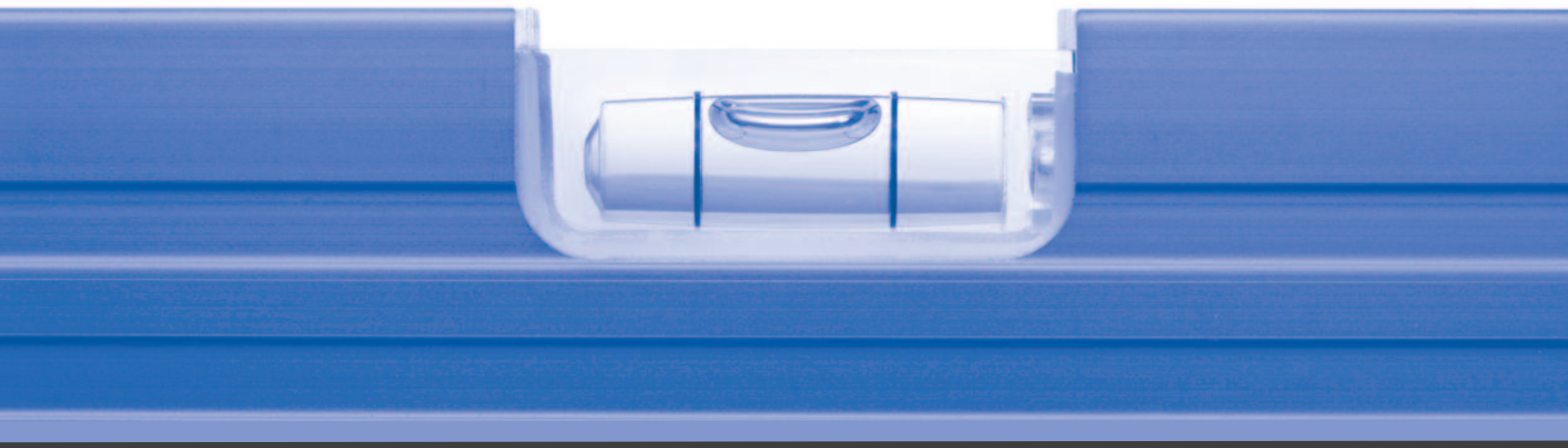

ICLG

The International Comparative Legal Guide to:

International Arbitration 2014

11th Edition

A practical cross-border insight into international arbitration work

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Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe and CIS:

Western Europe:

Continued Overleaf →

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of England and Wales?

Arbitration proceedings in England and Wales (and Northern Ireland) are governed by the Arbitration Act 1996 (the "1996 Act").

The 1996 Act applies only to arbitration agreements that are in writing (section 5(1)). Although oral arbitration agreements are recognised at common law, the 1996 Act does not apply to wholly oral arbitration agreements (section 81(1)(b)). Such agreements will not benefit from the default procedures or various other statutory powers conferred on the tribunal under the 1996 Act. Oral arbitration agreements also fall outside the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

An agreement is deemed to be in writing if it is: (i) made in writing (whether or not signed by the parties) (section 5(2)(a)); (ii) made by exchange of communications in writing (section 5(2)(b)); or (iii) evidenced in writing (section 5(2)(c)). An agreement is evidenced in writing pursuant to section 5(2)(c) if recorded by one of the parties or by a third party with the authority of the parties to the agreement (section 5(4)). An exchange of written submissions in arbitration proceedings in which the existence of an agreement (other than in writing) is alleged by one party, and not denied by the other party, will constitute an agreement in writing as between those parties (section 5(5)). Under the 1996 Act, parties also may orally agree to arbitrate by referring to terms that are in writing (section 5(3)). Writing includes "being recorded by any means" (section 5(6)).

As to the content of an arbitration agreement, the 1996 Act simply requires that the parties agree "to submit to arbitration present or future disputes (whether they are contractual or not)" (section 6(1)). Parties may agree the specific terms of a written arbitration agreement or, alternatively, refer to a document containing an arbitration clause. Such reference will constitute an arbitration agreement if the effect of it is to make that clause part of the agreement (section 6(2)).

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

English courts generally take a broad view as to what constitutes an "arbitration agreement" under the 1996 Act; it suffices for the parties to have recorded in writing nothing more than an intention to refer any disputes to arbitration (section 6). The various default provisions of the 1996 Act provide detailed procedures, designed to enable parties to use and enforce arbitration agreements in circumstances where the clauses themselves provide little or no practical assistance.

However, the English High Court recently held that a clause providing for an arbitration procedure (to determine the loss arising out of an insurance policy) was non-compliant with the 1996 Act and therefore not a genuine arbitration clause (*Turville Heath Inc v Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC)).

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

The 1996 Act promotes party autonomy and the courts are expected to take a non-interventionist approach where parties have agreed to submit their disputes to arbitration. The English courts also take a fairly broad view as to what matters will be deemed arbitrable under an arbitration agreement, with a view to promoting international trade and comity.

In 2008, the English House of Lords held that the time had come for a "fresh start" to the approach courts ought to take to the construction and enforcement of jurisdiction and arbitration clauses in international commercial contracts, and that such clauses ought to be more liberally construed (*Fiona Trust Corp v Privalov & Ors* [2007] 4 All ER 951, 958; see also *Deutsche Bank AG v Sebastian Holdings Inc* (No 2) [2011] 2 All ER (Comm) 245 (Court of Appeal)). In *Fiona Trust*, the House of Lords held that since the arbitration agreement is severable, it does not necessarily follow that it will be invalid if the underlying agreement has been held to be invalid (for example, because of misrepresentation). Instead, the arbitration agreement can only be invalidated by virtue of independent factors. However, in *Hyundai Merchant Marine Company Limited v Americas Bulk Transport* [2013] EWHC 470 (Comm), the English High Court held (on appeal to an award under section 67 of the 1996 Act) that a lack of consensus preventing the main agreement from coming into existence also prevented the arbitration agreement coming into existence. According to the Court, the two agreements were subject to the same conditions of agreement, which were not satisfied. In a more recent decision concerning validity of arbitration agreements, the High Court refused to declare the parties' agreement unenforceable even though the remaining contractual obligations were contrary to English public policy. A letter of guarantee issued by a Chinese company had been found to breach English public policy as it formed part of a scheme designed solely with the purpose of breaking Chinese law (*Beijing Jianlong Heavy Industry Group v Golden Ocean Group and Others* [2013] EWHC 1063 (Comm). In a case concerning the

scope (as opposed to the validity) of arbitration agreements, *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), the High Court reaffirmed the *Fiona Trust* principle that parties to arbitration agreements are generally understood to be rational businesspeople intending all disputes arising out of their relationship to be determined by the same tribunal, unless language to the contrary is present. In this case, Interprods attempted to argue that a dispute fell outside the wide scope of the arbitration clause at issue, because De La Rue terminated a contract following alleged criminal conduct. The High Court rejected the argument that such a matter was not intended to be covered by the wording of the arbitration agreement.

In relation to the enforceability of an agreement to negotiate, or an agreement to settle disputes amicably, the High Court has previously held that where an ADR process was not properly defined and the parties' commitment to the process was equivocally expressed, the relevant clause could not be held to be a valid pre-condition to the issue of proceedings. The obligation and the process in question need to be sufficiently clear and certain to be given legal effect (*Wah (Aka Alan Tang) & Another v Grant Thornton International Ltd & Others* [2012] EWHC 3198 (Ch)).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in England and Wales?

The 1996 Act (which came into force on 31 January 1997) governs the enforcement of arbitration proceedings in England and Wales. The 1996 Act implements the New York Convention (signed and ratified by the United Kingdom in 1975, subject to the reservation that it applies only to awards made in the territory of another contracting party), insofar as it requires that contracting States recognise agreements in writing under which the parties undertake to submit disputes to arbitration (Article II(1) and (2)). There have been no changes to this legislation in the last year.

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

The provisions of the 1996 Act in force do not distinguish between domestic and international arbitration proceedings. It is important to note, however, that sections 85 to 87 of Part II of the 1996 Act (which modify Part I in the case of "domestic arbitration agreements") are not in force.

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

The 1996 Act is, in large part, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 (the "Model Law"). However, in a number of important respects, the 1996 Act does not adopt the Model Law in its entirety. Perhaps most significantly, the Model Law is intended to apply only to international commercial arbitration (Article 1(1) of the Model Law). In contrast, the 1996 Act is not as limited, applying equally to all forms of arbitration. In addition, in contrast to the Model Law, under the 1996 Act:

- the document containing the parties' arbitration agreement need not be signed (and in contrast to the pre-2006 Model Law drafting, the "writing" requirement under the 1996 Act is defined broadly ("being recorded by any means") and covers the language now contained in Option 1 of the amended version of Article 7 of the Model Law adopted in 2006);
- an English court is only able to stay its own proceedings and cannot refer a matter to arbitration;
- the default provisions for the appointment of arbitrators provide for the appointment of a sole arbitrator as opposed to three arbitrators;
- a party retains the power to treat its party-nominated arbitrator as the sole arbitrator in the event that the other party fails to make an appointment (where the parties' agreement provides that each party is required to appoint an arbitrator);
- there is no time limit on a party to oppose the appointment of an arbitrator;
- parties must expressly opt out of most of the provisions of the 1996 Act which confer default powers on the arbitrators in relation to procedure; and
- there are no strict rules for the exchange of pleadings.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in England and Wales?

The 1996 Act makes mandatory for all arbitrations sited in England and Wales those provisions listed in Schedule 1 of the 1996 Act (section 4(1)). These provisions apply whatever the parties may have agreed. The provisions listed in Schedule 1 include (by way of example) provisions relating to: (a) the court's powers to stay legal proceedings (sections 9 to 11), extend agreed time limits (section 12), remove arbitrators (section 24), secure witnesses' attendance (section 43), and to enforce an award (section 66); (b) challenges to an award (sections 64 and 68); and (c) the basic duties of tribunals and parties (sections 33 and 40).

3 Jurisdiction

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

The 1996 Act does not define or describe those matters that are capable of settlement by arbitration (i.e., arbitrable). The 1996 Act simply preserves the common law position in respect of arbitrability (section 81(1)(a)). However, the 1996 Act expressly applies to non-contractual, as well as contractual disputes (section 6(1)).

Under English common law, a multitude of non-contractual claims (including claims in tort, disputes involving competition law matters, disputes concerning intellectual property rights and certain statutory claims) are capable of settlement by arbitration. In a recent decision on the question of arbitrability of statutory claims, the English Court of Appeal confirmed that (a) statutory claims relating to minority interests in a company (unfair prejudice) are arbitrable, but (b) that arbitrators have no power to order the winding up of a company, relief which is reserved exclusively to the court (*see Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, further opining that the decision of the High Court in *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] 1 WLR 2910 (holding that in relation to claims for unfair prejudice, the statutory scheme provides for "*unfettered access*" to the courts) was "*wrongly decided*"). The Court of Appeal stressed

that the arbitrator's jurisdiction extended to deciding whether the unfair prejudice claim is made out on the facts and to "*whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding-up proceedings would be justified that a shareholder would then be entitled to present a petition*" for the winding up of the company. This contrasts with the decision of the High Court in *Clyde & Co LLP v Bates Van Winkelhof* [2011] EWHC 668 (QB), which confirmed that claims under the Employment Rights Act 1996 are non-arbitrable, since the Act renders void any agreement which would prevent an employee from having its case heard before an employment tribunal (a provision that does not appear in the legislation governing unfair prejudice claims).

Arbitration is limited to civil proceedings. Criminal matters are not capable of settlement by arbitration. In addition, a 2009 decision of the English court has suggested that an arbitration agreement will be considered "*null, void and inoperative*" to the extent that it purports to require the submission to arbitration of issues relating to mandatory EU law (see *Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655). There are questions as to whether this decision contradicts the long-held view that such matters – for example, EU competition claims – are indeed arbitrable (see e.g., *ET Plus SA v Jean-Paul Welter* [2005] EWHC 2115 (Comm.) (Q.B.), and *Eco Swiss China Time Ltd v Benetton International NV* [1999] (Case C-126/97)).

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The 1996 Act (section 30(1)) confers upon the arbitral tribunal (subject to the parties agreeing otherwise) the competence to rule on its own substantive jurisdiction as to:

- whether or not there is a valid arbitration agreement;
- whether or not the tribunal has been properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

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

Pursuant to section 9 of the 1996 Act, a party to an arbitration agreement (against whom legal proceedings are brought in England and Wales, in apparent breach of an arbitration clause), may apply to the court for a stay of proceedings in the court. The court is required to grant the stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed (section 9(4)). This requirement applies even if the seat of the arbitration is outside of England and Wales (section 2(1)). However, the right to a stay of judicial proceedings may be lost if the applicant has taken steps in the court proceeding to answer the substantive claim (section 9(3); *Nokia Corp v HTC Corp* [2012] EWHC 3199 (Pat), holding case management conference and inviting the court to make related orders constituted steps to "*answer the substantive claim*").

The House of Lords' decision in *Fiona Trust & Holding Corp v Privalov & Ors* [2007] 4 All ER 951, [2008] 1 Lloyd's Rep 254, held that arbitration clauses are to be given a broad interpretation, in accordance with the principle that parties will be taken to have intended to have all their disputes determined by the same tribunal, unless clear words exist to indicate a contrary intention (note the recent application of this principle in *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm)). In considering whether court proceedings are in respect of a matter referred to arbitration, the court will look at the nature and substance of the claim or claims and not at how those claims have been formulated in the parties' pleadings (*Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm)). In cases where facts give rise to claims under more than one contract between the same or closely related parties, the choice of arbitration under one contract may mean that claims under related contracts would also be stayed (*Deutsche Bank AG v Tongkah Harbour Public Company Ltd* [2011] EWHC 2251 (Comm)). Accordingly, the ability of parties successfully to resist a section 9 stay application has been significantly reduced.

The difficulty in parties successfully resisting section 9 stay applications has been recently emphasised in the Court of Appeal judgment of *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky and Others* [2013] EWCA Civ 784. In this case, the Court of Appeal allowed a stay of proceedings under section 9 (4) of the Act, finding that the High Court had been wrong in holding a Swiss arbitration clause was unenforceable as a matter of Swiss law, In arriving at this conclusion, the Court of Appeal made clear that the wording of section 9 (4) places the burden of proof on the party seeking to show that the arbitration agreement was either "null and void" or "inoperative" (once the section 9 applicant had established the existence of an arbitration clause, and that the clause covered the matters in dispute).

Under section 72 of the 1996 Act, a party who takes no part in the arbitral proceedings may challenge: (i) the validity of an arbitration agreement; (ii) whether the arbitral tribunal has been properly constituted; or (iii) the matters that have been referred to arbitration, and may seek an injunction restraining arbitration proceedings. The Court of Appeal has recently tackled the relationship between sections 9 and 72 of the 1996 Act, stating firmly that where the court is faced with applications under both section 9 and 72, the section 9 application should be determined first (along with any related issues, such as the validity of the arbitration agreement). In addition, the Court held that if there is a valid arbitration agreement, proceedings cannot be launched under section 72 at all (*Fiona Trust & Holding Corp v Privalov & Ors* [2007] EWCA Civ 20, at para. 34). In terms of anti-suit injunctions, the English court may no longer issue an anti-suit injunction to restrain proceedings brought in the courts of the Member States of the EU or EFTA where those proceedings are in contravention of an arbitration clause (*Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] All ER (D) 82). This position will however, be subject to some change from 10 January 2015 when the recast version to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Recast Regulation") becomes effective (see question 15.1 below). Notwithstanding this, the High Court has confirmed that no principle of EU law prevents a tribunal from entertaining a claim for damages for breach of an arbitration agreement arising out of proceedings brought before the court of another EU Member State (*West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm)).

Further, the English courts remain fully willing and able to restrain such proceedings brought outside EU/EFTA countries (see e.g., *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm); *Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2012] EWCA Civ 644).

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

Under the 1996 Act, and unless otherwise agreed by the parties, the arbitral tribunal may determine its own substantive jurisdiction (section 30).

However, a party to arbitral proceedings may request that the court determine questions as to the substantive jurisdiction of the tribunal (section 32(1)). Such applications must be made either with the agreement in writing of all parties to the proceedings or, alternatively, with the permission of the arbitral tribunal in circumstances where the court is satisfied that:

- the determination of the question is likely to produce substantial savings in costs;
- the application was made without delay; and
- there is good reason why the matter should be decided by the court (section 32(2)).

The arbitral proceedings may continue, and an award may be granted, at the same time that an application to the court for the determination of a preliminary point of jurisdiction is pending (section 32(4)). The right to object to the substantive jurisdiction of the court may be lost if the party takes part or continues to take part in the arbitral proceedings without objection (section 73).

In addition, the court has the ability to address the question of jurisdiction and competence pursuant to section 67, which a party may use to challenge an award on the basis of the tribunal's substantive jurisdiction, and section 72, which enables a person alleged to be a party to the proceedings, but who takes no part in these to question, *inter alia*:

- whether there is a valid arbitration agreement;
- whether the tribunal is properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

Similarly, the court may address these (and other) questions in recognition and enforcement proceedings, as it was invited to do in *Dallah v Pakistan* ([2010] UKSC 46). Asked to determine whether the arbitral tribunal had been correct in its determination that the Government of Pakistan was a proper party to the arbitration agreement as a matter of French law, the UK Supreme Court held that "*[t]he tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority* ...". Under section 103(2)(b) of the 1996 Act (which enacts Article V(1)(a) of the New York Convention), therefore, the English courts will undertake a complete rehearing rather than merely a review of the question of jurisdiction. This is also the approach in a section 67 challenge, as confirmed by the High Court decision *A v B* [2010] EWHC 3302 (Comm) (dismissing an application for security under section 70(7) of the 1996 Act).

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

English law does not afford a tribunal power to assume jurisdiction over individuals/entities not actually a party to the arbitration agreement. Arbitration is considered to be, first and foremost, a consensual process. While a tribunal may invite a non-party to submit testimony or produce documents willingly, it cannot itself compel that individual or entity to do so (although the court has powers to so order in certain circumstances in support of the arbitral process).

In various jurisdictions, a number of legal theories (e.g., agency, *alter ego* principles, third party rights and the group of companies doctrine) have been advanced to seek to bind non-signatories to arbitration agreements. English law, however, is circumspect in embracing these legal theories (*Adams and Others v Cape Industries Plc and Another* [1990] Ch 433; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5) and there has been a general refusal to accept the group of companies doctrine in the absence of consent on the part of the third party or possibly an estoppel (*Bay Hotel v Cavalier* [2001] UKPC 34). In *Peterson Farms Inc. v C & M Farming Ltd* [2004] All ER (D) 50, the High Court set aside an award in which the group of companies doctrine had been recognised, stating, *inter alia*, that it "*forms no part of English law*".

Until recently, there remained some scope under English law of reaching results not dissimilar to the group of companies doctrine by concluding that the non-signatory to an arbitration agreement was claiming "*through or under*" that agreement. Moreover, it was possible to argue in favour of piercing of the corporate veil (*Roussel-Uclaf v GD Searle & Co.* [1978] 1 Lloyd's Rep. 225).

However, in November 2008, the Court of Appeal in *City of London v Sancheti* [2008] EWCA Civ 1283; [2008] All ER (D) 204 (Nov); [2009] 1 Lloyd's Rep 117 closed the door on this possibility, determining that *Roussel-Uclaf* was wrongly decided and should not be followed. The defendant in *Sancheti* was accordingly denied a section 9 stay, because the Claimant (the Mayor and Commonality & Citizens of the City of London) was not a party to the relevant arbitration agreement (contained in the UK-India Bilateral Investment Treaty) – the relevant party was the UK Government.

Non-parties to a contract may, however, be able to invoke or be bound by an arbitration agreement contained in a contract where that party has, or has assumed, rights under that contract pursuant to the Contracts (Rights of Third Parties) Act 1999: *see Nisshin Shipping Co. Ltd v Cleaves & Co. Ltd* [2004] 1 All E.R. (Comm.) 481 (Q.B.) (brokers, who had rights to commission payments under a charterparty agreement to which it was nonetheless not a party, entitled to arbitrate against party to the charterparty). However, in *Fortress Value Recovery Fund LLP v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, the Court of Appeal held that very clear language is required in order to take the benefit of a contractual exclusion subject to an arbitration clause in the same agreement under the Contracts (Right of Third Parties) Act 1999. This decision also held that the scope of the Contracts (Rights of Third Parties) Act 1999 is limited to third party rights; and that limitations in a contract which may give rise to a defence are not assignable. As a result, non-contracting parties seeking to assert such defences are not covered by the Act.

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

Section 13 of the 1996 Act provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings. Limitation Acts include the Limitation Act 1980 (which provides that the time limit for commencing arbitration proceedings for a contract case is six years from the date of the breach (section 5)), as well as the Foreign Limitation Periods Act 1984. That legislation provides that where a dispute being determined in England and

Wales is governed by foreign law, the laws of the foreign state relating to limitation shall apply as a matter of substance.

Where an arbitration award has been set aside, the court may order that the lapse of time between the commencement of the original proceedings, and the date of the court order, be disregarded for limitation purposes (section 13(2)).

3.7 What is the effect in England and Wales of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where an arbitration is seated in England or Wales, there is no mandatory stay of proceedings where one party to the arbitration becomes insolvent. However, proceedings may be continued only with the consent of the administrator or permission of the court (Schedule B1, para. 43(6) Insolvency Act 1986). In this regard, in *Syska (acting as the administrator of Elektrim SA (in bankruptcy)) and another v Vivendi Universal SA and Others* [2009] EWCA Civ 677, the Court of Appeal upheld the decision of a London arbitral tribunal rejecting Elektrim's argument that they lacked jurisdiction because the arbitration agreement was effectively annulled by Polish bankruptcy law.

Moreover, in *United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd* [2013] EWHC 4335 (Ch), the English High Court recently held that a stay of proceedings against a Singaporean company could be lifted (to allow arbitration proceedings), even though insolvency proceedings were pending in Singapore. The purpose of lifting the stay was to determine the rights and obligations of the parties. In the circumstances, the High Court seems to have placed reliance on the legitimacy of the request for arbitration and the fact that lifting such a stay would not be burdensome on the defendant, as they could "piggyback" on the defence of a second defendant.

Article 15 of the Council Regulation on Insolvency Proceedings (No. 1346/2000) provides that the effects of insolvency on one party to "a lawsuit pending" (which includes an arbitration) are to be determined by the laws of the Member State in which that proceeding is sited. In this regard, the English Court of Appeal, in *Syska*, confirmed that Article 15 is not in conflict with Article 4 (which provides that the effects of a company's insolvency are to be determined by the law of the Member State in which the insolvency proceedings are opened), as Article 4(2) expressly exempts from that provision "lawsuits pending". As a result, if a party to an arbitration becomes insolvent during the course of the arbitration, the effect of that insolvency will be determined by the law of the seat of the arbitration.

4 Choice of Law Rules

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

Section 46 of the 1996 Act is largely similar in effect to Article 28 of the Model Law, providing that the dispute shall be decided in accordance with the parties' choice of law, or, if the parties agree, in accordance with "other considerations". Moreover, section 46 provides that a choice of the laws of a particular state is limited to the substantive laws of the foreign state, and not the foreign state's conflict of laws rules. (The law applicable to the procedure of the arbitration is governed by the 1996 Act (section 2).)

Where no choice or agreement is made, the tribunal is given considerable latitude, and is required to apply the law "determined by the conflict of laws rules which it considers applicable" (section 46(3) of the 1996 Act). This grants the tribunal broad power to apply a system of conflict of laws rules that it concludes is most appropriate to the case.

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

The Rome Convention has now been replaced by Regulation No. 593/2008 on the Law Applicable to Contractual Obligations (the "Rome I Regulation") for all contracts concluded after 17 December 2009. Article 7(2) of the Rome Convention (which applies in England and Wales pursuant to the Contracts (Applicable Laws) Act 1990) and Article 9(2) of the Rome I Regulation both provide that the other provisions of the Rome Convention/Rome I Regulation do not restrict the application of the rules of the law of England and Wales where they are mandatory, irrespective of the law otherwise applicable to the contract. Accordingly, where a rule of law of England and Wales is truly mandatory, it must prevail over the law chosen by the parties (*Ingmar GB Ltd v Eaton Leonard Technologies Inc* (Case C-381/98) [2001] All ER (EC) 57). Examples of such mandatory rules in England and Wales include the Employment Rights Act 1996, the Unfair Contract Terms Act 1977 and the Carriage of Goods by Sea Act 1981.

England and Wales did not incorporate Article 7(1) of the Rome Convention into its domestic law; accordingly, there is no scope for the mandatory laws of some other jurisdiction to prevail over the parties' choice of law for contracts concluded on or prior to 17 December 2009 (section 2(2), Contracts (Applicable Laws) Act 1990). However, there is no such right of derogation from Article 9(3) Rome I Regulation (which has replaced Article 7(1) of the Rome Convention for all contracts concluded *after* 17 December 2009). Article 9(3) preserves the ability to give effect to the over-riding mandatory provisions of a foreign state. Thus, where an arbitration is sited in England and Wales, effect must be given to "the overriding mandatory provisions of the law of the state where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful" (Article 9(3) Rome I Regulation).

As noted above, the English High Court has held that an "*arbitration clause would be 'null and void' and 'inoperative' within the meaning of section 9(4) of the 1996 Act, in so far as it purported to require the submission to arbitration of 'questions pertaining to' mandatory provisions of EU law*" (*Accentuate Ltd v ASIGRA Inc.* [2009] EWHC 2655). The authors understand from those involved with the case that this decision will not be the subject of any appeal, but maintain that this case was decided incorrectly on that point.

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

The Rome Convention and Rome I Regulation expressly exclude from their scope "arbitration agreements" (Article 1(2)(d) Rome Convention; Article 1(2)(e) Rome I Regulation). Accordingly, in England and Wales, the question of which law is applicable to the formation, validity and legality of the arbitration agreement itself is determined by the application of general common law choice-of-law principles. The existence of an express choice, provisions of the contract which contain necessary implications, or, in the absence of this, the surrounding circumstances, will be relevant in this determination (e.g., *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500). The question to be asked is which jurisdiction the arbitration agreement has a close and real connection with

(*Compagnie Tunisienne De Navigation S.A. v Compagnie D'Armement Maritime S.A.* [1971] AC 572); generally, this will be the law of the seat of the arbitration rather than the law applicable to the underlying agreement (where the two differ) *(C v D [2007] EWCA Civ 1282; Sulamerica Cia Nacional de Seguros SA v Ensesa Engenharia S.A.* [2012] EWCA Civ 638; *Abuja International Hotels Ltd v Meridien Sas* [2012] EWHC 87 (Comm)).

However, in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), the High Court emphasised that the proper approach should be to first ask whether the parties have impliedly (if not expressly) chosen the law governing the arbitration agreement before moving on to inquire which law has the closest and most real connection with the arbitration agreement.

5 Selection of Arbitral Tribunal

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

English law gives parties wide autonomy in their selection of arbitrators. The majority of the 1996 Act only operates as a fallback provision where express written agreement (section 5(1)) has not been reached. The only mandatory rules contained in the 1996 Act are that the death of an arbitrator brings his or her authority to an end and the court has the ability to remove arbitrators who are not performing their functions properly (section 24).

Therefore, parties are free to agree on the number of arbitrators, whether there is to be a chairman or an umpire, the arbitrators' qualifications, and the method of appointment (section 15). The consent of the arbitrators is required to ensure the validity of their appointment. Unless otherwise agreed, an agreement that the number of arbitrators shall be two (or any other even number) shall be understood to be an agreement that an additional arbitrator is to be appointed to act as chairman of the tribunal (section 15(2)).

In the absence of the parties' agreement as to the number of arbitrators, the tribunal will be made up of a sole arbitrator (section 15(3)). As indicated above, the court has the power to remove an arbitrator on several grounds, including: (i) justifiable doubts as to his impartiality; (ii) in the event that he or she does not possess the qualifications required by the parties' arbitration agreement; (iii) physical or mental incapability; or (iv) failures in conducting the proceedings (section 24(1)(a) to (d)).

The Court of Appeal previously decided in *Jivraj v Hashwani* ([2010] EWCA Civ 712) that an arbitration agreement stipulating that only persons of a specific religious belief could act as arbitrator was void because arbitrators were 'employees', falling within the scope of English anti-discrimination legislation in relation to religion and belief (the Employment Equality (Religion or Belief) Regulations 2003). The decision gave rise to concerns that requirements as to nationality (as, for example, in LCIA Rule 6 and ICC Rules, Article 9) would also render an arbitration agreement void as the relevant anti-discrimination legislation (the former Race Relations Act 1976, now replaced by the Equality Act 2010), is in similar terms to that considered in *Jivraj*. The UK Supreme Court subsequently overturned the Court of Appeal's decision by holding that arbitrators are not employees within the meaning of anti-discrimination legislation (*Jivraj v Hashwani* [2011] UKSC 40).

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

Parties are free to agree on the procedure for appointing arbitrators (including the chairman or umpire) (section 16(1)). If the parties fail to on agree an appointment procedure, the 1996 Act sets out detailed provisions for the appointment of: a sole arbitrator (joint appointment by the parties within 28 days of a written request by one party, section 16(3)); a tribunal comprised of two arbitrators (each party to appoint one arbitrator within 14 days of a written request by one party to do so, section 16(4)); a tribunal comprised of three arbitrators (as with two, but the two party-appointed arbitrators shall forthwith appoint a chairman, section 16(5)); and a tribunal comprised of two arbitrators and an umpire (as with three, subject to differences as to the timing of the umpire's appointment, section 16(6)). Where the parties have failed to even agree as to the number of arbitrators, by default, the tribunal shall consist of a sole arbitrator (section 15(3)).

In the event that the parties' agreed appointment procedure (or the section 16 default procedure) fails because of the failure to comply by one of the parties, the 1996 Act sets out a detailed default procedure, which enables the other party to give notice that it intends to appoint its arbitrator to act as sole arbitrator, and to make such an appointment (section 17(1)).

For other failures in appointment procedure, either party may apply to the court to exercise its powers, including to give directions, or to make the necessary appointments itself (see generally section 18(2) and (3)). The court may also delegate its power to make the necessary appointment to an arbitral institution if it thinks fit (see *Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050).

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

In the event that a sole arbitrator is appointed under section 17 of the 1996 Act, the party in default may apply to the court to set aside that appointment (section 17(3)). In all other cases where the appointment procedure has failed, unless the parties have agreed otherwise, they are entitled to apply to the court to: exercise its powers to give directions as to the making of appointments (section 18(3)(a)); direct that the tribunal be constituted by such appointments (section 18(3)(b)); revoke any previous appointments (section 18(3)(c)); or make the necessary appointments itself (section 18(3)(d)). *See Through Transport Mutual Assurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] All ER (D) 351 for confirmation of the English High Court's exercise of such powers.

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

The impartiality of arbitrators is central to the arbitration process. The 1996 Act states that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal" (section 1(a)). Section 24(1)(a) of the 1996 Act permits a party to apply to the court for the removal of an arbitrator on the basis that circumstances exist that give rise to justifiable doubts as to that arbitrator's "impartiality". Furthermore, section 33(1)(a) of the 1996 Act requires that the tribunal shall act fairly and impartially as between the parties. The English High Court confirmed in *ED & F Man Sugar Ltd v Belmont Shipping Ltd* [2011] EWHC 2992 (Comm) that a tribunal is not obliged to alert parties to potential arguments that may support their case.

The 1996 Act did not incorporate the Model Law provisions contained in Articles 12 and 13 thereof, requiring disclosure of

potential conflicts, and providing for a challenge procedure. The Departmental Advisory Committee preferred instead to retain the rule that the only issue is whether the arbitrator has acted impartially, and not whether they are "independent in the full sense of that word". This is consistent with the long-standing English practice of having party-appointed arbitrators (*AT & T Corporation v Saudi Cable Co* [2000] Lloyd's Rep 127).

Under the London Court of International Arbitration ("LCIA") Rules, arbitrators are required to sign a declaration before being appointed by the LCIA, "to the effect that there are no circumstances known to him that are likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration" (Article 5.3, LCIA Rules). In 2006, the LCIA voted to publish abstracts of its decisions on challenges to arbitrators, on the basis that the reasoned decisions would provide guidance to the arbitration community on the parameters of arbitrator independence and impartiality. The abstracts were first published in a special edition of Arbitration International (Vol 27, No. 3, 2011). Many related to alleged relationships or connections between an arbitrator and one of the parties to the arbitration. Of the 28 published abstracts, six cases were considered to be sufficiently problematic to satisfy the LCIA challenge standard, involving circumstances that give rise to "justifiable doubts" about an arbitrator's impartiality or independence. Of these six accepted challenges, three involved improper conduct by the arbitrator, and three involved relationship conflicts.

Under The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009) Part 1, Rule 2, "Members shall disclose any interest or relationship which is likely to affect, or may reasonably be thought likely to affect, their conduct".

The English courts also dismissed an application to remove an arbitrator and set aside an award where the arbitrator was instructed by the solicitors to one of the parties in unrelated litigation (*A v B* [2011] EWHC 2345 (Comm)). Recent proposed amendments to the LCIA Rules and the new International Bar Association ("IBA") Guidelines on Party Representation (2013) (notably guidelines six) both enable arbitrators, in certain circumstances, to remove counsel appointed after the tribunal is constituted in order to avoid a conflict of interest arising out of that appointment.

6 Procedural Rules

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

The provisions of Part I of the 1996 Act, which govern the procedure of an arbitration pursuant to an arbitration agreement, apply to arbitration proceedings that have their seat in England or Wales (section 2(1)). Under the 1996 Act, the "seat of the arbitration" is the juridical seat, which is the place where the arbitration has its formal legal seat and where the arbitration award will be made. Although it is usually the case, it is not essential that the physical hearings take place at the seat of the arbitration.

The parties are free to agree the seat of the arbitration in their arbitration agreement (section 3). If the parties fail to agree the seat of the arbitration, an arbitral (or any other) institution or person vested by the parties with powers to do so may designate the seat (section 3(b)). Alternatively, if authorised to do so by the parties, the arbitral tribunal may designate the seat (section 3(c)).

Where no arbitral seat has been designated or determined, and there is a connection with England and Wales, the court may still exercise its powers under the 1996 Act for the purpose of supporting the arbitral process (section 2(4)). The provisions relating to stay of proceedings and enforcement of arbitral awards apply regardless of the location (or even designation) of the seat (section 2(2)).

6.2 In arbitration proceedings conducted in England and Wales, are there any particular procedural steps that are required by law?

Essentially, the mandate of an arbitral tribunal in England and Wales is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. The parties are free to agree how their disputes are to be resolved, subject only to those safeguards necessary to protect the public interest. By virtue of section 33(1)(a) of the 1996 Act, the tribunal is required to act fairly and impartially as between the parties, giving each a reasonable opportunity to put its case and deal with that of its opponent (i.e., due process). The tribunal is required to adopt procedures suitable to the circumstances of a particular case (section 33(1)(b)) and must comply with that general duty in conducting the arbitral proceedings and in making all decisions relating to matters of procedure and evidence (section 33(2)).

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

There are no separate rules that govern the conduct of counsel (legal professionals or otherwise) from England and Wales in arbitral proceedings sited in England and Wales. English solicitors participating in arbitrations sited in England and Wales are bound by the Solicitors Regulation Authority ("SRA") Code of Conduct 2011 ("SRA Code of Conduct") (version 9, published on 1 April 2014). English qualified barristers, moreover, are governed by the Code of Conduct of the Bar Council ("Bar Code of Conduct"), as regulated by the Bar Standards Board ("BSB"). In discharging their functions, the SRA and BSB act as independent legal regulatory bodies, responsible for (among other matters) ensuring the good conduct of solicitors and barristers of England and Wales.

Further, solicitors and barristers are generally governed by the same professional standards in arbitration proceedings sited both inside and outside of England and Wales. In the case of solicitors, the SRA Code of Conduct, Chapter 13A, provides that the SRA Code of Conduct does not apply to those practising overseas or to those engaged in "temporary practice overseas". Those regulated individuals who are established in practice overseas and those authorised bodies or recognised sole practitioners with responsibility for or control over bodies or branch offices overseas, are governed by the SRA Overseas Rules. The Overseas Principles are modified from the SRA Principles, in order to take account of the different legal, regulatory and cultural context of practice in other jurisdictions, which may require different standards of conduct to those required in England and Wales. Equally, the Bar Code of Conduct is not expressly limited to regulating the conduct of barristers participating in cases within England and Wales. Instead, the Bar Code of Conduct is clear that the Code (or at least most sections of it) apply to all regulated persons "practising" or

"otherwise providing legal services". The wording of the Code is not jurisdictionally limited and hence applies to barristers involved in international arbitration proceedings sited both inside and outside of England and Wales.

There are no separate rules that govern the conduct of counsel from states/jurisdictions other than England and Wales in arbitral proceedings sited within England and Wales. In particular, there are no separate rules that impose mandatory codes of conduct on counsel irrespective of jurisdiction. Moreover, the SRA and Bar Code of Conducts are limited to solicitors and barristers of England and Wales.

6.4 What powers and duties does the national law of England and Wales impose upon arbitrators?

Under the 1996 Act, the parties are free to agree on the powers exercisable by the arbitral tribunal in relation to the proceedings (section 38). Unless otherwise agreed by the parties, however, the tribunal may order a claimant to provide security for the costs of the arbitration (section 38(3)); give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings (section 38(4)); direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation (section 38(5)); or give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control (section 38(6)).

In addition, the parties are free to agree that the tribunal shall have the power: to order on a provisional basis any relief which it would have power to grant in a final award (section 39(1)); to dismiss any claim where there has been inordinate and inexcusable delay (section 41(3)); or to dismiss any claim where a party fails to comply with a peremptory order of the tribunal to provide security for costs (section 41(6)). Where a party fails to comply with any other kind of peremptory order, the tribunal may: (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such materials as have been properly provided to it; or (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance (section 41(7)).

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

In England and Wales, only solicitors of the Supreme Court of England and Wales, and barristers called to the Bar in England and Wales, holding practising certificates from the respective English bodies regulating these professions (the Solicitor Regulation Authority and Bar Council and respectively), can have rights of audience in English courts, or rights to the "conduct of litigation" in proceedings issued in these courts. Appearing in court without one of these qualifications can render a person liable to a criminal charge (section 21 Solicitors Act 1974, sections 14(1) and 181(1) Legal Services Act 2007), contempt of court (section 14(4) Legal Services Act 2007) and that person will be precluded from recovering any fees from his putative client (section 25 Solicitors Act 1974). (These restrictions are subject to certain limited exceptions.)

An arbitration sited in England is not covered by these various provisions; accordingly, foreign lawyers are free to appear before an arbitration tribunal in England without restriction. Indeed, a representative need not necessarily be legally qualified in any jurisdiction; the 1996 Act specifically provides that, unless the parties otherwise agree, each party may be represented in the proceedings "by a lawyer or other person chosen by him" (section 36).

6.6 To what extent are there laws or rules in England and Wales providing for arbitrator immunity?

Arbitrators acting in arbitrations sited in England and Wales have immunity for any act or omission made in the discharge of the arbitrator's functions, unless the act or omission is shown to have been in bad faith (section 29, which is mandatory), although the parties may agree with an arbitrator regarding liability to be incurred by him as a consequence of his resignation (section 25(1)).

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

In principle, intervention by national courts in the arbitral process should be minimal. Nevertheless, the national courts have jurisdiction to act in support of arbitral proceedings and, in particular, may deal with procedural issues in relation to: the enforcement of peremptory orders of the tribunal (section 42); securing the attendance of witnesses (section 43); the taking and preservation of evidence, making orders relating to property, sale of goods, granting of interim injunctions or the appointment of a receiver (section 44); and the determination of a preliminary point of law (section 45). Parties to an arbitration agreement may, however, agree to exclude large parts of the national courts' powers (see *Mantovani v Caparelli SpA* [1980] 1 Lloyd's Rep. 375 and section 44 of 1996 Act).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in England and Wales permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Unless the parties have agreed otherwise, the tribunal is permitted to make preliminary orders in certain circumstances. In particular, the tribunal may order a claimant to: provide security for costs in the arbitration (section 38(3)); give directions relating to property which is the subject matter of the proceedings or as to which any question arises in the proceedings (section 38(4)); direct a party or witness to be examined (section 38(5)); or give directions for the preservation of evidence (section 38(6)).

In addition, the parties may agree that the tribunal shall be entitled to make an order for provisional relief (section 39) (e.g., disposition of property or payment on account of the costs of the arbitration). In the absence of agreement between the parties, the tribunal shall not have such power. The tribunal is authorised to grant such interim relief without having to seek the assistance of the court to do so.

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

The court is empowered to act in support of arbitral proceedings, unless otherwise agreed by the parties (section 44(1)). In particular,

unless otherwise agreed by the parties, the court has the power to make orders in support of arbitral proceedings in relation to: the taking of evidence (section 44(2)(a)); the preservation of evidence (section 44(2)(b)); and the making of orders relating to property relating to the proceedings (section 44(2)(c)). The court shall only act to the extent that the tribunal (or other institution) has no power to do so effectively, e.g., the tribunal is not yet constituted (section 44(5)). These powers are not mandatory and the parties are therefore entitled to agree that these provisions will not apply. For interim relief in support of arbitrations held outside England and Wales, see *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), [2008] 2 All E.R. (Comm) 1034 and *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS, The Western Moscow* [2012] EWHC 1224 (Comm)).

In addition, unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal (section 42).

The request of a party for relief will not impact on the jurisdiction of the arbitral tribunal in respect of the subject-matter of the request, where the court has stipulated that an order may be varied or set aside by the arbitrators themselves (section 44(6)). When exercising discretion to preserve assets or evidence under section 44 (3), the English High Court has recently considered the scope of its power "to make such orders as it thinks necessary", in cases of "urgency". First, in *Doosan Babcock Ltd v Commerializadora de Equipos y Materiales Mabe Lda* [2013] EWHC 3010 (TCC), the Court found it had jurisdiction to grant interim relief to restrain a beneficiary of a performance guarantee bond from making a demand under that bond. By contrast, in *Zim Integrated Shipping Services Ltd v European Container KS and European Container 11* [2013] EWHC 3581, Males J refused to order an injunction on the basis that defining the alleged contractual rights that the applicant sought to protect (their right to repayment of a loan that the respondent had refused to pay) as "assets" would stretch the meaning of that word too far.

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

In practice, the courts do not intervene in arbitral proceedings in England and Wales, except within the relatively narrow confines of the 1996 Act, where it is both necessary and appropriate for them to do so.

The object of the 1996 Act is to recognise and uphold party autonomy to choose the procedure for the resolution of disputes and to prevent unnecessary intervention by the courts. To that end, the 1996 Act confers as many powers of the court as possible onto the tribunal. Under the 1996 Act, the court has powers in relation to the enforcement of peremptory orders of the tribunal and the exercise of other court powers in support of arbitral proceedings (and in relation to securing the attendance of witnesses and the determination of a preliminary point of law).

Generally, the English courts will take a conservative approach to the exercise of its powers to grant relief under section 44. As noted above, the court shall only act to the extent that the tribunal (or other institution) has no power, or is unable for the time being, to do so effectively (section 44(5)); if the arbitrators have already been appointed, the court is unlikely to intervene unless satisfied that any order the arbitrators might make would have little value (for example, because it cannot be enforced, or involves a third party) (*Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep 371).

7.4 Under what circumstances will a national court of England and Wales issue an anti-suit injunction in aid of an arbitration?

As noted above, the ECJ has ruled that intra-EU anti-suit injunctions (i.e., those to restrain proceedings first brought in the courts of EU or EFTA Member States where those proceedings are in contravention of an arbitration clause) are a violation of EU law (*Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] All ER (D) 82). As a result, the English courts are no longer able to issue an anti-suit injunction in relation to proceedings in the courts of other EU/EFTA Member States; nor are they entitled to grant declaratory relief to confirm the validity of an arbitration agreement after another EU or EFTA court has ruled that there is no valid arbitration clause (*Endesa Generación SA v National Navigation Company ('Endesa')* [2009] EWCA Civ 1397). As outlined in question 3.3 of this Chapter, this position will be subject to change as of 10 January 2015 when the Recast Regulation comes into effect in the courts of EU Member States.

If there was uncertainty, following *West Tankers*, as to whether a party wishing to rely on an arbitration agreement could seek a declaration as to its validity from the court of the seat, despite the existence of a conflicting judgment from another EU court, that has been resolved by the Court of Appeal in *Endesa Generación SA v National Navigation Company* ('*Endesa*') [2009] EWCA Civ 1397 (reversing the decision at first instance), which held on the basis of the authority in *West Tankers* that the judge at first instance had been wrong to grant a declaration upholding the arbitration agreement in circumstances where the Spanish court had already ruled on that issue to the contrary. The Court of Appeal did note, however, the "unsatisfactory" effect of *West Tankers*, which leaves "the court in member state A where the proceedings on the merits have been commenced free to ignore a judgment in arbitration proceedings in state B the seat of the arbitration, but if a preliminary ruling can be obtained early enough in state A, the courts in state B are bound by the result of the preliminary ruling in state A".

However, the approach of the English courts is markedly different where EU law does not apply. Thus, the English courts have continued to grant anti-suit injunctions in respect of proceedings brought outside the EU, in violation of valid and binding arbitration agreements (*Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm), upheld on appeal ([2010] EWCA Civ 66); and *Transfield Shipping v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3642). The English courts will also grant such injunctive relief even where the applicant has no intention of commencing arbitration (*AES-UST Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), upheld on appeal in both the Court of Appeal and Supreme Court ([2011] EWCA Civ 647 and [2013] UKSC 35)) and at the post-award stage to restrain proceedings that "challenge, impugn or have as their object or effect the prevention or delay in enforcement" of an award (*Shashoua v Sharma* [2009] EWHC 957 (Comm)) (while leave to appeal was granted in this case, the authors are not aware of any reported decision on appeal).

In cases where the English courts have the power to grant an anti-suit injunction, the application must be made "promptly and before the foreign proceedings are too far advanced" (*The Angelic Grace* [1995] 1 Lloyd's Rep. 87 and *The Skier Star* [2008] 1 Lloyd's Rep 652). In cases where there is not yet a final decision as to whether there is a valid arbitration agreement, the applicant for an (interim) anti-suit injunction must satisfy the court that there is a "high degree of probability" that there is such an agreement and that bringing and continuing the court proceeding is contrary to such an agreement, a test which is justified because its effect is to prevent

the continuation of foreign proceedings (see *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm), followed in *Transfield Shipping v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3642 (Comm) [2010] EWCA Civ 66; *Malhotra v Malhotra* [2012] EWHC 3020 (Comm)).

In recent years, the Court of Appeal has affirmed the grant of an anti-suit injunction restraining a third party, not itself bound by the relevant arbitration clause, from pursuing Russian court proceedings on the grounds that there was evidence of collusion between that third party and the defendant in the arbitration in bringing the Russian proceedings (*Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2011] EWHC 308 (Comm), affirmed in [2012] EWCA Civ 644). Moreover, in 2013, the English courts have made clear their continued willingness to issue anti-suit injunctions to prevent proceedings in breach of an arbitration agreement. In *Ecom Argonindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm), for example, the High Court granted an anti-suit injunction despite an earlier anti-suit injunction being issued in another state. In *Bannai v Erez (Trustee in Bankruptcy of Eli Reifman)* [2013] EWHC 3689, Burton J refused to set aside an injunction despite the presence of insolvency proceedings in Israel.

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

If the parties agree that it is empowered to do so, the tribunal may order security for costs (section 38(1)). Furthermore, unless the parties exclude the possibility, the tribunal has a statutory power under section 38(3) to order security for costs.

It should be noted that if the parties exclude the right of the tribunal to order security for costs, the courts will also have no jurisdiction to order security for costs except, in relation to specified judicial proceedings under the 1996 Act (on applications and appeals under sections 67 to 69).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in England and Wales?

England has an extensive body of common law that establishes the governing rules of evidence. However, in the absence of agreement by the parties, the tribunal has the power to decide whether or not to apply the strict rules of evidence under English common law (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion (section 34(2)(f)). The 1996 Act does provide that parties are entitled to agree any procedural or evidential matter (section 34(1)) and the tribunal may determine the time, manner and form in which evidence is to be exchanged and presented (section 34(2)(f)). It is not uncommon for the parties to agree to the application of a set of 'international' evidentiary rules, such as the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (29 May 2010).

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

The tribunal has some power to order disclosure of documents, but it is not unlimited. Unless otherwise agreed, the tribunal has power to order a party to produce documents (section 34(2)(d)) and the tribunal may determine whether or not documents are relevant and/or privileged (section 34(2)(f)). The tribunal has no power to order production of documents by a third party, although any party to the proceedings may use those court procedures that are available in relation to legal proceedings to secure the attendance of a witness (including a third party witness) in order to produce documents (section 43).

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

The court may make orders requiring a party to comply with a peremptory order made by the tribunal (section 42). In addition, unless otherwise agreed by the parties, the court has powers that are exercisable in support of arbitral proceedings and these include powers in relation to the preservation of evidence and making orders for inspection, photographing, preservation, detention or sampling of property that is the subject of the proceedings (section 44(2)).

Parties to the proceedings may also use the same court procedures as are available in relation to legal proceedings to secure the attendance of a witness (including a third party witness) to produce documents (section 43). As recently confirmed in *Mi-Space (UK) v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC), however, the court cannot order pre-action disclosure (under the English Civil Procedure Rules "CPR") where a dispute between the parties is to be decided by arbitration.

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

Parties are free to agree whether there should be oral or written evidence in arbitral proceedings (section 34(1)). Otherwise, the arbitral tribunal may decide whether or not a witness or party will be required to provide oral evidence and, if so, what questions should be put to, and answered by, the respective parties and the manner in which that should be done (section 34(2)(e)). Unless otherwise agreed, the tribunal also has power to direct that a particular witness or party may be examined on oath or affirmation and may administer the necessary oath or affirmation (section 38(5)). There is no strict requirement that oral evidence be provided on oath or affirmation; it is a matter for the tribunal's discretion. The tribunal does not have the power to force the attendance of a witness. On the application of a party, the court may order the attendance of a witness to give oral testimony or produce documents in arbitral proceedings in accordance with the provisions in the 1996 Act (section 43).

The 1996 Act also permits the arbitral tribunal to appoint experts or legal advisors to report to it and the parties, or to appoint assessors to assist it on legal matters, unless otherwise agreed by the parties (section 37(1)). Further, and again unless otherwise agreed, the parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by such a person (section 37(1)(b)). Even where the applicable procedural rules are silent as to the right to comment conferred by section 37(1)(b), the parties will not be taken to have "otherwise agreed" to waive that right (*Price and Price v Carter* [2010] EWHC 1451). This suggests that express words would be required effectively to waive the section 37(1)(b) right.

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

Where the parties have not agreed on evidential matters in their arbitration agreement, the arbitral tribunal has the discretionary power to order a party to produce documents or classes of documents (section 34(d)). In so doing, the tribunal may determine that a document (or class of documents) is protected from disclosure on the ground of legal, professional or other privilege (assuming the precondition of confidentiality exists). In such situations, the tribunal may be guided by generally applicable principles of English law. For example, privileged documents may include documents attracting Crown privilege, "without prejudice" correspondence between the parties (including settlement offers), and documents passing between lawyer and client. However, it should be noted that communications between a lawyer and a third party are only privileged if made when litigation was "reasonably in prospect". Further, the definition of "client" for the purposes of determining which communications will attract privilege is relatively narrow under English law following a controversial decision of the English Court of Appeal (*Three Rivers District Council v Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474). Once a document has been produced by a party, it is generally required to be disclosed both to the other party and to the arbitral tribunal. In addition, a party may be taken to have waived privilege over a confidential document referred to in pleadings or witness statements in the arbitration itself in circumstances. This constitutes an express waiver of privilege. Implied waiver of privilege, on the other hand, is only likely to arise in arbitral proceedings involving a relationship creating that privilege in the first place, e.g., an arbitration between a client and his solicitor.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of England and Wales that the Award contain reasons or that the arbitrators sign every page?

The parties are free to agree on the form of any arbitral award (section 52(1)). In the absence of agreement, the award shall be in writing and signed by all of the arbitrators or all those assenting to the award (section 52(3)); it shall contain the reasons for the award (unless it is an agreed award or the parties have agreed to dispense with reasons) (section 52(4)); and it shall state the seat of the arbitration and the date when the award was made (section 52(5)). There is a specific requirement under the New York Convention that awards must be "duly authenticated". Therefore, an unsigned award may not be enforceable in another contracting state. (Note, however, the Court of Appeal's recent statements regarding the enforcement of awards under section 102 (1) of the Arbitration Act 1996 in *Lombard-Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356. This case is discussed fully in question 11.3 of this Chapter.) A tribunal is entitled to make a single, final award or, by virtue of section 47 of the 1996 Act, an award relating only to part of the claims submitted to it for determination. It is not uncommon for a tribunal to separate issues of liability and damages and to provide separate awards in respect of each.

The 1996 Act provides that the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief that it would have power to grant in a final award (section 39(1)). This includes the power to order payment of money, disposition of property, or security for costs or fees and costs. Unless agreed by the parties in writing (and subject to the court's power to extend it), there is no statutory time limit for making an award. Any time limit, however, must avoid unnecessary delay.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in England and Wales?

There are three bases upon which a party may challenge or appeal to the court against an arbitral award made in England and Wales.

First, a party may argue that the tribunal lacked substantive jurisdiction to make the award (section 67). A tribunal will have "substantive jurisdiction" where: (i) there was a valid arbitration agreement; (ii) the tribunal was properly constituted; and (iii) the tribunal ruled on matters "submitted to the arbitration in accordance with the arbitration agreement" (section 30). A hearing under section 67 is by way of complete rehearing (*Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 550 referred to with approval by the UK Supreme Court in *Dallah Real Estate & Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm); *Hyundai Merchant Marine Company Limited v Americas Bulk Transport Limited* [2013] EWHC 470 (Comm)).

Secondly, a party may challenge on the grounds of serious irregularity (section 68). Under the 1996 Act, serious irregularity may arise where: the tribunal has failed to comply with its general duty under the 1996 Act (including its duty to act fairly and impartially) (section 68(2)(a)); the tribunal has exceeded its powers (section 68(2)(b)); the tribunal has failed to conduct the proceedings in accordance with the parties' agreed procedure (section 68(2)(c)); the tribunal has failed to deal with all of the issues put to it (section 68(2)(d)); there is uncertainty or ambiguity as to the effect of the award (section 68(2)(f)); the award was obtained by fraud or otherwise contrary to public policy (section 68(2)(g)); the award does not comply with requirements as to form (section 68(2)(h)); or there was irregularity in the conduct of the proceedings, and the court considers that this has caused or will cause substantial injustice to the applicant (section 68(2)(i)).

An "error of law" on the part of the arbitrators will not give rise to "substantial irregularity", sufficient to uphold an appeal under section 68 (*Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 A.C. 221 (HL)). More generally, as the Court of Appeal has noted, the authorities "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" (*Bandwidth Shipping Corp v Intaari* [2008] 1 All ER 1015; see also A v B [2011] EWHC 2345 (Comm); *AK Kablo v Intamex* [2011] EWHC 2970 (Comm)).

The limitations of section 68 can be seen in *CNH Global NV v PGN Logistics Limited* [2009] EWHC 977 (Comm), in which the High Court described as a "howler" the arbitrators' failure to award interest, which then became a serious irregularity when the tribunal subsequently issued an addendum purporting to "correct" the award by ordering the payment of interest. The High Court nevertheless refused to set aside the award on the basis that the party ordered to pay interest had suffered no "substantial injustice". Similarly, in *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383, the High Court dismissed a challenge to an award despite making an unequivocal finding that there had been

fraud in the arbitration because the claimant was unable to establish that the tribunal probably would have come to a different decision if there had been no fraud. However, in *Soeximex v Agrocorp* [2011] EWHC 2743 (Comm), the High Court upheld a section 68 challenge on the basis that the tribunal had failed to address two distinct questions before it. The court remitted the matter for re-consideration by the tribunal. Moreover, as recently made clear in *Gujarat NRE Coke Ltd and Shri Anrun Kumar Jagatramaka v Coeclerici Asia Pte Ltd* [2013] EWHC 1987 (Comm) and *Statoil v Sonatrach* [2014] EWHC 875 (Comm), the English courts are highly reluctant to allow challenges to arbitral awards made in England and Wales. In *Gurjarat NRE Coke*, the High Court reaffirmed that only an "extreme case" on the basis of serious irregularity will justify its intervention. Similarly in *Statoil*, Flaux J made clear that the relevant question was not whether the tribunal "got it right", but whether there had been due process.

Finally, unless the parties agree otherwise, a party to arbitral proceedings may (in certain circumstances) appeal to the court on a question of law arising out of an award made in the proceedings (section 69). An appeal on a point of law may not be brought without either the agreement of all the other parties to the proceedings or the leave of the court (section 69(2)), which will be granted only if the conditions in section 69(3) are satisfied. The limited scope of section 69 has been confirmed by the English court, which has held that the only documents that would be admissible in a section 69 appeal are the award (and possibly documents to which the award refers that have contractual effect) and the contract governing the dispute between the parties (*Sylvia Shipping Co. Limited v Progress Bulk Carriers Ltd*. [2010] EWHC 542 (Comm); *Great Western Trains Company Ltd. v Network Rail Infrastructure Ltd* [2010] EWHC 117 (Comm); *Dolphin Tanker SRL v Westport Petroleum Inc* [2010] EWHC 2617 (Comm)). As stated by the High Court in Morris Homes (*West Midlands*) *Ltd v Keay* [2013] EWHC 932 (TCC), "the process of determining the application for leave to appeal should be a summary one, and one in which the applicant has to establish that it is clear-cut that the criteria [under section 69(3)] are established". Further, if the award being challenged is alleged to be "*obviously wrong*" under section 69(3)(c)(i), it must be a "*major intellectual aberration*" (see *HMV UK Ltd v Propinvest Friar Ltd Partnership* [2012] 1 Lloyd's Rep 416.

The High Court also recently held that it has jurisdiction to set aside an order granting leave to appeal an award on a point of law, for example, where the court had been misled or where a fundamental change of circumstances has destroyed the basis on which the order was made (*Latvian Shipping Company v The Russian People's Insurance Company (Rosno) Open Ended Joint Stock Company* [2012] EWHC 1412 (Comm)).

An appeal under any of these provisions must be brought "within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process" (section 70). In addition, a party's right to appeal under any of these sections may be lost if that party continues to "take part" in the proceedings and the relevant objection is not made "forthwith" (section 73). The importance of observing these deadlines and restrictions is clear from a number of cases, including *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2009] EWHC 3318; *Parbulk Ii A/S v Heritage Maritime Ltd SA* [2011] EWHC 2917 (Comm); and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm).

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

Parties may agree to exclude the right to appeal to the court on a question of law arising out of an award made in the course of arbitral proceedings (section 69(1)). For the purposes of section 69 of the 1996 Act, an agreement that the tribunal does not need to give reasons for its award will be deemed an agreement between the parties to exclude this basis of appeal (section 69(1)). However, parties wishing to exclude a right of appeal under section 69 must use "sufficiently clear wording"; a statement that the award shall be "final and binding" or "final, conclusive and binding" will not suffice (*Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm)).

Sections 67 and 68 are mandatory provisions of the 1996 Act (as listed in Schedule 1 to the 1996 Act); parties may not exclude their application.

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

The 1996 Act provides that an award made by the tribunal is final and binding unless otherwise agreed by the parties. Therefore, the parties are free to agree to challenge the award under any procedures set out in the arbitration agreement (or otherwise agreed), in addition to the grounds for challenge set out in the 1996 Act. Equally, the parties are free to agree that an award be disregarded entirely in order that they may re-arbitrate their dispute (in which case the first award cannot be enforced).

10.4 What is the procedure for appealing an arbitral award in England and Wales?

An appeal against an arbitral award must be commenced by the issue of an arbitration claim form (in accordance with CPR Part 62). The claim form must state under which section of the 1996 Act the application is brought and give details of the award being challenged, identifying which part or parts of the award are challenged and specifying the grounds for the challenge (rule 62.4(1) CPR). CPR PD 62 para. 12.5 is clear, however, that only the award and incorporated documents can be put before the court at the permission and appeal stage (see also *Cottonex Anstalt v Patriot Spring Mills Ltd* [2014] EWHC 236 (Comm)).

11 Enforcement of an Award

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

The United Kingdom is a party to the New York Convention, which it signed and ratified in 1975, subject to the reservation that it applies only to awards made in the territory of another contracting party.

Part III of the 1996 Act deals with the recognition and enforcement of New York Convention awards (i.e., awards made, in pursuance of an arbitration agreement, in the territory of another state which is also a party to the New York Convention).

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

An arbitral award made under the Geneva Convention 1927 is enforceable pursuant to section 99 of the 1996 Act. Section 99 of the 1996 Act has in practice been all but superseded by enforcement under the subsequent New York Convention. However, there remain a limited number of countries which have not yet acceded to the New York Convention that nevertheless remain party to the Geneva Convention 1927.

Other than legislation regarding the enforcement of awards in certain former Commonwealth states, England is not a signatory to any other Conventions regarding the recognition and enforcement of awards.

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

Generally speaking, the English courts exhibit a strong bias in favour of enforcement. The enforcement procedure prescribed by the 1996 Act distinguishes between foreign awards and awards made in England and Wales (as opposed to international and domestic awards) for this purpose.

An award made in England may be enforced as a judgment or an order of the court by leave of the court (section 66). The 1996 Act provides that leave will not be given where the tribunal is shown to have lacked substantive jurisdiction to make the award. The High Court has also recently affirmed that the power under section 66 of the 1996 Act to enter judgment in terms of a declaratory award includes the power to enter a negative declaratory award (see *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27, affirming [2011] EWHC 829 (Comm) and *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei Kg* [2011] EWHC 2452 (Comm)). A foreign award, rendered in another New York Convention state, will be recognised and enforced in the courts of England and Wales, subject to the limited exceptions set out in Part III of the 1996 Act (section 101).

The grounds for refusing to recognise or enforce foreign awards are limited to: incapacity of a party; invalidity of the arbitration agreement; lack of proper notice; lack of jurisdiction; procedural irregularity in the composition of the tribunal; the fact that the award has been set aside or not become binding in the country where it was made; the non-arbitrability of the subject matter of the arbitration; or the fact that it would be contrary to public policy to enforce the award (section 103). The English courts take a broad view of arbitrability and, for the most part, appear to be reluctant to refuse to enforce a foreign award on the grounds of public policy (which is deliberately not defined in the 1996 Act).

The English courts retain a discretion to enforce an award even where one of these grounds exists, but this discretion is very narrowly construed (*Yukos Oil Company v Dardana Ltd* [2002] 2 Lloyd's Rep 326). Indeed, in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs (Pakistan)* [2009] EWCA Civ 755, the Court of Appeal recognised that, although in certain circumstances a court may have discretion to enforce an award notwithstanding the existence of one of the conditions for refusal of enforcement set out in section 103, such circumstances must be limited. This was affirmed by the UK Supreme Court ([2010] UKSC 46, para. 46), where Lord Mance noted that "[a]bsent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs" if the court enforced or recognised an award which was found to have been made without jurisdiction.

The Court of Appeal has also held that the word "award" in sections 101 to 103 of the 1996 Act should be construed to mean the "award or part of it", and accordingly, that the court is permitted to enforce part of an award (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2008] All ER (D) 197 (Oct)). Moreover, the Court of Appeal has recently held that the formal requirements of section 102 (1) should not be construed too strictly, so as to give rise to "hollow formalism" (*Lombard-Knight v Rainstorm Pictures Ltd* [2014] EWCA Civ 356). In this case, the Court of Appeal adopted a pro-enforcement stance, holding that photocopies of two arbitration agreements, when accompanied by a Statement of Truth, could amount to "certified copies" of the original arbitration agreements, as required for enforcement by the wording of section 102 (1)(b). In so finding, the Court of Appeal rejected the High Court's interpretation that wording of section 102 (1)(b) required "independent" certification. The Court of Appeal also found it was inherent in a Statement of Truth that copies of the arbitration agreements were true originals.

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

In general, the English common law principles of *res judicata* and issue estoppel apply to arbitrations sited in England (section 100). A final and binding award, therefore, precludes the successful party from bringing the same claim(s) again, either in a fresh arbitration or before the national courts, and precludes both parties from contradicting the decision of the arbitral tribunal on a question of law or fact decided by the award (*Sun Life Insurance Company of Canada and others v The Lincoln National Life Insurance Company* [2006] 1 All ER (Comm) 675; *Injazat Technology Capital Ltd v Najafi* [2012] EWHC 4171 (Comm)).

In practice, the Privy Council has affirmed (in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041) that a prior award may be used by one of the parties to raise a defence of issue estoppel in a new arbitration between the same parties.

The doctrine of estoppel does not apply to subsequent proceedings between a party to an earlier arbitration and a non-party (*Sun Life Insurance Company* [2012] EWHC 4171). But the High Court recently decided that, in special circumstances, the doctrine of abuse of process may be relied upon by a non-party to an earlier arbitration to defend court claims made against it that have failed in the arbitration (*Michael Wilson & Partners Ltd v Sinclair* [2012] EWHC 2560 (Comm).

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

Section 103(3) of the 1996 Act enacts Article V(2)(b) of the New York Convention, so that an English court may refuse to recognise or enforce an award if it would be contrary to public policy. As noted above, the English courts generally adopt a pro-enforcement bias which is itself regarded as a matter of public policy (*Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 (CA)). As the Court of Appeal has said: "*[C]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution*".

(Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah Nat'l Oil Co. (sub nom DST v Rakoil) [1987] 3 WLR 1023, 1032 (English Court of Appeal), reversed on other grounds, [1988] 2 All E.R. 833 (House of Lords)). However, rare exceptions do exist and under English law, this defence has been invoked (broadly speaking) on the following grounds: the award was obtained by fraud (*Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 (CA); *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2008] 1 Lloyd's Rep 93); the award is tainted by illegality (*Soleimany v Soleimany* [1998] 3 WLR 811); the underlying agreement is contrary to principles of EU law, in particular competition law as set out in Articles 101 and 102 of the TFEU (*Eco Swiss China Time Ltd v Benetton International NV* (1999) (Case C-126/97); or the award is unclear as to the obligations imposed on the parties (*Tongyuan (USA) International Trading Group v Uni-Clan Ltd* (2001, unreported, 26 Yearbook of Commercial Arbitration 886)).

In a landmark 2012 decision, the Court of Appeal (in *Yukos Capital SARL v OJSC Rosneft Oil Company* [2013] EWCA Civ 885) had to consider (by way of preliminary issue) whether the recognition by the Dutch Court of Appeal of a Russian award that had been set aside in Russia (the Dutch court also refusing recognition of the Russian court's decision setting aside the award on the basis that the Russian court's decision was "partial and dependent") created an issue estoppel preventing Rosneft from arguing that the Russian court's decision setting aside the arbitration award is not partial and dependent. The issue for the Court of Appeal in that case was whether, on a claim to enforce a foreign award (a) where there was competing reliance on decisions of the state where the award was made and of another state were the award is taken for enforcement, and (b) when issues of public policy may be said to be involved, the English court shall decide any issue of public policy for itself, or whether it should be content to abide by the foreign courts' decisions, and if so, which one. In answering that question (as a preliminary issue), the Court of Appeal held that "The answer can hardly be the judgment which happens to be the first in time but must be that the English court will make up its own mind according to its own concept of public order not that of some other state". Accordingly, Rosneft was not estopped and whether or not the decisions setting aside the arbitral awards in Russia were "partial and dependent" would have to be tried in the English court.

12 Confidentiality

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

Subject to the parties' express agreement in relation to confidentiality, under English common law there is an implied duty of confidentiality in all arbitration agreements. This duty arises from the concept of the essentially private nature of international arbitration (*Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616).

The confidentiality of arbitral proceedings is not protected in the event that: the parties agree otherwise; matters relating to the arbitration are the subject of court proceedings (e.g., as a result of a party's application to the court for preliminary relief, enforcement proceedings or appeal); disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party; or disclosure is otherwise in the interests of justice (*Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616).

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

There are exceptions to the implied duty of confidentiality. Disclosure may be permitted outside the arbitral proceedings where the party that originally produced the material has consented to disclosure, the court has ordered or given leave for disclosure on the basis that it is reasonably necessary for the protection of the legitimate interests of an arbitrating party, or it is otherwise in the interests of justice (*Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616). The interests of justice are not confined to the interests of justice in England, thus, the Court of Appeal in *Emmott* took into account the fact that a New South Wales court would be misled in the absence of the disclosure sought, holding that the international dimension of the case demanded a broader view of interests of justice.

13 Remedies / Interests / Costs

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

The parties are free to agree the scope of the tribunal's power to grant remedies (section 48(1)). In the absence of agreement by the parties, the tribunal is permitted to order the payment of a sum of money, in any currency (section 48(4)). However, this does not give the tribunal an unfettered discretion as regards the currency of an award. Where a tribunal is unable to ascertain from the terms of the contract any intention as to which currency should be used, the damages should be calculated in the currency in which the loss was felt by the claimant or which most truly expresses his or her loss (*Milan Nigeria Ltd v Angeliki B Maritime Company* [2011] EWHC 892). Additionally, the tribunal has the same powers as the court to order a party to do or refrain from doing anything, specific performance, or rectification, setting aside or cancellation of a deed or other document (section 48(5)). In the absence of the parties' agreement to the contrary, a tribunal has no power to award punitive damages for breach of contract under English law. However, where the parties' agreement is sufficiently wide enough to encompass claims under a foreign statute, and that foreign statute provides for special damages or punitive damages (e.g., triple damages in U.S. anti-trust claims), an arbitral tribunal may be able to award such damages in an arbitration sited in England and Wales. A tribunal cannot assume sovereign powers, such as the power to order imprisonment or the payment of fines to the state, as these powers are reserved for certain courts, and the powers of the courts in section 48(5) are limited to those possessed by both the High Court and a county court (*Kastner v Jason* [2004] 2 Lloyd's Rep 233).

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

The 1996 Act provides that parties are free to agree on the powers of the tribunal as regards the award of interest (section 49(1)). In the absence of the parties' agreement, the tribunal will be entitled to award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case, on the whole or part of any amount awarded by the tribunal or claimed and outstanding at the commencement of the proceedings, but paid before the date of the award (section 49(3)). Interest may be awarded from the date of the award up until payment on the amount of any award and any interest or costs (section 49(4)).

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

The 1996 Act provides that a party may be entitled to recover the costs of the arbitration (section 61). These include: the arbitrators' fees and expenses (section 59(1)(a)); the fees and expenses of any arbitral institution (section 59(1)(b)); and the legal or other costs of the parties (section 59(1)(c)). The general principle in English arbitration is that costs should "follow the event" (i.e., the successful party will be entitled to its costs) (section 61(2)). The parties are entitled to agree any costs formula but, in the absence of agreement, the tribunal may make an award allocating costs as between the parties in accordance with the general principle. An arbitral tribunal may depart from the general principle in relation to the whole or part of the costs, in the event that it concludes that in the circumstances it is not appropriate. In practice, a tribunal may treat interim steps or applications separately for the purpose of costs considerations, potentially resulting in an unsuccessful party recovering its costs in relation to an unnecessarily expensive and onerous interim step in the proceedings taken by the successful party.

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

An arbitral award may be subject to earnings-related tax, but the payment of tax is a personal matter for the party to whom damages are paid. Essentially, damages intended to replace lost income or profit may be taxable.

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

Until 2005, the use of third party funding in England and Wales was prohibited as being contrary to the doctrine of maintenance and champerty. These restrictions were, however, liberalised following a 2005 decision of the Court of Appeal determining that professional funding could in fact enhance access to justice for parties who would not otherwise be able to afford legal advice (*Arkin v Borchard Line* [2005] 1 WLR 3055). As a result of this decision, there are now several professional funders active in the market (such as Calunius Litigation Risk Fund LP, Argentum Litigation Investments, Harbour Litigation Funding Ltd, Allianz Litigation Funding, IMF (Australia) Ltd, Burford Capital, Global Arbitration Litigation Services Ltd and Commercial Litigation Funding Ltd).

Third party funding in England and Wales is currently self-regulating. In November 2011, the Association of Litigation Funders of England and Wales ("ALF") published a Code of Conduct which defines the role of and provides guidelines to a third party funder. The Code expressly refers to funding in the context of both litigation and arbitration (and requires, *inter alia*, that funders maintain confidentiality in respect of all information relating to the dispute, shall not seek to influence the conduct of the dispute by the party's counsel and that the funding agreement ("LFA") state the extent of the funder's liability to the litigant to meet any adverse costs order). Members of the ALF agree to comply with the Code (although membership of ALF is voluntary).

A number of criticisms have been levelled both at the Code and the ALF. For example, the Institute for Legal Reform of the US Chamber of Commerce (ILR) and the European Justice Forum (EJF) both advocate in favour of *binding* (as opposed to voluntary) regulation. The potential for conflicts of interest is a further concern that has been expressed.

Despite *Arkin*, the legitimate scope of third-party funding remains unclear, including in relation to a funder's liability for costs if the litigant is unsuccessful. In *Arkin*, it was suggested that liability for costs may extend to a funder that has attempted to exercise control over the litigation. Most recently, the High Court has held that liability may arise where, for example, the funder is responsible for the litigation taking place or for causing the successful litigant to incur costs that it would not otherwise have incurred (*Merchantbridge & Co Ltd and another company v Safron General Partner Ltd and other companies* [2011] EWHC 1524). It is unclear how far these decisions extend to arbitration, not least because the third party funder is unlikely to be a party to the arbitration agreement (and a tribunal will therefore generally lack jurisdiction to make an award of costs against them).

As far as the authors are aware, there is no requirement under English law for the existence of a third party funder to be disclosed in the proceedings (we note as a matter of interest only, however, the prior announcement by Rosuro regarding the existence of its agreement with the Calunius Litigation Risk Fund LP in relation to a potential arbitration against the Republic of Venezuela (the Request for Arbitration in which could be filed with ICSID no earlier than 15 June 2012)). However, recent rule changes regarding the recovery of success fees in Conditional Fee Arrangements (see section 58(A)(6) of the Courts and Legal Services Act 1990 (as amended), which prevents the recovery of success fees from the losing side in "proceedings") have brought into question whether parties to arbitration can claim the costs of a success fee from the losing side. In particular, while section 58A of the Courts and Legal Services Act defines "proceedings" as including any sort of proceedings for resolving disputes (not only those in a court), arbitrators retain a discretion under section 63 of the 1996 Act to determine the recovery of costs on the basis that it thinks fit. It is therefore unclear whether arbitrators are still able to make cost awards as they see fit, or if they are bound by the terms of section 58A(6). Finally, in May 2012, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 received Royal Assent (in force April 2013). This provides for the use of Damages-based agreements ("DBAs") in civil litigation whereby the lawyer can recover a percentage of the client's damages if the case is won, but receive nothing if the case is lost (it also makes provision for the drafting of a binding code of conduct). Prior to this amendment, DBAs were only enforceable in relation to employment matters.

14 Investor State Arbitrations

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

The United Kingdom (which incorporates England and Wales) signed and ratified the Washington Convention on 26 May 1965 and 19 December 1966, respectively. The Washington Convention ultimately entered into force in the United Kingdom on 18 January 1967.

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

In the United Kingdom, BITs are described as Investment Promotion and Protection Agreements ("IPPAs"). According to the Foreign & Commonwealth Office, the United Kingdom has concluded 127 IPPAs. The United Kingdom is also a signatory to the Energy Charter Treaty, having deposited its instruments of accession and ratification on 16 December 1997. Pursuant to Article 207 TFEU, and since 1 December 2009, foreign direct investment falls within the common commercial policy of the European Union. Accordingly, the European Commission now leads the negotiation and conclusion of BITs with states outside of the European Union. In this regard, in *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Republic of Hungary* (ICSID Case No. ARB/07/22), where the first claimant was a company registered in the UK, the European Commission was allowed to make submissions as a non-disputing party in relation to the effect of EU competition law on the obligations of the Republic of Hungary under the Energy Charter Treaty.

Moreover, as a result of its extended competence, the EU has implemented Council Regulation 1219/2012 ("Regulation 1219/2012"), which entered into force on 9 January 2013. Following the implementation of Regulation 1219/2012, all EU Member State BITs with non EU states signed prior to 1 December 2009 will remain in force until replaced by new treaties between the EU and the relevant state(s). As part of the Regulation, in the event the European Commission considers an existing EU Member State BIT (with a non-EU State) to represent a serious obstacle to the EU's negotiation of a replacement BIT, the Commission will consult with the relevant Member State in an attempt to resolve the matter.

Recently, the European Union has also negotiated several Free Trade Agreements ("FTAs") with states, such as Korea, which the United Kingdom would be party to. Similar negotiations for an EU-Japan FTA are understood to be underway shortly. Moreover, negotiations regarding the US-EU Transatlantic Trade and Investment Partnership commenced in July 2013.

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

The United Kingdom's model BIT was published in 2005 and amended in 2006. Key elements of United Kingdom BITs include provisions for equal and non-discriminatory treatment of investors and their investments, compensation for expropriation, transfer of capital and returns and access to independent settlement of disputes.

The main objective of the United Kingdom's model BIT was to provide legal protection for British foreign property in a rapidly developing international context. It is similar to the model BITs of other European countries. Its language tends to emphasise investment protection rather than the liberalisation of the investment policies of developing countries.

Of particular note in the UK model BIT is Article 3 which is the "most favoured nation (MFN)" article. Article 3.3 expressly establishes which articles of a BIT the MFN provision would apply to, and this includes the dispute settlement provision of a BIT. The US Supreme Court also recently passed comment as to whether the local litigation requirement in the UK-Argentina BIT was a procedural prerequisite to investor-state arbitration, or a necessary substantive step needed prior to the formation of an agreement to arbitrate.

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

Under section 9 of the State Immunity Act 1978, where a state has agreed in writing to submit disputes to arbitration it will be deemed to have waived its right to jurisdictional immunity (see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529). This will be relevant in respect of signatories to the Washington Convention and IPPA signatories.

A state may nonetheless claim immunity from execution in order to prevent enforcement of an arbitral award. Under section 13(2)(b) of the State Immunity Act 1978, this immunity from execution may be waived by written consent but not by merely submitting to the jurisdiction of the courts.

There is no immunity in respect of property which is for the time being in use or intended for use for commercial purposes. However, English and international courts historically have been reluctant to deem state assets to be used for exclusively commercial purposes (*Alcom Ltd v Republic of Colombia and others* [1984] AC 580).

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in England and Wales (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Recent and ongoing developments include:

First, the effects of the decision of the ECJ in *Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] All ER (D) 82, in February 2009 (which make unavailable in the English courts anti-suit injunctions in respect of proceedings brought in another EU Member State in breach of an arbitration agreement), have to some extent been mitigated (although not removed) by the amendments introduced in the Recast Regulation, adopted on 12 December 2012, coming into force in the courts of EU Member States on 10 January 2015.

(i) Each Member State court has the power to refer parties to arbitration, to stay or dismiss proceedings, and examine whether the arbitration agreement is null and void, inoperative or incapable of being performed (thereby reinforcing the arbitration exception).

(ii) A decision by the courts of a Member State concerning the validity or enforceability of an arbitration agreement is not subject to the rules in the Regulation, regardless of whether the court decided the issue as a principal issue or incidental question (a court in one Member State is, therefore, not bound by a decision of the court of another Member State in respect of the validity of an arbitration agreement and may decide that issue for itself based on its own system of law).

(iii) Where a Member State court has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the dispute from being recognised or enforced according to the Regulation; however, in the event of a conflicting arbitral award and a Member State court judgment, the New York Convention takes precedence over the Regulation (the primacy of the New York Convention is thereby confirmed).

(iv) The Regulation should not apply to any action or ancillary proceedings relating to arbitration, including, among others, the establishment of arbitral tribunal, the power of arbitrators, the conduct of an arbitration procedure or any action concerning annulment, review and recognition or enforcement of an arbitral award.

Under the Recast Regulation, the court of a Member State will no longer be required to stay its proceedings related to arbitration pending a decision of another Member State court of which was first seised in respect of the same matter (in this respect at least, overturning the decision in *West Tankers*).

Further, by expressly stating that the New York Convention takes precedence over the Regulation, the Recast Regulation permits enforcement of an arbitral award under the New York Convention despite of a conflicting judgment rendered by another Member State court.

However, the Recast Regulation deliberately omits any text that addresses whether or not intra-EU anti-suit injunctions in support of international arbitration are available (thereby failing to reserve *West Tankers* in this respect). Such actions remain controversial, because they are perceived to undermine the principle of mutual trust between the courts of Member States. It is certainly arguable that an anti-suit injunction should be available (as a proceeding "ancillary to" arbitration) but the better view may be that they are not, since Recital 12 affirms that each Member State Court has the power to decide on issues relating to arbitration.

Secondly, in the past year, the English courts have demonstrated their continued willingness to issue anti-suit injunctions in an attempt to prevent proceedings in non-EU Member States, in breach of arbitration agreements. In this regard, the most notable decision is that of the Supreme Court in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 (mentioned in question 7.4 of this Chapter). In this case, the Supreme Court confirmed the grant of an anti-suit injunction to protect an arbitration agreement favouring England, despite the respondent not actually having commenced, or having no intention to commence, arbitration proceedings against the appellant. In a well-reasoned judgment, the Supreme Court made clear that an anti-suit injunction can be made to support both a positive right to arbitrate disputes in a particular forum; and a negative right not to be sued in any forum other than that specified in an arbitration agreement. When making its judgment, the Supreme Court also made clear that following the European Court's decision in *Allianz SpA v West Tankers Inc*, Case C-185/07 [2009] All ER (D) 82, the English courts would not grant an anti-suit injunction where the court proceedings in question were commended or continued within the European Union (or Lugano Convention) *espace juridique*.

Following the Supreme Court decision in *Ust-Kamenogorsk*, the English courts' willingness to grant or uphold anti-suit injunctions was further seen in the High Court decision of *Banni v Erez (Trustee in Bankruptcy of Eli Reifman)* [2013] EWHC 3689. In this case, the trustee of a large bankruptcy (Erez) unsuccessfully applied to set aside an anti-suit injunction that had been issued by the High Court, restraining commencement or pursuance of legal proceedings in Israel, in respect of matters falling within an arbitration agreement. Prior to the granting of the injunction, Erez had commenced insolvency proceedings in Israel, the local court refusing to grant a stay despite the presence of English law guarantees and a London arbitration clause. In considering whether to uphold the injunction, Burton J rejected Erez's argument that the existence of insolvency proceedings in Israel was sufficient reason for the English court not to grant, or continue granting, an anti-suit injunction.

Thirdly, the English Courts have also displayed a continued reluctance to allow challenges to arbitration awards, maintaining the view that arbitration proceedings should receive limited interference from the courts. In this regard, the judgments of *Gurjarat NRE Coke Ltd and Shri Arun Kumar Jagatramka v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm), *Statoil v Sonatrach* [2014] EWHC 875 (Comm) *and Lombard-Knight v Rainstorm Pictures Ltd* [2014] EWCA Civ 356) (mentioned in questions 10.1 and 11.3 of this Chapter) are of note. In *Gurjarat NRE Coke*, for example, the High Court reaffirmed the high-standard required for a successful challenge under section 68, finding that the Tribunal had acted "impeccably". In *Statoil*, the High Court doubted whether a Tribunal's assessment of the evidence (and its findings) "*…can as a matter of law, amount to a serious irregularity under section 68*". Flaux J also made clear that the question was not whether the tribunal "got it right", but whether there had been due process. Finally, in *Rainstorm Pictures*, the High Court adopted a practical approach to the formal requirements of section 102, finding: (a) they should not be forced into "hollow formalism"; (b) that the wording of section 102 did not require "independent" certification of the arbitration agreements; and (c) it was inherent in the Statement of Truth that copies of the arbitration agreements were true originals. The authors support the English courts' strict approach to challenges of arbitral awards, considering that it strikes the right balance between judicial oversight (required to ensure due process) and party autonomy.

Fourthly, as briefly outlined in question 14.2 of this Chapter, the EU continues to take the lead in matters of foreign direct investment. In this regard, given that the European Commission will now consult with a Member State when an existing BIT represents a serious obstacle to the EU's negotiation of a replacement BIT, there is potential for conflict and disagreement between Member States and the Commission. This matter is likely to be of particular importance in the UK, where there are 94 existing BITs, and where the UK's relationship with the EU is coming under ever increasing scrutiny at a political level.

Finally, it appears likely that the LCIA is set to adopt updated Rules in 2014. In February 2014, the LCIA issued a revised Draft of its Rules ("Draft Rules"). The LCIA was set to consider the Draft Rules on 9 May 2014. Since issuing the Draft Rules, the LCIA made clear that it intended to consider the Rules at a meeting on 9 May 2014. In general, the Draft Rules propose changes to a number of areas including the duties of arbitrators, formation of arbitral tribunals, law applicable to the arbitration agreement and arbitration, and seat of arbitration in default of such an agreement. One of the main developments proposed in the Draft Rules is to include Guidelines for Legal Representatives ("the Guidelines"). The stated aim of the Guidelines is to "promote generally the good and equal conduct of the parties' legal representatives appearing by name *within the arbitration proceedings*"; and the Guidelines are "not intended to derogate from an arbitration agreement or to undermine any legal representatives' primary duty of loyalty to the party it represents". Nor do they derogate from "mandatory laws, rules of law, professional rule or codes of conduct". Importantly, however, paragraph 7 of the Guidelines provides that the "Arbitral Tribunal may decide whether a legal representative has violated these general guidelines and, if so, how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6". If the Draft Rules are adopted, it will be interesting to see how they are applied and if the Guidelines make a positive contribution to the conduct of legal representatives in LCIA arbitral proceedings.

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

Some English institutions have taken steps to address the mounting time and costs involved in international arbitration proceedings. In particular, the Chartered Institute of Arbitrators ("CIArb") hosted a September 2011 conference on this topic. The conference presented findings from a CIArb research survey of various arbitral institutions, which showed that the UK was the most common seat chosen by respondents to the survey (most of whom were based in Europe), that the average length of an arbitration was between 17 and 20 months, and that claimants' arbitration costs were 10% lower in the UK than in the rest of Europe. The findings of the CIArb survey shed light on the need for a more flexible process which is why conference participants recommended the use of a diverse "toolkit of processes" to address disputes. In this sense, it was understood that arbitrators should develop a firm grasp of the key issues early in the proceedings in order to efficiently delegate time, narrow the evidence, streamline hearing timelines, and use expert testimony most effectively.

As noted above, the LCIA recently published its decisions on arbitrator challenges (referred to above in question 5.4). In addition, the LCIA is currently reviewing amendments to its rules, due to be published later this year.

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