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National Report for England and Wales (2019 through 2020)

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including

ANNEX I: The Arbitration Act 1996 (C.23)

ANNEX II: The Arbitration Act 1996 (Commencement No. 1) Order 1996

Chapter I. Introduction

1. Law on Arbitration

a. *Commercial arbitration*

English arbitration is a contractual method of resolving disputes. By their private law contract, the parties agree to entrust a dispute to the decision of their arbitration tribunal, to the exclusion of state courts. The tribunal is required to be impartial and to act fairly and the parties bind themselves to accept and implement the decision, whether or not they think it right in law or fact, subject only to such safeguards as are necessary in the public interest. (1) As of 31 January 1997, the Arbitration Act 1996 (C.23) ("the 1996 Act") became the principal English arbitration statute (see **Annex I**). (2) It is both a restatement, with important reforms, of English arbitration law and a consolidating statute, with significant amendments, of previous arbitration legislation: the Arbitration Acts 1950, 1975 and 1979 (together with the Consumer Arbitration Agreements Act 1988). (3) It re-enacts the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). To the extent there are any
P 2 ● extant arbitration proceedings commenced before 31 January 1997, these are subject to the old law under the English Arbitration Acts 1950-1979.

b. *The 1996 Act*

England has for many centuries been one of the major centres of international commerce. Consequently, the law and practice of transnational commercial arbitration has a long history. In modern times, a succession of statutory reforms from 1889 to 1979 led to the Arbitration Act 1996. The 1996 Act is the most extensive statutory reform of English arbitration law to date. Its scope exceeds any previous English statute on arbitration. It restates, with important modifications, the law and practice of English arbitration, both common law and statute, running chronologically through each stage of an arbitration: from the arbitration agreement, the appointment of the arbitration tribunal, the conduct of the arbitration, the award, to the English Court's recognition and enforcement of the award. The 1996 Act also consolidates previous arbitration statutes (with amendments) and provides a unitary non-interventionist regime for commercial arbitration in England. It has abolished the old distinction under the 1950-1979 Acts between domestic and non-domestic arbitration, such that the same regime applies to domestic and international arbitrations. (4)

Its form, language and scope are innovative for an English statute, (5) but it is not a comprehensive code on English arbitration. Certain topics are omitted deliberately (e.g., a definition of arbitration, arbitrability, most conflict of law rules, the privacy and confidentiality of arbitration proceedings, the secrecy of arbitral deliberations and oral arbitration agreements) and rely for their development upon the case law. Other topics that are addressed in provisions nonetheless require fuller explanation by reference to previous decisions of the English Courts. To this end, the 1996 Act is accompanied by two official commentaries prepared by the Departmental Advisory Committee ("DAC"): its Report on the Arbitration Bill 1996 and its Supplementary Report on the Arbitration Act 1996 (DAC Report I and DAC Report II). (6) For a greater understanding of certain provisions, regard must also be had to the DAC's earlier reports and to the corresponding provisions of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("the UNCITRAL Model ● Law" or "the Model Law") (7) and its *travaux préparatoires*. (8)
P 3 The 1996 Act has now been in force for more than twenty years and many of its provisions have been the subject of consideration by the English Courts. Much of the case law prior to the 1996 Act is of limited use in interpreting the 1996 Act, (9) save where it addresses matters not covered by the 1996 Act or where it elucidates principles that the 1996 Act restates; accordingly, this Chapter refers to the pre 1996 Act case law, where appropriate.

c. *Three general principles*

The 1996 Act begins by reciting three general principles on which Part I (Sects. 1 to 84) is founded (Sect. 1). The first is that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; the second recognises party autonomy in the choice of procedure, subject only to such safeguards as are necessary in the public interest; and the third enjoins the English Court not to intervene in the arbitral process in matters governed by the 1996 Act except as the 1996 Act provides. The first principle is also enshrined in Sect. 33, imposing on the arbitration tribunal a general duty to act fairly, impartially and efficiently, as well as in Sect. 40, imposing a general duty on the parties to ensure the proper and expeditious conduct of the arbitration proceedings. Both of these are mandatory provisions. As the third principle illustrates, the philosophy of the UNCITRAL Model Law pervades the 1996 Act. The injunction against undue court intervention is similar in practical effect, even where the Model Law's language is missing or modified. (10)

d. *Party autonomy*

The second principle is also expressed in Sect. 34(1), taken almost directly from Art. 19(1) of the Model Law, the Magna Carta for party autonomy in modern laws on international commercial arbitration. The 1996 Act's restrictions on party autonomy are expressly
P 4 listed as mandatory provisions in ● Sect. 4(1) and Schedule 1. (11) Only four of these can be regarded as restrictions on the will of the parties, (12) the remainder being intended to protect arbitrators, arbitral institutions and other third parties, and to entrench certain legal remedies for an aggrieved party.

Apart from these mandatory provisions, the non-mandatory provisions of the 1996 Act are effectively default procedures that apply in the absence of the parties' agreement on certain aspects of procedure. Indeed, almost all non-mandatory provisions in Part I of the 1996 Act are prefaced by the phrase “unless otherwise agreed by the parties”. Sect. 4(3) specifically provides for the parties' application of institutional rules, such as the arbitration rules of the ICC, LCIA or UNCITRAL. Where those rules apply to the matter in issue, the English Court has either no power to intervene at all, or, in the case even of certain mandatory provisions, such as the removal of an arbitrator under Sect. 24, no power to intervene unless the aggrieved party has first exhausted its remedies under the agreed arbitration rules. Moreover, Sect. 4(5) generally provides that the parties' choice of a foreign law as the law applicable in respect of any matter covered by a non-mandatory provision is equivalent to an agreement not to apply the 1996 Act's default provision (although note that such a choice cannot be made in general, but instead there has to be a choice of law with regard to the specific provision of the Act which the parties agree is not to apply (13)). In this way, English arbitration is formally liberated from rigid adherence to the procedures of the English Court in favour of a consensual procedure chosen by the parties for their particular arbitration and dispute, a free-standing system within a broad statutory framework intended only to guarantee fundamental principles of fair treatment, impartiality and efficiency. (14)

e. *Scope of application*

Part I of the 1996 Act applies when the juridical seat (legal place) of the arbitration is in
P 5 England: Sects. 2(1) and 3. The parties might not have chosen ● directly to have England as the seat. In *Atlas Power Ltd v. National Transmission and Despatch Co Ltd* where foreign parties agreed to arbitration “in accordance with the London Court of International Arbitration” but disagreed as to the seat, the English Court accepted as valid the LCIA's determination of the seat as England, with the result that Part I applied. (15) In appropriate cases the English Court has certain auxiliary powers to support a foreign-seated arbitration: see Sect. 2(3) on securing the attendance of witnesses and preserving evidence and property etc. under Sects. 43 and 44. (16) Regardless of the seat, the English Court has power to stay English legal proceedings in favour of the parties' arbitration agreement and to enforce an arbitration award in England: Sect. 2(2).

The mere fact that parties have chosen English law, expressly or impliedly, as the law applicable to their arbitration agreement does not mean of itself that Part I applies to their arbitration proceedings. This Part applies where the seat is in England (or where one of the special circumstances exists under Sect. 2 for its limited application). See *Dubai Islamic Bank PJSCv. Paymentech Merchant Services Inc* [2001] 1 All ER (Comm 514), paras. 31-55 for an analysis of how the English Court approaches the determination of the seat.

f. *Commencement date*

Save for Sect. 46(1)(b) of the 1996 Act on *ex aequo et bono* clauses (see Chapter V.5.*c* below), the 1996 Act has partial retrospective effect: Part I applies to arbitral proceedings commenced on or after 31 January 1997, irrespective of when the arbitration agreement was made: see Sect. 84 and the Commencement Order. (17) Part II on domestic arbitration agreements has never come into force. There is the possibility of abolishing these provisions altogether under Sect. 88 of the 1996 Act. (18) Unless and until Part II
P 6 comes into ● force, Part I governs both domestic and non-domestic arbitration proceedings. Part III on the enforcement of awards will not apply to awards made before 31 January 1997, where the old law under the 1950 through 1979 Acts will continue to apply.

To the extent that there are any extant arbitrations commenced before 31 January 1997, the old law will continue to apply to them. (19)

Where the 1996 Act engages the English Court, Part 62 (together with its Practice Direction) of the Civil Procedure Rules ("CPR") also applies, together with related court guides (especially Section O (Arbitration) of the Commercial Court Guide). (20) Of most practical relevance is Section I of CPR Part 62, which deals with applications to the Court under the 1996 Act. It contains rules relating to matters such as issuing court applications in aid of arbitration, case management, staying proceedings under Sect. 9 and extensions of time. Applications to the Court are made by use of an arbitration claim form in accordance with the procedure under CPR Part 8 (apart from applications under Sect 9, which are made by the ordinary application process during existing proceedings). (21) Unless the Court orders otherwise, hearings of arbitration applications to the Court are generally heard in private, whereas applications dealing with a preliminary point of law under Sect. 45 or an appeal on a question of law under Sect. 69 will be heard in public. (22) This inroad into confidentiality is a reflection that such court proceedings are likely to engage the public interest (although it is also in the public interest to facilitate a consensual method of dispute resolution – the courts can take into account the parties' expectations regarding privacy and confidentiality when they agree to arbitrate (23)). The Court may also decide to rule without a hearing. (24) Section III of Part 62 deals with enforcement under Sects. 66 and 101 of the 1996 Act and relevant sections of the old law. It mirrors the requirements in those provisions. (25) This Section also deals with the enforcement of awards rendered pursuant to the ICSID Convention. (26) The Practice Direction accompanying Part 62 contains further rules relating to court proceedings dealing with arbitration applications.

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g. *The arbitration exception*

Arbitration is ostensibly excluded from the scope of the EU regime on the recognition and enforcement of civil judgments as well as the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, enacted by the Civil Jurisdiction and Judgments Acts 1982-1991. In general, legal proceedings ancillary to the arbitration agreement, the arbitration and the arbitration award fall outside the scope of the Lugano Convention and the original EU instrument addressing these matters known as the Brussels Convention: see Sect. 3(3) of the 1982 Act, Art. 1 of these Conventions, the Schlosser and Renard Official Reports to those Conventions and the decision of the European Court of Justice in *Marc Rich & Co AG v. Societá Italiana Impianti (The Atlantic Emperor)*. (27) The (now superseded) Brussels Convention and its successor, the European Union's Regulation (EC) No. 44/2001 ("Brussels Regulation"), contained an arbitration exception, whose scope was, however, significantly narrowed by the decision of the European Court of Justice in *Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, and Generali Assicurazioni Generali SpA v. West Tankers, Inc* (28) where court-ordered anti-suit injunctions granted in favour of arbitral proceedings were held incompatible with the Brussels Regulation. Regulation (EC) 1215/2012 of 12 December 2012 ("Recast Regulation") supersedes the Brussels Regulation and applies within the European Union from 2015. Notwithstanding its Recital 12 and Art. 73.2 that suggest a broader scope for the arbitration exception, in *Nori Holdings Ltd & Orsv. Public Joint-Stock Company 'Bank Otkritie Financial Corporation'* [2018] EWHC 1343 (Comm) Males J held that the position in relation to anti-suit injunctions was the same under the Recast Regulation, i.e., that they were incompatible with the European regime. The learned Judge refused to grant an anti-suit injunction restraining Cypriot court proceedings. He referred to the possibility of the Cypriot Court staying proceedings in line with Art. II.3 of the New York Convention, or for the arbitral tribunal to make an anti-suit order, which, as an award, could be recognised and enforced within the EU. (29) If successful, these would be alternative routes for the applicant to achieve the same result without violating the European regime.

h. *The Insolvency Regulation*

Council Regulation (EU) 2015/848 on Insolvency Proceedings ("Recast Insolvency Regulation"), lays down mandatory rules applicable to cross-border insolvencies within the European Union. The Recast Insolvency Regulation applies to arbitral proceedings
P 8 and provides the choice of law rule to determine the effect of a party's insolvency on pending arbitration proceedings, specifying that

> "[t]he effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat" (Art. 18).

2. Practice of Arbitration

a. *General*

Commercial arbitration in England is a popular method of settling disputes for both domestic and international parties. Mostly such arbitrations are constituted by invoking

an arbitration clause in a contract, but many also take place under arbitration agreements made after the parties' dispute has arisen. There are more than forty professional bodies, chambers of commerce and trade organisations which act as appointing and sometimes also administering authorities under their rules, which vary considerably. There was justified criticism, in particular from the international community, before the Arbitration Act 1979 of the way in which the supervisory jurisdiction of the English Court could be readily invoked and exercised. Nevertheless arbitration flourished even then, with an estimated 10,000 or more arbitrations taking place in England during the year preceding the 1979 Act, mostly international and mainly in London, the majority of the international arbitrations being in the maritime and commodity sectors. In the years following the 1979 Act and particularly after the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto), there has been a steady increase in London of international commercial arbitrations in other fields, particularly so-called *one-off*, international cases as well as investor-state arbitrations.

b. ***Arbitral institutions***

LCIA

The principal institution administering *international* commercial arbitrations in London is The London Court of International Arbitration (LCIA). The function of the LCIA is to provide facilities for the settlement of any international dispute, commercial or otherwise, and wherever occurring, which may properly be submitted to arbitration or conciliation. The LCIA usually acts as both appointing and administering authority, although it can also act as an appointing authority under the UNCITRAL Arbitration Rules. The International
P 9 Arbitration Rules of the LCIA for world-wide use ("the LCIA ● Rules") are available in English and Russian. (30) Failing agreement between the parties on an arbitrator, the LCIA will appoint an arbitrator from its knowledge of arbitrators drawn from many countries. The LCIA is also prepared to assist in the selection and appointment of arbitrators in matters not governed by the LCIA Rules; and such assistance is frequently sought and given by the LCIA Registry. The LCIA Rules and further information about the activities of the LCIA can be obtained from:

The London Court of International Arbitration

70 Fleet Street

London EC4Y 1EU

Telephone: +44 (0)20 7936 6200

Facsimile: +44 (0)20 7936 6211

E-mail: enquiries@lcia.org

Website: <www.lcia.org>

ICC UK

ICC UK, the British affiliate of the International Chamber of Commerce, provides advice and information on ICC arbitration in England. Its Arbitration Consultant works with an Arbitration Panel comprised of senior practitioners and arbitration users. The ICC UK nominates proposed arbitrators when requested to do so by the ICC Court, typically for ICC cases where the seat of arbitration is London or where the proper law of the contract is English law and where it is otherwise appropriate to appoint someone from the UK. Inquiries should be addressed to:

ICC UK Arbitration and ADR Committee

ICC United Kingdom

First Floor

1-3 Staple Inn

London WC1V 7QH

Telephone: +44 (0)20 7838 9363

E-mail: arbitration@iccwbo.uk

Website: <www.iccwbo.uk>

It is impossible within the confines of this report to summarise the activities of the great many other institutions in England which make provision for international arbitration in particular fields, from construction to reinsurance. By way of illustration, however, several prominent specialist arbitration organisations may be mentioned:

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LMAA

The London Maritime Arbitrators' Association (the LMAA) is an association formed by London maritime arbitrators, the majority of whom are commercial persons with strong

connections to the Baltic Exchange. (31) It is the usual practice of LMAA arbitrators in *ad hoc* arbitrations to accept appointments on the LMAA Terms, which provide different procedures for arbitrations on documents only and where oral hearings are required by the parties. The term *London Arbitration* is sufficiently well understood throughout the maritime world to make express reference to institutional rules unnecessary. The LMAA publishes a regular newsletter and yearly law review. It offers a small claims service under the *LMAA Small Claims Procedure* and mediation under the *LMAA Mediation Terms (2002).* In addition to its arbitrator members, the LMAA invites supporting members from legal practitioners and arbitration users throughout the world. The LMAA can be contacted at:

The London Maritime Arbitrators' Association (The LMAA)

The Baltic Exchange

38 St Mary Axe

London EC3A 8BH

Telephone: +44 (0) 20 7283 7701

Facsimile: +44 (0) 20 7283 7702

Email: info@lmaa.london

Website: <www.lmaa.org.uk>

GAFTA

The Grain and Feed Trade Association (GAFTA) arbitrations are carried out in accordance with an elaborate set of arbitration rules. Its standard rules are published in a separate GAFTA standard form No. 125 which are incorporated by reference into some 80 standard contract forms covering different deliveries of grain, animal feeding-stuffs and pulses. The Rules lay down the procedure to be followed in detail and provide for a two-tier system: subject to the provisions of the Rules a right of appeal lies from an award of the arbitrator(s) to a GAFTA Board of Appeal. Only members of GAFTA, or employees of members, may serve as arbitrators. Ordinarily only persons engaged or who have been engaged in the trade may represent parties before a Board of Appeal. There is another set of rules contained in GAFTA No. 126, providing a simplified procedure before a sole arbitrator with no second tier, within a fixed timetable. GAFTA No. 127 is a set of rules suited to maritime disputes. GAFTA No. 128 is a set of mediation rules. The address of
P 11 GAFTA is:

The Grain and Feed Trade Association (GAFTA)

9 Lincoln's Inn Fields

London WC2A 3BP

Telephone: +44 (0)20 7814 9666

Facsimile: +44 (0)20 7814 8383

Email: post@gafta.com

Website: <www.gafta.com>

The following offer specialist arbitration and other dispute resolution services in the fields of commercial insurance and reinsurance, commodities, metals trading and construction respectively:

The Insurance and Reinsurance Arbitration Society – ARIAS (UK)

c/o IUA, 3 Minster Court

Mincing Lane

London EC3R 7DD

Telephone: +44 (0) 1732 832 475

E-mail: honsecretary@arias.org.uk

Website: <www.arias.org.uk>

Federation of Oils, Seeds and Fats Associations (FOSFA)

4-6 Throgmorton Avenue

London EC2N 2DL

Telephone: +44 (0)20 7374 2346

Website: <www.fosfa.org>

London Metals Exchange (LME)

10 Finsbury Square

London EC2A 1AJ

Telephone: +44 (0)20 7133 8888

Email: arbitration@lme.com

Website: <www.lme.com/regulation/arbitration>

Royal Institution of Chartered Surveyors (RICS)

RICS Dispute Resolution Services (DRS)

55 Colmore Row

Birmingham B3 2AA

Telephone: +44 (0) 20 7334 3806

Email: drs@rics.org

Website: <www.rics.org/uk/footer/dispute-resolution-service>

The Society of Construction Arbitrators

The Honorary Secretary Rowan Planterose

9 College Road

Ardingly

Haywards Heath

West Sussex RH17 6TU

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Telephone: +44 (0)14 4489 2299

Email: honsec@constructionarbitrators.org

Website: <www.constructionarbitrators.org/>

CIArb

In the *national* field the principal institution administering arbitrations is the Chartered Institute of Arbitrators ("the Institute"). It is a multi-disciplinary body of more than 16,000 members from 133 countries, principally comprising architects, engineers, builders and surveyors within the UK. A primary function of the Institute is to train and set standards for lay-arbitrators, mediators and adjudicators but it also runs courses and lectures for legal practitioners. Qualified members of the Institute are placed on panels of arbitrators from which its president makes appointments. The Institute's Arbitration Rules and information about its activities and membership can be obtained from:

Chartered Institute of Arbitrators (CIArb)

12 Bloomsbury Square

London WC1A 2LP

Telephone: +44 (0) 20 7421 7447

Email: memberservices@ciarb.org

Facsimile: +44 (0)20 7900 2917

Website: <www.ciarb.org>

c. *Other forms of arbitration*

The Arbitration Act 1996 provides for only one form of consensual arbitration, namely: the appointment of an arbitral tribunal to decide the parties' specific dispute pursuant to the terms of a written arbitration agreement. Arbitration under an oral arbitration agreement falls outside the 1996 Act, but remains effective at common law (Sects. 5(1) and 81(b)). Statutory adjudication is also outside the scope of the 1996 Act (see Sect. 108 of the Housing Grants, Construction and Regeneration Act 1996). (32) The institution of valuation, expertise or appraisement (e.g., of the value of shares) is widely used in England and is recognised under the English law of contract. But these procedures must be distinguished from arbitration. Valuation does not usually require the parties to be heard (orally or in writing). It is generally intended to prevent a future dispute as distinct from resolving a specific dispute. (33) The 1996 Act does not apply to valuation or
P 13 appraisal, nor to conciliation, ● mediation or other kindred forms of Alternative Dispute Resolution ("ADR"), nor to final determinations of the Financial Ombudsman Service. (34)

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Lord Mustill

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"Arbitration in England: The Current Issues", 4 Arbitration International (1988, no. 1) p. 75

"Remedies Against the Reluctant Respondent: The Position Under English Law", 5 Arbitration International (1989, no. 3) pp. 294-299

"Towards a New English Arbitration Act", 7 Arbitration International (1991, no. 1) pp. 17-26

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Chapter II. Arbitration Agreement

1. Form and Contents of the Agreement

a. *Arbitration clause and submission agreement*

Sect. 6 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) defines an arbitration agreement as an agreement to submit to arbitration present or future disputes (whether they are contractual or not), corresponding to Art. 7(1) of the Model

Law. This definition covers both (i) an arbitration clause by which the parties agree to submit future disputes to arbitration (sometimes called an agreement to refer) and (ii) an agreement to submit an existing dispute to arbitration (sometimes called a submission). It is not necessary in either case for the arbitration agreement to be signed by any party or to name the arbitrator or arbitrators (see Sect. 5). It may be contained in a document separate from the substantive contract, whether agreed separately or incorporated by reference (Sect. 6(2)). The word 'dispute' in Sect. 6(1) is a broad concept and Sect. 82(1) defines it as including a difference. (35) The Court will strive to find an arbitration agreement effective even where there are uncertainties in the translation of an agreement into English or other ambiguities, (36) but, mindful of the personal nature of such an agreement, general words of incorporation are normally insufficient, unless they seek to incorporate an arbitration agreement contained in a contract between the same parties. (37)

b. *Form*

P 19 Sect. 5 ostensibly requires the arbitration agreement to be in writing, broadly corresponding to Art. 7(2) of the Model Law. (38) The definition of writing ● extends not only to an agreement made in writing (whether or not signed by the parties) but also to an agreement made by exchange of communications in writing and to an agreement evidenced in writing, where it is recorded by any means (e.g., in documentary or electronic form), either by one of the parties or by a third person with the parties' authority. An oral contract, or a contract made by written offer and acceptance by conduct, incorporating by reference written terms providing for arbitration will produce an arbitration agreement in writing under Sect. 5(3). In addition, under Sect. 5(5), an exchange of written submissions in arbitral or legal proceedings in which the existence of an arbitration agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in its response will constitute as between those parties an arbitration agreement in writing to the effect alleged. (39) The English Court will not construe arbitration agreements in an overly restrictive manner; for example it has found an arbitration agreement properly incorporated into a sub-contract; (40) in the maritime context it has found that an arbitration agreement contained in a charterparty could cover disputes arising out of a subsequent settlement agreement contained in correspondence, where that settlement agreement lacked an express arbitration clause; (41) where two parties entered into a shareholders' agreement containing an arbitration clause, the Court found that the unnamed but disclosed principal of a party could sue under the arbitration agreement. (42)

c. *Other agreement*

This statutory requirement for writing extends to any amendment of the arbitration agreement up to the making of the award: see *other agreement* in Sect. 5(1). If the parties do not themselves satisfy the written requirement for their agreed amendment, the tribunal (or other third party) may do so by recording the amendment in the form of a
P 20 procedural order by consent under ● Sect. 5(4). Conversely, the parties may terminate a written arbitration agreement orally: see Sect. 23(4).

d. *Oral agreement*

A wholly oral agreement to refer an existing or future dispute to arbitration is valid at common law, but outside the scope of the 1996 Act: see Sect. 81(1)(b). Such an oral agreement is regarded as highly undesirable since, in most cases, the agreement is revocable by either party up until the issue of the award, the agreement will lack the default provisions otherwise provided by the 1996 Act, the arbitration tribunal will lack the statutory power to award interest and the English Court could not exercise its essential auxiliary powers. Furthermore the tribunal could not exercise any power under Sect. 5(4) to save the arbitration agreement by recording it in writing with the parties' authority, because the 1996 Act would be inapplicable in the first place.

e. *Model arbitration clause*

The LCIA (43) currently recommends the following model clause to parties who wish to have disputes referred to arbitration under the LCIA Rules:

> "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause."

This model clause is not linked with a choice of English law as the law applicable to the substantive contract although it is particularly designed to be consistent with English law. However, the LCIA advises parties to express in their contract the law of the country by which it shall be governed, by adding: "The governing law of this contract shall be the substantive law of ..." In addition, the LCIA recommends the parties to specify the place (seat) and language of the arbitration (neither of which need be English) and the number of arbitrators:

> "The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be ... [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ]."

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The LCIA has other recommended wordings for existing disputes, mediation, expert determination and adjudication. The LCIA is willing to act as appointing and also (if required) as administering authority under the UNCITRAL Arbitration Rules. The following model clauses are recommended to parties who wish to take advantage of its services:

(i) Parties wishing to adopt the *UNCITRAL Arbitration Rules* should use the following UNCITRAL model clause:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

(ii) Parties also wishing to designate the *LCIA as appointing authority* may add the following model clause:

> The appointing authority shall be the LCIA (the London Court of International Arbitration);

and they may wish to consider adding the following:

> The number of arbitrators shall be ... [one or three];
>
> The legal place or seat of arbitration shall be ... [town or country];
>
> The language to be used in the arbitral proceedings shall be ...

(iii) Parties also wishing to use the *administrative services of the LCIA* may add the following clause:

> Any such arbitration shall be administered by the LCIA (the London Court of International Arbitration) in accordance with the UNCITRAL Arbitration Rules. Unless the arbitral tribunal directs otherwise, all communications between the parties and the arbitral tribunal (except at hearings and meetings) shall be made through the LCIA. Any such communications shall be deemed received by the addressee when received by the LCIA. When passed on by the LCIA to any party such notices or communications will be sent to the address of that party specified in the Notice of Arbitration or such other address as may have been notified in writing by that party to the LCIA.

Further details of the LCIA's services provided for arbitration under the UNCITRAL Arbitration Rules may be obtained from its Registry, at the address given in Chapter I.2 above.

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2. Parties to the Agreement

a. *Capacity*

Every natural or legal person who has capacity generally to enter into contracts may conclude an arbitration agreement. Under English conflict rules, such capacity is generally determined by the *lex personalis*, the law of domicile, as distinct from the *lex loci arbitri* or other law applicable to the arbitration proceedings, the arbitration agreement or the substantive contract. (44) Under English law, a minor (a natural person below eighteen years of age) will be bound by an arbitration agreement contained in a contact for necessaries sold and delivered to him or her, or in a contract of service, education, apprenticeship or instruction to the benefit of the minor; other contracts are voidable at the option of the minor. (45) The invalidity of the substantive contract will not by itself invalidate the arbitration agreement, if it be otherwise valid: see Sect. 7 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) and Separability, II.4 below. The law governing the arbitration agreement governs whether a person is party to that arbitration agreement. (46) That law is the one chosen by the parties, expressly or impliedly, or, failing that, the system of law with which the arbitration agreement has the closest and most real connection. (47)

b. *Bankruptcy and other issues*

A bankrupt may make an arbitration agreement under English law; but only his or her trustee may make an arbitration agreement which will bind the estate; and if the trustee in bankruptcy adopts a contract containing such an arbitration agreement, it may be enforced against the trustee (but not otherwise). (48)

One partner's signature to an arbitration agreement binds his or her partners if he or she had express, implied or apparent authority to bind them, or if these partners ratified the

arbitration agreement. (49) Unless otherwise previously agreed by the parties, an arbitration agreement is not discharged by the death of a party. It may be enforced by or against the personal representatives of that party: Sect. 8(1) (applying to written arbitration agreements where the seat is both within and without England or no seat has been designated or determined). Likewise, the winding-up of a company in England does
P 23 not ● discharge an arbitration agreement: the liquidator may bring or defend arbitration proceedings thereunder (with permission of the Court). (50)

c. *States*

The 1996 Act applies to the English Crown: see Sect. 106, applying Part I to any arbitration agreement to which the monarch, either in right of the Crown or the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party. A foreign state, state-owned entity or state agency may be party to an arbitration agreement with a national or foreign legal entity or individual. Many states, state entities and state agencies choose arbitration in London. The State Immunity Act 1978 restricts the immunity that foreign states can claim from the jurisdiction of civil courts and tribunals in the UK: Sect. 3 provides that a state is not immune regarding proceedings relating to a commercial transaction entered into by the state. Sect. 9(1) treats a submission to arbitration as an implied waiver of immunity: it provides that when a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune regarding proceedings in the courts of the UK which relate to the arbitration, including enforcement. (51) This provision has effect subject to any contrary provision in the arbitration agreement and does not apply to arbitration agreements between states (as discussed below at IX.2.*b*, an arbitration agreement between an investor and a state is not an arbitration agreement between states, notwithstanding the underlying investment treaty parties being states). A frequent problem is the authority of public officials to bind their state: Sect. 2(7) provides that the head of a state's diplomatic mission in the UK, or the person performing his or her functions, shall be deemed to have authority to submit on behalf of his or her state in regard to any proceedings. Note that the act of state doctrine applies to arbitration. (52)

d. *Two parties*

There must be at least two parties to an arbitration agreement. (53) Similarly, at least two parties are required for the existence of a dispute and the effectiveness of arbitration proceedings or an award. If a party ceases to exist under its *lex personalis* during proceedings, there can be no effective arbitration proceedings or valid award. (54) While the existence of a party may be a question of fact, this does not prevent the issue from being characterised as one of substantive jurisdiction, with regard to whether there is a
P 24 valid ● arbitration agreement (Sect. 30(1)(a)) or whether the tribunal has been properly constituted (Sect. 30(1)(b)). (55)

e. *Third party*

A third party entitled to enforce the terms of a contract by virtue of the Contracts (Rights of Third Parties) Act 1999 but subject to a term providing for the submission of a dispute to arbitration will be treated as a party to the arbitration agreement for the purposes of the 1996 Act, as long as the arbitration agreement is in writing. (56) In certain other circumstances, a third party can take the place of a party to an arbitration: for example, a legal assignee can succeed to the rights of an assignor in a pending arbitration, provided the assignee (i) gives notice to the other side to perfect the legal assignment and (ii) intervenes in the arbitration by giving notice to the arbitrators. (57) Note that the assignor remains liable for costs already incurred in the arbitration. (58) The Court has upheld a tribunal's decision to replace a party in the arbitration following a corporate merger and scheme of amalgamation carried out in a foreign jurisdiction, rejecting the attempted characterisation as equitable assignment (which would have made notice necessary). (59)

f. *Multi-party and multi-contract disputes*

Multi-party disputes can generate complex problems in arbitration because of the requirement to show that each party consented to arbitrate with the others in respect of a particular dispute or disputes. Where there are more than two parties, issues can arise as to which party has a right to nominate an arbitrator or whether different claims can form part of the same reference to arbitration (and hence be dealt with in one set of proceedings). An added layer of complexity arises when there is a multiplicity of contracts relating to the same underlying transaction, when there may be an overlap of different references to arbitration. Certain institutional rules have sought to address these problems in their rules. Such problems have not been entirely solved in England (if indeed they are ever capable of any non-consensual solution). Each case needs to be considered against its own factual and legal matrix. For example, a single request for arbitration to cover disputes arising out of more than one agreement may not be sufficient, and instead separate requests may be required. (60) The problems of multi-party disputes were extensively reviewed by the DAC leading to its 1990 Report on Consolidation, having been earlier considered (but not resolved) by the Commercial
P 25 Court Committee in 1978, by its 1985 ● Sub-Committee on Arbitration and by the DAC's first chairman, Lord Mustill. (61)

The prevailing English view remains that the best (although by no means perfect) way is to attempt to solve such problems by consensual methods, either by overall agreement between all disputant parties or, more particularly, by arbitration rules on consolidation or arbitration agreements permitting the same arbitral institution to act as appointing authority for all arbitrators on all related contracts. Sect. 35 also allows the parties to agree that their arbitral proceedings be consolidated with other arbitral proceedings or that concurrent hearings shall be held on whatever terms may be agreed (e.g., as to legal costs, delay or eventual de-consolidation); but unless the parties confer such power upon the arbitration tribunal, it has no power to impose consolidation or concurrent hearings. Choosing institutional rules frequently entails choosing a set of rules that addresses these problems to some degree. (62)

The risk of inconsistent findings by different tribunals or other procedural problems does not entitle the English Court to refuse a stay of legal proceedings under Sect. 9, which refusal might allow consolidation of legal proceedings before the Court. (63) A stay of legal proceedings is mandatory in favour of both domestic and international arbitration agreements, subject only to the statutory exceptions. (64) Nor has the English Court any power to consolidate different arbitrations between different parties. It also has no power to order related arbitrations between different parties to be heard together or even at immediately succeeding hearings: it is regarded as implicit in the parties' arbitration agreement (subject to express agreement to the contrary by all parties) that each arbitration is private and confidential to those parties, requiring strangers to be
P 26 excluded from the hearings and the conduct of the ● arbitration. (65) The confidentiality obligation applies not only to awards, but also to pleadings, submissions and proofs of evidence, although there is the possibility of an exception in the case of consent, in the interests of justice, or where it is reasonably necessary for the protection of the interests of a party to the arbitration. (66)

Where the English Court exercises its statutory power of appointment under the 1996 Act (see Chapter III.2.*c* below), the Court may, in appropriate cases, appoint the same arbitrator in related arbitrations, which may reduce the risk of inconsistent awards to a certain extent. (67) The appointment of the same arbitrator in related cases where the parties are not identical can, however, create other problems including the perception of lack of procedural fairness where one party is able to present material which another party before the same arbitrator in a different arbitration has no proper opportunity to address. Solutions imposed by the Court can run the risk of violating the sanctity of the parties' arbitration agreement, contrary to the general principle that primacy should be given to party autonomy (restated in Sect. 1(b)), and also raise potential problems for the enforcement of any resulting award in another jurisdiction by virtue of Art. V(1)(*d*) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). (68)

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3. Domain of Arbitration

a. *Arbitrability*

The Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) deliberately does not seek to define matters incapable of settlement by arbitration: see Sect. 81(1)(a), which explains that Part I of the 1996 Act does not affect any rule of law relating to arbitrability. Whether a matter is arbitrable will be determined by reference to English law. (69) Generally, all those matters which affect the civil interests of parties are arbitrable, including private disputes in connection with patents, trade-marks and matters of anti-trust.

Because an arbitration tribunal is appointed privately by the parties, there are certain limitations with regard to the range of remedies it can grant, compared with those available to the English Court. For example, an arbitration tribunal has no power to fine or commit any person to prison for violating its orders. Save where the parties have expressly so agreed, it has no power to order the specific performance of a contract relating to land: see Sect. 48(5)(b). (70) On the other hand, the presumption of "one stop shop" adjudication can lead the English Court to construe an arbitration agreement to find that the parties intended a tribunal to have the power an English Court would not have, such as ordering the buy-out of shares of a foreign company. (71)

An arbitration award operates *in personam*. It cannot bind or be enforced against the public at large (e.g., as a court judgment *in rem* against a ship or for the revocation of a patent), but following enforcement under Sect. 66 it operates like any ordinary judgment by the Court.

Similarly, Sect. 81(1)(c) does not define those narrow (72) grounds of public policy which would allow or require the English Court to refuse recognition or enforcement of an arbitration agreement or award in England. To date, there is no reported case where the
P 28 English Court has exercised such powers, (73) which ● powers nonetheless undoubtedly exist: see Sect. 1(b) and Sect. 103(3), enacting Art. V(2)(*b*) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). For example, an award should not be recognised by the English Court if it

would have the effect of enforcing an unlawful agreement violating the mandatory competition rules of the European Union, but an allegation that a contract was vitiated by such rules is nonetheless arbitrable in England; (74) and so too are issues of bribery, corruption and illegality.

Where the foreign law on the basis of which an award stands to be enforced in England contains principles that English law would not recognise, the Court will enforce it as long as those principles do not affect a universal principle of morality or are injurious to the public good; for example, the Court has enforced a foreign law award recognising a penalty clause (which English law does not recognise). (75)

b. *Filling gaps*

Where the parties' agreement regarding procedure leaves certain matters open, the tribunal may fill those gaps (Sect. 34(1)). Where the parties' contract leaves substantive matters open, a tribunal may also fill those gaps, provided the applicable substantive law allows the tribunal to do so (Sect. 46(1)(a)). Where English law applies to the substantive contract, in the absence of any other provision in the arbitration agreement or contract on the matter, the English Court may imply a term in the arbitration clause entitling the arbitrator to fill appropriate gaps in a commercial contract. Thus in *F & G Sykes (Wessex) Ltd v. Fine Fare* [1967] 1 Lloyd's Rep 53, a five-year agreement for the sale of poultry left undetermined the number of birds to be supplied after the first year, thereafter such figures were to be agreed. Generally such an agreement to agree is void for uncertainty under English law. Fortunately, in that case there was an arbitration clause in the agreement. By virtue of an implication the Court of Appeal treated the failure to agree as a difference within the arbitration
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clause. (76) In the commercial context, the Court will normally be reluctant to find an arbitration clause itself to be void by reason of uncertainty. (77)

The parties are free to agree the remedies able to be awarded by their tribunal (Sect. 48(1)) or can empower it to decide their dispute in accordance with other considerations (Sect. 46(1)(b)). The parties' ability to agree the available remedies is not restricted to those available to the English Court. (78)

c. *Adapting contracts*

The arbitrability of hardship clauses (i.e., the adaptation of contracts to changed circumstances) was not considered expressly by the English Court under the 1950-1979 Acts. On the other hand, it was thought that generally such disputes would be capable of being decided by an arbitrator. Under the 1996 Act, provided the arbitration tribunal is authorised to do so, it may adapt contracts pursuant to hardship clauses. If filling of gaps is permissible, this must *a fortiori* be the case.

4. Separability of Arbitration Clause

Sect. 7 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) contains a restatement of the English doctrine of the legal autonomy, or separability, of the arbitration clause from the substantive contract in which it is physically contained, as expressed in the decision of the Court of Appeal in *Harbour v. Kansa* which re-interpreted the earlier decision of the House of Lords in *Heyman v. Darwins.* (79) Subject to other agreement of the parties, this doctrine applies to an arbitration agreement where England is the seat of the arbitration or where the law applicable to the arbitration agreement is English law, even where the seat is outside England or there is no seat designated or determined: Sect. 2(5). Sect. 7 corresponds to Art. 16(1) of the Model Law, but is drafted in broader terms. It owes nothing to the other English doctrine of severability, which seeks to save a valid part of an agreement from the invalid part of the same agreement. This doctrine of separability, or autonomy, assumes legally distinct agreements. It ensures that in certain circumstances a legal defect in the substantive contract does not infect with invalidity an otherwise effective arbitration clause physically embedded or incorporated by reference in that substantive contract, as
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reconfirmed by the House of Lords in *Fiona Trust v. Privalov.* (80) It brings English law firmly within the modern doctrine of autonomy established for decades in Switzerland, France and Germany. (81) The same doctrine of autonomy also ensures that the *individual* arbitration contract is autonomous from the *continuous* arbitration contract: see Chapter II.5.*a* below (also called the doctrine of double-separability).

Accordingly, by virtue of Sect. 7 and unless otherwise agreed by the parties, an arbitration agreement which either forms part or was intended to form part of the substantive agreement, whether or not the latter agreement is made in writing, is treated as a distinct agreement and is not necessarily regarded as invalid, non-existent or ineffective because that substantive agreement is invalid or never came into existence or has become ineffective. Where, under English law, the substantive agreement is void, avoided, unenforceable, discharged by frustration, performance or wrongful repudiation accepted by the innocent party or even vitiated by illegality, the arbitration clause will usually survive that invalidity and ineffectiveness, if otherwise valid, existing and effective itself. Note, however, that if the challenge to the underlying contract is based on an absence of any consensus, this is likely also to mean that no arbitration agreement came into existence either. (82) Unless the scope of the arbitration clause suggests

otherwise, it is the English Court's general approach that the arbitration clause is intended to provide one-stop adjudication of all contractual and non-contractual disputes between the parties, in the phrase used by Lord Justice Hoffmann in *Harbour v. Kansa* (83) and reconfirmed by the House of Lords in *Fiona Trust*. (84) Should the parties wish to exclude the separability doctrine, they would be required to make this clear. A choice of law other than English law in respect of the substantive contract does not of itself operate to displace Sect. 7. There would need to be an express choice of law election regarding separability. (85) As previously noted (See I.1.*d* and footnote 13), this is true for the relationship between a parties' choice of law and non-mandatory provisions
P 31 generally: for a choice of law to ● trigger Sect. 4(5), there has to be a choice of law with regard to the specific provision of the Act which the parties agree is not to apply. (86)

5. Effect of the Agreement (See also Chapter V.4 – Jurisdiction)

a. *Juridical nature*

In English law, an arbitration agreement may involve two distinct arbitration contracts, in addition to the parties' substantive agreement. The first contract is the autonomous arbitration clause (or the separate arbitration agreement) to submit future disputes to arbitration: it is the *continuous* arbitration contract between the contractual parties which can give rise to more than one arbitration in the event of successive disputes, especially in long-term substantive agreements. It has been judicially described as nearly, if not quite, a mutual conditional option. (87) The second arbitration contract is the legal relationship created by the claimant's exercise of the option conferred by the first contract, taking effect as an *individual* arbitration contract between the disputant parties to submit their present dispute to arbitration. That individual arbitration contract may also become a multi-party contract as the individual arbitrator(s) and the arbitral institution (if any) assume contractual relations with the disputant parties on its terms. Both arbitration contracts are legally autonomous from each other and from the parties' substantive agreement. In theory, at least, each can be subjected to a different applicable law. An arbitration agreement creates mutual rights and obligations between the parties. It does not operate for the benefit of one party only, nor is it analogous to an exemption clause in a substantive contract. (88) Where there are more than two parties to the agreement (and to the arbitration agreement), and one of them commences proceedings against the two other parties, there may be a question whether there are in truth two separate arbitrations or there is only one. This will depend on the specific circumstances. (89)

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b. *Stay of litigation*

Sect. 9 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) (enacting Art. II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") and corresponding to Art. 8(1) of the Model Law) provides for a stay of legal proceedings in favour of the parties' arbitration agreement. Sect. 9 applies wherever the seat of the arbitration or where no seat has been designated or determined: Sect. 2(2)(a). There are no distinctions between international or domestic arbitration or between parties from within or without England. The source of the Court's power is not the arbitration agreement, but its general jurisdiction under Sect. 37 of the Senior Courts Act 1981. (90) A party must make its application to the Court for a stay after taking the procedural step of acknowledging the legal proceedings but before taking any step in the proceedings to answer the substantive claim: Sect. 9(3). Filing a defence, but also applying for security for costs (91) or for disclosure, (92) bars a defendant from obtaining a stay under Sect. 9.

The Court is bound to grant such an application unless satisfied that there is no arbitration agreement or that the arbitration agreement is null and void, inoperative, (93) or incapable of being performed: Sect. 9(4). (94) The applicant's burden of proof can vary: a merely arguable case as to validity will not be sufficient if the Court can resolve the issue itself or by directing an issue to be tried; an arguable case will, however, be sufficient if the Court cannot resolve the issue on the application and does not direct a trial of the issue (because it is simply the other side of the coin to the respondent being unable to discharge the burden of proof which lies upon it under Sect. 9(4)) (95) – for example, where the issues are too complex for a swift determination by the Court. In such
P 33 a ● case, a court will grant a stay on the basis of an arguable case and it will be for the tribunal to deal with the objection to its jurisdiction. The Court has held that optional arbitration agreements (where a party "may" submit a dispute to arbitration) are sufficient for a stay under Sect. 9. (96) If the Court refuses to grant the application, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to these proceedings: Sect. 9(5). If the Court's refusal to stay proceedings is under appeal, the court proceedings may nevertheless continue, although the Court will not determine the claim before resolution of the appeal. (97)

There is no requirement that an arbitration be on foot or that the applicant intend to bring arbitration proceedings. (98) The Court may grant an interim, as opposed to final, injunction and, where foreign proceedings are the trigger for the Sect. 9 application, in

some cases it may be appropriate to leave it to the foreign court to recognise and enforce the parties' agreement on forum (although not where the foreign court refuses to do so on a basis which the English Court is not bound to recognise and on grounds which are unsustainable under English law). (99) A stay under Sect. 9 is only available to parties to the arbitration agreement, or parties claiming through or under them (Sect. 82(2)); a non-party does not have standing to apply for a stay on the basis that there is a matter to be referred to arbitration. (100) Where proceedings between a party to a contract containing an arbitration agreement and third parties benefitting under that contract under the Contracts (Rights of Third Parties) Act 1999 are on foot, a stay may be sought (i) by the party against the third party where the latter seeks to enforce a benefit conferred upon it that is subject to the procedural condition to arbitrate or (ii) by the third party against the party to the contract in relation to a dispute in respect of which that third party has a right to enforce a term providing for that dispute to be submitted to arbitration. (101)

Where a party successfully obtains a court's decision to stay foreign proceedings and the
P 34 other party fails to comply, the successful party may ● institute committal proceedings, which may result in the Court imposing a fine on the defaulting party or, where fines would be ignored, imprisonment. (102)

c. *Court jurisdiction*

In English legal theory, the effect of an arbitration agreement is not to oust the jurisdiction of the English Court (103) whereas, as a general principle, an agreement to oust the Court's jurisdiction is void. (104) This historic principle is however drastically curtailed by Sect. 1(c) and the ability of parties to agree to contract out of the Court's power to review points of law. Nevertheless, except insofar as the 1996 Act provides otherwise, a bare agreement to oust the jurisdiction of the English Court is void. Yet a stipulation that there should be no cause of action until differences under the contract have been resolved by arbitration (a so-called *Scott v. Avery* clause) (105) is not regarded as an ouster of jurisdiction and is therefore valid. The appropriate remedy for a party to an arbitration agreement sued in breach of that agreement is to enforce the arbitration agreement under Sect. 9 by means of a stay of the legal proceedings. (106) (The English Court also enjoys an inherent jurisdiction to stay legal proceedings in cases not contemplated by this statutory provision.) (107) The ability of the tribunal to order anti-suit injunctions is no reason for the Court not to grant such an injunction (108) and, unlike in the context of Sect. 44 measures (see IX.5.*b*), this potential parallel availability does not act as a fetter on the Court's jurisdiction under Sect. 9. The fact that, under the Hamburg Rules, (109) foreign courts have jurisdiction is not a good reason not to recognise
P 35 an arbitration agreement by issuing an anti-suit injunction. (110) In the insolvency ● context, there is no presumption that arbitration agreements do not extend to claims to avoid a transaction made by a liquidator or other office holder in insolvency proceedings; instead, the Court examines the substance of the claim and, where the relief sought is for an order which the arbitrators have power to make and the dispute is essentially contractual, there is no reason why the dispute should not be arbitrated. (111)

A stay under Sect. 9 is available against a party pursuing foreign court proceedings to invalidate a contract containing the arbitration agreement, even though the basis of the foreign proceedings is an allegation that that agreement is based on a law that contravenes constitutional principles (and, as a matter of English law, the issue of constitutional compliance is not arbitrable), where that attempt to invalidate the contract falls within the scope of the arbitration agreement (which it normally would). (112)

Conversely, a court will ordinarily decline to give declaratory relief that a tribunal has jurisdiction in circumstances where the claimant asserts the existence of a binding arbitration agreement, and the claimant is able to commence an arbitration to determine its claim. (113)

d. *Kompetenz-kompetenz*

A tribunal is competent to determine a challenge alleging that a tribunal lacks jurisdiction or that a claim is inadmissible: Sect. 30. Rulings as to jurisdiction are reviewable by the Court or, where applicable, in any available arbitral process of appeal or review (see Chapter VII). Under Sect. 32, the Court may decide the question of the tribunal's jurisdiction as a preliminary matter, if all parties agree or if the tribunal gives permission and the Court is satisfied that (i) the determination of the question is likely to produce substantial savings in costs, (ii) the application was made without delay, and (iii) there is good reason why the matter should be decided by the Court (see also Chapter V.4.*b*).

Chapter III. Arbitrators

1. Qualifications

a. *Capacity*

Generally, any natural person may be appointed as an arbitrator. There is no restriction

P 36 on nationality, although nationality may play a role regarding an arbitrator's perceived impartiality (114) and accordingly many institutional rules place restrictions on nationality by reference to the parties' nationalities (115) The parties may also prescribe positive and negative qualifications for arbitrators in their arbitration agreement: e.g., that they should be merchants or that they shall not be a lawyer. Where a party successfully challenges an arbitrator on the basis of lack of required qualifications, the appointment and proceedings thereafter, including the award, are void. (116) A person who is physically or mentally incapable of conducting a fair hearing (e.g., a young infant or insane person) is disqualified. A person who is capable of conducting a fair hearing may be removed as arbitrator if he or she is disqualified by an absence of impartiality or if he or she refuses to conduct the arbitration without unnecessary delay or expense (see para. 2 below).

b. *Impartiality*

The Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) prescribes that an arbitrator shall be impartial: see Sects. 1(a), 24(1)(a) and 33(1)(a). The last two provisions being mandatory, it is not open to the parties to agree upon the appointment of an arbitrator who is partial. By omitting any reference to independence, as prescribed by Art. 12 of the Model Law, (117) the 1996 Act intends only to exclude non-partial dependence as a separate ground for disqualifying an arbitrator. An arbitrator's lack of independence could still be evidence of partiality, including a failure before appointment to disclose dependence on one of the parties. The DAC considered, however, that a separate requirement of independence could give rise to endless arguments on the scope of dependence and consequently of disclosure as to independence (as it has in other jurisdictions); and that it could frustrate also the legitimate expectations of arbitration users in small, specialist fields where the arbitrators are commercial persons in regular business contact with users of those arbitrations (e.g., certain shipping, commodity and diamond trades and specialist classes of reinsurance). (118)

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c. *Judge-arbitrators*

The 1996 Act allows for judicial arbitrators to be appointed by the parties, i.e., a judge appointed and sitting as an arbitrator in a private hearing: Sect. 93 and Schedule 2. An eligible High Court judge (as defined in Sect. 93(5) may, if in all the circumstances he or she thinks fit to do so and with the consent of Lord Chief Justice, accept appointment as a sole arbitrator or umpire. A judge-arbitrator may exercise a judge's power in support of arbitration and is competent to enforce any award he or she makes under Sect. 66. Applications to the Court under the 1996 Act in respect of jurisdictional issues or points of English law (available only on the limited basis set out in the 1996 Act: see Chapter VI.3.c below) lie to the Court of Appeal (Sch. 2 Sect. 2(1)).

Similarly, Sect. 93 allows parties to agree to the appointment of an Official Referee as arbitrator, i.e., one of the Circuit Judges conducting Official Referees' Business as a specialist division of the High Court, particularly in construction and complex technical or factual disputes. (119)

d. *Status*

The arbitrator's authority derives from the party's consent contained in the arbitration agreement. The Supreme Court in *Jivraj v. Hashwani* (120) cited with approval commentary describing this contractual arrangement as *sui generis*, (121) as opposed to one of agency or the provision of services. Once an arbitrator is appointed, the parties have effectively no control over him or her (in the absence of agreement). The arbitrator is in critical respects independent of the parties. His or her functions and duties require the arbitrator to rise above the partisan interests of the parties.

The parties' stipulation that an arbitrator be of a particular religion or belief can be a valid criterion that the Court will uphold if it is legitimate and justified. (122)

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2. Appointment of Arbitrators

a. *Consent*

The consent of the putative arbitrator, freely given, is an indispensable requirement for the validity of the appointment. This is irrespective of who appoints the arbitrator (one or more of the parties, an arbitral or other institution, an appointing authority, other arbitrators or the Court).

b. *Ad hoc and institutional arbitrations*

In *ad hoc* arbitration, there is no institution to administer the arbitration including to supervise the appointment of a tribunal. Parties typically appoint a single arbitrator or form a three-member tribunal where each party appoints its own arbitrator and the two arbitrators either appoint a third arbitrator who acts as chairman (123) (more commonly

now termed a “presiding arbitrator”, or appoint an umpire who acts as a single arbitrator replacing the two arbitrators after receiving notice from them of a disagreement on a matter relating to the arbitration.

The more common *institutional* tribunal (where an arbitral institution administers the proceedings) similarly typically consists of one or three arbitrators. In the latter scenario, many institutional rules permit the parties to agree that the two arbitrators nominated by the parties select the presiding arbitrator. (124) Under the Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto), the parties are free to agree on the procedure for appointing their tribunal, including breakdowns in that procedure and replacement members of the tribunal: see Sects. 16(1), 18(1) and 27(1). Many commercial parties prefer directly to propose the presiding arbitrator. Regardless of what the parties agree, however, some institutions retain a degree of control over the composition of the tribunal: under the LCIA Rules, a party may nominate an arbitrator, but it is the LCIA that appoints arbitrators (in practice, the LCIA tends to follow a party's nomination provided the selected arbitrator is impartial and independent). (125) Similarly, the ICC retains the power to confirm or not confirm arbitrators nominated by the parties.

The 1996 Act is designed to ensure that an arbitral tribunal is able to be appointed. The Court has no power, however, to make a direction under Sect. 18(3) concerning the appointment of an arbitrator where an arbitration clause agreed between the parties has operated as intended, albeit that one of the parties has failed to cooperate, in circumstances where the clause has made provision for non-cooperation. (126) The Court will look at substance, rather than form, in considering whether the appointment process
P 39 is effective. For ● example, recognising that parties frequently may act without the benefit of legal advice, the Court is flexible in considering whether a party has taken the procedural step of a “request in writing” under Sect. 16(3). (127) The Court has rejected the view that Sect. 21 means an umpire's appointment is only valid if made by the parties, as opposed to by the arbitrators. (128)

c. *Statutory procedures*

In the absence of the parties' agreement, the 1996 Act provides detailed default provisions to address situations where party appointment of arbitrators has failed.

The party-appointment default provisions cater for the situation of a sole arbitrator (Sect. 16(3)), two arbitrators (Sect. 16(4)), three arbitrators (Sect. 16(5)), and two arbitrators and an umpire (Sect. 16(6)).

Where (in a multi-arbitrator scenario) a party refuses to exercise its right to appoint an arbitrator, Sect. 17 allows the other party to appoint its appointed arbitrator the sole arbitrator (following notice provisions).

As to any other case (e.g., where there are more than two parties), the Court has powers of appointment under Sects. 16(7) and 18; see also Sect. 19, inviting the Court to have regard to party agreement on the required arbitrator qualifications, and Sect 21(5), allowing the Court, where there is an umpire, to substitute the two arbitrators with the umpire.

d. *Presiding arbitrator (chairman) and umpire*

The parties are free to agree upon the functions of the presiding arbitrator in relation to the making of decisions, orders and awards: Sect. 20(1). If there is no agreement, such decisions etc. shall be made by all or by a majority of the arbitrators (including the chairman). Where there is no unanimity or majority, the view of the chairman shall prevail: Sect. 20(2) and (3). The parties are also free to agree upon the functions of an umpire: Sect. 21(1). In the absence of agreement, the umpire attends the arbitration proceedings but can make no decision, order or award until he or she has replaced the arbitrators upon notice of their disagreement: Sect. 21(3) and (4).

3. Number of Arbitrators (See also Chapter V.2 – Making of the Award)

By Sect. 15(1) of the Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto), corresponding to Art. 10(1) of the Model Law, the parties are free to agree on the number
P 40 of arbitrators. There is no legal restriction on what that ● number may be but there are practical limitations. Where the number is even, the parties should agree how the tribunal is to make its decisions, orders and awards: Sect. 22(1). In England tribunals are most commonly sole arbitrators or three-member tribunals, either comprising of two arbitrators and an umpire or (more usually) three arbitrators, one of whom is the chairman / presiding arbitrator. If there is no agreed number of arbitrators, the tribunal consists of a sole arbitrator under Sect. 15(3). Where the parties have agreed that the number of arbitrators shall be two or any other even number, their agreement is to be understood, unless the parties have otherwise agreed in writing, as requiring the appointment of an additional arbitrator as chairman under Sect. 15(2).

Where the parties do not specify the number of arbitrators, but use “arbitrators” in the plural, the Court has found that the absence of an agreed number means that the default of a sole arbitrator under Sect. 15(3) applies. (129) The “self-help” mechanism in Sect. 17 is not available when the number of arbitrators is unspecified. (130)

A possible deviation from the number of arbitrators agreed by the parties in their

contract for the final resolution of their dispute is the emergency arbitrator mechanism present in some institutional rules (to which the parties have also agreed by choosing those rules), whereby a party can seek urgent determination before a sole emergency arbitrator, irrespective of the number of arbitrators in the arbitration agreement. (131)

4. Challenge to Arbitrators

a. *Revocation*

By Sect. 23(1) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto), the parties are free to agree in what circumstances the authority of an arbitrator may be
P 41 revoked. (132) In particular, the parties may confer powers of ● revocation upon an arbitral or other institution acting under its rules: see Sects. 4(3) and 23(3)(b). In the absence of other agreement, the parties may also act jointly by written agreement to revoke an arbitrator's authority (unless the parties agree also to terminate their arbitration agreement, which need not be in writing): see Sect. 23(4). It is not possible for one party unilaterally to revoke the authority of any arbitrator. The fact that parties may jointly revoke the authority of an arbitrator is considered a feature of party autonomy. (133)

b. *Challenge*

By Sect. 24(1) of the 1996 Act, a mandatory provision, a party may apply to the Court to remove an arbitrator on any of four specific grounds (see Chapter III.5 below). As a necessary precondition, the applicant party must first have exhausted any available recourse with the relevant person or institution vested with the power to remove the arbitrator: see Sect. 24(2). The Court's power is discretionary. Before the Court will remove an arbitrator, the applicant will need to persuade the Court that the complaint is not technical but strikes at the root of the arbitration procedure. (134) The exercise of the Court's discretion is likely to be significantly influenced by the decision of the arbitral or administering institution not to revoke the challenged arbitrator's appointment: it would be rare for the Court to remove an arbitrator notwithstanding that the institutional process has reached a different conclusion. (135) An aggrieved party may lose its right to complain if it continues to take part in the arbitration without timeously making its objection: see Sect. 73(1).

Sect. 24 has been held to reflect the common law test for apparent bias, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased; this is an objective test involving a balanced and detached approach. (136) See *Tv. V, W, A* [2017] EWHC 565 (Comm), para. 96 for a summary of the applicable principles. The test of substantial injustice under Sect. 24 has been held to be the same as under Sect. 68. (137) As regards an arbitrator's duty of disclosure, the cases show that a prospective arbitrator should disclose facts and circumstances known to him or her which would or might give rise to justifiable doubts as to his or her impartiality; the Court will review the disclosure as at the time given and not with the benefit of hindsight. (138) A rare
P 42 ● example of a successful Sect. 24 application concerned the situation where the arbitrator had failed to disclose to the parties at the outset of the case that he had a financial interest in his father's law firm in circumstances where the firm and his father acted for one of the parties and derived significant financial benefit from that continuing commercial relationship. (139)

The IBA Guidelines on Conflicts of Interest 2014 do not form part of English law, but may be relevant to the Court's determination of whether there is bias and apparent bias. The Guidelines are not applied mechanically. (140)

The increasing use of tribunal secretaries (or the heightened awareness of their use) has also given rise internationally to challenges to arbitrators on the basis of an alleged impermissible delegation of their duty to resolve the parties' conflict, which is commonly viewed as *intuitu personae*, with the consequence that its core elements are non-delegable. Such challenges in England face a high hurdle. (141)

Where parties stipulate that an arbitrator must have experience in a particular field, this typically does not restrict the available pool of individuals to those with *business* experience in those fields, but instead includes individuals with relevant *legal* experience in such fields. (142)

c. *Procedure*

The procedure to be followed in relation to any challenge is to apply to the Court by way of an arbitration claim pursuant to Part 62 of the Civil Procedure Rules, supported by witness evidence of the complaint with notice to the other parties, the arbitrator concerned and to any other arbitrator. Whilst the application is pending, the arbitration proceedings may continue: Sect. 24(3). Where the Court removes an arbitrator, it may also make an order as to his or her entitlement to or repayment of fees or expenses: Sect. 24(4). The arbitrator concerned is entitled to appear and be heard by the Court before the Court renders its decision: Sect. 24(5). There is no appeal from the Court to the Court of Appeal without permission of the Court: Sect. 24(6).

In the unusual circumstances where the institution appointing the arbitrator brings

disciplinary proceedings against the arbitrator, it may have a legitimate interest in obtaining certain documents filed in the arbitration, to which, as a non-party, it ordinarily would not have access; in certain circumstances, the English Court may
P 43 nevertheless grant access to such documents, on the basis of the general public interest in maintaining the quality of arbitrators. (143) ● Disclosure orders in this context are exceptional; the Court has taken the view that that they may only be granted where the removal application has a real prospect of success and the disclosure is strictly necessary in order to dispose of it. Only in wholly exceptional cases would it be appropriate to grant disclosure of a tribunal's internal communications. (144)

5. Termination of the Arbitrator's Mandate

An arbitrator's mandate can be terminated in a number of ways. First, the Court may uphold an application for removal of an arbitrator as described above, on one or more of the four grounds set out in Sect. 24(1) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto): (a) that circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality; (b) that that the arbitrator does not possess the qualifications required by the arbitration agreement; (c) that the arbitrator is physically or mentally incapable of conducting the arbitration proceedings (or there are justifiable doubts as to his or her capacity to do so); or (d) that the arbitrator has refused or failed properly to conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award, provided in each case that "substantial injustice has been or will be caused to the applicant party to the proceedings".

Where an arbitrator has been removed, Sect. 27 gives flexibility to the parties regarding how they wish to fill the vacancy on the tribunal. The parties' agreed procedure, with some manipulation if necessary, will take precedence over the default mechanism in the 1996 Act, which only applies when the parties' agreed procedure fails. (145)

Secondly, the mandate may terminate on the circumstances specified by the parties. The 1996 Act abrogates the old power of the Court on the revocation of an arbitrator's authority (under Sect. 1 of the 1950 Act), however, Sect. 23 permits parties to agree in writing (146) on what circumstances the authority of an arbitrator may be revoked, e.g., upon the amicable settlement of their dispute.

Thirdly, the mandate may be revoked under Sect 23 by the parties acting jointly or by an arbitral or other institution or person vested by the parties in that regard, e.g., upon the termination of the arbitration or arbitration agreement. Such removal does not affect the arbitrator's statutory immunity under Sect. 29. It has long been impermissible (since 1833) for a party unilaterally to revoke the authority of an arbitrator. (147)

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6. Liability of Arbitrators

a. *Liability*

There is no reported instance of an English arbitrator or arbitral institution being held liable for negligence in the performance of their roles, whether in tort or contract or another system of law. Before the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto), it was not finally settled that an arbitrator had immunity for negligence at English law. (148) Whilst the point had not given rise to practical problems in England, the DAC considered that such legal uncertainties should be removed by statute, including in particular the risk of contractual liability (short of dishonesty) for substantial damages. (149) Whereas implied terms as to reasonable care and skill under the Supply of Goods and Services Act 1982 (Sect. 13) do not apply to arbitrators and umpires, the risk of contractual liability remained where such terms were expressly agreed or where the 1982 Act implied a statutory term as to carrying out a service within a reasonable time (Sect. 14). (150) There is a strong policy reason for this position. Most English commercial arbitrators, who are not active in another profession, are not insured for legal expenses or for liability in damages for errors and omissions as an arbitrator; any liability found against them could have disastrous personal consequences in such circumstances.

b. *Statutory immunity*

Sect. 29(1) provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator unless the act or omission is shown to have been in bad faith. This statutory immunity is mandatory, i.e., it is a minimum immunity for the arbitrator in tort, contract or otherwise, whatever the terms of his or her appointment or the parties' arbitration agreement or the applicable law to his or her relationship with the aggrieved party. It extends to the arbitrator's employees and agents: Sect. 29(2); but it does not extend to the liability of an arbitrator incurred by reason of his or her resignation: see para. *d* below. Whilst there may be room for debate as to the qualifying words *functions as arbitrator* (e.g., whether it covers pre-appointment functions as to disclosure etc.), the English legal term of art *bad faith* has been interpreted to mean actual malice (in the sense of personal spite or a desire to
P 45 injure for improper reasons) or knowledge of the ● absence of any power to discharge the function at issue. (151) The aggrieved party bears the legal burden of proving this

exception to the statutory immunity.

c. *Contractual immunity*

As to contractual immunity, it is clear at English law that, short of fraud, the arbitrator would be entitled to protect himself or herself by a specific exemption, whether agreed as a term of his or her appointment by the parties or contained in the parties' arbitration agreement, such as Art. 31.1 of the 2014 LCIA Rules (which also immunises the institution and its officers, members and employees). (152) Given the existence of the minimum statutory immunity under the 1996 Act, it appears that this form of contractual immunity would satisfy the test of reasonableness required for valid exemption clauses under the Unfair Contract Terms Act 1977.

d. *Resignation*

The statutory immunity does not protect an arbitrator from liability incurred by reason of his or her resigning as arbitrator: Sect. 29(3). The non-mandatory Sect. 25 provides default provisions in the event of an arbitrator's resignation: the parties are free to agree with the arbitrator the consequences of his or her resignation, including the entitlement to fees and expenses or any legal liability: Sect. 25(1). In the absence of such agreement, Sect. 25(3), whilst it does not confer upon the arbitrator a statutory right to resign, (153) allows the arbitrator to apply to the Court for relief as to the legal consequences of resignation, including immunity as to any liability thereby incurred and the payment or repayment of fees and expenses.

e. *Institutions*

Sect. 74(1), a mandatory provision, exempts an arbitral or other institution for liability, in tort, contract or otherwise, for anything done or omitted in the discharge or purported discharge of its function of appointing or nominating an arbitrator unless the act or omission is shown to have been in bad faith. This is a useful immunity for institutions performing a public service at no or no substantial cost. At English law, there was no case establishing that arbitral institutions might enjoy immunity on par with arbitrators. It was
P 46 considered ● possible that appointing authorities could attract liability on the basis of an implied promise or representation that the designated arbitrator was suitably qualified or trained. (154)

Sect. 74(2) also exempts an arbitral or other institution for anything done or omitted by an arbitrator (or his or her employees or agents) in the discharge or purported discharge of his or her functions as arbitrator, by reason of that institution having appointed or nominated that arbitrator. At English law, it is doubtful whether an institution could ordinarily attract such liability, without more (e.g., an express contractual undertaking as to a candidate's fitness to serve as arbitrator); but, given that this provision is mandatory, it will protect an institution where the applicable law does impose such liability. In addition to these minimum statutory immunities, an institution is also entitled to exclude by contract its potential liability to the parties: see para. *c* above, *mutatis mutandis*. (155)

Chapter IV. Arbitral Procedure

1. Place of Arbitration (See also Chapter V.3 – Form of the Award)

a. *Legal place*

A juridical seat of the arbitration in England is critical to the application of Part I of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto), including its mandatory provisions: Sect. 2(1). The seat is the expression of the parties' will, being designated by them or on their behalf by the arbitral institution or the arbitration tribunal. Only where not so designated will the English Court determine the seat, where required, having regard to the parties' agreement and all the relevant circumstances: Sect. 3. The seat of arbitration is not otherwise a defined term in the 1996 Act. As the DAC Report I makes clear (para. 26), it is the legal place of the arbitration, which is not necessarily the geographical place or places where the arbitration hearings are held or where the arbitrators deliberate. Moreover, unless the parties agree otherwise, Sects. 53 and 100(2)
P 47 (b) treat an award as made at the *seat* of the arbitration ● regardless of where it was signed, despatched or delivered by the arbitration tribunal (see Chapter VII.2 below). This distinction under the 1996 Act between the legal place of the arbitration and the geographical place where the arbitration proceedings are in fact conducted is also evident from Sects. 2(3)(a) and 43(3)(b) respectively. In the absence of clear provision to the contrary, an agreement on the law of X as the law applicable to the arbitration agreement or arbitration ordinarily implies agreement on X as the seat of the arbitration. (156) When determining the seat of the arbitration, the Court will be more prepared to infer an intended distinction between the laws applicable to substance and procedure than to distinguish between the place of arbitration and the curial law, with the consequence that, in the absence of strong contrary indications, a geographic specification will ordinarily entail that location's law being the applicable curial law. (157) A court will routinely construe a reference to "UK law" as a reference to the laws of England and Wales. (158)

b. *Foreign seat*

Where the seat is outside England, the 1996 Act has only limited application. It applies to the stay of English legal proceedings in favour of arbitration (Sects. 9-11) and to the enforcement of foreign awards (Sect. 66 and Part III of the 1996 Act), all being mandatory provisions: Sect. 2(2). In addition, the English Court has limited discretionary powers in support of an arbitration taking place outside England (Sects. 2(3) and 2(4)). Although Sects. 2(3) and (4) envisage a situation where no foreign seat has yet been designated by the parties or on their behalf, it is the orthodox view that English conflict of laws rules require every arbitration to have a seat, within or without England, which subjects its conduct to the municipal law of that seat. English law does not recognise the concept of a delocalised arbitration, floating in the transnational firmament, unconnected with any municipal system of law. (159) Where there is no foreign seat designated, the English Court may determine it under Sect. 3 (if required), even in the case where the municipal
P 48 law of that seat does recognise the ● concept of a transnational arbitration. In that event, English law treats that concept as deriving from the law of that seat. (160)

c. *Geographical place*

Sect. 34(2)(a) addresses the geographically convenient place where hearings may be held. The exercise of that power has no legal effect on the juridical seat of the arbitration. For example, where London is the seat of the arbitration, subject to the parties' agreement otherwise, the arbitration tribunal has a discretion to conduct part of the proceedings in a foreign country where some of the witnesses are resident. Likewise, the arbitrators may deliberate at one or more of their offices abroad and sign the award in each of their home-countries. Such deliberations and the mere signing of an award at a more convenient geographical place or places does not affect London as the seat of the arbitration or the place where the award is made: see Sect. 53. Conversely, where the juridical seat is abroad, the mere fact that London is chosen as a geographically convenient place for hearings, deliberations and signature of the award does not subject that arbitration to the procedural framework of the 1996 Act. It remains an arbitration with a foreign seat. Likewise Sect. 100(2)(b) treats the award as made under the foreign seat for New York Convention purposes, even where it is signed in London (and vice versa). (161)

2. Arbitral Proceedings in General

a. *Overview*

As explained at Chapter I.*d*, there are certain mandatory provisions of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) that apply when the arbitration is seated in England (and certain provisions apply even without an English seat – see Chapter IV.*b*). The other, non-mandatory provisions apply by default, unless the parties agree otherwise. Subject to those applicable provisions, tribunals have a wide latitude to make determinations with regard to the conduct of proceedings (see, e.g., Sect. 34). In practice, tribunals frequently resort to other guidelines with respect to certain parts of the procedures, such as the IBA Rules on the Taking of Evidence in International Arbitration. These can be either treated as binding or they can be taken as guidance (the precise status of such guidelines is usually recorded in the first procedural order).

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It is customary for the parties in substantive commercial matters to exchange written submissions; two common formats are (i) 'memorial' style, where each party submits two rounds of submissions, accompanied by witness, expert and documentary evidence, with the second round intended to be responsive to the other side's latest round; and (ii) 'pleadings' style, where the claimant's statement of case is followed by the respondent's defence, followed by the claimant's reply. Similarly to English litigation, disclosure, factual and expert witness evidence follow after exchange of pleadings. Parties may also submit skeleton arguments in advance of the hearing, summarising their respective cases. A hearing, while typical, is not mandatory (Sect. 34(2)(h)) and the tribunal may proceed to issue its award on the basis of written evidence only. (162) In practice, it is likely only to do so with the parties' agreement (as a tribunal would instantly open itself up to a Sect. 68 challenge), except when one of the parties is in default (see, e.g., Art. 15.8 of the LCIA Rules 2014). At any hearing, there may be oral closing submissions following the conclusion of the evidence. These closing submissions can be replaced with (or supplemented by) written closing submissions.

b. *Time limits*

Many arbitration agreements provide that a specified step must be taken within a prescribed period of time from the date on which a cause of action arises, failing which the prospective claim is time-barred or the claimant's right extinguished. (163) Such a stipulation is valid under English law, unless struck down under Sects. 3 and 7 of the Unfair Contract Terms Act 1977 as an unreasonable exemption clause, distinct from the arbitration agreement.

Sect. 12 of the 1996 Act provides, however, that the Court has jurisdiction to extend time for commencing the arbitration or taking some other step as a pre-condition to

arbitration, if it is satisfied that (i) the circumstances were outside the parties' reasonable contemplation when they agreed the provision and that it would be just to extend the time; or (ii) one party's conduct makes it unjust to hold the other to the provision, e.g., where the intended respondent has led the claimant to believe during settlement negotiations that he or she would not invoke the time limit. (164) This is a mandatory provision; but it can be invoked only after the aggrieved party has exhausted any available arbitral process for obtaining an extension of time: Sect. 12(2). (165)

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When considering an application under Sect. 12, the Court will have regard to what is commercially sensible. Unilateral mistake or negligent omission do not constitute bars to a successful Sect. 12 application; (166) the Court may not, however, extend time by reason only that in general terms it would be just to do so. (167)

Sect. 14 permits the parties to agree the circumstances in which arbitral proceedings are to be regarded as commenced. In the absence of party agreement, the proceedings in respect of a matter are commenced (i) when one party serves on the other party or parties a notice in writing requiring him or her or them to submit that matter to a person named or designated in the arbitration agreement; (ii) where the arbitrator or arbitrators are to be appointed by the parties, when one party serves on the other party or parties notice in writing requiring him or her or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter; or (iii) where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, when one party gives notice in writing to that person requesting him or her to make the appointment in respect of that matter. The Courts construe Sect. 14 liberally and have found arbitral proceedings commenced where an intention to commence arbitration or invoke the arbitration agreement was clear in the notice even though it did not as such request the appointment of an arbitrator. (168) A notice without an English translation is not necessarily fatal and can be construed as sufficient notice of a claim. (169) Where a respondent's notice refers to "in relation to all disputes arising under the [contract]" but does not explicitly refer to counterclaims, this has been held sufficient to cover counterclaims which otherwise would have been time-barred. (170) Whilst the Courts are generous with respect to when the proceedings have commenced, they have adopted a stricter approach with respect to ensuring that the respondent has received notice of the proceedings. The Claimant accordingly needs to take care properly to notify the intended respondent of its claim. Notice to an individual who has neither actual nor ostensible authority to accept service is not sufficient. (171) An email to a junior employee, as opposed to a company's generic business address, has also been held not to constitute service within the meaning of Sect. 76. Where the respondent has not been provided with
P 51 adequate notice of the claim, any award subsequently rendered is vulnerable to attack as discussed further below in relation to relief under Sect. 72 of the 1996 Act. (172)

c. *Pre-conditions*

Occasionally, an arbitration clause will impose one or more steps as a pre-condition to the commencement of arbitration proceedings. Where these steps are contractually valid under the applicable law, the claimant party must discharge its obligation before bringing arbitration proceedings; but a breach of that obligation, whilst sounding in damages, may not necessarily invalidate the request for arbitration. (173) Under English law, such pre-conditions may not be valid if they seek to impose unreasonable conditions operating in effect as exemption clauses (see para. *a* above) or legal obligations too uncertain to enforce, e.g., an obligation to seek to settle the dispute amicably or to negotiate in good faith. (174) While an arbitration clause will normally be interpreted expansively (see *Fiona Trust* at II.4 above), expert determination clauses do not benefit from this presumption; instead there is no presumption either way. (175)

d. *Arbitrator's general duties*

The 1996 Act imposes general mandatory duties on the tribunal and the parties under Sects. 33 and 40 (see also Chapter I.1.*d* above). The tribunal's general duty of fairness, equal treatment and efficiency under Sect. 33 is applicable to its decisions on matters on procedure and evidence. Being a mandatory provision, the parties cannot by agreement release the arbitrator from compliance with that paramount duty. In the extreme case of an irreconcilable clash between such a duty and the parties' agreement, it would appear that the arbitrator's remedy is to resign from his or her office and seek relief from the Court under Sect. 25. (176)

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Sect. 33(1)(a) departs from Art. 18 of the Model Law in requiring the arbitration tribunal to give each party a "reasonable" rather than a "full" – opportunity of presenting its case, the latter being considered a dangerous incitement to unreasonable prolixity, delay and expense. (177) Deliberate disregard by an arbitrator of mandatory duties under Sect. 33, (e.g., indifference to unnecessary delay or expense) may be a ground for the arbitrator's removal by the Court (Sect. 24) or constitute a serious irregularity affecting the arbitrator's award (Sect. 68).

e. *Parties' general duties*

As regards the parties, their general mandatory duty under Sect. 40 requires them to do all things necessary for the proper and expeditious conduct of the arbitration proceedings, including, *inter alia*, complying timeously with the orders of the tribunal. Tribunals have the power to issue peremptory orders where a party fails to comply with a tribunal order without showing sufficient cause. (178) Sanctions for a party's non-compliance of a tribunal's peremptory order include the measures under Sect. 41(7), whereby the tribunal may (a) direct that the defaulting party may not rely on allegations or material which was the subject matter of the order; (b) draw adverse inferences; (c) proceed to an award; and (d) make a costs order, (enforceable by the Court under Sect. 42) and the loss of procedural rights to object before the tribunal and the Court under Sect. 73. (179) There is no direct remedy before the Court against a party which flagrantly flouts its duties under Sect 40; the Court can, however, assist under Sect. 42 where the tribunal has taken action under Sect. 41 against a party which has not complied with its duties and where the tribunal's peremptory order is not complied with. (180) In certain cases, where English law is applicable, the innocent party can treat the other party's conduct as a wrongful repudiation of the arbitration agreement and, by accepting it, bring that agreement to an end, effectively terminating the arbitration proceedings. (181)

f. *Arbitral autonomy*

Apart from Sects. 33 and 40, there are no mandatory statutory or common law rules governing the way in which arbitrations should be conducted in England. The parties are empowered to agree the procedure of their arbitration, including the procedural powers exercisable by the arbitration tribunal and the Court in support of the tribunal: Sects. 1(b), 34(1), 38(1), 41(1), 42(1) and 44(1). The English approach is that the internal conduct of arbitral proceedings requires only a minimum of regulation; and that, in general, it
P 53 should be left to ● the good sense of the arbitration tribunal to decide how to proceed, subject to party agreement. Excessive intervention by statute or court tends to impede one of the main aims of arbitration, i.e., finding a flexible and expeditious method of settling disputes. The English Court therefore regards an arbitration tribunal as the master of its own procedure. (182) It is encouraged actively to manage the arbitration. The Court is not entitled to give an arbitrator procedural directions during the course of a pending and validly constituted arbitration. The Court will not seek to correct an arbitrator's procedural directions during the arbitration on the ground of error of law or fact or the erroneous exercise of discretion. (183) Such errors do not amount by themselves to serious irregularity under Sect. 68. The House of Lords confirmed as much in *Lesotho Highlands Development Authority v. Impregilo SpA*. (184) It is generally regarded as of paramount importance that judicial intrusion in the arbitral process be kept to a minimum in the interests of expedition and finality of arbitration proceedings. (185) Subject to the mandatory principle that each party is entitled to a fair hearing before an impartial tribunal (Sect. 33), the Court will regard the express or implied agreement as to the way in which the arbitration should be conducted, or the custom in the particular trade, as effective and binding. (186)

g. *Procedural pragmatism*

There is an enormous diversity of arbitration procedures in London ranging from look-sniff quality arbitrations lasting a few minutes, to informal documents only arbitrations, to elaborate oral proceedings with pleadings, document production, examination and cross-examination of witnesses and oral submissions by advocates. There are even optional procedures which some may now regard as odd. For example, while a tribunal of
P 54 three arbitrators is ● now the general rule in international commercial arbitrations, (187) as previously noted, (188) arbitrations in London can be conducted by two arbitrators, appointed by the parties, and an umpire who only steps in if and when the arbitrators disagree. Some traditional usages with the umpire system can appear unusual. A practice which has long been followed in maritime and commodity arbitrations is a good illustration of this: if the parties have each appointed an arbitrator, and the two arbitrators have failed to agree and have in turn appointed an umpire, the arbitrators continue to act but in a different role: they become advocates representing their appointers before the umpire. In strict legal theory this practice of arbitrator-advocates is difficult to reconcile with the role of impartial arbitrators. However, it has long been followed in documents-only arbitrations; and it costs a great deal less than requiring appearances by lawyers. (189) In short, the first question in England is not whether a particular procedure is consistent with legal theory. The approach is more pragmatic: does it work and does it satisfy the users of the arbitral process?

h. *Statutory procedures*

In default of the parties' agreement, the 1996 Act provides a broad range of procedures which may be applied by the arbitration tribunal: see particularly Sects. 34-39 and 41. For example, Sect. 34 lists detailed but non-exhaustive powers relating to the time and place of the arbitration hearings, the language of the arbitration, the form of written pleadings (if any) and amendments thereto, the scope of documentary disclosure (if any), the time, manner and form of evidence to be adduced by the parties and whether there should be oral or written submissions or evidence. Sect. 37 allows the tribunal to appoint experts, assessors or legal advisers to advise it (see below). All these powers exist and are exercisable by the arbitration tribunal subject always to its mandatory duties under Sect.

33 and any agreement by the parties (in writing) at any time during the arbitration: Sect. 34(1).

i. *Inquisitorial procedures*

Sect. 34(2)(g) introduces an important express power: the arbitration tribunal may decide whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law. Before the 1996 Act, it was said that an English arbitrator was not entitled to proceed inquisitorially unless the parties had agreed expressly or impliedly that he or she should do so. (190) The reason was presumably that arbitrations in which parties were represented by lawyers were modelled on the adversarial procedure of the English Court, and that, over time, this gave rise to the implied understanding that such
P 55 ● arbitrations would only be conducted in this way, i.e., involving pleadings, discovery, examination and cross-examination of witnesses by the parties' lawyers adducing themselves all relevant evidence before the arbitration tribunal. On the other hand, it has long been recognised that in complex cases involving scientific or technical issues the inquisitorial system can be more effective than the adversarial system, particularly before a tribunal qualified in those fields. Several commentators had pressed for flexible reforms departing from the strict adversarial procedure. (191) This provision in the 1996 Act is expressly intended to introduce inquisitorial procedures to English arbitration, subject to the parties' agreement and the mandatory requirements of fairness etc. under Sect. 33. (192) Parties are, of course, free to confer specific inquisitorial powers upon their arbitrators. The adoption of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (193) for example, would serve to endow the proceedings with a more inquisitorial flavour.

3. Evidence

a. *General*

The English Courts have certain strict procedural rules for the adducement and status of evidence. Arbitration tribunals in England are not constrained by such rules unless the parties have agreed to apply strict rules of evidence: Sect. 34(2)(f) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto). Paragraphs (f) and (h) permit a tribunal to dispense with the court rule requiring submissions of foreign law to be adduced as expert evidence, rather than argued in submission by the parties' representatives. Even before the 1996 Act, submissions on law other than English law were often presented directly by non-English lawyers appearing in London before tribunals comprising non-English arbitrators, to whom that law was not foreign at all. (194) Nonetheless, it should be noted that the Civil Evidence Acts 1968-1972 apply to arbitration, allowing written witness statements to be adduced in evidence, without producing that witness for oral cross-examination where that witness is abroad, and the Civil Evidence Act 1995 has abolished the hearsay rule under English civil law. (195)

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b. *Evidence of fact witnesses*

Arbitrators do not have the power to enforce the attendance of witnesses (although note that judge-arbitrators do have such powers – see III.1.*c* above, but in that case the power is not by virtue of their quality as *arbitrators*). The Court, with the tribunal's permission or written agreement of the other parties, will give assistance by way of a witness summons, to compel the attendance of witnesses within the UK and to ensure the production of documents. In relation to the latter, no person can be compelled to produce any document or other material evidence which he or she could not be compelled to produce in legal proceedings: Sect. 43(4). Such compulsion is reinforced by the Court's powers for contempt of court. In principle, the Court cannot compel production of documents from non-parties; nevertheless, in appropriate cases, the Court may make orders for the inspecting, copying or preservation of a specific document in the possession of a non-party. (196)

The Court also has the power to make orders in relation to the taking of evidence of a witness: Sect. 44(2)(a). Where the arbitration is seated in England and the witness is abroad, in appropriate cases the English Court may issue a letter of request addressed to the foreign court requesting the examination of the witness for the purpose of the arbitration. Where the witness is in England and the arbitration seated abroad, the English Court is able to assist, but might refuse assistance if the difference in procedure between the domestic and foreign jurisdictions would make it inappropriate to do so (see Chapter V.*b*). Where both the witness and the arbitration are abroad, it is unlikely that the Court would retain any ability to make an order in this regard. (197)

The arbitration tribunal has power to direct that a witness or party shall be examined on oath or affirmation; and it has itself the power to administer an oath or affirmation to an oral witness: Sect. 38(5). The question whether witnesses should be sworn is a matter for the discretion of the tribunal unless the arbitration agreement requires it. If oral evidence takes place, cross-examination of opposing witnesses is normally permitted (with re-examination). The arbitrator is entitled to control the nature, scope and length of the cross-examination: Sect. 34(1)(f) and (h), subject always to the mandatory

requirements of fairness etc. under Sect. 33.

c. *Party-appointed experts*

Where the parties adduce evidence from their own expert witnesses, the tribunal may control the time, manner and form in which such evidence should be exchanged between the parties and presented to the tribunal: Sect. 34(2)(f).

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d. *Documentary evidence*

Under Sect. 34(2)(f), unless the parties agree otherwise in writing, the tribunal has the power to decide all procedural and evidential matters, including whether to apply strict rules of evidence as to the admissibility, relevance or weight of any material (written, oral or other), and the time, manner and form in which such material should be exchanged and presented by the parties. In addition, subject to the parties' written agreement otherwise, the tribunal has the power to decide whether and to what extent it should itself take the initiative in ascertaining the facts, acting inquisitorially: Sect. 34(2)(g). Almost invariably, these matters are addressed in arbitration rules agreed by the parties, for example Art. 22.1(iii) and 22.1(vi) of the LCIA Rules 2014.

e. *Document disclosure*

Subject to the parties' agreement otherwise, the arbitration tribunal has a discretionary power to order a party to produce documents which it determines to be relevant: Sect. 34(2)(d). The tribunal may also determine an issue as to whether a document is protected from disclosure on the ground of legal, professional or other privilege. The English Court has no power to order production of documents in an arbitration, save to support an order by the arbitration tribunal for the production of documents: Sect. 42. Frequently, as an additional guide to the tribunal's discretionary exercise of its power to order documentary production (whether conferred by the 1996 Act or by arbitration rules), parties consent to the tribunal applying or taking account of the IBA Rules on the Taking of Evidence in International Arbitration. (198) Alternatively, the Prague Rules offer a more "civil law" approach to the arbitration, with a greater emphasis on the tribunal taking a more active role in managing the procedure and fact-finding (permissible under Sect. 34(2)(g)), as well as providing for more limited disclosure and a suggestion of dispensing with a hearing.

4. Tribunal-appointed Experts (See Chapter IV.3 for Party-appointed Expert Witnesses)

Under the traditional adversarial system in English arbitration, an arbitration tribunal, similarly to the English Court, did not on its own initiative appoint or call an expert witness. The Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) broke that procedural mould. Subject to the parties' written agreement otherwise, the arbitration tribunal may appoint any expert, including any legal adviser or assessor, on the application of a party or upon its own motion. That person's fees and expenses are
P 58 treated as expenses of the tribunal reimbursable by the parties (this portion of Sect. 37 is a mandatory provision). The tribunal may allow such person to attend the arbitration proceedings: Sect. 37. This power can be exercised with the inquisitorial procedures under Sect. 34(e) and (g). In exercising its power under Sect. 37, the tribunal must allow the parties a reasonable opportunity to comment, orally or in writing, on any information, opinion or advice offered by that person to the tribunal, and it must meet the mandatory requirements of fairness etc. under Sect. 33. Good practice requires the arbitrator to discuss with the parties whether an expert should be appointed and, if so, on what terms. Discussing the case with the expert without the parties' prior consent may be an irregularity, but not necessarily a serious irregularity within the meaning of Sect. 68. (199)

An arbitrator may rely on his or her own expert knowledge or experience in the fields in question. That may be the very reason why that particular arbitrator was appointed to the tribunal. On the other hand, fairness will usually require that the arbitrator should disclose to the parties any special knowledge of scientific or technical matters relevant to the dispute and invite their submissions thereon. (200) Failure to do so could amount to a breach of the mandatory provisions of Sect. 33.

5. Interim Measures of Protection (See also Chapter I.1 – Law on Arbitration)

a. *Arbitral measures*

An arbitration tribunal has power to give directions in relation to any property which is the subject of the arbitration 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: Sect. 38(4) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto). These directions may include orders in the broadest terms as to the inspection, photographing, preservation, custody or detention of any property at issue (whether within or without England) by the tribunal, an expert or another person, (201) e.g., perishable goods or a vessel in a foreign port. The tribunal may also order the taking of samples and the

conduct of experiments and order the preservation of documentary evidence. The English Court is empowered to support the tribunal's peremptory orders against a party to the arbitration proceedings: Sect. 42 (see para. 7.*b* below). Unless the parties agree in writing,
P 59 the tribunal has no power to order on a ● provisional basis the payment of money or the disposition of property: Sect. 39(4) (see Chapter V.1 below).

b. *Court measures*

The Court is also empowered to act where the tribunal itself cannot act effectively or at all, e.g., against non-parties to the arbitration, in urgent cases, or where there is no tribunal yet formed or arbitration yet commenced: Sect. 44. Sect. 44(5) restricts the Court's ability to make Sect. 44 orders, however, to those circumstances where the tribunal, institution or other person vested by the parties with that power has no power or is unable for the time being to act effectively – where the rules adopted by the parties provide for the appointment of an emergency arbitrator or expedited tribunal formation this can mean that the tribunal can "act effectively". (202) Where the Court is able to act, its powers are extensive and court orders are more easily enforced within the jurisdiction than an order of the tribunal. The Court has the power under Sect. 44(2)(e) and (3) to grant an interim injunction restraining any person (English or foreign) from removing assets from the jurisdiction in cases where there is a reasonable apprehension that such person will fail to honour the award and remove assets from the jurisdiction in order to prevent enforcement of the award. Such an order is still commonly referred to as a *Mareva* injunction after the leading case in which the power was first established. (203) This power is not incompatible with the arbitral process: it is exercised in aid of that process. The Court also has the power to issue a freezing injunction after the conclusion of the arbitral proceedings but this appears to emanate from Sect. 37 of the Senior Courts Act 1981 rather than Sect. 44 of the 1996 Act. (204) When considering an application for a freezing injunction, a court is entitled to rely on a tribunal's findings of fact. (205) Similarly, under Sect. 44(2)(b) and (3), the Court may grant an order commonly termed an *Anton Piller* order preserving evidence in aid of an arbitration, but this power is used only in exceptional circumstances. (206) Injunctive relief may also be granted in order to protect contractual rights. (207) In all cases of court orders under Sect. 44, the Court may provide that its order shall cease to have effect (in whole or in part) on the further order of the tribunal: Sect. 44(6). The usefulness and flexibility of Sect. 44 has led the Court to
P 60 order the sale of liened crude oil ● cargo, given the alternative of incurring operating expenses for the vessel, where the unchallenged evidence was that enforcement of an award, even if produced quickly, would take at least three to four months. (208)

Under Sect. 11, a mandatory provision, the English Admiralty Court may allow the arrest of a vessel *in rem* to continue even where the English legal proceedings are stayed in favour of arbitration. (209)

In addition to the powers of the Court under Sect. 44, the Court has the power to grant injunctive relief under Sect. 37 of the Senior Courts Act 1981 to protect the contractual commitment to arbitration and thereby restrain foreign proceedings commenced in breach of the arbitration agreement, provided the proceedings are outside of the EU/Lugano regime (see I.1.*g* above): see *AES UST-Kamenogorsk Hydropower Plant JSC v. AES UST-Kamenogorsk Hydropower Plant LLP*. (210) While a court is unable to order an anti-suit injunction where the EU regime applies, a court is able to give effect to an anti-suit injunction contained in a tribunal's award. (211) While the matter may not be finally settled, current case law suggests that Sect. 44 measures are only available against parties to the arbitration agreement, although the possibility of use against a non-party is not entirely discounted. (212) The Court's ability, e.g., to grant freezing orders against non-parties whose assets are de facto owned by a party to the arbitration agreement (e.g., through agents or nominees) may be more restrictive than the Court's powers in connection with Court proceedings. (213) The case law shows that the Court may also assist where a party has obtained a US court order requiring a witness to disclose documents and provide evidence by deposition under 28 United States Code (USC) §1782 in aid of a London arbitration, (214) although it is unclear whether this US device may be properly used in aid of arbitral proceedings. (215) This should be contrasted with the Court's refusal to exercise its power to order the taking of evidence from a witness in aid
P 61 of a New York arbitration, on the basis that the ● differences in procedure between English law and curial New York law made it inappropriate to do so (see Sect. 2(3)). (216)

In exceptional circumstances, the Court will restrain a party from pursuing a foreign-seated arbitration or seeking recognition and enforcement of an award from that arbitration against another party, where the Court has previously ruled that the latter is not bound by the arbitration agreement, notwithstanding that the Court does not have supervisory jurisdiction with respect to the arbitration. (217)

c. *Security for costs*

The arbitration tribunal has power under Sect. 38(3) to order a claimant or a counterclaimant (see Sect. 82), but not a respondent to claim or counterclaim as such, to provide security for the costs of the arbitration so as to ensure that the losing claimant or counterclaimant cannot simply walk from its obligations under an adverse costs award. This power may not be exercised solely on the ground that the claimant or counterclaimant is an individual ordinarily resident outside the UK, or a corporation or

association incorporated or formed under the laws of a country outside the UK, or whose central management and control is exercised outside the UK. It was considered that a policy of discriminating between local and foreign claimants and counterclaimants could damage England as a leading arbitration centre for non-English users and could violate EU law in regard to citizens and legal persons from the rest of the European Union. (218)

This broad discretionary power is likely to be exercised most sparingly where the arbitration is truly international, as distinct from the traditionally English forms of London arbitration. (219) The sanction for non-compliance with the tribunal's peremptory order to provide security is the tribunal's award dismissing the claim or counterclaim: Sect. 41(6). The English Court has no such power to order security for costs in arbitration: it is solely a matter for tribunals. This is an important change from the position under the
P 62 1950 Act, ● where the position was reversed, with power vested in the Court but not (without the parties' agreement) the arbitration tribunal. (220)

The presence of third party funding may be a factor influencing a tribunal's decision whether to grant security for costs and in what amount. The “Arkin cap”, which previously limited commercial funders' adverse costs liability to the amount of funding they provided, is no longer a hard limit in English litigation, which would likely weaken any claimant's or counterclaimant's arguments that the Arkin cap ought to constitute a ceiling in arbitration on any amount ordered to be provided by way of security for costs. (221)

6. Representation and Legal Assistance

a. *Representation*

A party is always entitled to represent itself in arbitration proceedings and appear in person at an oral hearing, by itself or by its duly authorised representative: Sect. 33 of the Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto). Generally, a party is also entitled to be represented in the proceedings by English or foreign lawyers or any other persons appointed by that party: Sect. 36. (222) This is a non-mandatory provision; and the parties are free to agree otherwise (see para. *c* below).

b. *Legal representation*

The language of Sect. 36 (“*chosen by him*”) embraces second or third choices of counsel, thereby helping to discourage a recalcitrant party's stubborn insistence on a particular lawyer of its choice who is professionally unavailable for a long time, thereby ensuring delay in the proceedings. (223) Delay caused by a party's insistence upon an over-busy practitioner could also breach that party's general duty under Sect. 40. Although not a legal obligation, it is customary (and recommended) to give advance notice to the arbitrator and other party of the intention to be represented by a lawyer at a hearing. Failing such notice, the proceedings may be adjourned by the arbitrator to give the other party an opportunity also to seek legal assistance, with potential costs consequences for the party having failed to give notice. (224)

It is also advisable, even in commercial cases where lawyers are already instructed, for
P 63 parties to give advance notice of the appointment of additional ● representatives, including barristers. This enables any potential conflicts issues to be identified and addressed in advance.

c. *Non-legal representation*

The word *person* in Sect. 36 indicates that no legal qualification is required to represent a party in arbitration proceedings. (225) The controversial issue regarding representation by claims consultants, particularly in construction arbitrations, was considered to raise a matter of general principle beyond the scope of the 1996 Act and the DAC's terms of reference. In certain forms of English arbitration, the right to appear by a lawyer is excluded by express provision in the standard arbitration rules of trade associations (although these rules cannot prevent lawyers advising a party). (226) This has caused difficulty in the past, but it now seems that trade associations more easily exercise their discretionary powers to admit lawyers at the hearing.

7. Default

a. *Arbitration agreement*

The parties are free to agree the powers of the arbitration tribunal in dealing with a party's failure to do something necessary for the proper and expeditious conduct of the arbitration: Sect. 41(1) of the Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto). Many institutional or other arbitration rules will provide an appropriate remedy. For example the ICC International Court of Arbitration may itself approve the Terms of Reference notwithstanding a party's refusal to sign them, while the LCIA Court will constitute the tribunal notwithstanding the recalcitrant conduct of any party. (227) The 1996 Act allows the tribunal to make a peremptory order (with further sanctions for default) where a party has failed to comply with an order without showing sufficient cause. The sanctions for default include the ability of a tribunal to issue an award against the defaulting party: see para. *b* below. The parties are also free to exclude default remedies otherwise available from the English Court: Sect. 42(1).

b. *Peremptory orders*

As noted above, if a party fails to comply with an arbitrator's order without showing
P 64 sufficient cause, the arbitration tribunal may issue a peremptory order, ● defined as an order made under Sect. 41(5) or a corresponding power agreed by the parties (Sect. 82(1)). It is an order to the same effect as the previous order, prescribing such time for compliance as the tribunal considers appropriate. Failing compliance with such peremptory order within the prescribed deadline, the tribunal may exercise against the defaulting party any of the sanctions under Sect. 41(7): (i) disentitling the recalcitrant party from relying upon any allegation or material which was the subject matter of the order, e.g., debarring presentation of part of its case for failure to provide relevant documentation or to provide clarification or particulars of that case under Sect. 34(2)(c) and (e); (ii) drawing adverse evidential inferences from non-compliance, e.g., attributing less weight to a written witness statement under Sect. 34(2)(f) for failure to present that witness for cross-examination by the adverse party and the tribunal; (iii) proceeding to an award on the basis of existing materials; (228) and (iv) making an adverse order for costs incurred in consequence of non-compliance, e.g., for costs wasted from a forced adjournment. None of these sanctions should be imposed without further notice to the defaulting party, giving it a reasonable opportunity to defend itself within the meaning of Sect. 33. Moreover, none of these remedies includes a default award against the defaulting party, which the drafters of the 1996 Act considered too draconian a sanction. (229) (These remedies do not apply to a failure to comply with a peremptory order to provide security for costs, where the sanction is an award dismissing the claim or counterclaim: see Sect. 41(6) and para. 5.*c* above.) A peremptory order is not by itself an award: see Chapter V.1.*a* below.

c. *Award*

First, where there is inordinate and inexcusable delay by a claimant (or counterclaimant) in pursuing its claim, the arbitration tribunal may make an award dismissing that stale claim if satisfied that the delay gives rise, or is likely to give rise, to a substantial risk that a fair resolution of issues in that claim is impossible or that the delay has caused, or is likely to cause, the respondent serious prejudice: Sect. 41(3). (230) In particular, where the parties have agreed a limitation period shorter than the statutory limitation period, that agreed shorter period is the yardstick by which to measure the delay. (231) The
P 65 award will bind the recalcitrant claimant and prevent the claim being referred ● again to arbitration. Secondly, where a party, without showing sufficient cause, fails to attend or be represented at an oral hearing after due notice or fails in a documents-only arbitration to submit written evidence or written submissions following due notice, the arbitration tribunal may proceed and make an award on the basis of the evidence before it: Sect. 41(4), (232) broadly corresponding to Art. 25 of the Model Law.

d. *Court powers*

The Court may enforce peremptory orders made by the tribunal, on the application of one or more of the parties (with the permission of the tribunal), of the tribunal itself (on notice to the parties) or by written agreement of all parties that these court powers should be available, (233) provided always that all available arbitral processes have been exhausted for failure to comply with that order: Sect. 42(2) and (3). Failure to comply with the Court's order under Sect. 42 may attract severe penalties to the defaulting party, including fines, sequestration and committal for contempt.

8. Confidentiality of the Award and Proceedings

a. *Confidentiality of the arbitral award and proceedings*

Under English law, the starting position is that arbitration awards are private documents and confidential to the parties. While the precise juridical bases of confidentiality and privacy in English arbitration are unclear, it is beyond doubt that English law recognises these principles, subject to a range of exceptions. The drafters of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) took the view that an attempt to enshrine these principles in the 1996 Act, however, would prove too rigid, and preferred to leave it to the Courts to deal with exceptions pragmatically on a case by case basis. (234) Any publication or use of an award by a party or third person without permission of all the parties could be a breach of the arbitration agreement, sounding in damages or allowing the Court to grant injunctive relief to restrain publication by a party or third person. It is, however, implicit in the arbitration agreement that a party may use the award for enforcement and other legal proceedings, including in a subsequent arbitration between
P 66 the same parties, (235) ● and to this end the award may become a public document in court proceedings, (236) both domestically and abroad. Once an award is properly in the public domain, it is difficult for a party to maintain any continued expectation of confidentiality. (237) The confidentiality principles embrace the proceedings themselves, subject again to exceptions. Sometimes institutional rules expressly provide for arbitration proceedings to be private and confidential. (238) Even so, many institutions, in an effort to become more transparent, are taking steps to encourage and facilitate publication of awards. The ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 January 2019 sets out the ICC's

approach to the publication of awards made on or after 1 January 2019: the ICC Secretariat will notify the parties and arbitrators that the award may be published no less than two years after such notification; any party may object to the publication or require the award to be anonymised or pseudonymised, in which case the award will be anonymised or pseudonymised or not published at all. The Secretariat will take into account any confidentiality agreement relating to specific aspects of the arbitration or the award, and applicable data protection regulations. The Secretariat may, in its discretion, exempt awards from publication. An unresolved difficulty is how to ensure compliance with applicable data protection laws and regulations; non-party individuals whose personal details may feature in an award might not know of the contents of such award. It is unclear how the ICC would obtain their advance consent to publication. The practical solution would likely be that, as a general rule, any personal data would need to be omitted from publication.

b. *Confidentiality of arbitration-related court proceedings*

Consistently with the principles that the arbitration process is private and confidential, arbitration-related proceedings before the English Court will usually be held without public access to the award, court hearing or eventual judgment, particularly by the Commercial Court handling the vast majority of arbitration applications under the 1996 Act. The leading case is *City of Moscow v. Bankers Trust*, where the relevant judgment (but not the award) was eventually made public in a redacted form. (239) In *Teekay Tankers Ltdv. STX Offshore & Shipbuilding Co Ltd* the Court endorsed a litigant's good faith use of
P 67 prior arbitral awards in court proceedings. (240) The existence of a prior award ● may found a court's decision to strike out a claim pursued in the Court as an abuse of process and collateral attack on that prior arbitral decision. (241)

Chapter V. Arbitral Award

1. Types of Award

a. *Decisions, orders and awards*

The Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) contemplates three categories of adjudication by an arbitration tribunal: decisions, orders and awards (including rulings on jurisdiction): see Sects. 21(4), 22(1), 31(4) and 46. A decision relates to procedural and evidential matters (e.g., under Sect. 34); an order includes peremptory orders under Sect. 42; other adjudications are characterised as an award. The 1996 Act's provisions as to awards do not apply to decisions and orders. There are three types of award under the 1996 Act: provisional, agreed and final awards. If the parties agree in writing to confer on the tribunal the power to make a provisional award, Sect. 39 permits the tribunal to order, on a provisional basis, any relief which it would have power to grant in a final award, including a provisional order for the payment of money or the disposition of property, subject to later readjustment in the tribunal's final award. (242) This is a useful power likely to be found in certain arbitration rules; but its exercise by the tribunal will still require careful regard to the mandatory principles of Sect. 33. (243) Sometimes tribunals fail to label their awards consistently with the 1996 Act; properly speaking, an interim award is a provisional award (i.e., subject to further revision), whereas a partial award is a final award in relation to one or more of the issues for the tribunal's determination. A typical example would be a partial (final) award on jurisdiction. The Courts will give primacy to the substance of the award in order to determine its nature (244) (especially given the imprecise labelling practice to which some tribunals succumb). For agreed awards recording a settlement by the parties during the arbitration proceedings, see Chapter V.6 below. A partial final award can be enforced and challenged like any other final award. Any challenge to a partial final award on
P 68 jurisdiction must be pursued within the relevant time limits after the making of ● that award. A party cannot proceed to a merits phase and keep its options open to challenge the earlier jurisdictional award. (245)

b. *Final awards*

Unless the parties have otherwise agreed in writing, the 1996 Act allows a tribunal to make one final award or several final awards on different issues: Sect. 47. All such awards must comprehensively resolve the particular dispute or part of the dispute at issue between the parties. The making of more than one award is used for a number of different purposes at different stages of the proceedings, such as to decide the law applicable to the dispute, to determine liability only, to resolve a preliminary question of law or fact (e.g., whether a claim is time-barred or has been settled), or to determine particular heads of claim. This power is likely to be used by tribunals seeking more actively to manage the proceedings in the exercise of their paramount duties under Sect. 33 even where the issue is not legally or even commercially determinative of the entire dispute. (246)

2. Making of the Award

a. *Decision-making*

In practice, the three-arbitrator system has largely replaced the traditional two arbitrators and an umpire system in England. (247) Where there is an umpire, he or she decides the dispute under Sect. 21(4) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) as if he or she were a single arbitrator in the event of disagreement between the two arbitrators. Where there are three (or more) arbitrators, unless the parties agree otherwise, the majority view prevails under Sect. 22(2).

b. *Time limits*

There is no express statutory time limit for the making of an award under the 1996 Act, save for the arbitration tribunal's paramount duty under Sect. 33 to avoid unnecessary delay. If the parties have agreed on a time limit for the making of an award, it controls the tribunal (subject again to Sect. 33). For example, if the parties choose to arbitrate under the ICC Rules, those Rules contain a stipulation that the tribunal render its final award within six months from the last signature of the Terms of Reference or from the date the Secretariat notifies the tribunal of the ICC Court's approval of the Terms of
P 69 Reference, (248) but the ICC Court has the power to extend the time limit under ● Art. 31(2) and routinely does so. Where there is no timetable, an arbitration tribunal is expected to proceed with the arbitration and to make its award with all reasonable despatch. If an arbitrator fails to do so, he or she may be removed by the Court under Sect. 24(d)(ii) if the applicant party has suffered or will suffer substantial injustice (see Chapter III.4 above). In the event of an award being remitted by the Court for reconsideration by the arbitration tribunal (see Chapter VII below), the tribunal must make its fresh award in respect of the remitted matters within three months of the Court's order (or such other time as the Court directs): Sect. 71(3).

c. *Dissenting opinions*

There is no statutory provision regulating the procedure to be adopted in the event of a dissenting opinion by an arbitrator. It is a matter for the tribunal to decide how in such a case the dissent should be expressed. As a matter of English law the attachment of a minority opinion to the award does not affect the validity or enforceability of the award. (249)

3. Form of the Award

a. *Form*

The parties are free to agree on the form of an award, e.g., whether it is to be an oral award or (more usually) a written award: Sect. 52(1) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto). An oral award made with the parties' written agreement is effective and enforceable under Sect. 66 and an oral award under an oral agreement also remains enforceable at common law under Sect. 81(1).

In the absence of the parties' other written agreement, however, Sect. 52 imposes formal requirements taken from Art. 31 of the Model Law: the award is to be in writing signed by all the arbitrators or all arbitrators assenting to the award; (250) it is to contain the reasons for the award (unless it is an agreed award: see Section 6 below, or the parties otherwise dispense with the requirement for reasons, for example by agreeing to the tribunal ruling *ex aequo et bono* or as *amiable compositeur* under Sect. 46(1)(b)); it must state the seat of the arbitration and the date when the award is made.

Unless otherwise agreed by the parties in writing, the award is treated as having been made at the seat of the arbitration: Sect. 53 (251) (see also Chapter IV.*a* above). These
P 70 provisions may be particularly important for the application ● of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") to an award made in England in the event of that award's enforcement by an overseas court.

As for the date of the award, unless otherwise agreed in writing by the parties, Sect. 54 provides that the tribunal may decide on that date. Where it fails to do so, the date is the date on which the arbitrator signs the award or, where there is more than one, the last arbitrator signs the award.

b. *Reasons*

There is nothing in the 1996 Act which defines the reasons required for an award. The drafting of reasons is treated as a matter of practical common-sense, although parties will tend to expect more elaborate reasons from a lawyer-arbitrator and less legal analysis from a lay-arbitrator. (252) In the limited circumstances where the award is the subject of an appeal on a question of English law (see Chapter VII below), the Court may order the arbitration tribunal to give reasons or further reasons for its award: Sect. 70(4).

c. *Sanctions*

If the award is defective in form, it is susceptible to challenge before the Court for serious irregularity under Sect. 68(2)(h), provided first that the applicant has exhausted any other available recourse for the award's correction and any arbitration remedies by way of appeal or review. Moreover, a challenge in the Court also requires the applicant to prove substantial injustice (see Chapter VII below). Purely technical or pedantic

challenges are unlikely to surmount this procedural hurdle, if reached at all. In any event, the almost inevitable remedy would be the defective award's remission by the Court to the tribunal with an invitation to comply with the formalities required by the 1996 Act or the parties' arbitration agreement.

4. Jurisdiction (See also Chapter II.5 – Effect of the Agreement)

a. *Power of arbitrators*

The tribunal has no substantive jurisdiction (as defined by Sect. 82(1) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto)) if no valid arbitration agreement exists, or is inoperative or incapable of being performed, or if the arbitration tribunal has been improperly constituted, or if a disputed matter lies outside the scope of the
P 71 parties' arbitration agreement or the ● reference to arbitration. Who is to decide whether this is so? Under Sects. 30 and 31, unless the parties agree otherwise in writing, the tribunal may rule on a party's challenge to its own jurisdiction, either as an award on a preliminary issue or in its final award. (253) If the tribunal rules that it has jurisdiction, it will proceed to resolve the merits of the parties' dispute. If the tribunal rules that it has no jurisdiction, it cannot proceed to an award on the merits. A party is required to raise its jurisdictional challenge promptly: Sect. 31(1) and (2). If it takes part or continues to take part in the arbitral proceedings without making its objection timeously, it will lose its right to protest both to the tribunal and the Court: Sect. 73(1).

Subject to such waiver, any award as to a tribunal's jurisdiction may be challenged by a party under Sect. 67. Pending such decision by the Court, the tribunal may continue with the arbitral proceedings and make one or more awards on the merits: Sect. 67(2).

b. *Role of the Court*

The arbitration tribunal's decision on its own jurisdiction, however, is not final and the Court may have the last word under Sects. 30(2) and 67. While not bound or restricted by the tribunal's reasoning and findings, the Court may nonetheless have regard to them. (254) That remedy requires the aggrieved party first to exhaust any arbitration procedure by way of appeal, review, correction or additional award under Sect. 70(2). Any application to the Court must be made within twenty-eight days of the award's date or the date when the aggrieved party was notified of the adverse result of such appeal or review: Sect. 70(3).

Under Sect. 32, it is also possible to obtain a speedy declaratory judgment from the Court as to the tribunal's substantive jurisdiction during the arbitration proceedings, if either all parties agree in writing or the tribunal consents and the Court is satisfied that its decision could save substantial costs, the application was made without delay and that there is good reason why the Court should decide the matter. This will be the exceptional course adopted by parties where only a limited issue of English law or fact determines the tribunal's jurisdiction. In such circumstances, the arbitration proceedings may be stayed by the tribunal: Sect. 31(5). Otherwise, particularly if factual disputes are involved, the aggrieved party must seek its remedies successively before the tribunal, the arbitration appeal or review body (if any) and then the Court.

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c. *Non-participating parties*

A person alleged to be a party to arbitral proceedings but who takes no part in those proceedings may challenge the tribunal's substantive jurisdiction by legal proceedings before the Court for an injunction, declaration or other relief at any time: Sect. 72. That party can also exercise remedies under Sect. 67 to challenge an adverse award on jurisdiction (which may be the merits award implying jurisdiction) for lack of jurisdiction. For such a non-participating person, there is no duty under Sect. 70(2) first to exhaust any right of appeal or review from an award on jurisdiction. This protection for a non-party was regarded as a vital provision in the DAC Report I, para. 295. It is a mandatory provision.

5. Applicable Law

a. *What laws*

One of the tasks of an arbitrator in an international arbitration is, of course, to decide what law governs (a) the substantive issues (usually contractual) between the parties, (b) the arbitration agreement, reference or submission and (c) the conduct of the arbitration. Logically, given the autonomy of the arbitration clause, it does not follow that the same law must govern (a) and (b) though, the English Court of Appeal has held that in the absence of any indication to the contrary an express choice of substantive governing law of the contract was a strong indication of an implied choice of the same law as governing the arbitration agreement: see *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA.* (255) On rare occasions law (c), the law of the seat of the arbitration or *lex arbitri* may differ from law (b), the substantive law of the arbitration agreement. (256) A London arbitration clause does not conclusively establish English law as the law governing the substantive contract; it may be only one of the relevant factors for the tribunal to take

into account. On the other hand, the seat of the arbitration will usually imply a choice of the applicable procedural law of that seat, if there is no contrary provision. Where that seat is England, Sect. 2(1) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) provides that the provisions of Part I of the 1996 Act will apply. The Court of
P 73 Appeal has held that the arbitration agreement formed ● by an investor accepting a state's standing offer to arbitrate was governed by international law. (257)

b. *Substantive contract*

With regard to the law governing the substance of a contractual dispute, an arbitration tribunal must give effect to the parties' agreement on the choice of applicable law: Sect. 46(1). This need not necessarily be a system of law of a particular country, for example, the parties may choose Shia Sharia law. (258) It is conceivable that a choice of law clause may not be upheld if it is intended to evade mandatory provisions of a legal system with which the contract has its closest connection. If the parties have not expressly or impliedly agreed a choice of law clause in their contract or elsewhere, the tribunal may apply the conflict of laws rules which it considers applicable: Sect. 46(3).

Under English conflict of laws rules, the arbitral tribunal will generally consider the terms and nature of the contract and the general circumstances of the case: see also the Rome I (259) and Rome II Regulations. (260) Notwithstanding that arbitration agreements are excluded from the scope of the Rome I Regulation (Art. 1(2)(e)), but an arbitration tribunal is nonetheless entitled and may be required to apply these regulations, where the law applicable to the contractual or non-contractual obligations between the parties is in issue.

c. *Other considerations*

Sect. 46(1)(b) permits the tribunal, if the parties so agree (but not otherwise), to decide the dispute in accordance with such other considerations as are agreed by the parties or determined by the tribunal. This provision corresponds, in different language, to Art. 28(3) of the Model Law, which permits the tribunal to decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised the tribunal to do so. The English Court will recognise an award made in England *ex aequo et bono* or as *amiable compositeur*, just as it had previously recognised foreign awards of this kind, including awards which addressed an indeterminate law under a foreign arbitration agreement. (261)

An agreement by the parties under Sect. 46(1)(b) will also qualify as an exclusion of any
P 74 right to appeal to the English Court on a question of English ● law, there being none to appeal. (262) Sect. 46(1)(b) has only prospective effect, applying to arbitration agreements made on or after 31 January 1997. (263)

d. *Remedies*

The parties are free to agree on the powers exercisable by the tribunal as regards remedies: Sect. 48(1). Subject to the parties' written agreement otherwise, an arbitration tribunal is entitled to express its award for the payment of money in any currency under Sect. 48(2) and (4); and Sect. 49 allows the tribunal a discretionary power to award simple or compound interest, at commercial rates, from such dates as it sees fit until payment by the paying party. Where a tribunal has not ordered post-award interest, it is not open to the Court to add interest, as doing so would amount to an impermissible intervention when the award should be left intact (264) (see Sect. 1(3)). A tribunal may also order a party to do or refrain from doing anything and order specific performance of a contract (other than land in the absence of agreement in writing otherwise), or order the rectification, setting aside or cancellation of a deed or other document: Sect. 48(5).

6. Settlement

If the parties compromise or settle their differences, it is the frequent practice for parties to agree that their settlement be set out in a consent award and this is codified in Sect. 51 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto). (265) It provides a written record of the settlement; and if the settlement is not complied with, it allows the aggrieved party to enforce the award rather than begin fresh arbitration proceedings on the original cause of action. The arbitration tribunal (although not bound to do so) will usually make such an award in agreed terms unless there is something objectionable in the settlement, e.g., an attempt to mislead third parties. Almost invariably it will be evident from the face of the award that it is an agreed award. Indeed, it is usual for the parties also to sign the consent award.

Sect. 51 corresponds to Art. 30 of the Model Law, whereby agreed awards have the same status and effect as any other award on the merits of the case (thereby avoiding any theoretical dispute as to whether a tribunal has any jurisdiction to make an award when the parties' dispute no longer exists). The 1996 Act's provisions on the form of the award also apply, save that no reasons are required for an agreed award: Sect. 52.

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7A. Correction and Interpretation of the Award

Once the arbitration tribunal has published its award on a disputed matter, it is *functus officio*. Thereafter, without written agreement of the parties (which may of course be contained in arbitral rules adopted by the parties), the tribunal may not amend its award or provide any interpretation of its award as regards that matter. In the absence of such agreement, Sect. 57(3)(a) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) does, however, give the arbitration tribunal a limited power to correct a clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, e.g., a typing error, mathematical mistake or the accidental transposition of the parties. (266) This power corresponds to Art. 33 of the Model Law. Before exercising that power, the tribunal must afford the parties a reasonable opportunity to make representations to it. A party making a Sect. 57 application must do so within twenty-eight days of the date of the award. The tribunal needs to make any correction within twenty-eight days of the application or, where it itself takes the initiative, within twenty-eight days of the date of its award: Sect. 57(5) (or such longer periods as the parties may agree).

If there is a more serious mistake or a need for clarification beyond the removal of ambiguity, and if it cannot be resolved by party agreement, the correct procedure is for one or more parties to apply to the Court for remission of the award to the tribunal under Sect. 68(2)(f).

7B. Additional Award

Where the tribunal fails in its final award to deal with a claim presented to it (including claims for interest or costs), it may make an additional award in respect of that claim: Sect. 57(3)(b) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto). The tribunal must make such an additional award within fifty-six days of the date of the award (or such longer period as the parties may agree).

Where this remedy is not available and the parties cannot agree upon the making of an additional award, the correct procedure is an application by an aggrieved party to the Court to remit the award to the arbitration tribunal under Sect. 68(2)(d).

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8. Fees and Costs

a. *General*

Sects. 59 to 65 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) provide a complete code on the liabilities of the parties for the costs of an arbitration. Only Sect. 60 is mandatory, invalidating any agreement made before the dispute has arisen which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event, i.e., regardless of the result of the arbitration on the merits of the parties' dispute. (267) Otherwise, the parties are free to agree between themselves the allocation of recoverable costs. The costs of the arbitration are defined as (a) the arbitrators' fees and expenses, (b) any arbitral institution's fees and expenses and (c) the legal or other costs of the parties: Sect. 59.

b. *Deposit*

The parties are jointly and severally liable to each arbitrator to pay his or her reasonable fees and expenses: Sect. 28(1). Usually, as regards advance deposits on account of such fees and expenses, the parties and the tribunal will have agreed terms of appointment or be subject to arbitration rules. (268) Such contractual agreements are effective under Sect. 28(5). Under Sect. 56(1), as a form of lien, the tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

c. *Award of costs*

In the absence of the parties' agreement otherwise, the tribunal has discretion to award the costs of the arbitration. The general principle, in line with domestic English Court practice, is that costs should follow the event: Sect. 61. In other words, an order for costs should generally be made in the light of the relative success or failure of the parties to the arbitration in the absence of special circumstances. A tribunal wishing to depart from this general principle should take care to explain those circumstances. By its award on costs (which must contain reasons, unless the parties otherwise agree in writing), the tribunal may direct to whom and by whom such costs are to be paid; and it may determine the amount of such costs under Sect. 63(3). A tribunal is competent to award costs incurred in relation to obtaining third party funding, which can form awardable other costs of the parties under Sect. 59(1)(c). (269) Where a party discontinues
P 77 enforcement proceedings, the Court may require that party to disclose the identity of the funder and the details and terms of any funding arrangement. (270)

In the event of an issue as to the reasonableness of the tribunal's fees and expenses, a party may apply to the Court to determine the matter under Sect. 64(2). With regard to their quantification, the general English practice in *ad hoc* arbitration is for arbitrators to charge on the basis of time spent as opposed to a percentage of the sums involved.

Institutional rules typically provide their own procedures with respect to the remuneration of arbitrators. The LCIA Rules, for example, provides for hourly rates; the ICC Rules provide for an *ad valorem* system, calculated by reference to the amount in dispute. (271)

d. *Ceiling on costs*

There is a useful provision under Sect. 65 which allows the tribunal, in exercising its paramount duty under Sect. 33 to manage the arbitration efficiently, to limit the costs of the arbitration to a specified amount at any stage of the arbitration. In respect of a small sum or simple dispute or issue, it can seek to ensure that the parties do not incur disproportionate legal costs. Whilst a party can nonetheless choose to spend what it likes, it will not recover the surplus from the other party, whatever the result on the merits. In addition, this provision is intended to protect a smaller party from a larger party using the threat of an eventual liability for significant costs as a form of financial intimidation against the exercise of the smaller party's legal rights. (272)

9. Notification of the Award and Registration

a. *Notification*

The parties are free to agree in writing any requirements as to notification of the award to the parties: Sect. 55(1) of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto). In the absence of such agreement, the award must be notified to each party by service of a copy of the award, which must be done without delay after the award is made: Sect. 55(2). Given that procedural deadlines run from the date of the award, as opposed to from the date of notification, it is important that such notifications take place promptly. In certain cases the Court may grant an extension of time for procedural deadlines under Sect. 79. For example, the Court has granted an extension under Sect. 79 in order to enable the arbitral process to correct itself, by allowing a party to
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apply to the tribunal to correct an ambiguity in the award under the LCIA Rules. (273)

There is no requirement for the registration of an award in England.

b. *Lien*

There is an exception to Sect. 55: the tribunal is entitled under Sect. 56 (a mandatory provision) to refuse to deliver the award until full payment of its fees and expenses. This power allows the tribunal effectively to exercise a statutory lien on its award where the parties have not previously paid a deposit in full on account of its fees and expenses. Under this practice, the arbitration tribunal usually notifies the parties that the award is ready to be taken up on payment of its fees and costs, the award being equally available to both parties for taking up. The party who has taken up the award and paid the tribunal's fees and expenses, may then be entitled in accordance with the terms of the award to recover such fees and costs (or part thereof) from the other party.

In the event of an issue as to the reasonableness of the tribunal's demands, after exhausting first any arbitral remedy by way of appeal or review, an aggrieved party may apply to the Court for relief, both before or after paying the arbitration tribunal.

10. Enforcement of Domestic And International Awards Rendered in England and Wales (See also Chapter VI – Enforcement of Foreign Arbitral Awards)

Sect. 58 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) provides that, in the absence of the parties' contrary written agreement, (274) an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them, e.g., assignees and insurers exercising rights of subrogation. In cases where there is no indication of a serious attack on the validity of the award, the successful party may proceed directly to the Court for summary enforcement of the award in the same manner as a judgment under Sect. 66, reflecting Art. 35 of the Model Law.

Under Sect. 66, (which is a mandatory provision) judgment may be entered in terms of the award, e.g., for the payment of a sum expressed in foreign currency. Such an application is usually made *ex parte*, with no oral hearing, and the defendant is given a short period to show cause why the judgment should not be made in final form.

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Where there is an attack on the award for lack of substantive jurisdiction, serious irregularity or appeal on a point of English law under Sects. 67-69, the application under Sect. 66 can be heard by the Court at the same time. Where a court remits parts of an award back to a tribunal, it can enforce the unremitted portion under Sect. 66. (275) Even though a purely declaratory award on its face has no coercive aspect, it may nevertheless be enforced under Sect. 66. (276)

The defendant may invoke certain passive defences, based on arbitrability or public policy (Sect. 81(1)), but the defendant cannot invoke active defences based upon lack of substantive jurisdiction, serious irregularity or an appeal on English law if it has no right to exercise those remedies under Sects. 67-69. As described above (V.4.*a, b* and *e*), those

remedies are subject to restrictions and time limits under Sect. 70 and may be lost altogether under Sect. 73. A monetary claim under Sect. 66 is a claim in debt, with the result that a demand to pay an award may qualify as a statutory demand for winding-up a company for non-payment of its debt. (277) Where there is a confidentiality or non-disclosure agreement in respect of an arbitration, the Court will seek to construe such an agreement in a manner that does not prevent a party relying on the award in respect of rights declared in its favour by the award. (278)

A plaintiff may also bring an action at common law for damages for breach of the defendant's implied promise to honour the award. (279) This will involve a trial. This procedure is used when issues arise on the award which cannot be decided summarily. The measure of damages will typically be the amount due to the plaintiff under the award.

The 1996 Act's enforcement provisions under Sect. 66 and Part III will not apply to an award made in arbitration proceedings commenced before 31 January 1997, being the commencement date under the Commencement Order (see Chapter I.1.*f* above). Accordingly, an award made in pre-commencement proceedings cannot use the summary procedure under Sect. 66, but is subject to the similar summary procedure existing under Sect. 26 of the 1950 Act. The action at common law remains available to both pre- and post-commencement awards.

11. Publication of the Award

As noted at Chapter IV.8 above, under English law, commercial arbitration awards are
P 80 private documents and confidential to the parties, subject to any ● policies and practices of the administering institutions (280) with respect to publication or to the taking of steps in the Court which brings an award into the public domain.

It has been the general practice of England-based arbitral institutions not to publish English awards, save in rare circumstances where the award merited the attention of arbitration practitioners and users. Awards made under the LCIA Rules are not published by the LCIA. (281) Digests of awards made by LMAA arbitrators are only occasionally published (by consent) in the LMAA newsletter and other journals (as provided in the LMAA Terms). (282) In such cases, the award is edited to meet any requirements for confidentiality and the parties' consent. For example, the award in *The Bamburi* [1982] 1 Lloyd's Rep 120 was reported by consent of the parties because the judge-arbitrator's decision (on marine insurance implications of the vessel's entrapment following hostilities between Iraq and Iran) had general application to some seventy other vessels also entrapped and insured at Lloyds'. (283) Nevertheless, commercial arbitration awards are not considered to be authoritative sources of English law. Whilst useful in practice even in unofficial, or camouflaged, form for practitioners, in theory English commercial awards should not ordinarily be cited to arbitration tribunals.

Chapter VI. Enforcement of Foreign Arbitral Awards

1. Enforcement under Conventions and Treaties

a. *1923-1958*

The UK is a signatory to the 1923 Geneva Protocol on Arbitration Clauses, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). In practice, the 1958 New York Convention will govern the enforcement of foreign awards, rather than the 1927 Geneva Convention. Between Contracting States of the New York Convention, the 1923 Protocol and 1927 Convention cease to have effect: Art. VII of the New York Convention.

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b. *1961-1965*

The UK has also ratified the 1965 Washington Convention for the Settlement of Investment Disputes between Contracting States and Nationals of Other States. (284) The UK is not a signatory to the 1961 European Convention on International Commercial Arbitration.

c. *The 1958 New York Convention*

Part III of the Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto) gives effect to the obligations assumed by the UK when ratifying the 1958 New York Convention for the recognition and enforcement of a New York Convention award. Such an award means an award made in pursuance of an arbitration agreement in the territory of a state, other than the UK, which is a party to the New York Convention: Sect. 100(1). The reciprocity reservation was made not only by the UK but by two thirds of the 160 or so states that have adhered to the New York Convention so far.

An applicant seeking enforcement of a New York Convention award must produce a duly authenticated original award or a duly certified copy and the original arbitration agreement or a duly certified copy: Sect. 102, corresponding to Art. IV of the New York

Convention. Where those documents' language is not English, the applicant must also produce translations certified by an official or sworn translator or by a diplomatic or consular agent. Sect. 103 exhaustively states the grounds for refusal of enforcement of such an award, corresponding to Art. V(1) of the New York Convention. If the Court does not accept that there is a valid ground for refusal of enforcement, it will enforce the award; even where the respondent succeeds in establishing a ground, the Court retains a discretion nonetheless to enforce the award: see the word *may* in Sect. 103(2). (285) A court assessing a Sect. 103 ground will normally engage in a rehearing rather than review. (286)

Where an application for the setting aside or suspension of the award is pending before a competent authority of the jurisdiction in which or under whose laws the award was made, the Court may adjourn the decision on the recognition or enforcement of the award, if it considers it proper to do so (see Art. VI of the New York Convention). It may also order suitable security: Sect. 103(5). That security is not available when the Court is dealing with an issue raised under Sect. 103(2) or (3), nor under general powers of the
P 82 Court. (287) ● Instead, it is the price of an adjournment under Sect. 103(5) which an award debtor is seeking pending the outcome of foreign proceedings; it is not to be imposed on an award debtor who is resisting enforcement on properly arguable grounds in England. (288) Suitable security can take a variety of forms; for example, it can be a package of undertakings from the award debtor and its subsidiaries, coupled with a top-up guarantee. (289)

Where the defendant is outside England, the applicant must seek the Court's permission supported by witness evidence to effect service of the enforcement proceedings outside the jurisdiction; (290) but the Court's exercise of jurisdiction is not conditional on the defendant having assets within England. (291)

Although not expressly provided for in the New York Convention or the 1996 Act, the term "*award*" has been interpreted by the Court of Appeal as meaning "award" or "any part of it" thereby permitting partial enforcement of an arbitral award provided that a judgment can be entered in the form of part of the award. (292)

2. Enforcement where no Convention or Treaty Applies

English law permits a foreign award to be enforced at common law, by action on the award: (293) see Chapter VI.4.*b* above. In practice, this remedy will only be used to enforce a foreign award which is not a New York Convention award or to enforce any award where it would not be appropriate to use the Court's summary procedures under Sect. 66 of the Arbitration Act 1996 (C.23) (see **Annex I** hereto), e.g., because difficult issues of fact or law arise.

3. Rules of Public Policy

a. *Public policy*

Sect. 103(3) of the Arbitration Act 1996 (C.23) (see **Annex I** hereto) provides that enforcement of a New York Convention award may be refused by the Court where it would be contrary to public policy to enforce the award. It enacts Art. V(2)(*b*) of the New York Convention. The same principle applies to all arbitration awards. The Court has
P 83 developed a narrow view of public policy ● for the enforcement of awards, see, e.g., *DST v. Shell*. (294) There is no known case of the English Court refusing to enforce a New York Convention award on the ground of public policy.

b. *EU public policy*

The Court, like all other state courts of the European Union Member States, is required to apply the public policy of the European Union, including its competition rules. In legal proceedings for the enforcement of an award, faced with violations of mandatory EU rules, the Court may be required to decline enforcement of the award or to refer an issue to the Court of Justice of the European Union (CJEU): *Municipality of Almelo v. Energiebedrijf IJsselmij NV* (295) (See Chapter *IX.2* below for a discussion of *Achmea* (296) and *Micula* (297)). It remains to be seen to what degree EU norms continue to play a role in domestic court proceedings following Brexit.

Chapter VII. Means of Recourse

1. Appeal on the Merits from an Arbitral Award

a. *Appeal to a second arbitral instance*

Institutional arbitration rules sometimes provide, particularly in the commodity field, for a two-tier system of arbitration, i.e., a first level of party-arbitration (two chosen arbitrators who appoint a third) and an appeal to a Board of Appeal constituted by the relevant arbitration institution. Such an appeal is usually by way of a complete rehearing. The GAFTA Rules provide an example of this two-tier system.

b. *Appeal to a court*

It is inevitable in any modern society that there will be some measure of control of the arbitral process exercisable by state courts at the seat of the arbitration. A state court which is asked to enforce an award made within its territorial jurisdiction cannot be expected to lend its assistance for the recognition or enforcement of the award in that jurisdiction where, e.g., it considers that the award was obtained unfairly. The question that arises is therefore the appropriate extent of judicial control over the award.

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Approaching the matter in this way, the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) contains three useful remedies exercisable by the Court with regard to an award made in England as the seat of the arbitration: (i) a challenge to the tribunal's substantive jurisdiction; (ii) a challenge for serious irregularity; and (iii) an appeal on a question of English law. These are powers exercisable over an award rather than over arbitration proceedings over which the Court under the 1996 Act has no supervisory powers (save that a challenge for serious irregularity examines the conduct of the arbitral proceedings retrospectively). Since these mechanisms only apply to awards, they cannot be used to attack other types of decisions, such as procedural orders. (298) As previously noted, for any challenges or objections, the time limits run from the date of the award, not from its publication or notification to the parties. (299)

The policy of avoiding delay and expense enshrined in the third principle of the 1996 Act means that, where the Court does exercise auxiliary jurisdiction, the right to appeal can be restricted such that the Court seised must give permission to appeal, in order to avoid protracted appeals. (300)

c. *Substantive jurisdiction*

Sect. 67 (a mandatory provision) allows a party to apply to the Court to challenge an award as to the tribunal's substantive jurisdiction. The term is defined in Sect. 30 to signify the lack of a valid arbitration agreement, the improper constitution of the arbitration tribunal or matters not submitted to arbitration in accordance with the parties' arbitration agreement. The challenge may be made to an award on jurisdiction or an award made on the merits (which implies the tribunal having exercised substantive jurisdiction), but where there is a partial award on jurisdiction, it is that award a party
P 85 must challenge (and the time limits discussed below apply). As explained above at V.1.*a*, it is not open to a party to see whether it prevails on the merits and, if it does not, then challenge the partial award on jurisdiction. (301) A court dealing with a Sect. 67 application will engage in a re-hearing rather than a review. (302) This means that the Court will conduct a full analysis of the materials before it and substitute its own views for those of the arbitral tribunal. The result will be for the Court to confirm, vary or set aside the award. A party may lose its right to apply to the Court under Sect. 67 (see Sect. 73) and its exercise is subject to the restrictions listed in Sect. 70(2) and (3), i.e., the exhaustion of any arbitral remedies by way of appeal, review, correction or additional award and the twenty-eight-day time limit for application to the Court. The Court may extend this twenty-eight-day time limit (whether or not it has already expired) under Sect. 79, where substantial injustice would otherwise be done and any arbitral process for obtaining an extension must first be exhausted. In practice, this requirement is a stringent hurdle to overcome (303) and a court will rarely grant an extension of time. (304) For relevant factors for extensions under Sects. 79 and 80(5), see, for example, *Aoot Kalmneftv. Glencore International AG* [2001] 2 All ER (Comm) 577, para. 59 and *Terna Bahrain Holding Co WLLv. Al Shamsi* [2012] EWHC 3283 (Comm), para. 27. (305) Where the delay is lengthy and the extension application is based on fresh evidence, such evidence needs to be "transformational" or "seismic" in order for the Court to grant the extension. (306) When examining a tribunal's jurisdiction, the Court will construe the arbitration agreement in a pragmatic and commercial manner (307) and construe the notice of arbitration by considering the parties' previous communications regarding the issues between them. (308) Under Sect. 70(7), the Court may order the party challenging the award to provide security for the award in relation to applications under Sects. 67-69. It will ordinarily only do so where the challenge is flimsy or otherwise lacks substance and where the applicant for security can demonstrate that the challenge to the award will
P 86 prejudice its ability to enforce it, for example because of a risk of dissipation of assets. (309) Where the applicant's delay, without good explanation, in paying the tribunal's fees delays the publication of the award, the Court has refused to grant an extension of time for a Sect. 69 challenge; (310) the same logic should apply to other types of challenges, including under Sect. 67. An appeal to the Court of Appeal is only possible with the permission of the Court that heard the Sect. 67 application. Even where that Court finds that the application falls outside Sect. 67, that Court's permission is likely required for an appeal. (311)

d. *Serious irregularity*

Sect. 68 (a mandatory provision) allows a party to apply to the Court to challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award. The term is defined in Sect. 68(2), ranging from the tribunal's failure to discharge its mandatory duties of fairness under Sect. 33 to any irregularity in the conduct of the proceedings or award admitted by either the tribunal or the arbitral institution vested by the parties with powers relating to the proceedings or award. It does not allow a

challenge to a decision or order of the tribunal which is not an award. The DAC Report makes clear that the original intention of the Sect. 68 mechanism was that it would only be available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected (312) . The Court will focus on due process, rather than whether the decision is substantively correct; for example, an erroneous exercise of power is not, by itself, an excess of power within the meaning of Sect. 68(2)(b). (313) As with jurisdiction, a party may lose its right to apply to the Court under Sect. 68 (see Sect. 73) and its exercise is subject to the restrictions listed in Sect. 70(2) and (3), i.e., the exhaustion of any arbitral remedies by way of appeal, review, correction or additional award (314) and the twenty-eight-day time limit for application to the Court. Where there is a correction of the award, the time limit commences from the date of the award as originally issued, unless the correction is material to the challenge, in the sense that the correction is necessary to enable the party to know whether or not it has grounds to challenge the award. (315) The Court's primary remedy is remission of the
P 87 award back to the arbitration tribunal in ● order to save the award. Only if remission is inappropriate will the Court set aside the award or declare it to be of no effect: Sect. 68(3). (316) The Court's armoury under Sect. 68 does not include the ability to remove an arbitrator, this being the exclusive province of Sect. 24. (317) Sect. 68 applicants should take note of the Court's guidance in *Orascom TMT Investments SARLv. VEON Ltd* (318) on the drafting of an arbitration claim form in relation to a Sect. 68 challenge. The Court noted that this guidance equally applies to Sect. 67 challenges. In the rare scenario where there are further arbitration proceedings between the same parties, the Court may stay the challenge proceedings under Sects. 67 and 68 pending the outcome of those further arbitrations, in order to allow the underlying question to be examined by an independent and experienced tribunal, selected by the parties, whose work would also be subject to the Court's supervisory jurisdiction. (319)

e. *Appeal on English law*

Sect. 69 permits a party to appeal to the Court on a question of English law arising out of an award, either by agreement of all parties to the arbitration (320) or with permission of the Court. This provision is non-mandatory: see exclusion agreements at para. *f* below. Sect. 82(1) defines a question of law for an application to the English Court as a question of English law. There cannot, therefore, be an appeal on a question of fact or a question of foreign law, e.g., where the law applicable to the parties' substantive contract is foreign law, even where the parties have agreed that the foreign law is the same as English law. (321)

There are several restrictions on the bringing of such an appeal, in particular the filtering provisions for the granting of permission to appeal, established by the House of Lords' decision in *The Nema* [1982] AC 724. Sect. 69(3) requires the question of law substantially to affect the legal rights of a party, the tribunal must have been asked to determine the question, and, on the basis of the findings of fact in the award, the decision of the tribunal must be obviously wrong (or expressed in a manner precluding the Court from
P 88 determining whether the tribunal has answered the question of law correctly (322)) ● or, where the question of English law is one of general public importance (323) (e.g., the meaning of a provision in a standard printed form of charterparty applied to a factual situation widespread in the market), the decision must be at least open to serious doubt. For an explanation of “obviously wrong”, see *HMV UKv. Propinvest Friar.* (324) The Court will examine an award in a fair and reasonable way (325) and not with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. (326) In any case, notwithstanding the parties' agreement to resolve their dispute through arbitration, the Court must be satisfied that it is just and proper in all the circumstances for it to determine the question. This includes considerations as to whether justice requires an appeal to the Court when the parties have agreed to arbitrate in London rather than litigate in the English Court. (327) The Court will apply the tribunal's findings of fact for testing the correctness of the tribunal's conclusions on the relevant questions of law. (328) If the arbitration tribunal has failed to provide reasons in its award or the Court finds those reasons wanting, it may order the tribunal to state reasons in sufficient detail for its purpose: Sect. 70(4). An error for the purpose of Sect. 69 does not exist when the tribunal has applied the correct legal principle wrongly to the facts. (329) The precise characterisation of the tribunal's alleged mistake is important: where, on a correct analysis, the tribunal was considering evidence rather than applying a wrong legal test, no appeal under Sect. 69 will lie. (330) Notwithstanding various restrictions on a party's ability to bring a Sect. 69 appeal, the Court has allowed such an appeal in order to answer a hypothetical question, by construing the criterion of general public importance under Sect. 69(3) against the context of the popularity of arbitration (whose decisions do not form part of English case law) and the need to develop the law. (331) The normal remedy where an appeal is upheld is remission to the tribunal. See *Maurice J Bushell & Cov. Graham Irving Born* [2017] EWHC 2227 (Ch) paras. 23 to 53 for a discussion when remission might be inappropriate.

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Ordinarily, applications for permission are made on paper only, with no oral hearing: Sect. 69(5). If permission is granted (or the parties agree), on the appeal itself the Court

may confirm, vary, remit or set aside the award, in whole or in part: Sect. 69(7). As before, a party may lose its right to apply for permission to the Court under Sect. 69 (see Sect. 73); and its exercise of any right to appeal is subject to the restrictions listed in Sect. 70(2) and (3), i.e., the exhaustion of any arbitral remedies by way of appeal, review, correction or additional award and the twenty-eight-day time limit.

In addition to allowing an appeal to the Court on a question of English law following the issuing of a final award, the Arbitration Act 1996 (Sect. 45) also allows a party to apply to the Court for a determination of a question of law as a preliminary issue arising in the course of the proceedings which the Court is satisfied substantially affects the rights of one or more of the parties. The Court will only consider such an application if (i) it is made with the agreement of all the parties or (ii) with the tribunal's permission and the Court is satisfied that the determination of the question is likely to produce substantial savings in costs and the application is made without delay. The arbitral proceedings may continue while the Court application is pending. To date, the Sect. 45 mechanism has hardly ever been used. In one instance, the Court considered, including by reference to without prejudice communication, whether the parties had reached a binding settlement agreement, finding that they had not done so. (332)

f. *Exclusion agreements*

By written agreement, the parties may exclude any right of appeal on a question of English law under Sect. 69. This does not constitute an impermissible constraint to the right to a hearing contained in Art. 6 of the European Convention on Human Rights. (333) The exclusion agreement may be contained in, or incorporated by reference into, the parties' arbitration agreement, for example via Art. 26.8 of the LCIA Rules 2014. On its own, the phrase “final and binding” is not sufficient to exclude the Sect. 69 mechanism, but, in conjunction with other factors, it may do so. (334)

2. Setting aside of the Arbitral Award (Action for Annulment, Vacation of the Award)

a. *Effect*

The grounds on which an arbitral award can be set aside by the Court under the
P 90 Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto) have been ● discussed above, with regard to Sects. 67 (Substantive Jurisdiction), 68 (Serious Irregularity) and 69 (Appeal on Question of English law) of the 1996 Act: see Chapter VII.1 above. Where the Court can remit the award under Sects. 68 and 69, that is ordinarily the appropriate remedy rather than setting aside: Sects. 68(3) and 69(7); see *Maurice J Bushell & Cov. Graham Irving Born* [2017] EWHC 2227 (Ch) paras. 23 to 53 for a discussion when remission might be appropriate. Whether the Court will remit the award to the same or different tribunal will be fact sensitive: where the Court finds a serious irregularity causing substantial injustice in the context of a Sect. 68 application, it is more likely to order that the case be remitted to a new tribunal. (335) Where the Court sets aside an award, in whole or in part, the whole or that part of the award is of no legal effect, just as if it had never been made. According to the orthodox view, the arbitration tribunal would not then be *functus officio* and it could make a fresh award. (336) However, given that setting aside is the remedy of last resort, the conduct of the tribunal leading to that draconian remedy may be such that its members would be subject to challenge and removal (see Chapter III.4 above).

In making an order setting aside an award, the Court may also grant relief against a *Scott v. Avery* clause, i.e., by ordering that no effect be given to any contractual provision that an award shall be a condition precedent to the bringing of legal proceedings: Sect. 71(4) and Chapter II.5.*c* above.

b. *Appeals*

An appeal from the Court to the Court of Appeal from the Court's decision lies only with the Court's permission under Sects. 67(4) and 68(4). An appeal under Sect. 69(8) additionally requires the Court to be satisfied that the question of English law is one of general importance or is one which for some special reason should be considered by the Court of Appeal.

3. Other Means of Recourse

a. *Remission of the award*

The grounds on which an arbitral award can be remitted by the Court under the Arbitration Act 1996 (C.23) (“the 1996 Act”, see **Annex I** hereto) have been discussed above, with regard to Sects. 67 (Substantive Jurisdiction), 68 (Serious Irregularity) and 69 (Appeal on Question of English Law): see Chapter VII.1 above. Remission is an old and useful
P 91 remedy under English ● law, inflicting less harm to the parties' arbitration than annulment of the award. Where the Court orders remission to the tribunal, in whole or in part, the award (or that part of it) loses legal effect (but the unaffected part remains and may be enforced); and the tribunal must make a fresh award in respect of the matters remitted within three months of the Court's order (or such longer or shorter period as the Court may direct): Sect. 71(3) of the 1996 Act. The tribunal otherwise remains *functus*

officio and has no power to re-open matters not remitted.

b. *Appeals*

An appeal from the Court to the Court of Appeal from a court order remitting an award is similarly restricted: see para. 2.*b* above.

Chapter VIII. Conciliation/Mediation

1. General

a. *ADR in England and Wales*

There has been a marked interest by users of commercial arbitration in conciliation, mediation and other forms of ADR as an amicable, quick and cost effective method of resolving their commercial disputes, particularly in the construction and engineering fields. It is not, however, limited to commercial disputes.

b. *Institutions*

Several arbitration institutions, both domestic and international, offer ADR facilities before or during the arbitration proceedings, including the LCIA and ICC UK. The principal institutions include:

Centre for Effective Dispute Resolution (CEDR)

70 Fleet Street

London EC4Y 1 EU

Telephone: + 44 (0)20 7536 6000

Facsimile: 44 (0)20 7536 6061

E-mail: info@cedr.com

Website: <www.cedr.com>

In Place of Strife (IPOS)

70 Fleet Street

London EC4Y 1 EU

Telephone: + 44 (0) 33 3060 5832

E-mail: info@mediate.co.uk

Website: <www.mediate.co.uk>

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Independent Mediators

70 Fleet Street

London EC4Y 1 EU

Telephone: + 44 (0) 20 7127 9223

Website: <www.independentmediators.co.uk>

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2. Legal Provisions

The English Courts will enforce a contractual agreement to refer disputes to ADR and will stay legal proceedings to give effect to such an agreement provided that the agreement contains an identifiable procedure (and therefore does not give rise to objections on grounds of uncertainty): *Cable & Wireless Plc v. IBM United Kingdom Ltd.* (337)

Under the court reforms initiated by Lord Woolf, (338) litigants are to be encouraged to use alternative methods of dispute resolution, including conciliation. The Commercial Court has promulgated practice statements requiring legal practitioners to advise their clients on such alternative procedures. (339) There is at present no statutory provision providing for conciliation of international commercial disputes.

Chapter IX. Investment Treaty Arbitration

1. Conventions and Treaties

Applicability of the 1996 Act

The orthodox rule of non-justiciability and judicial restraint (as applied by the English Courts) is generally regarded as precluding the Court from interpreting the terms of an international treaty, (340) including for example a bilateral investment treaty ("BIT") entered into between sovereign states. (341)

P 94 Whether an award rendered under a BIT is subject to the corrective mechanisms contained in the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto) is a separate question. The Court of Appeal has held that an award in respect of a claim brought by a private investor under an investment treaty could be subject to the 1996 Act because an appropriately worded BIT may give rise to direct rights in favour of individuals and a dispute resolution mechanism capable of being operated by such individuals. The fact that the arbitration agreement might be governed by international law does not affect this conclusion and does not give rise to an issue of non-justiciability: *Occidental Exploration and Production Co v. The Republic of Ecuador.* (342)

The UK is party to a series of multilateral treaties containing arbitration mechanisms, some of which take the form of agreements between the EU, its Member States and non-EU states. (343) As at the date of writing, it remains to be seen which arrangements will govern the situation following the UK's likely withdrawal from the EU. The UK is also party to around ninety BITs currently in force, which would be unaffected by Brexit, except that potential intra-EU BIT implications from the *Achmea* decision would no longer apply (see 2.*b*). There are several other BITs signed, but not in force. (344)

2. Investment Arbitration

a. *United Kingdom as a party to investment arbitration*

The UK is a party to many investment treaties. There is so far only one reported case addressing a claim brought against the UK under an investment treaty: *Ashok Sanchetiv. United Kingdom*. As mentioned above, the case is noteworthy in relation to Sect. 9 of the Arbitration Act 1996 (C.23) ("the 1996 Act", see **Annex I** hereto), clarifying that the Sect. 9 applicant needs to be a party to the arbitration agreement. In particular, for the purpose of analysing whether a person is a party to an arbitration agreement it is irrelevant under English law that a state may be liable under international law for the acts of that party. (345) Note, nevertheless, that in the context of ICSID arbitration proceedings, Sect. 3(2) of the Arbitration (International Investment Disputes) Act 1966 expressly preserves the applicability of Sect. 9.

A potential reason for the relative paucity of investor-state arbitrations against the UK is likely to be the availability of viable domestic remedies, whether by way of judicial
P 95 review or specific statutory remedies, against administrative organs of the state. The English judiciary is famously independent, and would not be expected to be partial to the UK if a party were to complain about government action (or inaction) in proceedings brought before the English Courts.

b. *Recognition and enforcement of investment arbitration awards: non-ICSID*

Arbitration awards against foreign states are routinely enforced in England. Where such an award is made (or deemed to be made) in the territory of a state which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), the enforcement regime of Part III of the 1996 Act applies. English Courts will permit respondent states to raise jurisdictional arguments at this stage of the proceedings (346) and will consider any applicable immunities under the State Immunity Act 1978 (which does not contain limitations on the timing of raising jurisdictional objections equivalent to Sect. 73). Admissibility objections, however, even if they appear to succeed on the facts, will not be entertained by the Court if they were not raised before the tribunal. (347) Where the Court has supervisory jurisdiction over the arbitral proceedings, e.g., where the seat is in England, it will, on application by a party, review an investment arbitration tribunal's jurisdictional decision. If appropriate, the Court will overturn a finding declining jurisdiction and direct the tribunal to continue the proceedings. (348) A state's waiver of immunity by a submission to arbitration under Sect. 9 of the State Immunity Act 1978 includes a waiver of immunity regarding enforcement, (349) and Sect. 13 makes a state's assets used for commercial purposes available for enforcement. (350) The immunity waiver under Sect. 9(2) of the State Immunity Act 1978 does not apply to arbitration agreements between states, however, the arbitration agreement invoked by an investor is not regarded as an agreement between states, notwithstanding that the only parties to the treaty itself are states. (351)

In *Achmea*, (352) the CJEU held that Arts. 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) preclude a provision in the BIT between the Netherlands and
P 96 the Slovak Republic, pursuant to which an ● investor from one Member State may bring proceedings against another EU Member State before an arbitral tribunal. This decision dealt with a specific BIT, to which the EU was not a party, with its own applicable law clause and is confined to EU law (rather than public international law) The full scope of the *Achmea* judgment remains the subject of debate, including in the investment treaty arbitration awards under intra-EU BITs which have upheld jurisdiction subsequent to *Achmea*. (353) No English Court has yet had to address enforcement of an intra-EU BIT award since the *Achmea* decision, other than in the *Micula* case, which addressed a separate question of state aid (see below). Brexit may limit any implications from *Achmea* in the UK.

c. *Recognition and enforcement of investment arbitration awards: ICSID*

Where an award is made under the ICSID Convention, the Arbitration (International Investment Disputes) Act 1966 governs enforcement; no recourse under the 1996 Act is possible. (354)

Sects. 1(2) and 2 the Arbitration (International Investment Disputes) Act 1966 provide that, in line with Art. 54 of the ICSID Convention, a party seeking recognition or enforcement of an ICSID award is entitled to have the award registered in the High Court and that it will take effect as such. Interim measures are not available from the English Court in support of ICSID proceedings. (355) The grounds for refusing enforcement of an award under the 1966 Act are very limited. In *Micula v. Romania* (356) the tribunal issued an award in the claimants' favour in 2013. The award was registered in the UK in 2014 under the 1966 Act. In 2015 the European Commission issued a decision explaining that the enforcement of the award would constitute state aid under Art. 107(1) of the TFEU, with the consequence that it would be prohibited under EU law; in June 2019, the General Court of the European Union (GCEU) annulled this decision (357) and, in September 2019, the US District Court for the District of Columbia issued an opinion that judgment would be entered in favour of the award creditors. (358) Before the GCEU's annulment occurred, the English Court of Appeal refused to set aside the registration of the award but did order a stay of
P 97 enforcement pending the determination of the ● GCEU proceedings. Romania was also ordered to pay GBP 150m as security, although the Court noted that non-compliance would not, without more, lead to an automatic lifting of the stay. This judgment is an attempt to navigate the conflicting substantive obligations under the ICSID Convention and EU norms, while taking into account parallel proceedings in the EU courts. (359) In the context of the UK's likely withdrawal from the European Union, the post-withdrawal arrangements, including the status of EU law within England, remain unclear at present; one potential solution could be the one articulated by the US District Court for the District of Columbia. This is accordingly an evolving issue.

3. Other National Investment Legislation

Although not applying to ICSID Awards under the Arbitration (International Investment Disputes) Act 1966, other investment arbitration awards may be subject to the Debt Relief (Developing Countries) Act 2010, which limits financial recoveries against the poorest developing states, as identified by the Heavily Indebted Poor Countries Initiative of the IMF and the World Bank.

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★) *Karyl Nairn QC*: Partner, Skadden, Arps, Slate, Meagher & Flom (UK) LLP, London.

Maximilian Szymanski: Associate, Skadden, Arps, Slate, Meagher & Flom (UK) LLP, London.

This report addresses the law and practice of consensual commercial arbitration in England and Wales; but for linguistic convenience, reference will be made only to England. English consumer, statutory, county court and other non-consensual arbitrations lie outside the scope of this report. The authors are indebted to the writers of the 2015 version of this report, V.V. Veeder QC and R.H. Diwan QC, on whose work they have drawn.

#) For a copy of a previous version of this document, should this be available, please contact customer support.

*) The authors of the National Report England, Karyl Nairn QC and Maximilian Szymanski, confirm that the National Report as published in Handbook Supplement 107 of October 2019 ***continues to reflect current arbitral practice*** in England and Wales.

Following the 2016 Brexit referendum, the United Kingdom left the European Union on 31 January 2020. There is a transitional period until the end of 2020, during which EU law continues to apply. The status of EU law beyond 2020 remains subject to negotiations, and will be addressed in a forthcoming Supplement.

The status of legislation annexed is as follows:

- **Annex I**: The Arbitration Act 1996 (C.23) (published in Supplement 107 of October 2019) ***remains in effect***.
- **Annex II**: The Arbitration Act 1996 (Commencement No. 1) Order 1996 (published in Supplement 23 of March 1997) ***remains in effect.***

1) This general definition derives from Lord Mustill's opinion in *Pupuke Service Station Limited v. Caltex Oil (NZ) Limited* PC (16 December 1995) and Sect. 1 of the Arbitration Act 1996. Note that under Sect. 58(1) of the 1996 Act, the parties are free to agree that the award shall not be final and binding but such an agreement would be most unusual.

2) The 1996 Act is also available on the Internet: <http://www.legislation.gov.uk/ukpga/1996/23/contents>.

3) Arbitration clauses in consumer contracts with legal and natural persons are now governed by Sects. 89-91 of the 1996 Act (Part II) and the Consumer Rights Act 2015.

4) See I.1.*f* for the potential distinction between domestic and international arbitrations if Sects. 85 to 87 are enacted, although this possibility remains remote.

5) The radical and innovative nature of the 1996 Act for the law and practice of English arbitration was acknowledged by the House of Lords in *Lesotho Highlands v. Impregilo* [2005] UKHL 43, paras. 17-18. Lord Steyn (with whom the other Law Lords agreed) there cited with approval Lord Michael J. Mustill and Stewart C. Boyd's *Commercial Arbitration*, 2nd edn., with 2001 Companion Volume (henceforth "Mustill & Boyd, *2001 Companion*") and, extra-judicially, Lord Wilberforce. The former referred to the 1996 Act's "entirely new face, new policy and new foundations". The latter described the 1996 Act, on the whole, as providing under English law "a freestanding system, free to settle its own procedure and free to develop its own substantive law". See also fn. 14 below.

6) For the DAC Report I and II, see Mustill & Boyd, *2001 Companion*.

7) The UNCITRAL Model Law was amended in 2006 ("the Amended Model Law").

8) For the text of the UNCITRAL Model Law, see *ICCA Handbook*, Vol. VI, and see <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>; for commentaries on the drafting and text of the Model Law, see A. Broches, "Commentary on the Model Law", *ICCA Handbook* under UNCITRAL Commentary and, *in extenso*, H. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989 Kluwer). For the text of the Model Law and the Amended Model Law see <www.uncitral.org>.

9) *Seabridge Shipping ABv. AC Orssleff's Eftf's A/S* [1999] 2 Lloyd's Rep 685, 690.

10) Contrast Sect. 1(c): in matters governed by this Part the court *should* not intervene except as provided by this Part with Art. 5 of the Model Law: In matters governed by this Law, no court *shall* intervene except where so provided in this Law. The former wording is directed at the exercise of the English Court's discretion only, preserving in legal theory the inherent jurisdiction of the English Court over the arbitral process (see also DAC Report I, paras. 21 et seq.). See also *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, para. 33.

11) These mandatory provisions are contained in Sects. 9-13, 24, 26(1), 28-29, 31-33, 37(2), 40, 43, 56, 60, 66-68, 70-71 (part) and 72-75 of the 1996 Act. Schedule 1 is attached in **Annex I**. For the reader's convenience, the mandatory provisions of the Act are indicated in the text of the Act in **Annex I** by an *.

12) Sect. 13 (Application of Limitation Act 1980 and Foreign Limitation Periods Act 1984); Sect. 40 (general duty of parties), Sect. 60 (certain agreements on costs), and Sect. 73 (loss of right to object). If the parties were to choose a foreign seat, albeit holding hearings in England for geographical convenience only, even these mandatory provisions would not be applicable (see IV.1.c below).
13) *C v. D* [2007] EWCA Civ 1282, para. 19.
14) In welcoming the Arbitration Bill during its second reading in the House of Lords on 18 January 1996, Lord Wilberforce said (extra-judicially): "I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law." (Hansard, col. 778).
15) [2018] EWHC 1052 (Comm). Note that the LCIA's determination of the seat took place under Art. 16.1 of the 1998 rules; the 2014 Rules provide that, in default of the parties' agreement regarding seat, the seat is London, unless the tribunal (rather than the LCIA Court) otherwise determines; see also Art. 18(1) of the ICC Rules 2017 which provides that, in the absence of party agreement, the ICC Court shall determine the seat.
16) *Silver Dry Bulk Company Limitedv. Homer Hulbert Maritime Company Limited* [2017] EWHC 44 (Comm).
17) *The Arbitration Act 1996 (Commencement No. 1) Order 1996*; 1996 No. 3146 (C.96), ISBN 0-11-063536-1 (see **Annex II**).
18) The DAC considered that the distinction between domestic and non-domestic arbitration agreements based on the nationality, habitual residence, place of incorporation or central control and management of the parties, first introduced in the 1975 Act and repeated in the 1979 and 1988 Acts, could violate EU law, as direct or indirect discrimination against foreign citizens and legal persons of the European Union: see para. 326 of DAC Report I, the subsequent decision of the Court of Appeal in *Philip Alexander Securities v. Bamberger* (Times, 22 July 1996, ICCA *Yearbook Commercial Arbitration* XXII (1997) (henceforth *Yearbook*) p. 872, Rev. arb. (1996) p. 167) and the DTI's Consultation Document of July 1996, para. 3; see also the ECJ decision of 26 September 1996 in *Data Delecta Aktiebolag v. MSL Dynamics* (Case C-43/95), (Times Eur.L.Rep, 10 October 1996). The UK's proposed withdrawal from the European Union may diminish this particular rationale; the arbitral regime has, however, worked well without the 'domestic provisions' for more than twenty years and it would seem odd if Brexit were to trigger renewed appetite to introduce a distinction between domestic and international arbitrations.
19) For the law and practice under the Arbitration Acts 1950-1979, see the previous National Report England and the previous **Annexes I**, **II** and **III** (Suppl. 9, Sept. 1988).
20) Part 62 (Arbitration Proceedings) provides a largely self-contained code of civil procedure for arbitration matters in the English High Court; it is published in Vol. 2 of the Civil Procedure Rules.
21) CPR 62.3(1) and (2).
22) CPR 62.10(3).
23) *Moscow City Council* v. *Bankers Trust Co* [2004] EWCA Civ 314, para 34.
24) Practice Direction 62, para. 10.1.
25) CPR 62.18(6).
26) CPR 62.21; see also Arbitration (International Investment Disputes) Act 1966.
27) See Mustill & Boyd (2nd edn.), p. 87. Legal materials on the *Marc Rich Case* [1991] ECR 1-3855, [1989] 1 Lloyd's Rep 548, [1992] 1 Lloyd's Rep 342, [1992] 1 Lloyd's Rep 624 and the several difficulties raised by the arbitration exception are extensive; in particular, see 7 Arbitration International (1991, no. 3) p. 179 et seq. and Dicey & Morris, Vol. 1, p. 576.
28) Case C-185/07 [2009] OJ C82/4.
29) *Proceedings concerning Gazprom OAO* (Case C-536/13), paras. 35-41.
30) The English and Russian versions are available online: <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx>.
31) For the practice of LMAA arbitration, see C. Ambrose, K. Maxwell and A. Parry, *London Maritime Arbitration*, 2nd edn. at Chap. 4(d); B. Harris, M. Summerskill and S. Cockerill, "London Maritime Arbitration", 9 Arbitration International (1993, no. 3) p. 275.
32) Sect. 108(1) confers upon a party to a construction contract to be performed in England, whatever its applicable law, the right to refer a dispute arising thereunder for adjudication under a procedure either complying with Sect. 108(2)-(4) or provided by the Scheme for Construction Contracts.
33) See *Palaclath v. Flanagan* [1985] 2 All ER 161 on a rent review surveyor acting as expert and not as arbitrator.
34) *Berkeley Burke SIPP Administration LLP v. Charlton* [2017] EWHC 2396 (Comm).
35) See DAC Report I, para. 41; see also *Sykes v. Fine Fare* [1967] 1 Lloyd's Rep 53 and *Vosper Thorneycroft v. Min. of Defence* [1976] 1 Lloyd's Rep 58.
36) *Av. B* [2018] EWHC 1370 (Comm).
37) *Habas Sinai ve Tibbi Gazlar Isthisal Endustri ASv. Sometal SAL* [2010] EWHC 29 (Comm), paras. 46-52.

38) The precise wording of Art. 7 of the Model Law was not followed in the light of the criticisms made of its limitations by users and the DAC's 1989 Report (p. 52), *ibid.*, to the effect that Art. 7, in requiring a signature on the document, could leave most bills of lading, many brokers' contract notes and other important categories of contracts outside the scope of the Model Law. The financial markets in the City of London, extensive users of paperless contracts incorporating standard terms providing for, *inter alia*, arbitration, made similar criticisms, as did users of Lloyd's salvage arbitration where parties ordinarily contract by radio on the Lloyd's Standard Forms of Salvage Agreement: see DAC Report I, paras. 31 to 40. Art. 7 of the Model Law as amended in 2006 has removed the signature requirement and also permits (under Option II) national legislation to abandon the writing requirement altogether. See also T. Landau and S. Moollan, "Article II and the Requirement of Form", in Emmanuel Gaillard and Domenico Di Pietro, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008).

39) This broad definition of *arbitration agreement* in the 1996 Act conforms with the non-exhaustive English text of Art. II(2) of the 1958 New York Convention, as also interpreted by the English Court, but it is probably wider than the French version of Art. II: see DAC Report I, para. 34, *Excomm Ltd v. Ahmed Abdul-Qawi Bamaodah* [1985] 1 Lloyd's Rep 403; *Zambia Steel v. James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225, *Yearbook* XIV (1989) p. 715; contrast F.A. Mann, "An 'Agreement in Writing' to Arbitrate", 3 Arbitration International (1987) p. 171.

40) *Barrier Ltdv. Redhall Marine Ltd* [2016] EWHC 381.

41) *Sonact Group Limitedv. Premuda SPA* [2018] EWHC 3820.

42) *Filatona Trading Ltd & Anorv. Navigator Equities Ltd & Ors* [2019] EWHC 173 (Comm).

43) Other institutions of course provide for standard or model arbitration agreements. The LCIA's model clause is referred to in this report by way of example primarily because the current default provision in the Rules is that London will be the seat of arbitration in the absence of any express choice to the contrary. At time of writing the 2014 Rules were proposed to be revised but not in this respect.

44) *J (Lebanon)v. K (Kuwait)* [2019] EWHC 899 (Comm), paras. 56-59.

45) See David St. John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*, 24th edn. (Sweet & Maxwell 2015) para. 3-009.

46) *J (Lebanon)v. K (Kuwait)* [2019] EWHC 899 (Comm), para. 10.

47) *Sulaméricav. Enesa Engenharia* [2012] EWCA Civ 638, para. 9; see also *J (Lebanon)v. K (Kuwait)* [2019] EWHC 899 (Comm), paras. 11-17.

48) *Russell on Arbitration*, 24th edn., para. 3-041.

49) *Russell on Arbitration*, 24th edn., para. 3-016.

50) For a full discussion of this topic see Mustill & Boyd (2nd edn.), pp. 151-153; see also DAC Report I, paras. 48-49.

51) See Mustill & Boyd (2nd edn.), pp. 151-152. See also *Svenska Petroleum v. Government of Lithuania (No 2)* [2006] EWCA Civ 1529 at paras. 116-117.

52) *Reliance Industries Ltd and anotherv. Union of India* [2018] EWHC 822 (Comm).

53) See *Onassisv. HP Drewry SARL & ors* (1949) 82 LL L 565.

54) *Baytur v. Finagro Holdings* [1992] 1 QB 610, 619: There cannot be a valid arbitration when one of the two parties has ceased to exist.

55) *Ga-Hyun Chung (as the former statutory trustee of Homer Hulbert Maritime Co Ltd)v. Silver Dry Bulk Co Ltd* [2019] EWHC 1147 (Comm).

56) Sect. 8(1) of the Contracts (Rights of Third Parties) Act 1999.

57) *The Montedipe S.p.A.v. JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep. 11.

58) *Bayturv. Finagro Holdings* [1992] 1 QB 610, 618-9.

59) *Av. B* [2016] EWHC 3003 (Comm).

60) *Av. B* [2017] EWHC 3417 (Comm); contrast *The Biz* [2010] EWHC 2565 (Comm).

61) For the DAC 1990 Report, see Chapter I.4.*a* above; see also M. Mustill, "Multipartite Arbitrations: An Agenda for Law-Makers", 8 Arbitration International (1992, no. 4) p. 383; A. Diamond, "Multi-Party Arbitrations A Plea for a Pragmatic Piecemeal Solution", 7 Arbitration International (1991, no. 4) p. 403; and V.V. Veeder, "Multi-party disputes: Consolidation under English law The Vimeira – a Sad Forensic Fable", 2 Arbitration International (1986, no. 4) p. 310.

62) See, for example Arts. 8 and 22(viii)-(x) of the 2014 LCIA Rules and Arts. 7 to 10 and 12(6)-(8) of the 2017 ICC Rules.

63) The 1996 Act, by abolishing the distinction between domestic and non-domestic arbitration and subjecting both to the regime of Art. II(3) of the 1958 New York Convention, substantially changes the position for national arbitration from the 1950-1979 Acts: contrast *Taunton-Collins v. Cromie* [1964] 1 WLR 633 and Mustill & Boyd (2nd edn.), at p. 141 et seq.

64) Under the 1996 Act, the English Court has no longer any statutory discretion not to stay English legal proceedings brought by any party in breach of a domestic arbitration agreement, such as the Court had previously enjoyed under the 1950-1975 Acts. In particular, Sect. 4(1) of the 1950 Act is repealed by the 1996 Act; and its statutory successor, Sect. 86 of the 1996 Act, has not been brought into effect by the Commencement Order (see Chapter I.1.*f* above).

65) *Oxford Shipping Co Ltd v. Nippon Yusen Kaisha (The Eastern Saga)(No. 2)* [1984] 2 Lloyd's Rep 373, disapproving a passage to the contrary in Mustill & Boyd (1st edn.) p. 112; see generally Mustill & Boyd (2nd edn.), at pp. 141-148.
66) *Ali Shipping Corpv. Shipyard Trogir* [1999] 1 WLR 314.
67) This was done in *Abu Dhabi v. Eastern Bechtel* [1982] 2 Lloyd's Rep 425, 21 BLR 117, *Yearbook* IX (1984) p. 448, Rev. arb. (1983) p. 119 (with commentary by Paulsson). Despite initial enthusiasm for the Court of Appeal's innovative approach, it seems unlikely to provide a workable solution without the parties' consent. Indeed the sole arbitrator appointed in these two cases (Sir John Megaw) declined to hear both arbitrations together in the absence of all parties' consent: see Mustill & Boyd (2nd edn.), at p. 145, fn. 13. Note *Halliburton Cov. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, where the Court of Appeal refused to remove an arbitrator sitting in more than one case arising out of the same underlying facts, finding that "*the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias*" (para. 53); this decision is currently subject to appeal to the Supreme Court, scheduled to be heard in late 2019.
68) See A.J. van den Berg, "Consolidated arbitrations and the 1958 New York Arbitration Convention", 2 Arbitration International (1986, no. 4) p. 367; S. Jarvin, "Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986 – a Critique of Dr. van den Berg", 3 Arbitration International (1987, no. 3) p. 254 and A.J. van den Berg, "Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986 – A Replique to Mr Jarvin", 3 Arbitration International (1987, no. 3) p. 257.
69) J. D. M. Lew and O. Mardsen, "Chapter 19: Arbitrability", in J. D. M. Lew, H. Bor, G. Fullelove and J. Greenaway, eds., *Arbitration in England, with chapters on Scotland and Ireland* (Netherlands: Kluwer Law International, 2013), p. 402.
70) This restriction is an historical oddity, being first introduced by Sect. 7 of the 1934 Act. The DAC elected not to change the law on this point: see DAC Report I, para. 234. See, however, Art. 22.1(vii) of the 2014 LCIA Rules, which grants to a tribunal the power to order specific performance of any contract relating to land; contrast *David Sterlingv. Miriam Rand, Morris Rand* [2019] EWHC 1034 (Ch) where the court found that, on the evidence available, an agreement to arbitrate under Jewish law did not amount to an agreement that the Beth Din would be able to order specific performance relating to land.
71) *Filatona Trading Ltd & Anorv. Navigator Equities Ltd & Ors* [2019] EWHC 173 (Comm).
72) For example, failed attempts at bribery do not taint a contract such as to render it unenforceable: *National Iranian Oil Cov. Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm); see also *RBRG Trading (UK) Ltdv. Sinocore International Co Ltd* [2018] EWCA Civ 838.
73) For an example of the English court refusing enforcement on public policy grounds of a *domestic* (non-Convention) award, see *Soleimanyv. Soleimany* [1999] Q.B. 785; another example of a domestic award at risk of non-enforcement on public policy grounds is *David Sterlingv. Miriam Rand, Morris Rand* [2019] EWHC 1034 (Ch), in which the judge considered refusing enforcement of the domestic award for public policy reasons, but deferred the decision.
74) *Gemeente Almelo v. Energiebedrijf IJsselmij NV(Case No 393/92)*, a decision of the European Court of Justice on a reference from the Netherlands. Issues of EEC competition rules were arbitrated in *Bulk Oil v. Sun International (Nos 1 & 2)* [1986] 2 All ER 744, where the English Court referred these matters to the European Court under Art. 177 of the EEC Treaty (an arbitrator has no power to make such reference). See generally Mustill & Boyd (2nd edn.), at pp. 73-74; M Friend, "EEC Law, Preliminary Rulings and Arbitrators", 99 LQR (1983) p. 356; Lord Mackenzie-Stuart, "Arbitration and the Court of Justice of the European Communities", 4 ICC Bulletin (1993, no. 1) p. 51.
75) *Pencil Hill Ltdv. US Citta Di Palermo SpA* [2016] 1 WLUK 262, para. 30.
76) See also *Vosper Thorneycroftv. Min of Defence* [1976] 1 Lloyd's Rep 58; *Queensland Electricity Generating Boardv. New Hope Collieries Pty Ltd PC* [1989] 1 Lloyd's Rep 205; but see also *Johnsonv. Edwards (Inspector of Taxes)* [1981] STC 660.
77) *Associated British Portsv. Tata Steel UK Limited* [2017] EWHC 694 (Ch), paras. 65-66.
78) DAC Report I paras. 223 and 234.
79) *Harbour v. Kansa* [1993] QB 701, *Yearbook* XX (1995) p. 771; *Heyman v. Darwins* [1942] AC 356.
80) *Fiona Trust v. Privalov* [2007] UKHL 40, *Yearbook* XXXII (2007) p. 654, Portwood, Rev. arb. (2008) p. 117. For commentaries on the decision see Thoughts on Fiona Trust, 24 Arbitration International (2008, no. 3) at pp. 467-473 (Gee), at pp. 475-487 (McNeill and Juratowitch), at pp. 489-497 (Samuel).
81) See the DAC 1994 Consultation Paper, 10 Arbitration International (1994, no. 2) p. 189, p. 227; S. Boyd and V.V. Veeder, *"Le développement du droit anglais de l' arbitrage depuis la loi de 1979"*, Rev. arb. (1991, no. 2) p. 209, p. 221.
82) *Hyundai Merchant Marinev. Americas Bulk Transport* [2013] EWHC 470 (Comm); [2013] 2 All ER (Comm) 649.

83) *Harbour v. Kansa* [1993] QB 701, 724; it should be noted that Hoffmann LJ at p. 723 treated the *Sojuznefteexport v. Joc Oil* case (a FTAC award made in Moscow under Russian law and enforced by the Bermuda Court under the 1958 New York Convention) as a decision where the answer would have been the same under English law: see *Yearbook* XV (1990) p. 384, *Yearbook* XVIII (1993) p. 92.
84) *Fiona Trust v. Privalov* [2007] UKHL 40.
85) *National Iranian Oil Cov. Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm).
86) *Cv. D* [2007] EWCA Civ 1282, para. 18.
87) *London Steamship v. Bombay Trading (The Felicie)* [1990] 2 Lloyd's Rep 21, approving the passage in Mustill & Boyd, 2nd edn, now at p. 505; see also *Furness Withy v. Metal Distributors (The Amazonia)* [1990] 1 Lloyd's Rep 236, at p. 244. This juridical analysis derives necessarily from the decision of the House of Lords in *Bremer Vulkan v. South India Shipping* [1981] AC 909, *Yearbook* VII (1982) p. 162: see *Black-Clawson v. Papierwerke Waldhof-Aschaffenburg* [1981] 2 Lloyd's Rep 446, per Mr Justice Mustill followed in *Syska (acting as the administrator of Elektrim SA (in bankruptcy) v. Vivendi (and others)* [2008] EWHC 2155 at para. 93, *Yearbook* XXXIV (2009) p. 293.
88) See *The Mahkutai* [1996] AC 650, 666 per Lord Goff (on exclusive jurisdiction clauses).
89) See for an example where the Court found that there were two separate arbitrations *Agarwal Coal Corp (S) Pte Ltdv. Harmony Innovation Shipping Pte Ltd* [2017] EWHC 3556 (Comm), paras. 78-90.
90) *The Channel Tunnel Case* [1993] AC 334, 360.
91) *Adamsv. Cattley* (1892) 66 LT 687.
92) *. Chappellv. North* [1891] 2 QB 252, 256-257.
93) Inoperative in a Sect. 9 context means that the arbitration agreement has come to an end prior to the application for a stay being made or heard, for example where one party to the arbitration agreement evidences an intention not to be bound by it and the other party accepts such repudiation: *Downingv. Al Tameer Establishment* [2002] EWCA Civ 721, para. 34.
94) The fourth ground of refusing a stay under the 1950-1975 Acts, namely there was not in fact any dispute between the parties with regard to the matter agreed to be referred, has been abolished under the 1996 Act: DAC Report I, para. 55. There should no longer be any issue as to what this word signifies for the purposes of a stay of English litigation or summary judgment by the English Court: contrast *Hayter v. Nelson* [1990] 2 Lloyd's Rep 265, *Yearbook* XIX (1994) p. 717; and *John Mowlem v. Carlton Gate* (1990) 51 BLR 104. The further partial exception under Sect. 24(2) of the 1950 Act (where fraud was alleged) has similarly been repealed by the 1996 Act. On the scope and application of Sect. 9(4) see *Joint Stock Company Aeroflot-Russian Airlines v. Berezovsky* [2013] 2 Lloyd's Rep 242 at paras. 73-74.
95) *Golden Ocean v. Humpuss Intermoda Transportasi Tbk Ltd et al* [2013] EWHC 1240 (Comm), para. 54; *JSC Aeroflot Russian Airlines v. Berezovksy* [2013] EWCA Civ 784, [73] and [80]; see also Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th edn, p. 45.
96) *Anzenv. Hermes One Limited (British Virgin Islands)* [2016] UKPC 1.
97) *Autoridad del Canal de Panamav. Sacyr SA and others* [2017] EWHC 2337 (Comm), paras. 40, 44-45.
98) *AES UST-Kamenogorsk Hydropower Plant JSCv. AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, paras. 28, 60.
99) *AES UST-Kamenogorsk Hydropower Plant JSCv. AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, paras. 60, 61.
100) *The Mayor and Commonalty & Citizens of the City of Londonv. Ashok Sancheti* [2008] EWCA Civ 1283, para. 29.
101) Contract Rights of Third Parties) Act 1999, Sects. 8(1) and (2); see discussion in *Fortress Value Recovery Fund I LLCv. Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, paras. 29-30, 36, 42-44.
102) *Mobile Telecommunications Co KSCv. HRH Prince Hussam bin Abdulaziz au Saud* [2018] EWHC 3749 (Comm).
103) This is the legal reason why the English Court *stays* legal proceedings under Sect. 9, as opposed to *dismissing* such proceedings on the ground that an arbitration agreement provides a defence: see the DAC 1994 Consultation Paper, 10 Arbitration International (1994, no. 2) p. 189, pp. 225-226; and *Doleman v. Ossett* [1912] 3 KB 257.
104) See also *Dobbsv. The National Bank of Australasia Limited* [1935] 53 CLR 643.
105) *Scott v. Avery* (1856) 5 H.L. Cas 811; see generally Mustill & Boyd, *2001 Companion*, on its effect and functions, at pp. 161-166.
106) See *The Channel Tunnel Case* [1993] AC 334, 352-353, *Yearbook* XIX (1994) p. 736; but the defect in Sect. 1 of the 1975 Act (preventing the exercise of the statutory stay) was cured by the broader language of Sect. 9(2), allowing a stay of litigation in favour of arbitration, even where other dispute resolution procedures have not been exhausted by the parties as a condition precedent to arbitration – see also DAC 1 Report, para. 53.
107) See also *Joint Stock Company Aeroflot-Russian Airlinesv. Berezovsky* [2013] 2 Lloyd's Rep 242 at paras. 73-74.
108) *Nori Holdings Limited et alv. PJSC Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), para. 42.

109) United Nations Convention on Carriage of Goods by Sea (Hamburg Rules). Art. 21 provides jurisdictional rules in relation to proceedings relating to the carriage of goods under this convention; the UK has not adopted the Hamburg Rules.
110) *Aline Tramp SAv. Jordan International Insurance Co* [2016] EWHC 1317 (Comm), paras. 52-54.
111) *Fulham Football Club (1987) Ltdv. Richards* [2011] EWCA Civ 855; *Nori Holdings Limited et alv. PJSC Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).
112) *Aqaba Container Terminal (Pvt) Cov. Soletanche Bachy France Sas* [2019] EWHC 471, paras. 35-38.
113) *HC Trading Malta Ltdv. Tradeland Commodities SL* [2016] EWHC 1279 (Comm), para. 40.
114) For example, where a state is party to an arbitration and a potential arbitrator is a national of that state.
115) For example, Art. 6 of the LCIA Rules.
116) *Rahcassi Shipping Co SAv. Blue Star Line Ltd* [1969] 1 QB 173.
117) See also, for example, Art. 11(1) of the ICC Rules 2017.
118) DAC I Report, paras. 101 to 104. The IBA Guidelines on Conflicts of Interest in International Arbitration follow the Model Law in prescribing that arbitrators should be both impartial and independent; the Guidelines do not, however, override national law and therefore there remains no requirement of independence in English arbitrations unless the parties have agreed to it, e.g., by adopting the IBA Guidelines in their agreement or adopting institutional rules which require arbitrators to be independent such as the LCIA or ICC Rules, whose Arts. 5.3 and 11(1), respectively, require arbitrators to be both impartial and independent.
119) For Judge-arbitrators, see Thomas, LMCLQ (1983) p. 120; see generally Mustill & Boyd, *2001 Companion*, at p. 265 et seq.; and Fay, *Official Referees' Business*, Sweet & Maxwell (1983) at pp. 115-119, (on Sect. 11 of the 1950 Act, *mutatis mutandis* on Sect. 93 of the 1996 Act).
120) *Jivraj v. Hashwani* [2011] UKSC 40.
121) See also the reference in *Jivrajv. Hashwani* [2011] UKSC 40, para. 76, to a 1904 German Reichsgericht decision describing the nature of the arbitrator's office as having "an entirely special character".
122) Norms of non-discrimination on the basis of religion or belief contained in the Employment Equality (Religion or Belief) Regulations 2003 are not applicable, as these do not apply to arbitrators and their selection: *Jivrajv. Hashwani* [2011] UKSC 40, para. 50.
123) The 1996 Act uses the term "chairman".
124) See, e.g., LCIA Rules 2014 Art. 5.9 and ICC Rules 2017 Art. 12(5).
125) LCIA Rules 2014 Art. 5.3.
126) *Silver Dry Bulk Co Ltdv. Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm).
127) *Atlanska Plovidba & Anor v. Consignaciones Asturianas SA "The Lapad"* [2004] EWHC 1273 (Comm), para. 17.
128) *Van Der Giessen-De-Noord Shipbuilding Division B.V.v. Imtech Marine & Offshore B.V.* [2008] EWHC 2904 (Comm), para. 106.
129) *Itochu Corporationv. Johann M.K. Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996, para. 31.
130) *Exmek Pharmaceuticals SACv. Alkem Laboratories Limited* [2015] EWHC 3158 (Comm), para. 41.
131) See Art. 29 and Appendix V of the ICC 2017 Rules, under which an emergency arbitrator's decision takes the form of an order and does not bind a subsequently constituted tribunal; see further Art. 9B of the LCIA 2014 Rules, under which an emergency arbitrator's decision takes the form of an order or an award.
132) The concept of revocation of an arbitrator's authority derives historically from the 1833 Act and the former status of an arbitrator as being analogous to an agent of the parties. It is a remedy enjoyed by the parties, as distinct from removal of an arbitrator as a remedy exercised by the English Court on a party's application. As to legal effect, the different terms are not significant: see DAC Report I, para. 96. For example, many institutional rules allow the institution to remove an arbitrator on challenge for cause, albeit that technically that arbitrator's authority is being revoked.
133) DAC Report I, para. 97.
134) DAC Report I, paras. 105 and 106.
135) DAC Report I, para. 107.
136) *Haliburtonv. Chubb* [2018] EWCA Civ 817, paras. 39-40; note that this decision is being appealed to the Supreme Court; see also *Hv. L* [2017] EWHC 137 (Comm) where the court found that it was desirable for those with relevant expertise as arbitrators to sit in different arbitrations arising out of the same matters, and that the arbitrator's experience and reputation for integrity would enable him or her to approach the evidence and argument with an open mind.
137) *P v. Q* [2017] EWHC 194 (Comm), paras. 89, 94.
138) *Haliburtonv. Chubb* [2018] EWCA Civ 817, paras. 71, 83.
139) *Sierra Fishing Cov. Farran* [2015] EWHC 140 (Comm).
140) *W Ltdv. M SDN BHD* [2016] EWHC 422 (Comm).
141) *P v. Q* [2017] EWHC 194 (Comm), para. 89.

142) In *Allianz Insurance Plc (formerly Cornhill Insurance Plc)v. Tonicstar Ltd* [2018] EWCA Civ 434, para. 19, the Court of Appeal found that the requirement of "experience in insurance or reinsurance" meant that a barrister practising for more than ten years in the fields of insurance and reinsurance was eligible for appointment.
143) *The Chartered Institute of Arbitratorsv. B and others* [2019] EWHC 460.
144) *Pv. Q* [2017] EWHC 148 (Comm).
145) See *Tonicstar Limitedv. Allianz Insurance Plc (formerly Cornhill Insurance Plc)* [2017] EWHC 2753 (Comm), paras. 14-15 (reversed on appeal, but not on this point).
146) Where the parties agree to terminate the arbitration agreement, whether in writing or not, the revocation of an arbitrator's authority need not be in writing: Sect. 23(4).
147) DAC Report I, para. 96.
148) For the position preceding the 1996 Act, see J. D. M. Lew, ed., *The Immunity of Arbitrators* (LLP 1990) ISBN 9781850443247) pp. 21-28, reporting the meeting of the LCIA's European Users' Council 1990; Redfern, from P. Fouchard, "Final Report on the Status of the Arbitrator", 7 ICC Bulletin (1996, no. 1), pp. 27, 43; and Mustill & Boyd, *2001 Companion*, pp. 224-232 and p. 544.
149) See the DAC 1994 Consultation Paper, 10 Arbitration International (1994, no. 2) p. 189, p. 232; and DAC Report I, paras. 131-134.
150) See the Supply of Services (Implied Terms) Order 1985 Sect. 2, excluding the application of Sect. 13 to the services rendered by an arbitrator or umpire in his or her capacity as such, but not of Sect. 14 of the 1982 Act.
151) *Melton Medes v. SIB* [1995] 3 All ER 880. This phrase is common in English statutory immunities for regulatory bodies: see e.g. Sect. 187(1) of the Financial Services Act 1986 (which was under consideration in *Melton Medes*), now replaced by Sect. 222 of the Financial Services and Markets Act 2000.
152) See *Arenson v. Arenson* [1977] AC 405, 426; *Sutcliffe v. Thackrah* [1974] AC 727, 736.
153) At English law, none exists; yet the English Court cannot compel, by an order for specific performance, an arbitrator to render services against his or her will: see *Succula v. Harland & Wolff (Hull 705)* [1980] 2 Lloyd's Rep 381, 385 and the Commercial Court's Sub-Committee's Report of October 1985, quoted in V.V. Veeder, *I. Preventing Delay and Disruption of Arbitration/II. Effective Proceedings in Construction Cases*, ICCA Stockholm Arbitration Congress 1990, p. 278.
154) See DAC Report I, paras. 300-301; the DAC 1994 Consultation Paper, 10 Arbitration International (1994, no. 2) p. 189, p. 233; and *dicta* in *Pratt v. Swanmore* [1980] 2 Lloyd's Rep 504, 509 and *United Co-operatives v. Sun Alliance* [1987] 1 EG 126, 127. Further, Sect. 13 of the Supply of Goods and Services Act 1982, above, can apply to an arbitral institution, in certain qualifying circumstances, so as to impose upon it a contractual obligation to use reasonable care and skill in the nomination or appointment of an arbitrator.
155) For example, Art. 31.1 of the 2014 LCIA Rules provide immunity to the institution and its officers, members and employees from liability to any party for any act or omission in connection with any arbitration, unless that act or omission is shown by that party to constitute conscious and deliberate wrongdoing or to the extent this article is shown to be prohibited by any applicable law.
156) *Naviera Amazonica Peruana SA v. Cia Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, *Yearbook* XIII (1988) p. 156; see also Thomas, LMCLQ (1984) p. 491 and Mustill & Boyd, *2001 Companion*, at pp. 61-70.
157) *Shagang South-Asia (Hong Kong) Trading Co. Ltdv. Daewoo Logistics* [2015] EWHC 194 (Comm), paras. 24-25.
158) *Exmek Pharmaceuticals SACv. Alkem Laboratories Limited* [2015] EWHC 3158 (Comm), para. 24.
159) *Bank Mellat v. Helliniki Techniki SA* [1984] QB 291, 301; and see Mann, "Lex facit arbitrum" in *International Arbitration: Liber Amicorum for Martin Domke*, Sanders (ed.) (1967), reprinted in Arbitration International (1986) p. 241. *Cf.* the French approach in *PT Putrabali Adyamulia v. Rena Holdings*, Cour de cassation, 1ere civ, June 29, 2007, *Yearbook* XXXII (2007) p. 299, Rev. arb. (2007), p. 507, and see further Gaillard, *Legal Theory of International Arbitration* (2010).
160) See DAC Report I, para. 27.
161) The equivalent passage in the 1988 edition of this text was criticised in *Hiscox v. Outhwaite* [1992] 1 AC 562, 594, *Yearbook* XVII (1992) p. 599, where the House of Lords held that the sole arbitrator (an English Queen's Counsel), who had signed his award in a London arbitration at his office in Paris, had thereby made his award in France as a foreign award under the Arbitration Acts 1950-1975. The effect of Sects. 53 and 100(2)(b) of the 1996 Act is to repeal this decision: see DAC Report I, paras. 253 and 392.
162) See also Art. 8 of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, directing the tribunal and parties to consider dispensing with a hearing.
163) See Mustill & Boyd, *2001 Companion*, p. 200 et seq.; and Thomas, LMCLQ (1981) p. 529 (both on Sect. 27 of the 1950 Act).
164) Sect. 12 introduced a test different from Sect. 27 of the 1950 Act: see DAC Report I, paras. 62-75. The old cases and commentaries on Sect. 27 should be read with extreme caution.
165) This provision partially overturns the effect of the House of Lords' decision in *Comdel v. Siporex (No 2)* [1991] 1 AC 148.

166) *Haven Insurance Co Ltdv. EUI Ltd (t/a Elephant Insurance)* [2018] EWCA Civ 2494.
167) *Cathiship SAv. Allanasons Ltd, The Catherine Helen* [1998] CLC. 1310, 1320.
168) *Charles M. Willie & Co (Shipping) Ltdv. Ocean Laser Shipping Ltd* [1999] 1 Lloyd's Rep. 225.
169) *Ekran OAOv. Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm), see also the discussion generally at, paras. 13-32.
170) *Glencore International AGv. PT Tera Logistic Indonesia & Another* [2016] EWHC 82 (Comm).
171) *Sino Channel Asia Ltdv. Dana Shipping and Trading PTE Singapore & Another* [2016] EWHC 1118 (Comm).
172) *Glencore Agriculture BVv. Conqueror Holdings Ltd* [2017] EWHC 2893 (Comm). See discussion in Section V.4.*c* below.
173) See *The Channel Tunnel Case* [1993] AC 334, 354, *Yearbook* XIX (1994) p. 736; *Paul Smith v. H&S Int* [1991] 2 Lloyd's Rep 127, *Yearbook* XIX (1994) p. 725; and *The Jing Hong Hai* [1989] 2 Lloyd's Rep 522, 525.
174) *Walfordv. Miles* [1992] 2 AC 128; but where the parties have agreed a particular procedure, this is sufficiently certain to make the agreement to engage in alternative dispute resolution enforceable: *Cable and Wireless plcv. IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); see also *Sulaméricav. Enesa Engenharia* [2012] EWCA Civ 638 and *Wah (Aka Alan Tang) and anotherv. Grant Thornton International Ltd and others* [2012] EWHC 3198 (Ch). In *Emirates Trading Agency LLCv. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), the Court found an agreement to negotiate to constitute a precondition to the right to arbitrate, but subsequent decisions have rowed back on this expansive interpretation: *Emirates Trading Agency LLCv. Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm) and *DS-Rendite-Fonds NR 1066 VLCC Titan Glory GmbH and Co Tankschiff KGv. Titan Maritime SA* [2015] EWHC 2488 (Comm).

175) *Barclaysv. Nylon* paras. 27-28.
176) DAC Report I, paras. 159-163.
177) DAC Report I, paras. 164-165.
178) Sect. 41(5) and see discussion at 7.*b* below.
179) DAC Report I, para. 205.
180) *Elektrim S.A.v. Vivendi Universal S.A., Vivendi Telecom International S.A., Elektrim Telekomunikacja Sp. z.o.o, Carcom Warszawa Sp. z.o.o.* [2007] EWHC 11 (Comm), para. 128.
181) *Downingv. Al Tameer Establishment* [2002] EWCA Civ 721.
182) See *Carlisle Place v. Wimpey* [1981] 1 WLUK 60; *Three Valleys v. Binnie* [1991] 1 WLUK 469.
183) For example, in *Av. B* [2018] EWHC 3366, the Court found that a tribunal's decision to exclude evidence given in examination-in-chief did not amount to a serious irregularity.
184) *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43 confirming that the erroneous exercise of an available power could not amount to an excess of power within the meaning of Sect. 68(2)(b) of the 1996 Act. For commentaries on *Lesotho Highlands*, see W. Park, "The Nature of Arbitral Authority: A Comment on *Lesotho Highlands*", 21 Arbitration International (2005, no. 4) p. 483; V.V. Veeder and S. Moollan, ";Note – Royaume-Uni Chambre des Lords", le Revue de l'Arbitrage (2006, no. 4) pp. 1011-1037. The earlier decision of the House of Lords in *Bremer Vulkan v. South India Shipping* [1981] AC 909, [1980] 1 Lloyd's Rep 255 put a firm end to the idea that the English Court enjoyed a general supervisory jurisdiction over a pending arbitration; see also *K/S A/S Bill Biakh v. Hyundai Corporation* [1988] 1 Lloyd's Rep 187, *Yearbook* XV (1990) p. 360, applying *Moran v. Lloyd's* [1983] QB 542; and the discussion in Mustill & Boyd, *2001 Companion*, at p. 559 et seq., addressing the broader question of misconduct under the former 1950 Act. The 1996 Act effectively codifies the result of this case law.
185) *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43, paras. 26, 34.
186) *Naumannv. Edward Nathan & Co. Ltd* (1930) 37 Ll. L Rep. 249.
187) In domestic building arbitrations a sole arbitrator is the most common tribunal.
188) See Chapters III.2 and III.3 above.
189) *Citland v. Kanchan Oil Industries Pvt Ltd.* [1980] 2 Lloyd's Rep 277; and for arbitrator-advocates generally, see Mustill & Boyd, *2001 Companion*, at pp. 258-264.
190) *Bremer Vulkan v. South India Shipping* [1981] AC 909, 948.
191) For example, see Kerr, JBL (1980), p. 180 and J. Martin and H. Hunter, "New Developments in English Procedure: Commercial Judges leap-frog over Commercial Arbitrators", 3 Arbitration International (1987, no. 4), p. 337.
192) DAC Report I, paras. 171-172.
193) Available at: <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.
194) See M. Hunter, "Modern Trends in the Presentation of Evidence in International Commercial Arbitration", 3 Amer. Rev. Int'l Arb. (1992) p. 204, fn. 1.
195) Sect. 1; see Mustill & Boyd, *2001 Companion*, at p. 356 et seq. (The 1995 Act came into force on 31 January 1997).

196) *Assimina Maritime Ltdv. Pakistan National Shipping Corp (The Tasman Spirit)* [2004] EWHC 3005 (Comm), para. 14.
197) Robert Merkin and Louis Flannery, *Arbitration Act 1996,* 5th edn., pp. 180-182.
198) Available at: <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.
199) *Hussmann (Europe) Limitedv. Al Ameen Development & Trade Company* [2000] 2 Lloyd's Rep. 83, para. 46.
200) *Fox v. Wellfair* [1981] 1 Lloyd's Rep 514; and see Mustill & Boyd, *2001 Companion*, at p. 361 et seq.
201) As to the exercise of the like power for the inspection of a vessel overseas under Sect. 12(6)(g) of the 1950 Act, see *The Cienvik* [1996] 2 Lloyd's Rep 395, 403.
202) *Gerald Metals SAv. Timis* [2016] EWHC 2327 (Ch).
203) Now referred to as a "Freezing Injunction" under the current Civil Procedure Rules.
204) *Eastern European Engineering Ltdv. Vijay Construction (Proprietary) Ltd* [2018] EWHC 1539 (Comm).
205) *Great Station Properties SA and anotherv. UMS Holding Ltd and others* [2017] EWHC 3330 (Comm).
206) *Mareva Compañía Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509; see generally Mustill & Boyd, *2001 Companion*, at p. 342 et seq. An *Anton Piller* order allows the claimant to preserve property and evidence by entering the respondent's premises, in extreme cases where these are in jeopardy: see [1976] Ch 55.
207) *Cetelem SA v. Roust Holdings Ltd* [2005] 2 Lloyd's Rep 494.
208) *Dainford Navigation Incv. PDVSA Petroleo SA "Moscow Stars"* [2017] EWHC 2150 (Comm).
209) See *Company 1v. Company 2* [2017] EWHC 2319 (QB) for a discussion of the factors an English court will take into account when considering whether to aid a party seeking a payment into a joint account held by the parties' solicitors, alternatively an interim freezing order and disclosure of certain documents, in the context where the English court may not be the natural forum.
210) *AES UST-Kamenogorsk Hydropower Plant JSCv. AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.
211) *Proceedings concerning Gazprom OAO* (Case C-536/13), paras. 35-41.
212) *Cruz City Mauritius Holdingsv. Unitech Ltd. et al.* ([2014] EWHC 3704 (Comm.), paras. 8-13, 47-51. *DTEK Trading SAv. Mr Sergey Morozov and another* [2017] EWHC 94 (Comm), para. 59.
213) *TSB Private Bank International SAv. Chabra* [1992] 2 All ER 245.
214) *Dreymoor Fertilisers Overseas Pte Ltdv. Eurochem Trading GmbH and another* [2018] EWHC 2267.
215) *In re Application of Hanwei Guo for an Order to Take Discovery for Use In a Foreign Proceeding Pursuant To 28 U.S.C. § 1782* (2019 WL 917076 (S.D.N.Y. Feb. 25, 2019).
216) *Commerce & Industry Co of Canadav. Certain Underwriters at Lloyd's of London* [2002] 1 WLR 1323.
217) *Sana Hassib Sabbaghv. (1) Wael Said Khoury & 9 Ors* [2018] EWHC 1330.
218) *DAC* Report I, para. 366i and DAC Report II, paras. 24-25. Indeed, the equivalent practice in the English Court has been successfully challenged on this ground: *Fitzgerald v. Williams* [1996] 2 All ER 171; and see also *Data Delecta v. MSL*, above. Although this prohibition against discrimination could allow, on its strict wording, discrimination against a foreign state, this was not Parliament's intent but appears rather to be a slip in drafting: contrast the similar wording on the former definition of domestic arbitration agreement under Sect. 85: DAC Report I, para. 389.
219) In the exercise of its discretion, an arbitration tribunal could follow the distinction previously established by the English Court between international and English arbitrations: contrast *Bank Mellat v. Helliniki* [1984] QB 291 (an ICC arbitration); and *K/S A/S Bani v. KSEC* [1987] 2 Lloyd's Rep 445 (LMAA shipbuilding dispute). The previous court practice is not however binding upon the arbitration tribunal: its discretion is broad, subject only to Sect. 33 and the parties' arbitration agreement.
220) DAC Report I, paras. 190-196.
221) In the English litigation context, *Daveyv. Money et al* [2019] EWHC 997 (Ch) declined to apply the Arkin cap to a third party costs order against commercial funders providing funding to the claimant.
222) Foreign lawyers can directly retain English barristers as counsel in international arbitrations in England (and elsewhere).
223) DAC Report I, para. 184.
224) DAC Report I, para. 185.
225) DAC Report I, para. 186.
226) By itself, such an exclusion is not contrary to public policy: *Henry Bath v. Birgby Products* [1962] Lloyd's Rep 389. However, an award may be challenged for serious irregularity under Sect. 68(2) if an arbitrator unfairly disallows legal representation in breach of his or her general duty under Sect. 33: *Hookway v. Alfred Isaacs* [1954] 1 Lloyd's Rep 491 under the 1950 Act.
227) See Art. 23(3) of the ICC Rules 2017 and Art. 5.1 of the LCIA Rules 2014.

228) In *Tv. V & W* [2018] EWHC 1492 (Comm), the arbitrator proceeded to make an award based on the materials before her without an oral hearing following a party's failure to comply with a peremptory order. The Court rejected a Sect. 68 challenge for serious irregularity, finding that by agreeing to arbitrate under the LCIA Rules, the parties had not contracted out of the Sect. 41 mechanism providing for peremptory orders.
229) DAC Report I, para. 221.
230) *Grindrod Shipping PTE Ltdv. Hyundai Merchant Marine Co Ltd* [2018] EWHC 1284 (Comm).
231) *Dera Commercial Estatev. Derya Inc* [2018] EWHC 1673 (Comm).
232) See also under the 1950-1979 Acts, *Bremer Vulkan v. South India Shipping* [1981] AC 909, 987.
233) For obvious reasons, this consent from the defaulting party is likely to predate its default, being contained in the parties' arbitration agreement or rules incorporated therein.
234) DAC Report I, paras. 11-17.
235) *Associated Electric & Gas Insurance Services Limitedv. European Reinsurance Company of Zurich* [2003] UKPC 11, where the parties in the two arbitrations were the same; contrast *Ali Shipping Corporationv. Shipyard Trogir* [1999] 1 WLR 314, where one of the parties was different in the second arbitration and the Court of Appeal declined to permit material from the first arbitration to be used in the second arbitration, notwithstanding that the changed parties had the same beneficial owner.
236) See Civil Procedure Rules Part 62.10 (Arbitration Claims); *Moscow City Council v. Bankers Trust Co* [2004] EWCA Civ 314, paras. 34, 38, 39, 42 and *Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, paras. 60-70.
237) *Symbion Power LLCv. Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC).
238) For example, LCIA Rules 2014 Art. 30.
239) See *City of Moscow v. Bankers Trust* [2004] EWCA Civ 314, paras. 34, 38, 39, 42; see also CPR 62.10.
240) [2017] EWHC 253 (Comm), paras. 409-416.
241) *Michael Wilson & Partners Ltdv. Sinclair and others* [2017] EWCA Civ 3, paras. 48, 37, 73, 87.
242) For a discussion of freezing orders on an interim basis by virtue of a provisional award, see *Kastnerv. Jason* [2004] EWCA Civ 1599.
243) See DAC Report I, para. 203.
244) See *Nicola Rotenbergv. Sucafina SA* [2012] EWCA Civ 637, para. 27, where the Court found an "interim" award to be a partial, as opposed to provisional, award.
245) *Telecom of Kosovo J.S.C. (formerly PTK JSC)* v. *Dardafon.Net LLC* [2017] EWHC 1326 (Comm).
246) DAC Report I, paras. 227-230.
247) See Chapter III.3 above.
248) ICC Rules 2017, Art. 31.
249) *Bank Mellatv. GAA Development Construction Company* [1988] 2 Lloyd's Rep 44, *Yearbook* XV (1990) p. 521.
250) Sect. 52(3) will allow an effective award to be made even where a dissenting arbitrator refuses to sign the award; but equally a dissenting arbitrator may sign the award without affecting or even disclosing his or her dissent: see DAC Report I, para. 251.
251) DAC Report I, paras. 250, 253.
252) See under the 1979 Act, *Bremer v. Westzucker (No 2)* [1981] 2 Lloyd's Rep 130, 132; *Rayner v. Shaher Trading* [1982] 1 Lloyd's Rep 632, 636; and *Hayn Roman v. Cominter* [1982] 2 Lloyd's Rep 458, 464. The Court has not encouraged even distinguished lawyer-arbitrators to provide lengthy reasons, although parties themselves often welcome them: see *The Antaios* [1985] AC 191, 200 and, for succinct non-English civil lawyers, see *City of Moscow v. Bankers Trust* [2004] EWCA Civ 314, para. 45.
253) Giving the tribunal *Kompetenz-Kompetenz*, without using that word: DAC Report I, para. 137.
254) *Dallah Real Estate & Tourism Holding Cov. Ministry of Religious Affairs, Pakistan* [2010] UKSC 46, para. 31.
255) *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638, para. 11; S. Pearson, "*Sulamérica v. Enesa*: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement", 29 Arbitration International (2013, no. 1) p. 115.
256) *The Channel Tunnel Case* [1993] AC 334, 357; and see also *Naviera Amazonica Peruana v. Cia Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, *Yearbook* XIII (1988) p. 156 for a theoretical discussion of law (b) differing from law (c).
257) *Occidental Exploration and Production Cov. The Republic of Ecuador* [2005] EWCA Civ 1116, para. 33.
258) *Musawiv. RE International (UK) Ltd* [2007] EWHC 2981 (Ch).
259) Regulation on the law applicable to contractual obligations (Rome I), Regulation (EC) No. 593/2008.
260) Regulation on the law applicable to non-contractual obligations (Rome II), Regulation (EC) No. 864/2007.

261) *Deutsche Schachtbau und Tiefbohrgesellschaft mbHv. Shell International Petroleum Co. Ltd* [1990] 1 AC 295, 304, 316; and *The Channel Tunnel Case* [1993] AC 334, 368.
262) DAC Report I, para. 223.
263) Commencement Order, para. 4 of Schedule 2 (see **Annex II**).
264) *Walkerv. Rowe* [2001] 1 Lloyd's Rep 116.
265) See, for example, Art. 33 of the ICC Rules 2017.

266) See *Mutual Shipping Corporation v. Bayshore Shipping Co (The Montan)* [1984] 1 Lloyd's Rep 389, [1984] 1 WLR 625 and Thomas, [1985] LMCLQ 263, under the 1950 Act.
267) This is an old rule of English public policy: see DAC Report I, para. 267. It does not invalidate such an agreement *after* the parties' dispute.
268) For example, Art. 24 of the LCIA Rules 2014.
269) *Essar Oilfield Services Ltdv. Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), para. 68.
270) *Anatolie Stati & Orsv. Kazakhstan* [2019] 5 WLUK 275.
271) LCIA Rules 2014, Art. 5.4 and Schedule of Costs, Sect. 3; ICC Rules 2017, Appendix III – Arbitration Costs and Fees, Scales of administrative expenses and arbitrator's fees.
272) DAC Report I, para. 272.
273) *Xstrata Coal Queensland Pty Ltd & Orsv. Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2016] EWHC 2022 (Comm).
274) A choice of foreign law as the proper (substantive) law of the contract does not constitute an agreement to the contrary: *C v. D* [2007] EWCA Civ 1282 para. 18.
275) *Michael Carterv. Harold Simpson Associates (Architects) Ltd* [2004] UKPC 29, paras. 23-24.
276) *West Tankers Ltdv. Allianz SpA* [2012] EWCA Civ 27, para. 36.
277) By analogy with Sect. 26 of the 1950 Act (in similar terms), see *Coastal States v. Mabro* [1986] 1 Lloyd's Rep 465, 467.
278) *Associated Electric and Gas Insurance Services Ltdv. European Reinsurance Co of Zurich* [2003] UKPC 11, para. 11.
279) *Bremer Oeltransport Gmbhv. Drewry* [1933] 1 KB 753, 760.
280) ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 January 2019.
281) LCIA Notes for Parties, Sect. 19 (Confidentiality and Publication of Awards); the LCIA may publish abstracts of decisions by the LCIA Court on challenges to arbitrators, as well as sanitised statistical information about cases.
282) There is also the problematic issue of copyright in the award: see S. Boyd and V.V. Veeder, *"Le développement du droit anglais de l'arbitrage depuis la loi de 1979"*, Rev. arb. (1991, no. 2) p. 209, p. 258.
283) See Thomas, LMCLQ (1983) p. 120.
284) Awards made by the International Centre for Settlement of Investment Disputes (ICSID) are enforced by a special procedure under the 1966 Act, enacting the 1965 Washington Convention; see Dicey & Morris, above, Vol. 1 at p. 592 et seq.
285) See *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] AC 763 at para. 68 observing that Art. V covered a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke the discretion afforded by "may" than in others.
286) *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] AC 763, paras. 96-104.
287) *IPCO (Nigeria) Ltd v. NNPC* [2017] UKSC 16, paras. 24, 30, 40-45.
288) *IPCO (Nigeria) Ltd v. NNPC* [2017] UKSC 16, para. 28; see also *Dardanav. Yukos* [2002] EWCA Civ 543, para. 27.
289) *NJSC Naftogaz of Ukrainev. PJSC Gazprom*, [2019] EWHC 658 (Comm), para. 40.
290) Civil Procedure Rules, rules 6.36 and 6.37, and commentary thereto.
291) *Rosseel NV v. Oriental* [1991] 2 Lloyd's Rep 625, 629, *Yearbook* XVI (1991) p. 615; *FESCO v. Sovcomflot* [1995] 1 Lloyd's Rep 520, *Yearbook* XXI (1996) p. 699; and *ABCI v. BFT* [1996] 1 Lloyd's Rep 485, *Yearbook* XXII (1997) p. 857.
292) *IPCO (Nigeria) Ltd v. NNPC* [2017] UKSC 16, para. 9.
293) *Dalmia Dairy Industries Ltdv. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, 238.
294) *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Shell International Petroleum Co. Ltd* [1990] 1 AC 295, 316.
295) Case C 393/92 [1994] I ECR 1477; see J. van Haersolte-van Hof, "Decision of the European Court of Justice, dated April 27, 1994, in case C-393/92, E.C.R. 1994, I-1477, Almelo/IJsselmiu", 6 Amer. Rev. Int'l Arb. (1995) p. 83.
296) *Slovak Republic v. Achmea B.V.*, Case C-284/16.
297) *Miculav.Romania*, ICSID Case No. ARB/05/20.
298) *Enterprise Insurance Company plcv. U-Drive Solutions (Gibraltar) Limited and another* [2016] EWHC 1301 (QB).
299) *Sv. A and B* [2016] EWHC 846 (Comm).

300) E.g., Sect. 67(4): "The leave of the court is required for any appeal from a decision of the court under this section."; see also DAC I Report, para. 74(iii), "Thirdly, we have made any appeal from a decision of the court under this Clause subject to the leave of that court. It seems to us that there should be this limitation, and that in the absence of some important question of principle, leave should not generally be granted. We take the same view in respect of the other cases in the Bill where we propose that an appeal requires the leave of the court." Where the 1996 Act does not restrict the right to appeal, that right remains unaffected: *Inco Europe Ltd. And Othersv. First Choice Distribution (a firm) and Others* [1999] 1 WLR 270, 276: "there is nothing ... which excludes the jurisdiction of the Court of Appeal" in Sects. 9-11, 13, 28, 64, 65, 72 and 74, where the 1996 Act does not provide for a restriction (confirmed by the House of Lords). See further *Henry Boot Construction (UK) Limitedv. Malmaison Hotel (Manchester) Limited* [2001] QB 388 confirming that the reference to "court" in this context means the County Court or High Court, but not the Court of Appeal, such that the latter cannot overturn the former's refusal to grant permission to appeal (see also definition of "court" in Sect. 105 as the High Court or the county court).

301) *Telecom of Kosovo J.S.C.v. Dardafon.net LLC* [2017] EWHC 1326 (Comm), paras. 13-14.

302) *Azov Shipping Cov. Baltic Shipping Co (No.1)* [1998] C.L.C. 1240, 1242-1243; *Peterson Farms Incv. C&M Farming Ltd* [2004] EWHC 121 (Comm), paras. 19-20.

303) *Minermetv. Lucky-Field Shipping* [2004] 2 Lloyd's Rep 348, para. 9.

304) DAC Report I, para. 309.

305) Although contrast the doubt on this exposition of the factors in *Sv. A* [2016] EWHC 846 (Comm), para. 26, following the domestic decisions in *Mitchellv. News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Dentonv. TH White Ltd* [2014] EWCA Civ 906.

306) See *Av. B* [2019] EWHC 799 (Comm), where the Court dismissed an application to extend the time for bringing a jurisdictional challenge under Sect. 67 where the challenge was 959 days late.

307) For example, in *Backosv. WFW Global LLP* [2019] EWHC 243, the Court found that the arbitration agreement contained in a partnership agreement covered disputes arising after a party had left the partnership, noting that most disputes would arise out of a member's departure from a partnership.

308) *Bondv. Mackay and others* [2018] EWHC 2475.

309) *IPCO (Nigeria) Ltdv. NNPC* [2017] UKSC 16, para. 43; *Erdenet Mining Corporation LLCv. ICBC Standard Bank plc and others* [2017] EWHC 1090 (Comm), para. 10.

310) *Squibb Group Ltdv. Pole 2 Pole Scaffolding Ltd* [2017] EWHC 2394 (TCC), paras. 34-35.

311) *Union Marine Classification Servicesv. Government of the Union of Comoros* [2016] EWCA Civ 239, paras. 11-12.

312) DAC I Report, para. 280.

313) *Lesotho Highlands Development Authorityv. Impregilo SpA* [2005] UKHL 43, para. 24.

314) *Xv. Y* [2018] EWHC 741 (Comm), where the Court found a party's failure to seek clarification of the award under Sect. 57(3) to constitute a bar to a Sect. 68 application.

315) *Kv. S* [2015] EWHC 1945 (Comm), para. 24; *EssarOilfields Services Limitedv. Norscot Rig Management Pvt Limited* [2016] EWHC 2361 (Comm), paras. 90-92; *Daewoo Shipbuilding and Marine Engineering Co Ltdv. Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), paras. 52-65.

316) *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club)v. AFC Fylde Limited* [2018] EWHC 3318 (Comm); contrast *RJ, L Ltdv. HB* [2018] EWHC 2833 (Comm) paras. 55-58.

317) *RJ, L Ltdv. HB* [2018] EWHC 2833 (Comm) para. 20.

318) [2018] EWHC 985 (Comm), paras. 2-5.

319) *Minister of Finance (Incorporated) and anotherv. International Petroleum Investment Company* [2019] EWHC 1151 (Comm).

320) Such consent can be made in the parties' arbitration agreement. This practice had developed in standard forms of domestic construction contracts under the similar provision under the 1979 Act. The DAC declined to outlaw this practice and expressed the view that it plainly satisfied the requirement of Sect. 69(2)(a): see DAC Report I, para. 292.

321) *Reliance Industries Ltdv. Enron Oil & Gas India Ltd* [2002] 1 All ER (Comm) 59, paras. 32-33.

322) *Fehn Schiffahrts GmbH & Co KGv. Romani SPA* [2018] EWHC 1606 (Comm).

323) For example, *NYK Bulkship (Atlantic) NVv. Cargill International SA* [2016] UKSC 20, which addressed issues of agency (para. 1).

324) [2011] EWCA Civ 1708, para. 5; a "*major intellectual aberration*" would be sufficient: *Braes of Doune Wind Farm (Scotland) Ltdv. Alfred McAlpine Business Services Ltd* [2008] 1 Lloyds Rep 608.

325) *Kershaw Mechanical Services Ltdv. Kendrick Construction* [2006] EWHC 727 (TCC), para. 57.

326) *Zermalt Holdings SAv. Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14.

327) See DAC Report I, para. 290.

328) *The Agios Dimitrios* [2004] EWHC 2232 (Comm), para. 5.

329) *Coal Authorityv. Davidson* [2008] EWHC 2180 (TCC), para. 6.

330) *ST Shipping & Transport Pte Ltdv. Space Shipping Ltd* [2017] EWHC 2808 (Comm).

331) *Dry Log Bulk Carriersv. Phaethon International Co SA* [2016] EWHC 3798 (Comm), paras. 9-11.
332) *Goodwood Investments Holdings Inc.v. Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm).
333) *Sukuman Ltdv. Commonwealth Secretariat* [2006] EWHC 304 (Comm), para. 26.
334) *Essex CCv. Premier Recycling Ltd* [2007] B.L.R. 233, QBD (TCC), para. 26.
335) *Secretary of State for theHome Departmentv. Raytheon Systems Ltd* [2015] EWHC 311 (TCC), para. 23.
336) See Mustill & Boyd (2nd edn.), pp. 565-567 (under the 1950 Act), *sed quaere*. Another view would be that the tribunal was *functus officio* but the parties' arbitration agreement remaining extant and capable of performance, the claimant party can commence fresh arbitration proceedings before a new tribunal.
337) *Cable & Wireless Plc v. IBM United Kingdom Ltd* [2002] EWHC 2059, K. Mackie, "The Future for ADR Clauses After *Cable & Wireless v. IBM*" 19 Arbitration International (2003, no. 3) p. 345, V.V. Veeder, *"Observation – England and Wales High Court (Commercial Court), 11 octobre 2002"*, Rev. arb. (2003) p. 537.
338) Woolf, Access to Justice Interim (1995) and Final (1996) Report.
339) See the ADR Practice Directions at [1994] 1 WLR 14 & 1270 and [1996] 1 WLR 1024.
340) The Court may however consider obligations under treaties in certain circumstances. See the decision in *Belhaj and another v. Straw and others* [2017] UKSC 3 in which the UK Supreme Court found that state immunity and the foreign act of state doctrine did not operate to bar private law claims against the UK in circumstances where certain UK authorities and officials were allegedly complicit in wrongs said to have been committed by other states, contrary, inter alia, to international law (unlawful detention and rendition, torture or cruel and inhuman treatment and assault).
341) *JH Rayner (Mincing Lane) Ltdv. DTI* [1990] 2 AC 418, 467-477; *Buttes Gas and Oil Cov. Hammer* [1982] AC 888, 931-934; *British Airways Boardv. Laker Airways Ltd* [1985] AC 58, 85-86; contrast *Kuwait Airways Corporationv. Iraqi Airways Company (Nos 4 and 5)* [2002] AC 883, where the House of Lords considered the *Buttes Gas* principles as not preventing the English Court from identifying the plain breach of the United Nations Charter during Iraq's invasion of Kuwait and subsequent expropriation of the Kuwaiti civil aviation fleet.
342) *Occidental Exploration and Production Co v. The Republic of Ecuador* [2005] EWCA Civ 1116, paras. 32-33, 41.
343) A list is available here: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom...>, under the heading "Treaties with Investment Provisions".
344) A list is available here: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom...>, under the heading "Bilateral Investment Treaties".
345) *The Mayor and Commonalty & Citizens of the City of Londonv. Ashok Sancheti* [2008] EWCA Civ 1283, para. 35.
346) *London Steam Ship Owners Mutual Insurance Association Ltdv. Spain (The Prestige)* [2013] EWHC 2840 (Comm), para. 82.
347) *PAO Tatneftv. Ukraine* [2018] EWHC 1797 (Comm).
348) *GPF GP Sarlv. Poland* [2018] EWHC 409; the seat of this arbitration was London.
349) *Svenska Petroleum v. Government of Lithuania (No 2)* [2006] EWCA Civ 1529, para. 117; *Gold Reserve Inc.v. The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), para. 87.
350) Outsourced consular activities do not fall under the 'commercial' exception: *LR Avionics Technologies Ltdv. The Federal Republic of Nigeria and another* [2016] EWHC 1761 (Comm).
351) *Gold Reserve Inc.v. The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), para. 17.
352) *Slovak Republic v. Achmea B.V.*, Case C-284/16.
353) See, e.g., *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic* (ICSID Case No. ARB/17/14).
354) See Arbitration (International Investment Disputes) Act 1966 Sect. 3(2) and *Occidental Exploration and Production Co v. The Republic of Ecuador* [2005] EWCA Civ 1116, para. 38.
355) *ETI Euro Telecom International NVv. Bolivia* [2008] EWCA Civ 880, para. 109 recognising the effect of Arts. 26 and 47 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules as excluding domestic court interim remedies (absent the parties' agreement), notwithstanding the fact that these do not, strictly speaking, form part of English law.
356) ICSID Case No. ARB/05/20.
357) *Micula et alv. European Commission*, Cases T-624/15, T-694/15 and T-704/15.
358) *Micula et al v. Romania*, Case No. 17-cv-02332 (APM).
359) *Viorel Micula and othersv. Romania and European Commission (Intervener)* [2018] EWCA Civ 1801.