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United Kingdom

INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The Arbitration Act 1996 (**the 1996 Act**) will apply if the arbitration is seated in England and Wales or Northern Ireland. The Arbitration (Scotland) Act 2010 (**the 2010 Act**) will apply if the arbitration is seated in Scotland. The mandatory provisions are set out in Schedule 1 of the 1996 Act and section 8 of the 2010 Act. Such provisions include those in relation to duties of the arbitral tribunal and parties, and challenges to arbitrators and arbitral awards. Additionally, the Arbitration (International Investment Disputes) Act 1966 sets out a special regime for ICSID awards.

The responses below focus on the 1996 Act.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

The New York Convention entered into force in the United Kingdom on 23 December 1975, with a reciprocity reservation. The United Kingdom has submitted notifications extending the territorial application of the New York Convention to Gibraltar, Isle of Man, Bermuda, Cayman Islands, Guernsey, Jersey and the BVI.

3. What other arbitration-related treaties and conventions is your country a party to?

In addition to the New York Convention, the United Kingdom is also a party to (a) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 and (c) numerous other bilateral and multilateral investment treaties.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The UNCITRAL Model Law has not been adopted in England and Wales but it has influenced the 1996 Act. Some significant differences relate to arbitrability, separability of arbitration clauses, competence of the arbitral tribunal to rule on its own jurisdiction and judicial intervention (including the availability of appeals on a point of law).

5. Are there any impending plans to reform the arbitration laws in your country?

Following consultations, the Law Commission of England and Wales issued its Fourteenth Programme of Law Reform in March 2021, in which it invited comments on potential reform of the 1996 Act, with the view to maintaining London's status as a leading venue for international arbitration in light of the recent arbitration reforms in other jurisdictions. Potential areas of reform include (i) introducing an express power for tribunals to adopt a summary judgment procedure and to strike out unmeritorious claims, (ii) reviewing the current procedure for challenging decisions on jurisdiction, (iii) expressly allowing service of notice by email, (iv) introducing express remedies for delays to the arbitral process, (v) clarifying the distinction between the enforcement mechanisms for Part I awards and New York Convention awards and (vi) introducing trust law arbitration. The Law Commission invited stakeholders to comment by 31 July 2021, with a view to publishing the results during the first half of 2022.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

A number of arbitral institutions are based in the United

Kingdom, including: London Court of International Arbitration (LCIA); Chartered Institute of Arbitrators (CIArb); London Maritime Arbitrators Association (LMAA); and Reinsurance Arbitration Society (ARIAS (UK)). In addition, various commodity organisations based in the United Kingdom have published arbitral rules, including the Grain & Feed Trade Association (GAFTA) and the London Metal Exchange (LME).

The LCIA last updated its Arbitration Rules as well as to its Schedule of Arbitration Costs on 1 October 2020. The LCIA's stated aim in updating its Arbitration Rules was to streamline the arbitral process, provide clarity for arbitrators, mediators and parties alike, and to adapt the Rules to reflect evolving best practices (notably, the increased use of virtual hearings). The changes relate to: *(i)* enhancing the tribunal's case management powers; *(ii)* expressly permitting the conduct of virtual procedural conferences and hearings; *(iii)* making electronic filings and communications the default rule; *(iv)* the appointment and role of tribunal secretaries; *(v)* the rules regarding multi-party and multi-contract arbitrations, including expanding the tribunal's and the LCIA Court's power to consolidate and concurrently conduct arbitration proceedings; *(vi)* incorporating provisions on data protection, cybersecurity and compliance issues; and *(vii)* increasing the maximum hourly rate that can be charged by arbitrators.

As for other institutions, on 23 April 2021, the LMAA revised its Terms to reflect the impact of the COVID-19 pandemic by expressly recognising the possibility of virtual and semi-virtual hearings as well as electronic awards, among other changes. The new Terms apply from 1 May 2021. In the same vein, GAFTA introduced some minor changes to its Arbitration Rule No. 125, which relates to the conduct of oral hearings by the Tribunal or the Board of Appeal, effective from 1 September 2020. The current CIArb Arbitration Rules entered into force on 1 December 2015, and in April 2020, the CIArb released a "Remote Procedures Guideline".

7. Is there a specialist arbitration court in your country?

There is no specialist arbitration court in England and Wales. However, the English Commercial Court is highly experienced and supportive of international arbitration.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

To fall within the scope of the 1996 Act, an arbitration agreement must be in writing or be evidenced in writing. This includes an oral agreement to arbitrate by reference to "*terms which are in writing*" (s.5(3) of the 1996 Act).

9. Are arbitration clauses considered separable from the main contract?

Unless otherwise agreed by the parties, an arbitration agreement is separable from the main contract (s.7 of the 1996 Act and *Fiona Trust & Holding Corporation v. Privalov* [2007] UKHL 40).

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

The English courts do not apply a validation principle *per se*. In order to consider the validity and enforceability of an arbitration agreement, the English courts will first determine the applicable law. In a recent decision, *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38, the Supreme Court held that the law applicable to an arbitration agreement is determined by applying English common law rules for resolving conflicts of laws. Accordingly, the law applicable to an arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such agreement, the law with which the arbitration agreement is most closely connected (*see* Question 14).

The Supreme Court also expressly recognized the validation principle as a general principle of contractual interpretation in English law (*Enka*, para. [98]-[97]) as well as its applicability as part of the analysis to determine the parties' intentions with regard to the law applicable to the arbitration agreement. The Supreme Court also recognized, *obiter*, the possibility that the validation principle might constitute an exception to the "close connection" rule, if the arbitration agreement were invalid under the law of the seat (typically the law applicable to the arbitration agreement under the "close connection" test), but not under the law governing the rest of the contract (*Enka*, para. [146]).

11. Is there anything particular to note in your jurisdiction with regard to multi-party

or multi-contract arbitration?

The 1996 Act does not contain provisions for court-ordered consolidation. However, this matter can be addressed by either (a) the rules of arbitral institutions, which often provide a framework for consolidation or (b) the parties' agreement (s.35 of the 1996 Act).

The updated LCIA Rules, which came into effect on 1 October 2020, allow a party wishing to commence more than one arbitration (whether that is against more than one respondent or under more than one arbitration agreement) to serve a 'composite request' in respect of all such arbitrations, after which each arbitration so commenced proceeds separately, subject to the LCIA Court or the arbitral tribunal determining otherwise (Art. 1.2 of the LCIA Rules). Respondents are similarly allowed to respond in a 'composite' manner (Art. 2.2 of the LCIA Rules). The updated LCIA Rules have also clarified and expanded the tribunal and the LCIA Court's power to consolidate or concurrently conduct arbitration proceedings. The tribunal (subject to the LCIA Court's approval) or, depending on the circumstances, the LCIA Court, has the power to consolidate arbitration proceedings. The tribunal can also order that two or more arbitrations under the same or compatible arbitration agreements, and between the same parties or arising out of the same or a series of related transaction(s), be conducted concurrently where the same tribunal has been constituted to hear each arbitration (Art. 22A of the LCIA Rules).

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

The possibility of binding third parties to an arbitration agreement is expressly contemplated in section 82(2) of the 1996 Act. It provides that references in Part I (Arbitration pursuant to an arbitration agreement) to a "party" to an arbitration agreement include "*any person claiming under or through a party to the agreement*". A non-party to a contract may be bound by that contract's arbitration agreement if: *(i)* a party assigns or transfers rights or causes of action under the contract to that third party; *(ii)* the third party is able to enforce the terms of the contract in accordance with the Third Parties (Rights Against Insurers) Act 1930 or the Contracts (Rights of Third Parties) Act 1999; or *(iii)* the third party replaces one of the original parties by way of novation. It is also possible for an insurer to be subrogated to contractual rights and thus become bound by the contract's arbitration agreement.

Three recent court decisions are worth mentioning. *First*, in *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* [2018] EWHC 1902 (Comm), the English Courts held that a trade finance bank was bound by the arbitration clause in a bill of lading, as the assignee and lawful holder of the bill under the Carriage of Goods by Sea Act 1992 (COGSA).

Second, in *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm), the English courts held that where a non-signatory seeks to enforce rights under a contract containing an arbitration clause, it is subject to that arbitration clause and bound to arbitrate in order to enforce those rights.

Third, in *Filatona Trading Ltd and Ors v Navigator Equities Ltd and Ors [2020] EWCA Civ 109, the Court of Appeal considered whether an individual who was not a named party to the agreement in question could bring arbitration proceedings as a disclosed principal. The Court of Appeal upheld the Commercial Court's decision that a disclosed and identified principal (even if not a named party in the contract) could rely on the arbitration agreement in the main contract to pursue a claim under the contract.*

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

The 1996 Act does not identify any matters as non-arbitrable (s.81(1)(a)), and clarifies that both contractual and non-contractual disputes may be submitted to arbitration (s.6(1) of the 1996 Act; see also *Fiona Trust & Holding Corporation v Privalov* [2007) UKHL 40). The English courts approach arbitrability on a case-by-case basis and, in determining whether or not a matter is arbitrable, consider whether it constitutes a matter of public interest "*which cannot be determined within the limitations of a private contractual process*" (*Fulham Football Club*, [2011] EWCA Civ 855, para. [40]).

Matters that have been deemed non-arbitrable under English law include those related to the registration of (and disputes concerning the grant of) patents and trademarks, some employment and family disputes, insolvency proceedings (which are subject to the statutory regimes set out in the Insolvency Act 1986) as well as criminal matters. The English Courts have recently held that, "*there is a discernible trend towards expanding the range of disputes that are arbitrable*" *(Sterling v Rand and Rand* [2019] EWHC 2560 (Ch), para. [71]).

Recently, the Court of Appeal in *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc* [2020] EWCA Civ 759, decided a dispute concerning the arbitrability of a claim for relief under section 1028(3) of the Companies Act 2006 (which gives the court the power to direct that a dissolved but restored company be put in the same position as if it had never been dissolved). Bridgehouse argued that section 1028(3) implicated the public interest and therefore such applications were not arbitrable. The Court found that the principle of party autonomy is only limited by safeguards necessary to protect the public interest and that disputes under shareholders agreements or articles of association are arbitrable to the extent that they concern essentially private matters. Applying that test, the Court concluded that section 1028(3) applications are not unsuitable for arbitration.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

In October 2020, the Supreme Court decided *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38. In that case, the dispute resolution clause provided for arbitration seated in London, but it did not specify governing law (nor did the main contract). The Supreme Court, by a majority (3-2), identified the following key principles to determine the law governing the arbitration agreement:

- The court will apply English law rules of contractual interpretation to determine whether the parties have expressly or impliedly agreed upon a particular governing law.
- Where the parties have not specified the law governing the arbitration agreement, but have specified the law governing the main contract, that law will generally also apply to the arbitration agreement.
- The choice of a different jurisdiction as the seat of the arbitration is not, without more, sufficient to negate the inference that the choice of law for the main contract was also intended to apply to the arbitration agreement.
- That inference may however be negated if: (a) the law of the seat provides that, where an arbitration is seated in that jurisdiction, the arbitration agreement will be governed by its law; or (b) there is a "serious risk" that the arbitration agreement would be "significantly undermined" if governed by the law of the main contract. These factors may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.
- Finally, in the absence of an express or implied choice of law governing the arbitration agreement or the main contract, the court will determine and apply the law that is "most closely connected" to the arbitration agreement. As a rule, this will ordinarily be the law of the seat, even if that differs from the law found to govern the main contract.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The arbitral tribunal will decide the dispute either (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. A choice of law by the parties is understood to refer to the substantive laws of a country and not its conflict of law rules. In the absence of the parties' agreement, there is no specific set of choice of law rules that an arbitral tribunal must apply. Instead, the tribunal shall apply the law determined by the applicable conflict of laws rules (s.46 of the 1996 Act).

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

The UNIDROIT Principles and other transnational principles have been considered by English courts when interpreting contractual terms and clauses but have generally not been relied upon by the English courts as the substantive law to decide a dispute before them.

For example, in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, the Supreme Court decided that the parties to a contract could not effectively modify its contents orally, because such oral modification would constitute an implicit derogation from the "No Oral Modification" principle found, *inter alia*, in Article 29 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Article 2.1.18 of the UNIDROIT Principles. Notably, the Supreme Court defined the

UNIDROIT Principles and the CISG as "*widely used codes*".

However, the English courts have made clear that such transnational principles differ in many respects from English commercial law. For example, in discussing the inadmissibility of pre-contractual negotiations under English law, the House of Lords expressly mentioned that the admissibility of such evidence under the UNIDROIT Principles, the Principles of European Contract law, and the CISG reflect the French philosophy of contractual interpretation which is different from that of English law (*Chartbrook Limited v Persimmon Homes Limited,* [2009] UKHL 38).

17. In your country, are there any restrictions in the appointment of arbitrators?

Arbitrators must act fairly and impartially as between the parties (s.33 of the 1996 Act). The 1996 Act imposes no other conditions pertaining to the qualifications and characteristics of arbitrators. In particular, it is not necessary for an arbitrator to be a national of, or licensed to practise in, England.

18. Are there any default requirements as to the selection of a tribunal?

The 1996 Act contains default provisions for the appointment of arbitrators which apply in the absence of agreement between the parties (ss.16-17 of the 1996 Act), including time limits.

19. Can the local courts intervene in the selection of arbitrators? If so, how?

The courts can intervene where the parties have not agreed the procedure for the appointment of the arbitral tribunal. Pursuant to section 18 of the 1996 Act, any party may apply to the court (under Part 62 of the Civil Procedure Rules) to exercise its powers to (a) give directions on the appointment, (b) approve or revoke previous appointments or (c) make the appointment itself.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Pursuant to section 24 of the 1996 Act, any party may apply to the court (under Part 62 of the Civil Procedure Rules) to remove an arbitrator where (a) circumstances exist that give rise to justifiable doubts as to their impartiality, (b) the arbitrator lacks the requisite qualifications or capacity, or (c) the arbitrator refuses or fails to properly conduct proceedings or make an award. Where another entity (whether the tribunal itself or the institution administering the arbitration) is vested with the power to effect such removal, the complaining party is required to first exhaust that avenue before approaching the court (s.24(2) of the 1996 Act).

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

In November 2020, the UK Supreme Court decided *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. The dispute concerned a claim brought by Halliburton against Chubb under an insurance policy governed by New York law, in connection with the Deepwater Horizon incident. After the tribunal was constituted and without Halliburton's knowledge, the chairman of the tribunal accepted appointments in two other arbitrations which also arose out of the Deepwater Horizon incident, one of which was a party appointment by Chubb. Halliburton sought to remove the chairman on the basis that the overlapping proceedings gave rise to justifiable doubts as to the chairman's impartiality. The Supreme Court unanimously upheld the Court of Appeal's decision and confirmed that the 1996 Act imposes obligations of impartiality on arbitrators (para. 126). In assessing whether there is a real possibility that an arbitrator is biased, the Court will have regard to the facts and circumstances known at the time of the hearing to remove the arbitrator and apply an objective test to determine whether there is a real possibility of bias, having regard to the particular characteristics of international arbitration (including the private nature of most arbitrations) and applicable international standards, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. The fact that an arbitrator is repeatedly appointed by one party is unlikely— on its own—to support a finding of bias. Likewise, a failure to disclose relevant matters will not necessarily result in a finding of bias, however, such failure is a factor that the Court will take into account in assessing whether there is a real possibility of bias. In *Halliburton*, the Court found that arbitrator had not breached his duty of independence and impartiality, in the absence of justifiable doubts about his impartiality.

There have also been a number of recent cases discussing the grounds for challenging an arbitrator. In

Rabbi Moshe Avram Dadoun v Yitzchok Biton [2019] EWHC 3441, the High Court considered an application brought under section 68 of the 1996 Act, which concerned whether a unilateral and undisclosed communication between an arbitrator and an individual involved in the case constituted "apparent bias". The Court confirmed that such a communication did not amount to "apparent bias", demonstrating the high threshold that the English courts apply to such challenges.

Similarly, in *B & Anor v J & Ors* [2020] EWHC 1373 (Ch), the English High Court heard an application under section 24 of the 1996 Act to remove an arbitrator for "apparent bias" on the grounds that the arbitrator was a former employee of one of the parties to the arbitration. On the facts, the Court found that there was no evidence of "apparent bias" and dismissed the application.

In *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] EWHC 349 (Comm), the Commercial Court decided a dispute between Newcastle United Football Company Limited (NUFC) and the The Football Association Premier League Limited (PLL) concerning the potential sale of NUFC shares to an entity controlled by the Kingdom Saudi Arabia. In September 2020, the matter proceeded to arbitration with both NUFC and PLL appointing an arbitrator, who together appointed the Chair ("MB"). MB confirmed that no circumstances existed that gave rise to justifiable doubts as to his impartiality.

In October 2020, PLL informed NUFC that:

i. MB had advised PLL on unrelated matters on four prior occasions (more than three years previously); and
ii. MB had been involved in 12 arbitrations in which the PLL's current solicitors had also participated; in three of these, MB had been appointed by PLL's solicitors (two of which were subsequent to his appointment in the NUFC / PLL arbitration).

None of these matters had been disclosed by MB. NUFC invited MB to recuse himself; MB declined. NUFC then made an application to remove MB under section 24(1)(a) of the 1996 Act, arguing that a fair-minded and informed observer would conclude that there was a real possibility MB was biased.

The Court dismissed NUFC's application, concluding that none of the grounds put forward (individually or cumulative) led to the conclusion that there was a real possibility of bias. In doing so, the Court took into consideration the test set out in *Halliburton*, and emphasized the International Bar Association Guidelines on Conflicts of Interest, as well as the small pool of experienced and qualified sports arbitrators.

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

In *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (discussed in detail in question 21 above), the UK Supreme Court concluded that English law requires the disclosure of facts and circumstances that might lead a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator is biased. Furthermore, the Supreme Court indicated that under section 33 of the 1996 Act arbitrators appointed in arbitrations seated in England have an implied legal duty to disclose subsequent appointments where there is an overlap of parties and subject matter, and that a failure to make a necessary disclosure could itself demonstrate a lack of impartiality. Ultimately, the the Supreme Court held that the arbitrator was in breach of his legal duty of disclosure, because his subsequent appointment by Chubb was "a circumstance which might reasonably give rise to the real possibility of bias" (however, as noted above, the Court found that there was no breach of the duty of independence and impartiality).

In *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] EWHC 349 (Comm) (also discussed in detail in question 21 above), the Supreme Court concluded that there had been no breach of the duty to disclose. The Court found that the International Bar Association Guidelines on Conflicts of Interest did not mandate the disclosure of the instructions or appointments relied on by NUFC in their application to remove the arbitrator. Specifically, the Court explained that the arbitrator was not required to disclose:

i. advice that he had given to the PLL over three years earlier on a different issue; and
ii. prior appointments by PLL's solicitors, as he had not been appointed by them more than three times in the three years prior to the arbitration.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The 1996 Act allows the parties to agree on the procedure to be adopted in instances where there is a truncated tribunal (s.27). If there is no agreement, the

provisions of section 16 (procedure for appointment of arbitrators) and section 18 (failure of appointment procedure) apply to the filling of the vacancy as they do to the original appointment (s.27(3)).

The tribunal has the power to determine whether and, if so, to what extent the previous proceedings should stand (s.27(4)).

24. Are arbitrators immune from liability?

Under the 1996 Act, an arbitrator is not liable for any act or omission in the discharge or purported discharge of their functions as arbitrator unless the arbitrator is shown to have acted in bad faith (s.29(1)). Another exception relates to any liability incurred by the arbitrator by reason of their resignation (s.29(3)).

25. Is the principle of competence-competence recognized in your country?

Yes, the 1996 Act recognises the principle of competence-competence (s.30(1)).

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

If a party commences court proceedings in the jurisdiction in breach of the arbitration agreement, the court has the power to grant a stay on an application by the party against whom legal proceedings are brought (s.9(1)). The courts are also empowered to issue anti-suit injunctions where a party has commenced court proceedings in another jurisdiction (*see* Question 33).

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

The 1996 Act requires service of written notice in accordance with section 14. Further, it states that the Limitation Act 1980 and the Foreign Limitation Periods Act 1984 apply to arbitral proceedings as they apply to legal proceedings (s.13(1)). For contractual and tortious claims, the relevant period will be six years from accrual of the cause of action.

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

The State Immunity Act 1978 (the 1978 Act) provides that a state may not invoke immunity in connection with the commencement of arbitration proceedings if it has agreed to submit the relevant dispute to arbitration (s.9(2)). Otherwise, it is able to claim immunity.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

The 1996 Act allows the parties to agree on the powers of the tribunal in case a respondent (or claimant) fails to participate in the arbitration (s.41(1)). The tribunal is empowered to dismiss the claim, continue the proceedings in the absence of that party or issue a peremptory order (see s.41).

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

The 1996 Act does not contemplate voluntary intervention. According to the LCIA Rules (2020), third parties can join arbitration proceedings provided that both the third party and the party applying to join the third party have consented expressly to such joinder in writing, either in the arbitration agreement itself or after the arbitration has commenced (LCIA Rules (2020), art. 22.1(x)). The tribunal is not automatically bound by such an agreement, but has the power to allow the joinder "*after giving all parties a reasonable opportunity to state their views*" (LCIA Rules (2020), art. 22(1)). If all of the parties agree to the joinder of the third party, the LCIA Rules (2020) provide that the Tribunal must allow such joinder *"upon such terms (as to costs or otherwise) as the Arbitral Tribunal may decide"* (LCIA Rules (2020), art. 22.1).

31. Can local courts order third parties to participate in arbitration proceedings in your country?

A third party may participate—and may be ordered to participate—in an arbitration, but only if the third party

and all of the other parties concerned consent. Consent may be given by adopting institutional rules that provide for joinder.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

The 1996 Act allows the parties to agree on the powers exercisable by the tribunal for the purposes of and in relation to the proceedings (s.38(1)). If there is no agreement, section 38 and section 44 outline the various interim measures a tribunal and the court are permitted to issue, respectively.

The court has the power under section 44 to issue interim relief to support the arbitration process pending the constitution of the tribunal, including for the preservation of evidence or assets.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

The English courts are empowered to issue anti-suit and anti-arbitration injunctions where a party has commenced court or arbitration proceedings in breach of an arbitration agreement.

Prior to 31 December 2020, the English Courts were unable to issue intra-EU anti-suit injunctions because of the Recast Brussels Regulation. Since the UK's departure from the EU, the Recast Brussels Regulation no longer forms part of UK domestic law. In theory therefore, English courts can issue antisuit injunctions in relation to proceedings that have been brought before EU courts. As at the time of writing, however, it remains untested whether English courts will, in fact, grant such injunctions.

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

The 1996 Act provides that—subject to the parties' agreement—it is for the tribunal to decide whether to apply strict rules of evidence as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented (s.34(2)(f)).

If a witness is in the UK and the arbitration is being conducted (not necessarily seated) in England & Wales, parties may rely on the domestic courts to compel the attendance of the witness before the tribunal under section 43(1) of the 1996 Act. This provision also allows courts to compel witnesses to produce documents. However, these powers may only be exercised with the permission of the tribunal or by agreement of the parties.

Under section 44 of the 1996 Act, where a witness is overseas, the English Court can issue a Letter of Request to ask a foreign court to examine a witness located in that court's jurisdiction. The English Court will also enforce Letters of Request issued by foreign courts and can require a witness to be examined and to provide documents.

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

Solicitors, registered foreign lawyers, and registered European lawyers are subject to the SRA's Standards and Regulations 2019 including the SRA Code of Conduct 2019. Barristers are bound by the Code of Conduct of the Bar of England and Wales which is administered by the Bar Council, as set out in the Bar Standards Board Handbook (BSB Handbook). These codes apply whether the barrister or solicitor is acting as arbitrator or as counsel.

A foreign arbitrator conducting an arbitration in England & Wales is primarily subject to any applicable ethical codes or professional standards in their own jurisdiction and relevant provisions of the 1996 Act such as the obligation to (a) act fairly and impartially and (b) adopt procedures to provide a fair means for the resolution of the matters (s.33). There are also a number of non-binding ethical codes for arbitrators (including the IBA Rules of Ethics for International Arbitrators and its Guidelines on Conflicts of Interest in International Arbitration). Some institutions have also issued guidelines, such as the LCIA's General Guidelines for Parties' Legal Representatives.

As to party representatives, foreign counsel again are primarily subject to the ethical codes or professional standards in their own jurisdictions.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Whilst the 1996 Act does not address confidentiality, generally, there is an implied duty in English law to maintain the confidentiality of arbitration hearings, documents generated and disclosed during the arbitral proceedings and any award generated. This duty was recently reaffirmed by the Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (para. 83) for English-seated arbitrations governed by English law.

In broad terms, the exceptions to this duty are: *(i)* the parties may dispense with, or modify, the obligation of confidentiality by agreement or consent and *(ii)* where disclosure of documents is ordered or permitted by the court. Disclosure has been permitted where it is reasonably necessary for the establishment or protection of a party's legal rights and where it is necessary in the interest of justice or (possibly) in the public interest.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

There have been no recent court decisions in England and Wales considering the use of evidence acquired illegally in arbitration proceedings.

38. How are the costs of arbitration proceedings estimated and allocated?

The 1996 Act allows the parties to agree what costs in the arbitration are recoverable (s.63(1)). If there is no agreement, the tribunal may determine the recoverable costs of the arbitration on such basis as it deems appropriate (s.63(3)).

39. Can pre- and post-award interest be included on the principal claim and costs incurred?

Unless otherwise agreed by the parties, the 1996 Act allows the tribunal to award simple or compound interest:

a. **Pre-award interest**: from such dates as it considers just on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award (s.49(3)(a)).
b. **Post-award interest**: from the date of the award (or any later date) until payment, at such rates that it considers just on any outstanding amount of any award, including any award as to costs (s.49(4)).

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

The 1996 Act allows the parties to agree on the form of an award (s.52(1)). If there is no agreement, section 52 provides the conditions that need to be met. These include requirements that the award be in writing and signed by the arbitrators or all those assenting to it (s.52(3)).

Section 66 of the 1996 Act provides for a summary procedure for enforcing awards as a judgement with leave of the court. The 1996 Act also provides for the recognition and enforcement of a New York Convention award (s.100 et seq), including the requirement to submit originals or duly certified copies of the award and the arbitration agreement when seeking enforcement.

Under section 52(4) of the 1996 Act, an arbitral award must contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. This requirement has been interpreted to mean that the arbitrator(s) should set out what, on their view of the evidence, did and did not happen and why, in light of that, they have reached their decision.

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Timeframes relating to the recognition and enforcement of an award can be difficult to estimate as they are subject to the complexity and circumstances of any given award.

Application for leave to enforce the award may be made on an *ex parte* basis. At that point, the court may direct the arbitration claim form to be served or order *ex parte* enforcement of the award. Where leave to enforce *ex parte* is given, the award debtor typically has a period of

14 days to apply to set the order aside.

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

Yes, there is a different standard of review for recognition and enforcement of a foreign award in comparison to a domestic award. For foreign awards governed by the New York Convention, section 103 (Part III) of the 1996 Act provides for the grounds for review set out in Article V of the New York Convention. These are limited in comparison to the multiple grounds set out in section 68(2) (Part I) of the 1996 Act to challenge domestic awards.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

Subject to any rights of challenge, the parties are free to agree the remedies that can be granted by the tribunal (s.48 of the 1996 Act).

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

Generally, the grounds for challenging a domestic or foreign award are (a) absence of substantive jurisdiction (s.67(1)) or (b) a serious irregularity affecting the tribunal, the proceedings or the award (s.68). Unless otherwise agreed, the parties can appeal to the court on a question of law arising out of an award made in the proceedings (s.69(1)). Appeals under section 69 are difficult and succeed only in rare circumstances.

However, parties can agree to irrevocably waive their right to appeal, review or have recourse to any state court or other judicial authority by agreeing to arbitrate pursuant to various institutional rules. For example, Article 26.8 and 29.2 of the LCIA Arbitration Rules 2020 obligate parties to waive their right to appeal LCIA awards and decisions. Similarly, Article 35.6 of the 2021 ICC Arbitration Rules provides that parties are deemed to have waived their right to appeal an ICC award by agreeing to arbitrate under the ICC Rules.

The procedure for appeal and challenge is outlined in the Civil Procedure Rules.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

Under section 69(1) of the 1996 Act, the parties to arbitral proceedings can agree to waive the right to appeal to the court on a point of law.

The right to challenge the award for lack of jurisdiction or serious irregularity cannot be waived by the parties, even with mutual agreement. However, section 73 of the 1996 Act states that if a party continues to take part in the proceedings, it may lose the right to raise such an objection unless it can prove that it did not know of the grounds for objection at the time.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

Under section 9(1) of the 1978 Act, if a State has agreed in writing to submit a dispute to arbitration, it waives immunity from proceedings in the English courts which relate to the arbitration, including enforcement proceedings. In accordance with section 9 of the 1978 Act, this rule applies to commercial arbitrations involving state entities as well as investor-state disputes (See *Gold Reserve Inc. v The Bolivarian Republic of Venezuela* [2016] EWHC 153). This waiver extends only to immunity from the jurisdiction of the courts, and not immunity from execution against the sovereign's property.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

An award is binding on third parties who are bound by the arbitration agreement, as contemplated in section 82(2) of the 1996 Act.

Only a party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court to challenge an award of the arbitral tribunal.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

In *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm), the Commercial Court confirmed that arbitrators have the power to award the costs of a third party funder. These are considered to be "other costs of the parties" under section 59(1)(c) of the 1996 Act.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Parties to LCIA arbitrations can apply to submit disputes to an emergency arbitrator for urgent relief pending the formation of the arbitral tribunal. The rules governing the appointment of an emergency arbitrator are set out in Article 9B of the LCIA 2020 Rules.

However, this type of relief does not appear to be frequently used. In 2016, the first application under Article 9B of the LCIA Rules for the appointment of an emergency arbitrator was made and was rejected. In 2020, only five applications were made under Article 9B. Three were granted by the LCIA Court, one application was rejected and one was withdrawn. This may be due to the fact that Article 9A of the LCIA Rules sets out a procedure for the expedited formation of a tribunal, which can be used as an alternative route to obtaining interim measures.

There is also no clear statutory mechanism (unlike Singapore and Hong Kong) to enforce emergency orders/ awards under the 1996 Act. This is a potential area of reform that has been identified by the Law Commission is its 14th Programme of Law Reform (*see* Question 5).

Parties can apply to the court for interim relief under section 44 of the 1996 Act; however, it is likely that the court will not intervene where an application could be made to an emergency arbitrator under the relevant institutional rules (*Gerald Metals SA v The Trustees of the Timis Trust & others* [2016] EWHC 2327). In the 2020 update to the LCIA Rules, the provisions concerning the availability of emergency relief were amended to re-affirm that, notwithstanding those provisions, a party "may apply to a competent state court or other legal authority for interim or other conservatory measures before the formation of the Arbitral Tribunal".

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

The London Maritime Arbitrators Association (LMAA) Terms contain a Small Claims Procedure, designed for disputes under a value of US$50,000 (however, parties are free to agree a higher limit). A sole arbitrator acts for a fixed fee and generally assesses the case based on written submissions and documents.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Many UK firms, institutions and individuals have signed the Equal Representation in Arbitration Pledge, which is intended to improve the profile of women in arbitration with a view to securing the appointment of more women as arbitrators, on an equal opportunity basis. The LCIA has also signed the Equal Representation Arbitration Pledge and publishes yearly updates with diversity statistics. Last year, 33% of arbitrators appointed were women. In 2020 the LCIA Court appointed non-British arbitrators 47% of the time, compared to the parties and the co-arbitrators, who appointed non-British arbitrators 32% and 18% of the time respectively.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

On 27 July 2017, the English Commercial Court dismissed an application to enforce a Russian arbitral award that had been set aside by the Russian Commercial Court (*Maximov v Open Joint Stock Company OJSC (Novolipetsky Metallurgichesky Kombinat)* [2017] EWHC 1911 (Comm)). The Court held that an applicant seeking to enforce an award that has been set aside at the seat of arbitration must not only prove that set aside decision was wrong or manifestly wrong, but that it was so perverse that it could not have been arrived at in good faith or otherwise than by bias.

In June 2020, the Paris Court of Appeal refused to set aside a Paris-seated arbitration award that the English Court of Appeal had refused to enforce six months earlier on the grounds that the tribunal had wrongly asserted its jurisdiction. The Paris Court of Appeal found that the arbitration agreement was governed by French law (the law of the seat), while the English Court of Appeal concluded that it was governed by English law (the contract's governing law). The Paris court held that a nonsignatory was bound by the clause under French law, while the English court held it was not under English

law. The conflicting decisions illustrate the potentially significant consequences of failing to specify the law applicable to the arbitration agreement where the law governing the substance of the contract is not the same as the law of the seat of the arbitration (*Kabab-Ji SAL (Lebanon) v Kout Food Group* (Kuwait) [2020] EWCA Civ 6 (20 January 2020; CA Paris, pôle 1 – ch. 1, 23 jun. 2020, n°17/22943 (Court of Appeal)) (*see* Question 14).

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

There are no statistics available to assess the frequency with which corruption or bribery allegations are made in an arbitration context. It is worth noting, however, that in *Premium Nafta v Fili Shipping* [2007] UKHL 40, the House of Lords held that unless the arbitration agreement specifically (as opposed to the main contract) can be shown to have been induced by bribery, the arbitration agreement will remain valid.

English courts will typically require an allegation of corruption to be proved by the party advancing the relevant assertion, with the civil standard of proof of 'more likely than not' applying (*Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, [55]). However, courts have also provided additional guidance where more serious allegations of fraud and corruption are in question, stating that "*although the standard of proof is the civil standard,... the cogency of the evidence relied upon must be commensurate with the seriousness of the conduct alleged*." (*JSC BTA Bank v Ablyazov & Ors* [2013] EWHC 510 (Comm) at [76]).

There have been a number of recent cases in which the English courts have considered the issue of corruption. In one notable recent case, *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm), Nigeria requested an extension of time to challenge an award under sections 67 and 68(2)(g) of the 1996 Act, on the basis that the agreement in question was procured by fraud and corruption. The Court allowed Nigeria to seek an unprecedented extension of time beyond the 28 day time limit in section 70(3) of the 1996 Act. The Court concluded that "*there is a strong prima facie case that the [agreement in question] was procured by bribery*" (para. 196), and that P&ID contributed to the delay, and would not suffer "*irremediable prejudice*" from the extension of time (para. 276).

In *Province of Balochistan v Tethyan Copper Company Pty Ltd* [2021] EWHC 1884 Comm, the High Court of Justice was faced with a request by the Province of Balochistan to annul an ICC Partial Award under section 67 of the 1996 Act on the basis that the agreement containing the arbitration agreement was void because it was procured through corruption. The High Court rejected the argument on the grounds that the corruption allegations were not raised as a jurisdictional objection before the ICC tribunal, and therefore the Province of Balochistan was precluded from raising them as a jurisdictional objection in the High Court pursuant to section 73 of the 1996 Act.

54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

There have been no recent court decisions, nor are there any pending decisions, in England and Wales considering the judgment of the CJEU in *Achmea*.

55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

In February 2020, the Supreme Court issued a decision in the *Micula* case (*Ioan Micula, Viorel Micula, S.C.* European *Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20). The Court of Appeal had previously confirmed a lower court's judgment staying the enforcement of the *Micula* award pending the conclusion of state aid proceedings before the General Court of the European Union (GCEU), where the European Commission was defending its decision to order Romania not to pay damages under the award on the grounds that it would amount to unlawful state aid under EU law.

The Court of Appeal's decision was appealed to the Supreme Court. Romania and the European Commission argued that the question of Romania's EU law obligations in relation to the award was pending before the Court of Justice of the European Union (CJEU) (having

been appealed from the GCEU), and that the Supreme Court should continue the stay pending the CJEU's decision to avoid the risk of conflicting decisions. The Supreme Court disagreed, finding that the question before it concerned the relationship between Article 54 of the ICSID Convention (which requires the UK to recognise and enforce ICSID awards) and Romania's EU law obligations. This question was not before the CJEU, which was merely reviewing the GCEU's decision as a matter of EU law. The UK Supreme Court overturned the decisions of the lower courts, finding that the stay of enforcement conflicted with the UK's obligations under Article 54 of the ICSID Convention.

There have been no further decisions—nor are there any pending cases–considering the CJEU's *Micula* decision.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

In April 2020, thirteen arbitral institutions, including the LCIA, issued a joint statement calling for solidarity, cooperation and collaboration in response to COVID-19. The statement emphasised the joint ambition of the institutions to support international arbitration's ability to contribute to stability and certainty in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay. Some of the relevant concerns identified by the institutions related to virtual hearings, confidentiality and data security, due process concerns, technological failures and enforceability risk.

Although the LCIA did not amend its Rules in response to COVID-19, the pandemic acted as a catalyst for the amendment of certain provisions, including expressly permitting the conduct of virtual procedural conferences and hearings and making electronic filings and communications the default rule (see question 6).

In September 2020, the amended GAFTA Arbitration Rule No. 125 came into effect, which expressly provides for hearings to be held virtually. GAFTA also announced that awards may be signed electronically, and the creation of an electronic GAFTA date stamp.

In July 2021, the LMAA issued its Guidelines for Virtual and Semi-Virtual Hearings, which were later incorporated in its 2021 updated Terms. The new Terms amended the definition of "hearing" to expressly refer to virtual hearings, and provide that awards may be signed electronically, and electronically notified to the parties.

Finally, in April 2020 the CIArb released a "Remote Procedures Guideline".

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

All three major arbitral institutions in England implemented reforms towards greater use of technology and more cost-effective conduct of arbitrations (*see* Questions 5 and 6).

For instance, Article19.1 LCIA Rules expressly provides that hearings may take place in person, virtually or in a hybrid form: "*As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)*." Further, the LCIA Rules now provide that electronic filing of documents is the default rule. (Art. 1.4)

Similar amendments regarding the use of technology and the conduct of virtual hearings were introduced by the LMAA and GAFTA.

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

Under the Insolvency Act 1986, once a company enters a mandatory insolvency process, arbitration may not be commenced or continued against it without the permission of the court (or, in the case of an administration, the consent of the administrator). A mandatory insolvency process includes administration, a compulsory winding-up or liquidation, or the appointment of a monitor. Conversely, in the case of a voluntary insolvency process, such as a company's voluntary winding up, the court's permission is not generally required to pursue arbitral proceedings against that company. Where the court's permission is required, the court will carry out a balancing exercise between the legitimate interests of the applicant and those of the other creditors. If it can be demonstrated that the arbitration is an effective means of resolving the issues in dispute between the parties and is not likely to hinder the insolvency proceedings, leave may be granted. In all cases, the goal is to ensure a level playing field amongst creditors, and a centralised and transparent insolvency process.

The insolvency of a party does not affect the enforceability of an arbitration agreement in itself. This was confirmed in the recent case of *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm), where the court confirmed that "[i]*n circumstances in which those claims seek relief which the arbitration tribunal is able to grant, and do not engage the interests of third parties save to the extent that any creditor of an insolvent company will benefit from its success in arbitration, those claims are arbitrable*" (para. 87(ii)).

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

The United Kingdom is a Contracting Party to the Energy Charter Treaty. The United Kingdom has not publicly expressed any specific views as to the current negotiations on the modernization of the Energy Charter Treaty.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

There have been no new developments regarding arbitration proceedings and climate change or human rights in England and Wales.

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

The UK has expressed its general support for the reform of the ISDS system and commented on the "Draft Working Paper on the Selection and Appointment of ISDS Tribunal Members" as well as the "Draft Working Paper on the Appellate Mechanism and Enforcement issues" (currently under discussion by the UNCITRAL Working Group III).

Concerning the "Selection and Appointment of ISDS Tribunal Members," the UK expressed its views regarding: *(i)* qualifications and other requirements; *(ii)* independence, impartiality and accountability; *(iii)* the promotion of diversity, balanced representation and inclusiveness; *(iv)* the means of implementing the proposed changes; and *(v)* the methods of selection and appointment under *ad hoc* systems.

On the "Appellate Mechanism and Enforcement issues", the UK clarified that its comments were without prejudice to any future position the UK government may take on an appellate mechanism. It then expressed its views concerning: *(i)* the scope of appeals; *(ii)* selection of arbitrators; *(iii)* the relationship between the appeal and existing annulment or setting aside procedures; *(iv)* the types of appealable decisions; *(v)* the effect of an appeal; *(vi)* the need to mitigate the resulting increase in the costs and duration of ISDS proceedings as the result of the introduction of an appellate mechanism; and *(vii)* enforcement mechanisms.

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