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# England and Wales

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## A. Legislation and rules

### A.1 Legislation

International arbitration in England and Wales<sup>2</sup> continues to be governed by the Arbitration Act 1996 (the “Act”).<sup>3</sup> Minor legislative amendments have been made to the Act since it came into force, but it otherwise remains substantively unchanged.

### A.2 Institutions, rules and infrastructure

The leading arbitral institution in the jurisdiction, the LCIA, updated its arbitration rules with effect from 1 October 2014. The previous

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<sup>2</sup> England and Wales are two of the four countries that make up the United Kingdom. They have a common legal system, whereas the other two countries in the United Kingdom (Scotland and Northern Ireland) have separate systems. For the purposes of the current publication, we intend only to refer to the laws of England and Wales. Any reference to “England” or “English” in this article should also be taken to include “Wales” or “Welsh.”

<sup>3</sup> See also: the Civil Procedure Rules and Practice Direction, Part 62; the Arbitration Act 1996 (Commencement No. 1) Order 1996 SI 1006/3146; the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 SI 1996/3 125; the Unfair Arbitration Agreements (Specified Amount) Order 1996 SI 1996/3211; and the Arbitration Act 1950, Part II Enforcement of Certain Foreign Awards. See also the Arbitration and Mediation Services (Equality) Bill, which proposes amendments regarding the application of equality legislation to arbitration and mediation services, and remains under Parliamentary consideration. The Bill had its first reading in the House of Lords in May 2016 and its second reading in January 2017 (transcripts of the general debate on all aspects of the Bill can be viewed online). The next stage, during which a detailed examination of the text of the Bill will be conducted (the Committee Stage), has yet to be scheduled.

rules had been in force since 1998 and were updated to bring them into line with current arbitration practice and procedure, particularly as regards the use of emergency arbitrators and powers of consolidation and joinder in multiparty and multicontract disputes. The 2014 rules also contain mandatory Guidelines for the Conduct of Legal Representatives.<sup>4</sup>

## B. Cases

Over the past 10 years, England has continued to be a popular seat for arbitrations, partly due to the generally pro-arbitration stance taken by the courts. In this section, we highlight some of the key examples of that approach in action.

### B.1 Purposive approach to the construction of arbitration clauses and upholding of the doctrine of separability

In *Fiona Trust*,<sup>5</sup> the then House of Lords<sup>6</sup> considered whether the arbitral tribunal had jurisdiction to determine allegations that a contract containing an arbitration clause was entered into as a consequence of bribery and, if the contract was invalid, whether the arbitration clause itself remained valid. This required the court to determine whether the arbitral tribunal could itself determine the validity of the contract. The leading judgment delivered by Lord Hoffman stated: “In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear

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<sup>4</sup> See the 2014 edition of this publication for further commentary in relation to the Guidelines.

<sup>5</sup> *Fiona Trust & Holding Corp & Ors v. Yun Privalov & Ors*. Also known as: *Premium Nafta Products Ltd. v. Fili Shipping Co. Ltd.* [2007] UKHL 40.

<sup>6</sup> On 1 October 2009, the House of Lords was replaced, as England’s highest appellate court, by the Supreme Court.



that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”

The court considered the issue of separability: if the contract was invalid for fraud, was the arbitration agreement also invalid? Case law predating the Act had held that if an entire contract was invalid, so was any arbitration clause it contained.<sup>7</sup> However, Section 7 of the Act clearly affirms the principle of separability and so the invalidity or rescission of a main contract does not necessarily entail the invalidity or rescission of the arbitration agreement contained within such a contract. The arbitration agreement is a distinct agreement and can only be void or voidable on grounds relating directly to it. The *Fiona Trust* decision affirms the doctrines of separability and competence-competence in English law.

In addition, in reaching its decision, the House of Lords endorsed the decision of the Court of Appeal in the same case to “draw a line” under a series of cases which had analyzed subtle distinctions between “in relation to,” “in connection with,” and “under,” as used in arbitration clauses and to make a fresh start by deciding questions of construction by reference first to the assumed intention of the parties in a business context.

## B.2 Validity of clauses specifying “UK Arbitration” and “UK Courts” and providing for tiered dispute resolution procedures

In 2015, the Commercial Court issued its judgment in a case<sup>8</sup> in which the relevant contract provided both that “arbitration shall be conducted in the UK in accordance with the provisions of the law in the UK in effect at the time of the arbitration” and for submission to the “exclusive jurisdiction of the Courts of the UK and of all Courts having jurisdiction in appeal from the Courts of the UK.” The losing party in the arbitration challenged the award under Section 67 of the

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<sup>7</sup> *Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co. Ltd.* [1988] 2 Lloyd’s Rep 63.

<sup>8</sup> *Exmek Pharmaceuticals SAC v. Alkem Laboratories Ltd.* [2015] EWHC 3158 (Comm).

Act, including on the basis that there was no valid arbitration agreement because the reference in the contract to both arbitration and court proceedings were inconsistent and irreconcilable.

The court rejected this argument, stating that the clauses, read together, provided for any disputes to be dealt with by arbitration with “UK” law as the curial law. Such arbitration was to be supervised by the “UK” courts exclusively. The court then held that references to “UK” law and courts should be construed as references to English law and the English courts, and confirmed that the venue for arbitration should be London. The application was dismissed.

By way of further example of the broadly supportive stance of the English courts, properly drafted, tiered dispute resolution clauses are also generally upheld in England, as long as they are certain enough. For example, the High Court held in a 2014 case that a dispute resolution clause requiring parties to seek to resolve any disputes by “friendly discussion” for a period of four weeks, failing which the non-defaulting party could refer the matter to arbitration, was valid and enforceable.<sup>9</sup> It was sufficiently certain because it had an identifiable standard, ie, to engage in fair, honest and genuine discussions aimed at resolving the dispute over a definite time period. The Judge noted that the courts should seek to give effect to parties’ agreed dispute resolution clauses and that there is a public interest in giving effect to clauses that require parties to seek to resolve disputes amicably before embarking on litigation or arbitration.

### B.3 High threshold to challenge arbitral awards

English law sets a high threshold for a successful challenge to an arbitration award under the relevant sections of the Act (Section 67 for lack of substantive jurisdiction, Section 68 for serious irregularity and Section 69 for appeal on a point of law). One typical example was a 2013 judgment in which the High Court dismissed a challenge to an

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<sup>9</sup> *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited* [2014] EWHC (Comm).



award for alleged serious irregularity brought on the basis that the tribunal failed to deal with certain issues.<sup>10</sup> The court found that to deal effectively with an issue, a tribunal need not “set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration,”<sup>11</sup> nor does a tribunal fail to deal with an issue it decides without giving reasons. A claimant should not subject an award to a sentence-by-sentence textual analysis with a view to demonstrating that the tribunal failed to deal with a particular issue.<sup>12</sup> The court should read the award in a “reasonable and commercial way.”<sup>13</sup> The court approved of the decision in an earlier case,<sup>14</sup> which held that “the focus ... under Section 68 is due process, not the correctness of the tribunal’s decision.”<sup>15</sup> A Section 68 remedy is only available in extreme cases where the tribunal has “gone so wrong in its conduct ... that justice calls ... for it to be corrected.”<sup>16</sup>

The 2014 case of *Lorand Shipping Ltd. v. Davof Trading (Africa) BV MV Ocean Glory*<sup>17</sup> is a good example of the type of injustice that will need to be shown in order to satisfy the high threshold of a Section 68 challenge. The court allowed a challenge, setting aside parts of the award and remitting it back to the arbitral tribunal, in circumstances where the tribunal had, without warning, taken a course not advocated by either party and upon which they were not given an opportunity to comment. In its award, the tribunal failed to determine certain claims and declined to reserve jurisdiction in respect of them, on the

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<sup>10</sup> *Primera Maritime (Hellas) Limited, Astra Finance Inc., Comet Finance Inc. v. Jiangsu Eastern Heavy Industry Co. Ltd., Ningbo Ningshing International Inc.* [2013] EWHC 3066.

<sup>11</sup> *Primera Maritime (Hellas) Limited, Astra Finance Inc., Comet Finance Inc. v. Jiangsu Eastern Heavy Industry Co. Ltd., Ningbo Ningshing International Inc.* [2013] EWHC 3066 per Mr Justice Flaux at paras. 27 and 41; approving *Hussman (Europe) Ltd. v. Al Ameen Development and Trade Co. and others* [2000] 2 Lloyd’s Rep 83 per Lord Gribner at para. 56.

<sup>12</sup> *Ibid.* per Mr Justice Flaux at para. 30.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Abuja International Hotels v. Meridian SAS* [2012] EWHC 87.

<sup>15</sup> *Ibid.* per Hamblen J at paras. 48-49.

<sup>16</sup> *Ibid.* per Mr Justice Flaux at para. 6.

<sup>17</sup> [2014] EWHC 3521 (Comm).

assumption that they would be brought by the claimant under a fresh arbitral reference. By the time of the award, however, the claims in question had become time-barred such that the effect of the tribunal’s approach was essentially to deprive the claimant of these claims. The court held that the tribunal’s failure to give the parties an opportunity to comment in advance on the course of action it ultimately adopted constituted a serious irregularity causing substantial injustice, within the meaning of Section 68 of the Act.

#### B.4 Anti-suit injunctions

In a 2013 judgment, the Supreme Court confirmed that English courts may grant anti-suit injunctions restraining proceedings outside the EU brought in violation of an arbitration agreement governed by English law, even where no arbitration proceedings are contemplated.<sup>18</sup> A party can simply rely on the arbitration clause to seek declaratory and injunctive relief from the English courts to restrain proceedings using Section 37 of the Senior Courts Act 1981 (the “SCA 1981”). Within the EU, however, an anti-suit injunction cannot not be granted where parallel proceedings are under way in a Member State, even in breach of an arbitration agreement.<sup>19</sup> It remains to be seen whether, after the UK formally leaves the EU, the position of the English courts will change in this regard.

#### B.5 Enforcement of awards subject to set aside proceedings in other jurisdictions

In keeping with the pro-arbitration legislative framework and approach of the English courts, foreign arbitral awards can be enforced with relative ease in England. As evidenced by a series of recent cases, however, there are certain circumstances in which the courts will refuse enforcement of awards that have been set aside by an earlier decision of a foreign court. In *Malicorp Ltd. v. Government*

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<sup>18</sup> *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35.

<sup>19</sup> *Allianz SpA and Others v. West Tankers Inc.* Case C-185/07.



*of the Arab Republic of Egypt*,<sup>20</sup> the court refused enforcement of an award on the basis that a previous decision of the Cairo Court of Appeal to set aside an order enforcing a New York Convention Award should (notwithstanding an ongoing appeal in Egypt) be treated as final and binding. On this basis, the set-aside decision was entitled to recognition as a matter of English law, and the court took the view that it did not have further discretion to enforce the award. In another recent case, the court refused enforcement on the basis that a previous judgment of the courts in Austria refusing to enforce the award created an issue estoppel.<sup>21</sup> It should be noted, however, that the English court is not bound to recognise a foreign decision setting aside an award if it considers that that decision offends principles of honesty, natural justice and public policy.<sup>22</sup>

## B.6 Independence of arbitrators

In two recent judgments, the English courts have confirmed the test for assessing allegations of apparent bias of arbitrators. One judgment related to a challenge to an award on the basis of serious irregularity caused by alleged bias<sup>23</sup> and the other to an application for the removal of an arbitrator for alleged bias.<sup>24</sup> The appropriate test is whether “the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”<sup>25</sup>

In the first case, the court found that there was no apparent bias in circumstances where, unbeknownst to the arbitrator, the law firm from which he conducted his practice as arbitrator had regularly acted for an affiliate of one of the parties to the arbitration. Accordingly, the

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<sup>20</sup> [2015] EWHC 361 (Comm). For further commentary on this case, see the 2014-2015 edition of this publication.

<sup>21</sup> *Diag Human SE v. Czech Republic* [2014] EWHC 1639 (Comm). For further commentary on this case, see the 2014-2015 edition of this publication.

<sup>22</sup> *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2014] EWHC 1288 (Comm). For further commentary on this case, see the 2014-2015 edition of this publication.

<sup>23</sup> *W Limited v. M SDN BHD* (2016) EWHC 422 (Comm).

<sup>24</sup> *Cofely Ltd. v. Bingham & Knowles Limited* (2016) EWHC 240.

<sup>25</sup> *Porter v. Magill* (2002) AC 357.

challenge to the arbitrator’s award was dismissed. The judge was critical of, and refused to follow, the provision of the IBA Guidelines on Conflicts of Interest in International Arbitration, which include on the non-waiverable red list any situation where “the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.”<sup>26</sup> This case is therefore also a helpful reminder of the supremacy of local law, and any relevant arbitration rules, over the (generally widely accepted and frequently used) IBA Guidelines.

By contrast, in the second case, the court found that there were a number of grounds that raised the possibility of apparent bias on the part of the arbitrator and granted an application for his removal. The judge placed particular significance on the weight and frequency of previous appointments of the same arbitrator by one of the parties, as well as the percentage of income (25%) that the arbitrator derived from that party. The judge was also critical of the arbitrator’s “unapologetic” or “aggressive” reaction when dealing with questions on his independence, which, in line with previous authority, was found to make apparent bias more (rather than less) evident.

## C. Trends and observations

### C.1 Potential legislative reform

The Law Commission, a statutory independent body tasked with keeping English law under review and recommending reform where required, has recently identified the Act as potentially in need of reform. The Law Commission has noted the importance of English law keeping up-to-date with other jurisdictions so that England can continue to compete as a top arbitration destination, and has recently sought views on whether changes to the Act should form part of its next Program of Law Reform to run from 2017 to 2020. The Law Commission has focused in particular on potential reform to facilitate

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<sup>26</sup> Paragraph 1.4 of the IBA Guidelines on Conflicts of Interest in International Arbitration.



more time and cost efficient case management (for example, by making statutory provision for summary judgment) and amendments to allow for arbitration of trusts disputes. It remains to be seen whether the Act will form part of the Law Commission's next Program of Law Reform.

## C.2 Continuing popularity of England as an arbitration venue

In its 2015 Registrar's Report, the LCIA confirmed another record high of 326 referrals in the year. Compared to the 133 referrals reported for the year in 2006, this represents an increase of almost 145% in the past decade. The LCIA's caseload remains of an international nature, as evidenced by the fact that in 2015, 85% of the parties to pending disputes were not of English nationality.

While in previous years the majority of LCIA arbitrations favored three-member tribunals, recent trends indicate a marginal preference for sole arbitrators. In the LCIA's costs and duration analysis (published in November 2015), it reported that the median duration of an LCIA arbitration is 16 months (ie, from receipt of the request for arbitration to the date of final award) and that the median cost (ie, the institution's administrative charges, tribunal and secretary fees) is USD 99,000.

## C.3 Efforts to retain England's popularity

The last 10 years have seen an explosion of competing arbitration venues. EU sanctions against Russia and an increase in dealings with China have also led to more contracts providing for Singapore or Hong Kong as the seat of arbitration, jurisdictions which some say are direct rivals to London due to the similarity of their legal systems. Most recently, the 2015 International Arbitration Survey by Queen Mary University highlighted a growing concern that arbitration in London is particularly costly and time consuming.<sup>27</sup> The arbitration

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<sup>27</sup> The School of International Arbitration at Queen Mary, University of London published the 2015 International Arbitration Survey: Improvements and Innovations

community in England has responded to these challenges in a variety of ways, three of which are highlighted below.

First, England was one of the first jurisdictions to embrace the IBA Guidelines on Party Representation published in 2013. Further, as part of its new rules which entered into force on 1 October 2014, the LCIA adopted its own provisions regulating the party representatives' conduct. These go one step further than the IBA Guidelines, which are generally adopted by the parties once a dispute has arisen, given that the choice of the LCIA rules will *automatically* subject any proceedings commenced after 1 October 2014 to these provisions. Although their adoption was controversial, the content of the LCIA Rules (to many) is for the most part aligned with the practice of international arbitration in England.

Second, England has not escaped the trend of adopting emergency arbitrator procedures; the LCIA Rules allow parties to apply to the LCIA Court for the expedited formation of a tribunal in the event of exceptional emergency, as well provide a mechanism for the appointment of an emergency arbitrator.<sup>28</sup> Although the rules themselves are not unusual, it is worth mentioning that, unlike the ICC Rules, they do not prescribe the form in which any such emergency measures should be adopted by the tribunal (ie, order or award), which may make enforcement easier. Most recently, and to further support arbitration, the High Court held that it has no power to grant interim relief under the Act in circumstances where such relief could (but not necessarily would) be granted under the LCIA Rules; it may only act where the powers of a tribunal to grant the relief sought are inadequate or the practical ability to exercise those powers is lacking.<sup>29</sup>

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in International Arbitration, sponsored by White & Case LLP. Available at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

<sup>28</sup> LCIA Notes on Emergency Procedures, section 3.3, paragraph 26. Available at: <http://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx>. Article 9B of the LCIA Arbitration Rules (2014). Available at [http://www.lcia.org/dispute\\_resolution\\_services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx)

<sup>29</sup> *Gerald Metals S.A. v. Timis & Ors* [2016] EWHC 2327 (Ch).



Third, and finally, we have seen an emergence of third-party funding in international arbitration for both insolvent and solvent parties arbitrating in England where such funding is permitted. A recent decision of the English High Court has generated increased interest,<sup>30</sup> because the court upheld an award which allowed the winning party to recover not only the costs that were funded by a third party, but also a significant uplift success fee.

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<sup>30</sup> *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited* [2016] EWHC 2361 (Comm). See also the ICC Commission on Arbitration and ADR December 2015 report, which states that such funding can be recovered if reasonable: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/Decisions-on-Costs-in-International-Arbitration---ICC-Arbitration-and-ADR-Commission-Report/>.