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Judicial Control of Arbitral Awards in the United Kingdom

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1 INTRODUCTION

This book provides a forum for discussion of current issues and debates in international arbitration, covering the independence and impartiality of arbitrators; how conflicting interests may affect the conduct of arbitrators; the enforcement of arbitral awards, principally under grounds of procedural irregularity; how to resolve issues of misconduct by arbitrators during proceedings; and the current judicial interpretation of arbitration clauses. In England, the key legislation which governs these issues is contained in the Arbitration Act 1996 (the Arbitration Act). Also influential in shaping these issues are the procedural rules of specific arbitral institutions, and the guidance published by organisations such as the International Bar Association (the IBA).

2 VACATING COMMERCIAL ARBITRATION AWARDS

2.1 *Independence and Impartiality of International Arbitrators*

It is of fundamental importance that international arbitrators are both independent and impartial. It is a human right that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[1] Arbitration, although not entirely compatible with such description, is a consensual process which has been held to fall within this right.[2] All arbitral tribunals have a duty to act fairly and impartially between the parties[3] while conducting the arbitration proceedings and while exercising any of its powers including in relation to procedure and evidence.[4]

Independence is easier to demonstrate than impartiality.[5] There are typically objective indicators of proximity or reliance by an arbitrator on a particular party or group. For example,

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[1] Article 6(1) Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (European Convention on Human Rights) and incorporated into English Law under Schedule 1 Article (6)(1) Human Rights Act 1998.

[2] Paul Stretford v. The Football Association Ltd and another [2007] EWCA Civ 238.

[3] Section 33(1)(a) Arbitration Act 1996.

[4] Section 33(2) Arbitration Act 1996.

[5] Bruno Manzanares Bastida, *The Independence and Impartiality of Arbitrators in International Commercial Arbitration*, 6 Rev. E-Mercatoria 4–5 (2007).

the International Chamber of Commerce (the ICC) rules of arbitration specifically require each arbitrator to declare any preexisting relationship of any kind, past or present, direct or indirect, with any party or legal counsel in order to establish their independence.[6] If any pecuniary or proprietary interest is held in one of the parties by an arbitrator, who also demonstrates partiality, this will automatically result in the disqualification of such arbitrator.[7] This can, however, become a fraught issue where an arbitrator is a lawyer operating within a large international law firm, in respect of a dispute where one of the parties is represented by another lawyer from the same firm but in a different office or jurisdiction.

Impartiality is a more abstract concept, requiring the arbitrator to reach a decision with an absence of preference for one party or another. This is ultimately the crucial criterion for an arbitrator, as Bishop succinctly notes: 'an arbitrator who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not impartial must be disqualified'.[8] This need for impartiality is also one of the key reasons for having an odd number of arbitrators within the tribunal, particularly where each party is entitled to appoint its own arbitrator.

One of the reasons that parties choose arbitration is that it is an opportunity to select a commercial arbitrator with knowledge of the market or technical issues in dispute, and who may be better placed to determine the issues than a judge in a traditional court process. However, in selecting a 'commercial' dispute resolution mechanism, the parties are potentially voluntarily submitting to the fact that the arbitrator may have an interest in the outcome of the arbitration through his or her experience. However, it is worth noting that it is almost invariably counterproductive for a party to nominate an arbitrator-advocate. This is because, as one arbitrator noted, '[t]he moment you start advocating for your side your voice is lost',[9] as the rest of the tribunal will disregard that arbitrator's arguments. Therefore, from a practical perspective, the ideal selection of an arbitrator is 'someone with the maximum predisposition towards my client, but with the minimum appearance of bias'.[10]

Often appealing to parties from different jurisdictions is the opportunity for neutrality that international arbitration provides. The parties can decide the law, the venue, the procedure and the tribunal to be applied for the resolution of a dispute. For example, the tribunal members will frequently be of different nationalities to the parties to the dispute. This is not necessarily a requirement, but helps to establish the principles of independence and impartiality, given that the tribunal members are physically removed from the experiences and cultural knowledge of the disputing parties.

2.2 *Parameters of Conflict of Interest*

Unlike a judge, whose principal authority, duty and accountability is to the state and to the court, an arbitrator's responsibilities are determined primarily by private entities, whether that is an arbitral institution, the appointing parties themselves or another appointing body. One of the key issues in international commercial arbitration is that there is no supranational authority

[6] Articles 11(2) and 11(3) International Chamber of Commerce Arbitration Rules 2017.

[7] Locabail v. Bayfield [1999] EWCA Civ 3004.

[8] Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration*, 14 Arbitration International 345 (1998), https://academic.oup.com/arbitration/article-abstract/14/4/395/216629 (cited in Bastida).

[9] Richard Woolley, *Is Arbitrator Impartiality a Myth?* Global Arbitration Review (June 9, 2015), https://globalarbitrationreview.com/print_article/gar/article/1034514/is-arbitrator-impartiality-a-myth?print=true.

[10] Martin Hunter, *Ethics of the International Arbitrator*, 4 ASA Bulletin, Association Suisse de l'Arbitrage Kluwer Law International 173–196 (1986).

which controls arbitrators.[11] For this reason, the boundaries for what behaviour and actions are acceptable for an arbitrator would not necessarily be acceptable for a judge. Also, given the generally pro-arbitration approach of the English courts, there is limited accountability and oversight of arbitral practices, other than that imposed by arbitral institutions, which of course apply only where their rules are adopted. No such accountability and oversight exists in ad hoc arbitrations. This also means there is no overarching body to determine whether an arbitrator has a conflict of interest disqualifying him from acting. This absence of oversight therefore relies upon the effective use of chosen arbitral rules and the integrity and moral code of individual arbitrators to ensure that decisions are reached following a fair consideration of each party's case.

One instance where the independence and impartiality of an arbitrator may sometimes be questioned is where there is third party funding of the arbitration proceedings. If a member of the tribunal has a relationship of some kind with the funder, that arbitrator may not be deemed to be fully independent. Given the relatively small number of arbitration funders currently, in specific areas of international commercial arbitration, it may be that arbitrators do not infrequently encounter situations where they have a connection of some sort with arbitration funders.

Another point sometimes made is that there is a contractual relationship between the parties and the arbitrator which does not exist in traditional court proceedings.[12] However, referencing *Jivraj* v. *Hashwani*,[13] Judge Dominique Hascher makes the point that the role of an arbitrator as adjudicator does not fit the traditional conception of a contract for services. The provision of services of the arbitrator is contingent on payment by the parties, but the conduct of those services by the arbitrator should not be.[14]

Statistically, it is fairly unusual for there to be a position where an arbitrator is in a clear and damaging position of conflict. Conflicts of interest relate primarily to the concept of independence[15] and can often be resolved at the outset of proceedings through disclosure by each arbitrator to the parties of any interest or previous connection to any of the parties to the dispute or proceedings which may have a bearing on the decision making that that arbitrator would conduct. However, if this is not done properly, then problems can and do arise. Issues of apparent bias may come into play.

In one recent illustrative case in this area, the English Court of Appeal agreed with the lower court's overall conclusion that 'the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility' that the arbitrator had been biased. This was in circumstances where the arbitrator in question had been appointed in respect of multiple overlapping references and where there was a common party, and in circumstances also where the court found that the arbitrator had wrongfully failed to make certain disclosures to the parties at the time of his appointment.[16]

Disclosure by an arbitrator of what may be considered a conflict of interest must be a transparent process in order to be an effective safeguard.[17] This requires honesty and disclosure

[11] Sheila Block, *Ethics in International Proceedings*, International Litigation News – Newsletter of the International Litigation Committee of the Section on Business Law, International Bar Association Oct. 2004, at 15–22.

[12] Dominique Hascher, *Independence and Impartiality of Arbitrators – Three Issues*, 27 American University International Law Review 789–806 (2012).

[13] Jivraj v. Hashwani [2011] UKSC 40 at 23.

[14] Hascher, *supra* note 12, at 789–806.

[15] *See* discussion on independence in *id.* at chapter 2.1, 2.

[16] Halliburton Company v. Chubb Bermuda Insurance Ltd. [2018] EWCA Civ 817 at 100.

[17] Cofely v. Bingham and Knowles [2016] EWHC 240 (Comm).

of sufficient detail to enable the parties to adequately assess the potential conflict of an arbitrator. However, if an arbitrator makes an erroneous or incomplete statement,[18] this should not automatically lead to their recusal or to the annulment of the award.[19]

2.3 *Procedural Irregularity and Misconduct of Arbitrators during Proceedings*

Where an arbitration is seated in England and Wales, an award can be challenged (1) on a point of law,[20] (2) lack of jurisdiction[21] and (3) serious irregularity.[22] We look at each of these in turn. The first two are addressed for completeness. The third type of challenge is the most germane to the subject matter of this chapter. The party challenging the award must make their application or appeal within twenty-eight days of the final award or other arbitral appeal process.[23] Furthermore, certain affected third parties have rights to challenge an award.[24]

2.3.1 *Appeal on a Point of Law*

An award may be appealed on a point of law arising from such award.[25] Parties can waive their rights to challenge or appeal an award,[26] commonly by agreeing to use a set of arbitral rules which expressly waive such rights. By way of example, this is the case under the ICC, London Court of International Arbitration (LCIA) and Singapore International Arbitration Centre (SIAC) rules. Where parties have a right of appeal against an arbitral award, the court has jurisdiction to confirm, vary, set aside or remit the award. Such a right of appeal is limited to points of English law only, and requires either the leave of the court, or the agreement of the parties pre- or post-dispute to allow appeals.

Successful appeals on a point of law are rare. The recent decision of *Dakshu Patel* v. *Kesha Patel*[27] was one such case. The court concluded that it was 'clear' that the tribunal had wrongly overlooked the relevant test under Section 19 of the Partnership Act 1890, which requires clear and unambiguous conduct indicating the parties' intention to vary contractual terms. The court concluded that the tribunal made an error of law in finding that there had been a variation to the profit-sharing provisions of two partnership agreements. The court also confirmed that a related Section 68 challenge would have succeeded, had it been necessary to base its decision on this point. The court varied the award and held that the parties were entitled to share the profits and losses equally.

In practice, appeals are rarely pursued by parties, being mostly limited to shipping cases. In the recent case of *J* v. *K*,[28] it was held that a tribunal had jurisdiction to review the determination of an expert, and to substitute its own determination following a rehearing of the disputed issues. It is clear from these cases that an appeal on a point of law places a high bar on applicants.

[18] Halliburton Company, *supra* note 16 offers an example of this.
[19] Hascher, *supra* note 12, at 789–806.
[20] Section 69 Arbitration Act 1996.
[21] *Id.* at Section 67.
[22] *Id.* at Section 68.
[23] *Id.* at Section 70(3).
[24] *Id.* at Section 72
[25] *Id.* at Section 69(1).
[26] *Id.* at Section 73.
[27] Dakshu Patel v. Kesha Patel [2019] EWHC 298 (Ch) at 18.
[28] J v. K [2019] EWHC 273 (Comm).

2.3.2 *Substantive Jurisdiction*

Where it is found that a tribunal did not have jurisdiction to hear the dispute, the court can confirm, vary or set aside an award made by such tribunal in whole or in part.[29] In order for a court to review the jurisdiction of the tribunal in such cases, an award has to be made. An order will not be sufficient.

A challenge to an arbitral award may be made where the tribunal has no 'substantive jurisdiction'[30] to hear the dispute. This may be done as part of the substantive award on the merits of the claims or, more commonly, in a separate preliminary hearing where the tribunal rules on its own jurisdiction. Section 67 of the Arbitration Act is mandatory – parties cannot contract out of the right to challenge an award on this basis. Grounds for challenging the jurisdiction of the tribunal include (1) existence or validity of the arbitration agreement, (2) scope of the arbitration agreement and (3) constitution of the tribunal.

Generally, the invalidity of a contract will not affect the validity of the agreement to resolve disputes through arbitration, unless the invalidity would effectively make both the contract and the arbitration agreement invalid. This might be the case, for example, if one of the parties did not have capacity to enter into the contract.[31] Furthermore, it will generally be presumed that the parties intended all disputes to be covered by the arbitration agreement, unless the language makes clear that certain matters are expressly excluded from the tribunal's jurisdiction.[32] For example, in *Sonact Group Limited* v. *Premuda SPA*[33] a settlement agreement (without a jurisdiction clause) was signed in relation to several disputes under a charter party (which contained an arbitration clause). Males J held that the arbitration clause in the charter party ('any and all differences and disputes of whatsoever nature') was wide enough to cover a claim under the settlement agreement. Males J found that it was 'inconceivable' that the parties could have intended that the owner would be unable to pursue a claim under the settlement agreement in arbitration. Males J stated that there was 'no bright line rule' that once parties enter into a new legal relationship, 'an arbitration clause in the underlying contract necessarily can no longer apply'.

Where the tribunal is found to have no substantive jurisdiction, a full retrial of the arbitration will be held. However, it has been reemphasised in several recent decisions that, in general, English courts will take a restrictive approach to such challenges to jurisdiction. For example, in *State A* v. *Party B*,[34] the court considered an application for an extension of time for a party to bring a Section 67 jurisdictional challenge. The court (per Sir Michael Burton), applied a high threshold and held that an extension of time will be granted only where a delay occurs in making a challenge (and/or applying for an extension of time), where the application is based on new evidence, and such new evidence is 'transformational', 'seismic' or 'a game-changer'. The extension of time was refused because the delay was a 'colossal' 959 days from the deadline to make the Section 67 challenge and the new evidence was not sufficiently 'transformational' to justify the extension of time anyway.

[29] Section 67(3) Arbitration Act 1996.
[30] *Id*. at Sections 30(1) and 82(1).
[31] David Wolfson & Susanna Charlwood, *Chapter 25: Challenges to Arbitration Awards*, *in* Arbitration in England 527–562 (Julian D. M. Lew, Harris Bor, et al. eds., 2013).
[32] See further in Section 4 on the scope and interpretation of commercial arbitration clauses. One recent illustrative example of this approach is included in this section, with further recent examples being considered in Section 4.
[33] Sonact Group Limited v. Premuda SPA [2018] EWHC 3820 (Comm) per Males J at 15–17 and 20.
[34] State A v. Party B [2019] EWHC 799 (Comm) per Sir Michael Burton at 53–54 and 56.

In another decision, *Filatona Trading Ltd* v. *Navigator Equities Ltd*,[35] the English court held that an unnamed but disclosed principal of a party to a shareholders' agreement could sue under an arbitration agreement. A and B were named as parties to the agreement, which also provided for all disputes to be referred to arbitration. C was not a named party to the SHA but was the disclosed principal of A, who entered into the contract with B as C's agent. C commenced arbitration proceedings against B. Teare J applied *Aspen Underwriting Ltd* v. *Credit Europe Bank NV*[36] and *Kaefer Aislamientos* v. *AMS Drilling*[37] and held that an undisclosed principal can sue and be sued on a contract on condition that (1) the contractual terms did not confine the application of the contract to the named parties; (2) at the time the relevant contract was entered into, the agent intended to contract on the principal's behalf; and (c) it was within the actual authority of the agent to enter into the contract. The judge held that the evidence satisfied the second and third points. On the first point, he held that, despite an entire agreement clause, the terms of the shareholders agreement did not act to prevent a disclosed principal from having rights under the contract: 'very clear words' were required to show that only the named party, rather than its principal, was intended to have such rights.

2.3.3 *Serious Irregularity*

It is under the concept of 'serious irregularity' that matters of procedural irregularity and misconduct of arbitrators will typically arise. Under Section 68 of the Arbitration Act, the court has jurisdiction to remit or set aside an award or to declare it to be of no effect where an applicant can show substantial injustice to itself as a result of a 'serious irregularity'. This jurisdiction is limited to listed examples of 'serious irregularity', which affect the tribunal, the proceedings or the award itself.[38] Section 68 of the Arbitration Act is, like Section 67, mandatory. Parties cannot contract out of the right to challenge an award for serious irregularity.

Although of mandatory application, a high threshold must be met before the court will interfere with the arbitral process based on Section 68. As a result, most applications fail. In one case, Morrison J described Section 68 as a 'long stop',[39] to be used in 'extreme cases where … something … went seriously wrong with the arbitral process'.[40] In *Vee Networks Ltd* v. *Econet Wireless Special Ltd*,[41] the court stated that the requirement for substantial injustice to a party will be satisfied if that party shows the irregularity caused the tribunal to reach a conclusion which was unfavourable to the applicant and which it might not have reached without the irregularity, provided that it was reasonably arguable that the tribunal could have reached a decision in the applicant's favour.

In order for a party's application for an arbitral award to be set aside under Section 68 of the Arbitration Act, the applicant needs to demonstrate the following:

1. a serious irregularity;
2. which falls within the exhaustive list, described in Section 68 (see later in the chapter); and
3. which has caused or will cause substantial injustice to the applicant.[42]

Section 68 sets out an exhaustive list of qualifying irregularities:[43]

[35] Filatona Trading Ltd v. Navigator Equities Ltd. [2019] EWHC 173 (Comm).
[36] Aspen Underwriting Ltd v. Credit Europe Bank NV [2018] EWCA Civ 2590.
[37] Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV and others [2019] EWCA Civ 10 at 114.
[38] Section 68 Arbitration Act 1996.
[39] Fidelity Management SA v. Myriad International Holdings BV [2005] EWHC 1193 (Comm) at 5.
[40] See also commentary in Wolfson & Charlwood, *supra* note 31, at 527–562.
[41] Vee Networks Ltd v. Econet Wireless Special Ltd [2004] EWHC 2909.
[42] Primera Maritime v. Jiangsu [2013] EWHC 3066 (Comm) at 6.
[43] Section 68(2) Arbitration Act 1996.

1. failure by the tribunal to comply with Section 33 of the Arbitration Act (containing the general duties of the tribunal, e.g., to give each party a reasonable opportunity to present its case);
2. the tribunal exceeding its powers (not including issues of substantive jurisdiction, covered by Section 67);
3. failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
4. failure by the tribunal to deal with all of the issues that were put to it;
5. any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
6. uncertainty or ambiguity as to the effect of the award;
7. the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
8. failure to comply with the requirements as to the form of the award; or
9. any irregularity in the conduct of the proceedings or in the award, which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

There have been many cases where disgruntled parties have sought to challenge the arbitral process or an award through use of a Section 68 challenge. Few have succeeded.

In the recent case of *A v. B*,[44] the applicant applied for the award to be set aside on the basis that the tribunal's decision to exclude factual evidence given in examination-in-chief was a serious irregularity. The court found that the application was based on the applicant's criticism of the tribunal's exercise of a discretion and refused the application. Given that the tribunal had a wide discretion as to how it exercised its powers, the decision made by the tribunal would have to be beyond the bounds of what could be considered an exercise of its discretion under the Arbitration Act and its own procedure. The evidential process that had been adopted provided for the principal evidence to be in writing, with a very short timetable for any oral evidence to be provided. The court held that the tribunal had been entitled to make the ruling it did, that the tribunal had considered the issues and had carried out a balancing exercise to reach its decision and that the tribunal had acted within the bounds of its wide discretion. Finally, the applicant's evidence did not address the relevant clause relating to invoice disputes, and so, even if it was an irregularity it could not be an irregularity affecting the invoice claims.[45]

One relatively recent case in which the court did grant the setting aside of an arbitral award on the basis of procedural irregularity is the case of the M.V. *Ocean Glory*.[46] This was a shipping case. Under a charter party, the owners referred a claim for demurrage to arbitration and, in ambiguously worded claim submissions, requested that the tribunal reserve its jurisdiction in relation to further non-particularised and unquantified claims. The charterers asked the tribunal to dismiss all of these claims on their merits. The tribunal issued a final award in which the tribunal stated:

> 30. Given the length of time since the cargo was discharged and that the Owners' provided no evidence that the cargo receivers / interests had or indeed intended to bring a claim against them under the Bill of Lading, we refuse their application.

[44] A v. B [2018] EWHC 3366 (TCC).
[45] *Id.* at 34–40, 42–44.
[46] Lorand Shipping v. Davof Trading (Africa) BV (M.V. *Ocean Glory*) [2014] EWHC 3521 (Comm).

> 31. In the event that the cargo receivers / interests do make a claim, doubtless the Owners will consider whether it is possible to start new arbitration proceedings against the Charterers. It follows that this award is not made on an interim basis, but is final in respect of the issues decided herein.

The effect of the award was to exhaust the tribunal's jurisdiction over any claims arising under the charter party without any regard to any contractual time bar, and to force any other claims to be brought in a new arbitration. The court found that the tribunal's approach (1) adopted a course of action not advocated by either party, (2) did not give the parties an opportunity to comment on the proposal of the tribunal to make such an award and (3) relied upon considerations not raised by the parties and which the parties had no opportunity to address before the award was made.

For these reasons, it was held, the tribunal's award constituted a serious irregularity. The tribunal neither found that the owner's claims should be rejected on the merits (as sought by the charterers), nor did it reserve the claims for further consideration (as sought by the owners). The court held that, given that neither party had advocated this course of action, the parties should have been given opportunity to address the course of action in fact adopted by the tribunal. In determining whether this failure caused substantial injustice to the owners, it was held to be sufficient that the tribunal 'might realistically' have reached a different conclusion. The court accepted that the threshold of Section 68 of the Arbitration Act is very high. It nevertheless issued a declaration that paragraphs 30 and 31 of the tribunal's award were of no effect and remitted that part of the award back to the tribunal. The fact that the owner's claims were barred constituted a substantial injustice even if starting a new arbitration, the course suggested by the tribunal, might objectively have been a practical solution.

In another recent case, the English court held that an arbitrator had committed a serious irregularity by making enquiries and eliciting information about a matter which proved determinative in the award, without notifying the parties about those enquiries or giving them an opportunity to make representations on the matter in light of those enquiries.[47]

Misconduct by arbitrators is not necessarily procedural and can include a wide range of misdemeanours, including influencing witnesses, failure to disclose an interest, and other grounds.[48] Misconduct is also something that may need to be addressed during the arbitral process, not simply after the award has been issued. Under the Arbitration Act, it is possible to apply to the court for removal of an arbitrator, inter alia, where (1) circumstances exist that give rise to justifiable doubts as to his or her impartiality or (2) where he or she has refused or failed properly to conduct the proceedings and substantial injustice has been caused or will be caused to the applicant.[49]

An example of such an application can be seen in the recent case of *P* v. *Q*.[50] Multiple grounds of misconduct were alleged by the claimant in an LCIA arbitration: (1) tribunal improperly delegated its role to the tribunal secretary by systematically entrusting the secretary with responsibilities going beyond what was permissible under the LCIA Rules and LCIA Policy; (2) chairman breached his mandate as an arbitrator and his duty not to delegate by seeking the views of the tribunal secretary, who was not party to the arbitration or a member of the tribunal, entitled to make decisions on substantial procedural issues; (3) other arbitrators

[47] Fleetwood Wanderers Ltd v. AFC Fylde LTD [Nov. 30, 2018] 11 WLUK 540.
[48] See discussion in Section 2.
[49] Section 24 Arbitration Act 1996.
[50] P v. Q [2017] EWHC 194 (Comm) at 14.

forming the tribunal also breached their mandate as arbitrators and their duty not to delegate by failing to participate sufficiently in the arbitration proceedings and the decision making process; (4) circumstances existed which gave rise to justifiable doubts about the chairman's independence and impartiality, following comments that the chairman had made at an international conference; and (5) chairman breached his duty to maintain the confidentiality of the arbitral proceedings. The court had little difficulty in rejecting all the grounds advanced and dismissed the claimant's application in its entirety.

In a similar way, as for serious irregularity under Section 68 of the Arbitration Act, the court will not lightly interfere with the conduct of the arbitral process. If that were not the case, it would serve to encourage frivolous claims intended not to facilitate conduct of the arbitral process but to frustrate it, to the detriment of all stakeholders in that process. In certain sectors of the arbitral community, there is increasing demand for arbitral tribunals to be more prescriptive in their approach. For this to succeed, it will require that the supervising courts continue holding a clear deferential line to procedural decisions of arbitral tribunals, as is presently the case in the English courts.

3 ENFORCING COMMERCIAL ARBITRATION AWARDS

3.1 *Anti-arbitration Law and Public Policy*

One of the standout features of English courts' approach to arbitration is their acceptance of anti-suit injunctions to prevent foreign proceedings commenced in disregard of any applicable arbitration agreement. An anti-suit injunction is designed to protect a negative obligation which arises under an arbitration (or jurisdiction) agreement: the negative obligation not to commence or continue foreign court proceedings in any other forum.[51] The legal basis for such injunctions is that the foreign proceedings amount to a breach of contract. As Lord Millett explained in the *Angelic Grace*:

> There is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.[52]

The powers of the English court to grant anti-suit injunctions differ depending on whether the court proceedings in breach of the arbitration agreement are brought in a member state court of the European Union (EU) (or Lugano Convention country) or in a court of a country outside the EU (or Lugano Convention country). Following the decision of the European Court of Justice (ECJ) in *West Tankers*,[53] EU member state courts are effectively precluded from granting anti-suit injunctions restraining the pursuit of court proceedings commenced in another member state in breach of an arbitration clause. In *West Tankers*, the ECJ held that the grant of anti-suit injunctions restraining proceedings in an EU member state was inconsistent with the principles of trust that underlie the Brussels Regulation and that such injunctions should not be available to restrain proceedings in the court of another member state. The correlative expectation is that the member state courts will themselves recognise and give

[51] David St. John Sutton, Judith Gill, & Matthew Gearing, Russell on Arbitration 384, para. 7-043 (24th ed. 2015).

[52] Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. (the *Angelic Grace*) [1995] 1 Lloyd's Rep 87 per Millett LJ at 96.

[53] Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc. Case C-185/07, interpreting Council Regulation (EC) No 44/2001 of Dec. 22, 2000 (Brussels Regulation).

deference to the arbitration agreement. However, the way in which EU member states approach such matters is not uniform, particularly where the agreement in question may be less than clear in its application and scope.

The recast Brussels Regulation, which came into force in January 2015,[54] has reinforced the position and clarified matters of potential overlap within the EU framework. The regulation retains and clarifies the arbitration exception,[55] such as incorporating new recitals,[56] which include (1) expressly preserving the right of member states' courts to rule on the validity of arbitration agreements; (2) stating that a ruling of a member state court on the validity of an arbitration agreement should not be subject to the rules on recognition and enforcement of the regulation; (3) confirming that the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention) takes precedence over the regulation, so member states' courts can recognise and enforce arbitral awards even where these are inconsistent with another member state court's judgment (for example, where a member state court has given judgment that the arbitration agreement is not valid); (4) clarifying that the regulation does not apply to any action or ancillary proceedings relating to the tribunal's establishment, arbitrators' powers, the conduct of the arbitration or any action or judgment relating to the annulment, review, appeal, recognition or enforcement of the award; and (5) expressly stating that the regulation shall not affect the application of the NY Convention.[57]

Where proceedings are brought outside the EU, the objections based on the Brussels Regulation or Recast Brussels Regulation do not arise. Therefore, in the English courts, anti-suit injunctions are permissible where the proceedings in question have been commenced in the courts of a non-Brussels Regulation or non-Lugano Convention country. This position was confirmed in *Shashoua and others* v. *Sharma*.[58] The Commercial Court confirmed that *West Tankers* did not apply to proceedings commenced in a court outside of the EU member states, including between countries that were party to the NY Convention. Furthermore, in a later judgment, Flaux J confirmed that the *West Tankers* judgment did not require an arbitral tribunal to refuse to grant relief which might be inconsistent with the judgment of another member state's courts.[59] It was within the tribunal's powers to award damages or an indemnity where the court proceedings had been brought in a member state court in breach of the arbitration agreement.

In practice, the English courts are generally receptive to granting injunctions (interim and final) to prevent parties to an arbitration agreement commencing or continuing proceedings in the courts of other jurisdictions outside of the EU.[60] However, this has not always been the case. Until the 1990s, the byword had been that injunctive relief in the face of foreign proceedings was to be exercised with caution, as it was seen as involving interference by the English courts in the proceedings of the foreign court. Matters of comity were sometimes foremost in the minds of the judges. However, this approach changed so that by the turn of the last century, England's

[54] Sutton, Gill, and Gearing, *supra* note 51, 385–389, paras. 7-045–7-047.
[55] Article 1(2)(d) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of Dec. 12, 2012 (Recast Brussels Regulation).
[56] Recital 12 Recast Brussels Regulation.
[57] Article 73(2) Recast Brussels Regulation.
[58] Shashoua and others v. Sharma [2009] EWHC 957 (Comm).
[59] West Tankers Inc. v. Allianz SpA and another [2012] EWHC 854 (Comm).
[60] This article does not contemplate the position that might arise following any exit from the EU by the UK. But, the prospect is clearly on the horizon that the English courts may soon be unshackled from the *West Tankers* decision, allowing them to broaden their injunctive reach to include proceedings commenced in EU members in breach of arbitration agreements.

highest court recognised that strong reasons were required to outweigh the prima facie entitlement to an injunction in such circumstances.[61] The matter was put in the following terms by Lord Hobhouse in a 2001 decision:[62]

> The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract.

Perhaps the most extreme example of an English court's readiness to act in this area is provided by the case of *Ust-Kamenogorsk*.[63] The case involved a twenty-five-year concession agreement governed by Kazakh law, containing an ICC London arbitration clause. The appellant was a Kazakh entity while the respondent was a UK entity. Both were parties to the agreement in question. The UK entity sought a declaration that certain claims under the agreement could be brought only in arbitration and/or an injunction against continuation or commencement of foreign proceedings. There was no dispute threatened at the time of events, but there was a history showing prior disregard of the arbitration agreement by the appellant, and indeed court findings obtained by the appellant in Kazakhstan that the arbitration agreement was invalid. At first instance both the declaration and injunctive relief were granted by way of final orders. The injunctive relief was granted in reliance on the court's broad injunctive powers contained in the Senior Courts Act.[64] The orders were upheld on appeal. On final appeal, the Supreme Court upheld the lower courts' decisions. Lord Mance said:[65]

> An injunction [to restrain foreign proceedings in breach of an arbitration agreement] is not "for the purposes of and in relation to arbitral proceedings," but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings.

The decision of the Supreme Court in the *Ust-Kamenogorsk* case cited the further rationale behind such an approach, as articulated by Millett LJ in the *Angelic Grace*:[66]

> The justification for the grant of [an] injunction . . . is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction, is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.

[61] Donohue v. Armco Inc [2001] UKHL 64; [2002] 1 All ER 749. This case addressed an exclusive choice of court clause, but the principle applies equally to an arbitration clause.

[62] Turner v. Grovit [2001] UKHL 65; [2002] 1 WLR 107 at p27. The citation is strictly obiter as the case involved claims brought in competing EU member state jurisdictions absent an exclusive jurisdiction clause or an arbitration clause. However, it has been cited with approval in Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 at p26, which involved an application for an anti-suit injunction in reliance on an arbitration agreement in relation to court proceedings threatened outside the EU, and summarised in the paragraphs that follow.

[63] Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35.

[64] Section 37 Senior Courts Act 1981, which provides 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'.

[65] Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35, per Mance LJ at 48.

[66] *Supra* note 52.

In short, the issue in hand involves a substantive right, enforceable independently of the existence or imminence of any arbitral proceedings. A respondent will thus have to provide good reasons why the court should not exercise its discretion to grant an anti-suit injunction, where the claimant has demonstrated the existence of a binding arbitration clause. If the claimant can show that the respondent will breach the terms of the agreement if it commences proceedings, then an injunction to prevent court proceedings is likely to issue. The claimant does not need to establish that the foreign proceedings are vexatious or oppressive.[67] It is nevertheless strongly advisable to apply for an injunction at the earliest opportunity.

It should be noted too that an anti-suit injunction can have serious consequences if ignored or flouted by continuance of the foreign proceedings in question. Breach of an anti-suit injunction may result in the respondent being found guilty of contempt of court, and subject to a fine and/or imprisonment. In the recent case of *Mobile Telecommunications Co KSC* v. *HRH Prince Hussam bin Abdulaziz au Saud*,[68] the English Commercial Court sentenced a Saudi prince to twelve months' imprisonment. This was deemed appropriate to safeguard the function of anti-suit injunctions to preserve a party's rights, which in the case flowed from a valid arbitration award. In the case of a corporate entity, it may be fined, its directors may be sent to prison or fined, or its assets seized. Although it is arguable that it would be contrary to public policy to allow enforcement where the anti-suit injunction has been breached, this will not be the case where, for the purposes of the Civil Jurisdiction and Judgments Act,[69] the parties have submitted to the foreign court's jurisdiction.

Anti-suit injunctions are generally sought prior to the foreign court making its judgment. Apart from anti-suit injunctions, the English courts generally will usually only intervene in arbitral proceedings at the point of enforcement. Section 101 of the Arbitration Act sets out that awards will be enforceable either summarily under Section 66 of the Arbitration Act, or by action on the award:

> (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
>
> (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

Whereas an international NY Convention arbitration award made in any other jurisdiction is enforceable anywhere that is party to the NY Convention, once the award is registered as a judgment under English common law under Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933, an action on the award is pursuant to domestic law. The award is no longer an internationally recognised award, but is merged into a local law judgment and ceases to have independent status. The English law judgment is what is enforced. This is different to where the judgment is entered in terms of the award.[70]

However, the English court may also be called upon to intervene post-judgment to prevent enforcement of a foreign judgment in circumstances where it is alleged that an arbitration

[67] *Id.*; Toepfer International v. Societe Cargill France [1998] 1 Lloyd's Rep 379; Navigation Maritime Bulgare v. Rustal Trading Ltd (the *Ivan Zagubanski*) [2000] EWHC 222 (Comm) and Bannai v. Erez (Trustee in Bankruptcy of Eli Reifman) [2013] EWHC 3689 (Comm).

[68] Mobile Telecommunications Co KSC v. HRH Prince Hussam bin Abdulaziz au Saud [2018] EWHC 3749 (Comm).

[69] Section 32(1)(c) Civil Jurisdiction and Judgments Act 1982; Spliethoff's Bevrachtingskantoor BV v. Bank of China Ltd [2015] EWHC 999 (Comm).

[70] Sutton, Gill, & Gearing, *supra* note 51, at 493, para. 8-059.

agreement has been breached. In these circumstances, the English law concept of comity becomes more preponderant, such that the English court will regard the grant of injunctive relief as a particularly serious matter.[71] An example of this approach can be found in the *Tanoh* case,[72] where the Court of Appeal upheld the first instance judge's refusal to grant injunctive relief. The Court of Appeal confirmed that the threshold requirement on the applicant to show a high probability that there was an arbitration agreement governing the dispute is applicable in respect of both an anti-suit (prejudgment) injunction and an anti-enforcement (postjudgment) injunction.[73] Reasons of comity and delay will often weigh more heavily against an applicant for an anti-enforcement injunction than will be the case in an anti-suit injunction.

3.2 *Public Policy*

By submitting to arbitration, and especially where the parties have expressly waived all rights to appeal an award, the parties' expectations are that state intervention in arbitration should be minimalist. In general,

> the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found in it.[74]

However, 'participation by the Court, however unwelcome in theory, is in certain situations inevitable'.[75] This is mainly because '[f]ew nations are prepared to lend the power of the state to enforce arbitration awards, without retaining some right to review the awards themselves. This is reflected in [Article V of] the NY Convention'.[76]

The English courts thus retain limited powers over the parties' autonomy in relation to due process and the principles of fairness, independence and impartiality, to ensure that domestic law is being interpreted and applied correctly, and to resolve issues where matters of public policy or the public interest arise. Where the awards are issued by tribunals seated in England and Wales, key modes of court intervention are the review mechanisms of challenge and appeal, as described earlier.

Enforcement may be opposed in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award[77] – for example, where there has been a serious irregularity in procedure resulting in substantial injustice to the applicant or where the award was obtained by fraud. The Arbitration Act confines court intervention to situations which risk undermining the integrity of the arbitral

[71] Masri v. Consolidated Contractors International (UK) Ltd and others (No 3) [2008] EWCA Civ 625 at 16.
[72] Ecobank Transnational Incorporated v. Tanoh [2015] EWCA Civ 1309.
[73] *Id*. at 91.
[74] Zermalt Holdings SA v. NuLife Upholstery Repairs Ltd [1985] EGLR 14, per Bingham J, cited in Fidelity Management v. Myriad International Holdings [2005] EWHC 1193 (Comm.) at 2, a case directed to a Section 68 challenge for serious irregularity.
[75] Coppee-Lavalin S.A. /N.V. v. Ken-Ren Chemicals and Fertilisers Ltd (In Liquidation in Kenya) and Voest Alpine Aktiengesellschaft v. Ken-Ren Chemicals and Fertilisers Ltd (In Liquidation in Kenya) [1994] 2 Lloyd's Rep 109 at 10.
[76] Mutual Shipping Corporation v. Bayshore Shipping Co. (the *Montan*) [1985] 1 Lloyd's Rep at 192, citing Intermare Transport G.m.b.H. v. International Copra Export Corporation (the *Ross Isle and Ariel*" [1985] 2 Lloyd's Rep at 589.
[77] Section 103(3) Arbitration Act 1996.

process. A key aspect of public policy is to minimise court intervention, on the basis that the parties have chosen to resolve their dispute under arbitral proceedings.

In matters of public policy, the focus of English law is upon domestic public policy. Given that enforcement of arbitral awards is by necessity a local procedure, international public policy is considered to have a more limited role than local public policy. However, it can affect the reasons why the English courts may step in. The starting position for the current English public policy position on enforcement of arbitration awards is that any arbitration has a territorial link to the seat in which such arbitration took place. The award does not exist in a lawless vacuum. In principle, this means that the challenged or unchallenged state of the award in the place of its seat will be an important consideration on any question of challenge in the English courts.

In order for the English courts to enforce an award that has been set aside by a court in the seat of the arbitration, positive and cogent evidence that the decision offended basic principles of honesty, natural justice and domestic concept of public policy will be needed. This approach can be seen in, for example, *Yukos Capital Sarl* v. *OJSC Oil Co Rosneft*.[78] In that case, the judge held that it was open to the applicant to argue that no effect should be given to the set-aside decision handed down by the Russian courts, 'based on conventional English conflict of law principles, for example that the judgments had been obtained by fraud, that it would be contrary to public policy to enforce the judgements, or that the judgments were obtained in breach of the rules of natural justice'. This case is discussed in more detail in Section 3.4. The approach of the English courts in matters of enforcement of a foreign award can be contrasted with that of the French courts, where the foreign law of the seat is not treated in the same way in matters of enforcement.[79]

One of the key current debates affecting public policy is the question of transparency, and the potentially adverse effect that private arbitration awards have on the development of a body of case law and binding precedent. For example, the ICC has recently published its revised note to parties and arbitral tribunals on the conduct of arbitration,[80] so that unless the parties opt out, ICC arbitral awards may be published in their entirety no less than two years after they have been notified to the parties. This is perhaps the boldest initiative from across a spectrum of transparency initiatives latterly being pursued by some of the world's leading arbitral institutions. In the past, it has not been uncommon to see publication of anonymised excerpts of procedural decisions issued by tribunals under the auspices of an arbitral institution, with the consent of the parties. However, it will be interesting to see how the recent ICC changes will in practice operate, both as to whether parties opt out, and as to how frequently the ICC chooses to publish awards. The new provisions apply to awards made as from January 1, 2019.

3.3 *Statistics*

As can be seen from the discussion, parties to an arbitration have a number of potential avenues to test the limits of the arbitral process in the English courts. One may legitimately wonder

[78] Yukos Capital Sarl v. OJSC Oil Co Rosneft [2014] EWHC 2188.

[79] Société Hilmarton v. Société OTV, Cour de cassation chambre civile 1 Audience publique du mercredi Mar. 23, 1994 N° de pourvoi: 92-15137 (1994) *Bulletin* I No. 104 at 79 (Paris Court of Appeal, Dec. 19, 1991); Société Pt Putrabali Adyamulia v. Rena Holding and others, Cour de Cassation, First Civil Chamber, June 29, 2007 (Petition No Y-06-13.293).

[80] *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, International Chamber of Commerce (Jan. 1, 2019), https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/.

whether the existence of these potential avenues of challenge might hinder or weaken the arbitral process as a dispute resolution solution. The existence in England of limited appeal rights to court from arbitral awards, for example, might seem counterintuitive where parties have specifically chosen to resolve their disputes in private. Statistics provide some relevant insight as to the courts' practical impact in England on arbitral process:

Claims under Section 68 (Serious Irregularity)

Year	No. of claims	Successful challenges
2015	34	1
2016	31	0
2017–March 2018	47	0

Claims under Section 69 (Appeal on a Point of Law)

Year	No. of claims	Permission for appeal granted	Successful appeals
2015	60	20	4
2016	46	0	0
2017–March 2018	56	10	1

As can be seen from the tables, between 2015 and March 2018, of 274 claims brought under Sections 68 and 69 of the Arbitration Act, only 6 of these reported claims were ultimately successful.[81] By way of limited update, from January 2019 to mid-August 2019, Lloyd's Law Reports published 53 cases of challenge to awards. Of those, 5 considered challenges under Section 67 of the Arbitration Act (of which 1 was successful), 12 considered challenges under Section 68 of the Arbitration Act (of which 3 were successful) and 6 considered challenges under Section 69 of the Arbitration Act (of which 1 was successful).[82] It is clear from these figures that although challenging awards in the English courts may be a regular occurrence, they remain relatively rare set against the total volume of arbitral activity in the UK. And even more rarely do such challenges succeed.

3.4 *Requirements for Enforceability of Awards*

One of the key advantages of arbitral proceedings over court proceedings is that the award will be recognised and enforced in many more countries than an English court judgment. This is most notably because of the NY Convention.[83] In order to be enforceable, an arbitration award must be a valid award. An order or direction made by the arbitral tribunal will be insufficient to commence enforcement proceedings in the English courts.[84] The award has to form a clear, unambiguous decision by the tribunal on some or all of the issues raised during the proceedings.

[81] Statistics obtained from *Commercial Court Users' Group Meeting Report – March 2018*, Courts and Tribunals Judiciary (Apr. 29, 2018), https://www.judiciary.uk/publications/commercial-court-users-group-meeting-report-march-2018/.

[82] Statistics obtained from analysis of Lloyd's Law Reports cases on i-Law, https://www.i-law.com/ilaw/doc/view.htm?id=400380.

[83] The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards may also assist.

[84] Michael Wilson & Partners Ltd v. John Forster Emmott [2008] EWHC 2684 (Comm) at 14.

Unless the parties have agreed the award or have agreed that reasons are not necessary, the award must set out the reasoning behind the tribunal's decision.[85]

The award must not leave any matters to be delegated to a third party. The tribunal may consult experts in connection with the issues to be decided upon (for example by appointing an expert or accepting counsel's opinion on certain points of law[86]), but the tribunal must come to its conclusions independently, and not delegate decision making. Where the tribunal has expert knowledge in a relevant field, the parties are deemed to have agreed that such expert knowledge would be used in reaching a decision. However, the tribunal should be careful to ensure that this knowledge is of general application in evaluating the current case, rather than the supply of new or specific comparable evidence.[87]

The award must be 'final', i.e., it must be a complete decision in relation to the issues requiring a decision to be made. Therefore, an interim or a partial award, i.e., one which makes a finding on some but not all of the issues in the dispute or which leave certain aspects of the dispute undecided may not be sufficient to be enforced. The award made must be one in which the tribunal has not exceeded its powers either during proceedings or in making the award, must not have been obtained by fraud, and must not be contrary to public policy.[88]

In England and Wales, an award (including a foreign award) may be enforced by (1) seeking leave to enforce the award as a judgment under Section 66 of the Arbitration Act,[89] (2) an action on the award (common law) or (3) for qualifying awards, under the NY Convention. Further procedure for enforcement is set out in the Civil Procedure Rules.[90] The NY Convention limits a party's grounds to challenge such an enforcement application. This limited approach is also reflected in Section 66 of the Arbitration Act. A resisting party's grounds for challenge may include (1) a lack of substantive jurisdiction,[91] (2) domestic public policy and (3) ambiguity or defect in the form of the award.

The NY Convention is incorporated into English law in the Arbitration Act, which includes provisions relating to the recognition and enforcement of arbitral awards.[92] In order to enforce an NY Convention award, the party seeking enforcement or recognition must produce a duly authenticated original award, or a certified copy of such award and a duly authenticated original arbitration agreement or a certified copy of such agreement, and a certified translation into English, if the award or agreement is written in another language. The NY Convention grounds upon which the English courts may refuse to recognise or enforce an arbitral award are set out in the Arbitration Act:

1. party to the agreement (under the law applicable to him) was under some incapacity;
2. agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
3. party was not given proper notice of the appointment or of the proceedings, or was otherwise unable to present his case;

[85] Section 52(4) Arbitration Act 1996.
[86] *Id.* at Section 37(1)(a); Gladesmore Investments Ltd v. Caradon Heating Ltd [1994] EG.
[87] Checkpoint Ltd v. Strathclyde Pension Fund [2003] EWCA Civ 84; Annie Fox v. PG Wellfair Ltd [1981] 2 Lloyd's Rep 514; JD Wetherspoon plc v. Jay Mar Estates [2007] EWHC 856.
[88] Arab National Bank v. The Registrar of Companies [2005] EWHC 3047 at 8-112.
[89] Section 66(1) Arbitration Act 1996.
[90] Rules 62.17–62.21, Part 62 Civil Procedure Rules as of Dec. 21, 2017, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part62.
[91] Section 66(3) Arbitration Act 1996.
[92] *Id.* at 101–103.

4. award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission;
5. composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement with the law of the country in which the arbitration took place; or
6. award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.[93]

As discussed, English courts will generally give recognition to court decisions of the seat setting aside an award, or refusing to set aside an award and may also order the party resisting enforcement to give suitable security for the award.

An illustration of this approach can be found in the relatively recent case of *Yukos Capital Sarl* v. *OJSC Oil Co Rosneft*, albeit that the judgment was addressed to a series of preliminary issues and did not decide the final issue as to whether the awards in question were enforceable.[94] Yukos was a part of a group of companies involved in oil production in Russia. The group was broken up and Russian government-owned Rosneft acquired the majority of its assets. Yukos had made various intragroup loans to its subsidiary Yuganskneftegaz, which was later acquired by Rosneft. Based on the terms of the loans, Yukos made a claim against Rosneft for over $160 million interest for the period between 2006 and 2010 during which Rosneft refused to satisfy four arbitral awards for a total of US $425 million made under the rules of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry in Moscow in favour of Yukos. Yukos then commenced enforcement proceedings in The Netherlands. However, on Rosneft's application, the awards were then set aside by the Russian courts. In a judgment of April 28, 2009, the Amsterdam Court of Appeal refused leave to enforce the Russian judgments on the grounds that the annulment decisions made by the Russian courts were not impartial or independent. The English Court of Appeal had earlier held that the Dutch court decision was guided by considerations of Dutch public order rather than English public policy and therefore did not create an issue estoppel on Rosneft in the English court proceedings.[95]

It was left open to the applicant to argue that no effect should be given to the Russian court set-aside decisions. It was thus argued that the set-aside decisions were (1) tainted by bias; (2) contrary to natural justice, in that the Russian courts deliberately misapplied the law; (3) procured in circumstances violating Article 6 of the European Convention on Human Rights; and (4) formed part of an illegitimate campaign of commercial harassment waged against the claimant by the Russian Federation for political reasons. The court's response was to articulate a test: whether the court in considering whether to give effect to an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award. In applying this test, it was held that it would be both unsatisfactory and contrary to principle if the court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy.[96]

However, an English court will not lightly ignore the decision of a foreign court at the seat of arbitration. In order for English courts to enforce an award that has been set aside in the

[93] Section 103 Arbitration Act 1996.
[94] Yukos Capital Sarl v. OJSC Oil Co Rosneft [2014] EWHC 2188.
[95] Yukos Capital Sarl v. OJSC Rosneft Oil Co (No. 2) [2014] QB 438.
[96] *Supra* note 94, at 20.

seat of the arbitration, cogent evidence of the foreign court acting deliberately wrongfully will need to be shown. Parties accordingly face high barriers to enforce awards which have been annulled by the court of the seat of the arbitral proceedings. This approach can be clearly seen in a recent post *Yukos* decision, again involving the Russian courts.[97] In the case, the English court dismissed an attempt to enforce a Russian award which had been annulled by a court in Moscow. The English court held that it was insufficient for the party seeking enforcement to show that the Russian court's decision was 'manifestly wrong or is perverse'. It was necessary that:

> (1) The decision must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it.
>
> (2) The evidence or grounds must be 'cogent'.
>
> (3) The decision of the foreign court must be deliberately wrong, not simply wrong by incompetence.[98]

Short of refusing enforcement, where an award is being challenged in the courts of the seat, the English court has power to 'suspend' enforcement of an arbitration award in the England, pending an application to challenge it.[99] An example of this is to be found in *APIS AS* v. *Fantazia Kereskedelmi KFT*.[100] In that case, a company sought a stay of enforcement of an arbitration award, alleging a serious irregularity in the conduct of the proceedings. The court held that it possessed an inherent jurisdiction to stay the enforcement of the award. However, the outcome of a challenge to enforcement of a foreign award in England may not necessarily follow the same path as the enforcement courts in the country of the seat. This issue arises most acutely where there has been no application at the seat to set aside the award. In a seminal case, *Dallah*,[101] the English court refused to enforce an arbitration award made in France against the government of Pakistan. The English court considered that the government of Pakistan had not been a party to the agreement containing the arbitration clause.

In the case, Dallah entered into a Memorandum of Understanding with the government of Pakistan to provide housing in Saudi Arabia for Pakistani pilgrims to Mecca. The president of Pakistan issued an ordinance creating the Awami Hajj Trust. The trust then entered into an agreement with Dallah, reiterating the terms negotiated by the government. The agreement contained an ICC arbitration clause but no choice of law clause. Pakistan was not a signatory to the agreement. The agreement lasted only about four months and disputes arose. The trust first brought claim against Dallah for breach of the agreement in Pakistani courts. The Pakistani courts dismissed the trust's claims on the basis that the trust no longer existed. Dallah then commenced an ICC arbitration against Pakistan, which Pakistan resisted on a number of grounds, including lack of jurisdiction.[102]

In June 2001, an arbitral tribunal made a jurisdictional award, declaring that Pakistan was bound by the arbitration clause in the agreement. Seated in Paris, the tribunal applied principles of French international arbitration law and decided jurisdiction based on 'those transnational general principles and usages reflecting the fundamental requirements of justice in international

[97] Maximov v. OJSC Novolipetsky Mettalurgichesky Kombinat [2017] EWHC 1911 (Comm).

[98] *Id.* per Sir Michael Burton at 15. The judge records that there was no issue between the parties on this approach.

[99] See Section 103(5) Arbitration Act 1996 in the case of an NY Convention award. In the case of an English award, the court has an inherent power – *see* APIS AS v. Fantazia Kereskedelmi KFT [2001] 1 All ER (Comm) 348.

[100] APIS AS, *supra* note 99.

[101] Dallah Real Estate & Tourism Holding Co v. Pakistan [2010] UKSC 46.

[102] *See* Gary Born, *Dallah and the New York Convention*, Kluwer Arbitration Blog (Apr. 7, 2011), http://arbitrationblog.kluwerarbitration.com/2011/04/07/dallah-and-the-new-york-convention/.

trade and the concept of good faith in international business'.[103] The tribunal held that the Trust was the 'alter ego' of the Pakistan government, making the government a 'true party' to the agreement and its arbitration clause.[104] The tribunal subsequently made a final award in favour of Dallah in the amount of $20,588,040. Dallah sought to enforce this award in England under the NY Convention and the Arbitration Act and also sought exequatur of the award in France. Pakistan resisted enforcement of the award in England. Pakistan relied on Article V(1)(a) of the NY Convention to argue that that there was no valid arbitration agreement. In August 2009, the French courts granted exequatur of the award for enforcement purposes. However, in its later decision, the UK Supreme Court denied enforcement of the award.

Before the UK Supreme Court, Dallah did not pursue the alter ego theory that had underpinned the tribunal's award. Argument focused instead on the common intention of the parties, applying French law principles. The court read the agreement narrowly and held that there had been no 'common intention'[105] for the government of Pakistan to be a party to the arbitration agreement, commenting that 'there was no material sufficient to justify the tribunal's conclusion'.[106] For one leading commentator, the Supreme Court did not '[apply] the real substance of the French standards when evaluating the parties' actual conduct and agreements'.[107] These would have been the appropriate standards to use, given that the tribunal was seated in France. And there was no choice of law specified in the agreement.

Turning to matters of fraud, alleged fraudulent conduct in arbitral proceedings has led to some recent interesting decisions. In *RBRG Trading (UK) Limited* v. *Sinocore International Co Limited*,[108] Hamblen LJ, held that a Chinese CIETAC award could be enforced in England even though the arbitrators found that the enforcing party, Sinocore, had behaved fraudulently by using forged bills of lading to demand payment from RBRG. In reaching this conclusion, it was relevant that Sinocore had been caught attempting to defraud RBRG's bank, which had refused to pay against the forged bills of lading, and that Sinocore's actions only constituted 'attempted fraud'.

In *Stati* v. *Kazakhstan*,[109] the English Court of Appeal allowed an appeal against the first instance decision granting an application to set aside a notice of discontinuance. Stati had obtained an award in a Swedish seated arbitration against Kazakhstan and successfully applied for an order to enforce the award in England. Kazakhstan sought to have the order set aside, alleging that the award had been obtained by fraud. The court gave Kazakhstan permission to add the fraud allegations to its application to set aside the enforcement order, and directed that it should proceed to trial 'as if commenced under CPR Part 7'. Stati then served notice of discontinuance of the enforcement proceedings and offered undertakings not to enforce the award. However, Kazakhstan argued for a final determination on the merits, due to its independent claims for declaratory remedies which would be unaffected by the notice of discontinuance or, alternatively, that the notice of discontinuance should be set aside. Knowles J set aside the notice of discontinuance. While the judge held that the fraud claim was not an independent claim, he considered that Kazakhstan had a legitimate interest in seeking to have the enforcement order set aside on the merits and that it would be useful to have a concluded answer on the

[103] Dallah Real Estate, *supra* note 101, at 33.
[104] *Id*. at 39.
[105] *Id*. at 132.
[106] *Id*. at 145.
[107] Born, *supra* note 102, at 4.
[108] RBRG Trading (UK) Limited v. Sinocore International Co Limited [2018] EWCA Civ 838 at 36.
[109] Stati v. Kazakhstan [2017] EWHC 1348 (Comm).

fraud issue. He directed that the fraud allegations should proceed to trial. The Court of Appeal agreed with Knowles J that the fraud claim was a defence to the enforcement action, and not an independent claim. However, for the Court of Appeal, once Stati discontinued the enforcement proceedings, Kazakhstan ceased to have a legitimate purpose in pursuing its defence in the English courts. The appeal was therefore allowed so as to give effect to the notice of discontinuance and bring the English proceedings to an end.[110]

In *Carpatsky Petroleum Corporation* v. *PJSC Urkrnafta*,[111] upon an application by Urkrnafta to set aside an order granting permission to enforce an award under the NY Convention, the court held that allegations of fraud which came to light only after the arbitral hearing had been concluded and after the award had been issued, would not be permitted to go to trial. In its application, Urkrnafta sought to rely upon documents obtained in March 2011, in circumstances when the award had been made in October 2010. It was urged by Urkrnafta that the new documents showed that the chairman of Carpatsky Petroleum Corporation had lied in his evidence on an issue central to the arbitral award.

Urkrnafta had previously mounted an unsuccessful challenge to the award in the Svea Court of Appeal, in Sweden, which was the competent authority of the seat of the arbitration for such matters. It had previously unsuccessfully contested enforcement in both the United States and The Netherlands. It had successfully resisted enforcement in the Ukraine based on a procedural argument and on an argument that there was no valid arbitration agreement in writing. Fraud had not been alleged in any of these other proceedings.

The court set out the principles to be taken into account when considering the public policy exceptions for enforcing arbitral Awards:[112]

> (a) Section 103 of the Arbitration Act reflects and embodies the predisposition in favour of enforcing
>
> New York Convention awards. Grounds for refusing recognition and enforcement of arbitral awards are to be construed narrowly;
>
> (b) Public policy is the public policy of England and Wales;
>
> (c) Public policy exceptions are a safety valve that should only be invoked in a clear case and which must be approached with extreme caution; and
>
> (d) When considering whether an award has been obtained by fraud, nothing short of reprehensible or unconscionable conduct will suffice to invest the court with a discretion to consider denying recognition or enforcement of the award.

The court also set out the evidential threshold facing an applicant seeking to resist enforcement of an award based on allegations of fraud, made up of two conditions: (1) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators and could not with reasonable diligence have been discovered before the award and (2) where perjury is the fraud alleged, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing and if unanswered must have that result.[113]

In light of these principles and the evidential threshold facing the applicant, the court had no difficulty in finding that Urkrnafta fell short. For the English judge, Urkrnafta was making

[110] Stati and others v. Republic of Kazakhstan [2018] EWCA Civ 1896, Lloyd's Law Reports 2 Lloyd's Rep. 263. The appeal was allowed on terms that the enforcement order be set aside and that the claimants give to the court undertakings, offered by them at first instance, not to enforce the award in England.

[111] Carpatsky Petroleum Corporation v. PJSC Urkrnafta [2018] EWHC 2516 (Comm). The *Stati* case was relied upon by the judge in this case.

[112] *Id*. at 39–42.

[113] The '*Westacre* test': Westacre Investments Inc v. Jugoimport-SDPR Holding Co Ltd [2000] QB 288, per Waller LJ.

essentially the same arguments on matters that had already been before the arbitral tribunal.[114] The new documents were not decisive. There were no abnormal circumstances which would justify the continuance of the fraud allegations. The court considered Urkrnafta's failure to raise fraud in the Swedish proceedings as a relevant factor (although not a bar in itself). Finally, the size of the award – US $145 million compared to the initial investment of US $6 million was not a sufficiently compelling reason to allow the fraud allegations to go to trial.[115]

Where enforcement of awards is concerned, another issue which can sometimes arise is around the claimed sovereign immunity of one of the parties. In a very recent case, *General Dynamics United Kingdom Ltd* v. *State of Libya*,[116] the principal issue to be considered was whether an arbitration award could be enforced against a state by court proceedings in the English courts, without formal service on that state. Section 12 of the State Immunity Act 1978 governs the service of court proceedings on states, and provides that:

> Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

An NY Convention award rendered against the state of Libya was not honoured and the claimant sought to enforce the award in England under Section 101 of the Arbitration Act. Application for enforcement was made to the English court. Teare J entered judgment on the award and made an order dispensing with the usual requirements of service on Libya, as he considered he had power to do under the court rules. The judge ordered that:

> Pursuant to Civil Procedure Rules 6.16 and 6.28, the Claimant has permission to dispense with service of the Arbitration Claim Form dated 21 June 2018, any Order made by the Court and other associated documents.

To ensure that the claim form nevertheless came to the attention of the state of Libya, Teare J made orders that the claim form and related documents be couriered to various addressees at various addresses in Tripoli and Paris. The state of Libya applied to set aside Teare J's orders. The court found that service under Section 12 of the State Immunity Act 1978 was mandatory where the English court sought to exercise jurisdiction over a foreign state. No other method of service was permitted. The court considered that the purpose of serving proceedings correctly was especially important in this case, not only to ensure that the content of the document served was communicated to the defendant but also to ensure that the jurisdiction of the English court was invoked against the state of Libya in a proper manner. It was held that the court's general power to dispense with service of a claim form in exceptional circumstances under CPR 6.16 did not apply where service was required to commence proceedings against a state, as this would be contrary to the mandatory terms of Section 12 of the State Immunity Act 1978.[117]

[114] Carpatsky Petroleum Corporation v. PJSC Urkrnafta [2018] EWHC 2516 (Comm) at p97: 'The overwhelming impression, in particular from the lengthy evidence of Mr Mascarenhas, is that Urkrnafta cannot accept its defeat before the tribunal on the merits. It wishes to re-run the same arguments on the same material that was before the tribunal', per Carr J.

[115] *Id.* at 89, 93 and 95.

[116] General Dynamics United Kingdom Ltd v. State of Libya [2019] EWHC 64 (Comm).

[117] General Dynamics United Kingdom Ltd v. State of Libya [2019] EWHC 64 (Comm) at 79.

4 JUDICIAL INTERPRETATION OF COMMERCIAL ARBITRATION CLAUSES

Since the Arbitration Act 1996 came into force, and following a Court of Appeal decision,[118] subsequently approved by the House of Lords,[119] the contemporary approach of the English courts is that any jurisdiction or arbitration clause in an international commercial contract should be construed to 'encompass the widest range of potential disputes that its terms will reasonably permit, including non-contractual claims and claims involving an admission of a criminal purpose'.[120] The value of previous authorities when construing arbitration clauses has been diminished considerably following the decision made in *Fiona Trust*, where the Court of Appeal indicated that parties who enter into arbitration agreements do not expect that, in the event of a dispute, there will be detailed argument, by reference to authorities, as to the precise meaning of the particular phrases that they have adopted. Instead, the court should adopt a presumption of 'one-stop adjudication',[121] reviewing the clause or agreement afresh. In the leading judgment in the House of Lords, Lord Hoffman stated the matter in the following terms:[122]

> 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 that certain questions were intended to be excluded from the arbitrator's jurisdiction.

Clear words would be necessary to exclude from an arbitration agreement any allegations of criminal conduct linked to the parties' contractual obligations.[123] Where the words 'arising out of or in connection with' (or similar) appear in an arbitration clause, this should generally be sufficient to capture any conceivable dispute linked to the contract, except for disputes where there is a question as to whether the contract in question ever existed.

Generally, claims based on alternative causes of action will be treated as falling within the tribunal's jurisdiction, especially where the facts of the dispute are related to other contractual claims falling within the arbitration agreement. In *JSC BTA Bank* v. *Ablyazov*, the phrase '[a]ny disputes, differences or claims arising from this contract (agreement) or in connection therewith' was held to cover noncontractual claims in connection with the underlying agreement.[124]

There may exceptionally be a question mark over the extent to which tort claims will fall within an arbitration agreement contained in a contract, and whether particular wording is sufficient to include tort claims that are advanced. In *Injazat Technology Capital Ltd* v. *Dr. Hamid Najafi*,[125] on an application for an injunction to restrain the defendant from pursuing a number of arbitrations, Flaux J had to consider whether a noncontractual claim for false imprisonment relating to an order obtained to prevent the defendant from leaving Dubai as part of the steps to enforce the final award in Dubai, fell within the scope of the arbitration

[118] Fiona Trust & Holding Corp v. Yuri Privalov [2007] EWCA Civ 20.
[119] Fiona Trust & Holding Corporation v. Privalov [2007] UKHL 40.
[120] Sutton, Gill, & Gearing, *supra* note 51, at 26, para. 2-004.
[121] Practical Law Arbitration, *Interpreting Arbitration Agreements under English Law*, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/Document/Id249cb971c9611e38578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2fv1%2f&transitionType=Default&contextData=(sc.Default)&firstPage=true.
[122] Fiona Trust, *supra* note 119, per Lord Hoffmann at 13.
[123] Interprods v. De La Rue International [2014] EWHC 68 per Teare J at 7 and 8.
[124] JSC BTA Bank v. Ablyazov [2011] EWHC 587 (Comm) at p64.
[125] Injazat Technology Capital Ltd v. Dr. Hamid Najafi [2012] EWHC 4171.

agreements in question. As part of his reasoning, he considered that such a claim did not fall within the scope of the arbitration agreements.[126]

The English courts generally strive to give effect to parties' intention to refer disputes to arbitration 'except in cases of hopeless confusion'.[127] In *Paul Smith Ltd* v. *H&S International Holding Inc.*,[128] the court found a binding arbitration agreement to exist in the following provisions:

> 13. Settlement of disputes – . . . any disputes or difference . . . shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules.
>
> 14. Language and law – This Agreement is written in the English language and shall be interpreted according to English law. The Courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit.

Steyn J interpreted clause 13 as a self-contained arbitration agreement, with clause 14 specifying the lex arbitri, the curial law or the law governing the arbitration. There was no inconsistency between clauses 13 and 14, and both clauses were valid and binding. The reference to the English courts in clause 14 did not affect the validity of the arbitration agreement.

While it can be seen that a broadly expressed arbitration agreement will be given the fullest effect possible by the English courts, it is important to note that the court cannot rewrite the parties' agreement where the arbitration agreement is expressed in more limited terms. In the *Petros Hadjikyriakos*,[129] the arbitration agreement was clearly limited to freight and demurrage claims. The arbitrators had no jurisdiction to hear similar claims relating to losses suffered for overtime for the elevator used to load and discharge cargo, and they could not construe the agreement to cover such claims.

In cases where parties have elected to carve out only certain disputes for arbitration, leaving others for resolution by other means, the English courts have at times been left with a difficult task. Where parties wish to adopt such hybrid or tiered dispute resolution procedures, it is important that the agreement be clearly expressed. In *Lovelock* v. *Exportles*,[130] the arbitration clause purported to submit '[a]ny dispute and/or claim' to arbitration in England and '[a]ny other dispute' to arbitration at the USSR Chamber of Commerce Foreign Trade Arbitration Commission in Moscow. Lord Denning found these clauses 'impossible to reconcile', and 'beyond the wit of man – or at any rate beyond my wit – to say which dispute comes within which part of the clause'.[131] The judge refused to give effect to the clause, with the result that the dispute was left to be decided by the court.

However, it is sometimes possible to 'modify' detailed provisions of an arbitration agreement where necessary to give effect to the parties' intentions. In *Film Finance Inc.* v. *The Royal Bank of Scotland*,[132] the court modified the detailed provisions of the arbitration clause in order to give

[126] *Id.* at 9. The decision does not record the terms of the arbitration agreement in question, which limits the usefulness of this case for the reader. The judge was also clearly unimpressed with the claim: 'the claim for false imprisonment, even if it were not wholly unmeritorious, is not a claim which falls within the scope of the arbitration clause in either contract'.

[127] Sutton, Gill, & Gearing, *supra* note 51, at 69, para. 2-077.

[128] Paul Smith Ltd v. H&S International Holding Inc. [1991] 2 Lloyd's Rep 127 QBD (Comm) per Steyn J at 129.

[129] Food Corp of India v. Achilles Halcoussis (the *Petros Hadjukyriakos*) [1988] 2 Lloyd's Rep 56.

[130] ERJ Lovelock v. Exportles [1968] 1 Lloyd's Rep 163.

[131] *Id.* at 164.

[132] Film Finance Inc. v. The Royal Bank of Scotland [2007] EWHC 195 (Comm).

effect to the true intention of the parties. The court justified its approach in the following terms:[133]

> It is a well-established principle of interpretation that in these circumstances provisions may be read subject to necessary modifications, and disregarding what is inapplicable or 'insensible' (to use the word of Lord Esher MR in Hamilton & Co v Mackie & Sons, (1889) 5 TLR 677). This, in my judgment, will lead to an interpretation that was intended by the parties.

In *Mangistaumunaigaz Oil Production Association* v. *United World Trade Inc.*,[134] the court did not accept the argument that the words *if any* were inconsistent with an unconditional agreement to arbitrate. The court upheld the clause which provided for '[a]rbitration, if any, by ICC Rules in London', finding that the words *if any* were either *surplusage* which could be ignored, or an abbreviation for *if any dispute arises*.

By way of contrast, in *Kruppa* v. *Benedetti*,[135] the relevant clause provided that 'the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction'. The court found that the clause did not give rise to a binding agreement to arbitrate. Cooke J considered the clause inadequate to form an arbitration agreement on the basis that it was logically not possible to have an effective multitier dispute resolution clause with two binding tiers requiring arbitration and court litigation.[136] Cooke J held that the clause did not require the parties to refer any dispute to arbitration in the sense required by the Arbitration Act but merely envisaged the parties attempting to refer the matter to arbitration by agreement between them, failing which the English courts were to have jurisdiction on a nonexclusive basis.

In a very recent case, *Backos* v. *WFW Global LLP*,[137] and taking a pragmatic and commercial approach to matters, the English court held that disputes which arose out of the operation of an LLP agreement between the parties were to be determined by arbitration, despite the fact that one of the parties to the arbitration had ceased to be a member of the LLP when the dispute arose. After an award was rendered that was adverse to Mr Backos, he made application challenging the award for want of jurisdiction under Section 67 of the Arbitration Act. The arbitration clause on its face appeared to apply only to current 'Members' and not to 'Outgoing Members', with the contractual definition of *Member* excluding an 'Outgoing Member'. However, the court proceeded to construe the word *Member* to include someone who was a member when the relevant events occurred, which was enough to hold that the arbitration agreement applied and the award could stand.[138]

[133] *Id.* at 36.
[134] Mangistaumunaigaz Oil Production Association v. United World Trade Inc. [1995] 1 Lloyd's Rep 617 QBD (Comm) at 617.
[135] Kruppa v. Benedetti and another [2014] EWHC 1887 (Comm).
[136] *Id.* per Cooke J at 12.
[137] Backos v. WFW Global LLP [2019] EWHC 243 (Ch).
[138] *Id.* at p34.