UK (England and Wales)

Jon Tweedale and Clare Dwyer
Addleshaw Goddard LLP

GENERAL

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

Commercial arbitration continues to thrive. While London has always attracted international commercial arbitrations between multinational companies, a recent growth area has been arbitrations against states arising from claims under investment treaties.

London remains a popular seat for major international arbitrations, which is attributable to its status as a major financial centre and world trade market, the popularity of English law as a governing law for commercial contracts and the non-interventionist approach of the English courts. The local courts’ approach is exemplified by the guiding principles set out in the Arbitration Act 1996 (1996 Act), including that an English court will not intervene in any arbitration except to the limited extent permitted by the 1996 Act, the provisions of which are designed to support the arbitral process and safeguard the public interest (see Question 16).

In addition to international arbitration, commercial arbitration remains the dispute resolution procedure of choice in a number of areas of commerce and industry in the UK. Examples include commodities trading, shipping and the construction industry, which have historically used arbitration to achieve a quick and efficient settlement of disputes.

The principal advantages of commercial arbitration over court litigation include:

- The relative ease with which an arbitration award can be enforced under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) in over 140 states (including emerging markets). Conversely, the number of states in which an English court judgment can be enforced is significantly smaller.

- The privacy and confidentiality afforded by the arbitral process (English court proceedings generally take place in public).

- The flexibility of the arbitral process, which enables the parties to tailor the procedure to suit a particular dispute (for example, by limiting or dispensing with disclosure or adopting an expedited timetable). This advantage is particularly relevant if one of the parties is based in a foreign jurisdiction that has a different legal culture and tradition, and a compromise procedure is required (for example, if one party is based in a civil law country and the other in a common law country).

- Neutrality, in terms of both:
  - avoiding any perceived bias of the local courts in favour of the locally based party;
  - neutralising the potential advantage of a locally based party having greater familiarity with local court procedures in the case of international arbitrations involving parties based in different jurisdictions.

The principal disadvantage of commercial arbitration is arguably the general inability of the parties to join a third party to an arbitration without the third party’s consent. This makes parallel proceedings, which may have inconsistent outcomes (even though they arise from the same subject matter), possible. A related disadvantage is the difficulty of consolidating arbitrations (even between the same or similar parties).

Cost and delay are also often cited by users as disadvantages of commercial arbitration. However, this largely depends on the manner in which the tribunal has managed the proceedings. While commercial arbitrations generally give rise to costs which do not arise in court proceedings (such as the tribunal’s fees and administration costs of an arbitral institution), those additional costs are generally compensated by the shorter final hearings and, usually, more limited disclosure. If properly managed, the costs of a commercial arbitration should not exceed those of comparative court litigation.

Any delay also depends on the tribunal and its approach. There is no reason why arbitral proceedings cannot proceed on an expedited timetable or a timetable in line with comparative court proceedings. New procedures are being introduced by the arbitral institutions such as the International Chamber of Commerce (ICC) to address the issue of arbitrators taking on too many appointments (which can give rise to delays). For example, nominated arbitrators are required to reveal how many arbitrations they are working on as an arbitrator or counsel.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

The principal arbitral institutions used to resolve large commercial disputes include the:


- London Court of International Arbitration (LCIA) (www.lcia-arbitration.com).
International Centre for Dispute Resolution (ICDR) (the international section of the American Arbitration Association (AAA)) (www.adr.org).

There are also a number of specialist organisations which administer arbitrations in areas such as commodities, insurance, construction and shipping. Examples include the:

Since the Housing Grants, Construction and Regeneration Act 1996, construction disputes must first be referred to statutory adjudication within the set time limits. While the awards are binding on an interim basis under the Act, it is common for adjudication decisions to be subject to a right of appeal to arbitration.

In relation to arbitrator-appointing bodies, the Chartered Institute of Arbitrators (CIArb) (www.ciarb.org) is commonly used and can provide arbitrators with specialist expertise in a wide variety of fields and sectors. Bodies such as the Centre for Effective Dispute Resolution (CEDR) (www.cedr.com) are also gaining popularity. Professional bodies such as the Chartered Institute of Surveyors, the Law Society and the Chartered Institute of Accountants are commonly approached to propose arbitrators with specialist expertise in their respective fields.


The 1996 Act, which replaced the Arbitration Acts of 1950 and 1971, contains substantially all of the statutory provisions applicable to arbitration. The 1996 Act is based on a modified form of the UNCITRAL Model Law and applies to all arbitrations (the 1950 and 1971 Acts previously made a distinction between UK and international arbitrations). The 1996 Act has universally been recognised as a great improvement, particularly because all of the main provisions relating to arbitration are now gathered in one comprehensive statute.

The guiding principles on which the 1996 Act is based are summarised in section 1 of the Act and include the following:
- The fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- The parties’ freedom to agree how disputes are to be resolved, subject only to safeguarding the public interest.
- The national court should not intervene except as provided by the 1996 Act.

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

The 1996 Act contains numerous mandatory provisions which the parties cannot exclude. The mandatory sections of the 1996 Act are listed in Schedule 1 and include, among others:
- The court’s power to stay court proceedings brought in breach of an arbitration agreement and related provisions (sections 9 to 11).
- The court’s power to extend agreed time limits and to apply the Limitation Acts (sections 12 and 13).
- Provisions dealing with the arbitrator’s position, such as (sections 24, 26(1), 28 and 29):
  - the power of the court to remove the arbitrator;
  - the effect of the arbitrator’s death;
  - the parties’ liability for the arbitrator’s fees and the arbitrator’s immunity.
- The jurisdiction of the tribunal (sections 31 and 32).
- The general duty of the tribunal to act fairly and impartially (section 33).
- The general parties’ duty to do all things necessary for the conduct of the arbitration (section 40).
- The court’s power to secure the attendance of witnesses (section 43).
- The tribunal’s power to withhold an award for the:
  - non-payment of the arbitrators’ fees and expenses (section 56); and
  - ineffectiveness of an agreement providing that a party must pay the whole or part of the costs of the arbitration in any event (section 60).
- The enforcement of an award (section 66) and grounds for challenging an award (sections 67, 68, 70 and 71).

5. Are there any requirements relating to independence or impartiality?

A tribunal is under a general duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity to present its case and deal with that of its opponent (section 33(1) (a), 1996 Act). The court has the power to remove an arbitrator if there are circumstances which give rise to justifiable doubts as to the arbitrator’s impartiality (section 24(1)(a), 1996 Act).

The ICC and LCIA rules also contain provisions requiring the impartiality of the arbitrator, and both institutions require every arbitrator to sign a declaration of independence. The International Bar Association (IBA) has issued Guidelines on Conflicts of Interest in International Arbitration.

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.

The limitation periods prescribed by the English Limitation Acts (the Limitation Act 1980 and Foreign Limitation Periods Act 1984, as amended or supplemented) apply to arbitral proceedings in the same way as they apply to English court proceedings (section 13, 1996 Act).
In contract claims, the limitation period is generally six years from the date the contract was breached. In tort, the limitation period is usually six years from the date on which damage occurred, but where the damage was concealed the period may in certain circumstances be extended to run from the date on which the damage was or could have been discovered.

If a foreign law applies to the agreement which is the subject of the arbitration, the relevant foreign limitation periods will apply.

If the parties have agreed a time limit (for example, in the arbitration agreement) within which an arbitration must be commenced, the court can extend that time limit (section 12, 1996 Act). In practice, however, parties rarely specify a time limit for commencing an arbitration.

**ARBITRATION AGREEMENTS**

7. For an arbitration agreement to be enforceable:
   - What substantive and/or formal requirements must be satisfied?
   - Is a separate arbitration agreement required or is a clause in the main contract sufficient?

**Formal requirements**

For an arbitration agreement to be enforceable under the 1996 Act, the only formal requirement is that the arbitration agreement is recorded in writing. “In writing” is very widely defined, and even includes an oral agreement to arbitrate recorded by a third party with the parties’ authority.

**Separate arbitration agreement**

A separate arbitration agreement is not required and a clause in the main contract is sufficient. The arbitration clause can be in a separate document and incorporated by reference in the substantive contract (section 6(2), 1996 Act). Even if the substantive contract is found to have been invalid (for example, by reason of fraud), the arbitration clause may still be effective in certain circumstances.

Generally, the approach to the construction of arbitration agreements is liberal, encouraged by the decision in *Fiona Trust v Privalov* [2007] EWCA Civ 20, followed in *Habas Sinai v Sometal* [2010] EWHC 29 Comm. In the latter case, the phrase “All the rest will be same as our previous contracts” was held to incorporate the arbitration clause contained in previous contracts.

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?

The 1996 Act contains the following provisions relating to the number, qualifications/characteristics or selection of arbitrators:

- If the number of arbitrators is not agreed by the parties, the tribunal must consist of a sole arbitrator (section 15, 1996 Act).

- Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number will be understood as requiring the appointment of an additional arbitrator as the tribunal’s Chairman (section 15(2), 1996 Act).

- If a court appoints an arbitrator under the 1996 Act, the court must have due regard to any agreement of the parties as to the qualifications required of the arbitrator (section 19, 1996 Act).

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

Arbitration is a consensual process and a third party can generally only be joined to an arbitration by consent. Therefore, third parties must have agreed to be bound by the arbitration agreement or otherwise agreed to become a party to the arbitration proceedings.

A third party can enforce a term of a contract if the contract expressly provides for it to do so or confers a benefit on it, unless it appears that the parties did not intend the term to be enforceable by a third party (section 1, Contracts (Rights of Third Parties) Act 1999 (1999 Act)). This principle also applies to arbitration agreements (section 8, 1999 Act). If a third party is seeking to enforce a contract term which is subject to an arbitration agreement (for example, because the contract contains an arbitration clause), then the third party is treated as a party to the arbitration agreement and must enforce the term through arbitration proceedings.

**PROCEDURE**

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

The 1996 Act contains default rules governing the appointment and removal of arbitrators and the start of arbitral proceedings:

- **Commencement of arbitral proceedings (section 14).** If the arbitrator has been named in the arbitration agreement, arbitration proceedings are commenced when one party serves a notice in writing on the other party(ies), requiring him (them) to submit the matter to the named arbitrator. If the arbitrator(s) must be appointed by the parties, arbitral proceedings are commenced when one party serves on the other party(ies) a notice requiring him (them) to appoint an arbitrator, or to agree the appointment of an arbitrator in relation to the matter. If the arbitrator must be appointed by a person other than a party to the proceedings, arbitral proceedings are deemed to be commenced when one party gives notice in writing to the appointing person requesting him to make the appointment in relation to the matter.

- **Appointment of arbitrators (section 16).** Broadly, if there is to be a sole arbitrator, the parties must jointly appoint the arbitrator within 28 days after the service of a request in
writing by either party to do so. If the tribunal must consist of two arbitrators, each party should appoint an arbitrator within 14 days after a request in writing by either party to do so (and, if there are to be three arbitrators, the two so appointed should appoint a third arbitrator as the tribunal’s Chairman).

- **Power to appoint sole arbitrator (section 17).** If each of two parties to an arbitration agreement must appoint an arbitrator and one party fails to do so, notice in writing can be given by the other party (to the non-compliant party) proposing that its arbitrator be appointed to act as sole arbitrator. If the party in default does not respond within seven clear days, the first party can appoint its arbitrator as sole arbitrator, but the other party can apply to the court to set aside the appointment.

- **Failure of appointment procedure (section 18).** If the procedures set out in the arbitration agreement fail, an application to the court can be made to appoint the arbitrator(s) and/or make additional directions.

- **Revocation of arbitrator’s authority (section 23).** Generally, if the parties have not agreed in what circumstances an arbitrator’s authority can be revoked, revocation requires either:
  - that the parties act jointly;
  - a decision by an arbitral or other institution which the parties have vested with the power to revoke.

- **Courts’ power to remove arbitrators and grounds (section 24).** The grounds include:
  - justifiable doubts as to the arbitrator’s impartiality;
  - that he does not possess qualifications required by the arbitration agreement;
  - that he is physically or mentally incapable of conducting the proceedings;
  - that he has refused or failed properly to conduct the proceedings and that substantial injustice will be caused to the applicant.

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

Subject to the mandatory provisions in the 1996 Act (see Question 4), the parties can determine the applicable procedural rules. Parties typically adopt the procedural rules of an arbitral institution such as the LCIA or ICC.

If the parties have not adopted a particular set of rules, the tribunal has a broad discretion to prescribe the procedure, subject to the duties and requirements imposed by the 1996 Act. For example, the tribunal must adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, to provide a fair means for the resolution of the matters to be determined (section 33(1)(b), 1996 Act).

Subject to the parties’ right to agree any matter, it is for the tribunal to decide all procedural and evidential matters (section 34, 1996 Act). There is a non-exhaustive list in section 34 of what these matters may include, for example:

- **Language.**
- **Disclosure.**
- **The rules of evidence to be applied.**

The 1996 Act also gives the tribunal certain procedural powers (see Question 12).

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The parties are generally free to agree the tribunal’s procedural powers. If the parties have agreed on procedural rules (such as the ICC’s), the tribunal assumes the procedural powers in those rules.

If there is no express agreement, the tribunal can (1996 Act):

- **Appoint experts, legal advisers or assessors (section 37).**
- **Order disclosure of documents (section 34(2)(d)).**
- **Order security for costs (see section 34(2)(d)).**
- **Order disclosure of documents (see section 34(2)(d)).**
- **Direct that a party or witness shall be examined on oath or affirmation (section 38(5)).**

EVIDENCE

13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

The parties can agree whether there should be disclosure and, if so, the scope of it. In the absence of any agreement, the tribunal can determine whether disclosure is required, the scope of any disclosure and applicable procedure (section 34(2)(d)).

In practice, the scope of disclosure is usually far more limited than the disclosure required in English court proceedings. Typically, the parties disclose the documents they intend to rely on but also request the disclosure of limited categories of documents from the other party. If the other party declines to disclose the requested documents voluntarily, the tribunal then typically rules on each of the disputed requests. The disclosure requests are usually put into a “Redfern schedule” in which the requested party lists the categories of documents requested and describes their relevance. The other party then inserts its position on each of the requests into the Redfern schedule alongside the relevant request before the tribunal finally inserts its ruling on each disputed request. Parties often choose to adopt the IBA Rules on the Taking of Evidence to provide an objective standard for assessing the relevance of documents.

The tribunal can order disclosure similar to standard disclosure in English court proceedings, in which the parties must disclose all documents in their possession or control which support, or are detrimental to, their case. However, this is becoming increasingly rare. In EDO Corporation v Ultra Electronics (2009) EWCA 682
The court confirmed that orders for pre-action disclosure available in English court proceedings are not available if the parties are contractually obliged to arbitrate.

**CONFIDENTIALITY**

14. Is arbitration confidential?

The 1996 Act is silent on the issue of confidentiality. The parties can agree on whether the arbitration proceedings must be confidential (for example, this may be dealt with in the arbitration clause). The Court of Appeal established that, in the absence of the parties’ agreement, an implied term of confidentiality arises as a matter of English law, as a necessary incidence of the arbitration proceedings (Ali Shipping Corporation v Shipyard Trogir [1998] 1 Lloyds Report 643 (Ali Shipping). Therefore, documents such as statements of case, any witness statements, or any documents produced cannot be disclosed to third parties without the consent of the other parties to the proceedings.

There is an exception for “reasonable necessity”, confirmed in the Ali Shipping case, but it must be applied flexibly. For example, a document may have to protect a party’s legal rights in relation to a third party or in the interests of justice/public interest.

**COURTS AND ARBITRATION**

15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

The court can be called to intervene to assist arbitration proceedings in certain circumstances. The court’s powers are set out in sections 42 to 44 of the 1996 Act:

- **Section 42.** The court can make an order requiring a party to comply with a peremptory (that is, final) order made by the tribunal.

- **Section 43.** A party to arbitration can use the same court procedures as are available in court proceedings to secure the attendance of witnesses to give oral evidence at a hearing, provided that the witness is in the UK and the arbitration is being conducted in England and Wales (or Northern Ireland).

- **Section 44.** The section sets out further court powers which are exercisable in support of arbitrations. These include powers relating to:
  - the taking of evidence of witnesses;
  - the preservation of evidence;
  - orders for the inspection and detention of property;
  - ordering that samples be taken;
  - the sale of any goods subject to the proceedings;
  - the granting of an interim injunction or the appointment of a receiver.

The parties can agree to exclude the court’s powers under section 42 and section 44 but not those under section 43. In addition, the court’s powers may be restricted depending on the particular circumstances of the case and the detailed provisions of sections 42 to 44 should be considered before seeking the court’s assistance. For example, the tribunal’s permission and/or consent of the other parties may be required for applying to the court (for example, if the court is asked to exercise its powers under section 44 but the case is not urgent (section 44(4)).

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

An English court will not intervene to frustrate arbitration and will only intervene to assist or support the arbitral process (in the manner and to the extent permitted by the 1996 Act) (see Question 15). In practice, cases involving significant court intervention are largely confined to ad hoc arbitrations in which the parties failed to agree a basic procedure in the arbitration agreement and are unwilling or unable to agree the procedure. In these circumstances, applications to the court may be required, for example, to secure the appointment of an arbitrator.

It is exceptionally difficult and rare for a party to attempt to delay arbitration proceedings through frequent court applications, not least because this strategy would almost certainly fail and result in adverse costs orders against the applicant.

17. What remedies are available where a party starts court proceedings in breach of an arbitration agreement, or initiates arbitration in breach of a valid jurisdiction clause?

If a party starts court proceedings in breach of an arbitration agreement, the other party to the arbitration agreement can apply to stay the proceedings, to the extent they concern that matter (section 9, 1996 Act). This also reflects the UK’s obligation under Article II(3) of the New York Convention.

If a party initiates arbitration proceedings in breach of a valid jurisdiction clause the tribunal can, unless the parties have agreed otherwise, rule on its own substantive jurisdiction and dismiss the arbitration proceedings (section 30, 1996 Act).

18. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

An English court has power to grant an anti-suit injunction to restrain proceedings started overseas in breach of an arbitration agreement (section 44(2)(e), 1996 Act).

However, if court proceedings are brought in the Courts of another EU member state in breach of an arbitration agreement, English courts cannot grant anti-suit injunctions, as it is for the courts of the relevant EU member state to rule on their own jurisdiction (Allianz SpA v West Tankers Inc (Case C-185/07) (West Tankers)). The European Court of Justice (ECJ) decision in West Tankers was endorsed by the English Court of Appeal in National Navigation Co v Endesa Generacion SA (2009) EWCA Civ 1397. The Court of Appeal held that if another EU member state court (in that case, the Spanish court) had decided that an arbitration clause was invalid, the English court was bound to follow that decision.
Outside the EU, this issue does not arise, and the English court has confirmed this in a series of decisions. In *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66, for example, the Court of Appeal upheld an anti-suit injunction to restrain proceedings in Tunisia brought in breach of an arbitration agreement.

### 19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Unless otherwise agreed by the parties, a tribunal can rule on its own substantive jurisdiction, including ([section 30, 1996 Act])

- Whether there is a valid arbitration agreement.
- Whether the tribunal is properly constituted.
- What matters have been submitted to arbitration in accordance with the arbitration agreement.

Therefore, the 1996 Act recognises the doctrine of kompetenz-kompetenz. Either party can apply to the tribunal seeking such a determination.

A party can also apply to the court seeking a determination on the tribunal’s substantive jurisdiction ([section 32, 1996 Act]). However, this application can only be made with the agreement in writing of all other parties to the arbitration proceedings or the tribunal’s permission. Certain other requirements also apply.

The right to object to the tribunal’s jurisdiction may be lost if the objection is made later than the first step in the proceedings to contest the merits of any matter in relation to which the tribunal’s jurisdiction is challenged. However, the party objecting can participate in the appointment of the tribunal ([section 31(1), 1996 Act]). If the tribunal is determining its jurisdiction, it may do so either in ([section 31(4), 1996 Act])

- A separate award as to jurisdiction.
- The award on the merits.

A party to an arbitration who has taken no part in the proceedings can also challenge jurisdiction of the tribunal by application to the local courts ([section 72]).

The concept of separability is recognised ([section 7, 1996 Act]). Therefore, an arbitration agreement must not automatically be considered invalid if the agreement of which it forms part is itself invalid. In this context, the arbitration agreement is treated as a distinct agreement.

### REMEDIES

#### 20. What interim remedies are available from the tribunal?

Can the tribunal award:

- Security for costs?
- Security or other interim measures?

Other interim measures

The parties are free to agree that the tribunal shall have the power to award, on a provisional basis, any relief which it would have power to grant in a final award ([section 39, 1996 Act]) (for final remedies, see *Question 21*). The provisional award can order, for example, the payment of money or the disposition of property between the parties. The power to make provisional awards is only available if expressly granted by the parties.

### Security for costs

The parties are free to agree the powers exercisable by the tribunal ([section 38, 1996 Act]). These include the tribunal’s power to order a claimant to provide security for costs ([section 38(3), 1996 Act]), but this should not normally be exercised on the ground that the claimant is an individual ordinarily resident outside the UK, or a corporation incorporated under the law of a country outside the UK.

#### 21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

The parties can agree the final remedies that can be granted by the tribunal ([section 48, 1996 Act]). Default powers are set out in section 48 and include the power to make a declaration and to order the payment of any sum in any currency. The tribunal can also have the same powers as a national court in relation to:

- Granting an injunction (to order a party to do or refrain from doing anything).
- Ordering specific performance or rectification of a contract.
- Setting aside or cancelling a deed or other document.

The parties can also agree on the tribunal’s powers to award interest and in default of such agreement the tribunal can award simple or compound interest from such dates, at such rates and with such rests as it considers just in the circumstances, on the whole or any part of the award ([section 49, 1996 Act]).

The tribunal can make an award allocating the arbitration costs between the parties ([section 61, 1996 Act]) (see *Question 24*).

### APPEALS AND CHALLENGES

#### 22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal or challenge?

Arbitration awards can be challenged or appealed in the local court. However, the grounds for these challenges or appeals are limited (1996 Act). There are three substantive grounds on which a party can apply to the court:

- **Substantive jurisdiction** ([section 67, 1996 Act]). A party may lose the power to challenge on the basis of jurisdiction if an objection is not made at an early stage (see *Question 19*).
- **Serious irregularity** ([section 68, 1996 Act]). A serious irregularity must be one (or more) of those listed in...
section 68 and must be considered by the court to cause substantial injustice to the applicant. The following can amount to serious irregularity:

- the tribunal exceeded its powers;
- the tribunal failed to conduct the arbitration in accordance with the agreed procedure;
- the tribunal failed to deal with all issues before it;
- the award was obtained by fraud.

In practice, the test of serious irregularity is difficult to satisfy under English case law. Numerous appeals on this ground fail. An appeal succeeded in *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 Comm, where the majority of the tribunal changed the way the parties were required to present their case without giving the parties the opportunity to deal with the new approach.

- **Appeal on a point of law (section 69, 1996 Act).** An appeal on a point of law arising out of an award cannot be brought unless the parties have agreed or the court has given permission. Permission is only given if (section 69(3)):
  - the determination of the question will substantially affect the rights of the parties;
  - the question is one the tribunal was asked to determine;
  - the decision was obviously wrong or of general public importance and open to serious doubt;
  - it is just and proper to give permission.

The parties can only agree to exclude the right to appeal under section 69, and it is common to do so (for example, the LCIA and ICC Rules exclude this right). However, the exclusion must be clearly worded (*Shell Egypt West v Dana Gas Egypt* [2009] EWHC 2097 Comm).

An appeal is made by application to the court and must be brought within 28 days of either:

- The date of the award.
- The date when the appellant was notified of the result of any available arbitral process of appeal or review.

COSTS

23. What legal fee structures can be used? For example, hourly rates and task-based billing? Are fees fixed by law?

Lawyers’ fees are not fixed by law, and hourly rates and task-based billing are commonly used. The parties and their lawyers are free to agree what legal fee structures they intend to adopt, and the arbitrator’s decisions regarding costs do not affect these fee structures.

English lawyers are presently prevented from entering into contingent fee arrangements (that is, those under which a proportion of damages is payable to the lawyer on success), but conditional fee arrangements (permitting an uplift on the lawyer’s fees on success) are permitted.

24. Does the unsuccessful party have to pay the successful party’s costs? How does the tribunal usually calculate any costs award and what factors does it consider?

The tribunal can make an award allocating the costs of the arbitration between the parties (section 61, 1996 Act). Unless otherwise agreed, this must be done on the general principle that costs should follow the event (that is, the unsuccessful party pays the successful party’s costs), except if it appears that this is not appropriate in all the circumstances.

The parties can agree what costs of the arbitration are recoverable (section 63, 1996 Act). Costs include the fees and expenses of the arbitrator and any arbitral institution, as well as the legal or other costs of the parties (section 59, 1996 Act). If the parties have not agreed what costs are recoverable, the tribunal can determine recoverable costs on such basis as it thinks fit, but it must specify:

- That basis.
- The items of recoverable costs.
- The amount referable to each.

If the tribunal fails to do so, either party can apply to the court.
Unless the tribunal or court determines otherwise, recoverable costs are to be calculated on the basis that a reasonable amount is awarded in relation to all costs reasonably incurred, and doubts are resolved in favour of the paying party. The tribunal also has power to limit recoverable costs (section 65, 1996 Act).

Agreements to pay costs “in any event” between the parties are prohibited (section 60, 1996 Act), unless entered into after the dispute in question has arisen. Rules such as those of the LCIA and ICC also contain provisions concerning the recoverability of costs, which generally follow those in the 1996 Act.

**ENFORCEMENT**

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

An arbitral award can, with the permission of the court, be enforced in exactly the same manner as a judgment or order of the English court (section 66, 1996 Act).

An application for enforcement is made to the court and once permission is given, a judgment can be obtained (or entered) in the terms of the arbitral award. Permission is usually given, unless the tribunal lacked substantive jurisdiction.

Once the judgment has been obtained, it can be enforced through the usual procedures available in the courts. For example, orders can be obtained permitting enforcement officers (sheriffs) to seize property of the debtor and/or granting a charge over real estate or shares.

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

The UK is a party to both the New York Convention and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva Convention). Therefore, awards made by tribunals in arbitrations seated in England and Wales should in theory be enforceable in all those jurisdictions which are party to the New York and/or Geneva Convention. While a few jurisdictions worldwide are not party to these conventions, they may permit the award of foreign awards rendered in the UK depending on the particular requirements for the recognition and enforcement of foreign arbitral awards in those jurisdictions.

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

Foreign arbitral awards are commonly enforceable in the UK. Part III of the 1996 Act deals with the recognition and enforcement of foreign arbitral awards under the New York and Geneva Conventions. For those jurisdictions which are a party to both Conventions, the enforcement procedure for a New York Convention award applies (sections 100 to 104, 1996 Act).

A New York Convention award can be enforced in the same manner as a judgment or order of the local court, once the court has given permission for this. To seek permission, the applicant must produce:
- The original award (or a certified copy).
- The original arbitration agreement (or a certified copy).
- A certified translation if either document is in a foreign language.

The only grounds for refusing enforcement are those under Article V of the New York Convention, namely that:
- The party to the arbitration agreement was under some incapacity.
- The arbitration agreement was not valid under its substantive law.
- The party against whom it is to be enforced was not given proper notice or was unable to present his case.
- The tribunal lacked jurisdiction.
- There has been a procedural irregularity.
- The award is not binding on the parties.
- It would be contrary to public policy to recognise/enforce the award.

Geneva Convention awards are still dealt with under Part II (section 99) of the Arbitration Act 1950.

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

The duration of enforcement proceedings varies, depending, for example, on whether any challenges are made to the enforcement and the workload of the court to which the application is made. (Most applications for enforcement are made to the Commercial Court in London, although the national Mercantile courts, and Technology and Construction courts also have jurisdiction to deal with enforcement.) Enforcement (in terms of obtaining a judgment) generally takes a matter of weeks, but can extend to several months in some cases.

There is no express provision for an expedited procedure, but the local courts may in some circumstances grant interim relief such as a freezing order, which preserves the assets of the debtor.

**CONTRIBUTOR DETAILS**

Jon Tweedale and Clare Dwyer
Addleshaw Goddard LLP
T +44 207 788 5795
+44 161 934 6534
F +44 207 606 4390
+44 161 934 6060
E jon.tweedale@addleshawgoddard.com
clare.dwyer@addleshawgoddard.com
W www.addleshawgoddard.com
The seat of arbitration prescribed in an arbitration clause can have an important strategic impact, as can the inclusion or absence of other provisions, such as provisions providing for consolidation and joinder. Obtaining specialist advice at the time the arbitration agreement is drafted is therefore a prudent investment.

Addleshaw Goddard LLP is regarded as one of the UK’s leading dispute resolution practices, and was recognised for its expertise in International Arbitration by the Legal 500 in 2009.

With a dedicated team of arbitration specialists spread across our three offices, we have the capability and experience to handle complex, high value disputes arising in any jurisdiction.