International
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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The provisions of the Arbitration Act 1996 (the "Arbitration Act") apply only to arbitration agreements that are made "in writing" (Section 5(1)). An agreement is "in writing" if: (i) it is made in writing (with no requirement for such agreement to be signed); (ii) the agreement is made by exchange of communications in writing; or (iii) the agreement to arbitrate is "evidenced in writing" (Sections 5(2)(a) to (c)). In one case, the High Court held that an arbitration agreement was evidenced by minutes of a meeting (*Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 (QB)).

Where parties agree otherwise than in writing, such as orally, by reference to terms which are in writing, they make an agreement in writing for purposes of the Arbitration Act (Section 5(3)). Oral arbitration agreements otherwise fall outside the scope of the Arbitration Act. However, such agreements may still be recognised and enforced at common law (under Section 81(1)(b) of the Arbitration Act).

The Arbitration Act does not require parties to include any particular requirements in their agreement to arbitrate. Under the Act, arbitration agreements can refer contractual and non-contractual disputes, both present and future, to arbitration (Section 6(1)). However, the agreement to refer a dispute to arbitration, and not another dispute resolution method, must be sufficiently clear (*Flight Training International v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm)). The arbitration agreement may be included in the substantive contract or may be incorporated by reference to a separate document (Section 6(2)).

1.2 What other elements ought to be incorporated in an arbitration agreement?

In addition to clearly specifying arbitration as the mode of dispute resolution, as required by the Arbitration Act, parties are advised to:

- specify the legal place or "seat" of the arbitration;
- provide for the number of arbitrators and a clear selection process for the tribunal;
- include an express choice of governing law for the arbitration agreement in addition to the choice of law governing the substantive contract to which the arbitration agreement relates;
- adopt arbitral rules from one of the principal arbitral institutions or *ad hoc* rules;
- consider whether to exclude any rights of appeal under Section 69 of the Arbitration Act or to remove court powers to grant interim measures under Section 44 of the Arbitration Act; and
- specify the language in which the arbitration should be conducted.

Where parties do not include these elements, the Arbitration Act's corresponding default provisions apply.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

English courts favour enforcement of arbitration agreements. In the leading case of *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, Lord Hoffman held that construction of an arbitration clause should start from the assumption that parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal.

In further aid of enforcing arbitration agreements, English law also recognises both the separability presumption (Section 7, Arbitration Act) and the validation principle.

An arbitration agreement will be regarded as separate from (and unaffected by the invalidity of) the main substantive contract unless there is clear evidence of factors that directly and independently impeach the arbitration agreement. The Supreme Court has clarified in that the separability presumption only insulates the arbitration agreement in circumstances that would render the substantive contract ineffective (*Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38).

The Supreme Court recently confirmed that English courts recognise the validation principle, which provides that contractual provisions, including any choice of law provision, should be interpreted so as to give effect to, and not defeat or undermine, the presumed intention that an arbitration agreement will be valid and effective (*Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38; *Kabab-Ji SAL v Kout Food Group* [2021]

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UKSC 48). However, the Supreme Court clarified that the validation principle is a principle of construction that assists in determining the choice of law where the parties have not made an express choice. It presupposes that the parties agreed to submit a dispute to arbitration. It does not apply where a party argues that there was no agreement to arbitrate.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act governs the enforcement of arbitration proceedings in England and Wales.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The provisions of the Arbitration Act apply to both domestic and international arbitration proceedings. Sections 85 to 87 apply only to domestic arbitrations, but those provisions never came into force.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

England and Wales have not adopted the UNCITRAL Model Law, although the drafting of the Arbitration Act was, in some respects, influenced by the 1985 text. The Arbitration Act differs from the Model Law in the following significant ways:

- the Arbitration Act allows only 28 days from the date of the award for a challenge (the Model Law allows three months);
- under the Arbitration Act, the default tribunal comprises a single arbitrator (three arbitrators under the Model Law);
- the Arbitration Act allows appeals to court on questions of English law arising out of an award (no comparable provision in the Model Law); and
- the Arbitration Act allows parties to agree to limit the tribunal's power to rule on its own substantive jurisdiction (no comparable provision in the Model Law).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The mandatory provisions of the Arbitration Act have effect, notwithstanding any agreement to the contrary (Section 4(1). In contrast, the non-mandatory provisions of the Arbitration Act have effect only where the parties have not agreed on alternate arrangements (Section 4(2). The full list of mandatory provisions is set out in Schedule 1 to the Arbitration Act, and include:

- powers for courts to stay proceedings where determination of the dispute is the subject of an arbitration agreement (Sections 9 to 11);
- power of courts to remove arbitrators in specified circumstances (Section 24);
- immunity for arbitrators and arbitral institutions for acts done in the discharge of arbitration functions (Sections 29 and 74);
- the tribunal's obligation to act fairly and impartially between the parties (Section 33);
- the parties' duty to do all things necessary for the proper and expeditious conduct of the proceedings (Section 40);
- the court's powers to secure witness attendance (with the tribunal's permission or agreement of the parties) (Section 43);
- the tribunal's right to withhold an award in the event of non-payment of their fees (Section 56); and
- provisions regarding the enforcement and challenge of arbitral awards (Sections 66 to 71).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Most commercial disputes can be arbitrated. The Arbitration Act allows both contractual and non-contractual disputes to be arbitrated. However, certain disputes are not arbitrable as a matter of English common law (as preserved by the Arbitration Act in Section 81(a)), including:

- criminal and certain family law matters;
- disputes over the validity of a foreign legislative act;
- certain employment claims under the Employment Rights Act 1996;
- insolvency proceedings subject to the statutory regimes in the Insolvency Act 1986 (however, insolvency claims are not automatically deemed non-arbitrable) (*Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm));
- certain low-value consumer disputes (under £5,000) are not arbitrable pursuant to the Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 2167/99); and
- disputes under illegal contracts.

A matter in dispute not being arbitrable does not invalidate the arbitration agreement itself, and does not place a dispute comprising both arbitrable and non-arbitrable claims outside of the parties' agreement to arbitrate (*Aqaba Container Terminal (Pvt) Co v Soletanche Bachy France SAS* [2019] EWHC 471 (Comm)).

The English courts have also recently considered the arbitrability of consumer disputes in the e-commerce and digital assets sectors, refusing jurisdictional challenges to domestic litigation proceedings where the terms and conditions of online auction platforms and cryptocurrency exchanges include arbitration provisions (*Chechetkin v Payward Ltd and others* [2022] EWHC 3057 (Ch)) and *Soleymani (appellant) v Nifty Gateway LLC* (respondent) [2022] EWCA CIV 129). In *Soleymani*, the Court of Appeal has directed that a full trial take place to determine whether such arbitration agreements in the consumer context are valid.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

English law recognises the principle of *kompetenz-kompetenz*. Unless otherwise agreed by the parties, the tribunal has the power to determine the following, which together comprise the "substantive jurisdiction" of the tribunal: (i) whether there is a valid arbitration agreement; (ii) whether the tribunal is properly constituted; and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement (Sections 30, 82(1), Arbitration Act).

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3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Where a party commences court proceedings in apparent breach of an arbitration agreement, courts have the power to stay the proceedings under Section 9 of the Arbitration Act. The courts must order a stay of any proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed (Section 9(4), Arbitration Act). In addition, in "rare and compelling circumstances", the court can exercise its inherent jurisdiction to stay proceedings even where the requirements of Section 9 are not satisfied (*Reichhold Norway ASA v Goldman Sachs International* [1999] EWCA Civ 1703).

The court also has inherent jurisdiction to grant a stay of proceedings commenced in a foreign court (Section 37, Senior Courts Act 1981). To preserve the right to challenge the court's jurisdiction, any application should be made before a party has taken any substantive steps in answering the substantive claim in court (Section 9(3)). Where some of the matters raised in court fall within the scope of the agreement to arbitrate, the court may order a stay of only those matters that have been referred to the court in breach of the arbitration agreement (*Sodzawiczny v Ruhan and others* [2018] EWHC 1908 (Comm)).

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Courts have limited power to intervene to address the jurisdiction of the tribunal during arbitral proceedings. A party may apply to court for a binding ruling on a preliminary point of jurisdiction only if the parties agree in writing or with the tribunal's permission (Section 32, Arbitration Act). Where the application is based on the tribunal's permission, courts only grant an application that is likely to produce substantial costs savings, there is good reason why the court should decide the matter, and the application was made without delay (Section 32(2)).

In practice, such applications rarely succeed (*see Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd* [2021] EWHC 1094 (Comm)). A court application for the determination of a preliminary point of jurisdiction neither precludes the arbitration from continuing nor prevents the tribunal from issuing an award while the court application remains pending (Section 32(4)).

A named party that did not take part in the arbitral proceedings may apply to court to challenge: (i) the existence of a valid arbitration agreement; (ii) whether the tribunal has been properly constituted; or (iii) the matters that have been submitted to arbitration (Section 72). A party who participates in the proceedings may lose the right to object to the substantive jurisdiction of the tribunal if the party continues to take part in the arbitration without raising such an objection (Section 73).

Once a tribunal renders an award on its jurisdiction, a party, whether it participated in the arbitration or not, may apply to court to challenge the substantive jurisdiction of the tribunal under Section 67, as addressed in question 10.1.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Under English law, an arbitral tribunal may only assume jurisdiction over parties to an arbitration agreement. English law does not recognise any "group or companies" doctrine (*Peterson Farms Inc. v C & M Farming Ltd* [2004] EWHC 121 (Comm)), and treats each corporate entity as having a separate legal personality except in the rare circumstances where a party demonstrates that the corporate veil can be pierced (*VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5).

However, a third party may be bound by an arbitration agreement to which it was not originally a party on the application of certain principles of English law, as below:

- the assignment of a contract to a third party (*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm));
- as an agent of another party;
- under the Contracts (Rights of Third Parties) Act 1999, which allows third parties to enforce the terms of a contract that purports to confer a benefit upon them;
- under the Insolvency Act 1986, an administrator of a company which has entered insolvency will be bound, as the company's agent, by the company's arbitration agreements (Section 349A);
- where an insurer has a right of "subrogation" (that is, to enforce the rights of an insured party against a third party), a subrogated insurer may be bound by an arbitration agreement applicable to the subrogated rights or claims; and
- where an insurer of an insolvent debtor may be pursued by a third party for the insured's debt, the third party will be bound by an arbitration clause made between the insurer and the insured.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Parties can agree to time limits for claims brought in arbitration (Section 12(1), Arbitration Act). Absent such agreement, the Limitation Act 1980 and the Foreign Limitation Periods Act 1984 apply to arbitral proceedings in the same manner as to proceedings before English courts (Section 13).

The Limitation Act 1980 sets a limitation period of six years for actions in contract and tort, and 12 years for claims brought under certain instruments (such as a deed). The limitation period may be extended in circumstances where the defendant has deliberately concealed a fact relevant to the claimant's right of action.

Where a dispute is governed by a foreign law, the laws relating to limitation applicable in the foreign state apply. Under the Foreign Limitation Periods Act 1984, any law relating to limitation periods is treated as a matter of substance rather than procedure.

A court may extend the contractually agreed limitation period only if: (i) the circumstances are such as were outside the reasonable contemplation of the parties when they agreed to the provision in question, and it would be just to extend the time; or (ii) the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question (Section 12(3)).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

If a party to an ongoing arbitration seated in England is subject to a winding-up order or enters administration, a mandatory stay of those proceedings applies and the arbitration may only be continued with the consent of the administrator or with the

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permission of the court (Insolvency Act 1986, Section 130(2) and Schedule B1, paragraph 43(6)). Courts have the discretion to order a stay in the event of a voluntary winding-up. Courts also have wide discretion in deciding whether to lift a stay of proceedings and will aim to do what is fair and just in the circumstances, particularly keeping in mind the interest of the creditors (*United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd* [2013] EWHC 4335 (Ch)).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The tribunal must determine the dispute by applying the law chosen by the parties as applicable to the substance of the dispute (Section 46(1)(a), Arbitration Act). Where the parties select the laws of a particular country, that choice encompasses the substantive laws of that country but not its conflict of law rules (Section 46(2)).

Parties can also agree that their dispute shall be determined in accordance with "other considerations" determined by the parties or the tribunal, such as trade usages (Section 46(1)(b)).

Where the parties have not chosen or agreed on an applicable law, the tribunal shall apply the law "determined by the conflict of laws rules which it considers applicable" (Section 46(3)). Accordingly, the tribunal has wide powers to apply a system of conflict of laws rules that it considers to be the most appropriate to the particular case.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

English law does not provide for any mandatory rules of law to prevail over the parties' express choice of law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Where parties choose the law governing the arbitration agreement, whether expressly or through implication, that choice governs the formation, validity and legality of the arbitration agreement. Where the parties do not make such a choice, the law applicable to the formation, validity, and legality of the arbitration agreement is the law "most closely connected" to the arbitration agreement.

The Supreme Court recently clarified these principles in the leading cases of *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 and *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48. In *Enka*, the Supreme Court found that the law applicable to an arbitration agreement is: (i) the law expressly or impliedly chosen by the parties; or (ii) if no such choice has been expressed or impliedly made, the law "most closely connected" to the arbitration agreement.

The Supreme Court found that, generally, where the parties have chosen the law applicable to the main contract, but have neither expressly nor impliedly chosen which law governs the arbitration agreement, the choice of law in the main contract should apply to the arbitration agreement. The Court noted that while an arbitration clause in a contract may be more readily governed by a different law than other clauses of a substantive contract, absent a good reason to conclude otherwise, all of the terms of a contract should be governed by the same law. The Supreme Court also found that where there is no choice of applicable law to the arbitration agreement, English courts should determine, "objectively and irrespective of the parties' intention", the law with which the arbitration agreement has its "closest connection". In *Enka*, there was no express choice of governing law for either the arbitration agreement or the substantive contract within which the arbitration agreement was found. The Supreme Court found that, in general, the law governing the arbitration agreement will be most closely connected to the law of the seat based on a number of factors, including: the seat is the legal place of performance of the arbitration; the Court's approach was consistent with the New York Convention; and relying on the law of the seat supported the reasonable expectations of contracting parties who have chosen to settle their disputes by arbitration in a specified place but made no choice of law for their contract (consistent with the *Fiona Trust* principles, see question 1.3). Since the seat was London, English law applied to any question of the validity of the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

English law places few limitations on the parties' autonomy to select arbitrators. The parties may select the number of arbitrators to determine their dispute, the method by which those arbitrators are selected (including any criteria or qualifications that the members of the tribunal must possess), and specify whether an arbitrator will act as "chairman", "president" or "umpire" of the tribunal (Sections 15(1), 16, Arbitration Act). Unless the parties agree otherwise, the Arbitration Act provides that an agreement to appoint two or any even number of arbitrators should be understood as an agreement for an additional arbitrator as chairperson of the tribunal (Section 15(2)).

Once the arbitrators have consented to their appointment and have been appointed to a tribunal (*see ARI v WXJ* [2022] EWHC 1543 (Comm) for a recent case where a party challenged whether the other party had successfully appointed an arbitrator), courts have several mandatory powers to remove an arbitrator (upon application by a party), including on the grounds that:

- circumstances exist that raise justifiable doubts as to the impartiality of an arbitrator (Section 24(1)(a));
- the arbitrator does not possess qualifications required by the arbitration agreement (Section 24(1)(b));
- the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's capacity to do so (Section 24(1)(c)); or
- the arbitrator has refused or failed to conduct the proceedings properly or efficiently (Section 24(1)(d)).

In such circumstances, the applying party must also be able to demonstrate that substantial injustice has been or will be caused (Section 24). If the arbitration is being conducted under institutional rules that empower the institution to remove an arbitrator, the applying party must exhaust available recourses at the institution before applying to court (Section 24(2)).

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties' chosen method for selecting arbitrators fails, the Arbitration Act contains a default procedure for the appointment of the tribunal.

Where each of two parties to an arbitration agreement is to appoint an arbitrator and one party refuses or otherwise fails to

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do so within the time specified, the other party may give notice in writing to the party in default that it proposes to appoint that arbitrator to act as sole arbitrator in the arbitration (Section 17(1), Arbitration Act).

Where the appointment procedure has otherwise failed, unless the parties have agreed to the contrary, courts may exercise certain powers upon application by a party, including:

(i) giving directions as to the making of arbitrator appointments (Section 18(3)(a));
(ii) directing that the tribunal be constituted by such appointments as have been made (Section 18(3)(b));
(iii) revoking any previous appointments (Section 18(3)(c)); or
(iv) making the necessary appointments itself (Section 18(3)(d)).

If the parties fail to agree on an appointment procedure, the Arbitration Act sets out a default procedure for the appointment of the tribunal members (Section 16). Where the parties have failed to agree on the number of arbitrators, a sole arbitrator will be appointed by default (Section 15(3)).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Courts can intervene in the selection of arbitrators as described in question 5.2. Courts can also remove arbitrators as described in question 5.1.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

The very first provision of the Arbitration Act states that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal" (Section 1(a)). The Arbitration Act also imposes on the arbitral tribunal a general duty to act fairly and impartially between the parties (Section 33(1)(a)). An award can be challenged for serious irregularity where the tribunal fails to comply with this general duty (Section 68(2)(a)).

Where circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality, the Arbitration Act allows a party to apply for that arbitrator to be removed (Section 24(1)(a)). In the leading case of *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, the Supreme Court confirmed that under Section 33 of the Arbitration Act an arbitrator has a duty to disclose facts and circumstances that would or might reasonably give rise to justifiable doubts regarding impartiality. In *Halliburton*, the arbitrator had accepted appointments in multiple overlapping arbitrations with one common party. The Supreme Court held that failure to disclose these overlapping arbitral appointments "may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias". Ultimately, however, the Court concluded that in the circumstances, a fair-minded and informed observer would not have inferred that there was a real possibility of unconscious bias.

Arbitrators sitting in English-seated arbitrations are also subject to rules or guidelines requiring disclosure of potential conflicts of interest through institutional arbitration rules or through the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines").

As noted below in question 15.1, the independence and disclosure of arbitrations was a focus of the Law Commission's consultation paper on proposed reforms to the Arbitration Act in September 2022. Whilst the Commission's final recommendations have not yet been published, it has provisionally indicated that the requirement for arbitrators to disclose connections to the parties or subject matter of the dispute should be codified in the Arbitration Act.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

English law imposes few limits on the parties' choice of procedural rules for arbitrations. For convenience, parties generally adopt a set of institutional rules or *ad hoc* rules (such as the UNCITRAL Rules). Under the Arbitration Act, the tribunal has the power to decide all procedural and evidential matters, subject to the parties' right to agree on any procedure (Section 34(1), Arbitration Act).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no specific procedural steps required by English law. However, an arbitral tribunal must comply with its overarching "general duty" in conducting arbitral proceedings, in its decisions on matters of procedure and evidence and when exercising all other powers conferred on it: (i) to act fairly and impartially; and (ii) to adopt procedures suitable to the circumstances of a particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined (Section 33, Arbitration Act).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

English solicitors acting in England and Wales are bound by the rules of conduct and ethics in the Solicitors Regulation Authority Code of Conduct 2019 ("SRA Code of Conduct"), and barristers by the Bar Standards Board ("BSB") Handbook 2020. These ethical rules apply to practice before both courts and tribunals. For foreign-seated arbitrations, solicitors who temporarily practise abroad will be subject to the same rules of conduct and ethics under the SRA Code of Conduct as if the proceedings were taking place in England and Wales. Barristers must comply with the applicable rules of conduct prescribed by the local Bar unless this conflicts with one of the "Core Duties" as set out in the BSB Handbook, in which case the Core Duties prevail (Rule C13 of the BSB Handbook).

Foreign counsel acting in arbitral proceedings in England and Wales are subject to the applicable rules from their home jurisdictions. English law does not impose any specific additional obligations on them.

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6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Unless otherwise agreed by the parties, the tribunal shall have the power to:

- order that a claimant provide security for the costs of the arbitration (Section 38(3), Arbitration Act);
- give directions in relation to any property that is the subject of the proceedings or as to which any question arises in the proceedings (Section 38(4));
- direct a party or witness to be examined on oath or affirmation (Section 38(5)); or
- give directions to a party for the preservation of evidence for the purposes of the proceedings (Section 38(6)).

The tribunal may also sanction parties in the event of default, including the power to:

- dismiss any claim where there has been inordinate and inexcusable delay (Section 41(3));
- continue the proceedings in the absence of a party if that party fails without sufficient cause to participate (Section 41(4)); and
- make a peremptory order prescribing a time for compliance, if a party fails to comply with the tribunal's orders or directions (Section 41(5)).

Where a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may dismiss the claim (Section 41(6)). Where a party fails to comply with any other kind of peremptory order, the tribunal can direct that the party in default may not rely upon any allegation or material that was the subject matter of the order, draw adverse inferences, and issue an award on the basis of such materials as have been properly provided to the tribunal (Section 41(7)).

The parties cannot exclude the tribunal's power to withhold an award for failure to pay the tribunal's fees (Section 56(1)). See question 6.2 for the tribunal's overarching "general duty".

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Generally, only barristers called to the Bar in England and Wales and Solicitors of the Senior Courts of England and Wales have rights of audience in English courts. The Arbitration Act instead provides that each party may be represented in the proceedings by a "lawyer or other person" chosen by the party, unless the parties otherwise agree (Section 36 of the Arbitration Act). Accordingly, foreign lawyers can appear before arbitral tribunals in England without restriction.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators acting in arbitrations seated in England and Wales have immunity from suit for "anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith" (Section 29(1), Arbitration Act). Any employee or agent of an arbitrator has the same immunity (Section 29(2)).

Arbitral institutions are also immune from suit in respect of any failings in the discharge or the purported discharge of their functions, unless any such act or omission is shown to have been in bad faith (Section 74).

The Law Commission's consultation paper on proposed reforms to the Arbitration Act published in September 2022 provisionally recommends that the immunity of arbitrators should be further strengthened. Its provisional proposal followed a string of decisions that suggest that Section 29 may not prevent a costs order against an arbitrator where he/she is removed under Section 24 of the Arbitration Act, even though such instances are "extremely rare" (*Cofely Ltd v Bingham and another* [2016] EWHC 240 (Comm) and *C Ltd v D and X* [2020] EWHC 1283 (Comm)).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Courts may provide support to the arbitral process with limited procedural issues during the arbitration relating to:

- the enforcement of peremptory orders of the tribunal (Section 42, Arbitration Act);
- securing the attendance of witnesses (Section 43);
- the taking and preservation of evidence, the inspection of property, the sale of goods that are subject to the proceedings, interim injunctions, and the appointment of a receiver (Section 44); and
- the determination of a question of law arising during the proceedings which the court is satisfied substantially affects the rights of one or more of the parties, although this power is rarely exercised (Section 45).

The parties can exclude all of these powers except for the tribunal's to secure the attendance of witnesses in Section 43.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Parties can agree upon the powers that the tribunal should have in relation to preliminary and interim relief, including through adopting institutional rules which provide for specific powers of preliminary or interim relief.

In the absence of such agreement (or unless the parties have agreed to exclude these powers) the tribunal has the power to grant the following interim measures, all without recourse to court assistance:

- order that a claimant provide security for the costs of the arbitration (Section 38(3), Arbitration Act);
- give directions in relation to any property that is the subject of the proceedings or as to which any question arises in the proceedings (Section 38(4));
- direct that a party or witness be examined on oath or affirmation (Section 38(5)); or
- give directions to a party for the preservation of evidence for the purposes of the proceedings (Section 38(6)).

The parties may also agree that the tribunal shall have the power to order any relief on a provisional basis which it would have the power to grant in a final award, including for the payment of money, for the disposition of property as between the parties or for an interim payment on account of costs in the arbitration (Section 39).

A tribunal can issue a peremptory order, which requires compliance by a particular deadline, if a party fails to comply with an order or direction of the tribunal (Section 41(5)).

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7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Courts have the same powers to grant interim measures in support of arbitration as they do for court proceedings, including:

(i) taking of evidence (Section 44(2)(a), Arbitration Act);
(ii) preservation of evidence (Section 44(2)(b));
(iii) inspection of property (Section 44(2)(c));
(iv) sale of any goods that are the subject of the proceedings (Section 44(2)(d)); and
(v) granting of an interim injunction or the appointment of a receiver (Section 44(2)(e)).

In *A and B v C, D and E* [2020] EWCA Civ 409, the Court of Appeal recently held that under Section 44(2)(a), a court can order that a resident in England be deposed in support of an arbitration seated in New York.

Relief under Section 44 is only available where that relief cannot be obtained from the arbitral process (Section 44(5)), such as where a tribunal has not yet been constituted or a party required an order binding on third parties.

A court may only order the preservation of assets if the requisite level of urgency is apparent (Section 44(3)). If the matter is not urgent, the court may only exercise its powers under Section 44(2)(a) to (e) with the permission of the tribunal or with the agreement in writing of the other parties (Section 44(4)).

Courts have the same power to grant interim relief in respect of foreign arbitral proceedings as for foreign court proceedings.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Court intervention in arbitral proceedings is only available in the limited circumstances set out in the Arbitration Act. Courts can only grant such relief in the case of urgency (under Section 44(3)) or if the tribunal does not have the necessary power to act or is unable to effectively act for the time being (under Section 44(2)). Since Section 44 is a non-mandatory provision of the Arbitration Act, parties can amend or exclude it.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Parties can apply to English courts for a stay of any court proceedings covering matters subject to an arbitration agreement (Section 9, Arbitration Act). Even where the requirements of Section 9 are not met, courts have the inherent power to stay proceedings in "rare and compelling circumstances" (Section 49(3) of the Senior Courts Act 1981; *see Reichhold Norway ASA v Goldman Sachs International* [1999] EWCA Civ 1703).

If proceedings are commenced in a foreign court in breach of a valid arbitration agreement with the seat in England and Wales, English courts can issue an anti-suit injunction under Section 37 of the Senior Courts Act 1981 where it is just and convenient to do so (*ZHD v SQO* [2021] EWHC 1262 (Comm)). Courts can issue anti-suit injunctions even where the arbitration proceedings have not yet commenced or have even been proposed. A party must apply for an anti-suit injunction promptly and before the foreign proceedings are too far advanced.

English courts also grant anti-suit injunctions to restrain proceedings that challenge, impugn or have as their object or effect the prevention or delay in enforcement of an arbitral award (*Shashoua v Sharma* [2009] 2 Lloyds Rep 376).

English courts may also grant anti-arbitration injunctions to restrain an arbitration seated abroad under Section 37 of the Senior Courts Act 1981, but only in exceptional cases, such as where the foreign arbitration is vexatious or oppressive (*Sabbagh v Khoury* [2019] EWCA Civ 1219).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

An arbitral tribunal may grant security for costs against the claimant or counterclaimant (unless agreed otherwise) under Section 38(3) of the Arbitration Act, but cannot do so only because: (i) an individual claimant is ordinarily resident overseas; (ii) a corporate claimant is incorporated or has its central management overseas.

Courts cannot order security for costs during an arbitration but can enforce a tribunal's order for security for costs. Courts can grant an order for security for costs where a party makes an application to challenge an arbitral award under Sections 67, 68, or 69 of the Arbitration Act, subject to the same limitations as for tribunals set out above (Section 70(6)). If a court order of security is not complied with, any application to challenge the award will be dismissed.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Courts can enforce any preliminary relief or interim measures granted by a tribunal by giving effect to a tribunal's peremptory orders (Section 42, Arbitration Act). A "peremptory order" requires compliance within a particular time. Once a tribunal makes a peremptory order and a party fails to comply by the deadline, the other party, or the tribunal itself, may apply to court under Section 42 for an order to enforce the relief or measures granted by the tribunal. A failure by the defaulting party to comply with the court's order constitutes contempt, and can result in fines or imprisonment. A party seeking to enforce an order of the tribunal must first exhaust any available arbitral process in respect of failure to comply with the tribunal's order (Section 42(3)).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The parties can agree to any rules of evidence. Under the Arbitration Act's default provisions, the tribunal has broad discretion to decide issues of evidence, including "whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented" (Section 34(2)(f)). Some tribunals also rely on the IBA's Rules on the Taking of Evidence in International Arbitration.

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8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Absent a contrary agreement by the parties, a tribunal can determine "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage" (Section 34(2)(d), Arbitration Act). A tribunal cannot compel a third party to provide disclosure of documents. The tribunal cannot itself compel the attendance of witnesses, but a court can (*see* question 8.3).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Courts can assist arbitral proceedings to secure the attendance of a witness (including a third-party witness) to order the production of documents or other material evidence by a witness or by ordering a witness to provide oral testimony in the arbitration (Section 43, Arbitration Act). Where a tribunal has issued a peremptory order requiring a party to produce documents, courts can also make orders requiring compliance with the tribunal's peremptory order (Section 42).

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The Arbitration Act authorises the tribunal, absent party agreement to the contrary, to determine whether oral evidence is required at a hearing and whether any (and if so, what) questions should be put to witnesses (Section 34(2) and 34(2) (h), Arbitration Act). The tribunal may direct that a party or witness giving oral testimony shall be examined on oath or affirmation, and administer any necessary oath or affirmation (Section 38(5)).

In civil proceedings under English law, lawyers (barristers and solicitors) may not "coach" witnesses – that is, influence their evidence. Lawyers from outside England and Wales will be subject to the rules of ethics and professional conduct of their home jurisdictions in this regard.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

If English law applies to questions of privilege, then, in general terms, communications between a lawyer and a client for the dominant purpose of seeking legal advice are protected by "legal advice privilege". "Legal advice" encompasses the advice provided by the lawyer both on the law and also regarding what could prudently and sensibly be done in the relevant legal context (*Three Rivers District Council & Ors v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48) and to the continuum of communications and meetings between the lawyer and the client (*Balabel v Air India* [1988] Ch. 317).

Only individuals directly charged with communicating with the lawyers, rather than all employees of the company, are deemed to be the "client" for purposes of privilege analysis (*Three Rivers District Council & Ors v Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474).

Litigation privilege protects communications between parties, their lawyers and third parties for the dominant purpose of legal proceedings "reasonably in prospect". Parties may also have joint privilege (where parties have a joint interest in the subject of the legal advice, such as a company and its shareholder) or common interest privilege (where parties have a common interest in the subject matter of the issue).

Communications with in-house counsel are also protected by privilege as set out above.

Communications between parties to a dispute produced in a genuine attempt to settle that dispute are protected by "without prejudice" privilege.

Privilege can be waived intentionally or inadvertently, but only clients can waive privilege. A common way in which a party may lose privilege in the arbitration context is by referring to privileged materials in submissions or evidence.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

The Arbitration Act does not provide a statutory definition of an award and parties are free to agree on the form of the award. Where parties do not so agree, an award shall:

(i) be in writing signed by all the arbitrators or all those assenting to the award;
(ii) contain the reasons for the award unless it is an agreed award; and
(iii) state the seat of the arbitration and the date when the award is made (Sections 52(3) to 52(5)).

The tribunal's reasons must be intelligible, and deal with the substantial points raised. An award in which the reasons do not meet that standard can be challenged under Section 68(2) of the Arbitration Act (serious irregularity). When considering such a challenge, a court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

An award may be rendered by the majority of the tribunal. Under Section 20, the chairman shall prevail in relation to an award where there is neither unanimity nor a majority decision.

A tribunal can render a single final award or issue more than one award on different aspects of the matters to be determined (Section 47). However, an award must make a final determination of substantive rights or liabilities regarding a particular issue or claim in the arbitration.

Orders and directions that address only applicable procedural mechanisms are not awards.

While an award may contain dissenting opinions (Section 52(3)), dissenting opinions do not form part of the award. A party may rely on a dissenting opinion in a challenge on a point of law under Section 69 (*B v A* [2010] EWHC 1626 (Comm)), but cannot rely on a dissenting opinion to ground a challenge on the basis of serious irregularity under Section 68 (*F Ltd v M Ltd* [2009] EWHC 275 (TCC)).

A tribunal may also issue awards by consent (Section 51).

There is no statutory time limit for a tribunal to render an award, but the tribunal has an overarching obligation to avoid unnecessary delay (Section 33(1)(b)). The parties can also agree that the tribunal must render an award within a certain time period.

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9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

A tribunal can correct an award to remove any clerical mistake or error arising from an accidental slip or omission, or clarify or remove any ambiguity in the award (Section 57(3)(a), Arbitration Act). It may also make an additional award in respect of any claim that was presented to the tribunal, but not dealt with in the award (Section 57(3)(b)). Absent the parties' agreement to the contrary, any application to the tribunal to make such a correction must be made within 28 days of the date of the award (Section 57(4)). Any correction of an award must be issued by the tribunal within 28 days of the date of an application or 28 days of the date of the original award where the tribunal acts on its own initiative (Section 56(5)). The time limits may be extended upon application to courts under Section 79(1).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

A party wishing to challenge an arbitral award must exhaust any process of appeal available through the tribunal, any institutional rules and any correction process under Section 57 (Section 70(2), Arbitration Act). Thereafter, parties can challenge an award on three bases:

(i) The tribunal lacked substantive jurisdiction (Section 67):
   (a) To prevent waiver of this argument, a party must make this challenge "forthwith" (Section 73). In *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm), the court refused a Section 67 challenge where the tribunal had already made a partial award on jurisdiction which was binding and had not been challenged.
   (b) Section 67 challenges lead to full rehearings on the issue of jurisdiction (*Dallah Real Estate & Tourism Holding Co. v Government of Pakistan* [2010] UKSC 46). The court may confirm the award, vary it, or set it aside in whole or in part.

(ii) Serious irregularity that has the effect of causing substantial injustice (Section 68):
   (a) To succeed, a party must demonstrate that a "serious irregularity" has taken place in respect of the tribunal, the proceedings, or the award, and that such irregularity caused "substantial injustice" to the applicant. The Act sets out nine separate potential heads of serious irregularity, including the failure of the tribunal to comply with its general duty to act fairly and impartially, the tribunal exceeding its powers and the failure of the tribunal to deal with all of the issues put to it.
   (b) Courts cannot reconsider the merits of an award or adjudicate on whether the tribunal's findings of fact or law were wrong (*Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43).
   (c) Section 68 challenges are rarely granted. In the case of *Doglemor Trade Ltd & Ors v Caledor Consulting Ltd & Ors* [2020] EWHC 3342 (Comm), a tribunal made a significant error in calculating damages, declined to correct the award after the mistake became apparent. The court granted the challenge as the uncorrected award caused substantial injustice. As well as this, in the recent case of *Royal & Sun Alliance Insurance Ltd v Tughans* [2022] EWHC 2589 (Comm), the High Court remitted an award to a tribunal on the basis that a serious irregularity had occurred following its decision to award the respondent full indemnity, even though the issue was only argued in the post-award submissions (and not at the merits hearing). Interestingly, the Court reached its decision despite determining that the test for substantial injustice had not been met. Such cases are examples of unusual interventions by English courts.

(iii) An appeal on a question of law (Section 69):
   (a) Section 69 challenges can only be brought with the agreement of all of the parties to the arbitration or with the court's permission. Courts only grant permission where: (a) the determination of the question will substantially affect the rights of one or more of the parties; (b) the tribunal was asked to determine the question; and (c) the tribunal's decision on the question is either "obviously wrong" on the basis of the findings of fact in the award or open to serious doubt if the question is of general public importance. To satisfy the threshold of "obviously wrong", the tribunal's reasoning must demonstrate a "major intellectual aberration" (*HMV UK Ltd v Propinvest Friar LP* [2011] EWCA Civ 1708).
   (b) Courts must also be satisfied that it is just and proper in all the circumstances for the court to determine the question.
   (c) Parties commonly exclude application of Section 69 in their arbitration agreements either explicitly or through the adoption of institutional rules that have the same effect.

A challenge or appeal under any of Sections 67, 68 or 69 must be brought within 28 days of the date of the award (or 28 days of the notification of the decision of any applicable process of arbitral appeal or review) (Section 70). Those time limits can be extended by the court under Section 79.

As discussed below in question 15.1, the Law Commission's consultation paper on proposed reforms to the Arbitration Act published in September 2022 includes as areas of focus both jurisdictional challenges against arbitral awards under section 67 of the Arbitration Act and appeals on a point of law under section 69 of the Arbitration Act. Challenges to awards under section 67 of the Arbitration Act on the basis that a tribunal lacked jurisdiction is also a stated focus of the Commission's March 2023 second consultation paper. The Commission has indicated that where an objection on the basis that the tribunal lacks jurisdiction has been made, and the tribunal has ruled on this, then any subsequent section 67 challenge by a party who participated in the arbitral proceedings should not be in the form of a full rehearing. The Commission's final proposed reforms are yet to be published.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties can agree to exclude the right to appeal an award on a question of English law (Section 69(1), Arbitration Act). The rights of appeal under Section 67 (the tribunal lacked substantive jurisdiction) and Section 68 (serious irregularity) cannot be excluded.

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10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties cannot extend by agreement the powers of the court to review an award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

See question 10.1 for the procedure applicable where parties have participated in the arbitration.

Where an applying party has taken no part in the arbitration (Section 72(2)), a challenge to an arbitral award is launched through the issuance of an arbitration claim form under Part 8 of the Civil Procedure Rules ("CPR") (CPR 62.3 and Practice Direction 62.2.1).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United Kingdom (which includes England and Wales) signed and ratified the New York Convention in 1975. It has one reservation: the Convention applies only to awards made in the territory of another contracting party. Sections 100 to 103 of the Arbitration Act provide for the recognition and enforcement of awards made in the territory of another state that is also a party to the New York Convention.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The United Kingdom is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. The following acts are also in force in England and Wales: (i) the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides for the enforcement of judgments and arbitral awards from specified former Commonwealth countries; and (ii) the Arbitration (International Investment Disputes) Act 1966, which provides for the recognition and enforcement of awards pursuant to the ICSID Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

English courts are generally pro-enforcement. Domestic arbitral awards may be enforced in the same manner as a judgment or order of the English court (Section 66, Arbitration Act).

Foreign awards made in a New York Convention state may be enforced in English courts in the same manner as a judgment or order of the court (Section 101(2)). An authenticated original award, or a certified copy, together with the original arbitration agreement or a certified copy, must be produced (Section 102(1)). If the award or the arbitration agreement is in a foreign language, a certified translation must be produced (Section 102(2)).

The grounds upon which a court may refuse recognition and enforcement of a New York Convention award are narrow (Section 103). Even where one of the grounds under Section 103 is established, English courts can enforce an award, although this discretion is narrowly construed (*Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Res judicata and issue estoppel preclude parties from bringing the same claims against the same parties already resolved by a final and binding decision, whether a court judgment or arbitral award. A prior award may be used by one of the parties to raise a defence of issue estoppel in a new arbitration between the same parties. In the recent case of *Union of India v Reliance Industries Limited and another* [2022] EWHC 1407 (Comm), the English Commercial Court held that a tribunal in a London-seated arbitration could determine issues of *res judicata* according to English law even if the substantive law of the underlying contract was not English law. The court also confirmed that arbitral tribunals can apply the English law principle articulated in *Henderson v Henderson* (1843) 67 ER 313 that a party may not raise in subsequent proceedings matters that could and should have been raised in the earlier proceedings, but were not (*see also Daewoo Shipbuilding & Marine Engineering v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC), where the court confirmed that *Henderson v Henderson* applied within the same arbitral proceedings to prevent a party from pleading at a later stage facts it could have pleaded earlier).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

English courts may refuse to recognise or enforce an award if it would be contrary to public policy to recognise or enforce the award (Section 103(3), Arbitration Act). However, courts approach such arguments with "extreme caution" and have set a high standard for refusing enforcement on public policy grounds (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm); *RBRG Trading (UK) v Sinocore International Co Ltd* [2018] EWCA Civ 838).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The scope of the obligation of confidentiality in arbitration proceedings has been developed through common law, and is not codified in the Arbitration Act. While the legal basis remains a matter of some controversy, broadly, parties to arbitration and the arbitral tribunal are bound by an implied duty to keep confidential the hearings in the arbitral dispute, the documents disclosed (or created) during the arbitral proceedings, and any arbitral awards rendered (*see Michael Wilson & Partners Ltd v Emmott* [2008] EWCA Civ 184).

Whether the implied obligation of confidentiality precludes parties from disclosing the fact that an arbitration had been commenced or the identity of the parties to that arbitration remains an unsettled question.

Parties can insert confidentiality clauses in their arbitration agreements, including by adopting institutional rules with confidentiality provisions.

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Confidentiality is one of the eight specific areas identified in the Law Commission's consultation paper on the proposed reform of the Arbitration Act published in September 2022 (as discussed below in question 15.1). Whilst the Commission's formal recommendations have not yet been published, its initial proposals indicate that confidentiality will remain to be not codified in statute, contrary to the approach taken by leading institutional rules and other jurisdictions.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

A party is prohibited from referring to and/or relying on information and documents disclosed in an arbitration in any subsequent proceedings (subject to the exceptions to the duty of confidentiality outlined in question 12.1).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Where the parties do not agree on the scope of the tribunal's powers regarding remedies, the Arbitration Act empowers the tribunal to:

(i) make a declaration as to any matter to be determined in the proceedings (Section 48(3)); and
(ii) order the payment of a sum of money, in any currency (Section 48(4)).

The tribunal also has the same powers as the court to:

(i) order a party to do or refrain from doing anything;
(ii) order specific performance of a contract (other than a contract relating to land); and
(iii) order the rectification, setting aside or cancellation of any deed or other document (Section 48(5)).

English law permits the grant of punitive or exemplary damages in limited circumstances, and an award of exemplary damages may not be enforceable on public policy grounds.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Subject to any agreement between the parties, the tribunal may award interest (in simple or compound form) "from such dates, at such rates and with such rests as it considers meets the justice of the case" (Section 49, Arbitration Act). The tribunal can award both pre-award (Section 49(3)) and post-award interest (Section 49(4)).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Unless the parties agree otherwise, tribunals award costs based on the general principle that costs should follow the event (Section 61(2), Arbitration Act). The Arbitration Act otherwise empowers the tribunal to allocate costs on such basis as it thinks fit (Section 63(3)). The tribunal may depart from the general principle that costs follow the event where it would not be appropriate in relation to the whole or part of the costs (Section 61(2)); for example, to sanction a party for "guerrilla tactics" during the arbitration. The allocable costs include legal or "other costs" of the parties (Section 59(1)(c)), arbitrators' fees and expenses (Section 59(1)(a)), and fees and expenses of any arbitral institution (Section 59(1)(b)). English courts have also found that such costs can include fees in respect of third-party funding (*Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

English law distinguishes between awards that constitute "income" and "capital" in the hands of the recipient. Generally, damages are taxed as income if they compensate a loss of income. Damages will generally be "capital" where they relate to assets such as shares or property (or where the damages are to compensate for the destruction of the profit-making capability of an asset). The rates of taxation payable vary between individual and corporate entities.

If damages are "capital", the award creditor is generally taxed as if it had sold part of that asset.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Lawyers acting in arbitral or court proceedings can fund claims through the use of a "conditional fee arrangement" ("CFA") or a "damages-based agreement" ("DBA").

A CFA is an agreement with a lawyer that provides for the lawyer's fees and expenses, or part of them, to be paid only in certain delineated circumstances, typically if the client wins the case.

A DBA depends not on the achievement of a specific condition (or outcome) but on the achievement of damages. It is a fee agreement where the client only pays the lawyer if the client obtains a specified financial benefit, typically an award of damages.

A growing number of professional funders are active in funding both arbitral and court proceedings in England & Wales.

English courts are generally supportive of third-party funding arrangements, and have recently dismissed challenges to the award of the third-party funding costs under section 68 of the Arbitration Act (*Tenke Fungurume Mining S.A. v Katanga Contracting Services S.A.S.* [2021] EWHC 3301 (Comm)). The Supreme Court recently heard a landmark challenge to the validity of third-party funding arrangements in a litigation context, which has the potential to render such arrangements unenforceable under English law (on appeal from *PACCAR Inc and others v Road Haulage Association Ltd and another* [2021] EWCA Civ 299). The Court's decision remains pending as of the writing of this chapter.

14 Investor-State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Washington Convention was signed by the United Kingdom (which incorporates England and Wales) on 26 May 1965 and ratified on 19 December 1966, ultimately entering into force on

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18 January 1967. The full list of member states can be found at: https://icsid.worldbank.org/about/member-states/database-of-member-states.

14.2 How many Bilateral Investment Treaties ("BITs") or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The United Kingdom has entered into more than 100 BITs, of which over 90 are currently in force. The United Kingdom has been a signatory to the Energy Charter Treaty since 16 December 1997. On 1 January 2021, the Trade and Cooperation Agreement ("TCA") concluded between the EU and the UK entered into force. The TCA does not provide for an effective investor-state dispute resolution mechanism and offers limited substantive protections to foreign investors. In addition to the TCA, there are BITs in place between the UK and 11 EU Member States: Malta (1986); Hungary (1987); the Czech Republic (1990); Slovakia (1990); Lithuania (1993); Estonia (1994); Latvia (1994); Romania (1995); Bulgaria (1995); Slovenia (1996); and Croatia (1997). The UK's BIT with Poland (1987) was terminated by Poland in 2019 but remains in effect for all investments made while it was still in force, until 22 November 2035. The TCA does not terminate any of these BITs and applies "without prejudice to any earlier bilateral agreement" between the UK and EU Member States.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The United Kingdom's model BIT, published in 2008, includes provisions for the fair, equitable and non-discriminatory treatment of investments, transfer of capital and returns, compensation for expropriation, and access to arbitration for dispute resolution. Article 3 of the model BIT contains the "most favoured nation" clause, which encompasses the dispute-settlement clause of the treaty.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The State Immunity Act 1978 ("State Immunity Act") grants two different kinds of immunity:

- immunity from adjudication, which protects a state from being subject to the jurisdiction of English courts; and
- immunity from enforcement, which shields a state from having a writ of enforcement executed against it by an English court.

There are a number of exceptions to immunity from adjudication, but only two exceptions to immunity from enforcement. Section 9 of the State Immunity Act provides that where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration it is not immune from English court proceedings related to the arbitration.

The exceptions to immunity from enforcement of an arbitration award against a state include: (i) where the state has given written consent (including through a prior agreement, such as the arbitration agreement) (Section 13(3)); and (ii) the property of the state is in use or intended for use for commercial purposes (Section 13(4)).

In the recent case of *General Dynamics UK Ltd v The State of Libya* [2022] EWHC 501 (Comm), the Commercial Court refused an application from Libya to set aside an order granting General Dynamics permission to enforce a New York Convention arbitral award against it on the grounds that it had adjudicative and enforcement immunity under the State Immunity Act. Libya had already participated in the arbitration and had taken no steps to demonstrate its intention to assert sovereign immunity in the event of an award being made against it.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

The Law Commission, which recommends reforms to legislation to Parliament, published its first consultation paper on proposed reforms to the Arbitration Act in September 2022, and a further consultation paper in March 2023. The review seeks to ensure the viability of the Arbitration Act, by ensuring both that it is fit for purpose and that it continues to promote the UK as a leading destination for commercial arbitrations.

The September 2022 consultation paper identified eight key areas of review:

- confidentiality;
- independence of arbitrators and disclosure;
- discrimination;
- immunity of arbitrators;
- summary disposal of issues that lack merit;
- interim measures ordered by the court in support of arbitral proceedings (Section 44, Arbitration Act);
- jurisdictional challenges against arbitral awards (Section 67, Arbitration Act); and
- appeals on a point of law (Section 69, Arbitration Act).

The March 2023 consultation focuses on three specific areas:

- the proper law of the arbitration agreement;
- challenges to awards under Section 67 on the basis that a tribunal lacked jurisdiction; and
- discrimination in the context of arbitration.

The consultation period for the second consultation period closed in May 2023, and the Commission's final proposals are yet to be published.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The restrictions in place as a result of the COVID-19 pandemic accelerated the adoption of remote proceedings, along with further improvements in the ability of parties to use electronic documents in case management procedures and in other efficiency and cost-saving measures. The use of remote proceedings continues to be a focus of modernisation for the national courts. In June 2023, the HM Courts and Tribunals Service ("HMCTS") announced plans to transition to a new video hearing service by March 2024, including virtual consultation rooms and built-in guidance for court users.

The London Court of International Arbitration ("LCIA") has adopted new procedural rules, which came into effect from 1 October 2020, that contain a number of innovations, including empowering tribunals to adopt technology to enhance the efficiency and expeditious conduct of arbitrations (Article 14.6).

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The Rules also make explicit reference to hearings conducted virtually (Article 19.2).

The updated LCIA Rules also provide consolidation of cases by the LCIA (Article 22.7), and allow the tribunal to summarily dismiss claims that are "manifestly without merit" (Article 22(viii)).

Domestically, there is also a general push to make the operation of courts and tribunals more sustainable and environmentally friendly. HMCTS has developed a five-year strategy which focuses on reducing carbon emissions, saving water, reducing waste and protecting and nurturing biodiversity. The Commercial Court, for example, now operates on a paperless basis. The updated LCIA Rules also provide for electronic means as the default for the submission of a request for arbitration, response and any written communications thereto (Articles 4.1 and 4.2).

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

English-seated tribunals regularly conduct hearings by telephone or video conference, particularly where parties and counsel from different jurisdictions must appear and to settle procedural or other collateral matters. Even before the COVID-19 pandemic, it was not unusual in London-seated arbitrations for international witnesses to give evidence by video conference at merits hearings. While such hearings were less common in the national courts before March 2020, the courts adapted swiftly to the conduct of virtual hearings with the onset of the COVID-19 pandemic, and have remained to some extent a feature in the national courts post-COVID-19, particularly in procedural hearings (such as directions or case management hearings), as well as in cases involving more sophisticated legal entities in the Commercial Court (which now conducts the majority of its hearings which are half a day in length or less remotely).

In December 2021, HMCTS published an evaluation of remote hearings based on a study of more than 8,000 members of the judiciary, legal representatives and other court users, finding overall general satisfaction with remote hearings while noting concerns depending on the type of parties involved and the kind of hearing. The Law Society recommends that courts decide whether a hearing should be remote on a case-by-case basis, and only where the court is satisfied that justice can be served via a remote hearing, weighing the importance and urgency of the hearing against factors suggesting justice might be better served through a physical hearing.

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