# The International Arbitration Review

Seventh Edition

Editor
James H Carter

Law Business Research

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# EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2016

# Chapter 14

# ENGLAND & WALES

*Duncan Speller and Francis Hornyold-Strickland*[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;

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1 Duncan Speller is a partner and Francis Hornyold-Strickland is an associate at Wilmer Cutler Pickering Hale and Dorr LLP.

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.

*b* Part II contains provisions dealing with 'domestic arbitration agreements', '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, the commencement of the Act and the extent of its application.

### 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), which 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 the [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 disputes as to how the Act should be interpreted and applied.[9]

---

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

### iii The scheme of the Act

The general principles are also reflected throughout the provisions of 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 'avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[11]

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, the parties can opt out of non-mandatory provisions by agreement.

The courts in turn have emphasised in a number of judgments the importance to the arbitral process of party autonomy. 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 has only a limited power to intervene in certain circumstances that will support the 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

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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.

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.

to arbitral proceedings as it has in respect of legal proceedings, including in respect of the taking of evidence of witnesses, the preservation of evidence, and the 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, including on the ground that the tribunal lacked substantive jurisdiction (under Section 67 of the Act) or on ground of serious procedural irregularity (under Section 68), or by providing an appeal 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 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 procedural irregularity under Section 68 do not require leave, unlike appeals on points of law under Section 69, there is no evidence that this looser requirement has encouraged frivolous litigation.[26]

### iv Court relief in support of arbitration

A consistent theme in recent case law, in 2015 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

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').

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 Societe 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.

proceedings in contemplation or 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 in Europe

***Hague Convention on Choice of Court Agreements***

On 10 December 2015 the EU ratified the Hague Convention on Choice of Court Agreements (Hague Convention),through Council Decision 2014/887/EU.[29] Both the EU (with the exception of Denmark) and Mexico have adopted the Hague Convention, by ratification and accession respectively.[30] The US, Singapore and Ukraine have signed but not ratified it as yet. The Hague Convention entered into force on 1 October 2015 with its ratification by the European Union.

The Hague Convention is designed to create a global conflict of laws framework for jurisdiction and the enforcement of judgments in civil and commercial disputes. Its aim is to support recognition of exclusive choice of court agreements by states. As such, generally, the Convention only applies to exclusive (rather than non-exclusive) choice of court agreements.

An 'exclusive' choice of court agreement is defined in Article 3(a) as an agreement that: '[…] designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.' (By contrast, if the choice of court agreement is not exclusive, the Hague Convention will not apply.) For instance, the 'Courts of Germany' or 'the High Court of England and Wales' would both be interpreted as exclusive choice of court provisions. For contracting states (such as the EU and the US) that contain a number of territorial units with different systems of law, Article 25 generally treats each territorial unit as a separate state for the purposes of the Convention.

Article 2(4) of the Hague Convention does not apply to matters relating to arbitration. However, it is not yet clear how hybrid arbitration and litigation clauses will be interpreted. For instance, if the parties have agreed to arbitrate but one party has an option to elect to litigate (and the clause would otherwise fall within the Convention), does the Convention still apply? The correct answer would appear to be 'yes'. First, it is difficult to see how an

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.

29 eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0887&from=EN.

30 www.hcch.net/en/instruments/conventions/status-table/?cid=98.

arbitral tribunal could be considered 'any other court' as per Article 3(a). Secondly, the *travaux preparatoires* indicated that Article 3(a) was not amended to apply to arbitration in such circumstances.[31]

There is not yet an established body of precedent on the application of the Hague Convention, and its scope of application is significantly more limited than the New York Convention. Although its entry into force may enhance the attractiveness of exclusive jurisdiction clauses in some contexts, there is little basis to think that it will challenge the popularity of international arbitration as a means of dispute resolution in England and Wales or elsewhere.

### ii Developments affecting international arbitration in England and Wales

#### *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.[32] 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.[33]

In 2015, the LCIA saw a 10 per cent increase on referrals in contrast to 2014, with 326 arbitrations in total (up from 290 the previous year).[34] Of those 326, 256 were conducted under the LCIA rules, and most others were conducted under the UNCITRAL rules (with the LCIA acting as appointing authority).[35] The types of cases referred continue to be diverse, with healthcare, pharmaceuticals, mining sale and purchase agreements, construction and engineering, financial agreements, and media and sports disputes all featuring.[36]

The LCIA continues to be particularly attractive to European and Russian parties, with the majority in 2015 being from the UK (15.6 per cent), the Russian Federation (10.3 per cent) and other western European countries (7.1 per cent).[37] It is also popular with parties from Cyprus (7.4 per cent) and the BVI (6.4 per cent), as well as a host of other parties from states across the globe.[38]

In 2015, the LCIA appointed 449 arbitrators to 227 different arbitrations in 2015 (up from 362 the previous year).[39] Of those, 118 were appointments of sole arbitrators conducting LCIA arbitrations, with 323 being part of three-member LCIA tribunals. Eight were appointments under UNCITRAL or other *ad hoc* arbitrations.[40] The ratio of

31 See Paragraph 53 of Preliminary Document No. 32 of June 2005, a document referenced in the Report at footnote 144.

32 www.allenovery.com/news/en-gb/articles/Pages/Judith-Gill-QC-announced-as-next-president-of-the-.aspx.

33 www.lcia.org/News/changes-to-the-lcia-court-and-board-of-directors.aspx.

34 LCIA Registrar's Report 2015, p. 1.

35 Ibid., p. 1.

36 Ibid., p. 1.

37 Ibid., p. 2.

38 Ibid., p. 2.

39 Ibid., p. 3.

40 Ibid., p. 3.

sole-arbitrator to three-member tribunals continues to be finely balanced, with the ratio for 2015 at 52:48 in favour of sole arbitrators (this contrasts to 46:54 the previous year in favour of three-member tribunals).[41]

In terms of gender diversity, the percentage of female arbitrators being appointed by the LCIA Court rose in 2015 compared to 2014, with 28.2 per cent of all appointments being women (compared with 19.8 per cent the previous year).[42] The percentage of women arbitrators appointed by the parties also increased from 4.4 per cent to 6.9 per cent, although the percentage of female arbitrators appointed by nominees dipped, from 14.5 per cent in 2014 to 4 per cent in 2015.[43]

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, appointment of an emergency arbitrator, and of replacement arbitrators.[44] For instance the guidance notes explain that a party can request the expedited formation of the tribunal at the same time as Filing a Request for Arbitration by writing to the Register (preferably via electronic means) and by notifying all the other parties.[45] They also explain the procedures for applying for an emergency arbitrator and what must be included in the application; this includes: (a) the specific grounds for requiring an emergency arbitrator; (b) the specific claim, with reasons for emergency relief; (c) all relevant documentation.[46] In addition, the notes clarify what will happen after an application is submitted. For instance, this can include giving the responding party the opportunity to comment before a determination is made.[47]

***ICC arbitration***

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

London was the second most popular seat for ICC arbitrations in 2014, with 86 cases, after Paris with 93.[48] Swiss cities featured as the third and fourth most popular seats, with 45 and 31 arbitrations being seated in Geneva and Zurich respectively (totalling 76 across both).[49] Of those disputes referred to the ICC, English was also the most popular governing law with 14.1 per cent, followed by US laws (10.2 per cent), then Swiss, German and French law at 7.3 per cent, 6.3 per cent and 6.2 per cent respectively.[50]

41 Ibid., p. 3.
42 Ibid., p. 4.
43 Ibid., p. 4.
44 www.lcia.org/adr-services/guidance-notes.aspx.
45 Ibid., at 3.2.
46 Ibid., at 4.2.
47 Ibid., at 4.3.
48 ICC Dispute Resolution Statistics 2014, pp. 11 and 12.
49 Ibid., pp. 11 and 12.
50 Ibid., pp. 13 and 14.

The UK also continues to provide the largest number of arbitrators for ICC appointments, with 216 (16.28 per cent), followed by 131 from the US (9.87 per cent) and 119 from Switzerland (8.97 per cent).[51]

***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 the LMAA.

In 2015, 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.[52] It made 3,160 appointments (down from 3,582 in 2014).[53] In 2015, 553 awards were rendered, a similar amount to but slightly down on the figures for 2014, at 584.[54] The LMAA also conducted 179 mediations, of which 42 were successful.

***Arbitration and Mediation Services (Equality Bill)***

On 1 June 2015, 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.[55]

The Act proposes amendments to various statutes, including the Arbitration 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*),[56] or that the division of an estate on intestacy must be unequal.[57] 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.[58] This is aimed at stopping 'jurisdiction creep' among shariah courts.[59]

On 11 December, the Bill reached the committee stage in the House of Lords, where no amendments were suggested. It will now go to a third reading (yet to be scheduled).

**ii Arbitration developments in the English courts**

In 2014 and 2015, the English courts once again witnessed a significant inflow of arbitration-related cases, raising a plethora of issues.

51 Ibid., p. 9.

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

53 Ibid.

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

55 www.theguardian.com/law/2011/jun/08/sharia-bill-lords-muslim-women.

56 Arbitration and Mediation Services (Equality) Bill (HC Bill 136) Part 2.

57 Arbitration and Mediation Services (Equality) Bill (HC Bill 136), Part 2.

58 Arbitration and Mediation Services (Equality) Bill (HC Bill 136), Part 5.

59 See footnote 55.

***Challenges for apparent bias***

In the recent *W Ltd v. M SDN BHD* case,[60] 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, the paragraph 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, per the test in *Porter v. Magill*.[61]

***When does the Fiona Trust 'one stop shop' presumption 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 (the *Fiona Trust* presumption). In the recent *Trust Risk Group SpA v. AmTrust Europe Ltd* case,[62] 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

60 [2016] EWHC 422 (Comm).

61 [2002] 2 AC 537.

62 [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 will the English courts issue anti-arbitration injunctions?***

In the recent *AmTrust Europe Ltd v. Trust Risk Group SpA* case[63] (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: '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, it 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

63 [2015] EWHC 1927 (Comm).

an English arbitration and certainly not 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*,[64] 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 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 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 whether the second claimant could 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

64 [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 in 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 pending set aside proceedings in a foreign jurisdiction raises a host of practical issues for international arbitrations, particularly regarding the need for the speedy and efficient resolution of disputes.

In the recent *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation* case[65] and supplementary judgment *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation*,[66] the court determined that because lengthy set aside proceedings were like to take decades, it was justified in proceeding to enforce an arbitration award.

The award was challenged in the Nigerian courts on 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: 'Recognition and enforcement of the award may be refused'. Similarly, Section 103(2) and 103(5) state respectively that 'Recognition 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,[67] 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'.

65 [2015] EWCA Civ 1144.

66 [2015] EWCA Civ 1145.

67 [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.

***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[68] 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 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,[69] 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 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.

68 [2015] EWHC 1500 (Ch).

69 [2016] EWHC 510 (Comm).

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.[70] 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(s) of the Act (per the ratio of the case *C v. D*).[71] 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 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 contract. 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 the *Fiona Trust* litigation:

> *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.*[72]

To this end, Burton J's judgment in *NIOC v. Crescent Petroleum* is concordant with both English law's pro-arbitration stance, as well as 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 (ICSID Convention) came into force in the United Kingdom on 18 January 1967.[73] The United Kingdom also ratified the Energy Charter Treaty 1994 on 16 December 1997.[74] In addition, the United Kingdom is currently party to 108 bilateral investment treaties (BITs).[75]

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

71 [2008] 1 Lloyds Law Rep 239.

72 [2007] EWCA Civ 20 at Paragraph 25.

73 See icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20 8-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20 the%20Purpose%20of%20the%20Convention.pdf, at p.6.

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

75 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.[76] 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.[77] 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.[78] 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.[79] 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.[80] Member States may negotiate to enter into new, or to amend existing, extra-EU BITs.[81] However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance,[82] and the Commission may require them to include or remove provisions to their ensure compatibility with EU law or investment policy.[83]

## III OUTLOOK AND CONCLUSIONS

England and Wales continues to consolidate its position as 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

76 Article 3 of the Regulation.
77 Articles 2, 3 and 5 of the Regulation.
78 Article 8 of the Regulation.
79 Articles 5 and 6(2)–(3) of the Regulation.
80 Article 12(1) of the Regulation.
81 Article 7 of the Regulation.
82 Article 8 of the Regulation.
83 Article 9(1) and (2) of the Regulation.

the guiding principles that underpin the Act. Recent case law generally reinforces 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 Arbitration Act.

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 mechanisms that can be used to support the arbitral process, such as the newly enacted emergency arbitrator provisions.

# Appendix 1

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