



Arbitration Guide  
IBA Arbitration Committee

# **ENGLAND & WALES**

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## **I. Background**

### **(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

In England and Wales, arbitration is often used as an alternative to litigation. Some perceived advantages of arbitration include the fact that arbitral awards are enforceable more easily and in more countries than judgments of the courts due to the number of countries which have ratified the New York Convention; the fact that arbitration allows parties to keep disputes out of national courts enabling them to select a neutral forum for cross-border disputes; the fact that arbitration offers flexible procedures which allow parties to agree on the venue and the procedural law and have some say in the choice of the arbitrator(s); the fact that arbitration is a private process with the potential for confidentiality; and the fact that arbitration allows only limited grounds of challenge or appeal.

Arbitration is not suitable for every dispute. Some perceived disadvantages of arbitration include: the potential that an uncooperative party can delay and disrupt proceedings to a greater extent than would be possible in English court litigation; the fact that some arbitrators are heavily booked, making it difficult to obtain hearing dates; the concern that inexperienced counsel often try to run arbitrations like national litigation; the fact that there is no summary judgment procedure in arbitration; the potential obstacle that, absent agreement, the tribunal has no power over third parties; and the fact that the absent agreement tribunal has no power to consolidate arbitrations arising from the same set of facts.

### **(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

As one of the world's leading centres of arbitration, arbitrations of all kinds take place in London. Domestic arbitration is common in many sectors such as the insurance and construction industries. Disputes arising in the commodities or shipping industries are often referred to arbitration under the rules of the London Maritime Arbitrators Association (LMAA). The LMAA website reports that '[m]ore maritime disputes are referred to arbitration in London than to any other place where arbitration services are offered'.

London is also a thriving centre for the resolution of international disputes through arbitration under a variety of procedural rules such as those of the London Court of International Arbitration, the International Chamber of Commerce, the Stockholm Chamber of Commerce, the American Arbitration Association International Centre for Dispute Resolution and many others.

Many of these arbitrations involve parties with no connection to the jurisdiction. Parties seeking to engage in arbitration are drawn to the jurisdiction because they perceive it to be a neutral venue with an arbitration law and courts that support

arbitration. They also come because there is an abundance of suitably-serviced venues for hearings and easy access to specialist lawyers as well as because of the general prevalence of the English language and law in international commerce.

**(iii) What types of disputes are typically arbitrated?**

A wide range of contractual and non-contractual claims can be referred to arbitration in this jurisdiction including disputes involving IP rights, competition disputes and statutory claims.

Certain family law matters can now be resolved in arbitration. In 2012 the Institute of Family Law Arbitrators (“IFLA”) (a not for profit company which was established as a result of a collaboration between the Family Law Bar Association, the Chartered Institute of Arbitrators and the Centre for Child and Family Law Reform) established The Financial Scheme for the resolution of certain disputes relating to finances and property arising from family relationships. In 2016 it established the Children Arbitration Scheme which resolves issues between parents or other persons holding parental responsibility or a sufficient interest in a child’s present or future welfare. Further information is available on the IFLA website.

Criminal and planning law matters cannot be referred to arbitration.

**(iv) How long do arbitral proceedings usually last in your country?**

The length of proceedings varies greatly. If the parties have a relatively straightforward dispute, co-operate and adopt a fast track procedure, an arbitration can be concluded within months or even weeks. In a substantial international arbitration involving complex facts, many witnesses and experts and post-hearing briefs, the arbitration could take many years. A reasonably substantial international arbitration will likely take between one and two years.

**(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

There are no professional restrictions on foreign nationals acting as arbitration counsel or arbitrators in this jurisdiction. Indeed a significant number of foreign lawyers practice in the jurisdiction as evidenced by the large number of foreign law firms that have offices in London.

## II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The Arbitration Act 1996 governs all arbitrations seated in England, Wales and Northern Ireland, both domestic and international.

The Arbitration Act is heavily influenced by the UNCITRAL Model Law, but it has some important differences. For example, the Arbitration Act covers both domestic and international arbitration; the document containing the parties' arbitration agreement need not be signed; an English court is only able to stay its own proceedings and cannot refer a matter to arbitration; the sole arbitrator in the event that the other party fails to make an appointment (where the parties' agreement provides that each party is required to appoint an arbitrator); there is no time limit on a party's opposition to the appointment of an arbitrator; parties must expressly opt out of most of the provisions of the Arbitration Act which confer default procedural powers on the arbitrators; and there are no strict rules governing the exchange of pleadings.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

No, the Arbitration Act applies to both domestic and international arbitration.

- (iii) **What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

The UK has ratified the New York Convention, the Washington Convention and the Geneva Convention.

- (iv) **Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

Yes. The Arbitration Act requires the tribunal to apply the substantive law chosen by the parties. If the parties so agree, the tribunal may determine the dispute in accordance with other considerations. This provision allows parties to agree to apply rules which are not the law of a country or to permit the tribunal to act as *amiable compositeur* or *ex aequo et bono*. If the parties have not chosen or agreed to a substantive law, the Arbitration Act requires the tribunal to apply the substantive law identified by the conflict of laws that the Tribunal determines are applicable.

### III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

The Arbitration Act requires that an arbitration agreement must be in writing or evidenced in writing. What constitutes ‘in writing or evidenced in writing’ is broadly defined and includes an oral agreement to arbitrate by reference to terms which are in writing. A purely oral arbitration agreement would only be recognised by the common law and the provisions of the Arbitration Act would not apply. ‘Writing’ means recorded by any means, and therefore encompasses electronic records or communications.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

The English Courts are supportive of arbitration and will endeavour to uphold parties’ agreements to arbitrate even if they are poorly drafted. They will not enforce an agreement if it is deemed to be ‘pathological’, that is, if it is impossible to understand what the parties agreed.

- (iii) **Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses are commonly used, particularly in the construction and engineering sectors. An agreement to negotiate is not enforceable by a court as a matter of English law. Arbitral tribunals rarely enforce them either. However, an agreement to wait a specified period of time after a trigger event before taking a certain step, for example commencing proceedings, can be enforced, provided that the trigger and the time limit are clearly defined.

These type of clauses are the industry norm in certain sectors and the procedures do sometimes lead to the resolution of the dispute before arbitration proceedings are commenced. In order to minimise the use of delaying tactics, it is advisable to include time limits for each pre-arbitral stage. An arbitral tribunal can take into account a party’s refusal to comply with the pre-arbitral procedures when awarding costs.

**(iv) What are the requirements for a valid multi-party arbitration agreement?**

All parties must consent to arbitration and, in order to comply with the New York Convention, must consent in writing in order for the award to be enforceable in other countries which have ratified the Convention.

**(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

English law recognises so called ‘option clauses’ which allow one party to select arbitration or litigation after the dispute has arisen, provided they are sufficiently clearly drafted.

**(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?**

An arbitration agreement binds a person claiming under or through a party to the arbitration agreement, for example an assignee or a person subrogated to that party’s contractual rights. A third party beneficiary of rights under a contract may also be bound by an arbitration clause under English law. Otherwise, arbitration agreements cannot bind a party that has not consented to arbitration.

**IV. Arbitrability and Jurisdiction**

**(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Some types of disputes cannot be referred to arbitration. These include criminal cases and planning laws, which restrict the rights of landowners to develop their property. This used to be the case in relation to family law disputes, although recently schemes have been established to allow certain aspects of family law disputes to be resolved in arbitration (see answer to Question I(iii)).

Usually, the tribunal will determine whether the dispute can be referred to arbitration, but under certain conditions the courts may decide. The question of whether the subject matter of the dispute can be arbitrated can arise at different stages of the proceedings. It can be raised if a party applies to the court to stay proceedings on the grounds that the parties have agreed to arbitrate the dispute. The question of arbitrability can also be raised if a party not taking part in the arbitration applies for declaratory or injunctive relief on the grounds that the dispute is not arbitrable and therefore the tribunal lacks jurisdiction. Additionally, during the course of an arbitration, a party may apply to the tribunal, or (with all parties’ agreement or the tribunal’s permission) to the court, objecting that the

tribunal does not have substantive jurisdiction. Lastly, a party may challenge an award in the courts or resist enforcement of an award on the grounds that the tribunal lacked substantive jurisdiction.

The question of arbitrability is a matter of jurisdiction.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

Where a party commences litigation in the courts in this jurisdiction in breach of a valid arbitration agreement, the other party may apply to stay the proceedings. A defendant must challenge the court's jurisdiction within the time for acknowledging service of the claim (usually 14 days). The defendant need not serve a defence on the merits until the jurisdictional dispute is resolved (and if it did so, would normally be deemed to have waived any objection to the court's jurisdiction). If the party breaching the arbitration clause commences litigation in another jurisdiction (other than a Member State of the European Union or a Contracting State to the Lugano Conventions), the responding party can apply to the court in this jurisdiction for an anti-suit injunction. Although having an English seat is not mandatory, English courts are less likely to grant an anti-suit injunction without one.

Parties may waive their right to arbitrate if they participate in the foreign court proceedings other than to challenge jurisdiction.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

The arbitral tribunal may rule on its own substantive jurisdiction as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. The tribunal's decision can be challenged. If the decision is challenged, the court will hold a full re-hearing of the jurisdictional question.

## V. Selection of Arbitrators

- (i) **How are arbitrators selected? Do courts play a role?**

Usually the arbitration agreement between the parties sets out the procedure for appointing the arbitrators. If the agreement fails to do this, the Arbitration Act sets



out a default procedure that will apply. If that fails, the parties can apply to the court.

**(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

When an arbitrator has a prior interest that might raise doubts about his impartiality, he should disclose that interest at the earliest opportunity. Failure to do so will give rise to a ground to challenge the arbitrator by applying to any body given authority by the parties to decide such challenges (typically an arbitral institution) or, provided the parties have exhausted every contractually-agreed procedure for challenges, to the court.

A challenge is made by giving notice to the other parties, to the arbitrator concerned and to any other arbitrator. The arbitrator facing challenge is entitled to be heard in court. The parties cannot contract out of the right to apply to the court for the removal of an arbitrator. Any provision (for example in institutional rules) that an arbitral institution's decision on a challenge is final, will not prevent a party applying to a court if the institution refuses to remove the arbitrator.

**(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

The law does not impose general restrictions on who can be appointed as an arbitrator. It does, however, provide for certain ethical duties, some of which are set out in the Arbitration Act, while others have been developed by judges and can be found in the common law.

The Arbitration Act requires arbitrators to act fairly and impartially. They must adopt procedures suitable to the circumstances of the particular case, avoid unnecessary delay or expense and provide a fair means of resolving the dispute referred to them.

The common law imposes further duties such as the duty to render an enforceable award.

**(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

There are specific codes of conduct applying to solicitors or barristers whether acting as counsel or arbitrator. Solicitors of England and Wales and registered foreign lawyers are bound by the Solicitors' Code of Conduct 2011. Barristers of England and Wales are bound by their own separate Code of Conduct.

There are also a number of non-binding ethical codes for arbitrators and counsel (including the IBA's Guidelines) which are commonly used in this jurisdiction. The IBA Guidelines on Conflicts of Interest were considered in an English case, illustrating how a court in this jurisdiction derived assistance from the Guidelines when considering a challenge to an arbitrator.

## VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Arbitrators may grant interim relief. Unless agreed otherwise by the parties, the tribunal can order security for costs, issue orders relating to the property which comprises the subject matter of the proceedings and issue orders for the preservation of evidence. The tribunal also may order, on a provisional basis, any relief which it would have the power to grant in a final award.

Unless the parties agree otherwise, the Arbitration Act allows tribunals to issue more than one award at different times. This power can be effective in reducing time and cost by determining a key issue early on without the parties having to determine all the issues in the case. Subject to the parties agreeing otherwise, tribunals can also issue partial awards which are binding on the parties until a final determination of the issue.

Unless otherwise agreed by the parties, the court may order a party to comply with a peremptory order made by the tribunal. One of the guiding principles of the Arbitration Act is to minimise court intervention in the arbitral process so the courts will take action to support the arbitral process only if the tribunal cannot act effectively.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

Courts may grant interim injunctions to support arbitrations if the arbitral tribunal has no power or is unable to act effectively. In a recent case the English court held that where there is sufficient time for an applicant to obtain relief from an expedited tribunal or emergency arbitrator, it does not have power to grant urgent relief.

The court can direct that its order shall cease to have effect, in whole or in part, on the order of the tribunal.

- (iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Generally speaking, the courts have the same powers to act in support of arbitration as they have in litigation. They have the power to summon witnesses, require a person to produce documents or material evidence, preserve evidence, make freezing orders and appoint a receiver. The court will only exercise these powers if the tribunal cannot act or cannot act effectively; the court's powers are intended to support the arbitration and not to supplant the powers of the tribunal.

If the tribunal is constituted, it must either consent to the court exercising its powers or the parties must provide their agreement in writing. If the matter is urgent, a party can dispense with those requirements and apply directly to the court.

## **VII. Disclosure/Discovery**

- (i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

The extent of disclosure or discovery will depend upon the case and the counsel and arbitrators involved. Experienced international arbitrators and counsel will, in most cases, take a more limited and focused approach than that taken in English litigation. This usually results in parties disclosing only documents on which they rely and limited categories of documents in response to document requests.

There is no requirement in English law to disclose any documents in an arbitration and so disclosure can be dispensed with entirely in some cases. The Arbitration Act confers a wide discretion on tribunals which enables them to tailor the extent of disclosure to the requirements of particular cases.

- (ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**

The tribunal can require the parties to disclose documents in their possession or power that are necessary for the resolution of the dispute. A tribunal which ordered disclosure of irrelevant documents would be in breach of its duty to adopt appropriate procedures and avoid delay and unnecessary expense.

The English courts have confirmed that court orders for pre-action disclosure are not available if there is an arbitration agreement between the parties. Furthermore, the tribunal has no power to order disclosure from third parties. If evidence is required from a third party, a party to the arbitration can (with the agreement of all

- parties or the permission of the tribunal) apply to the court for assistance.
- (iii) **Are there special rules for handling electronically stored information?**

There are no special rules for handling electronically stored information in the context of arbitrations. Parties usually look to the best practices developed in relation to litigation, and increasingly arbitration, and adapt them to the case accordingly. Tribunals typically try to avoid wide-ranging electronic disclosure exercises.

## VIII. Confidentiality

- (i) **Are arbitrations confidential? What are the rules regarding confidentiality?**

The Arbitration Act does not mention confidentiality, but the courts will imply a duty of confidentiality on the parties to an arbitration and the tribunal to maintain the confidentiality of the hearing, the documents generated and disclosed during the proceedings and the award itself.

This implied duty is, however, subject to broad exceptions. Confidentiality can be waived with the leave of the court if certain criteria are met. Such a waiver of confidentiality must be in the interests of justice or in the public interest, necessary for the protection of the legitimate interests of an arbitrating party and with the express or implied consent of the party that produced the document.

- (ii) **Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?**

No. The tribunal will determine which documents the parties should disclose.

- (iii) **Are there any provisions in your arbitration law as to rules of privilege?**

No, but the tribunal will typically apply legal professional privilege. The tribunal will determine which documents the parties should disclose. Complex questions often arise, such as whether the law of privilege of the jurisdiction in which the document was created or of the jurisdiction of the seat of the arbitration should apply. Tribunals frequently will try to resolve these questions by applying either the English law of privilege or the law that provides the most protection against disclosure.

## IX. Evidence and Hearings

- (i) **Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

The IBA Rules on the Taking of Evidence in International Arbitration are not binding, but they are commonly used by parties and tribunals as guidance. The tribunal retains discretion to depart from them.

- (ii) **Are there any limits to arbitral tribunals' discretion to govern the hearings?**

The Arbitration Act requires that the tribunal act fairly and impartially and give the parties a reasonable opportunity to present their cases. The tribunal must not adopt procedures which give rise to unnecessary expense or delay. Aside from these basic duties of fairness, the tribunal has very wide discretion in relation to how the hearings are run. It need not even require a hearing to be held and can, instead, determine the dispute before it on the basis of the parties' submissions (although many institutional rules require a hearing to be held if a party requests it).

- (iii) **How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

The testimony of a fact witness is usually given in the form of a written witness statement which is exchanged between the parties prior to the hearing and stands as that witness's direct evidence. If a statement is disputed, the witnesses may be cross-examined, but it is up to the tribunal to decide if, when and how the witness is questioned.

If the parties cannot agree how witness evidence will be presented, the tribunal will decide the matter. In practice this means that the legal cultures and backgrounds of the appointed arbitrators have a strong influence. Arbitrators from common law backgrounds such as English Queen's Counsels will be very familiar with cross-examination and will be more likely to order it if the parties cannot agree.

- (iv) **Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

There are no rules on who is eligible to be a witness. The tribunal has discretion as to whether a witness will take an oath or affirmation.

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?**

The Arbitration Act does not provide for differences in the treatment of witnesses. The Arbitration Act confers unfettered discretion on the tribunal to determine relevance and weight of witness testimony.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

There are no formal requirements relating to how expert testimony is presented. The tribunal has wide discretion over how such testimony is presented, subject only to giving the parties a reasonable opportunity to present their cases.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

It is not common for an arbitral tribunal to appoint an expert. If a tribunal appoints its own expert in addition to the experts appointed by each party, the role of the tribunal's expert is usually to explain the evidence presented by the parties' experts and to clarify and explain technical issues. The tribunal-appointed expert should not become an advocate for one of the parties.

There are no requirements in the arbitration law in this jurisdiction that experts are to be selected from a particular list.

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

While witness conferencing of factual or expert witnesses is sometimes used, it is not common. If used, it is usually done with the agreement of the parties, and fact witnesses are examined (as a group) separately from expert witnesses. The tribunal will often pose the same questions to each of the witnesses and will generally take the lead in questioning them. After the tribunal has finished questioning the witnesses, the parties' representatives have a limited amount of time to ask additional questions.

Witness conferencing can save time and money but because the parties' representatives have only a limited amount of time to pose their questions, this technique is less favoured by common law lawyers who generally prefer a full cross-examination of each witness.

**(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

Tribunals frequently appoint secretaries and will usually obtain the consent of the parties before doing so. The costs of the secretary are either paid by the parties or, as is often the case, included in the fees of the arbitrators.

As a matter of English law there are no specific rules or requirements governing the use of arbitral secretaries, but tribunals must not delegate decision making power to a secretary without the consent of the parties. In a recent case the English court held that the critical yardstick was that tribunal members could not abrogate or impair their personal decision-making function. The court stated that, for this reason, best practice was to avoid asking the secretary to express a view, but failure to follow best practice does not equal failure to properly conduct proceedings, especially where an arbitrator is experienced and used to reaching independent decisions without being influenced by suggestions from junior assistants. It further found that it is normal and appropriate for a secretary to work under the chairman's direct supervision. In an experienced tribunal, the co-arbitrators could assume that the secretary would be tasked appropriately, absent something to alert them otherwise. Co-arbitrators were not under a personal, non-delegable duty to direct or manage the secretary collectively.

The LCIA has also recently provided certain guidelines for the use of tribunal secretaries and the scope of their role in its Notes to Arbitrators. For LCIA arbitrations, a tribunal secretary is required to provide a Statement of Independence.

**X. Awards**

**(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

The parties can agree on the formal requirements of the award. If they cannot do so the Arbitration Act sets out the default formalities that will apply. The Arbitration Act defaults require that the award must be in writing and signed by all the arbitrators or all those assenting to the award. It must contain the reasons for the award, the seat of the arbitration and the date that the award was made.

Comprehensive relief is available. Unless agreed otherwise by the parties, the tribunal can make a declaration as to any matter to be determined in the proceedings, order a payment of money, order a party to do or refrain from doing something, order specific performance under a contract (except one that relates to land), order rectification and set aside or cancel a deed or other document.

**(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

There is no express rule as to whether arbitrators can award punitive or exemplary damages. If the parties agree, the arbitrators can do so. Without such agreement they can award exemplary damages in the same circumstances that the English courts could if English law applies or if such damages are provided for in the applicable law. The Arbitration Act gives the tribunal the power to award simple or compound interest.

**(iii) Are interim or partial awards enforceable?**

Yes, interim and partial awards are enforceable.

**(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?**

Arbitrators are allowed to issue dissenting opinions. There are no rules relating to their form and content, but dissenting opinions usually contain the reasons for the dissent.

**(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?**

Awards can be made by consent. The arbitrator will record the terms agreed. Awards by consent have the same status as an award on the merits. The normal conditions for an award apply. Under the Arbitration Act, it is not necessary to state that the award was made by consent; however, some arbitral institutions, such as the London Court of International Arbitration, require this.

The parties may agree to terminate the proceedings by consensual withdrawal of the tribunal's jurisdiction or they may terminate the arbitration agreement itself.

**(vi) What powers, if any, do arbitrators have to correct or interpret an award?**

The tribunal may correct an award in order to remove any clerical mistake or error arising from an accidental slip or omission, clarify or remove any ambiguity in the award or make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but not dealt with in the award.



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## **XI. Costs**

- (i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?**

The parties can agree how costs will be borne. In the absence of any agreement, the Arbitration Act sets out a general principle to guide the tribunal, namely, that the costs should follow the event except in cases where it would not be appropriate to do so.

In most cases, therefore, the unsuccessful party bears the costs.

- (ii) What are the elements of costs that are typically awarded?**

Typically awarded costs include the arbitrator's fees and expenses, the costs of supervision by any arbitral institution, the costs of the parties' counsel and their expenses such as venue, travel, translations, etc.

- (iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?**

Yes, the tribunal has jurisdiction to determine its own costs and expenses subject to the application of the procedural rules agreed between the parties.

- (iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

Unless the parties have agreed otherwise, the tribunal can apportion costs if it determines that it is not appropriate for costs to follow the event. Any agreement that a specific party must pay all or part of the costs is valid only if made after the dispute has arisen. When apportioning costs the tribunal will take into account how the parties have conducted the arbitration. For example, if one party won on the merits but caused unnecessary delay and increased costs, the tribunal may not order the losing party to pay all of the winning party's costs.

- (v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

A party wishing to challenge a tribunal's award on costs can apply to the court.

The court will not substitute its own discretion for that of the tribunal, but will examine the award to see if the tribunal exercised its discretion appropriately. A challenge usually only will succeed if it can be shown that the tribunal made an error of law or if the award amounted to a serious irregularity.

## **XII. Challenges to Awards**

- (i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

While it is generally difficult to challenge an award in this jurisdiction, there are three grounds on which a challenge can be made, namely: (a) jurisdiction; (b) serious irregularity; and (c) a point of law. Before applying to a court, the applicant must first exhaust all available recourses from the tribunal to correct the award or make an additional award and any available arbitral process of appeal or review.

### **(a) Challenge to the tribunal's substantive jurisdiction**

The challenge may be to the substantive award on the merits, or may be a challenge to a preliminary award on the tribunal's jurisdiction. Jurisdictional challenges can be made to the existence or validity of the arbitration agreement, the constitution of the tribunal or the scope of the arbitration agreement. Recent English case law has confirmed that where a party is seeking to resist enforcement on the basis that the tribunal lacked jurisdiction the court is bound to revisit the tribunal's decision on jurisdictions.

### **(b) Challenge on the ground of serious irregularity**

An award can be challenged if there has been a serious irregularity that has caused or will cause substantial injustice to the applicant. The irregularity may relate to the tribunal, the proceedings or to the award itself. The bases for mounting such a challenge are where the tribunal failed to act fairly and impartially, caused unnecessary delay or expense, exceeded its powers, failed to deal with all the issues that were put to it or where the award was obtained by fraud or in a way contrary to public policy.

### **(c) Appeal on a point of law**

An appeal on a point of law can be brought with the agreement of all other parties to the arbitration or with the leave of the court. For such judicial leave to be granted, the applicant must be able to show: that a determination of the question will substantially affect its rights; that the question of law is one which the tribunal was asked to determine; that the decision of the tribunal is obviously wrong; or that the question is of general public importance and the tribunal's decision is open to serious doubt. The court must also be satisfied that it is just and proper to determine the question.

Challenges must be brought within 28 days of the date of the award or within 28 days of being notified of the outcome of any arbitral appeal, review, correction to the award or an additional award. The average duration of challenge proceedings is generally one to two months.

- (ii) **May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

Parties can waive the right to challenge an award on a point of law, but this must be agreed either expressly or by incorporation of rules containing a waiver (for example both the ICC and LCIA rules exclude such a challenge). The other grounds are mandatory and cannot be waived. However, a party may be deemed to have waived its right to challenge by not raising an objection promptly upon discovery or lapse of time.

- (iii) **Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Please refer to the answer to [Question XII(i)]. In theory there are three levels of appeal: an appeal can be made to a court of first instance, then to the Court of Appeal and finally to the Supreme Court.

- (iv) **May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

An award challenged on jurisdictional grounds will not be remanded to the tribunal. In addition, the court may, if it sees fit, remand an award that has been challenged on other grounds to the tribunal for reconsideration. In this case the tribunal must issue a fresh award within three months of the court order.

### **XIII. Recognition and Enforcement of Awards**

- (i) **What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

There are two alternative procedures that can be followed in order to enforce an award. The first is to seek leave of the court for permission to enforce, the second is to begin an action on the award, seeking the same relief from the court as set out in the tribunal's award.

Enforcement of an award made in the jurisdiction may be opposed by challenging the award (see the responses to Question XII above). However, the court also may

refuse to enforce an award that is unclear, does not specify an amount, or offends public policy. Enforcement of a foreign award may be opposed on any of the limited grounds set out in the New York Convention.

A stay may be granted for a limited time pending a challenge to the order for enforcement. The court will consider the likelihood of success and whether enforcement of the award will be made more or less difficult as a result of the stay. Conditions that might be imposed on granting the stay include such matters as paying a sum into court. Where multiple awards are to be rendered, the court may give permission for the tribunal to continue hearing other matters, especially where there may be a long delay between awards.

**(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

If a foreign arbitral award is recognised, it can be enforced in the same way as a judgment or order of the national courts. The successful party can apply to the court for an order to seize the goods of the losing party, or to freeze money held by a third party which would otherwise be paid to the losing party. The successful party could also apply to the court for a receiver to be appointed to collect the money or could even make an application to bankrupt the losing party.

**(iii) Are conservatory measures available pending enforcement of the award?**

Yes, a party may seek interim measures such as a freezing injunction.

**(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

The English courts have a good record of enforcing arbitral awards. The courts will enforce an arbitral award in the same way that they will enforce an order or judgment of a court.

In a recent case the English Court held that where it was being asked to enforce an award which had been set aside at the seat, the Claimant had a high hurdle to surmount; namely whether the decision at the court of the seat was so extreme and incorrect so as to not to be open to a court acting in good faith.

**(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

Most awards are complied with voluntarily. If the party against whom the award was made fails to comply, the party seeking enforcement can apply to the court.

The length of time it takes to enforce an award which complies with the requirements of the New York Convention will depend on whether there are complex objections to enforcement which require the court to investigate the facts of the case. If a case raises complex issues of public importance the case could be appealed to the Court of Appeal and then to the Supreme Court. This process could take around two years. If no complex objections are raised, the party seeking enforcement can apply to the court using a summary procedure that is fast and efficient.

There are time limits relating to the enforcement of the award. Failure to comply with an award is treated as a breach of the arbitration agreement. An action on the award must be brought within six years of the failure to comply with the award or 12 years if the arbitration agreement was made under seal. If the award does not specify a time for compliance, a court will imply a term of reasonableness.

#### **XIV. Sovereign Immunity**

**(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

States enjoy immunity from the jurisdiction of the English Court unless they have submitted to the jurisdiction, agreed to waive immunity, the proceedings concern a commercial transaction or it has entered into an arbitration agreement. Separately States enjoy immunity with respect to execution against their assets unless they have agreed to waive this immunity.

Problems can arise where it is not the State itself which is a party to the arbitration agreement but a State entity and it is unclear whether that State entity is entitled to immunity as part of the State. For this reason it is advisable to include an express provision in the agreement stating that the State is also a party to the agreement so that any arbitral award can also be enforced against the State.

**(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?**

An important distinction must be made between enforcement and execution. If a State agrees to arbitration it waives immunity from jurisdiction, recognition and enforcement of an award. However, the State's agreement to the arbitration does not waive its immunity with respect to execution against State assets. It is therefore necessary to obtain a waiver which mentions both immunity from jurisdiction and immunity from execution. Failure to do this can result in a situation where a court recognizes an award and issues an enforcement order, but the award cannot be executed against State assets.

## **XV. Investment Treaty Arbitration**

- (i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Yes. The United Kingdom is a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and other multinational treaties such as the Energy Charter Treaty.

- (ii) Has your country entered into bilateral investment treaties with other countries?**

Yes. The UK has entered into over 100 bilateral investment treaties.

## **XVI. Resources**

- (i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The leading texts on arbitration in England, Wales and Northern Ireland, are:

- ‘Russell on Arbitration’, 24th Edition, by David St John Sutton, Judith Gill QC, and Matthew Gearing. Published by Sweet & Maxwell, 2015.
- ‘Redfern & Hunter on International Arbitration’, Sixth Edition, by Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter. Published by Oxford University Press, 2015.
- ‘Arbitration Law’, Edited by Robert Merkin, Service Issue No. 76, Informa.

- (ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

Each spring and autumn the London Court of International Arbitration (“LCIA”) holds a European Users’ Council Symposium lasting two days. It is preceded by a half-day Symposium for members of the Young International Arbitration Group (“YIAG”). The Symposia are very popular and firms are limited in the numbers of people they can send to each one. Full details and booking forms are posted on the LCIA’s website.

The Investment Treaty Forum hosted by the British Institute of International and Comparative Law holds two public seminars on investment treaty arbitration each year. Details are available on the website of the British Institute of International and Comparative Law.

The Chartered Institute of Arbitrators offers a wide range of courses, and also qualifications that are recognised around the world.

## XVII. Trends and Developments

- (i) **Do you think that arbitration has become a real alternative to court proceedings in your country?**

Yes. Arbitration is a respected and valued binding method of resolving disputes in this jurisdiction.

- (ii) **What are the trends in relation to other ADR procedures, such as mediation?**

Mediation is commonly used to settle a wide range of disputes in this jurisdiction, including family law and business disputes. The courts encourage parties to mediate and will, sometimes, penalise parties who unreasonably ignore an interparty invitation to mediate, for example, by denying them all or part of their costs if they win their case at trial.

Other forms of ADR are less common but are used.

There are a large number of organisations offering training in all forms of ADR. Many of these organisations will also help set up ADR schemes, recommend mediators and monitor trends and developments in the area.

- (iii) **Are there any noteworthy recent developments in arbitration or ADR?**

Globalisation and the dynamic growth in emerging market economies are driving the increased use of arbitration to resolve international disputes. There has been some discussion as to whether BREXIT will have any affect on the practice of arbitration in London. However, it is expected to have limited, if any, effect. The reason for this is that the essential legal framework for arbitration (the Arbitration Act and the New York Convention) exist independently of the European Union legal regime and will be unaffected by the UK leaving the EU.

Traditionally, financial institutions did not include arbitration clauses in their transactional documents but that has changed. Now, transactions involving parties in emerging market jurisdictions frequently include international arbitration clauses.