

## GUIDE TO ARBITRATION PLACES (GAP)

# ENGLAND & WALES

CHAPTER PREPARED BY

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### JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration in England and Wales is subject to a sophisticated legal regime, supported by knowledgeable, efficient and commercially astute local courts, and a substantial body of experienced arbitration practitioners. Empirical research shows that London is consistently recognised to be among the most preferred arbitration seats in the world.<sup>1</sup>

The Arbitration Act 1996 (the “**1996 Act**”) regulates arbitrations seated in England, Wales or Northern Ireland. Party autonomy, fairness and the non-intervention of the courts are the underlying principles of the 1996 Act. Although not specifically mentioned in the 1996 Act, English common law recognises the confidentiality of arbitral proceedings, subject to limited exceptions.

The 1996 Act was influenced by the United Nations Commission on International Trade Law (“**UNCITRAL**”) Model Law, and incorporated many of the internationally recognised principles of arbitration contained in the UNCITRAL Model Law. However, there are a number of differences between the 1996 Act and the UNCITRAL Model Law.

Arbitral tribunals have wide-ranging powers under the 1996 Act, including powers to decide on matters relating to their jurisdiction, the conduct of arbitral proceedings, evidentiary and procedural matters and remedies that may be granted to a party. These powers are only limited by the tribunal's duty to ensure fairness and impartiality and to avoid unnecessary delay or cost to the parties. The parties are also generally free to limit or expand these powers as they deem appropriate.

The 1996 Act confers on English courts extensive powers that they can exercise in support of arbitral proceedings seated in England and Wales or Northern Ireland (and outside of those jurisdictions in certain circumstances). English courts, which enjoy a long-standing reputation for fairness and impartiality, generally show deference to arbitral tribunals and refrain from intervening in arbitral proceedings. English courts will enforce both arbitral awards rendered under the 1996 Act and foreign awards enforceable pursuant to the New York Convention 1958, again subject to very limited exceptions.

Key places of arbitration in the jurisdiction?	London.
Civil law/common law environment? (if mixed or other, specify)	Common law.
Confidentiality of arbitrations?	There is no express provision for confidentiality in the 1996 Act, but English law generally recognises the confidentiality of arbitral proceedings subject to limited exceptions. For example, documents used in arbitration proceedings may be disclosed where ordered by the court or in cases where such disclosure is necessary for a party to establish or protect its legal rights.
Requirement to retain (local) counsel?	There is no requirement to engage local counsel for arbitration proceedings. However, parties must retain local counsel (barristers or solicitor-advocates) to appear before the English courts for any

<sup>1</sup> See, for instance, White & Case and Queen Mary University of London 2021 International Arbitration Survey. Available at: <https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final.pdf>

	ancillary court proceedings. This also applies to claims for enforcement of awards in England.
Ability to present party employee witness testimony?	There is no limitation on a party's ability to present the testimony of its employees. It is for an arbitral tribunal to decide on such evidential matters, including the admissibility, form, weight and relevance of any evidence tendered (section 34 of the 1996 Act). <sup>2</sup>
Ability to hold meetings and/or hearings outside of the seat?	The parties are free to hold meetings and/or hearings outside of the seat (section 34(2)(a) of the 1996 Act). This also applies to remote meetings and/or hearings.
Availability of interest as a remedy?	Yes. An arbitral tribunal has the power to award interest (simple or compound) as it considers appropriate, subject only to the freedom of parties to exclude or limit this power (section 49 of the 1996 Act).
Ability to claim for reasonable costs incurred for the arbitration?	Yes. Unless the tribunal or the court determines otherwise, the successful party will be allowed to claim a " <i>reasonable amount in respect of all costs reasonably incurred</i> " (section 63(5)(a) of the 1996 Act). Parties are free to agree on cost allocation <u>but</u> any pre-dispute agreement that one party must pay the cost of the arbitration regardless of the outcome is unenforceable (section 60 of the 1996 Act).
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no specific restrictions of funding models under the 1996 Act. Under English law, parties are allowed to enter into conditional fee arrangements ("CFAs") and damages-based agreements ("DBAs"). Third party funding is also permitted.
Party to the New York Convention?	Yes.
Party to the ICSID Convention?	Yes.
Compatibility with the Delos Rules?	Yes.
Default time-limitation period for civil actions (including contractual)?	Actions in contract must generally be brought within 6 years from the time when the cause of action arose. <sup>3</sup>
Other key points to note?	An unsuccessful party has the right to challenge an arbitral award to an English court for a " <i>serious irregularity</i> " affecting the award and causing " <i>substantial injustice</i> " (section 68). Parties cannot exclude this provision although, in practice, challenges on this ground rarely succeed. A party may also appeal to a court on a point of English law determined in the arbitral award (section 69).

<sup>2</sup> It is also possible to compel the attendance of a witness (including the employee of a party to the proceedings) before a tribunal through a court order (section 43 of the Act). This is however subject to the permission of the tribunal or the agreement of the other parties and the witness must be in the United Kingdom with the arbitral proceedings in England.

<sup>3</sup> See section 5 Limitation Act 1980. Other sections of the Act set out more detailed provisions for different kinds of civil actions including actions in torts (6 years), personal injury or death (3 years), defamation or malicious falsehood (1 year), recovery of land (12 years), and under the Consumer Protection Act 1987 (3 years) etc. See also the Foreign Limitation Periods Act 1984 in relation to the application of foreign limitation periods to arbitrations seated in England & Wales (see Section 12 of the Arbitration Act 1996).

	Parties may, however, choose to exclude the application of this provision and, in practice, will frequently do so by choosing institutional rules containing waivers of any rights of appeal. <sup>4</sup>
World Bank, Enforcing Contracts: <i>Doing Business</i> score for 2020, if available?	68.7
World Justice Project, Rule of Law Index: <i>Civil Justice</i> score for 2023, if available?	0.71

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<sup>4</sup> See *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, para. 3.

## ARBITRATION PRACTITIONER SUMMARY

The 1996 Act was enacted to restate the key principles that had emerged from both the English common law and international arbitration practices. Although the 1996 Act incorporated many of the internationally recognised principles of arbitration contained in the UNCITRAL Model Law, there are a number of differences between the two.

Party autonomy is a central feature of the 1996 Act. Parties are afforded significant liberty to modify or exclude many provisions of the 1996 Act. There are very few mandatory provisions, and those that are included are retained principally to protect the public interest and the fairness of the arbitral process.

The 1996 Act also places limits on the intervention of English courts in arbitral proceedings. In practice, the English courts show great deference to decisions of arbitral tribunals, and typically refrain from intervening in arbitral proceedings.<sup>5</sup> The bulk of the courts' powers are exercised in support of arbitral proceedings seated in England and Wales or Northern Ireland, with more limited powers exercisable in relation to foreign-seated arbitrations.

Date of arbitration law?	1996 (with most provisions coming into force on 31 January 1997).
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	The UNCITRAL Model Law was not followed wholesale, but the 1996 Act mirrors many of the key principles of the UNCITRAL Model Law. One of the key differences is that the 1996 Act allows for arbitral awards to be appealed on a point of English law (section 69 of the 1996 Act) unless that right is waived by express or implied agreement of the parties.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Yes, applications in support of arbitrations are made in the specialist courts of the Business and Property Court of the High Court of Justice, typically in the Commercial Court or the Technology and Construction Court (TCC). <sup>6</sup> These courts consist of judges who are suitably experienced in arbitration and commercial matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim measures are available from the courts, and the courts will grant these <i>ex parte</i> (without notice) in limited but appropriate cases. These are usually for urgent situations where a delay may prejudice the right of the party seeking the interim measure. However, these are subject to a subsequent <i>inter partes</i> (on notice) hearing to determine whether the interim measure should remain in place. The grant of such interim measures is limited to situations where the arbitral tribunal or institution holding those powers either " <i>has no power or is unable for the time being to</i>

<sup>5</sup> Note that there are recent cases demonstrating that the English courts are prepared, in appropriate cases, to grant injunctions to stop a foreign-seated arbitration (see e.g., *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm); *Whitworths Ltd v Synergy Food Ingredients & Processing BV* [2014] EWHC 4239 (Comm)).

<sup>6</sup> Claims under the 1996 Act must be commenced in accordance with Rule 62 of the Civil Procedure Rules ("CPR") and the corresponding Practice Direction to Part 62. Details about the appropriate forum for bringing an arbitration claim are also contained in the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996.

	<i>act effectively</i> " (section 44(5) of the 1996 Act). It is not uncommon for a court to grant such interim measures. <sup>7</sup>
Courts' attitude towards the competence-competence principle?	The principle of competence-competence is clearly stated in section 30(1) of the 1996 Act and is respected by the English courts so that any jurisdictional challenge should, in the first instance, be determined by the tribunal. In limited circumstances, English courts may give a preliminary ruling on the arbitral tribunal's jurisdiction, where an application is made with the agreement of the parties or with the permission of the tribunal (section 32 of the 1996 Act). At the enforcement stage, a tribunal's decision on its own jurisdiction may be subsequently challenged by a party before the courts. When reviewing a tribunal's decision on jurisdiction at the enforcement stage, the court will make its own independent finding, without deference to the previous decision of the arbitral tribunal. <sup>8</sup>
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Yes.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The 1996 Act allows the courts to annul an award where it has been successfully appealed on a point of law arising from the tribunal's award pursuant to section 69 of the 1996 Act (and only where the court is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration (see Section 69(7)). The point of law is limited to any question of law of England and Wales or Northern Ireland. A party can therefore only appeal where the law of England and Wales or Northern Ireland was the law applicable to the merits of the dispute. <sup>9</sup>
Do annulment proceedings typically suspend enforcement proceedings?	No. The English courts do have the power to adjourn an enforcement action where there is an ongoing annulment proceeding at the seat (section 103(5) of the Act) but this is not automatic. As a condition for adjournment, English courts may impose an order for security on the party seeking adjournment. <sup>10</sup>
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The English courts will generally abide by a decision on annulment made by the supervisory court at the seat of the arbitration. As such, the courts will usually refuse enforcement of an arbitral award that has been annulled at the seat. However, in limited situations English courts may depart from this approach, for example, where the foreign court's set-aside decision was "so

<sup>7</sup> The court would, however, only grant such interim relief ex parte if the case was urgent and if the order sought was necessary to preserve evidence or assets. See *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618; *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm).

<sup>8</sup> See e.g., *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46. The court would review *de novo* the evidence relating to the decision of the tribunal on jurisdiction and in such cases the tribunal's decision on its own jurisdiction 'has no evidential value'.

<sup>9</sup> This may however be excluded if parties so agree (section 69(1) of the 1996 Act). Where such right of appeal is excluded, no appeal on questions of law can be made.

<sup>10</sup> See *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] UKSC 16; *Dardana Ltd. v. Yukos Oil Co (No. 1)* [2002] EWCA Civ 543.

	<i>extreme and incorrect as not to be open to [that foreign] court acting in good faith</i> ". <sup>11</sup> This indicates that a very high hurdle must be met by a party seeking the enforcement of an award which has been annulled by the court of the seat.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	No. A tribunal has the power to decide all procedural and evidential matters and this includes a decision on when and where any part of the proceedings is to be held (section. 34(1) & (2) of the 1996 Act).
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	Generally, English courts have no jurisdiction over disputes against sovereign states on account of sovereign immunity and they would not permit enforcement actions against the property of a state. <sup>12</sup> However, there is an exception where the state has agreed to submit the dispute to arbitration. <sup>13</sup> Regarding enforcement of awards, this may be enforced against state property that is for the time being in use or intended for use for commercial purposes. <sup>14</sup>
Is the validity of blockchain-based evidence recognised?	There is limited evidence on the use of blockchain-based evidence in arbitral proceedings. However, because the tribunal has the power to decide the manner and form in which evidence may be exchanged or presented under the Act (section 34(2)(f)), a tribunal may admit blockchain-based evidence in its discretion.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	There is no English law decision on this yet. The 1996 Act only requires an agreement and/or award to be in writing to benefit from the protections afforded under the Act. Writing has been defined very broadly (section 5(3) and (6)). English law suggests that electronic documents would generally satisfy any statutory requirement for writing, which may potentially extend to a blockchain-based agreement and/or award.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	As above, there is not yet any English decision on this point. A lot would depend on the parties' agreement, especially regarding the form of the final award.
Is the jurisdiction monist or dualist?	Dualist.
Other key points to note?	ϕ

<sup>11</sup> *Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm).

<sup>12</sup> See sections 1 & 13(2) Sovereign Immunity Act 1978.

<sup>13</sup> See section 9 Sovereign Immunity Act 1978; *Svenska Petroleum Exploration AB v. Lithuania (No. 2)* [2006] EWCA Civ 1529.

<sup>14</sup> See section 13(4) Sovereign Immunity Act 1978.

## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model law?

The 1996 Act was influenced by the UNCITRAL Model Law, and incorporated many of the internationally recognised principles of arbitration contained in the UNCITRAL Model Law. For instance, both the UNCITRAL Model Law and the 1996 Act afford parties significant freedom in deciding the conduct of arbitral proceedings. However, as the Model Law was not adopted wholesale<sup>15</sup> there are a number of differences between the UNCITRAL Model Law and the 1996 Act, including the scope of the law, default provisions on number of arbitrators, possibility of appeal on points of law, and grounds for annulment of awards, as further explained below.

Unlike the UNCITRAL Model Law, the 1996 Act is not limited to international commercial arbitration, but also extends to domestic arbitration (indeed the 1996 Act does not distinguish between the two). The 1996 Act has four parts. Part I applies generally to all arbitrations seated in England and Wales or Northern Ireland and sets out, amongst other things, default provisions for the arbitration of disputes and the powers of the court relating to arbitral proceedings. Part II concerns other provisions relating to specific types of arbitration (including provisions on domestic arbitration agreements, but these were not brought into effect). Part III provides for the recognition and enforcement of foreign awards, including pursuant to the Geneva Convention and New York Convention. Finally, Part IV contains general provisions on the application of the 1996 Act.

The most important differences between the UNCITRAL Model Law and the 1996 Act include the following:

First, in the absence of agreement on the number of arbitrators, the default position under the 1996 Act is that the tribunal will consist of a sole arbitrator (section 15(3)), whereas the default position under the UNCITRAL Model Law is a panel of three arbitrators (Article 10(2)).

Second, the procedural grounds upon which an award can be challenged in England and Wales and Northern Ireland, contained in section 68(2) of the 1996 Act (on the grounds of serious irregularity), are more wide-ranging than the grounds for the set-aside of the award contained in Article 34(2) of the UNCITRAL Model Law. However, section 68(2) requires a higher substantive threshold for an award to be set aside. Thus, an applicant seeking a set-aside under section 68 must establish both that there was a “serious irregularity” of the specific kind listed in the Act<sup>16</sup> and that this irregularity has caused or will cause “substantial injustice” to the applicant.<sup>17</sup> Whilst the English courts have found that “substantial injustice” may occur if a party is not given an opportunity to put its case<sup>18</sup> or where the arbitral tribunal fails to deal with a substantial point,<sup>19</sup> the mere presence of these circumstances is not enough for a challenge to succeed; the applicant will have to establish that it has in fact suffered prejudice. Because of the high substantive threshold under Section 68, successful applications are rare. In any event, the primary remedy to be favoured by the court is a remission of the award to the tribunal for reconsideration unless the court is satisfied it would be inappropriate to do so (see section 68(3)).<sup>20</sup>

<sup>15</sup> This was a result of the recommendation of the Departmental Advisory Committee on Arbitration, a committee of arbitration experts set up in 1985 and dissolved in 1997 to consider arbitration legislation in the United Kingdom from the perspective of the UNCITRAL Model Law.

<sup>16</sup> The lists of the kinds of irregularity in section 68(2) was described as a closed list by the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43, para. 28.

<sup>17</sup> See *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43, para. 28 noting that the requirement for a “serious irregularity” shows that a “high threshold must be satisfied”.

<sup>18</sup> See e.g., *Kalmneft v Glencore International AG and another* [2002] 1 All ER 76; *K v P* [2019] EWHC 589 (Comm).

<sup>19</sup> See e.g., *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84.

<sup>20</sup> See e.g., *K v P* [2019] EWHC 589 (Comm).



Section 69 of the 1996 Act allows for arbitral awards to be appealed to the English courts on a point of English law unless the parties have agreed to exclude such right (as they will frequently have done by agreeing to arbitral rules containing widely phrased waivers of rights of recourse).<sup>21</sup> The UNCITRAL Model Law does not make provision for arbitral awards to be appealed on a point of law.

## 1.2 When was the arbitration law last revised?

The arbitration law was last formally revised in 1996 with the introduction of the 1996 Act. Few amendments have been made to the 1996 Act since its enactment. However, the law in this area continues to develop through ongoing advancements in case-law from the English courts.

## 2. The arbitration agreement

### 2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

English law recognises the separability of the arbitration agreement from the main contract. As a result, the law which applies to the arbitration agreement may be different from that applicable to the underlying contract.<sup>22</sup> The English courts determine the governing law of the arbitration agreement through undertaking a three-stage enquiry into: (1) any express choice by the parties, (2) any implied choice by the parties, and (3) the law with the closest and most real connection to the arbitration agreement.

Where the parties have expressly agreed on the law governing the arbitration agreement, effect will be given to this agreement. The UK Supreme Court has also recently ruled that a general choice of law to govern the parties' substantive obligations will constitute an express choice of law to govern the arbitration agreement.<sup>23</sup> This is so even where the law of the contract is different from the law of the place chosen as the seat of the arbitration. However, this is subject to two exceptions. First, if the substantive governing law would make the arbitration agreement invalid, there will be a "powerful inference that such a meaning could not rationally have been intended."<sup>24</sup> In this regard, the court would apply the validation principle that a contract should be interpreted so that it is valid rather than ineffective. Second, the presumption in favour of the substantive governing law may be displaced where there is a specific provision in the law of the seat that indicates that an arbitration subject to that law must be governed by the law of the seat.

Where either of these exceptions apply, it will be necessary for the Court to apply limbs (2) and (3) of the test to determine the governing law. In practical terms, this will usually mean that the law of the seat will apply in circumstances where either exception is applicable.

In cases where the contract lacks a governing law clause, there will be an implied choice in favour of the law of the seat. However, there is no conclusive presumption that an express choice of seat creates an implied choice of the law applicable to the arbitration agreement.<sup>25</sup>

Finally, where there is no express or implied choice, there is a general rule under limb (3) that the law of the seat will be the law with the closest and most real connection to the arbitration agreement.

### 2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

English law recognises that the words "seat" and "venue" or "place" are not necessarily synonymous. However, a reference in an arbitration agreement to 'venue' would usually be treated as the juridical seat of

<sup>21</sup> See *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, para. 3.

<sup>22</sup> See e.g., *Sulamerica CIA Nacional de Seguros SA & ors v Enesa Engenharia SA & ors* [2012] EWHC 42 (Comm), para. 7; *C v D* [2007] EWCA Civ 1282, paras. 22-29.

<sup>23</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, para 53.

<sup>24</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, para. 106.

<sup>25</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, para. 117.

the arbitration and not just as the geographical location where the tribunal might hold hearings.<sup>26</sup> To displace this presumption, there must be significant evidence to the contrary showing that the parties have chosen another seat for the arbitration and that such a choice would be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration.<sup>27</sup>

### **2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?**

Section 7 of the 1996 Act stipulates that, unless otherwise agreed between the parties, an arbitration agreement is distinct from the underlying agreement. Accordingly, the arbitration agreement remains valid even where the underlying agreement is said to be invalid, ineffective or has not come into existence. The English courts have also found that the arbitration agreement is to be treated as a “*distinct agreement*” which can be void or voidable only on grounds relating directly to the arbitration agreement and not merely because the main agreement is invalid.<sup>28</sup> However, there are limited circumstances where the court may declare the arbitration agreement invalid on the same grounds as the underlying agreement (for example, forgery).<sup>29</sup>

### **2.4 What are formal requirements (if any) for an enforceable arbitration agreement?**

In general, Articles 807-808 of the Code of Civil Procedure require the arbitration agreement to exist in writing and to describe its scope of application.

An arbitration agreement needs to be in writing or evidenced in writing to bring the arbitration within the scope of the 1996 Act (sections 5(1) and (2) of the 1996 Act).<sup>30</sup> “*In writing*” is construed widely and includes, among others, an oral agreement to submit to arbitration by reference to “*terms which are in writing*” (section 5(3)). The 1996 Act also allows parties to incorporate a separate arbitration agreement into their contract provided the agreement is properly referenced (section 6(2)).

An agreement in writing is valid whether or not it is signed by the parties (section 5(2)(a)). Note, however, that the New York Convention requires arbitration agreements to be signed (Article II(2)). Accordingly, while a signature is not required under English law, the lack of a signed arbitration agreement may pose an impediment to the enforcement of an English arbitration award in other jurisdictions.

### **2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?**

Arbitration is a contractual process that relies on the consent of the parties using it. Arbitration agreements, therefore, typically bind only those parties who have consented to submit their dispute to arbitration. However, English law recognises a number of exceptions in which a third party, as a non-signatory, may nevertheless be bound by an arbitration agreement.

Section 82(2) of the 1996 Act expressly provides that a third party may be bound by an arbitration agreement if it makes claims under or through a party to the arbitration agreement. A clear example would be where an agent or trustee enters into a contract containing an arbitration agreement on behalf of the principal or beneficiary. This provision may also apply in situations where the original agreement has been assigned or novated to a third party.

<sup>26</sup> See e.g. *Shashoua v. Sharma* [2009] EWHC 957, *Enercon GmbH, Wobben Properties GmbH v. Enercon (India) Limited* [2012] EWHC 689 (Comm); *Process and Industrial Developments Ltd v Nigeria (1)* [2019] EWHC 2241 (Comm).

<sup>27</sup> See *Enercon GmbH, Wobben Properties GmbH v. Enercon (India) Limited* [2012] EWHC 689 (Comm).

<sup>28</sup> *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] UKHL 40.

<sup>29</sup> *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] UKHL 40.

<sup>30</sup> Although oral arbitration agreements are expressly recognised in section 81(1)(b) of the 1996 Act, the provisions of Part I of the 1996 Act do not apply to an agreement not in writing, including, for example, the right to require a stay of legal proceedings and the right to summary enforcement of the award.

In addition to this, the Contracts (Rights of Third Parties) Act 1999 provides that a third party may be entitled to, or indeed bound, to submit to arbitration to enforce a right or benefit conferred to it under a contract, in circumstances where the contract contains an arbitration agreement that covers the dispute.<sup>31</sup>

English law does not recognise the “*group of companies*” doctrine.<sup>32</sup> In line with the corporate law doctrine of separate personality, companies within the same corporate group are considered to be distinct legal entities, including for the purposes of establishing whether they are a party to an arbitration agreement. However, in appropriate cases, English court may apply the “*alter ego*” doctrine to pierce the corporate veil and hold a non-signatory company of the same group bound by the arbitration agreement. This may occur where there has been substantial wrongdoing such as fraud or where the corporate structure has been abused to escape legal responsibilities.<sup>33</sup>

## 2.6 Are there restrictions to arbitrability? In the affirmative:

Section 6(1) of the 1996 Act provides that both contractual and non-contractual disputes are arbitrable, but the 1996 Act does not provide additional guidance on arbitrability (*i.e.*, whether the subject matter of a particular dispute is legally capable of being referred to arbitration).<sup>34</sup>

Under English law, the question of what disputes can be referred to arbitration is closely linked to public policy (including the public policy in favour of commercial arbitration). Thus, criminal and certain family law matters (such as the care or parenting of children) are considered non-arbitrable as these engage important public policy questions and there is no countervailing argument in favour of arbitration.<sup>35</sup> In the absence of any public policy considerations or any specific statutory restriction, parties can generally submit their disputes to arbitration.

Competition law issues are *prima facie* arbitrable and the English Court has proven willing to stay court proceedings concerning cartel damages where the claims fell within the scope of an arbitration clause.<sup>36</sup>

Certain employment disputes are arbitrable (where the dispute is purely contractual in nature<sup>37</sup>) while others are non-arbitrable as they fall within the exclusive jurisdiction of the statutory Employment Tribunal (for example, claims concerning unfair dismissal).

Disputes concerning intellectual property rights (including as to the validity of such rights) are arbitrable but any resulting Award will only bind the parties to the underlying arbitration agreement.

Insolvency disputes would also generally be arbitrable under English law. However, the relief sought must be that which the arbitrator can grant, derived from the consensual nature of arbitration and any award made would not bind those who are not parties to the arbitration.<sup>38</sup> For example, an arbitrator would lack the power to order the winding up of a company in the context of an arbitration claim.

<sup>31</sup> Section 8 of the Contracts (Rights of Third Parties) Act 1999. The leading case on arbitration matters involving this Act is *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), where brokers were entitled to claim payment of commission in arbitration proceedings provided for in a charterparty.

<sup>32</sup> See *Peterson Farms Inc. v C&M Farming Ltd.* [2004] EWHC 121 (Comm) (applying Arkansas law rather than English law).

<sup>33</sup> See e.g., *VTB Capital v. Nutritek International* [2013] UKSC 5.

<sup>34</sup> Section 103(3) of the 1996 Act acknowledges that an award may not be recognised or be enforceable “if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.”

<sup>35</sup> See Section 4.6.2 below re. the power of arbitral tribunals, in certain circumstances, to determine whether criminal offences have been committed.

<sup>36</sup> *Microsoft Mobile OY (Ltd) v Sony Europe Limited et al.*, [2017] EWHC 374 (Ch).

<sup>37</sup> *Clyde & Co LLP v Krista Bates van Winkelhof* [2011] EWHC 668 (QB), paras. 39-40.

<sup>38</sup> *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), paras. 43-68.

### **2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?**

Yes, see above.

### **2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?**

Yes. Section 91(1) of the 1996 Act provides that arbitration agreements relating to claims under £5,000 in consumer contracts are unfair and therefore unenforceable.<sup>39</sup> For claims over £5,000, the arbitration agreement may still be considered unfair and unenforceable if it causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.<sup>40</sup>

## **3. Intervention of domestic courts**

### **3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?**

#### **3.1.1 If the place of arbitration is inside of the jurisdiction?**

English courts adopt a non-interventionist approach to arbitration, as required by section 1 of the 1996 Act. As such, the courts have the power under section 9 of the 1996 Act to grant a stay of court proceedings commenced by a party in breach of a valid arbitration agreement. An application for a stay must be made within the relevant period for acknowledging service of a claim under the Civil Procedure Rules.<sup>41</sup>

The party seeking the stay must show that: (i) a concluded arbitration agreement exists; and (ii) it covers the disputes that are the subject of the court proceedings. Under Section 9(4), the court must grant the stay unless the party resisting it can prove, on the balance of probabilities, that the agreement is null and void, inoperative or incapable of being performed.<sup>42</sup> These issues are typically determined by the Court on a summary basis (*i.e.*, based on written evidence rather than following cross-examination of witnesses at trial).

Where the Court is unable to determine the existence or scope of an arbitration agreement on a summary basis, it has two options. First, it can direct that the issue of existence or scope be tried and determined in Court, following which a stay would be granted under section 9 if appropriate. Or, second, the Court can stay the proceedings under its inherent jurisdiction (even though the formal requirements of section 9 have not been met) to enable the arbitral tribunal to determine the issue of existence or scope under Section 30 of the 1996 Act. If the tribunal ultimately determines that it lacks jurisdiction, the stayed court proceedings could be revived.

#### **3.1.2 If the place of arbitration is outside of the jurisdiction?**

In accordance with section 2(2)(a) of the 1996 Act, section 9 applies even if the seat of arbitration is outside England and Wales or Northern Ireland, or if no seat has yet been designated or determined.

### **3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?**

The 1996 Act does not oblige the English courts to recognise or enforce an injunction issued by an arbitral tribunal enjoining the court to stay ongoing litigation.

<sup>39</sup> See also Article 3 of the Unfair Arbitration Agreements (Specified Amount) Order 1999.

<sup>40</sup> See Section 89 of the 1996 Act, Section 62 of the Consumer Rights Act 2015, and *Mylcrist Builders Limited v Mrs. G Buck* [2008] EWHC 2172 TCC, paras 55-56.

<sup>41</sup> The defendant is not required to serve a defence to the claim in the court litigation until the application for stay of the court proceedings has been resolved. However, if the defendant does serve a defence, it will be deemed to have accepted the court's jurisdiction and to have abandoned the right to seek a stay of the court proceedings.

<sup>42</sup> *Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, paras. 72-80.

In circumstances where there are related contracts between parties with inconsistent dispute resolution clauses, the English court may take the existence of an anti-suit injunction into account when determining whether it is appropriate to stay the English court proceedings on case management grounds.<sup>43</sup> On the other hand, in exceptional circumstances, the English Court may grant an anti-arbitration injunction to prevent a party from continuing with an arbitration where it would be vexatious and oppressive to do so.<sup>44</sup>

### 3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction?

The 1996 Act applies generally to arbitrations seated in England and Wales or Northern Ireland and limits intervention of the courts. However, in certain cases, the 1996 Act allows the courts to intervene in support of arbitration even where the seat is outside of those jurisdictions. English courts may, therefore, compel a person subject to their jurisdiction to attend or produce a document before an arbitral tribunal seated outside the jurisdiction (section 43).<sup>45</sup> The court's general powers in support of arbitral proceedings in section 44 of the 1996 Act are also available in respect of arbitrations seated outside the jurisdiction. For example, under section 44(2)(e) of the 1996 Act, the court has the power to grant interim injunctions in support of arbitration proceedings, including freezing orders to prevent a party from dissipating its assets. Such freezing orders are often issued alongside associated disclosure orders requiring the party against whom the order is made to provide details of its assets.<sup>46</sup> The English Court of Appeal has recently confirmed that English courts have the power under section 44(2)(a) to order the taking of evidence in support of a foreign arbitration, and this order can be made against a non-party to the arbitration.<sup>47</sup>

In appropriate cases, English courts have the power to prevent court proceedings commenced in breach of an arbitration agreement in foreign jurisdictions. Under section 37 of the Senior Courts Act 1981, the court may grant an anti-suit injunction restraining a party from either commencing or carrying on with proceedings abroad in breach of an arbitration agreement. However, following the ruling of the European Court of Justice (as it then was) in *Allianz SpA v West Tankers Inc (Case C-185/07)*, the English courts cannot grant anti-suit injunctions to prevent proceedings in the courts of other EU member states in breach of an arbitration agreement, where such proceedings fall within the scope of the original Brussels Regulation.<sup>48</sup> A more recent English decision in *Nori Holdings Ltd v Bank Otkritie Financial Corporation*<sup>49</sup> affirmed that the Recast Brussels Regulation<sup>50</sup> does not alter the continued validity of *West Tankers* as the authoritative statement of EU law. This confirms that English courts are unable to grant anti-suit injunctions against proceedings brought before the courts of another EU member state. The position in relation to Switzerland, Iceland and Norway is likely

<sup>43</sup> See, e.g., *Autoridad del Canal de Panamá v Sacyr, S.A., Salini-Impregilo S.P.A., Jan De Nul, N.V., Constructora Urbana S.A., Sofidra S.A.* [2017] EWHC 2228 (Comm) para. 65 ("it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions, and avoid unnecessary duplication and expense.")

<sup>44</sup> See e.g., *Sabbagh v. Koury* [2019] EWCA Civ 1219.

<sup>45</sup> In *Viking Insurance Co v Rosedale and Ors* [2002] 1 Lloyd's Rep. 219, the court affirmed its power to order the examination of English witnesses in proceedings taking place in New York, although in this case, the court refused to make the order. The court further clarified in *Commerce & Industry Insurance Co (Canada) v Lloyd's Underwriters* [2002] 2 All E.R. (Comm) 204, that it would be inappropriate to order the examination of unwilling witnesses in foreign arbitral proceedings where there was insufficient evidence to show that the witnesses' evidence could have a marked effect on the outcome of the arbitration.

<sup>46</sup> Guidance as to the circumstances in which it will be appropriate for the court to enforce a worldwide freezing injunction is provided in *Dadourian Group Int Inc v Simms* [2006] EWCA Civ 399.

<sup>47</sup> *A and B v C, D and E* [2020] EWCA Civ 409; paras. 35 – 48.

<sup>48</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is not currently clear what the position of the English courts will be post-Brexit.

<sup>49</sup> *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).

<sup>50</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

to be similar to this, as the provisions contained in the 2007 Lugano Convention are nearly identical to those in the original Brussels Regulation. Anti-suit injunctions are, however, available in respect of proceedings brought outside the EU or the Lugano Convention states.

#### 4. The conduct of the proceedings

##### 4.1 Can parties retain foreign counsel or be self-represented?

Yes. There are no restrictions in the 1996 Act or the common law on the instruction of outside counsel or self-representation in arbitration proceedings. However, parties must retain English qualified counsel for any court proceedings in support of the arbitral proceedings.

##### 4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Section 33 of the 1996 Act imposes a general duty on the arbitral tribunal to act fairly and impartially as between the parties, in its conduct of the proceedings, as regards procedural and evidentiary matters and more generally, in the exercise of all its powers. While the 1996 Act requires members of an arbitral tribunal to act 'impartially' as between the parties, it does not expressly impose a separate requirement for the arbitrators to be 'independent' of the parties. A lack of independence may, however, be capable of giving rise to doubts as to the arbitrator's impartiality.

Where the circumstances give rise to justifiable doubts as to an arbitrator's impartiality and also have caused or will cause "*substantial injustice*" to a party, a party can apply to the court for the arbitrator to be removed under section 24(1) of the 1996 Act. In determining whether or not an arbitrator is, or gives the appearance of being, biased, the English courts will have regard to various sources, including English case law on judicial bias, the IBA Guidelines on Conflicts of Interest in International Arbitration<sup>51</sup> and arbitral decisions relating to challenges to arbitrators on similar grounds. The English courts take a case by case approach to determining these questions, applying the test of whether the circumstances would "*lead a fair-minded and informed observer to conclude that there was a real possibility ... that the [arbitrator] was biased*".<sup>52</sup>

Where an arbitrator has a prior interest that may call into question his or her impartiality, it is advisable that this should be disclosed at the earliest opportunity. In a recent decision, the UK Supreme Court ruled that a duty of disclosure may arise where an arbitrator accepts multiple appointments in overlapping arbitrations.<sup>53</sup> Although a failure to disclose will not, of itself, give rise to an automatic finding of partiality, such failure may reinforce the doubts as to the arbitrator's impartiality.

##### 4.3 On what grounds do courts intervene to assist in the constitution of the Arbitral Tribunal (in case of *ad hoc* arbitration)?

English courts typically intervene in the constitution of the tribunal only where the parties' agreed procedure for the constitution of the tribunal (or the default procedure applicable under Sections 16 and 17 of the 1996 Act<sup>54</sup>) has failed in some way.

In those circumstances, unless parties have agreed a different procedure, Section 18 of the 1996 Act gives the courts substantial flexibility to ensure that a Tribunal is constituted. The court has the power to i) give

<sup>51</sup> *A and B v C, D and E* [2020] EWCA Civ 409; paras. 35 – 48.

<sup>52</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is not currently clear what the position of the English courts will be post-Brexit.

<sup>53</sup> *A and B v C, D and E* [2020] EWCA Civ 409; paras. 35 – 48.

<sup>54</sup> Section 16 sets out the default appointment procedure to be followed both for a sole arbitrator and for a tribunal of two or more members. Section 17 provides a mechanism to constitute a tribunal if one party fails to or refuses to appoint its arbitrator, allowing the other party to appoint their nominated tribunal member to be the sole arbitrator in the dispute and for the sole arbitrator's award to be binding on both parties.

directions as to the making of any necessary appointments (section 18(3)(a)); ii) direct that the tribunal be constituted by such appointments (or any one or more of them) as have been made (section 18(3)(b)); iii) revoke any appointments already made (section 18(3)(c)); and iv) make any necessary appointments itself (section 18(3)(d)). Where the court exercises its power to make an appointment, that appointment is deemed to be made by the agreement of the parties (section 18(4)).

#### **4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?**

Yes. Section 44 of the 1996 Act confers on the courts wide powers to grant interim measures in support of arbitral proceedings. However, the parties may exclude the courts' ability to exercise these powers. In all cases, the courts may only act if the arbitral tribunal, institution, etc. has no relevant power or is otherwise unable to act effectively (section 44(5)). The test of inability to act may be satisfied in situations where interim relief is required but an arbitral tribunal has not been constituted, or where an order has to be enforced against a third party which a tribunal would be unable to enforce.

The specific powers granted to the courts under the 1996 Act regarding interim measures are the same powers available to the courts in relation to court litigation. This includes the power to summon witnesses (both resident and non-resident in England and Wales), to grant freezing orders, appoint receivers, powers for the sale of goods, and powers to require persons to produce evidence. In non-urgent cases, agreement from the other party or permission from the arbitral tribunal is required for the English courts to grant interim measures (section 44(4)). For urgent cases, these requirements are not necessary, but the English courts are limited to making such orders as the courts consider "*necessary for the purpose of preserving evidence and assets*" (section 44(3)).

##### **4.4.1 If so, are they willing to consider *ex parte* requests?**

Yes. However, section 44(3) of the 1996 Act makes it clear that *ex parte* requests shall only be granted in urgent cases.

#### **4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?**

##### **4.5.1 Does it provide for the confidentiality of arbitration proceedings?**

Although the 1996 Act is silent on the issue of confidentiality, English law recognises the confidentiality of arbitral proceedings, which extends to documents produced or generated during the arbitration.<sup>55</sup> The duty of confidentiality is subject to a number of broad exceptions, including where disclosure is in the interests of justice or in the public interest,<sup>56</sup> it is ordered or permitted by the court, and/or it is necessary to pursue or protect a party's legal right. The parties may waive or modify the duty of confidentiality by agreement.

##### **4.5.2 Does it regulate the length of arbitration proceedings?**

English law does not regulate the length of arbitration proceedings. However, section 1(a) of the 1996 Act states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*". The tribunal is also under a general duty to adopt suitable procedures to avoid unnecessary delay in the conduct of the arbitral proceedings (section 33(1)(b) of the 1996 Act).

##### **4.5.3 Does the law regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?**

No. Under section 34 of the 1996 Act, the parties are free to decide on all procedural matters, including the location of any part of the proceedings, such as meetings and hearings (section 34(2)(a)). If the parties so

<sup>55</sup> *Emmott v Michael Wilson and Partners* [2008] EWCA Civ 184.

<sup>56</sup> *London and Leeds Estates Ltd v Paribas Ltd* [1995] 1 E.G.L.R. 102; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314.



wish, meetings and/or hearings may be held outside of England, Wales or Northern Ireland. Similarly, the tribunal may, in exercise of its powers to decide all procedural and evidential matters, direct the place(s) where hearings and/or meetings are to be held. This extends to a determination that hearings and/or meetings be conducted remotely.

#### **4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?**

Yes, the parties are free to agree upon the powers of a tribunal to issue interim measures. In practice, where an arbitration is governed by institutional rules such as the ICC Rules or LCIA Rules, the parties will have agreed to confer wide powers upon the tribunal to issue interim measures.

In the absence of any agreement between the parties, the 1996 Act confers certain default powers on the arbitral tribunal. Thus, a tribunal may make orders relating to security for costs (section 38(3)), order the inspection or preservation of property which is the subject of arbitral proceedings (section 38(4)), and the preservation of evidence in a party's custody or control (section 38(6)).<sup>57</sup>

#### **4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?**

Unless otherwise agreed between the parties, arbitral tribunals have a wide discretion under section 34(1) of the 1996 Act to decide "*all procedural and evidential matters*". Such matters include, for example, the form of submissions, whether the tribunal should take initiative in ascertaining the facts and the law, the language or location of hearings, whether documents should be disclosed in the arbitration, and what rules of evidence should be applied, and whether (and the extent to which) there should be oral or written evidence or submissions.<sup>58</sup>

#### **4.5.6 Does it make it mandatory to hold a hearing?**

No. Under section 34(2)(h) of the 1996 Act, the tribunal has the discretion to decide "whether and to what extent there should be oral or written evidence or submissions", including whether or not there should be a hearing.

#### **4.5.7 Does it prescribe principles governing the awarding of interest?**

Unless otherwise agreed by the parties, section 49 of the 1996 Act confers a wide discretion on the arbitral tribunal to decide the basis for the award of interest. The tribunal may award simple or compound interest for such periods and at such rates "*as it considers meets the justice of the case*". This discretion extends to interest on any costs award.

#### **4.5.8 Does it prescribe principles governing the allocation of arbitration costs?**

The default position under the 1996 Act for the allocation of costs is that costs follow the event (*i.e.*, the losing party pays the winning party's fees), except where it is inappropriate to do so in relation to either all or part of the costs (section 61(2)). Following established principles of English law, the arbitral tribunal may reduce the costs allowed to a successful party where the party's conduct contributed to any unnecessary cost.

The 1996 Act allows the parties to agree between themselves the allocation of costs regardless of the outcome of the arbitration but only if parties entered into such agreement after the relevant dispute arose (section 60). Any pre-dispute agreement as to the allocation of costs is not valid or enforceable.

<sup>57</sup> The parties may also agree to grant the tribunal the power to order, on a provisional basis, any relief which it would have the power to order in a final award, such as an order for provisional payment of money or disposition of property, or an order for interim payments on account of costs of the proceedings (section 39). However, these powers do not exist in the absence of an agreement between the Parties.

<sup>58</sup> The Tribunal may also direct whether this evidence is to be on oath or affirmation, and may for that purpose administer the necessary oath or affirmation (section 38(5)).



## 4.6 Liability

### 4.6.1 Do arbitrators benefit from immunity to civil liability?

Yes. Under section 29 of the 1996 Act, arbitrators are not liable for any act or omission in the discharge of their functions, except where their act or omission can be shown to be in bad faith. Unlike other provisions of the Act, parties cannot deprive the arbitrator of this protection. This protection extends to an arbitrator's employee or agent (section 29(2)). Although the 1996 Act does not define "*bad faith*", there is some guidance in case law as to what the English courts understand this to mean. Bad faith would ordinarily entail behaviour that is unacceptable, improper or unconscionable or conduct which violates standards of decency, fairness or reasonableness.<sup>59</sup> The burden of proving "*bad faith*" is on the party alleging it.

### 4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Criminal liability cannot arise directly from an arbitration proceeding as the tribunal does not have the power to render a criminal conviction or impose a custodial sentence. However, English case law recognises that arbitral tribunals have the power to find facts which establish a criminal offence (fraud being a prime example) and that, in certain circumstances, arbitral tribunals have jurisdiction to find that a criminal offence has been committed (where, for example, the commission of an offence is a pre-condition to the establishment of civil liability).<sup>60</sup>

## 5. The award

### 5.1 Can parties waive the requirement for an award to provide reasons?

Yes. Section 52(4) of the 1996 Act provides that the parties have the right to dispense with reasons.

### 5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

Yes. Under section 69 of the 1996 Act, the parties may waive their right to appeal the award on a point of law.

However, the parties cannot waive their right to challenge the tribunal's substantive jurisdiction (section 67), or to challenge the award on the basis of a serious irregularity (section 68). Under section 73, a party may lose its right to challenge an award before a court if it failed to raise the same objection promptly before the arbitral tribunal.

A successful challenge of an award does not necessarily result in the annulment of the award. Instead, the court may vary the award, remit the award to the same arbitral tribunal for consideration, or declare specific parts of the award to be of no effect. The courts cannot carry out a *de novo* review of a tribunal's findings of facts, unless the facts in question are directly relevant to a challenge concerning the tribunal's jurisdiction.

<sup>59</sup> *CPC Group Limited v Qatari Diar Real Estate Investment Company* [2010 EWHC 1535 (Ch)]; *Greenclose Ltd v National Westminster Bank Plc* [2014] EWHC 1156 (Ch).

<sup>60</sup> The decision of an arbitral tribunal that an offence was committed does not bind the state court. Where a subsequent charge is brought, evidence must be led to prove the guilt of the defendant to the relevant standard i.e beyond reasonable doubt. See *The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State* [2013] EWHC 3188 (Comm); *The London Steamship Owners' Mutual Insurance Association Ltd v Spain* [2015] EWCA Civ 333, at para. 78 ("It was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed. As the judge pointed out, however, it is necessary to distinguish between a finding of criminal conduct and a conviction which provides the basis for a penal sanction. It may also be important to distinguish between a claim and a dispute or difference."); *Interprods v De La Rue International* [2014] EWHC 68.

### 5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

None. The 1996 Act does not prescribe any atypical requirement to render a valid award.

The parties are generally free to agree on the form an award should take (section 52). In the absence of an agreement, the default position is that the award must be in writing, signed by all the arbitrators, and state the seat, date and reasons for the award.

### 5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

English law does not allow an award to be appealed based on findings of fact.

However, section 69 of the 1996 Act allows a party to appeal an award on a question of English law.<sup>61</sup> This right is limited in a number of ways. First, the parties can agree to exclude the right to appeal on a point of law. In practice, this frequently occurs where the parties have chosen institutional rules that include wide waivers of rights of recourse against the Award.<sup>62</sup> Second, an appeal can only be brought with the agreement of all the parties to the proceedings or with the court's permission. Third, even if an appeal is brought and succeeds, the court will typically remit the award to the tribunal for reconsideration in light of the court's findings. The court is not entitled to set aside the award unless it would be inappropriate to remit the matters in question to the tribunal (section 69(7)).

The requirements for obtaining permission from the court before an appeal can be brought are set out in section 69(3) of the 1996 Act. They include (i) that the determination will "*substantially affect*" the rights of one or more parties;<sup>63</sup> (ii) that the question of law is one which has been put to the tribunal to determine;<sup>64</sup> (iii) that on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt,<sup>65</sup> and (iv) that despite the agreement of the parties to resolve the matter by arbitration, it is "*just and proper*" for the court to determine the question in all the circumstances.<sup>66</sup>

### 5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

The 1996 Act sets out a simple procedure for the enforcement of awards rendered in the territory of a State (other than the United Kingdom) which is party to the New York Convention ("**Convention Awards**"). Convention Awards are generally enforced by summary procedure (i.e., no full trial is required). The party seeking recognition or enforcement files an application, which is supported by (i) the original award or a certified copy and (ii) the original arbitration agreement or a certified copy.<sup>67</sup> Where the award or agreement is in a foreign language, a duly certified English translation must be produced (section 102).<sup>68</sup> The court may then order the award be "enforced in the same manner as a judgment or order of the court to the same

<sup>61</sup> A question of law is defined in section 82(1) of the 1996 Act and excludes issues of foreign law.

<sup>62</sup> See *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, para. 3 per Lord Steyn confirming that Art 28.6 of the 1998 ICC Rules operated to exclude the application of Section 69 of the 1996 Act.

<sup>63</sup> See e.g., *CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer"* Schiffahrtsgesellschaft [2002] EWCA Civ 1878 (CA).

<sup>64</sup> See e.g., *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] EWHC 1441 (Comm).

<sup>65</sup> See e.g., *Demco Investments & Commercial SA v SE Bankers Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm); *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

<sup>66</sup> See e.g., *HMV UK Limited v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

<sup>67</sup> See e.g., *Lombard-Knight (and another) v Rainstorm Pictures Inc* [2014] EWCA Civ 356, where the court found that the term "certified" did not require independent certification or certification by an express reference to a comparison undertaken between the original document and the certified copy. It was sufficient to say that to the maker of the statement's knowledge and belief it was a true copy.

<sup>68</sup> CPR Part 62.18 and the Practice Direction 62 contain details of the procedure to be followed in a claim for the enforcement of an arbitration award.

effect" (section 101(2)). Where permission is granted, judgment may also be entered in terms of the award (section 101(3)). The grounds on which recognition or enforcement can be refused are limited to those set out in Section 103 of the 1996 Act, which reflects Article V of the New York Convention. Section 99 of the Act also provides a similar procedure for the enforcement of Geneva Convention awards.

Section 66 of the 1996 Act provides an alternative procedure whereby: (i) an Award may be enforced in the same manner as a judgment or order of the English court; and (ii) judgment may be entered in terms of the Award. Section 66 applies to all awards, wherever the underlying arbitration was seated (*i.e.*, it applies to both foreign and domestic awards).<sup>69</sup> Permission to enforce under Section 66 is within the discretion of the Court. While there is "*a strong presumption in favour of enforcing any arbitration award*"<sup>70</sup>, the procedure under Section 66 is not merely an "*administrative rubber stamping exercise*."<sup>71</sup> In practice, the Court may consider grounds for refusing enforcement broadly similar to those under the New York Convention. The Court will refuse leave to enforce if the defendant can show that the tribunal lacked substantive jurisdiction to make the award, and has not lost the right to raise such an objection (Section 66(3)).

Alternatively, the 1996 Act preserves the option to enforce arbitral awards at common law, which takes the form of an "action on the award" (sections 66(4) and 104). An action on the award allows a party to bring court proceedings founded on an arbitration award (essentially a contractual claim for breach of an implied obligation to fulfil the award). In principle, this route is available for all types of arbitral award (whether foreign or domestic, New York Convention or not), but in practice the additional costs and delay of bringing this kind of claim mean that it is a route of last resort.

Under the Limitation Act 1980, the limitation period to make an application to the court to enforce an award and to bring an action on the award is 6 years from the last moment when the award should have been satisfied (section 7) or 12 years where the arbitration agreement is under seal (section 8). Where it is not clear when this would be, the cause of action will accrue when a reasonable time to pay has passed, according to the circumstances of the specific case.

Different rules apply to the enforcement of awards rendered under the Convention on the Settlement of Investment Disputes between State and Nationals of Other States ("**ICSID Convention**"). Article 54(1) of the ICSID Convention states that "*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforced the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.*" Hence, an ICSID award may be registered in the English High Court, whereupon its pecuniary obligations have the same force and effect as if in a judgment of the English High Court.<sup>72</sup> The New York Convention grounds to resist enforcement do not apply to an ICSID Award before the English Court. Unless an ICSID Award is annulled pursuant to the internal ICSID procedure, the English Court is required to recognize it.<sup>73</sup>

## 5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

The filing of an application to set aside or suspend an award does not lead to an automatic suspension of the right to enforce under English law. However, by section 103(5) of the 1996 Act, the court has power to

<sup>69</sup> See Section(2)(2)(b) of the 1996 Act.

<sup>70</sup> *Sharma v. Farlam Ltd* [2009] EWHC 1622 (Ch), at [429].

<sup>71</sup> *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWCA Civ 27, at [38].

<sup>72</sup> See Arbitration (International Investment Disputes) Act 1966, Sections 1 and 2.

<sup>73</sup> Despite the limited role of national courts in recognising and enforcing an ICSID award, domestic law remains relevant. For example, in *Micula v Romania* [2017] EWHC 31 (Comm), the English Court registered an ICSID award but stayed further enforcement, pending determination by the Court of Justice of the European Union whether execution of the award might amount to unlawful state aid under relevant provisions of European Union law. The stay on enforcement was held not to conflict with the UK's obligations under the ICSID Convention because a purely domestic court judgment would have been subject to the same restriction.

adjourn the decision on recognition or enforcement of the arbitral award, and may, in appropriate cases, order the party seeking the suspension or setting aside of the award to give suitable security.

Where a party has challenged an award under section 67 because of lack of jurisdiction, the 1996 Act expressly allows the arbitral tribunal to continue with the arbitral process (section 67(2)). This provision is particularly useful in bifurcated proceedings: where the tribunal's jurisdictional finding is issued as a partial or separate award, proceedings can continue pending a party's challenge to the tribunal's award on jurisdiction.

### **5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

The general approach of the English courts is that an award that has been vacated at the seat of arbitration cannot be enforced in England. However, English courts retain a general discretion to enforce an award that has been set aside in the seat where the decision to vacate was *"so extreme and incorrect as not to be open to a [supervisory] court acting in good faith"*.<sup>74</sup> This is a high threshold that will rarely be met in practice.

### **5.8 Are foreign awards readily enforceable in practice?**

Yes, particularly where an award is rendered in a State which is a signatory to the New York Convention. The 1996 Act (sections 100 – 104) sets out a simple procedure for enforcement and the grounds for resisting enforcement are limited, mirroring those contained in the New York Convention.

### **6. Funding arrangements: are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?**

Conditional fee arrangements ("CFAs") and Damages-based agreements ("DBAs") are generally permitted in England. CFAs allow a payment of an agreed success fee to the lawyer in addition to the normal fees. Where no success is achieved (or the agreed threshold of success), the solicitor is only entitled to payment of the normal fees. On the other hand, DBA arrangements, commonly known as *"no win, no fee"* means that the solicitor is only entitled to fees where a claim is successful (or an agreed success threshold is achieved). Both CFAs and DBAs must however comply with statutory requirements governing such fee arrangements.<sup>75</sup> Third party funding is also generally available and there is an increasing awareness of this funding option.

## **7. Arbitration and technology**

### **7.1 Is the validity of blockchain-based evidence recognised?**

There is limited evidence on the use of blockchain-based evidence in arbitral proceedings as of date. However, there is a potential basis for its recognition under the 1996 Act given the very broad power of the arbitral tribunal on evidential matters. The tribunal has the power to decide the manner and form in which evidence may be exchanged or presented (section 34(2)(f)), taking into consideration its duty to adopt procedures suitable to the circumstance of the particular case (section 33(1) of the Act). Because blockchain remains a relatively new development, a lot may depend on the parties' consent and the nature of the contract which is the subject matter of the arbitration (e.g. whether a smart contract).

<sup>74</sup> See *Nikolay Viktorovich Maximov v Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm), para. 2. See also paras. 15 and 53.

<sup>75</sup> See The Damages-Based Agreements Regulations 2013 and The Conditional Fee Agreements Order 2013.

## 7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

An arbitration agreement needs to be in writing or evidenced in writing to bring the arbitration within the scope of the 1996 Act (sections 5(1) and (2) of the 1996 Act).<sup>76</sup> “*In writing*” is construed widely and includes, among others, an oral agreement to submit to arbitration by reference to “*terms which are in writing*” (section 5(3)). In addition, the Act recognizes an agreement “recorded by any means” to be in writing (section 5(6)). This is a very inclusive definition. An arbitration agreement recorded on a blockchain would be an agreement recorded by “electronic means” and would likely qualify as “recorded by any means”. English case law suggests that electronic documents would generally satisfy any statutory requirement for writing.<sup>77</sup>

The position may be less clear regarding awards and may depend on the parties’ agreement. Under the Act, parties are free to agree on the form of an award (section 52(1)), and this may potentially include agreeing to the award being recorded on a blockchain. However, where there is no agreement, the Act requires that the award be in writing and signed by all the arbitrators or those who assent to the award (section 52(3)). Because blockchain technology is entirely electronic and allowing only for digital signature, it remains open whether an award stored on a blockchain would meet the requirements of the Act on both writing and signature. It may well be argued (as explained in section 7.4 below) that because blockchain technology allows for digital signature, the Act’s requirements would be met.

## 7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

So far, there has been no English decision on this point. This is to be expected given the relatively new development of blockchain technology, especially in the context of arbitration. Much would depend on the parties’ agreement, especially regarding the form of the final award.

## 7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

English law has evolved to recognise various forms of electronic signatures. English case law confirms that electronic signatures are capable of satisfying a statutory requirement for a document to be signed where there is evidence that the signatory intended to authenticate the document.<sup>78</sup> Section 7 of the Electronic Communications Act 2000 also recognises the validity of electronic signatures.

Both case law and statute would therefore recognise the validity of an award signed electronically (by inserting a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate). Whatever the form of electronic signature used, what is important is that the signatory intended to authenticate the award. That said, it is crucial to consider how secure or trustworthy the electronic signatures are. A digital signature, using encrypted electronic keys authenticated by a third-party certificate, may therefore be more appropriate.

<sup>76</sup> Although oral arbitration agreements are expressly recognised in section 81(1)(b) of the 1996 Act, the provisions of Part I of the 1996 Act do not apply to an agreement not in writing, including, for example, the right to require a stay of legal proceedings and the right to summary enforcement of the award.

<sup>77</sup> See *Golden Ocean Group v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 and *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) [2006].

<sup>78</sup> See *Golden Ocean Group, Bassano v Toft* [2014] EWHC 377 (QB), *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm). See also the Law Society Practice Note 2016 and the Law Commission Report 2019, which both recognised that an electronic contract or deed executed with an electronic signature is capable of satisfying a statutory requirement to be in writing and/or signed and/or made under hand.

## 8. Is there likely to be any significant reform of the arbitration law in the near future?

Currently, the 1996 Act is undergoing review by the Law Commission.<sup>79</sup> After its initial consultation of stakeholders, the Law Commission recently published initial proposals for change to aspects of the Act.<sup>80</sup> According to the Law Commission, the changes proposed will improve the efficiency of cases, give further protections to arbitrators, grant extra powers to the courts to support cases, and refine the process for challenging an arbitrator and their decisions. Some of the proposed changes include: (1) confirming that the court powers exercisable in support of arbitral proceedings can be made against third parties, (2) a non-mandatory provision allowing arbitrators to adopt a summary procedure to dispose of a claim or defence, (3) an obligation by arbitrators to disclose any circumstances which might give rise to justifiable doubts as to their impartiality, (4) arbitrator immunity from costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator, and (5) any subsequent challenge to an arbitrator's decision on jurisdiction would be by way of an appeal rather than a full rehearing.

Overall, the Law Commission has confirmed that this review will not significantly change the provisions of the 1996 Act which it considers "*still functions very well*".

## 9. Compatibility of the Delos Rules with local arbitration law

We have not identified any obvious inconsistencies between the Delos Rules and English law.

## 10. Further Reading

1. Sutton, David St. John, *Russell on arbitration*, London, Sweet & Maxwell, 2015.
2. Merkin, Robert, *Arbitration Act 1996*, Abingdon, Oxon, Informa Law, 2014.
3. Heilbron, Hilary, *A practical guide to international arbitration in London*, London, Informa (Firm), 2008.
4. Tweeddale, Andrew, *Arbitration of commercial disputes: international and English law and practice*, Oxford, Oxford University Press, 2007.
5. Marshall, Enid A., *Gill: the law of arbitration*, London, Sweet & Maxwell, 2001.

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<sup>79</sup> Under the Law Commissions Act 1965, the Law Commission is a statutory body that is required to submit Programmes of law reform to the Lord Chancellor covering areas in which the Commission finds as deserving reform.

<sup>80</sup> See <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

## ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

There are many facilities available to support arbitrations in England & Wales (and, in particular, in London) and Northern Ireland. While we have listed a number of providers below, this is not an exhaustive list and does not constitute an endorsement or recommendation of any of the providers.

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> , with offices and a case team?	<ol style="list-style-type: none"> <li>1. The London Court of International Arbitration.</li> <li>2. JAMS International.</li> </ol>
Main arbitration hearing facilities for in-person hearings?	<ol style="list-style-type: none"> <li>1. International Dispute Resolution and Arbitration and Mediation Centre.</li> <li>2. The Chartered Institute of Arbitration.</li> <li>3. The International Arbitration Centre.</li> <li>4. London Delos Arbitration Point.</li> </ol>
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	<ol style="list-style-type: none"> <li>1. DocuLand Reprographics &amp; Scanning Bureau</li> <li>2. London Legal Paper Services</li> <li>3. Legastat</li> <li>4. ReproCopy Printing London</li> </ol>
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	<ol style="list-style-type: none"> <li>1. Opus 2</li> <li>2. British Institute of Verbatim Reporters</li> <li>3. Transcription City</li> <li>4. Optima Juris</li> <li>5. Planet Depos</li> <li>6. Lexitas</li> </ol>
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	<ol style="list-style-type: none"> <li>1. Consortra</li> <li>2. Insight IP</li> <li>3. Acolad</li> </ol>
Other leading arbitral bodies with offices in the jurisdiction?	φ