Part III—Recognition and enforcement of certain foreign awards

Part IV—General provisions

Schedules

PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

Introductory

General principles

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and
(c) in matters governed by this Part the court should not intervene except as provided by this Part.

NOTES

This section lays down the general principles upon which the Act is based. Its provisions had no previous precedent in statutory arbitration law. It is made clear by the closing words of the first paragraph, and,

indeed, by the DAC Report, paragraphs 18 to 22, that, in the case of any ambiguity in the Act, the three stated principles are to have overriding effect. The Act does not seek to define arbitration as such, but rather defines its most important features.

Statutory arbitrations and Article 6 ECHR

The specific problem of compulsory statutory arbitrations and Art 6 of the European Convention on Human Rights (ECHR)[1] was intended to be addressed on a case-by-case basis, by means of statutory instruments made under section 97, as explained in the Notes to sections 97 and 98 below. However, no statutory instruments have been introduced yet. Nevertheless, the relationship between Art 6 and arbitration has been given detailed consideration by the courts, and the following propositions may be put forward: (i) an arbitration agreement contained in standard rules does not infringe Art 6,[2] as the agreement constitutes a waiver of the right to a public hearing[3] by a judge,[4] and the parties are in any event protected by rights of appeal; (ii) an order for security for costs may in principle infringe Art 6 if it has the effect of preventing the claimant from pursuing his claim;[5] (iii) arbitration clauses may be incorporated from one document or contract into another without infringement of Art 6;[6] (iv) an oral hearing in the arbitration is not always necessary as long as the procedure adopted is otherwise fair;[7] (v) limited reasons are necessary for any refusal by the court to give permission to appeal against an award on the basis of error of law,[8] although the right to appeal may be legitimately waived by agreement;[9] and (vi) the prohibition on the giving of permission to appeal by the Court of Appeal is consistent with Art 6, as long as the Court of Appeal can intervene where the judge failed to reach any valid decision on whether permission to appeal should be granted.[10]

Impartiality and independence

Principle (a) has specific significance, as it forms part of the general duty of the arbitrators in their handling of the arbitration (section 33(1)(b)). Some commentators have noted that the word 'impartial' does not necessarily imply 'independent' and pointed out the lack of requirement for independence (contrast Art 12 of the Model Law). Nevertheless, the DAC Report concluded (see paragraphs 101 to 104) that impartiality ought to be enough, as in certain areas of arbitration, particularly where expert arbitrators are required, it might be difficult to find qualified arbitrators who are wholly uninterested in the issue, and accordingly that it should be enough that they act impartially. The point is developed further in the comments on section 24(1)(a) of the Act (removal of an arbitrator for want of impartiality). Despite the lack of inclusion of any duty to remain independent, most major institutional rules incorporate a requirement that the arbitrator must be impartial *and* independent.[11] The effect of this is, of course, to impose a contractual duty of independence, rather than a statutory one, but in practice the difference is unlikely to be significant.

1. Now incorporated into English law by the Human Rights Act 1998.
2. As long as the agreement is legitimate and not induced by duress, misrepresentation or mistake: this reservation was recognised in *Stretford v Football Association Ltd* [2007] 2 Lloyd's Rep 31 (CA).
3. *Department of Economics Policy and Development and Policy of the City of Moscow v Bankers Trust Co* [2004] 2 Lloyd's Rep 179.
4. *Stretford v Football Association Ltd* [2007] 2 Lloyd's Rep 31 (CA); *Shuttari v Solicitors Indemnity Fund* [2007] EWCA Civ 244; *Entico Corporation Ltd v UNESCO* [2008] 1 Lloyd's Rep 673; *El Nasharty v J Sainsbury plc (No 2)* [2008] 1 Lloyd's Rep 360.
5. See (in another context) *Nasser v United Bank of Kuwait* [2002] 1 All ER 401; *El Nasharty v J Sainsbury plc (No 2)* [2008] 1 Lloyd's Rep 360.
6. *Welex AG v Rosa Maritime Ltd* [2002] 2 Lloyd's Rep 701.
7. *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 2 Lloyd's Rep 1; *BLCT (13096) Ltd v J Sainsbury plc* [2004] 2 P & CR 32.
8. *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 2 Lloyd's Rep 1.
9. *Sumukan v Commonwealth Secretariat* [2007] 2 Lloyd's Rep 87 (CA).
10. *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 2 Lloyd's Rep 1; *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2007] 1 Lloyd's Rep 142; *Republic of Kazakhstan v Istil Group Ltd* [2007] 2 Lloyd's Rep 548 (CA); *Philip Hanby Ltd v Clarke* [2013] EWCA Civ 647.
11. See for example LCIA Rules (1998), Art 5.2 (**Art 5.3), ICC Rules (2012), Art 11.1, SCC Rules (2010), Art 14.

The principle of party autonomy

Principle (b) was referred to by the DAC as encompassing two distinct limbs: the parties should be held to their agreement; and the parties should be free to agree how their disputes are to be resolved.[12] This principle of party autonomy has been repeatedly referred to by the courts since the inception of the Act, including recently by the Supreme Court in *Jivraj v Hashwani*.[13] As will be seen in later discussion of the Act, the second limb of the principle as so formulated is a little misleading, as autonomy over the procedure will generally vest in the arbitrators rather than the parties. Moreover, there are particular matters over which the provisions of the Act are paramount and override the intentions of the parties (these are the mandatory provisions, listed in Schedule 1 to the Act). In particular, section 33 requires the arbitrators to conduct the proceedings in accordance with the rules of natural justice and in a manner proportional to the dispute, which operates as an implied limit on principle (b), as it is thought that an arbitration which does not comply with these minimum requirements can scarcely be described as such.[14] It has been recently confirmed by the Court of Appeal that principle (b) is not concerned with arbitrability, i.e. the permissible subject matter of arbitrations: *Fulham FC v Richards & Anr*.[15]

Minimal court interference

Principle (c) reflects a general desire to minimise judicial intervention in the running of arbitrations where the parties or the arbitrators can resolve issues for themselves, in the interests of speed, finality and reduced costs, and replicates the principle underlying Art 5 of the Model Law, with what some regard as an important difference, namely that the word 'shall' in Art 5 has become 'should' in the Act.[16] For the most part, decisions under the 1996 Act are consistent with this broad objective. The House of Lords has affirmed the principle of non-intervention whenever the legislation has come before it, most importantly in *Fiona Trust & Ors v Privalov & Ors*,[17] where it was confirmed that the interpretation of the scope of arbitration clauses should be generous and not hampered by fine linguistic distinctions, and in *Lesotho Highlands Development Authority v Impregilo SpA*,[18] where the ambit of the appeal provisions in sections 68 and 69 was restated in narrow terms. There may perhaps have been a tendency to mis-construe the principle of 'judicial minimalism' in section 1(c); in our view, the court may intervene as often as one or other party seeks its help, if it is truly to *support* rather than to *displace* or usurp the arbitral process, which is a different matter altogether.

The concluding words of principle (c) restrict non-intervention to matters governed by Part I of the 1996 Act. This leaves open the possibility that matters not governed by Part I remain subject to some form of residual judicial intervention, so that, for example, supportive powers not conferred on the courts by Part I, but nevertheless open to the courts in ordinary proceedings, may be exercised. This suggestion is contrary to the spirit of the legislation and, even if correct, is to be exercised in exceptional circumstances only.[19] It was accordingly held by Thomas LJ in *Emmott v Michael Wilson & Partners Ltd*[20] that a dispute as to the duty of confidentiality attaching to documents generated in the ongoing arbitration proceedings, which one party wishes to use in judicial proceedings, should be resolved by the tribunal and not by the courts.

12. DAC Report, para 19.
13. [2011] 2 Lloyd's Rep 513, particularly at [61]–[68] per Lord Clarke.
14. *Cf.* DAC Report, para 155.
15. [2011] EWCA Civ 855.
16. See the DAC Report, para 21, referring to an earlier DAC Report prepared in 1989 by a committee chaired by the then Lord Justice Mustill, in which this issue is discussed.
17. *Sub nom Premium Nafta Products Ltd v Fili Shipping Ltd* [2008] 1 Lloyd's Rep 254. See also: *Wedlake Bell v Jones* [2007] EWHC 1143 (Ch); *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc* [2008] EWHC 914 (Comm); *Greene Wood & McClean v Templeton Insurance Ltd* [2008] 2 Lloyd's Rep 269 (Walker J).
18. [2005] 2 Lloyd's Rep 310.
19. *Vale do Rio Doce Navagaçao SA v Shanghai Bao Steel Ocean Shipping Co Ltd and Sea Partners Ltd* [2000] 2 Lloyd's Rep 1 (Thomas J, as he then was); *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] 2 Lloyd's Rep 438 (Cooke J).
20. [2008] 1 Lloyd's Rep 616.

Anti-arbitration injunctions

One matter that has given rise to particular difficulty, particularly in the context of the judicial non-interference principle, is whether the courts can intervene to grant an 'anti-arbitration' injunction, restraining a person from pursuing arbitration proceedings, or even restraining the tribunal from acting in such proceedings, either here or, more usually, abroad. It would seem settled that such a power does exist,[21] and that it arises only under the general power of the court to grant injunctive relief in section 37(1) of the Senior Courts Act 1981 rather than under the 1996 Act.[22]

If the arbitration has its seat in England or Wales, section 1(c) and the mechanisms in the Act itself for determining jurisdictional disputes may well preclude an injunction absolutely, or at the very least in all but the most exceptional of cases, for example, where there is some sort of fraudulent or unconscionable conduct on the part of the person initiating or pursuing the arbitration, or where the court has already set aside the award on jurisdiction.[23]

If the arbitration has its seat outside England and Wales, then, assuming that the court has jurisdiction over the party in question, the power is again to be exercised in exceptional circumstances only, given that the tribunal is almost certain to have the power under the relevant curial law to determine its own jurisdiction, and there is unlikely to be any justification for intervention by the English courts,[24] in the absence of fraudulent or unconscionable conduct.[25] An injunction may be granted, however, where the English court has already determined (to the extent of giving rise to an issue estoppel as between the parties) that the purported arbitration agreement is invalid, or where the proceedings have been brought in breach of an exclusive jurisdiction clause.[26] Those exceptional cases aside, it is settled that section 37(1) of the 1981 Act does not confer any general power of intervention.[27]

A borderline case arose in *Excalibur Ventures LLC v Texas Keystone Inc*,[28] where the issue was as to the correct parties to the contract containing an ICC arbitration clause with New York as the seat. The applicants before Gloster J (as she then was) for the anti-arbitration injunction asserted that they were never parties to the contract, despite the ICC Court in Paris making a prima facie ruling to that

21. In *ASM Shipping Ltd of India v TTMI Ltd (No 2)* [2007] 2 Lloyd's Rep 155 at [54], Christopher Clarke J (as he then was) considered (correctly, in our view) that he had no power under the 1996 Act to restrain London arbitration proceedings, but appeared to have assumed (arguably incorrectly) that he had no residual power to do so.
22. Suggestions in *Albon v Naza Motor Trading SDN BHD (No 4)* [2007] 2 Lloyd's Rep 420, affirmed on other grounds [2008] 1 Lloyd's Rep 1 that the application under section 37 will not be an arbitration claim within CPR Part 62, ought now to be read in the light of the decision of the Supreme Court in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, in particular the comments at [50] per Lord Mance. If the application is made under section 37, it would appear that the court is not exercising any power under Part I of the 1996 Act, so that the principle of judicial restraint in section 1(c) is not applicable in any event. A suggestion to this effect was made by Tomlinson J (as he then was) in *Republic of Kazakhstan v Istil Group Inc (No 3)* [2008] 1 Lloyd's Rep 382 at [1], and we have to admit that it has some force. Although Lord Mance in *AES* discusses section 1(c) in the context of an application for an anti-suit injunction under section 37, he does not appear to contradict the principle that section 1(c) has no relevance.
23. *Republic of Kazakhstan v Istil Group Inc (No 3)* [2008] 1 Lloyd's Rep 382 (Tomlinson J, as he then was; injunction granted to restrain London arbitration proceedings where award on jurisdiction had been set aside under section 67). See also *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC) (Jackson J, not granted). See also the notes to section 72(1).
24. *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716 (David Steel J and CA; injunction to restrain Swiss arbitration refused at first instance, and refusal upheld). In *Intermet FZCO v Ansol Ltd* [2007] EWHC 266 (Comm) injunctive relief to restrain an arbitration proceeding in the Zurich Chamber of Commerce was refused by Gloster J (as she then was), but on the traditional grounds that there was no vexatious conduct, and there had been significant delay in making the application.
25. *Albon v Naza Motor Trading SDN BHD (No 4)* [2008] 1 Lloyd's Rep 1 (CA) (plausible evidence that signature on purported contract containing Malaysian arbitration clause was forged); *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289 (Gloster J; injunction to restrain New York arbitration granted pending resolution by High Court of issues relating to validity of arbitration agreement); *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] 1 Lloyd's Rep 442 (Andrew Smith J; injunction to restrain London LCIA arbitration refused).
26. *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF* [2011] 1 Lloyd's Rep 510 (Hamblen J), discussed below.
27. *Elektrim SA v Vivendi Universal SA (No 2)* [2007] 2 Lloyd's Rep 8 (injunction to restrain Swiss ICC arbitration refused).
28. [2011] 2 Lloyd's Rep 289.

effect, and despite the applicants having participated in that process, albeit consistently maintaining that they were not accepting the jurisdiction of the ICC tribunal over them.[29]

While accepting the principle that issues relating to arbitrability or jurisdiction, or to staying the arbitration, may in appropriate circumstances better be left to the foreign courts having supervisory jurisdiction over the arbitration, Gloster J considered that nevertheless, in 'exceptional cases', the court may exercise its power under section 37 to grant such an injunction.[30] In her judgment, the circumstances in *Excalibur* 'conclusively' pointed to the English court being the 'appropriate tribunal' to decide whether or not the applicants were parties to the arbitration agreement contained in the matrix contract, rather than the ICC arbitral tribunal. 'Such circumstances include not only the chronology of the litigation and the conduct of Excalibur, but also cost and case management considerations.' Gloster J was satisfied that the continuation of the arbitration (pending the outcome of the issue of jurisdiction) would be 'unconscionable, oppressive, vexatious or otherwise an abuse of the due process of the court', and that the grant of the anti-arbitration injunction was necessary to protect the applicants' legitimate interest in continuing the proceedings in England, which she regarded as the 'natural forum for the litigation' (meaning the resolution as to the issues of jurisdiction over the applicants).[31] In that regard, the judge was persuaded by a 'strong arguable case' that the applicants were not a party to the contract containing the arbitration clause and that the arguments put forward to the contrary were not 'legally or evidentially convincing', and by the fact that the respondent itself had commenced proceedings in the Commercial Court, albeit seeking relief in support of the foreign arbitration, so could not argue that it would have been oppressive to make it take part in a further hearing at which the jurisdiction issue would be determined.[32] Given the existence of those factors, it is difficult to argue that Gloster J was obviously wrong to grant the injunction, and in fact it seems on the facts of *Excalibur* that she was probably right to grant the injunction, particularly as it was an interim injunction.

In *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF*,[33] Hamblen J recognised that the grant of such an injunction was a matter of some debate in the arbitral community, but considered that to show the 'exceptional circumstances' which he determined were necessary for such an injunction to be granted, it would 'normally be necessary to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable'.[34]

It is therefore clear that the courts are approaching applications with the requisite degree of circumspection, commensurate with the duty to pay careful heed to any alleged arbitration agreement and to give due weight to all the relevant factors weighing one way or the other. We support this cautious approach, bearing in mind the need to ensure that the prevalence of such injunctions does not lend any support to the (wrongly held) theory that England is not an arbitration-friendly jurisdiction, and that they are only granted in truly exceptional circumstances and for a limited period, or otherwise (such as in *Claxton*) where the court has already determined (in a manner that would give rise to an issue estoppel) that the arbitration agreement is invalid.

Confidentiality in arbitration proceedings

It can be seen that there is no further express statement of the principle of confidentiality, as was proposed when the draft legislation was before the DAC. The DAC proposed creating an express saving for the

29. Ibid. at [44]–[45]. Pursuant to Art 6(2) of the (1998) ICC Rules (now Art 6.4 of the 2010 Rules), which provides in terms that, if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the [ICC] Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist.
30. Ibid. at [55]–[56].
31. Ibid. at [68]–[69].
32. Ibid. at [70].
33. [2011] 1 Lloyd's Rep 510. See also *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm), in which Popplewell J granted such an order to restrain arbitration proceedings in Singapore pending the resolution by the English court of an issue that would determine whether the Singapore arbitration agreement was valid or not.
34. Ibid. at [34]. Hamblen J also (and quite rightly) rejected the argument that the relief was in any way contrary to the principles set out in EC Regulation 44/2001. In *Claxton*, the issue as to the validity of the arbitration agreement had been determined by a previous hearing in the Commercial Court (resulting in the arbitration agreement having been held to be invalid), and so the injunction was granted.

common law rules on privacy and confidentiality. This approach, which was ultimately not adopted by the Government, rather begged the question of exactly what those rules might be. The principles of privacy and confidentiality, long assumed but until recently not the subject of detailed authority, were established in a series of cases decided shortly before the introduction of the Act, in particular *Dolling-Baker v Merrett*,[35] *Hassneh Insurance v Mew*,[36] *Insurance Company v Lloyd's Syndicate*[37] and *London and Leeds Estates Ltd v Paribas Ltd (No 2)*.[38] In those cases, it was made clear that confidentiality, which operated as an implied term in the arbitration agreement, could be lifted in exceptional circumstances only, in particular in the interests of justice being done in subsequent proceedings involving a party to the arbitration.

The DAC did not see any need to codify those principles, despite the fact that, in Australia, a rather different view has been taken of this issue, and confidentiality there has to some extent been eroded.[39] The DAC was concerned particularly with two issues: the fact that arbitral confidentiality is part of a wider concept of the protection of confidential information, which it would be difficult to deal with in the abstract; and the difficulty of setting out effective sanctions for breach of the parties' obligation of non-disclosure. The Government agreed with the DAC's view and itself pointed out that there were exceptions to confidentiality in the case of New York Convention awards,[40] which are enforceable in public proceedings, and, as is shown in the cases, in the common law itself; the Government's view was, therefore, that the matter should be resolved by the courts in the usual developmental fashion. Since the passing of the Act, the courts have considered the principles applicable to confidentiality on a number of occasions and have confirmed that the principle applies to documents generated for the purposes of the arbitration, evidence in the arbitration and the award itself. In the leading authority, the Court of Appeal in *Emmott v Michael Wilson & Partners Ltd*,[41] Lawrence Collins LJ (as he was then) identified the various situations in which the issue might arise:

(1) where a party to litigation sought disclosure of documents generated in an arbitration;[42]
(2) where a party to an arbitration sought a witness summons from the court to obtain material used in another arbitration;[43]
(3) where the issue was whether court documents relating to an arbitration should be published;[44] and
(4) where a party to an arbitration had an interest (commercial or otherwise) in disclosing documents generated in an arbitration (including the award itself) to third parties, for example, where in a reinsurance dispute, the award (but not the underlying documents generated in the arbitration) was required to be disclosed in related court or arbitration proceedings against other reinsurers or brokers.[45]

The decisions in *Ali Shipping Corporation v Shipyard Trogir*[46] and in *Emmott* have confirmed that the duty of confidentiality in relation to arbitration awards and documents used in arbitrations takes effect as a term implied in arbitration agreements as a matter of law, and not on the basis of the presumed

35. [1991] 2 All ER 891.
36. [1993] 2 Lloyd's Rep 243.
37. [1995] 2 Lloyd's Rep 272.
38. [1995] 2 EG 134.
39. *Esso Australia Resources Ltd v Minister for Energy and Minerals* [1994] ADRLJ 214: *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662.
40. The Convention on the Enforcement of Foreign Arbitral Awards, signed in New York in 1958, is referred to throughout this work as the New York Convention. A copy is contained in Appendix 4.
41. [2008] 1 Lloyd's Rep 616.
42. *Science Research Council v Nassé* [1980] AC 1028; *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Milsom v Ablyazov* [2011] EWHC 955 (Ch); *Westwood Shipping Lines Inc v Universal Schiffahtsgesellschaft mbH* [2012] EWHC 3837 (Comm).
43. *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102; *South Tyneside BC v Wickes Building Suppliers Ltd* [2004] EWHC 2428 (Comm). See also the unusual circumstances in *A Lloyd's Syndicate v X* [2011] EWHC 2487 (Comm).
44. *Glidepath BV v Thompson* [2005] 2 Lloyd's Rep 549; *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] 2 Lloyd's Rep 179.
45. *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243 (Colman J; award allowed to be disclosed in action against brokers); cf. *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272 (Colman J; no disclosure of award in arbitration with other reinsurers).
46. [1998] 2 Lloyd's Rep 643.

intention of the parties, although it is subject to exceptions. The implied term precludes the parties from using or disclosing for any other purpose documents prepared for or disclosed in the arbitration, including evidence or the award. That classification is important, because, if the question of the scope of the duty arises while the arbitration is still in existence, the arbitrators alone have jurisdiction to resolve that question:[47] the court can become involved only if the arbitration has come to an end and one or other of the parties wishes to use the documents for its own purposes.

The duty is subject to limited exceptions:

(a) the parties may waive the implied term, as where one party refers to arbitral documents in later proceedings, and the other then seeks disclosure of those documents; this was the position in *Emmott* itself. There may also be consent implied from the circumstances;[48]
(b) legal compulsion, where the court orders the production of arbitration documents for use in later proceedings,[49] for example, an appeal,[50] or where there is a subsequent dispute between the parties involving the same facts;[51]
(c) where there is a duty to the public requiring disclosure;[52] and
(d) where disclosure is reasonably necessary for the protection of an arbitrating party's rights as against a third party.[53]

Scope of application of provisions

2.—(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined:

(a) sections 9 to 11 (stay of legal proceedings), and
(b) section 66 (enforcement of arbitral awards).

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined:

(a) section 43 (securing the attendance of witnesses), and
(b) section 44 (court powers exercisable in support of arbitral proceedings);

47. The view of Thomas LJ in *Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616.
48. See on this point *The Owners, Masters and Crew of the Tug Hamtun v Owners of the ship St John* [1999] 1 Lloyd's Rep 883, in which Aikens J held that it was customary in the salvage market for the level of salvage awarded in an arbitration to be made available to later arbitrators and the courts, in order to achieve a level of consistency. Consent was thus implicit from the custom and practice of the market.
49. *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *London & Leeds Estates v Paribas (No 2)* [1995] 1 EGLR 102; *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 Lloyd's Rep 643; *South Tyneside Borough Council v Wickes Building Suppliers Ltd* [2004] EWHC 2428 (Comm).
50. *Department of Economics Policy and Development of the City of Moscow v Bankers Trust Co* [2004] 2 Lloyd's Rep 179.
51. There is an issue estoppel where an issue arising in a subsequent arbitration formed a key part of the reasoning in the first arbitration: *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 All ER (Comm) 253; *Department of Economics Policy and Development of the City of Moscow v Bankers Trust Co* [2004] 2 Lloyd's Rep 179; *Emcor Drake & Skull Ltd v Costain Construction Ltd and Skanska Central Europe AB* [2004] EWHC 2439 (TCC); *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan* [2004] 2 Lloyd's Rep 523.
52. *London & Leeds Estates v Paribas (No 2)* [1995] 1 EGLR 102. This ground is to be understood as applying only where the interests of justice so require: *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 Lloyd's Rep 643.
53. *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243; *Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616.

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where—

(a) no seat of the arbitration has been designated or determined, and
(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.

(5) Section 7 (separability of arbitration agreement) and section 8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland, even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.

NOTES

Relevance of the seat

The applicability of the Act is firmly fixed by reference to the seat (i.e. the juridical place) of the arbitration being in England and Wales or Northern Ireland, either by express or implied choice of the parties, or by designation – see section 3. All of Part I of the Act is applicable where the seat is domestic in this sense, irrespective of the law applicable to the arbitration agreement and of the place where the arbitration is physically conducted, although the parties are free to contract out of the non-mandatory provisions of the Act either directly or indirectly by agreeing to apply institutional rules (see section 4(3)) or a foreign law (see section 4(5)). The premise of section 2 is that there is a seat for the arbitration: a 'floating' or 'delocalised' arbitration without a seat is not recognised by the Act: this point is explained in the Notes to section 3. For this purpose, a seat is almost always defined in terms of a country (or a city) chosen as the place of arbitration.[1]

Application to foreign arbitrations

The remainder of section 2 lays down exceptional cases, where the Act applies to an arbitration even though its seat is outside England and Wales or Northern Ireland. In other cases, the English court cannot intervene.[2]

Section 2(2) states that certain aspects of the Act apply where the seat of the arbitration is outside the jurisdiction or if the seat has yet to be determined, and (by implication) whether or not the law governing the procedure is English law. Consequently, if the seat is abroad, the court must (if applied for):

(a) grant a mandatory stay of its proceedings where the matter is governed by a valid arbitration clause that applies to the case (sections 9 to 11); and
(b) enforce any award made abroad, in accordance with obligations under the New York Convention (sections 100–103).

Both of these obligations are imposed by the New York Convention.[3]

Section 2(3) deals with the case where the assistance of the English court under its powers in sections 43 (securing the attendance of witnesses) and 44 (general powers exercisable in support of arbitral proceedings) is required to ensure the proper functioning of, or to protect, the arbitration.

1. In the LCIA Rules (1998), Art 16.1 stipulates that, in the absence of agreement, 'London' (i.e. not 'England') shall be the seat of the arbitration (unless the LCIA court determines another seat to be more appropriate).
2. *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716; *C v D* [2008] 1 Lloyd's Rep 239. It was this consideration that influenced the court in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 1 Lloyd's Rep 608 to refuse to find that the parties had agreed that the seat and the curial law should be different.
3. DAC Supplementary Report, para 14. The reference there to section 66 is largely academic, given the specific provisions for enforcement of New York Convention awards under sections 100 to 103.

arbitration agreement	sections 6 and 5(1)
arbitrator	section 82(1)
available arbitral process	section 82(1)
claimant	section 82(1)
commencement (in relation to arbitral proceedings)	section 14
costs of the arbitration	section 59
the court	section 105
dispute	section 82(1)
enactment	section 82(1)
legal proceedings	section 82(1)
Limitation Acts	section 13(4)
notice (or other document)	section 76(6)
party—	
—in relation to an arbitration agreement	section 82(2)
—where section 106(2) or (3) applies	section 106(4)
peremptory order	section 82(1) (and see section 41(5))
premises	section 82(1)
question of law	section 82(1)
recoverable costs	sections 63 and 64
seat of the arbitration	section 3
serve and service (of notice or other document)	section 76(6)
substantive jurisdiction (in relation to an arbitral tribunal)	section 82(1) (and see section 30(1)(a) to (c))
upon notice (to the parties or the tribunal)	section 80
written and in writing	section 5(6)

NOTES

Section 83 embodies the familiar legislative technique of providing a table of defined terms, as used in Part I of the Act.

Transitional provisions

84.—(1) The provisions of this Part do not apply to arbitral proceedings commenced before the date on which this Part comes into force.

(2) They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.

(3) The above provisions have effect subject to any transitional provision made by an order under section 109(2) (power to include transitional provisions in commencement order).

NOTES

Too long ago to be of relevance any longer.

PART II
OTHER PROVISIONS RELATING TO ARBITRATION

Domestic Arbitration Agreements

Modification of Part I in relation to domestic arbitration agreement

85.—(1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.

(2) For this purpose a 'domestic arbitration agreement' means an arbitration agreement to which none of the parties is

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom.

and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

(3) In subsection (2) 'arbitration agreement' and 'seat of the arbitration' have the same meaning as in Part I (see sections 3, 5(1) and 6).

NOTES

Sections 85 to 87 of the Act have not been brought into force, and it is unlikely that they will ever be. Conversely, it is highly unlikely that the sections will ever be formally repealed. Although several foreign jurisdictions retain the distinction between domestic and non-domestic arbitrations (including Canada, New Zealand and Australia), such as existed in English law prior to the coming into force of the Act, English law has effectively abolished the distinction by holding back these three sections from the statute as enacted.

Staying of legal proceedings

86.—(1) In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.

(2) On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied

(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or

(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.

(3) The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.

(4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are concerned.

NOTES

This section (along with sections 85 and 87) has not been brought into force, and, although scheduled for repeal, it is likely to remain included in the statute but ignored for all purposes: see the Notes to section 85.

Effectiveness of agreement to exclude court's jurisdiction

87.—(1) In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under—

(a) section 45 (determination of preliminary point of law), or
(b) section 69 (challenging the award: appeal on point of law),

is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

(2) For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).

(3) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.

NOTES

This section (along with sections 85 and 86) has not been brought into force; see the Notes to section 85.

Power to repeal or amend sections 85 to 87

88.—(1) The Secretary of State may by order repeal or amend the provisions of sections 85 to 87.

(2) An order under this section may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate.

(3) An order under this section shall be made by statutory instrument and no such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

NOTES

No order has been made under this section. Perhaps the Secretary of State should do so, and put these sections out of their misery.

Consumer Arbitration Agreements

Application of unfair terms regulations to consumer arbitration agreements

89.—(1) The following sections extend the application of the Unfair Terms in Consumer Contracts Regulations 1994 in relation to a term which constitutes an arbitration agreement.

For this purpose 'arbitration agreement' means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual).

(2) In those sections 'the Regulations' mean those regulations and include any regulations amending or replacing those regulations.

(3) Those sections apply whatever the law applicable to the arbitration agreement.

NOTES

Sections 89 to 91 lay down a scheme for the regulation of consumer arbitration agreements, replacing the Consumer Arbitration Agreements Act 1988. The 1988 Act invalidated an arbitration agreement to which a consumer was a party and which fell within county court limits, provided that the agreement had been entered into prior to the dispute arising. The 1988 Act was all but rendered redundant with effect from 1 July 1995 by the Unfair Terms in Consumer Contracts Regulations 1994,[1] re-enacted with minor amendments by the Unfair Terms in Consumer Contracts Regulations 1999,[2] and was duly repealed by the Arbitration Act 1996. The Regulations implement the EC's Unfair Terms in Consumer Contracts Directive 1993.[3] The 1999 Regulations apply to any contract between a consumer (i.e. a natural person making a contract for purposes outside his business) and a commercial concern (i.e. a person who supplies goods or services, for purposes relating to his business, and including a profession, government department or local authority). Under the Regulations, a term in a contract with a consumer[4] is unfair, and is rendered unenforceable, if three conditions are met:[5]

(a) the term has not been individually negotiated: this refers to a term that has been drafted in advance, and the consumer has not been able to influence its substance;
(b) the term is contrary to the requirement of good faith, a concept that is not defined by the 1999 Regulations, although there had been a detailed definition in the 1994 Regulations; and
(c) the term causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

It is apparent that the Regulations apply to all manner of contract terms, most importantly, exclusion clauses. However, the Regulations are not so limited, and the Schedule to the Regulations sets out an illustrative list of potentially unfair terms. Item (q) in the schedule refers to any term that excludes or hinders the consumer's right to legal redress, in particular by the imposition of an obligation to go to arbitration. It is thought to be relatively unlikely that the presumption of unfairness can be rebutted in relation to arbitration clauses in consumer contracts, and, accordingly, the effect of the Regulations was to supersede the 1988 Act by providing more extensive protection to consumers.

The purpose of section 89 is to apply the 1999 Regulations to consumer arbitration agreements, and to repeal the 1988 Act so that consumer arbitration agreements are governed by a single set of rules. Section 89 is a curious provision, in that the Regulations, independently of it, apply to consumer arbitration agreements, and the main effect of section 89 is to declare the existing state of the law. However, section 89 does have some independent purpose, in that it confirms that the Regulations apply to arbitration clauses and, in some respects, extends the ambit of the Regulations. No distinction is drawn between pre- and post-dispute arbitration clauses, and any clause, whenever agreed to, is within the Regulations, provided that it is drafted in advance by the supplier. It is, however, far more likely that an arbitration agreement freely entered into by a consumer after a dispute has arisen will be regarded as fair. Fairness is to be determined at the time the agreement was made, and not in relation to what has happened subsequently, so the fact that the consumer has participated in the arbitration does not remove his right to allege that the clause was unfair by challenging the award.[6] A consumer who is sophisticated or who has had the benefit of legal advice when entering into the arbitration agreement is unlikely to benefit from the Regulations.[7]

It is the duty of a court, on an application for the enforcement of an arbitration award, to determine of its own volition whether the arbitration agreement was valid under the 1999 Regulations. Accordingly,

1. SI 1994 No 3159.
2. SI 1999 No 2083.
3. 93/13/EC.
4. See *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC).
5. See *Zealander v Laing Homes Ltd* [1999] CILL 1510, decided under the 1994 Regulations. Contrast *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC).
6. Case C-168/05 *Claro v Centro Movil Milenium SA*, 2006.
7. *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC).

even if there has not been a challenge to the clause in the arbitration proceedings, the enforcing court is required to consider the matter, but subject to the consideration that the award has not become binding by the expiry of the period of time set out for the award to be challenged.[8]

Regulations apply where consumer is a legal person

90. The Regulations apply where the consumer is a legal person as they apply where the consumer is a natural person.

NOTES

This section operates to extend the Unfair Terms in Consumer Contracts Regulations 1999 to arbitration agreements between a commercial supplier and a consumer who is a company or partnership: this goes further than the Regulations themselves, which are confined to consumers who are natural persons. A company that obtains goods or services other than for the purposes of its business is, therefore, protected by the Regulations.

Arbitration agreement unfair where modest amount sought

91.—(1) A term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.

(2) Orders under this section may make different provision for different cases and for different purposes.

(3) The power to make orders under this section is exercisable—

(a) for England and Wales, by the Secretary of State with the concurrence of the Lord Chancellor,
(b) for Scotland, by the Secretary of State, and
(c) for Northern Ireland, by the Department of Economic Development for Northern Ireland with the concurrence of the Lord Chancellor.

(4) Any such order for England and Wales or Scotland shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Any such order for Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 and shall be subject to negative resolution, within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) Order 1954.

NOTES

The effect of section 91 is to authorise the making of an order that fixes a financial limit for a financial remedy, so that an arbitration clause which relates to a lesser sum is automatically unfair. The power was exercised by the Unfair Arbitration Agreements (Specified Amount) Order 1999, fixing the sum at £5,000, exclusive of interest. If the sum sought is greater than £5,000, the consumer necessarily retains the right to rely directly upon the Unfair Terms in Consumer Contracts Regulations 1999, and so the mere fact that a dispute involving a large sum is outside section 89 does not mean that the arbitration clause in it is automatically valid, as it still has to pass the tests in the Regulations themselves.

8. Case C-408/08, *Asturcom Telecomunicaciones SL v Nogueria* [2009] EUECJ.

Small Claims Arbitration in the County Court

Exclusion of Part I in relation to small claims arbitration in the county court

92. Nothing in Part I of this Act applies to arbitration under section 64 of the County Courts Act 1984.

NOTES

This section was originally designed to make it clear that the Act did not apply to county court arbitrations. Such arbitrations were governed by the special rules laid down in the County Courts Act 1984. The concept of introducing separate legislation for the resolution of consumer disputes was considered but rejected by the DAC. The CPR replaced county court arbitrations with the small claims track for such claims. Section 92 no longer has any effect, although it has not yet been repealed.

Appointment of Judges as Arbitrators

Appointment of judges as arbitrators

93.—(1) A judge of the Commercial Court or an official referee may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement.

(2) A judge of the Commercial Court shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of business in the High Court and the Crown Court, he can be made available.

(3) An official referee shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of official referees' business, he can be made available.

(4) The fees payable for the services of a judge of the Commercial Court or official referee as arbitrator or umpire shall be taken in the High Court.

(5) In this section—

'arbitration agreement' has the same meaning as in Part I; and
'official referee' means a person nominated under section 68(1)(a) of the Senior Courts Act 1981 to deal with official referees' business.

(6) The provisions of Part I of this Act apply to arbitration before a person appointed under this section with the modifications specified in Schedule 2.

NOTES

This section permits a judge to act as an arbitrator. The Act applies to a judge–arbitrator subject to the modifications listed in Schedule 2 to the Act. The section re-enacts section 4 of the Administration of Justice Act 1970. The DAC Report, para 341 and 343, stated a desire to extend the section to all judges, and not just the two classes presently referred to, but agreement with the relevant departments could not be reached in time to permit this extension to be included.[1] The report highlighted a particular problem in disputes involving patents, where commonly the only acceptable arbitrators are judges.

1. DAC Supplementary Report, para 55.

Section 93(2)–(3) makes it clear that the parties do not have the right to appoint a judge, and that any appointment is subject to availability.

The modifications to the Act, listed in Schedule 2, re-enact the Administration of Justice Act 1970, Schedule 3. The purpose is to disapply those provisions of the Act that are not required by judges in the light of their existing powers.

It should be noted that, although the phrase 'official referee' has not actually been repealed by statute, the office does not formally exist as such, and business previously referred to as 'official referees' business' has been dealt with by the TCC since 1998. Those judges formerly dubbed 'official referees' are now judges of the TCC.

Statutory Arbitrations

Application of Part I to statutory arbitrations

94.—(1) The provisions of Part I apply to every arbitration under an enactment (a 'statutory arbitration'), whether the enactment was passed or made before or after the commencement of this Act subject to the adaptations and exclusions specified in sections 95 to 98.

(2) The provisions of Part I do not apply to a statutory arbitration if or to the extent that their application—

(a) is inconsistent with the provisions of the enactment concerned, with any rules or procedure authorised or recognised by it, or
(b) is excluded by any other enactment.

(3) In this section and the following provisions of this Part 'enactment'—

(a) in England and Wales, includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978;
(b) in Northern Ireland, means a statutory provision within the meaning of section 1(f) of the Interpretation Act (Northern Ireland) 1954.

NOTES

Statutory arbitrations exist by virtue of various enactments which provide that disputes under them shall be referred to arbitration. Statutory undertakings sometimes provide for disputes to be referred to arbitration (e.g. under the Water Act 1991). Other examples include the Agricultural Tenancies Act 1995, which provides *inter alia* that disputes between landlord and tenant under a farming business tenancy should be resolved by arbitration. The effect of this provision is to put statutory arbitrations on an equal footing with private consensual arbitrations, so far as possible (see sections 95 to 97).

General adaptation of provisions in relation to statutory arbitrations

95.—(1) The provisions of Part I apply to a statutory arbitration—

(a) as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement, and
(b) as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made were parties to that agreement.

(2) Every statutory arbitration shall be taken to have its seat in England and Wales or, as the case may be, in Northern Ireland.

NOTES

This provision is self-explanatory.

Specific adaptations of provisions in relation to statutory arbitrations

96.—(1) The following provisions of Part I apply to a statutory arbitration with the following adaptations.

(2) In section 30(1) (competence of tribunal to rule on its own jurisdiction), the reference to paragraph (a) to whether there is a valid arbitration agreement shall be construed as a reference to whether the enactment applies to the dispute or difference in question.

(3) Section 35 (consolidation of proceedings and concurrent hearings) applies only so as to authorise the consolidation of proceedings, or concurrent hearings in proceedings, under the same enactment.

(4) Section 46 (rules applicable to substance of dispute) applies with the omission of subsection (1)(b) (determination in accordance with considerations agreed by parties).

NOTES

Again, this provision is self-explanatory, as it makes necessary changes to the provisions concerning jurisdiction, consolidation and applicable law insofar as a statutory arbitration is concerned.

Provisions excluded from applying to statutory arbitrations

97. The following provisions of Part I do not apply in relation to a statutory arbitration—

(a) section 8 (whether agreement discharged by death of a party);
(b) section 12 (power of court to extend agreed time limits);
(c) sections 9(5), 10(2) and 71(4) (restrictions on effect of provision that award condition precedent to right to bring legal proceedings).

NOTES

The modification to section 8 is necessary, as there is no 'agreement' as such in a statutory arbitration. The time limit provision in section 12 is also redundant, as the legislation itself will have the necessary time limits built in.

Power to make further provisions by regulations

98.—(1) The Secretary of State may make provision by regulations for adapting or excluding any provision of Part I in relation to statutory arbitration in general or statutory arbitrations of any particular description.

(2) The power is exercisable whether the enactment concerned is passed or made before or after the commencement of this Act.

(3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

NOTES

No regulations have been made under this section.

award that had already been granted *exequatur* by a first instance French court. In these circumstances, the arguments for staying English enforcement proceedings pending the French court's decision appeared overwhelmingly powerful, yet were regrettably ignored.

Provision of security

In *Soleh Boneh International Ltd v Government of the Republic of Uganda*,[123] the Court of Appeal held that the decision to grant security was inextricably coupled with the decision to grant the adjournment, and that the enforcing court here should be encouraged to scrutinise carefully the strength of the challenge to the award in the curial court. If the court's preliminary view was that the award was manifestly valid, no adjournment should be granted (and, of course, no security ordered); if, on the other hand, the court considered the challenge to be weak, and the award manifestly valid, there should either be an order for immediate enforcement, or (perhaps where there is some doubt) an order for adjournment coupled with an order for security.[124]

As Gross J noted in *IPCO*, the right approach is that of a 'sliding scale'; for example (as in *IPCO* itself), the court may conclude that certain and severable parts of the award may be unimpeachable. In respect of those parts, the court should either order immediate enforcement, or at the very least order security sufficient to cover those sums undeniably due.

Saving for other bases of recognition or enforcement

104. Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.

NOTES

This section, which re-enacts section 6 of the Arbitration Act 1975, provides that any other forms of enforcement available in England are not precluded simply because the award is a Convention award. The possibility of bringing an action on the award at common law is thus retained.

PART IV GENERAL PROVISIONS

The Arbitration Act 1996: Part IV General Provisions

Meaning of 'the court': jurisdiction of High Court and county court

105.—(1) In this Act 'the court' means the High Court or a county court, subject to the following provisions.

(2) The Lord Chancellor may by order make provision—

(a) allocating proceedings under this Act to the High Court or to county courts; or
(b) specifying proceedings under this Act which may be commenced or taken only in the High Court or in a county court.

(3) The Lord Chancellor may by order make provision requiring proceedings of any specified description under this Act in relation to which a county court has jurisdiction to be commenced or taken in one or more specified county courts.

Any jurisdiction so exercisable by a specified county court is exercisable throughout England and Wales or, as the case may be, Northern Ireland.

123. [1993] 2 Lloyd's Rep 208, a decision on section 3(5) of the Arbitration Act 1975.
124. In *Conocophillips China Inc v Greka Energy (International) BV & Anr* [2013] EWHC 2733 (Comm), Popplewell J held that security under section 103(5) was not available merely because of a challenge to the award in the curial court; there had in addition (and at the very least) to be a challenge under section 103(2)(f).

(3A) The Lord Chancellor must consult the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland (as the case may be) before making an order under this section.

(3B) The Lord Chief Justice of England and Wales may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

(3C) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under this section

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;
(b) a Lord Justice of Appeal (as defined in section 88 of that Act).

(4) An order under this section—

(a) may differentiate between categories of proceedings by reference to such criteria as the Lord Chancellor sees fit to specify, and
(b) may make such incidental or transitional provision as the Lord Chancellor considers necessary or expedient.

(5) An order under this section for England and Wales shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) An order under this section for Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 which shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946 shall apply accordingly.

NOTES

Subsections (3A) to (3C) were inserted by the Constitutional Reform Act 2005, Schedule 4(1), paragraph 250. The relevant order made under this section is the High Court and County Court (Allocation of Arbitration Proceedings) Order 1996, SI 1996 No 3215, as amended by the High Court and County Courts (Allocation of Arbitration Proceedings) (Amendment) Order 1999, SI 1999 No 1010 to take account of the implementation of the Civil Procedure Rules 1998.

Crown application

106.—(1) Part I of this Act applies to any arbitration agreement to which Her Majesty either in right of the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party.

(2) Where Her Majesty is party to an arbitration agreement otherwise than in right of the Crown, Her Majesty shall be represented for the purpose of any arbitral proceedings—

(a) where the agreement was entered into by Her Majesty in right of the Duchy of Lancaster, by the Chancellor of the Duchy or such person as he may appoint, and
(b) in any other case, by such person as Her Majesty may appoint in writing under the Royal Sign Manual.

(3) Where the Duke of Cornwall is party to an arbitration agreement, he shall be represented for the purposes of any arbitral proceedings by such person as he may appoint.

(4) References in Part I to a party or the parties to the arbitration agreement or to arbitral proceedings shall be construed, where subsection (2) or (3) applies, as references to the person representing Her Majesty or the Duke of Cornwall.

NOTES

This section re-enacts section 30 of the Arbitration Act 1950, in extending the 1996 Act to the Crown.

Consequential amendments and repeals

107.—(1) The enactments specified in Schedule 3 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act.

(2) The enactments specified in Schedule 4 are repealed to the extent specified.

NOTES

Certain of the enactments specified in Schedule 3 have been repealed by subsequent legislation. The enactments affected have been deleted from Schedule 3 in the present text.

Schedule 3, paragraph 37, amends section 18(1) of the Senior Courts Act 1981 by stating that there is to be no appeal from a High Court decision 'except as provided by Part I of the Arbitration Act 1996'. Taken at face value, this amendment has the drastic effect of removing the ordinary right of appeal against the outcome of an arbitration application to the High Court unless the relevant section expressly provides a right of appeal. In *Inco Europe Ltd v First Choice Distribution*,[1] the House of Lords was of the view that it could not have been Parliament's intention to remove a right of appeal by means of a consequential amendment, and thus ruled that a right of appeal to the Court of Appeal remained in place even in respect of arbitration applications which did not specifically provide for a right of appeal. The affected sections are: 9, 10, 13, 28, 64 and 72.

Extent

108.—(1) The provisions of this Act extend to England and Wales and, except as mentioned below, to Northern Ireland.

(2) The following provisions of Part II do not extend to Northern Ireland—

section 92 (exclusion of Part I in relation to small claims arbitration in the county court), and
section 93 and Schedule 2 (appointment of judges as arbitrators).

(3) Sections 89, 90 and 91 (consumer arbitration agreements), extend to Scotland and the provisions of Schedules 3 and 4 (consequential amendments and repeals) extend to Scotland as far as they relate to enactments which so extend subject as follows.

(4) The repeal of the Arbitration Act 1975 extends only to England and Wales and Northern Ireland.

Commencement

109.—(1) The provisions of this Act come into force on such a day as the Secretary of State may appoint by order made by statutory instrument, and different days may be appointed for different purposes.

(2) An order under subsection (1) may contain such transitional provisions as appear to the Secretary of State to be appropriate.

Short title

110. This Act may be cited as the Arbitration Act 1996.

1. [2000] 1 Lloyd's Rep 467.

SCHEDULES

THE ARBITRATION ACT 1996: SCHEDULES

SCHEDULE 1: MANDATORY PROVISIONS OF PART I

(SECTION 4(1))

sections 9 to 11 (stay of legal proceedings);
section 12 (power of court to extend agreed time limits);
section 13 (application of Limitation Acts);
section 24 (power of court to remove arbitrator);
section 26(1) (effect of death of arbitrator);
section 28 (liability of parties for fees and expenses of arbitrators);
section 29 (immunity of arbitrator);
section 31 (objection to substantive jurisdiction of tribunal);
section 32 (determination of preliminary point of jurisdiction);
section 33 (general duty of tribunal);
section 37(2) (items to be treated as expenses of arbitrators);
section 40 (general duty of parties);
section 43 (securing the attendance of witnesses);
section 56 (power to withhold award in case of non-payment);
section 60 (effectiveness of agreement for payment of costs in any event);
section 66 (enforcement of award);
sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections;
section 72 (saving for rights of person who takes no part in proceedings);
section 73 (loss of right to object);
section 74 (immunity of arbitral institutions, etc.);
section 75 (charge to secure payment of solicitors' costs).

SCHEDULE 2: MODIFICATIONS OF PART I IN RELATION TO JUDGE–ARBITRATORS (SECTION 93(6))

Introductory

1. In this Schedule 'judge–arbitrator' means a judge of the Commercial Court or official referee appointed as arbitrator or umpire under section 93.

General

2.—(1) Subject to the following provisions of this Schedule, references in Part I to the court shall be construed in relation to a judge–arbitrator, or in relation to the appointment of a judge–arbitrator, as references to the Court of Appeal.

(2) The references in sections 32(6), 45(6) and 69(8) to the Court of Appeal shall in such a case be construed as references to the House of Lords.

Arbitrator's fees

3.—(1) The power of the court in section 28(2) or other consideration and adjustment of the liability of a party for the fees of an arbitrator may be exercised by a judge–arbitrator.

(2) Any such exercise of the power is subject to the powers of the Court of Appeal under sections 24(4) and 25(3)(b) (directions as to entitlement to fees or expenses in case of removal or resignation).

Exercise of court powers in support of arbitration

4.—(1) Where the arbitral tribunal consists of or includes a judge–arbitrator the powers of the court under sections 42 to 44 (enforcement of peremptory orders, summoning witnesses, and other court powers) are exercisable by the High Court and also by the judge–arbitrator himself.

(2) Anything done by a judge–arbitrator in the exercise of those powers shall be regarded as done by him in his capacity as judge of the High Court and have effect as if done by that court.

Nothing in this sub-paragraph prejudices any power vested in him as arbitrator or umpire.

Extension of time for making award

5.—(1) The power conferred by section 50 (extension of time for making award) is exercisable by the judge–arbitrator himself.

(2) Any appeal from a decision of a judge–arbitrator under that section lies to the Court of Appeal with the leave of that court.

Withholding award in case of non-payment

6.—(1) The provisions of paragraph 7 apply in place of the provisions of section 56 (power to withhold award in the case of non-payment) in relation to the withholding of an award for non-payment of the fees and expenses of a judge–arbitrator.

(2) This does not affect the application of section 56 in relation to the delivery of such an award by an arbitral or other institution or person vested by the parties with powers in relation to the delivery of the award.

7.—(1) A judge–arbitrator may refuse to deliver an award except upon payment of the fees and expenses mentioned in section 56(1).

(2) The judge–arbitrator may, on an application by a party to the arbitral proceedings, order that, if he pays into the High Court the fees and expenses demanded, or such lesser amount as the judge–arbitrator may specify—

(a) the award shall be delivered,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as he may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose the amount of fees and expenses properly payable is the amount the applicant is liable to pay under section 28 or any agreement relating to the payment of the arbitrator.

(4) No application to the judge–arbitrator under this paragraph may be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded.

(5) Any appeal from a decision of a judge–arbitrator under this paragraph lies to the Court of Appeal with the leave of that court.

(6) Where a party to arbitral proceedings appeals under sub-paragraph (5), an arbitrator is entitled to appear and be heard.

Correction of award or additional award

8. Subsections (4) to (6) of section 57 (correction of award or additional award: time limit for application or exercise of power) do not apply to a judge–arbitrator.

Costs

9. Where the arbitral tribunal consists of or includes a judge–arbitrator the powers of the court under section 63(4) (determination of recoverable costs) shall be exercised by the High Court.

10.—(1) The power of the court under section 64 to determine an arbitrator's reasonable fees and expenses may be exercised by a judge–arbitrator.

(2) Any such exercise of the power is subject to the powers of the Court of Appeal under sections 24(4) and 25(3)(b) (directions as to entitlement to fees or expenses in case of removal or resignation).

Enforcement of award

11. The leave of the court required by section 66 (enforcement of award) may in the case of an award of a judge–arbitrator be given by the judge–arbitrator himself.

Solicitor's costs

12. The powers of the court to make declarations and orders under the provisions applied by section 75 (power to charge property recovered in arbitral proceedings with the payment of solicitors' costs) may be exercised by the judge–arbitrator.

Powers of court in relation to service of documents

13.—(1) The power of the court under section 77(2) (powers of court in relation to service of documents) is exercisable by the judge–arbitrator.

(2) Any appeal from a decision of a judge–arbitrator under that section lies to the Court of Appeal with the leave of that court.

Powers of court to extend time limits relating to arbitral proceedings

14.—(1) The power conferred by section 79 (power of court to extend time limits relating to arbitral proceedings) is exercisable by the judge–arbitrator himself.

(2) Any appeal from a decision of a judge–arbitrator under that section lies to the Court of Appeal with the leave of that court.

This Schedule modifies the Arbitration Act 1996 insofar as it applies to judge–arbitrators and official referee–arbitrators. It refers back to section 93, and re-enacts the Administration of Justice Act 1970, Schedule 3.

SCHEDULE 3: CONSEQUENTIAL AMENDMENTS (SECTION 107(1))

Merchant Shipping Act 1894 (c. 60)

1. In section 496 of the Merchant Shipping Act 1894 (provisions as to deposits by owners of goods), after subsection (4) insert—

'(5) In subsection (3) the expression "legal proceedings" includes arbitral proceedings and as respects England and Wales and Northern Ireland the provisions of section 14 of the Arbitration Act 1996 apply to determine when such proceedings are commenced.'.

Stannaries Court (Abolition) Act 1896 (c. 45)

2. In section 4(1) of the Stannaries Court (Abolition) Act 1896 (references of certain disputes to arbitration), for the words from 'tried before' to 'any such reference' substitute 'referred to arbitration before himself or before an arbitrator agreed on by the parties or an officer of the court'.

. . .

Paragraph 3 was repealed by the Statute Law (Repeals) Act 2004, Schedule 1(6).

Paragraph 4 was repealed by the Education Act 1996, Schedule 38.

Commonwealth Telegraphs Act 1949 (c. 39)

5. Section 8(2) of the Commonwealth Telegraphs Act 1949 (proceedings of referees under the Act) for 'the Arbitration Acts 1889 to 1934, or the Arbitration Act (Northern Ireland) 1937,' substitute 'Part I of the Arbitration Act 1996'.

Lands Tribunal Act 1949 (c. 42)

6. In section 3 of the Lands Tribunal Act 1949 (proceedings before the Lands Tribunal)—

(a) in subsection (6)(c) (procedural rules: power to apply Arbitration Acts), and

(b) in subsection (8) (exclusion of Arbitration Acts except as applied by rules),

for 'the Arbitration Acts 1889 to 1934' substitute 'Part I of the Arbitration Act 1996'.

. . .

Paragraph 7 was repealed by the Telecommunications Act 2003, Schedule 19.

Patents Act 1949 (c. 87)

8. In section 67 of the Patents Act 1949 (proceedings as to infringement of pre-1978 patents referred to comptroller), for 'The Arbitration Acts 1889 to 1934' substitute 'Part I of the Arbitration Act 1996'.

National Health Service (Amendment) Act 1949 (c. 93)

9. In section 7(8) of the National Health Service (Amendment) Act 1949 (arbitration in relation to hardship arising from the National Health Service Act 1946 or the Act), for 'the Arbitration Acts 1889 to 1934' substitute 'Part I of the Arbitration Act 1996' and for 'the said Acts' substitute 'Part I of that Act'.

Arbitration Act 1950 (c. 27)

10. In section 36(1) of the Arbitration Act 1950 (effect of foreign awards enforceable under Part II of that Act) for 'section 26 of this Act' substitute 'section 66 of the Arbitration Act 1996'.

Interpretation Act (Northern Ireland) 1954 (c. 33 (N.I.))

11. In section 46(2) of the Interpretation Act (Northern Ireland) 1954 (miscellaneous definitions), for the definition of 'arbitrator' substitute—

'"arbitrator" has the same meaning as in Part I of the Arbitration Act 1996;'.

Agricultural Marketing Act 1958 (c. 47)

12. In section 12(1) of the Agricultural Marketing Act 1958 (application of provisions of Arbitration Act 1950)—

(a) for the words from the beginning to 'shall apply' substitute 'Sections 45 and 69 of the Arbitration Act 1996 (which relate to the determination by the court of