The International Arbitration Review

Eighth Edition

Editor
James H Carter

The Law Reviews

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THE INTERNATIONAL ARBITRATION REVIEW

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ENGLAND & WALES

Duncan Speller[1]

I INTRODUCTION

Arbitrations seated in England and Wales,[2] both international and domestic, are governed by the Arbitration Act 1996 (Act).[3] The Act, which is based in many respects on the UNCITRAL Model Law, consolidated and reformed the existing arbitration law, introducing a modern and 'pro-arbitration' legislative regime. Although comprehensive, the Act does not codify all aspects of English arbitration law.[4] Practitioners must therefore consult the common law as well as the Act to determine the status of the law on many issues.

i The structure of the Act

The provisions of the Act are set out over four parts:

a Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between mandatory provisions (i.e., those that have effect notwithstanding any agreement to the contrary) and non-mandatory provisions (i.e., those that can be opted out of, by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

b Part II contains provisions dealing with 'domestic arbitration agreements'and 'consumer arbitration agreements', and 'small claims arbitration in the county court';

c The provisions of Part III give effect to the United Kingdom's obligations to recognise and enforce awards under Articles III to VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); and

d Part IV comprises provisions concerning the allocation of proceedings between courts, and the commencement of the Act and the extent of its application.

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1 Duncan Speller is a partner at Wilmer Cutler Pickering Hale and Dorr LLP. The author would like to thank Payel Mazumdar for her assistance in updating this chapter.

2 There are three distinct jurisdictions in the United Kingdom, each of which has its own court system and laws. England and Wales together comprise a single jurisdiction; the other two are Scotland and Northern Ireland.

3 English Arbitration Act 1996, Section 2(1).

4 For example, the Act contains no provisions as to the confidentiality of arbitrations, but the courts have continued to develop and refine the law on this issue: *Ali Shipping Corp v. Shipyard Trogir* [1999] 1 WLR 314; *Glidepath BV v. Thompson* [2005] EWHC 818 (Comm); *Michael Wilson & Partners Ltd v. Emmott* [2008] EWCA Civ 184.

ii The main principles of the Act

The Act is based on three general principles set out in Section 1, which have served as a starting point for judicial reasoning and innovation in the application of the Act. A member of the Departmental Advisory Committee on Arbitration (DAC), who helped draft the Act in consultation with arbitration practitioners and users, recently described these principles as the 'philosophy behind the Act'.[5] The principles are:

a fairness ('the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense');[6]

b party autonomy over the arbitration proceedings ('the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest');[7] and

c the restriction of judicial intervention in proceedings ('in matters governed by [Part I] of the Act, the court should not intervene except as provided by [that] Part').[8]

Section 1 of the Act provides that Part I is 'founded on' these principles and shall be 'construed accordingly', and the English courts continue to refer to the guiding principles in resolving concerns over the interpretation and the application of the Act.[9]

iii The scheme of the Act

The aforementioned general principles are also reflected throughout the provisions of the Act. For example, the Act supports the general principle of fairness by imposing upon the parties the duty to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'; and upon the tribunal, the duty to act 'fairly and impartially',[10] and to adopt suitable procedures for 'avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[11]

5 The DAC produced two reports that provide a useful commentary on many of the Act's provisions: the Departmental Advisory Committee on Arbitration Law: Report on the Arbitration Bill (February 1996); and The Supplementary Report on the Arbitration Act 1996 (January 1997), chaired by the Rt Hon Lord Justice Saville. The reports continue to be referred to by the courts (see, e.g., *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 at Paragraph 31 et seq.; and *The London Steam Ship Owners Mutual Insurance Association Ltd v. The Kingdom of Spain* [2013] EWHC 2840 (Comm) at Paragraphs 25 and 49).

6 Section 1(a) of the Act.

7 Section 1(b) of the Act.

8 Section 1(c) of the Act.

9 *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, per Lord Justice Rix at Paragraphs 100, 105; *Itochu Corporation v. Johann MK Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 at Paragraph 17ff; *Bitumex (HK) Co Ltd v. IRPC Public Co Ltd* [2012] EWHC 1065 (Comm) at Paragraph 22; *Lombard North Central Plc v. GATX Corp* [2012] EWHC 1067 (Comm) at Paragraph 15; *Nomihold Securities Inc v. Mobile Telesystems Finance SA* (No. 2) [2012] EWHC 130 (Comm) Paragraphs 26, 58; *Turville Heath Inc v. Chartis Insurance UK Limited* [2012] EWHC 3019 at Paragraph 53; *Jivraj v. Hashwani* [2011] UKSC 40 at Paragraph 61ff; and *Gujarat NRE Coke Limited, Shri Arun Kumar Jagatramka v. Coeclerici Asia (PTE) Limited* [2013] EWHC 1987 (Comm) at Paragraph 23.

10 Section 40 of the Act.

11 Section 33(1) of the Act.

As for party autonomy, the Act reinforces this general principle through the non-mandatory nature of most of the provisions of Part I.[12] In contrast to the provisions specified by the Act as mandatory, parties can opt out of non-mandatory provisions by agreement.

The courts in turn have emphasised in a number of judgments the importance of party autonomy to the arbitral process. The Supreme Court in *Jivraj v. Hashwani*[13] upheld an arbitration clause that required arbitrators to be drawn from a particular religious group when the Court of Appeal had found the clause void for offending against European anti-discrimination legislation.[14] In that judgment, their Lordships approved the following statement of the International Chamber of Commerce (ICC):

> *The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (eg because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives).*[15]

The Act gives effect to the third principle – limited court intervention – in many of the mandatory provisions of Part I. Whereas the tribunal has substantial powers to decide all procedural and evidential matters,[16] to give directions in relation to property or the preservation of evidence,[17] and to order relief on a provisional basis,[18] the court on the other hand has only limited power to intervene. The court's intervention is limited to only certain circumstances to support arbitration (such as appointing arbitrators where the agreed process fails,[19] and summoning witnesses to appear before the tribunal);[20] and the court has the same powers for the purposes of and in relation to arbitral proceedings as it has in respect of legal proceedings, such as taking evidence of witnesses, preservation of evidence, granting of an interim injunction or the appointment of a receiver.[21] In this respect, the Act mirrors the UNCITRAL Model Law.[22]

In addition, the Act confers only limited rights of challenge of an award, on grounds that either the tribunal lacked substantive jurisdiction (under Section 67) or there was serious irregularity causing substantial injustice (under Section 68), or that an appeal is warranted on a point of law (under Section 69). As these provisions are designed to support the arbitral process and reduce judicial involvement in arbitral proceedings,[23] the courts have tended

12 See Section 4 of the Act.

13 [2011] UKSC 40.

14 Employment Equality (Religion or Belief) Regulations 2003.

15 *Jivraj v. Hashwani* [2011] UKSC 40 at Paragraph 61.

16 Section 34 of the Act.

17 Section 38(4) and (6) of the Act.

18 Section 39 of the Act.

19 Section 18 of the Act.

20 Section 43 of the Act.

21 Section 44 of the Act.

22 Section 17 J of the UNCITRAL Model Law.

23 See, e.g., *Itochu Corporation v. Johann MK Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 ('The policy of thus restricting appeals, found in Section 18 and a variety of other sections in the Act, is deliberate. It reflects the underlying general principles, as to party autonomy and protection of the parties from unnecessary delay and expense, enshrined in Section 1(a) and Section 1(b) of the Act').

to place a 'high hurdle' on parties seeking to set aside arbitral awards,[24] insisting that such challenges are 'long stop[s] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.[25] Although challenges of awards on the grounds of serious irregularity under Section 68 do not require the leave of the court, unlike appeals on points of law under Section 69, there is no evidence that this lesser requirement has encouraged frivolous litigation.[26]

iv Court relief in support of arbitration

A consistent theme in recent case law, in 2016 as in previous years, has been the English courts' exercise of their power to make orders in support of arbitrations seated in England and Wales. The Supreme Court has noted that the court has jurisdiction to grant an anti-suit injunction under Section 37 of the Senior Courts Act 1981 even where there are no arbitral proceedings in contemplation or there is no statutory basis under the Act for an injunction, in circumstances where the court is seeking to support arbitration by requiring parties to refer their disputes to arbitration.[27]

v Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,[28] namely the Commercial Court (for general commercial arbitration), and the Technology and Construction Court (for construction disputes).

II THE YEAR IN REVIEW

i Developments affecting international arbitration in England and Wales

Brexit

One of the most significant political developments of the past year was the decision of the United Kingdom to commence the process of leaving the European Union (Brexit) by serving notice under Article 50 of the Treaty on the European Union. Although the long-term

24 In *Bandwidth Shipping Corporation Intaari (the 'Magdalena Oldendorff')* [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd's Rep 7, Waller LJ stated, at Paragraph 38: 'In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to section 68 and in particular by reference to section 33 [...] It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.'

25 The DAC Report. See also *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43 and more recently *La Société pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural Gas LLC (Statoil)* [2014] EWHC 875.

26 A recent survey has shown that in 2009, 12 applications were made under Section 68, and 62 under Section 69; and in 2012, challenges under Section 68 were fewer than those under 69, being seven and 11 respectively: www.olswang.com/articles/2013/03/do-the-2012-stats-reveal-an-abuse-of-the-right-to-challenge-an-arbitral-award-for-serious-irregularity.

27 *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35.

28 See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, as amended.

consequences of this decision for London as a financial and legal centre remain unknown and the subject of a great deal of speculation, the Brexit decision will have little immediate formal impact on the process for arbitration in England and Wales.

The United Kingdom will remain a signatory to the New York Convention. The New York Convention is the backbone of international arbitration, as it governs enforcement of both arbitral awards and arbitration agreements. A party obtaining an award in an arbitration seated in England and Wales will presumptively remain able to enforce the arbitral award in the more-than 156 contracting states that are signatories to the New York Convention.

There are also no immediate proposals to amend the Act as a result of Brexit. The Law Commission of England and Wales continues to consider and consult upon potential changes to the Act in order to retain London's competitive edge as a seat for arbitration. For example, the Law Commission is currently considering whether the Act should be amended expressly to permit tribunals to determine preliminary issues of fact or law akin to the summary judgment procedures applicable in English court proceedings. However, these possible changes are not connected to the Brexit decision and are driven by a more general desire to ensure that London maintains its competitive advantage as an arbitration-friendly seat.

Brexit may arguably have positive consequences for the London arbitration market in several respects.

First, Brexit may create additional reasons for commercial users in some sectors that have historically been more inclined to resort to the English courts (e.g., in the financial services sector) to use arbitration.[29] While the United Kingdom remains a member of the European Union, a judgment obtained in the English courts is presumptively enforceable in other states within the European Union under the Brussels I Regulation (recast), Regulation 1215/2012, the (Recast Regulation) (subject only to limited exceptions). However, as discussed further below, it is unclear the Recast Regulation will continue to apply in the United Kingdom after it leaves the European Union. This potentially increases the 'enforceability premium' that attaches to an arbitral award as distinct from an English judgment. Whereas there is potential uncertainty surrounding the extent to which an English judgment will continue to be enforceable in other European Union Member States, an arbitral award will continue to benefit from the existing enforcement regime under the New York Convention. Parties entering into long-term contracts, in particular, may see significant advantages in opting for international arbitration over other means of dispute resolution.

Second, Brexit may give English courts greater freedom to issue anti-suit injunctions to protect the integrity of an agreement to arbitrate in London. At present, the English courts cannot issue anti-suit injunctions to restrain parties from court proceedings in other European Union Member States.[30] The English courts can only grant an anti-suit injunction to restrain a party from seeking to proceed with claims in a national court outside the European Union in breach of an agreement to arbitrate. Thus, post-Brexit, since the limitation would no longer apply, English courts could more freely issue anti-suit injunctions for breach of arbitration agreements.

29 See further www.cdr-news.com/categories/arbitration-and-adr/7122-international-arbitration-in-the-finance-sector-room-to-grow.

30 *Allianz SpA and Others v West Tankers Inc.* [2009] EUECJ C-185/07

The Hague Convention

On 10 December 2015, the EU ratified the Hague Convention on Choice of Court Agreements (Hague Convention) through Council Decision 2014/887/EU.[31] The EU (with the exception of Denmark), Singapore and Mexico have all adopted the Hague Convention: the EU and Singapore by ratification and Mexico by accession.[32] However, it remains to be seen whether the United Kingdom will independently ratify the Hague Convention once it leaves the EU. Ratification of the Hague Convention may provide one mechanism to ensure that English judgments are enforceable in other EU Member States in some circumstances, although its scope is more limited than the Judgments Regulation (and, in particular, the Hague Convention only applies to exclusive jurisdiction agreements).

The London Court of International Arbitration (LCIA)

The LCIA, which was established in 1892, remains one of the world's pre-eminent international arbitration institutions. In May 2016, Judith Gill QC took over as president of the LCIA, replacing Professor William Park.[33] The vice presidents are Paula Hodges QC of Herbert Smith Freehills and EY Park at Kim & Chang in Seoul. Audley Sheppard QC of Clifford Chance joined the board of directors as the chair.[34]

In 2016, 303 arbitrations were referred to the LCIA.[35] Of these, 253 were conducted under the LCIA Rules, and the others under the UNCITRAL Rules (with the LCIA acting as appointing authority).[36] The types of cases referred continue to be diverse, with healthcare and pharmaceuticals, energy and resources, construction and infrastructure, banking and finance, telecommunication, insurance, real estate, and media and sports disputes all featuring.[37]

The LCIA continues to be particularly attractive to European parties, with the majority in 2016 being from the UK (16.2 per cent) and Western Europe (7.7 per cent).[38] The percentage of parties who are Russian has reduced from 10.3 per cent in 2015 to 5 per cent in 2016. However, this figure understates the popularity of LCIA arbitration within Russia, as many Russian companies operate through entities incorporated in other jurisdictions (such as the British Virgin Islands (BVI) and Cyprus). The LCIA is also widely used by parties from Africa (6.3 per cent) and the BVI (6 per cent), and is gaining popularity with parties from other nations such as the United Arab Emirates, India and Kazakhstan.[39]

In 2016, the LCIA appointed 496 arbitrators (up from 449 the previous year).[40] Of those, 85 were appointments of sole arbitrators conducting LCIA arbitrations, with 400 being part of three-member LCIA tribunals. Five appointments were under UNCITRAL or other *ad hoc* arbitrations.[41] There seems to be a change of preference in 2016 from sole arbitrators

31 eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0887&from=EN.
32 www.hcch.net/en/instruments/conventions/status-table/?cid=98.
33 www.allenovery.com/news/en-gb/articles/Pages/Judith-Gill-QC-announced-as-next-president-of-the-.aspx.
34 www.lcia.org/News/changes-to-the-lcia-court-and-board-of-directors.aspx.
35 2016, LCIA: A Robust Caseload p. 5.
36 Ibid., p. 5.
37 Ibid., p. 7.
38 Ibid., p. 9.
39 Ibid., p. 9.
40 Ibid., p. 11.
41 Ibid., p. 11.

to three-member tribunals. In 2016, 62 per cent of cases were dealt with by a three-member tribunal as opposed to 48 per cent in 2015, and only 37 per cent were referred to sole arbitrator in comparison to 57 per cent in the preceding year.[42]

In terms of gender diversity, the percentage of female arbitrators being appointed by the LCIA Court in 2016 was 20.6 per cent.[43] 2016 also witnessed 82 first-time female arbitrator appointees by the LCIA.[44]

The use of emergency procedures has been the focus of recent attention in international arbitration, and in June 2015 the LCIA issued guidance notes for parties and arbitrators on the use of emergency procedures. This includes guidance on the expedited formation of a tribunal, and the appointment of an emergency arbitrator and replacement arbitrators.[45] For instance, the guidance notes explain that a party can request the expedited formation of a tribunal at the same time that it files a request for arbitration by writing to the Register (preferably via electronic means) and by notifying all the other parties.[46] They also explain the procedures for applying for an emergency arbitrator and what must be included in the application, such as the specific grounds for requiring an emergency arbitrator; the specific claim, with reasons for emergency relief; and all relevant documentation.[47] In addition, the notes clarify what will happen after an application is submitted. This can include giving the responding party the opportunity to comment before a determination is made.[48]

ICC arbitration

England and Wales continues to be a popular seat for arbitrations conducted under the rules of other international arbitration institutions, including those of the ICC.

London was the second-most popular seat for ICC arbitrations in 2015 with 57 cases, after Paris with 92.[49] With 60 arbitrations, the US was the third-most popular seat, with 28 of the arbitrations taking place in New York.[50] Swiss cities featured as the third and sixth most-popular seats, with 41 and 22 arbitrations being seated in Geneva and Zurich respectively (totalling 63 across both).[51] Singapore also emerged as a favoured seat, with 35 cases.[52] Of the disputes referred to the ICC, English law and US law were most commonly chosen, followed by the laws of Switzerland, France and Germany. Among US law, New York law appeared to be the most popular, followed that of by California, Florida and Texas.[53]

The UK also continues to provide the largest number of arbitrators for ICC appointments at 185 (14.09 per cent), followed by 133 from the US (10.13 per cent) and 111 from Switzerland (8.45 per cent).[54]

42 Ibid., p. 12.
43 Ibid., p. 12
44 Ibid., p. 13
45 www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx.
46 Ibid., at 3.2.
47 Ibid., at 4.2.
48 Ibid., at 4.3.
49 ICC Dispute Resolution Statistics 2015, p. 16.
50 Ibid., p. 16.
51 Ibid., p. 16.
52 Ibid., p. 16.
53 Ibid., p. 17.
54 Ibid., p. 15.

London Maritime Arbitrators Association (LMAA) and other arbitral institutions

England and Wales is also frequently chosen as a seat in arbitrations under rules developed for specific industry sectors, such as those of the LMAA.

In 2016, the LMAA continued to feature as a popular arbitration forum, principally for maritime and shipping disputes despite, or perhaps because of, prevailing poor drybulk market conditions globally.[55] It made 2,944 appointments (down from 3,160 in 2014).[56] In 2016, 535 awards were rendered, which was slightly down on the figures for 2015 at 553.[57] The LMAA conducted only 55 mediations (a steep drop from 221 mediations in 2015), of which 40 were successful.[58]

Arbitration and Mediation Services (Equality) Bill)

On 25 May 2016, the Arbitration and Mediation Services (Equality) Bill had its first reading in the House of Lords. The Bill, pioneered by Baroness Cox of Queensbury, is largely aimed at preventing discrimination against Muslim women.[59]

The Bill proposes amendments to various statutes, including the Act, regarding the application of equality legislation to arbitration and mediation services, particularly in the context of family law matters, domestic abuse and criminal proceedings. Among other things, the provisions include amendments to the Act such that no part of an arbitration can provide that a woman's evidence is worth less than a man's (or vice versa),[60] or that the division of an estate on intestacy must be unequal.[61] In addition, the Act would make it a crime, punishable with up to seven years' imprisonment, for a person to falsely claim jurisdiction over a matter without any basis under the Act.[62] This is aimed at stopping 'jurisdiction creep' among shariah courts.[63]

On 27 January 2017, the Bill had its second reading. The next stage is the Committee stage, at which a line-by-line examination of the Bill will take place; however, that has yet to be scheduled.

ii Arbitration developments in the English courts

The English courts continue to witness a significant inflow of arbitration-related cases raising a plethora of issues. These cases illustrate the application of the principles of the Act as described above. In particular, the cases demonstrate the willingness to intervene in support of an arbitration where consistent with the Act, but also an overarching concern that a court should be slow to intervene where the arbitrators are empowered and able to act.

55 www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

56 Ibid.

57 Ibid. These figures do not reflect figures from supporting members of the LMAA accepting arbitration appointments, so may slightly understate the full figures.

58 www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

59 researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2017-0003.

60 Arbitration and Mediation Services (Equality) Bill (HC Bill 18) Part 2.

61 Arbitration and Mediation Services (Equality) Bill (HC Bill 18), Part 2.

62 Arbitration and Mediation Services (Equality) Bill (HC Bill 18), Part 5.

63 See www.gatestoneinstitute.org/5512/sharia-courts-muslim-women.

Challenges for apparent bias

In the recent *W Ltd v. M SDN BHD* case,[64] Knowles J declined to set aside an award on the basis of apparent bias, despite the fact that the arbitrator's firm had represented an affiliate of one of the parties.

Actual or 'apparent' bias on the part of an arbitrator can give rise to a challenge of an arbitral award under Section 68 of the Act. Although not binding on the English courts, the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 are often treated as persuasive when analysing issues of bias. The Guidelines contain circumstances, divided into red, orange and green, with different consequences for each. The red list details specific circumstances that give rise to justifiable doubts regarding the arbitrator's independence. The list is subsequently subdivided into 'waivable' and 'non-waivable' situations (i.e., situations where the parties can agree to waive the issue, and situations where the arbitrator must always decline an appointment).

Prior to 2014, Paragraph 1.4 of the rules (non-waivable red list) applied only where the arbitrator (and not where his or her firm) had advised a party or an affiliate of one of the parties. In 2014, Paragraph 1.4 was amended to add the words 'or his or her firm'. Declining to apply Paragraph 1.4, Knowles J identified a weakness in the amendment to Paragraph 1.4 of the IBA Rules. He noted that the arbitrator was effectively a sole practitioner using the firm only for secretarial support; it was hard to see why the non-waivable Paragraph 1.4 had been so amended, since the relevant situation was less serious than many circumstances under the waivable red list; and inclusion on the non-waivable red list would mean that apparent bias would be assumed to exist without any examination of whether the arbitrator's impartiality or independence might in fact be affected.

Despite applauding the IBA's attempts to assist in assessing impartiality and independence, Knowles J made it clear that there was 'no doubt' that the circumstances of the present case would have fallen outside the rules pre-2014, and that on the instant case, a fair-minded and informed observer would not consider that there was a real possibility of bias as per the test in *Porter v. Magill*.[65]

When the Fiona Trust 'one-stop-shop' presumption does not apply

The *Fiona Trust* litigation reinforced, *inter alia*, the presumption that parties to an arbitration agreement are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal (*Fiona Trust* presumption). In the recent *Trust Risk Group SpA v. AmTrust Europe Ltd* case,[66] the question for determination that arose was whether a framework agreement (providing for Italian law and arbitration in Milan) superseded a provision for English law and determination in the English courts in a terms of business agreement (ToBA), or whether the two remained independent of one another.

While recognising the impact of the *Fiona Trust* one-stop-shop presumption, Beatson LJ held that the instant contracts (and their dispute resolution clauses) remained independent. Crucially, Beatson LJ distinguished *Fiona Trust* (which contained a single arbitration clause) from the current case (which contained two). He remarked that as a matter of contractual interpretation, there is no presumption that where two different dispute resolution clauses are

64 [2016] EWHC 422 (Comm).
65 [2002] 2 AC 537.
66 [2015] EWCA Civ 437.

contained in two separate contracts, the provisions in the more recent contract are necessarily intended to capture disputes in the earlier contract (particularly where, as here, the earlier contract had been fully operational for six months prior to the second and was intended to continue in existence subsequently). Whether the effect of different dispute resolution clauses in related contracts should lead to separate resolution procedures is a matter of contractual interpretation and will, first and foremost, be based on the parties' intentions.

While the case raises no novel principles, it clarifies a narrow and limited exception to the *Fiona Trust* one-stop-shop presumption.

When the English courts will issue anti-arbitration injunctions

In the recent *AmTrust Europe Ltd v. Trust Risk Group SpA* case[67] (related to the previous case), the commercial court rejected an application for an injunction restraining arbitral proceedings being commenced in Italy.

The claimant, an English insurance company, and an Italian insurance broker entered into a ToBA that provided that 'This agreement shall be construed according to English law and any disputes arising under it shall [...] be determined in the English Courts'. Subsequently, the parties entered into another framework agreement governing their relationship, which stipulated Italian law and provided for 'any dispute arising out of or in connection with this Agreement' to be determined by arbitration in Milan.

The relationship faltered, and the respondent commenced proceedings in Milan. The claimant responded by issuing proceedings in the English commercial court, and applied for an order requiring payment of the withheld funds into a designated account. The order was granted on the basis that the claimant had a 'good arguable case' that the ToBA continued after the framework agreement. That order was contested, but the appeal was rejected in the Court of Appeal.

The claimant then proceeded with an application for an anti-arbitration injunction under Section 37 of the Senior Courts Act 1981, restraining the Italian arbitration proceedings on the basis that the claims advanced in the Italian proceedings were subject to the exclusive jurisdiction of the English courts, and that arguments advanced in the Italian arbitration (that the framework agreement superseded the ToBA) had already been rejected in the English proceedings.

While there was no doubt that the English court had the power to issue an anti-arbitration injunction, Andrew Smith J refused to grant the order. Instead, he held that the first instance and Court of Appeal judges had not decided that the framework agreement did not supersede the ToBA. Rather, he had held that the claimant had established a 'good arguable case' for interlocutory purposes. Moreover, he held that the previous judges had done nothing more than recognise that the claimant had established a good arguable case that the English court had jurisdiction. They had not made any final decision on whether there was a relevant arbitration agreement, or whether the arbitration clause in the framework agreement covered the disputes referred to the Italian tribunal.

He further held that even if the English court felt that the claim in Italy was unarguable, the English court had no jurisdiction to dismiss unarguable claims brought in an English

67 [2015] EWHC 1927 (Comm).

arbitration, and certainly not in a foreign arbitration. The parties must have accepted that the tribunal should determine its own jurisdiction, and that courts of the seat should have supervisory jurisdiction.

While the case turns on established principles, it demonstrates that the courts will be cautious before ordering an anti-arbitration injunction, particularly where the arbitration is foreign and is subject to the supervisory function of the courts of the seat. It reinforces England and Wales' strong pro-arbitration stance, their considered deference to arbitral tribunals and their mindfulness of *Kompetenz-Kompetenz* comity.

Tribunals' jurisdiction to join third-party tortfeasors

Issues of jurisdiction over non-signatories to arbitration frequently arise in international arbitration. In December 2015, in *Egiazaryan and other v. OJSC OEK Finance*,[68] the commercial court heard a challenge to an LCIA award brought under Section 67 of the Act regarding jurisdiction and third-party tortfeasors. The applicant sought to argue that the tribunal had no jurisdiction over the claim because one of the claimants and one of the respondents were not party to the arbitration agreement, and thus could not be joined to the arbitration.

The claims were brought exclusively in tort by reference to Russian law, although the arbitration agreements (of which there were two – one in a shareholders' agreement, another in a share purchase agreement) were governed by English law.

The tribunal ruled that the second claimant was, if anything, a principal of the first claimant (which was a non-signatory third party), and that the second respondent was also a third party. It further held that the claims did not fall within the scope of the arbitration agreement because none of the principal claims were contract-related; rather, they were based on a conspiracy where the two main conspirators were third parties.

Remitting the award back to the tribunal, Burton J upheld the second claimant's challenge of the award. He addressed three points in doing so: (1) whether the second claimant's tort claim fell within the arbitration clauses; (2) whether Russian law applied to the ability of the second claimant to sue the second respondent (the latter of which was a third party); and whether, if the answers to (1) and (2) were in the affirmative, he should remit the case to the tribunal under Section 67(3) of the Act.

Addressing point (2) first, Burton held that the relevant question was not whether the second respondent was a party to the arbitration agreement, but whether – as with a case involving agency, assignment or succession – there was jurisdiction over a non-signatory to the arbitration agreement. Burton J ruled that while English law was the starting point, English conflict of laws rules could address another system of law. In this case, he held that the relevant law was the place of incorporation of the signatory to the arbitration agreement, which in this case was Russia. Applying Russian law, the second respondent could be joined to the arbitration.

As regards issue (1), Burton J was confused as to the tribunal's finding that the claims did not fall within the scope of the arbitration agreement on the basis that they were non-contractual; Section 6 of the Act provides that an arbitration agreement means 'an agreement to submit to arbitration present or future disputes (whether they are contractual

68 [2015] EWHC 3532 (Comm).

or not)'. Applying the liberal approach taken in *Fiona Trust* (and the presumption in favour of a one-stop shop for disputes), he held that the claim advanced was directly connected to the relationship under the contracts.

The case is interesting in that it distinguished the question of whether a party is a signatory to an agreement from whether a tribunal or court (or both) had jurisdiction over that party irrespective of that question. The case confirms it can be necessary to look to the law of the place of incorporation of the signatory of the agreement to determine whether related third parties should be joined to an arbitration.

Delay in set aside proceedings and the English courts' response

The question of whether English courts should exercise their discretion not to enforce an award where there are set aside proceedings pending in a foreign jurisdiction raises a host of practical issues for international arbitration, particularly regarding the need for the speedy and efficient resolution of disputes.

In the recent *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation* case[69] and supplementary judgment *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation*,[70] the court determined that because lengthy set aside proceedings were likely to take decades, it was justified in proceeding to enforce an arbitration award.

The award was challenged in the Nigerian courts on the basis of fraud, among other things. While the English court recognised that issues of the validity of the award are, *prima facie*, to be determined by the courts of the seat (in this case, Nigeria), it also noted that it is necessary to take into account the principles underlying Article V(1)(e) of the New York Convention, embodied in Sections 103(2)(f) and 103(5) of the Act, all three of which provide that it is at the court's discretion to enforce an award where there are ongoing set aside proceedings. Article V(1)(e) states that '[r]ecognition and enforcement of the award may be refused'. Similarly, Section 103(2) and 103(5) state respectively that '[r]ecognition or enforcement of the award may be refused [...]' and that '[...] the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award'.

The case provides a useful example of a circumstance where a lengthy delay involved in set aside proceedings may prompt English courts to exercise their discretion to enforce an award notwithstanding those proceedings.

Parties to a partial award made before a reconstituted tribunal still bound

In the recent *Emirates Trading Agency LLC v. Sociedade de Fomento Industrial Private Ltd* case,[71] the commercial division of the High Court decided that a reconstituted ICC tribunal and the parties to the arbitration were bound by a partial award made by the dissolved previous tribunal. The award rejected a jurisdictional challenge made on the basis that the respondent had failed to attempt to resolve the dispute by friendly discussion 'for a continuous period of three (3) months'.

69 [2015] EWCA Civ 1144.

70 [2015] EWCA Civ 1145.

71 [2015] EWHC 1452 (Comm).

The Court found that as the partial award had not been challenged, it gave rise to an issue estoppel under English law. This bound the claimant, who was now precluded from indirectly challenging it by means of a challenge to the reconstituted tribunal's final award.

Third-party funding in arbitration

Recently, the English courts have given further support to third party funding. In *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*,[72] *the* English Commercial Court *held* that third-party costs can be recovered under certain circumstances pursuant to the applicable institutional rules.

The arbitration was seated in London with the ICC Rules as the applicable arbitration rules. The arbitrator made a partial award, ordering Essar (the appellant) to pay costs on an indemnity basis to the claimant, including costs of a third-party funder.

The Court refused to set aside the award on grounds that the additional costs as a result of the third-party funding fell within the ambit of 'other costs' under Section 59(1)(c) of the Act. Thus, the Court held that it was within the power of a tribunal constituted under the ICC Rules to award recovery of the additional costs payable to a third-party funder.

Although a tribunal has a broad discretion with respect to the award of costs, and each case turns on its own facts, this case sets a welcome precedent for the growing number of third-party funders operating in the London market and parties using third-party funding. Third-party funders have variously described this decision as 'a landmark' and 'groundbreaking'.

Emergency provisions – conflict between institutional rules and the English courts

The recent decision of the English courts in *Gerald Metals SA v. Timis & Ors*[73] suggests that the availability of emergency relief under the LCIA Arbitration Rules may limit a party's ability to obtain urgent interim relief from the English courts under Section 44 of the Act.

The claimant, Gerald Metals, a Swiss company engaged in commodities trading, entered into an agreement with one of the respondents, which was secured by a guarantee given by the trustees (the second respondent). The guarantee was governed by English law and provided for arbitration under the Rules of the London Court of Arbitration.

The claimant had made an application under Article 9B of the LCIA Rules for the appointment of an emergency arbitrator, seeking an order preventing the trustee from disposing of the assets. The application was rejected. The claimant then made an application to the English court for a worldwide freezing order against the assets of the trustee and guarantor (respondent), and a freezing injunction under Section 44 of the Act. The English court also rejected the application under Section 44 of the Act.

The English courts under Section 44 are empowered to grant interim injunctions, and in cases of urgency to make necessary orders in relation to the preservation of assets. The new 2014 LCIA Rules also allow for an expedited formation of an arbitral tribunal in cases of 'exceptional emergency' under Article 9A of the Rules. Seeking the appointment of a sole arbitrator as 'emergency arbitrator' for emergency proceedings prior to the expedited formation of the arbitral tribunal is also allowed under Article 9B of the Rules.

72 [2016] EWHC 2361 (Comm).

73 [2016] EWHC 2327 (Ch).

The English court considered that the test of 'urgency' both under the LCIA Rules and Section 44 of the Act was materially the same. Thus, under the Act, when there is an overlap of power between the courts and the tribunal, the court is precluded from exercising its power under Section 44(5) of the Act unless the arbitral tribunal is unable to act in a timely manner. Since that was not the situation in this case, the English courts were unwilling to exercise their power under Section 44 of the Act. The court also opined that even if it did have the power under Section 44 of the Act, the claimant's request did not meet the threshold of urgency, and hence Section 44 would not be applicable.

Interrelationship between insolvency proceedings and arbitration

Insolvency (which is heavily dependent on local mandatory rules) and arbitration (which is a creature of contract) do not sit easily together. The recent *Seawolf Tankers Inc v. Pan Ocean Co Ltd* case[74] provides helpful clarification on the interrelationship between foreign insolvency proceedings and English arbitration.

The claimant and respondent (a South Korean shipping company) had entered into a pool agreement and a time charterparty for a vessel. Both agreements were governed by English law and provided that disputes would be referred to arbitration in London. However, the respondent went insolvent, and rehabilitation proceedings were commenced in Korea. The administrator and the Korean courts rejected the applicant's claim, and the English courts made an order recognising the foreign insolvency proceedings under the Cross-Border Insolvency Regulations 2006 (Regulations) Schedule 1, Article 15, which had the effect of staying the commencement of any actions against the insolvent respondent.

The applicants sought to have that recognition order varied under Schedule 1 Article 20(6) of the Regulations on the basis that, while any arbitration should be allowed to proceed, they would not seek to enforce any award or subsequent judgment against the respondent's assets without the agreement of the administrator or a further order of the court. The court agreed. In varying the order, Registrar Jones weighed a number of factors, including:

a the lack of evidence to suggest that an arbitration would adversely affect the results of the rehabilitation proceedings;

b the difficulty of the issues in dispute under English law;

c the possibility that arbitration was not the most efficient and cost-effective way of proceedings; and

d the lack of provision for an alternative (in the event of insolvency) to arbitration in London.

When considering these factors, Registrar Jones determined that the case leant heavily in favour of varying the stay and allowing the dispute to be resolved by arbitration in London.

The separability presumption under English law

In the recent *National Iranian Oil Company v. Crescent Petroleum* case,[75] the National Iranian Oil Company (NIOC) appealed a decision under Sections 67 and 68 of the Act.

In that case, the claimant (NIOC) and Crescent Petroleum entered into a long-term gas supply and purchase contract (GSPC) on 25 April 2001. In 2009, Crescent Petroleum

74 [2015] EWHC 1500 (Ch).

75 [2016] EWHC 510 (Comm).

commenced arbitration against NIOC claiming that, in breach of the GSPC, NIOC had failed to deliver any gas. The parties agreed (subsequent to the arbitration agreement) to hold the arbitration in London. The tribunal issued an award holding that NIOC had been in breach of its obligations since 1 December 2005.

On appeal to the English High Court, NIOC challenged the jurisdiction of the arbitrators in respect of the claim by reference to alleged corruption. In essence, it argued that the GSPC (which was governed by Iranian law) had been procured by corruption and was therefore void. Further, it argued that in the absence of an express choice, the arbitration agreement was also governed by Iranian law, and that because the separability presumption is not recognised under Iranian law, therefore the arbitration agreement was necessarily also void.[76] As a result, NIOC argued that the arbitrators had no jurisdiction.

Beatson J upheld the award. He held that Sections 2(1) and 7 of the Act confirm that where an arbitration is seated in England, an arbitration agreement is separable unless there is a choice to disapply the specific provision (or provisions) of the Act (as per the ratio in *C v. D*).[77] A determination that the arbitration agreement was governed by Iranian law could not of itself be regarded as a choice, disapplying the operation of the specific provisions of Sections 2(1) and 7. As such, the arbitration agreement was separable and the award was valid.

Burton J's judgment supports the almost universally accepted presumption that arbitration agreements are separable from the underlying contracts. This avoids situations from arising where a party can seek to invalidate an arbitration by impeaching the main contract only, as NIOC sought to argue in the instant case. Indeed, this matter was explicitly addressed in te *Fiona Trust*:

> *It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular[…]. It is only if the arbitration agreement is itself directly impeached for some reason that the tribunal will be prevented from deciding the disputes that relate to the main contract.*[78]

To this end, Burton J's judgment in *NIOC v. Crescent Petroleum* is concordant with both English law's pro-arbitration stance and the general global consensus on the separability of arbitration agreements.

iii Investor–state disputes

The Convention on the Settlement of Disputes between States and Nationals of Other States 1965 came into force in the United Kingdom on 18 January 1967.[79] The United Kingdom also ratified the Energy Charter Treaty 1994 on 16 December 1997.[80] In addition, the United Kingdom is currently party to 108 bilateral investment treaties (BITs).[81]

76 Whether Iranian law contains mandatory rules that do not recognise separability was also an issue in dispute.

77 [2008] 1 Lloyds Law Rep 239.

78 [2007] EWCA Civ 20 at Paragraph 25.

79 See icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf, at p.6.

80 www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf.

81 See investmentpolicyhub.unctad.org/IIA/CountryBits/221 for information about the United Kingdom in the UNCTAD database.

Under the Treaty of Lisbon, which took effect on 1 December 2009, the EU's competence was extended to cover foreign direct investment, which includes BITs concluded between EU Member States and third countries (extra-EU BITs). The EU subsequently enacted Regulation No. 1219/2012, which came into force on 9 January 2013, to clarify the status of the more-than 1,200 extra-EU BITs entered into before Lisbon came into force, as well as the ability of Member States to negotiate new extra-EU BITs.

Regulation 1219/2012 confirmed that extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries.[82] The Regulation required Member States to notify the Commission of any extra-EU BITs they wished to remain in force by 8 February 2013, and requires new Member States to provide notification within 30 days of their accession.[83] On 8 May 2013, the Commission published a list of the 1,311 extra-EU BITs of which it had been notified by that time, of which 94 were between the United Kingdom and non-EU countries.

The Commission intends to update the list every 12 months.[84] In the event, however, that the Commission considers an existing extra-EU BIT to represent a serious obstacle to the EU's negotiation of a replacement BIT, the Commission will consult with the relevant Member State to resolve the matter, which may result in the revision or termination of the relevant extra-EU BIT.[85] The Regulation is silent about the 'sunset provisions' in many extra-EU BITs, which guarantee protection for existing investments for 10 to 15 years after termination, and these provisions would appear to be unaffected by the Regulation.

The Commission will authorise the entry into force of those extra-EU BITs signed between 1 December 2009 and 9 January 2013 unless it determines that a BIT conflicts with EU law or provisions, or would constitute a serious obstacle to the EU's negotiation of a replacement BIT.[86] Member States may negotiate to enter into new extra-EU BITs, or to amend existing extra-EU BITs.[87] However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance,[88] and the Commission may require them to include or remove provisions to ensure their compatibility with EU law or investment policy.[89]

III OUTLOOK AND CONCLUSIONS

Notwithstanding the Brexit decision, England and Wales remains one of the most frequently selected seats for international arbitration. The practical attractions of England and Wales as a seat are built not just on the firm foundation of the Act but also on judicial willingness to apply the guiding principles that underpin the Act. Recent case law generally reinforces the fact that the English courts are strongly supportive of international arbitration. This is consistent with the principles of party autonomy and judicial non-intervention enshrined in the Act.

82 Article 3 of the Regulation.
83 Articles 2, 3 and 5 of the Regulation.
84 Article 8 of the Regulation.
85 Articles 5 and 6(2)–(3) of the Regulation.
86 Article 12(1) of the Regulation.
87 Article 7 of the Regulation.
88 Article 8 of the Regulation.
89 Article 9(1) and (2) of the Regulation.

With the coming into force of the 2014 LCIA Rules, and its guidance on emergency procedures subsequently issued in 2015, the LCIA has one of the most innovative and up-to-date sets of institutional rules. The 2014 LCIA Rules contain a range of innovative mechanisms such as emergency arbitration and consolidation that can be used to support the arbitral process.

International arbitration in England and Wales will no doubt continue to evolve as England and Wales seeks to preserve its competitive edge as an arbitral seat. Although it has little impact on the formal framework applicable to international arbitration, in terms of perceptions, the Brexit decision will create both challenges and opportunities for England and Wales as an arbitral seat in future years.

Appendix 1

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Mr Speller is an English barrister. He has represented clients in numerous institutional and *ad hoc* arbitrations sited in both common and civil law jurisdictions, including Austria, England, France, Germany, Hong Kong, New York, Singapore, Sweden and Switzerland. Mr Speller also has substantial experience of international commercial litigation in both the English Court of Appeal and in the commercial and chancery divisions of the High Court. He has particular experience of litigation concerning aviation, oil and gas, insurance and reinsurance, telecommunications, banking and competition law issues.

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