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London as a Centre for International Commercial Arbitration

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International commercial arbitration has become somewhat of a phenomenon in recent decades, and is now widely seen as best practice for commercial parties involved in disputes with an international dimension. This article reviews London's position as a major arbitral seat, and the contribution English arbitration law has made to London's place as a leading situs of international arbitrations.

The Advantages of International Arbitration

Businesspeople rightly cite neutrality, privacy, procedural flexibility and the international enforceability of awards as the major advantages of international arbitration over transnational litigation. By choosing international arbitration parties also avoid the significant and potentially very costly risk of parallel proceedings in different national courts. The scenario where one party's claims are heard in one country, and the other party's claims are heard in another, is (as it should be) unpalatable to businesspeople. International arbitration offers parties the ability to have all of their disputes centralised in a single neutral and private forum, resulting in an arbitral award that enjoys global enforceability pursuant to the New York Convention.

Party autonomy is the hallmark of arbitration, and it is this autonomy which gives disputants the freedom to choose neutral legal rules, arbitral tribunals and the seat of their arbitration. This autonomy also allows parties to make a multitude of other important choices as to the procedures their arbitration will follow, ensuring that international arbitration is more effective and efficient than litigation. Notwithstanding this flexibility, business (and state) users of international arbitration do not typically wish to risk the uncertainty of abandoning legal rules in favour of equitable or moral principles, or drawing lots for example. Businesses choose to resolve their disputes in accordance with substantive legal rules so that their legal rights are identifiable, ascertainable and (to an extent) predictable. They similarly make a choice about where to seat their arbitration, and thereby a choice of which country's domestic courts (and arbitration law) will support and oversee the arbitral process. Of course, not all substantive legal systems or arbitration laws are the same. National courts and their attitudes to international arbitration vary greatly also. It follows that some jurisdictions better serve the interests of parties to international commercial arbitration than others.

London has been at the centre of international arbitration's success story. In 1995 (both immediately prior to the enactment of the English Arbitration Act 1996 and the first year ICC arbitration statistics were made publicly available) the ICC received 417 requests for arbitration, of which only 24 were for arbitrations seated in the United Kingdom (5.8% of the ICC's caseload). By contrast, 111 of the ICC's new arbitrations in that year were seated in France (26.6% of the ICC's caseload) and 91 in Switzerland (21.8% of the ICC's caseload). Since 1995, arbitration, particularly in London, has flourished. In 2008 663 requests were filed at the ICC (an increase of over 50%), with 61 sited in England, an increase of over 100% and up to 9.2% of the ICC's caseload. Although the number of ICC arbitrations increased over 50% and those seated in London well in excess of 100% during this period, the number of arbitrations seated in France dropped from 111 to 87 (from 26.6% to 13.1% of the ICC's caseload), and also dropped in Switzerland from 91 to 83 (from 21.8% to 12.5% of the ICC's caseload). While the LCIA, based in London, has only recently begun to publish limited statistics, in 2003 it received 99 new requests for arbitration. By 2008 the LCIA's caseload had more than doubled, to 215 new requests for arbitration. Although the LCIA does not say how many of these arbitrations were seated in London, it is fair to assume that a very good proportion of them were.

How Does International Arbitration in London Meet the Demands of Commercial Parties?

It is important to recognise that the reasons for London's increasing importance as a centre for international arbitration are not monolithic. This expanse has occurred at the same time as an explosion in globalisation and the economic interconnectedness of world economies, which has seen London's importance as a centre for international commerce increase. London has also experienced a boom in its financial services sector and related industries. Moreover, London has historically been a significant international centre for the commodities, shipping and insurance industries, and continues to be an attractive home for arbitration concerning these disputes.

The English legal system is also attractive to foreign businesses contemplating arbitration. As an English speaking common law jurisdiction, English law and the English courts offer familiarities to arbitrating parties from English speaking and common law jurisdictions alike. The English legal system is also mature and predictable. Its contract and commercial laws are identifiable, sophisticated and supported by a strong body of precedent. Its courts uphold the Rule of Law, offer predictability, transparency and stability and they are free from corruption and political influence. London is a seen as offering a neutral and fair playing ground. These are all important considerations for parties when, as part of their commercial dealings, they negotiate the place where they will arbitrate in the event a dispute arises.

There is no doubt, however, that the support England's arbitration law offers international arbitration has also played a significant role in promoting London as a leading centre for international arbitration. The 1979 and then 1996 Arbitration Acts were each watersheds in the development of arbitration law in England, both philosophically and practically. In particular, the Arbitration Act 1996 (Act), described by the House of Lords in 2005 as a "*radical*" departure from England's previous arbitration regime, banished many long-entrenched views as to the necessity of judicial oversight of the arbitral system. (*Lesotho Highlands Development Authority v. Impregilo SpA and others* [2005] UKHL 43, [17].)

The Freedom to Arbitrate

It would perhaps be easy to take for granted and overlook what is the cornerstone of the Act, and that is its deep support for party autonomy. The Act makes that support explicit, expressly declaring that "*parties should be free to agree how their disputes are resolved*". (Section 1.) This includes, of course, the choice of arbitration over litigation. The corollary of parties choosing international arbitration as their method of dispute resolution is the extent to which the law of the seat gives effect to that choice. In particular, commercial parties choosing where to arbitrate their disputes are concerned about how courts at the seat will interpret arbitration agreements, and whether the laws of the seat restrict the arbitrability of certain types of disputes i.e. to whether certain types of disputes are not amenable to resolution through arbitration.

As seen in Section 1 of the Act, English arbitration law strongly upholds the freedom to arbitrate. In support, the English courts have recognised and enhanced this freedom by interpreting arbitration agreements widely, and by permitting a wide range of disputes to be resolved by way of arbitration. The House of Lords recently confirmed England's commitment to these policies, declaring that "*any jurisdiction or arbitration clause in an international commercial contract should be liberally construed*" and that "*the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*". The House of Lords also confirmed that the words "*arising out of*" should cover every dispute that could arise between the parties and that the words "*arising under the contract*" are to have no narrower meaning. (*Fiona Trust & Holding Corp v. Privalov* [2007] 4 All ER 951.) English law applies the same liberal approach to issues of arbitrability. In addition to contractual claims, English law permits non-contractual claims such as tort actions, intellectual property disputes and certain statutory claims to be resolved through international arbitration.

Subsequent to *Fiona Trust*, the English High Court has continually confirmed that it will widely interpret arbitration agreements so as to give effect to the parties' intention to arbitrate their disputes. For example, in *Norscot Rig Management PVT Ltd v. Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm) a claimant sought to challenge an arbitrator's jurisdictional award which held that the arbitrator had jurisdiction to adjudicate certain set-offs and counterclaims made by the respondent in the arbitration. Those set-offs and counterclaims arose not from a breach of the contract containing the arbitration agreement, but pursuant to the breach of a second contract between the same parties (which did not contain an arbitration clause). The arbitrator determined that he had jurisdiction under the arbitration agreement to determine the counterclaim. The High Court dismissed the challenge to the arbitrator's award on jurisdiction, holding that while the counterclaims did not "arise out of" the terms of the contract giving rise to the arbitration, they did "relate to" the contract under which the arbitration was commenced and therefore within the scope of the arbitration agreement.

To What Extent Can Parties Empower Arbitral Tribunals to Determine Their Own Jurisdiction?

Prior to the Act the English courts were subject to heavy criticism for their excessive intervention in arbitral proceedings. Such interferences were often related to issues concerning the ability of an arbitral tribunal to determine its own jurisdiction. The position prior to the Act, that arbitrators could do no more than express a preliminary view as to whether they had jurisdiction or not, has now been wholly discarded. The Act has expressly embedded the doctrine of *kompetenz-kompetenz* into English arbitration law, positively recognising the competence of an arbitral tribunal to determine and rule on its own jurisdiction in a final and binding manner. In this regard, the Act provides that unless otherwise agreed by the parties "*the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement*". (Section 30.) That determination, unless otherwise agreed by the parties, is "*final and binding*" (subject to limited rights of challenge, as discussed below). (Section 58.)

The ability for an arbitral tribunal to rule on its own jurisdiction, and for that ruling to be final and binding, is of great philosophical and practical importance. Having entered into a consensual agreement to arbitrate (hence excluding the jurisdiction of domestic courts), parties have a legitimate expectation that effect will be given to their expression of free will. In the same way, parties to international commercial arbitration do not expect to be faced with delays and difficulties caused by recourse to domestic courts when a question is raised as to the jurisdiction of the tribunal. The practical importance of recognising *kompetenz-kompetenz* principles is that challenges to the jurisdiction of the tribunal do not force the arbitrators to stay the arbitral proceeding and refer the matter to the court for determination. Rather, the determination may be made by the arbitrators themselves, subject to appeal. As the drafters of the Act explained, depriving tribunals of the power to rule on jurisdiction meant that recalcitrant parties could delay valid arbitration proceedings indefinitely by making spurious challenges to jurisdiction. (Departmental Advisory Committee on Arbitration Law, 1996 Report on the Arbitration Bill, at para. 138.)

The Act also provides for the situation where a party objects to the jurisdiction of the tribunal during the course of an arbitration. In these circumstances the Act again affirms the principles of *kompetenz-kompetenz*, by allowing the tribunal to rule on the matter (either in an award as to jurisdiction, or in its award on the merits). (Section 31.) This not only reaffirms the priority and competence of an arbitral tribunal to rule as to its own jurisdiction, but it also ensures the efficient resolution of disputes by ensuring that the tribunal render an award as to jurisdiction before any possible recourse to the courts.

The principle of separability is also found in the Act. Separability, which provides that an arbitral tribunal's decision that the main contract has not been concluded or is null and void shall not *ipso facto* invalidate the arbitration agreement, recognises the intention of parties to arbitrate rather than litigate their disputes and reinforces the priority and finality of arbitral awards going to the tribunal's jurisdiction. The concept was recently described by the highest English court as "*part of the very alphabet of arbitration law*". (*Lesotho Highlands Development Authority* at [21].) Section

7 of the Act enacts the principle of separability, providing that "*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*". Thus, where an arbitration agreement is not in issue or directly impeached by the grounds used to attack the validity of the main contract then English courts must refer the dispute to arbitration. (*Fiona Trust*.)

What Procedural Flexibility Do Parties Enjoy Under the Act?

The Act grants parties wide autonomy and freedom to determine the structure and procedures of their arbitration and does not prescribe the format that arbitrations must follow. Parties are expressly granted the ability to determine the extent of the tribunal's powers and the procedures to be adopted in the arbitration, the parties being "*free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings*". (Section 38.) The Act also provides that the tribunal's power to decide procedural and evidential matters is "*subject to the right of the parties to agree any matter*". (Section 34.) Similarly, the Act permits parties to choose what system of law, or other considerations, will be applied by the tribunal in deciding their dispute. Parties may mandate a tribunal to decide the issues in contention in their arbitration either in accordance with a substantive law, as is typically the case, or "if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal". This may include mandating the tribunal to determine the issues according to the equitable principles of *amiable composition* or *ex aequo et bono*. (Section 46.) In addition, the Act allows parties to agree on the form of an award including agreeing that the award may dispense with reasons, but provides default requirements in the absence of agreement (requirement for award to be in writing and provide reasons). (Section 52.)

The Act's recognition and support for party autonomy and procedural flexibility gives parties confidence that they can determine the procedure of their arbitration and that courts will not interfere with their choices. Parties' procedural choices are, however, subject to safeguards in the Act which seek to ensure that minimum standards of procedural fairness and public policy are complied with. The instances where English courts can intervene in the arbitral process, to uphold these exceptions to the Act's policy of judicial non-interference, are now reviewed.

Oversight in the Interests of Justice: What Degree of Finality Does English Law Afford to Arbitral Awards?

In a fundamental philosophical break from England's previous arbitration law, its Arbitration Act of 1979 began to circumscribe the ability of English courts to review the merits of arbitral awards and otherwise participate in the arbitral process. The advent of the 1996 Act heralded yet greater reform, further entrenching the principles of party autonomy, finality and judicial non-interference in arbitral proceedings sited in England. The starting point under the Act is that arbitral awards are final and binding. (Section 58.) Nor do the English courts continue to exercise (as they did before the Act) any general supervisory jurisdiction over arbitrations. Instead, English courts are limited to exercising specific statutory powers with regard to arbitral processes, and only have limited appeal and review functions. The House of Lords reiterated these principles in *Lesotho*, stating that a "*major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process*". Moreover, the House of Lords strongly expressed the sentiment that the Act, especially as concerned international arbitrations, should operate as a code, directing that courts should "*rely on the language of the Act*" and that "*International users of London arbitration should ... be able to rely on the clear 'user–friendly language' of the Act and should not have to be put to the trouble or expense of having regard to the pre–1996 Act law on issues where the provisions of the Act set out the law. If international users of London arbitration are not able to act in that knowledge, then one of the main objectives of the reform will have been defeated*". This is a strong policy statement that English courts will be slow to interfere with the decisions of arbitrators. A subsequent High Court decision concerning an international arbitration seated in London, reiterated this policy, stating that the ethos of the Act "*is to give the courts as little chance to interfere with arbitrations as possible*". (*Elektrim S.A v. Vivendi Universal S.A. & Ors* [2007] EWHC 11.)

Notwithstanding the Act's policy against judicial interference in the arbitral process, it does provide for limited rights of appeal and review to the courts. These rights seek to ensure that parties have an avenue to challenge arbitral awards that breach minimum standards of procedural fairness or justice, and recognise that parties who choose international arbitration do not generally do so at the expense of resolving their disputes in a just and fair manner. In addition to safeguarding private interests, oversight of arbitrations by the court at the seat of the arbitration also uphold the public interest in safeguarding minimum standards of fairness, justice and public policy. It is a widely accepted principle of international arbitration law that arbitration procedures and awards must not offend public policy at the seat of arbitration, or in the enforcement jurisdiction (as reflected in Article V(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958). Perhaps most importantly, oversight by national courts plays a gatekeeper role in safeguarding the legitimacy of the international arbitral system itself.

Thus, while the Act affirms party autonomy it expressly makes parties' free will "*subject only to such safeguards as are necessary in the public interest*", reflecting the possible need to balance what may be competing interests. (Section 1.) While parties to an international arbitration seated in England are free to choose the procedures which will govern their arbitration, and arbitrators free to exercise broad discretion in accordance with the mandate given to them by the parties, both arbitral procedures and awards must comply with limited public interest safeguards required by English arbitration law.

To this end the Act includes a number of mandatory safeguards. For example, the Act places positive, mandatory obligations on arbitral tribunals to "*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*" and "*to provide a fair means for the resolution of the matters falling to be determined*". (Section 33.) The Act also provides for limited rights of appeal and review to ensure minimum rights of procedural fairness are upheld and to maintain the integrity of the arbitral system. Challenges to an award on the basis of lack of substantive jurisdiction (Section 67), serious irregularity affecting the tribunal (Section 68) and appeals on points of law arising out of an arbitral award (Section 69) are available grounds by which parties may seek to set aside arbitral awards.

Section 67: Challenges to Substantive Jurisdiction

Section 67 of the Act provides parties with a right to challenge an arbitral award as to its substantive jurisdiction. That is, as to 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. (Sections 82(1) and 30(1)(a) to (c).) The ability to challenge a tribunal's jurisdictional award is a significant check on the *Kompetenz-Kompetenz* principle embodied in Section 30 of the Act. It is also clear that a jurisdictional challenge pursuant to Section 67 does not proceed by way of limited review of the arbitrator's decision. Instead, challenges proceed by way of a de novo rehearing with no deference given to arbitral awards challenged for lack of jurisdiction; it is for the court to determine whether the tribunal had been correct, not whether it has come to a reasonable conclusion. (*Azov Shipping Co. v. Baltic Shipping Co* [1999] 1 Lloyd's Rep 68; *Republic of Serbia v. Imagesat International NV* [2009] EWHC 2853 (Comm); *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v. Cometal SAL* [2010] EWHC 29 (Comm); *Norscot Rig Management PVT Ltd v. Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm)); *B v. A: (1) A (2) X v. B* [2010] EWHC 1626 (Comm.).)

Unlike appeals on questions law (Section 69), parties cannot contract out of the right to bring a challenge against an award for want of substantive jurisdiction pursuant to Section 67. The recent decision of the High Court in *B v. A* has also confirmed that an error in the application of the chosen law does not involve a lack of substantive jurisdiction as defined in the Act. (*B v. A* at [28].)

While the ability to challenge an arbitral award as to its jurisdiction appears to be inconsistent with principles of *Kompetenz-Kompetenz* and judicial non-interference, English law (as do many other jurisdictions) justifies this policy choice on the basis that it affords proper weight to a party's assertion that it should never have been before the arbitrators in the first place (and, possibly, that the attempt to instigate arbitration proceedings was an abuse of process or itself a breach of contract). Court oversight of the tribunal's substantive jurisdiction is therefore seen as safeguarding the legitimacy of the wider arbitral regime. In *Azov Shipping* Rix J justified the court's exercise of its Section 67 jurisdiction by arguing that "[u]*ltimately, a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight*". The right to challenge a tribunal's decision as to its own jurisdiction is also consistent with England's obligations under the New York Convention, which permits refusal of enforcement where there is no arbitration agreement. (New York Convention, Article V(1)(a); Arbitration Act 1996, Section 103(2)(b); *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755.)

At the same time, the Act seeks to affirm parties' interests in finality by allowing only a short window within which jurisdictional challenges may be made. If no objection is taken to the award by means of a challenge under Section 67 within 28 days of the award or under any agreed procedure, the parties are deemed to have waived their right to object, and therefore cannot subsequently seek to challenge the award for want of jurisdiction by any other means. (Section 73(2)). This limitation period provides certainty and finality, so that claimants and tribunals to arbitral proceedings can continue with confidence in the event of a waiver.

Section 68: Challenge for Serious Irregularity

Uncontroversially, and consistent with England's obligations under the New York Convention, Section 68 of the Act provides a right of challenge where there is serious irregularity affecting the tribunal. Such irregularities pertain to procedural deficiencies in the arbitral processs or award and which have caused (or will cause) "*substantial injustice*". (Section 68(2)). In contrast to a jurisdictional challenge under Section 67, court oversight pursuant Section 68 is by way of review rather than appeal. Accordingly, an erroneous exercise of power or a mere error of law cannot amount to an excess of power, and it is not for the court to assess whether the tribunal arrived at the "correct" decision. (*Lesotho Highlands Development Authority* at [27]; *Double K Oil Products 1996 Ltd v. Neste Oil OYJ* (2009) [2009] EWHC 3380; *B v. A* at [26].)

Section 69: Appeal on Points of Law

Section 69 of the Act provides, only where English law applies to the merits of the dispute, that a dissatisfied party has the right to apply to the court for leave to appeal against an award on the ground of error of law "*unless otherwise agreed by the parties*". Judicial review of points of English law in an arbitration award can therefore, in all categories of consensual arbitration and irrespective of the situation of the parties or of the seat of the arbitration, be excluded by agreement between the parties.

Other than the requirement for such an agreement to be in writing, there is no guidance in the Act as to what terminology is required. (Section 6.) It is clear, however, that the exclusion agreement does not have to form a part of the arbitration agreement itself, and can be incorporated by reference to the arbitration rules governing the arbitration. For example, Article 28(6) of the ICC Rules provided that "*By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any forms of appeal insofar as such waiver can validly be made*". (*Sumukan Ltd v. The Commonwealth Secretariat* [2007] EWCA Civ 243; *B v. A* at [12].) The High Court has recently confirmed, however, that an arbitration agreement providing that the "*decision of the majority of the arbitrators, rendered in writing, shall be final, conclusive and binding*" did not exclude the right of appeal on points of law. Instead, the High Court held that clear and express words excluding rights of appeal on points need to be included in the arbitration agreement (although reference to Section 69 itself did not need to be made). (*(1) Shell Egypt West Manzala GmbH (2) Shell Egypt West Qantara GmbH v. Dana Gas Egypt Ltd (Formerly Centurion Petroleum Corporation)* [2009] EWHC 2097 (Comm).) Parties wishing to exclude appeals of law should therefore be conscious to specifically exclude such a right when drafting their arbitration agreement.

In sum, apart from the uncommon occurrence of a challenge to the tribunal's jurisdiction under Section 67 of the Act, the Act permits parties wide autonomy to grant arbitrators exclusive power to determine the legal consequences of all aspects of their dispute. Thus, English arbitration law affords parties significant ability to limit interference by the courts in their private proceedings.

Concluding Comments

As a seat for international arbitration, London provides parties with a mature, predictable, transparent and neutral support structure that emphasises party autonomy, flexibility, and judicial non-interference in the international arbitration process. Although the Act permits limited court oversight of arbitral processes, it does so only in limited circumstances and only to uphold and enhance the legitimacy of arbitration as a means of dispute resolution. The English courts have consistently underlined their support for the arbitral process by intervening only in accordance with the "*clear 'user-friendly language' of the Act*", and such support will undoubtedly continue. This commitment to creating a business friendly - and importantly predicable - support structure for international arbitration highlights again the radical changes introduced by the 1996 Act, and one of the reasons for the growing popularity of London as an arbitral seat.

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