CHAPTER 1

London maritime arbitration

A. Introduction

1.1 Arbitration is a private method of resolving disputes. It is used when parties agree to refer their dispute to an impartial tribunal consisting of one or more arbitrators. Parties normally agree to arbitration by means of an arbitration agreement in a contract made before a dispute has arisen. It can also be agreed after a dispute has arisen. Arbitration differs radically from court proceedings in that it arises out of an agreement and the rules of procedure governing litigation do not apply, thus allowing a flexible and confidential procedure to be adopted to suit the parties' convenience. Arbitrators are generally appointed by the parties (or by means to which the parties have agreed) and are paid by the parties; they are usually chosen for their familiarity with the commercial, technical or legal aspects of the dispute. The advantages of arbitration are its privacy, its potential as a flexible, speedy means of resolving commercial disputes and the ability to enforce arbitral awards under the New York Convention. However, the efficiency of arbitration depends on the cooperation of the parties (and their lawyers and indeed the arbitrators) in preparing a case and minimising the areas of substantive dispute. The Arbitration Act 1996 places duties on the parties and the arbitrators to ensure the dispute is resolved efficiently. However, in practice it may be difficult to enforce these duties and arbitration can be just as slow and expensive as litigation if the parties will not cooperate and if the arbitrators do not take a firm approach to the proceedings.

1.2 "London maritime arbitration" is a broad term usually applied to arbitration taking place in London where the dispute involves in some way a ship – for instance a dispute under a charterparty, bill of lading, ship sale agreement or shipbuilding contract. There is, however, no strict definition of maritime arbitration which would require the involvement of a ship and any arbitration carried out on terms published by the London Maritime Arbitrators Association (LMAA) might be termed a maritime arbitration. This book aims to provide a practical

guide to the law and practice of maritime arbitrations in London, particularly arbitrations proceeding under LMAA terms.[1]

1.3 London maritime arbitration is sometimes treated as if it were distinct from "international commercial arbitration" seated in London, because this term is commonly used to describe commercial arbitrations administered by an institution.[2] While there are differences, particularly in the strength of connection between some institutions and London as a seat of arbitration, these should not be overstated since both types of arbitration have much in common. They both relate to international commercial disputes and are subject to the 1996 Act. There is a significant overlap between the arbitrators, practitioners and parties who are involved in both. Further, many more arbitrations are commenced under the LMAA Terms each year than are referred to institutional arbitration in London,[3] and the vast majority of appeals to the Commercial Court on points of law arise from shipping cases.[4]

B. The London Maritime Arbitrators Association ("the LMAA")

History and aims

1.4 London maritime arbitration traces its origins back at least to the birth of the Baltic Exchange at the Virginia and Baltick Coffee House in 1744, and arguably much earlier.[5] Traditionally, maritime arbitrators were members of the shipping trade who found time to act as arbitrators largely on an honorary basis. Maritime arbitration is now much more time-consuming and formal. Most arbitrations are carried out by full-time professional arbitrators, technical experts, or lawyers who charge a professional fee. The LMAA is a professional association which was set up in 1960, originating from a group of brokers at the Baltic Exchange who were listed as available to be appointed as arbitrators.[6] The objects of the Association were described at its first Annual General Meeting as, "to see that the machinery of Arbitration is adequately manned and new Arbitrators trained, also to further our aim that London Arbitration shall not only be strictly impartial and economical, but reasonably expeditious so far as consistent with thorough investigation and sound judgment".[7] Its objects today remain very similar, albeit expanded in form.[8]

1 The current LMAA terms discussed in this book are: the LMAA Terms (2017); the LMAA Small Claims Procedure (2017); the LMAA Intermediate Claims Procedure (2017); and the LMAA FALCA Rules.

2 For discussion of the tendency to adopt this treatment, see Ian Gaunt, "Review of the 2015 White and Case Survey of International Commercial Arbitration" in *The LMAA Newsletter Winter 2015–2016, Part Two*, 22.

3 In 2015, there were at least 3160 appointments on LMAA Terms: see fn 9 below. In the same period, 326 arbitrations were referred to the London Court of International Arbitration: LCIA website, "Registrar's Report 2015" www.lcia.org/LCIA/reports.aspx accessed 13 September 2016.

4 It has been estimated that in the period 2012–2015, 75% of appeals arose from shipping disputes: Sir Bernard Eder, "Does arbitration stifle development of the law? Should s.69 be revitalised?" Chartered Institute of Arbitrators (London Branch) AGM Keynote Address, 28 April 2016 http://arias.org.uk/news-and-views/keynote-address-by-sir-bernard-eder/ accessed 13 September 2016.

5 J Tsatsas, "A focus on maritime arbitration: the LMAA Conference 2010", *Arbitration* (2010) 76(3), 396–398. London courts referred maritime disputes to arbitration from as early as the fourteenth century: see Derek Roebuck, *Mediation and Arbitration in The Middle Ages* (HOLO Books: the Arbitration Press, 2013) 80, 82.

6 M. Summerskill, "The London Maritime Arbitrators Association" *Arbitration* (1985) 51, 503–513, 504. See also B. Harris, "Why is London Maritime Arbitration Successful?" *LMAA Newsletter Summer 2011, Part Two,* 35–45.

7 M. Summerskill, "The London Maritime Arbitrators Association" *Arbitration* (1985) 51, 503–513, 506.

8 See the LMAA Rules (Revised & updated up to May 2014), Rule 2.

1.5 Unlike the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) or certain commodity associations such as the Grain and Feeds Trade Association (GAFTA), the LMAA does not actively supervise or administer arbitrations. However, the LMAA (or more usually, the President of the LMAA for the time being) may appoint arbitrators if the arbitration agreement so specifies or where applicable LMAA terms confer such a power (for example, where two party-appointed arbitrators fail to appoint a third arbitrator or umpire, where the parties have failed to agree upon a sole arbitrator, or where a sole arbitrator retires to avoid delay and the parties fail to agree upon a substitute).

1.6 The LMAA plays a central and supportive role in London maritime arbitration. Its members conduct the vast majority of maritime arbitrations in London. In 2015, there were at least 3160 appointments on LMAA terms and at least 438 awards issued under LMAA terms.[9] The LMAA is responsible for drawing up the LMAA Terms (and other rules such as the Small Claims Procedure)[10] and laying down standards of conduct for its members.[11] It has an informative role: maintaining a website, issuing a handbook, publishing a newsletter and generally keeping members informed of relevant developments, for instance by holding seminars. The LMAA website and handbook are very useful sources of information on practice and individual arbitrators.[12] In addition, the LMAA may be called upon to appoint arbitrators in accordance with LMAA terms or an arbitration clause and to give members advice on specific questions. In a wider context it seeks to maintain high professional standards in maritime arbitration and to act as a representative body, for instance by making representations about proposed legislation relevant to its members' interests.

Members

1.7 The LMAA consists of two main groups of members: full members and supporting members.[13] As at January 2017 there are 37 full members who are generally prepared to undertake maritime arbitration of any description or duration. Approximately two thirds of these have a predominantly legal background and the rest have technical or commercial expertise. Many full members arbitrate as a full-time occupation. They would almost certainly be treated as "commercial men" or "engaged in the shipping trade" for the purpose of satisfying such a qualification required in an arbitration clause.[14] To become a full member the

9 LMAA website, "2015 Statistics" www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce accessed 11 July 2016. These figures relate to all LMAA terms and are based on figures provided by full and aspiring members of the LMAA as well as from barristers accepting appointments on LMAA terms. They do not otherwise include figures from supporting members. The exclusion of LMAA arbitration statistics from the 2015 White and Case Survey of International Arbitration has been criticised as leading to an underestimation of the relative importance of London in international commercial arbitration: Ian Gaunt, "Review of the 2015 White and Case Survey of International Commercial Arbitration" *LMAA Newsletter Winter 2015–16, Part Two,* 22.

10 See fn 1.

11 The LMAA has issued a Code of Ethics (which is available to full members only) and has powers to suspend, expel or caution full members: see the LMAA Rules, Rule 15.

12 www.lmaa.org.uk. The LMAA can be contacted via the Honorary Secretary. The identity or contact information of the Honorary Secretary may change and therefore reference should be made to the website.

13 There are also honorary members and retired members.

14 *The Myron (Owners) v Tradax Export SA, The Myron* [1969] 1 Lloyd's Rep 411 (Comm) 415, *Rahcassi Shipping Company SA v Blue Star Line Ltd, The Bede* [1969] 1 QB 173 (Comm), *Pando Compania Naviera SA v Filmo SAS* [1975] 1 QB 742 (Comm). See also *Armada (Singapore) Pte Ltd v Gujarat NRE Coke Ltd* [2014] FCA 636, in which the Federal Court of Australia rejected an argument that two English barristers with considerable experience in arbitrating commercial disputes were not "commercial men" under English law.

applicant must demonstrate his knowledge of the relevant areas of English law and competence in writing awards. The general rule is that an applicant for full membership must have been engaged for at least 15 years in a position of responsibility within the shipping industry, generally in commercial, technical or legal areas. Applicants must be UK residents or otherwise able to attend London hearings at short notice. A substantial commitment to arbitration will normally be required to ensure that sufficient time can be given to arbitrations and to help secure the impartiality of an independent arbitrator. The LMAA election sub-committee will interview potential full members in meetings. The sub-committee will report on each applicant but election to full membership is ultimately decided by the LMAA Committee.[15] The LMAA Committee has powers (which have never needed to be used) to remove a member from the LMAA where his conduct is inconsistent with LMAA membership.[16]

1.8 The second group of LMAA members consists of around 750 supporting members drawn mainly from the shipping trade, solicitors' firms, barristers and P&I clubs. Supporting members do not, as a general rule, practise full-time as arbitrators but may from time to time accept appointments and wish to lend their support to the objects of the LMAA. Applicants for supporting membership should be aged at least 28 with suitable commercial or technical experience or be qualified as a lawyer for five years. The application must be supported by one full member or two referees, preferably supporting members.[17] The names of supporting members who are willing to accept appointments as an arbitrator are listed on the LMAA website.[18]

1.9 The supporting members represent "the users" of London maritime arbitration. The Supporting Members Liaison Committee plays an important role in raising matters of interest and liaising with the LMAA, for example in the drafting of LMAA terms. In 2011 a Supporting Members Liaison Committee (Asia Pacific) was established. It is intended to be complementary to the Supporting Members Liaison Committee and to provide a perspective on matters pertaining to London arbitration and the LMAA from the Asia Pacific region. Most significant changes in practice will only be adopted after consultation with these committees. Supporting members also have the opportunity to meet full members throughout the year at seminars, lunches, meetings and the annual dinner.

1.10 In 2010, the LMAA introduced a list of arbitrators who are supporting members and intend to apply for full membership in due course (referred to as "aspiring full members"). Aspiring full members seek further appointments in LMAA arbitrations to enable them to demonstrate the experience criterion for full membership. Selection for the list requires fulfilment of some of the requirements of full membership (including independence from competing commercial activities), but does not imply any endorsement by the LMAA. In January 2017 there were 31 aspiring full members.

C. The LMAA Terms

1.11 The LMAA Terms were first introduced in 1984 and amended versions came into force in 1987, 1991, 1997, 2002, 2006, 2012 and most recently in 2017 (Appendix L contains flow

15 LMAA website, "Guidelines for Full Membership" www.lmaa.london/uploads/documents/GUIDELINES%20FOR%20FULL%20MEMBERSHIP.pdf accessed 11 July 2016.

16 See the LMAA Rules, Rule 15.

17 LMAA website, "Guidelines for Supporting Membership" www.lmaa.london/uploads/documents/GuidelinesforSupportingMembership.pdf accessed 11 July 2016.

18 LMAA website, "List of supporting members generally prepared to accept appointment as arbitrators" www.lmaa.london/uploads/documents/SupportingMembersAcceptingAppointments.pdf accessed 11 July 2016.

charts setting out the usual procedure under the 2017 Terms). The Terms are flexible in that the parties and the arbitrators may agree to alter or dispense with any part of them. The combination of clarity, convenience and flexibility found in the LMAA Terms means that they are often chosen to govern arbitrations where the arbitrators are not members of the LMAA, for instance where the sole arbitrator is a practising lawyer. The current version (the LMAA Terms (2017))[19] applies to all arbitrations commenced on or after 1 May 2017.[20] The current Terms (like the previous LMAA Terms) largely reflect the provisions of the 1996 Act. Paragraph 7(a) provides a general rule (where the seat of the arbitration is in England and Wales) that:

> [T]he arbitral proceedings and the rights and obligations of the parties in connection therewith shall be in all respects governed by the [1996] Act save to the extent that the provisions of the Act are varied, modified or supplemented by these Terms.

1.12 The Terms provide further detail and, in some respects, confer greater powers on the tribunal, for example by enabling the tribunal to make orders for concurrent hearings. The previous edition of this book discussed the 2006 version of the Terms. The changes introduced in 2012 and 2017 were intended to address issues which had arisen under the earlier versions of the Terms. Paragraph 8(a) of the LMAA Terms 2012 introduced a default rule that a tribunal will consist of three members if the arbitration agreement makes no provision as to the number of arbitrators, paragraph 10 gave the tribunal an express discretion as to when and how to deal with disputes referred to the tribunal after the arbitration is commenced, and paragraph 20 required the tribunal, if asked, to do its best to indicate when its award will be available. Paragraph 11 of the LMAA Terms 2017 introduced a new power of the President of the LMAA to appoint a sole arbitrator in default of the parties' agreement, and the LMAA Checklist was incorporated into the 2017 Terms as a new Fourth Schedule. The more specific effects of the LMAA Terms are discussed throughout the rest of this book. References to "the LMAA Terms" in this book are to the current LMAA Terms (2017).

When are LMAA Terms applicable?

1.13 The LMAA Terms contemplate three circumstances in which the LMAA Terms may apply to a reference. The first, and most straightforward, is whenever the parties have agreed expressly that they shall apply.[21] Such agreement is most commonly to be found in the arbitration agreement between the parties. However, such an agreement could be concluded at any time, even after a reference has been commenced.

1.14 Paragraph 5 of the LMAA Terms also specifies two specific circumstances in which the parties "shall be taken" to have agreed that the LMAA Terms shall apply to their reference, namely:

(a) whenever the dispute is referred to a sole arbitrator who is a full Member of the Association and whenever both the original arbitrators appointed by the parties are full Members of the Association, unless both parties have agreed or shall agree otherwise;

(b) whenever a sole arbitrator or both the original arbitrators have been appointed on the basis that these Terms apply to their appointment; and whenever a sole arbitrator or

19 Available on the LMAA website www.lmaa.london/uploads/documents/THE%20LMAA%20TERMS%202017%20Clean.pdf accessed 9 February 2017. Also reproduced at appendix B.

20 For the meaning of "commencing" arbitration, see s 14 of the 1996 Act and chapter 10 on appointments.

21 LMAA Terms, para 5.

> both the original arbitrators have been appointed on the basis referred to at (b), such appointments or the conduct of the parties in taking part in the arbitration thereafter shall constitute between the parties an agreement that the arbitration agreement governing their dispute has been made or varied so as to incorporate these Terms and shall further constitute authority to their respective arbitrators so to confirm in writing on their behalf.

1.15 Although parties seeking to appoint an arbitrator sometimes state that the appointment is to be on LMAA Terms (even though there is no reference to the LMAA Terms in the arbitration agreement), it is more often the case that the arbitrator stipulates that acceptance is "on" or "subject to" the LMAA Terms "in force for the time being", either by expressly stating this or by a printed notice to that effect on his writing paper. An arbitrator's acceptance of appointment "on LMAA Terms" will mean that those Terms govern his appointment and his relationship with the party appointing him, for example as regards his right to booking fees. However, this alone will not be sufficient to render the Terms applicable to the conduct of the arbitration because this requires the agreement of both parties.

1.16 If the claimant appoints its original arbitrator on the LMAA Terms, and communicates that fact to the respondent before the respondent has appointed its own arbitrator, then the communication of the claimant's appointment could be analysed as an offer that the LMAA Terms should apply to the reference (capable of acceptance by the respondent appointing its arbitrator also on the LMAA Terms).[22] In these circumstances, it is suggested that the LMAA Terms would apply to the reference. An offer by the claimant to appoint a sole arbitrator on LMAA Terms which is communicated to, and accepted by, the respondent would have a similar effect. However, if a sole arbitrator is appointed on the LMAA Terms by default,[23] then it is unlikely that the LMAA Terms would apply to the reference pursuant to paragraph 5(b), unless the party in default took part in the arbitration with actual or apparent knowledge that the arbitrator had been appointed on LMAA Terms and did not object to such terms applying to the reference.

1.17 If the dispute is referred to a sole arbitrator who is a full member of the LMAA, or the original arbitrators appointed by the parties are full members, it is doubtful whether paragraph 5(a) of the LMAA Terms is effective by itself to make the arbitral proceedings subject to LMAA Terms, if the parties have not agreed that the LMAA Terms should be applied to the reference by some other means.

1.18 The decision of Saville J in *Fal Bunkering v Grecale Inc of Panama*[24] concerned this type of scenario. A dispute arose out of a charterparty which provided for arbitration but without reference to arbitration rules. The owners appointed a full member of the LMAA who expressly accepted the appointment on LMAA Terms. The charterers were not informed of the terms of that appointment and their arbitrator (also a full member of the LMAA) accepted appointment without reference to any terms. The owners applied to the arbitrators for security for costs, relying on the LMAA Terms which gave the arbitrators jurisdiction to grant security

22 Compare *Kingscroft Insurance Co Ltd v Nissan Fire and Marine Insurance Co Ltd* [1999] Lloyd's Rep IR 603 (Comm) 621. See also *Fal Bunkering of Sharjah v Grecale Inc of Panama* [1990] 1 Lloyd's Rep 369 (Comm) 373, where Saville J drew an analogy with the type of "multilateral" contract found in *Clarke v Dunraven* [1897] AC 59 (HL). In that case, competitors in a regatta had each agreed with the secretary of the yacht club to obey certain rules during the race. It was held that there was a contract on those rules between the competitors.

23 For example, pursuant to the 1996 Act, s 17 (under the LMAA Terms 2012) or under the LMAA Terms para 11. See further, chapter 10 on default appointments.

24 [1990] 1 Lloyd's Rep 369 (Comm). At the time of the decision arbitrators only had the power to grant security for costs if this was agreed by the parties.

for costs. The charterers sought, and were granted, a declaration that the owners were not entitled to apply to the arbitrators for security.

1.19 Saville J held that the starting point in deciding the terms governing a reference is the parties' express or implied agreement. What the parties impliedly agreed was to be found by looking at what each party was reasonably entitled to conclude from the attitude of the other. It was not possible to assume from the fact that both arbitrators were known to be members of the LMAA that, as a matter of usage, the arbitration should be conducted on LMAA Terms. It was not shown that LMAA members universally and invariably only accepted appointments on LMAA Terms. On the facts, there was no agreement on the terms governing the reference. Saville J applied a contractual analysis of the arbitrators' relationship with the parties and suggested, *obiter*, that if the charterers' arbitrator had accepted appointment on LMAA Terms this would probably have been sufficient to incorporate the LMAA Terms in the reference.

1.20 The problem sought to be addressed by paragraph 5(a) of the LMAA Terms is unlikely to arise in practice since full members of the LMAA now usually accept appointments expressly subject to the LMAA Terms. Their correspondence will usually contain notices to the effect that they accept appointment on LMAA Terms so that parties continuing in the arbitration without objection to the Terms would probably be treated as agreeing by conduct to incorporate them.[25]

Alternative LMAA procedures

1.21 In addition to the LMAA Terms, the LMAA has issued the following alternative procedures which are intended to be simpler and cheaper than the full LMAA Terms:

- The LMAA Small Claims Procedure (2017).[26]
- The FALCA Terms.[27]
- The Intermediate Claims Procedure (2017).[28]

The provisions of these terms are discussed fully in chapter 12.

Which LMAA Terms apply?

1.22 The question of which version of the LMAA Terms will apply is a matter of construction of the arbitration agreement and the arbitrators' terms of appointment. Where an arbitration agreement provides that certain rules apply, then *prima facie* that refers to the rules in force at the time the arbitration is begun.[29] That presumption is reinforced by the current LMAA Terms (which are stated to apply to all arbitrations commenced on or after 1 May 2017[30]) and

25 The last sentence of para 5 of the LMAA Terms would support this view.

26 LMAA website, "LMAA Small Claims Procedure (2017)" www.lmaa.london/uploads/documents/SCP%202017%20Clean.pdf accessed 9 February 2017. Also reproduced at appendix C.

27 FALCA stands for "Fast and Low Cost Arbitration". See the LMAA website, "FALCA Terms and Notes" www.lmaa.london/uploads/documents/FALCA-Terms.pdf accessed 12 July 2016.

28 LMAA website, "Intermediate Claims Procedure (2017)" www.lmaa.london/uploads/documents/ICP%202017%20Clean.pdf accessed 9 February 2017. Also reproduced at appendix C.

29 *China Agribusiness Development Corporation v Balli Trading* [1998] 2 Lloyd's Rep 76 (Comm); *Perez v John Mercer & Sons* (1922) 10 Ll L Rep 584 (CA); *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279 (Comm) and *EDM JM Mertens & Co PVBA v Veevoeder Import Export Vimex BV* [1979] 2 Lloyd's Rep 372 (Comm) 383.

30 The issue of when an arbitration is treated as commenced is considered in chapter 10. See s 14 of the 1996 Act.

by the BIMCO/LMAA Arbitration Clause (2009)[31] (which provides that "the arbitration shall be conducted in accordance with the LMAA Terms current at the time when the arbitration proceedings are commenced").

1.23 Uncertainty as to the applicable terms may arise where the arbitration agreement was made before the current terms came into force and it provides for arbitration according to the terms in force at the date of the contract.

> In *The Robin*,[32] a charter made in January 1997 included an arbitration clause providing that "where appropriate the LMAA Small Claims Procedure (1989) will be used". The 1989 procedure had been superseded by a later procedure and Toulson J found that the 1989 procedure did not apply: the probable intention of the parties was that the procedure current at the relevant date (i.e. commencement of arbitration) would apply and the reference to 1989 was an error.

1.24 It is doubtful whether amendments to arbitration terms made after the commencement of an arbitration would apply in preference to the terms in force at the date of commencement. Amended arbitration rules would probably only be given preference in so far as the old rules had become out of date and impractical to apply.[33]

1.25 The LMAA Small Claims Procedure (or FALCA Rules or the Intermediate Claims Procedure) will normally apply only where there is provision to that effect in the arbitration clause or an agreement by the parties after the dispute has arisen to apply those terms.

D. London Salvage Arbitration

1.26 Disputes in connection with salvage are usually referred to arbitration under a two-tier process of arbitration established by the Salvage Arbitration Branch of the Council of Lloyd's.[34] The current Lloyd's Standard Form of Salvage Agreement (LOF 2011) provides that the remuneration and special compensation of the salvage contractor, and any other difference arising out of the salvage agreement, "shall be determined by arbitration in London in the manner prescribed by Lloyd's Standard Salvage and Arbitration Clauses ('the LSSA Clauses') and Lloyd's Procedural Rules in force at the date of this agreement".

1.27 Under the LSSA Clauses, the arbitrator is appointed by the Council of Lloyd's (the Council)[35] from a panel of arbitrators maintained by the Council.[36] The arbitration is conducted in accordance with the Procedural Rules approved by the Council (Lloyd's Procedural Rules).[37] Under LOF 2011, the question for determination is usually the remuneration and/or special compensation of the salvage contractor, although other disputes may arise. There are commonly many different owners of the salved property, particularly where the salvage relates to a container vessel. The LSSA Clauses and Lloyd's Procedural Rules contain provisions directed towards these features of salvage claims. The arbitrator has power at any stage of the proceedings to order that the amount of security provided by the owners of the salved property

31 LMAA website, "BIMCO/LMAA Arbitration Clause (2009)" www.lmaa.london/lmaa-bimco-clause.aspx accessed 12 July 2016.
32 *Ranko Group v Antarctic Maritime SA* [1998] LMLN 492 (Comm), see transcript of 12 June 1998.
33 *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279 (Comm) 286.
34 For more detailed discussion, see Francis D. Rose, *Kennedy & Rose: Law of Salvage* (8th edn, Sweet & Maxwell, 2013) paras 14–053 to 14–116 and John Reeder, *Brice on Maritime Law of Salvage* (5th edn, Sweet & Maxwell, 2011) paras 8–123 to 8–239.
35 LSSA Clauses, clause 5.1.
36 *Kennedy & Rose* para 14–008.
37 LSSA Clauses, clause 6.1.

be varied.[38] The arbitrator also has power to make provisional or interim awards, including for payments on account.[39] Parties to the salvage agreement who wish to participate in the arbitration are required to appoint an agent or representative ordinarily resident in the UK,[40] failing which they are deemed to have renounced their right to be heard or adduce evidence[41] but are nevertheless bound by the award.[42] The Lloyd's Procedural Rules provide for a short timetable.[43] Unless otherwise agreed or ordered, disclosure is limited to specified classes of documents,[44] and no expert evidence is permitted unless the arbitrator is satisfied that it is reasonably necessary for the proper determination of an issue arising in the arbitration.[45] The arbitrator is obliged to ensure that the represented parties are informed of the benefit which might be derived from the use of mediation.[46]

1.28 There are special provisions of the LSSA Clauses in relation to salved cargo insofar as it consists of laden containers, which include the right of the arbitrator to take into account any agreement between the salvage contractors and the owners of salved cargo comprising at least 75 per cent of salved cargo represented in the arbitration when dealing with the owners of salved cargo who were not represented at the time of the agreement.[47] There is also a Fixed Cost Arbitration Procedure (FCAP) for documents-only arbitrations in suitable cases (usually including, but not limited to, those cases where the security demanded by the salvors is less than US$ 1,500,000[48]).

1.29 Any party may appeal from an award under the LSSA Clauses (including an FCAP award) by giving written notice of appeal to the Council within 21 days after the award was published by the Council.[49] The Council nominates the appeal arbitrator; traditionally the Council appoints a standing appeal arbitrator.[50] The appeal arbitrator has power to admit the evidence or information which was before the arbitrator, together with the arbitrator's notes and reasons for his award, any transcript of evidence and such additional evidence or information as he may think fit.[51]

1.30 Awards and appeal awards made under the LSSA Clauses will ordinarily be made available on the Lloyd's website (accessible by subscription) unless the arbitrator or appeal arbitrator has ordered that there is good reason for deferring or withholding them.[52] The publication of awards in this manner was introduced by LOF 2011. However, there was previously an implied qualification to the confidentiality of LOF awards based on the custom and practice that such awards were made available to LOF arbitrators and counsel in other LOF cases, with a view to promoting uniformity and consistency within the LOF system of arbitration.[53]

38 LSSA Clauses, clause 4.4.
39 LSSA Clauses, clause 6.5.
40 LSSA Clauses, clause 7.1.
41 LSSA Clauses, clause 7.3.
42 LSSA Clauses, clause 6.8.
43 Lloyd's Procedural Rules, rules 2, 3 and 7.
44 Lloyd's Procedural Rules, rule 4.
45 Lloyd's Procedural Rules, rule 5.
46 Lloyd's Procedural Rules, rule 6.
47 LSSA Clauses, clause 14.
48 FCAP, para 1.
49 LSSA Clauses, clause 10.1.
50 *Kennedy & Rose*, para 14–094.
51 LSSA Clauses, clause 10.7.
52 LSSA Clauses, clause 12.1.
53 *The Hamtun* [1999] 1 Lloyd's Rep 883 (Adm) (Peter Gross QC).

1.31 It has recently been suggested that the use of LOF 2011 is in marked decline in favour of commercial contracts such as the 2010 versions of the BIMCO Wreckhire, Wreckstage and Wreckfixed forms.[54] The London arbitration agreement in these forms provides that the arbitrator should be selected by the party claiming arbitration from the panel of Lloyd's salvage arbitrators, with a right of appeal to the person currently acting as Lloyd's appeal arbitrator, and that the arbitrator and appeal arbitrator should have the same powers as those appointed under the LOF 2000 and its revisions (which would include LOF 2011). However, claims below US$50,000 are subject to the LMAA Small Claims Procedure and claims below US$400,000 (or such other sum as the parties may agree) are subject to the LMAA Intermediate Claims Procedure.

E. The LCIA

1.32 Maritime disputes are also referred to London arbitration from time to time under the rules of the London Court of International Arbitration (LCIA), particularly under shipbuilding, ship finance and energy-related contracts. The current rules are the LCIA Arbitration Rules (2014), which came into effect on 1 October 2014 (the LCIA Rules).[55] In contrast with the LMAA, the LCIA administers arbitration and makes all appointments of arbitrators (although the parties may agree that they shall have a right to nominate candidates for appointment). In circumstances of urgency before the tribunal has been appointed, an Emergency Arbitrator may be appointed to decide claims for emergency relief pending formation of the tribunal. The LCIA Rules set out a timetable for the service of statements of case (subject to contrary direction by the tribunal) and permit consolidation and joinder of third parties in certain circumstances. The costs of the arbitration (other than the parties' own legal costs) are determined by the LCIA Court and will include the LCIA's own charges for administering the arbitration (calculated on the basis of the time used).

1.33 In general, the shipping market has shown a preference for non-administered arbitration, at least in lower value and less complex matters. For example, the Singapore Chamber of Maritime Arbitration was established in 2004 offering administered maritime arbitration, but was reformed in 2009 to offer a non-administered form of arbitration in response to the preferences of its users.[56] Nevertheless, it has been suggested that the LMAA should consider adopting an expanded governance structure and, perhaps, moving closer to an administered system of arbitration, in order better to address issues of cost and delay in the arbitral process.[57]

F. Other London arbitration

1.34 There are also London maritime arbitrations which are conducted without any reference to the LMAA or other standard terms.[58] This may occur where the arbitration

54 Sam Kendall-Marsden "Lloyd's Open Form – a contract on the rocks?" http://www.standard-club.com/news-and-knowledge/news/2016/12/web-alert-lloyd-s-open-form-a-contract-on-the-rocks.aspx accessed 18 April 2017.

55 LCIA website, "LCIA Arbitration Rules (2014)" www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx accessed 13 July 2016.

56 Between 2004 (when the SCMA was established to offer an administered process) and 2009, only four case references were registered: Lee Wai Pong, "The evolving role of SCMA in Singapore's arbitration landscape" in *19th Session of the International Congress of Maritime Arbitrators*, vol 2, (Hong Kong, 2015) 1121–1126, 1123.

57 Daniel Evans, "LMAA arbitrations: observations of a user" *Arbitration* 2010, 76(3), 399–404.

58 This is sometimes referred to as *ad hoc* arbitration, although the term *ad hoc* is more commonly used to refer to non-administered arbitration (such as arbitration under the LMAA Terms), in contrast with administered institutional arbitration.

agreement makes no reference to applicable terms and the tribunal is not comprised exclusively of full LMAA members. In practice, where the parties and tribunal are familiar with London maritime arbitration, such references are generally conducted in a manner very similar to references under the LMAA Terms. The arbitrators may also invite the parties to agree to terms of appointment which may confer additional powers upon the tribunal (such as, for example, the power to order the parties to secure the tribunal's fees by way of a deposit).[59] However, certain powers given to an LMAA tribunal are not available to such tribunals (unless agreed by the parties), such as the power to direct that references be heard concurrently and the power to stay a party's claim upon failure to provide security for costs.

G. London maritime arbitration compared with other seats

1.35 London remains the pre-eminent centre for the arbitration of international maritime disputes. Other significant centres for the resolution of international maritime disputes include New York, Hong Kong, Singapore, China, and Germany.

1.36 The majority of New York maritime arbitration is conducted under the Rules of the Society of Maritime Arbitrators, Inc (the SMA Rules). New York arbitration in accordance with the SMA Rules is one of the alternative dispute resolution provisions in BIMCO forms (and many other standard forms). In common with the LMAA, the SMA does not administer arbitrations. It does, however, maintain a roster of members qualified to act as arbitrator. The distinctive features of arbitration under the SMA Rules are that awards are published[60] (unless the parties agree otherwise in advance); SMA arbitrators may order pre-award security and may also issue subpoenas to compel third parties to produce documents or testify; there is no right to pre-hearing disclosure (although the tribunal can order disclosure); and the tribunal has the power to consolidate disputes under two or more contracts. In contrast with the general rule which prevails in American courts, the tribunal has the power to award legal costs. There are also SMA Rules for a Shortened Arbitration Procedure for disputes involving smaller monetary amounts, under which the arbitrator's fees and recoverable legal costs are capped at modest levels. In general, awards can only be set aside by the Federal Courts on limited grounds (generally, only if the arbitrators demonstrated a manifest disregard of the law, one or more members of the tribunal demonstrated evident partiality or bias, or the tribunal exceeded its powers).[61] There is no right of challenge on the grounds of error of law or fact.

1.37 Hong Kong maritime arbitration may be conducted under the rules of an institution, such as the Hong Kong International Arbitration Centre (HKIAC), or on an *ad hoc* basis (with or without reference to rules such as the LMAA Terms). There is no set of non-institutionally administered rules specifically for Hong Kong maritime disputes in common use.[62] The HKIAC Maritime Arbitrators Group, a group of HKIAC arbitrators specialising in maritime

59 Compare the LMAA Terms, First Schedule, Section (E), which entitles the tribunal to security in certain circumstances. The LCIA will act as fundholder in non-LCIA disputes: see the LCIA website, "Fundholding" www.lcia.org/Fundholding/Fundholding.aspx accessed 6 September 2016.

60 It is also common practice in New York to publish awards in references which are not governed by the SMA Rules: John D. Kimball, "Overview of significant recent developments in New York arbitration, 2012–2015" in *19th Session of the International Congress of Maritime Arbitrators*, vol 1, (Hong Kong, 2015) 67–85, 67.

61 ibid, 82.

62 The China Maritime Arbitration Commission has special rules for Hong Kong arbitration: see para 1.39.

matters, reported that its members had been appointed on 157 occasions in 2013.[63] The Hong Kong Maritime Arbitration Group (HKMAG) also maintains a list of professionals resident in Hong Kong who are prepared to sit as arbitrators in maritime disputes. Under Hong Kong law, emergency relief granted by emergency arbitrators is enforceable; tribunals may grant interim relief on a without notice basis; tribunals may order security for costs; and the costs of the proceedings are recoverable. Unless the parties opt into a regime which is similar to sections 68 and 69 of the 1996 Act, there is no challenge to awards on the grounds of error of law or fact. It is possible for the parties to agree that the Court shall have power to order consolidation of arbitrations. The Hong Kong Maritime Arbitration Clause published by the HKIAC and the HKMAG provides for lower value disputes to be conducted in accordance with the HKIAC Small Claims Procedure.[64]

1.38 The Singapore Chamber of Maritime Arbitration (SCMA) publishes rules for the arbitration of maritime disputes (the SCMA Rules). The SCMA reported 37 arbitrations under the SCMA Rules in 2015.[65] The SCMA does not administer arbitrations. Its Rules are similar to the LMAA Terms, although it has been suggested that the procedure in Singapore maritime arbitration is often closer to that of the Singapore Courts.[66] The SCMA maintains a panel of arbitrators, but it is not obligatory to appoint an arbitrator from the panel in references under the SCMA Rules. In contrast with the LMAA Terms, under the SCMA Rules the tribunal is obliged to hold a hearing unless the parties agree otherwise. The SCMA Rules include a Small Claims Procedure, under which arbitrators' fees and the parties' recoverable costs are capped at modest levels. Since 2012, arbitration in Singapore under the SCMA Rules has been one of the dispute resolution choices in new BIMCO standard forms. Maritime disputes may also be arbitrated in Singapore under the rules of an institution (such as the Singapore International Arbitration Centre (SIAC), which offers administered arbitration under the SIAC Rules) or on an *ad hoc* basis. Under Singapore law applicable to international arbitrations, emergency relief granted by emergency arbitrators is enforceable; tribunals may make interim injunctions; tribunals can order security for costs; and the costs of the proceedings are recoverable. There is no challenge to awards on the grounds of error of law or fact, unless the parties opt into the regime for domestic arbitrations (which permits appeals on questions of law in terms similar to section 69 of the 1996 Act).

1.39 Under Chinese law, an arbitration agreement must identify an arbitration commission to which disputes are to be referred in order to be valid. Accordingly, Chinese maritime arbitration is conducted by such arbitration commissions, particularly the China Maritime Arbitration Commission (CMAC). Arbitrations administered by CMAC are conducted under the CMAC Rules. In 2014, CMAC accepted 119 cases, of which 46 were foreign-related.[67] Arbitrators are appointed from a panel maintained by CMAC, unless the parties agree otherwise. The CMAC Rules permit consolidation of disputes; joinder of additional parties (provided they are bound by the arbitration agreement); interim measures; emergency relief granted by an

63 HKIAC website, "Case Statistics 2013" http://www.hkiac.org/about-us/statistics accessed 18 April 2017.

64 Hong Kong Shipowners Association website, "Maritime Arbitration Group" www.hksoa.org/links/maritime_arbitation.html accessed 12 September 2016.

65 www.scma.org.sg/pdf/casesummary.pdf accessed 12 September 2016.

66 Marks Sachs, "Singapore Arbitration – Divergence and Harmony in the Shared Common Law Experience" in *19th Session of the International Congress of Maritime Arbitrators*, vol 2, (Hong Kong, 2015) 1057–1071.

67 Jianlong Yu, "The new development of China Maritime Arbitration" in *19th Session of the International Congress of Maritime Arbitrators*, vol 1, (Hong Kong, 2015) 87–95, 86.

emergency arbitrator (provided the parties agree);[68] the investigation and collection of evidence by the tribunal; conciliation by the tribunal with the consent of the parties; concurrent oral hearings; and the award of costs. Under the CMAC Rules, an oral hearing must take place unless the parties and the tribunal agree otherwise; proceedings are confidential unless both parties request the tribunal to order that they should be public. Draft awards are submitted to CMAC for scrutiny. There is a CMAC Summary Procedure for disputes of lower value, and there are special rules for arbitrations administered by the CMAC Hong Kong Arbitration Centre. The parties may choose whether the arbitration fees should be calculated by reference to the amount in dispute or time spent. Under Chinese law, arbitral awards involving foreign elements cannot be challenged on the grounds of error of law or fact.[69]

1.40 In Germany, maritime disputes are arbitrated under the Rules of the German Maritime Arbitration Association (the GMAA Rules). Under the GMAA Rules, the parties are free in their choice of arbitrators (subject to any provisions of their arbitration agreement). The principal differences between GMAA arbitration and London maritime arbitration are that there is no obligation to disclose documents, save in very limited circumstances; the tribunal has an obligation to seek to facilitate settlement at every stage of the proceedings; and the tribunal adopts an inquisitorial role. There is an oral hearing unless the parties agree to a documents-only arbitration, but oral hearings are generally shorter than in London. The tribunal's fees and the recoverable costs are determined by the amount in dispute. The GMAA does not have separate rules for small claims.[70] There is no right to challenge awards in Germany on the grounds of error of law or fact.[71]

H. Maritime arbitration and the Civil Procedure Rules

1.41 The Civil Procedure Rules ("the CPR"), first introduced in 1999, are the court rules applicable to civil litigation in the English High Court and county court. At its outset the CPR expressly states its aim, or "overriding objective", as follows:

> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly;

68 See Qiang Shi and Beiping Chu, "The Emergency Arbitration Procedures in the New CMAC Rules and the Interim Measures Prior to Arbitration in Chinese Laws" in *19th Session of the International Congress of Maritime Arbitrators*, vol 1, (Hong Kong, 2015) 491–502, 498.

69 Zhou Qinghua, "On Setting aside Arbitral Awards Involving Foreign Elements in China" in *19th Session of the International Congress of Maritime Arbitrators*, vol 1, (Hong Kong, 2015) 515–522, 516.

70 Axel Salander and Christoph Hasche, "Germany" in Global Arbitration Review, *Maritime & Offshore Arbitration 2016* http://globalarbitrationreview.com/jurisdiction/1000014/germany accessed 12 September 2016.

71 Boris Kasolowsky and Carsten Wendler, "Germany" in Global Arbitration Review, *Commercial Arbitration 2016* http://globalarbitrationreview.com/jurisdiction/1003154/germany accessed 18 April 2017.

however, a party has issued proceedings to arrest a vessel the court may grant a stay of these proceedings but order that the arrest be maintained as security for an award under section 26 of the Civil Jurisdiction and Judgments Act 1982.[117] The court probably has power under section 44 of the 1996 Act to allow a freezing order to remain in force to preserve assets where court proceedings are stayed under section 9 of the 1996 Act.

Appeals

7.57 There is a right of appeal from a first instance decision under section 9 or the court's inherent jurisdiction. Such an appeal can only be made with the permission of the Court of Appeal or the first instance court.[118] This is not clear from the 1996 Act which makes no provision for appeal from decisions under section 9. On its literal meaning the statute, taken together with the provisions on appeals under the Senior Courts Act 1981, could be read as excluding any right of appeal. However, the House of Lords in *Inco Europe Ltd v First Choice Distribution*[119] resolved the point by deciding that there had been a drafting error in the legislation and that it should be read so as not to remove the Court of Appeal's jurisdiction.

117 See *Greenmar Navigation Ltd v Owners of Ships Bazias 3, The Bazias 3* [1993] 1 Lloyd's Rep 101 (CA) on the scope of the discretion under s 26.

118 CPR Part 52.3.

119 [2000] 1 Lloyd's Rep 467 (HL).

CHAPTER 8

Injunctions and arbitration

A. Introduction

8.1 An injunction is an order requiring a party to do something or (more usually) to refrain from doing something. It is a remedy with a very broad range of use. For example, freezing orders may be granted to stop a party dissipating its assets pending the determination of a dispute (see chapter 18). Injunctions may also be the appropriate remedy to prevent disclosure of confidential information (see chapter 13). Injunctions are a general remedy which arbitrators can award under section 48(5) of the 1996 Act (see chapter 19).

8.2 This chapter will primarily focus on the use of an injunction against a party who has breached an arbitration agreement by pursuing foreign proceedings which relate to disputes the parties agreed to resolve by arbitration, or where a party is pursuing an arbitration in an unlawful way (for example, where the matter has already been decided against that party). European case law[1] now precludes an English court from granting such an injunction in relation to court proceedings in another EU state but such relief remains available to restrain court proceedings outside the EU. Law and practice is discussed in this chapter (and throughout this book) on the basis that the UK is a member of the EU. The position is likely to be affected by future changes implemented by reason of Brexit. However, the continuing application of the New York Convention and the exclusion of arbitration from the scope of the Brussels I Regulation mean that the changes may be less significant to arbitration than in other areas of jurisdictional dispute.

8.3 Where proceedings are brought in the English courts in breach of an arbitration clause the appropriate remedy is a stay of proceedings (see chapter 7). Stays and anti-suit injunctions

1 *Allianz SpA v West Tankers Inc* Case C-185/07, [2009] 1 Lloyd's Rep 413, commonly known as *The Front Comor* and *Turner v Grovit* Case C-159/02 [2004] ECR 1–3565, [2005] 1 AC 101 (ECJ), approved in *Gazprom OAO* Case C-536/13 (CJEU) [2015] 1 Lloyd's Rep 610. The same approach would most probably apply under the currently applicable Regulation (EU) No. 1214/2012, the Recast Brussels I Regulation.

are regarded in English law as opposite and complementary sides of a coin; operating as counterpart remedies that support the arbitration agreement.[2]

8.4 Beyond disputes concerning anti-suit injunctions, the most common court injunctions are those sought under section 44(2)(e) of the 1996 Act to support an existing or proposed arbitration. Section 44 is set out in chapter 12 and dealt with in more detail there and also in chapter 18 as regards freezing orders.

B. Types of injunction

8.5 English law recognises that an injunction may be granted either as an "interim" or as a "final" remedy. A final injunction is a permanent order restraining a party indefinitely from doing something (or requiring him to do something). An interim injunction is a temporary order of the same sort and is usually sought to preserve the status quo pending the final determination of the parties' rights, for instance a freezing order will usually be subject to a time limit. Despite its temporary nature an interim injunction may be commercially determinative of the dispute between the parties. The basic rule governing the grant of an interim injunction is that the remedy is discretionary. The applicant must establish a serious issue to be tried on the merits (although if the injunction is likely to be determinative of the question of the forum for a dispute, an applicant will probably have to show a stronger case on the merits).[3] An interim injunction will not be granted if damages would be an adequate remedy for the wrong alleged. The applicant must also establish that the balance of convenience lies in favour of the grant of an injunction. This will involve considering the risk of causing injustice if the injunction is granted or refused.[4] One particular feature of an interim injunction is that the applicant must give an undertaking (often to be supported by security) to pay damages for any loss sustained by reason of the injunction if it is found that the applicant was not entitled to it.

8.6 Injunctions are also sometimes categorised on grounds of whether they prohibit an act (a negative injunction) or require a positive act (a mandatory injunction). The courts are generally much more reluctant to make mandatory injunctions unless it is clear exactly what the enjoined party is required to do. The court needs to have "a high degree of assurance" that the claimant has the right contended for,[5] and may sometimes need to be satisfied that the applicant has "an unusually strong" case for the injunction.[6]

8.7 An injunction to restrain a party from pursuing foreign proceedings is generally called an anti-suit injunction and can be granted as a final or interim order. An injunction to restrain a party from pursuing arbitral proceedings is often called an anti-arbitration injunction (and can similarly be granted as final or interim relief).

8.8 An injunction granted to restrain an imminent or threatened wrongful act is sometimes called a *quia timet*[7] injunction.

2 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281 [23], [60].

3 *Sheffield United Football Club Limited v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167; *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB).

4 See generally, *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] AC 603 (HL).

5 *Dolphin Tankers SRL v China Shipbuilding Trading Co* [2009] EWHC 2216 (Comm); *Seele Middle East FZE v Drake & Scull International SA Co* [2013] EWHC 4350 (TCC).

6 *SAB Miller Africa v East African Breweries* [2009] EWHC 2140, [2010] 1 Lloyd's Rep 392 [50], see also *Engineered Medical Systems Bregas AB* [2003] EWHC 3287 (Comm), see further CPR, Part 25.

7 Meaning "because he fears".

Shell International Petroleum Co Ltd v *Coral Oil Co Ltd*[8] provides an example of a *quia timet* anti-suit injunction. It involved an agreement for supply of oil providing for arbitration in London of any dispute arising "in connection with" the agreement. Shell gave notice to terminate the agreement and Coral threatened to bring proceedings in Lebanon claiming a right to compensation granted under Lebanese law rather than on the basis of breach of the agreement. Moore-Bick J granted an injunction to prevent Coral pursuing proceedings in Lebanon on grounds that the claim that Coral wished to make in Lebanon depended on the contract and was a claim within the scope of the arbitration clause.

C. Arbitrators' jurisdiction to grant injunctions

8.9 Section 48(5) of the 1996 Act makes clear that as regards remedies, arbitrators have the same powers as the court "to order a party to do or refrain from doing anything". Thus arbitrators may grant an injunction as a remedy in an award (for example, an order restraining disclosure in breach of confidence). In practice, however, a tribunal's power to grant injunctions is more limited than that of a court.

8.10 First, an injunction granted by an arbitrator will only be enforceable against the parties to the arbitration and cannot bind third parties.[9] Secondly, an arbitrator lacks the court's coercive powers to punish for non-compliance (for example, committal for contempt). Enforcement can only be achieved by means of sanctions for non-compliance (e.g. peremptory orders)[10] or, more commonly, by obtaining a court order for enforcement (typically under section 66 of the 1996 Act or foreign legislation giving effect to the New York Convention). Thirdly, an arbitrator only has power to grant final relief and cannot grant an interim injunction unless the parties have agreed on such powers. This is because section 39 of the 1996 Act precludes the grant of interim relief on a provisional basis in the absence of written consent. This construction of the Act was applied in *Starlight Shipping Co v Tai Ping Insurance Co Ltd*[11] where Cooke J held that arbitrators had powers under LMAA Terms to make a final award restraining the pursuit of foreign proceedings, but not to grant an interim injunction. The current LMAA Terms similarly do not give arbitrators powers to grant interim injunctions. Even if the parties have agreed to confer power on the tribunal to grant interim orders, such orders may be less easy to enforce than a comparable court order, in particular since it is not clear whether they are sufficiently final and binding to be enforceable under the New York Convention.

8.11 Fourthly, urgent injunctive relief may be more difficult to obtain from an arbitral tribunal because it may not be possible to constitute the tribunal at short notice. There are no provisions for emergency arbitrators under the LMAA Terms. This is not perceived as a shortcoming since in most cases the English Commercial Court has the expertise and resources to provide effective remedies backed by the court's coercive powers. Maritime arbitrators will be reluctant to hear an application without full notice to the other party since this is seen as inconsistent with the consensual nature of arbitration and the tribunal's duties to give each party a reasonable opportunity to put its case. There is also concern that enforcement

8 [1999] 1 Lloyd's Rep 72 (Comm).

9 cf *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649 and *Mace (Russia) Ltd v Retansel Enterprises Ltd* [2016] EWHC 1209 (Comm) where an injunction was made against a third party on grounds of collusion amounting to vexatious conduct.

10 *Pearl Petroleum Co Ltd v Kurdistan* [2015] EWHC 3361 (Comm).

11 [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230 (this aspect was not questioned by the Supreme Court in *Ust*), see also *Kastner v Jason* [2004] EWHC 592 (Ch), [2004] 2 Lloyd's Rep 233 in the context of freezing orders.

of such an injunction could be refused on grounds of lack of proper notice. Fifthly, even if final, an arbitrator's order may be less likely to be given recognition in a foreign court than a conventional award of damages.[12] Accordingly, it is more common for injunctions to be sought from a court and injunctions are relatively uncommon to be awarded. If granted, the injunction will typically lie alongside a declaration or an order to pay damages and it will be given following a full hearing on the merits (whether on paper or orally). It would usually consist of an order that a party stop doing a wrongful act or that it proceed with a specific transaction or give specific instructions.

D. The statutory basis for injunctions

8.12 The court's power to grant any injunction in the commercial context is based on statute.[13] Section 37 of the Senior Courts Act 1981 ("the 1981 Act") gives broad powers for the court to grant an injunction "in all cases in which it appears to the court to be just and convenient to do so". It is the primary source of the High Court's general powers to grant injunctions and will be triggered where a party has acted or threatened to act unconscionably or where a party has invaded or threatened to invade the applicant's legal or equitable rights.

8.13 The 1996 Act also provides rules on injunctions. Section 44 of the Arbitration Act 1996 deals specifically with interim injunctions available from the court in support of existing or proposed arbitral proceedings (the typical example being a freezing order). As explained above, a tribunal's power to grant injunctions arises under section 48(5) of the 1996 Act which expressly confers power on arbitral tribunals to grant injunctions in a final award. Section 72 of the Act expressly recognises the right of a party who has not taken part in arbitral proceedings to challenge the tribunal's jurisdiction by way of an application to court for an injunction. This provision is discussed in chapter 6.

8.14 The 1996 Act is not an exhaustive code for injunctions relating to arbitration.[14] It expressly preserved the court's jurisdiction to grant injunctive relief as developed by case law in so far as it is consistent with the scheme of the 1996 Act.[15] There are also some obvious gaps in the 1996 Act. For example, section 44 does not give power to grant final relief,[16] so if a party seeks a final injunction in support of an arbitration agreement or arbitral proceedings it would have to rely upon the courts' powers under section 37 of the 1981 Act.[17] In addition,

12 Although there is authority that such an award should be enforceable: see *West Tankers Inc v Allianz Spa* [2012] EWCA Civ 27, [2012] 1 Lloyd's Rep 398; *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm), [2011] 2 Lloyd's Rep 531 and *Gazprom OAO* Case C-536/13 (CJEU) [2015] 1 Lloyd's Rep 610.

13 The court's inherent jurisdiction to grant injunctions is only of practical relevance in very limited areas e.g. unusual family law disputes.

14 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281.

15 1996 Act, s 81(1) "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part", see also DAC Report, para 312.

16 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281 [46].

17 The restrictions imposed by s 44 do not apply when the court is considering final injunctions in support of an arbitration – *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc* [2008] EWHC 914 (Comm), [2008] 2 Lloyd's Rep 269.

section 44 of the 1996 Act relates to existing or proposed arbitral proceedings so that section 37 of the 1981 Act will apply if no arbitration is proposed or started.[18]

8.15 The precise scope of the court's jurisdiction to make injunctions in the context of disputes relating to arbitration has raised some difficult issues as to the relationship between the wide powers conferred on the court by the 1981 Act and the narrower rules under the 1996 Act. In particular, under section 44 of the 1996 Act the court only has power to grant interim injunctions in relation to an existing or proposed arbitration, and unless there is consent such injunctions can only be granted in cases of urgency where the tribunal is unable to act effectively.

8.16 The Supreme Court's decision in *Ust*[19] has resolved much uncertainty and made clear that the 1996 Act has not ousted the court's general powers under the 1981 Act. The source of the court's power is clear in relation to anti-suit injunctions where *Ust* is fairly decisive authority that an injunction is granted under section 37 of the 1981 Act and the source of the court's power is not section 44 of the 1996 Act, whether or not an arbitration has been started or proposed.[20] Lord Mance made clear that section 44 of the 1996 Act was not intended to exclude the court's powers to grant an anti-suit injunction under section 37 of the 1981 Act, even where an arbitration was on foot or proposed.[21] His analysis was that an anti-suit injunction was for the purpose of enforcing the arbitration agreement (in particular the promise not to pursue foreign proceedings under the contract, what he called the negative promise). On this basis he considered that an anti-suit injunction was not "for the purpose of and in relation to arbitral proceedings"[22] and the court's power was not found under section 44.

8.17 Accordingly, anti-suit injunctions are firmly treated as granted under the court's general powers under the 1981 Act. In addition, they are regarded as consistent with the scheme of section 44 of the 1996 Act since the court would usually take the view that the tribunal is unable to act as effectively as the court and the application is an urgent one.[23] Outside the context of anti-suit injunctions it is not entirely clear whether the 1996 Act defines the court's jurisdiction to grant an interim injunction in relation to arbitral proceedings or is merely to be given weight as part of the overall scheme. The Court of Appeal in *Cetelem SA v Roust*[24] considered that it was bound by the requirements of section 44 in giving an interim injunction but did not investigate the scope of its general powers under the 1981 Act. Subsequently some cases[25] suggested that the court's broader powers under section 37 could not be used to

18 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281.

19 ibid. See also *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442 regarding anti-arbitration injunctions.

20 In *Southport Success S.A v Tsingshan Holding Group Co. Ltd Ust* [2015] EWHC (Comm) 1974, [2015] 2 Lloyd's Rep 578 the reasoning of *Ust* was applied where London arbitration had commenced. In *Ust* Lord Mance took a different analysis from Cooke J in *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230 who had granted an anti-suit injunction relying on both ss 44 and 37. Lord Mance emphasised that an anti-suit injunction was enforcing the arbitration agreement as opposed to being made in relation to arbitral proceedings for the purpose of s 44.

21 Lord Mance took a different view from Cooke J in *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230 who had granted an anti-suit injunction under s 44.

22 1996 Act, s 44(1).

23 *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230, see also *National Insurance & Guarantee Corporation Ltd v M Young Legal Services Ltd* [2004] EWHC 2972 (QB) [2005] 2 Lloyd's Rep 46.

24 [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep 494.

25 *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep 519 [68], see also *SAB Miller Africa BV v East African Breweries Ltd* [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep 422 [11].

circumvent the requirements of section 44 where an arbitration has commenced or is proposed. The preferred view, especially following *Ust*, is that the 1996 Act provides statutory guidance as to when the court's jurisdiction should be exercised rather than defining the court's jurisdiction to grant an interim injunction.[26]

8.18 However, regardless of any uncertainty as to the precise limits of the court's jurisdiction, in any case relating to arbitration the scheme of the 1996 Act will firmly influence the court's discretion to give an injunction. In *Ust* Lord Mance recognised that the general powers under section 37 of the 1981 Act must be exercised sensitively with due regard for the scheme and terms of the 1996 Act when an arbitration had commenced or was proposed.[27] However, this does not mean that the section 44 requirements must be satisfied.[28] It has been recognised that where there are arbitral proceedings (or they are proposed) the court would only exceptionally exercise its powers under section 37 in circumstances where the detailed statutory requirements of section 44 were not met.[29] In practice, however, the court will now generally not examine the section 44 requirements in cases involving anti-suit or anti-arbitration injunctions[30] (probably on the premise that the tribunal is unable to act effectively at any stage) but is more likely to do so in cases where the injunction is more obviously intended to support arbitral proceedings (e.g. freezing orders, and orders relating to evidence).

8.19 In the past injunctions were available from the courts to prevent an arbitration being pursued where the arbitrator was biased[31] or where there was no arguable claim.[32] Such decisions are now to be viewed very cautiously in the light of the 1996 Act, which attempts to reduce the court's power to intervene in the arbitral process. Section 1(c) provides that "in matters governed by this Part the court should not intervene except as provided by this Part". Accordingly, where the 1996 Act provides a remedy, for example removal of an arbitrator for bias under section 24, the court would not be willing to intervene by way of injunction.[33]

8.20 The court's power to grant an interim injunction under section 44(2)(e) is expressed in general terms, but is limited, save in cases of urgency, to circumstances in which either the tribunal permits an application to the court or all the other parties agree to this in writing. In practice, consent may not be forthcoming and the court's powers to grant interim injunctions in support of arbitral proceedings are most likely to be invoked where a party

26 *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442 [26].

27 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281 [60]. Even where no arbitration is proposed but the injunction is sought to enforce the arbitration agreement (namely the promise not to take foreign proceedings) the court will, as in *Ust*, take account of the statutory scheme of the 1996 Act. See also *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230; *Sheffield United Football Club Limited v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167 and *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8.

28 *Southport Success S.A v Tsingshan Holding Group Co. Ltd Ust* [2015] EWHC (Comm) 1974, [2015] 2 Lloyd's Rep 578 [25].

29 See *Barnwell Enterprises Ltd v ECP Africa* [2013] EWCH 2517 (Comm), [2014] 1 Lloyd's Rep 171 [37].

30 e.g. s 44 was not investigated in *Golden Ocean Group Ltd v Humpuss Intermoda* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421.

31 *Beddow v Beddow* (1878) 9 Ch D 89 (Ch).

32 *Sissons v Oates* (1894) 10 TLR 392, a court would now probably refuse to interfere given that the parties agreed to arbitrate, see, e.g., *Halki Shipping Corporation v Sopex Oils Ltd, The Halki* [1998] 1 Lloyd's Rep 465 (CA).

33 See *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep 267, where the Court of Appeal confirmed that an injunction should not be granted where relief under s 9 of the 1996 Act was available. This part of the judgment was not subject to appeal.

is seeking to establish urgency. In such a case the applicant will also have to establish that the relief is necessary for the purpose of preserving evidence or assets. However, assets are broadly defined to include contractual rights of action.[34] This means the court can give orders urgently required pending or during an arbitration to preserve evidence but also in order to preserve or enforce a parties' disputed substantive rights – e.g. to allow inspection of records, to submit a proposed transaction for approval by a central bank or to stop shares being sold.[35] However, the court will only act to the extent that the tribunal is unable for the time being to act effectively (section 44(5)). If the parties have agreed to confer emergency powers on the tribunal (or to allow for emergency arbitrators) this may affect the court's jurisdiction to intervene under section 44 and its willingness to grant an injunction.[36]

8.21 Once the court is satisfied that the jurisdictional requirements of section 44 are satisfied it still has discretion as to whether to grant an injunction. As discussed above, the usual discretionary factors applicable to the court's discretion to grant interim injunctions (e.g. establishing a serious issue to be tried and the balance of convenience) apply to the grant of relief under section 44 and are covered in detail in the White Book commentary to CPR Part 25.[37] In exercising its discretion, the court will also balance the need to support the arbitration and to protect the parties' rights against the need to avoid usurping the tribunal's role and to uphold the policy of the 1996 Act against judicial intervention in the arbitral process. The court may be willing to make judgments as to the parties' substantive rights if necessary but it will be reluctant to grant an injunction where this would usurp the tribunal's function in determining those rights, and it is notable that there is no power to grant a final injunction under section 44.[38] Even where the usual discretionary factors are satisfied and also the section 44 requirements (urgency and that an arbitral tribunal is unable to act effectively) the courts have typically only intervened to the minimum extent of ordering relief required to maintain the status quo.

> For example, in *Barnwell Enterprises Ltd v ECP Africa*[39] Hamblen J was willing to grant an interim injunction to prevent the sale of shares but only on a short term basis to maintain the status quo pending the parties getting a further decision from the tribunal as to whether it could give the relief sought.

E. Anti-suit injunctions

8.22 This is an injunction restraining the commencement or pursuit of foreign proceedings. It is usually sought where foreign proceedings have been commenced or threatened in respect of matters that the parties agreed to refer to arbitration, and damages would not be an adequate remedy for the breach of the arbitration agreement. It could also be sought as a means of restraining foreign proceedings to challenge an award.[40] Where proceedings are brought in the UK in breach of an arbitration clause the appropriate remedy is a stay of proceedings under section 9 of the 1996 Act. An English court is not competent to stay foreign proceedings but

34 *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep 494.

35 ibid. *Barnwell Enterprises Ltd v ECP Africa* [2013] EWCH 2517 (Comm), [2014] 1 Lloyd's Rep 171.

36 *Mace (Russia) Ltd v Retansel Enterprises Ltd* [2016] EWHC 1209 (Comm); *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch).

37 *See Barnwell Enterprises Ltd v ECP Africa* [2013] EWCH 2517 (Comm), [2014] 1 Lloyd's Rep 171 [47].

38 *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep 494.

39 [2013] EWHC 2517 (Comm), [2014] 1 Lloyd's Rep 171 [37].

40 *C v D* [2007] EWHC 1541 (Comm), [2007] 2 Lloyd's Rep 367, [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239.

it can restrain a party from commencing or pursuing foreign proceedings. The influence of European law means that injunctions to restrain proceedings within and outside the European Union (and European Free Trade Area) must be considered separately.

Injunctions to restrain proceedings within the EU[41]

8.23 Since 1978 the United Kingdom has been party to the European rules on jurisdiction and the enforcement of judgments in civil and commercial matters. This discussion is based on the UK being subject to those rules but the position is likely to be affected by future changes implemented by reason of Brexit. The European rules were initially contained in the Brussels Convention 1968. The rules were subsequently set out in the Brussels I Regulation in force from 2002. These rules have now been replaced with Regulation (EU) No. 1214/2012 ("the Recast Brussels I Regulation") which applies to civil and commercial proceedings commenced since 10 January 2015. The purpose of these rules is to ensure the free movement of civil and commercial judgments and also to provide common rules. The Recast Brussels I Regulation (like the Brussels Convention and the Brussels I Regulation before it) broadly covers proceedings in civil and commercial matters in European Union states.[42] This would include claims in contract and tort, thereby covering most claims ordinarily covered by arbitration clauses in shipping contracts. However, like its predecessors, it also includes a broad exception for "arbitration" since the European rules were never intended to govern recognition and jurisdictional issues relating to arbitration (not least because the 1958 New York Convention already existed in this respect).

8.24 For many years the English courts continued to grant anti-suit injunctions notwithstanding the European rules. However, from 2009 this practice stopped because the European Court of Justice ("Court of Justice")[43] ruled in *The Front Comor*[44] that it was incompatible with the Brussels I Regulation for an English court (and indeed any EU court) to grant an anti-suit injunction restraining a party from pursuing proceedings before the courts of another EU or Lugano Convention state on the ground that such proceedings would be in breach of an arbitration agreement.

> In *The Front Comor*[45] the claimant shipowners' vessel collided with the defendant charterers' jetty. The charter contained a London arbitration clause. Charterers' insurers commenced delictual proceedings in Sicily against owners to recover moneys paid out. Colman J granted owners an anti-suit injunction to restrain the Italian proceedings on grounds of breach of the arbitration clause. On leap-frog appeal to the House of Lords, the House of Lords referred the following question to the Court of Justice: "Is it consistent with [the Brussels I Regulation] for a Court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?" The Court of Justice's response was negative. It accepted that the anti-suit injunction proceedings were outside the scope of the Brussels I

41 And Iceland, Switzerland and Norway and any state ratifying the New Lugano Convention.

42 Similar provisions under the New Lugano Convention set up jurisdictional rules covering similar proceedings in the European Free Trade Association, i.e. Iceland, Norway and Switzerland. Reference should be made to specialist works such as *Dicey & Morris on the Conflict of Laws* for the precise scope of the Regulation and New Lugano Convention.

43 Note: since the Treaty of Lisbon came into force on 1 March 2009, the EU court institution is now known as the Court of Justice of the European Union (CJEU), including the highest court now known as the Court of Justice.

44 *Allianz SpA v West Tankers Inc* Case C-185/07, [2009] 1 Lloyd's Rep 413.

45 *Allianz SpA v West Tankers Inc* Case C-185/07, [2009] 1 Lloyd's Rep 413, applied in *National Navigation Co v Endesa Generacion SA, The Wadi Sudr* [2009] EWHC 196 (Comm).

> Regulation by reason of the exception in the regulation for "arbitration" but considered that the making of such an injunction was inconsistent with the Regulation because it undermined its effectiveness. In particular, the injunction would prevent the Sicilian court from ruling on whether it had jurisdiction under the Regulation and would run counter to the mutual trust upon which the Regulation is based.

8.25 The Court of Justice's earlier decision in *Turner v Grovit*[46] precluded the grant of an anti-suit injunction on the grounds that EU proceedings were being pursued in bad faith (this would cover proceedings which were being pursued vexatiously or oppressively). These two decisions marked a significant change in practice since previously such injunctions were commonly available. The Court of Justice firmly ruled that such relief would be incompatible with the European regime on jurisdiction in civil and commercial matters. Although these decisions were made under the previous Brussels I Regulation (and the Brussels Convention for *Turner v Grovit*) they represent the Court of Justice's binding ruling on the effect of these rules and also the exception for arbitration which has kept identical wording throughout.

8.26 The Recast Brussels I Regulation contains new additional recitals as an interpretative aid to the arbitration exception, and Article 73(2) also expressly states that the rules do not affect the application of the New York Convention. These changes are intended to make clear that the New York Convention takes precedence over the Regulation and also enhance the arbitration exception, specifically in making clear that a court ruling as to the validity of an arbitration agreement does not require recognition under the Regulation. However, these changes are unlikely to justify an English court in granting an anti-suit injunction to restrain EU proceedings since the Court of Justice's basic ruling in *The Front Comor* (namely that an EU court must be left to decide its jurisdiction and that an anti-suit injunction runs counter to the mutual trust between EU courts) remains unaffected. Following the coming into force of the Recast Brussels I Regulation the Court of Justice has considered the scope of the arbitration exception in *Gazprom OAO*.[47] Although its decision was given under the previous Brussels I Regulation it did not accept arguments that the Recast Brussels I Regulation meant that anti-suit injunctions should now be permissible and that its previous ruling in *The Front Comor* was wrong.

Alternative remedies for EU proceedings, including anti-suit injunctions from the arbitral tribunal

8.27 Until the decision in *The Front Comor* anti-suit injunctions from an English court were the most common remedy for dealing with a party that breached a London arbitration clause by pursuing foreign proceedings. As the law stands that remedy is no longer available to restrain proceedings in EU or EFTA states, and parties have had to develop alternative means to deal with the problem of proceedings wrongfully pursued in breach of arbitration agreements. The best means to avoid the problem is to draft the arbitration clause as clearly and widely as possible so that a foreign court will give effect to it and decline jurisdiction. However, in practice most arbitration agreements are in standard forms and it is also difficult to anticipate the approach of a foreign court to their application. Some parties may now simply try to make best use of the procedures of the foreign court but these can involve long delays.

46 Case C-159/02 [2004] ECR I–3565, [2005] 1 AC 101.

47 *Gazprom OAO* Case C-536/13 (CJEU) [2015] 1 Lloyd's Rep 610 where the ECJ declined to follow arguments put forward by Advocate General Wathelet suggesting that the decision in *The Front Comor* was wrong.

8.28 Another source of relief would be to seek damages for breach of the arbitration agreement from the arbitral tribunal. Such relief is well recognised under English law[48] and maritime arbitrators are willing to award damages for costs incurred in foreign proceedings wrongfully pursued where the claim is within the scope of the arbitration clause and the foreign proceedings are not being pursued solely to obtain security.[49]

> Following the decision of the Court of Justice in *The Front Comor*, the shipowners invoking the London arbitration clause claimed an award of damages for charterers' breach of the obligation to arbitrate (i.e. breach in pursuing the proceedings in Sicily). This claim was made in the London arbitration commenced at an earlier stage by the shipowners. The London tribunal made an award refusing damages on grounds that such relief would be inconsistent with the Court of Justice's decision in *The Front Comor*. However, Flaux J[50] allowed an appeal against that award and ruled that the tribunal arbitral was entitled to make an award of damages for breach of the obligation to arbitrate where it was satisfied that proceedings were commenced in an EU state in breach of an arbitration agreement.

8.29 Parties may still apply to the English court for a declaration as to the validity of the arbitration agreement even if an EU court is seised of the matter and has ruled on jurisdiction.[51] A court ruling on jurisdiction may be used as a defence in enforcement proceedings (typically as giving rise to the defence of *res judicata*[52] depending on the foreign rules). The correct route for obtaining a declaration will normally be under sections 32, 67 and 72 of the 1996 Act since the court may be reluctant to circumvent the statutory scheme, including section 30 under which the tribunal may rule first on jurisdiction. The courts have taken different approaches as to the weight to be given to the statutory scheme. Earlier cases suggested that it defined the court's jurisdiction to grant declaratory relief.[53] However, later cases (as discussed above) make clear that where the court's jurisdiction under section 37 of the Senior Courts Act 1981 can be invoked then the 1996 Act does not limit that jurisdiction but merely provides statutory guidance as to when it should be exercised.[54] Accordingly, where a declaration is sought as a remedy alongside an anti-suit (or anti-arbitration) injunction under the courts' general powers under section 37 of the Senior Courts Act 1981 the courts have been willing to grant declaratory relief outside the statutory scheme of the 1996 Act. Similarly, in the related context of jurisdictional issues arising on applications for stays the courts do not accept that section 30 precludes the court proceeding to make a declaration on

48 *Union Discount v Zoller* [2002] 1 WLR 517 (CA), see also *CMA CGM SA v Hyundai MIPO Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep 213.

49 *Kallang Shipping SA v AXA Assurances Senegal, The Kallang* [2008] EWHC 2761, [2009] 1 Lloyd's Rep 124, para 78, see chapter 18.

50 *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103.

51 *Toyota Tsusho Sugar Trading Ltd V Prolat SRL* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344. *National Navigation Co v Endesa Generacion SA, The Wadi Sudr* [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193 would probably be decided differently under the Recast Brussels I Regulation since recital 12 makes clear that rulings on the validity of an arbitration agreement do not require recognition under the Regulation.

52 i.e. meaning "a matter decided".

53 *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 215 (Comm); *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 (Comm); *HC Trading Malta Ltd* v. *Tradeland Commodities SL* [2016] EWHC 1279 (Comm), [2016] 2 Lloyd's Rep 130.

54 *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442 [26]; *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281 [39] suggesting that there was no jurisdictional bar on granting relief outside the statutory scheme, and also in the Court of Appeal, [2011] EWCA Civ 647, [2011] 2 Lloyd's Rep 233 [81]–[85].

the jurisdictional issue where this is the most efficient approach.[55] However, where there is no stay application and there is no real prospect of obtaining an anti-suit injunction (as would be the case in respect of EU proceedings) a court is unlikely to allow an application under section 37 for a declaration alone. In such cases the court is more likely to give weight to the statutory scheme under which applications for declarations as to the validity of an arbitration agreement are sought under sections 32 or 67.[56]

8.30 A further route would be to seek a declaratory award from the tribunal as to its jurisdiction and the existence of a valid arbitration agreement. The Court of Appeal has made clear that such a declaratory award can be enforced under section 66 of the 1996 Act in the same manner as a judgment.[57] This means that the award is entered as a judgment and could be given recognition as such in a foreign court (depending on the rules of the foreign court). Such a judgment could possibly be used as a defence in the foreign proceedings. An award on the merits could also be used in similar manner but whether such rulings will prevail over a foreign judgment obtained in breach of the arbitration agreement will depend on the approach of the foreign court, which will commonly give priority to its own ruling.

8.31 In light of *The Front Comor* it is now more common for parties to apply to the arbitral tribunal for an anti-suit injunction restraining the foreign proceedings. As discussed above, arbitrators have powers to grant injunctions (including anti-suit injunctions).[58] In *Gazprom OAO*[59] the Court of Justice confirmed that an anti-suit injunction granted by an arbitral tribunal is compatible with EU law and may accordingly be recognised and enforced by EU courts (typically under the New York Convention).

8.32 There are obvious limitations regarding such powers since the need for anti-suit relief may often arise before a tribunal has been constituted or is able effectively to act. Furthermore, arbitrators lack the powers of enforcement available to courts and an award in the form of an interim injunction may not be enforceable by a court. Further limitations are that arbitrators cannot grant interim relief unless the parties have so agreed and LMAA Terms do not provide for this or for emergency relief.[60] However, it is becoming somewhat more common for LMAA arbitrators to grant anti-suit injunctions as a final order after giving the parties an opportunity to be heard (whether on paper or orally).

Injunctions to restrain proceedings outside the EU[61]

8.33 The law here remains largely unaffected by European law[62] and has been built up by case law (including case law involving EU proceedings decided prior to *The Front Comor*). The court's jurisdiction to restrain foreign proceedings pursued in breach of an arbitration

55 *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289; *Golden Ocean Group Ltd v Humpuss Intermoda* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421.

56 *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344, *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm), [2016] 2 Lloyd's Rep 130.

57 *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27, [2012] 1 Lloyd's Rep 398.

58 *Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc.* [2008] EWHC 914 (Comm), [2008] 2 Lloyd's Rep 269 [33].

59 Case C-536/13 (CJEU) [2015] 1 Lloyd's Rep 610.

60 *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230.

61 And Iceland, Switzerland and Norway.

62 In *Shashoua v Sharma* [2009] EWHC 957 (Comm), [2009] 2 Lloyd's Rep 76 Cooke J made clear that *The Front Comor* did not preclude this type of injunction, see also *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep 543 [68] and *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281.

clause is clearly preserved by the 1996 Act but has its source in the Senior Courts Act 1981.[63] The question of whether the foreign proceedings are in breach of the arbitration agreement may be a dispute within the scope of the arbitration agreement. However, the application for an anti-suit injunction would not be subject to a stay of proceedings under section 9 of the 1996 Act because the question of whether the court should grant an injunction is not a matter referred to arbitration.[64] In this respect the courts have accepted that there may be an overlap between the jurisdiction of the tribunal and that of the court but this does not preclude the court granting an injunction since by agreeing on English arbitration the parties have agreed that the English courts have a supervisory jurisdiction.[65]

8.34 The court's power to grant anti-suit injunctions derives from section 37 of the Senior Courts Act 1981, and whether an interim or final injunction is sought, it is generally confined to injunctions granted (a) for the enforcement or protection of some legal or equitable right or (b) where the other party's conduct is vexatious, oppressive or unconscionable.[66] Even though the power is statutory, an injunction is an equitable remedy. Accordingly, the power is discretionary; it is exercised when "the ends of justice require it".[67] The term "vexatious or oppressive" has been used in a general way to cover the wide range of situations where justice requires an injunction to be granted.[68] It has also been used more narrowly to cover conduct distinct from a mere breach of contract, for instance if a foreign court adopted inherently unfair procedures.[69] In practical terms an injunction is most likely to be sought on this ground where third parties are involved who may not be party to the relevant arbitration

63 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281, where Lord Mance questioned at [48] comments in *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230 suggesting that the power also arose under s 44 of the 1996.

64 *Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379 (CA) 385; *Jacobs E & C Ltd v Laker Vent Engineering Ltd* [2014] EWHC 4818 (TCC).

65 *Sheffield United Football Club Limited v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167 [40]; *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442.

66 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291, 306 (HL); *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8; *Shipowners Mutual Protection and Indemnity Association v Containerships Denizcilik Naklayat ve Ticaret, The Yusuf Cepnioglu* [2015] EWHC 258 (Comm) 567, [2015] 1 Lloyd's Rep 567. Some authorities suggest that the jurisdiction is only available where there is infringement of a legal or equitable right, but in such cases this would usually include unconscionable, vexatious and oppressive conduct (e.g. *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909 (HL); *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH, The Jay Bola* [1997] 2 Lloyd's Rep 279, 286 (CA).

67 *Société Nationale Industrielle Aerospatiale* v *Lee Kui Jak* [1987] 1 AC 871 (PC) 892–893; *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 (CA), 286.

68 See the discussion in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871 (PC) 892–893, *Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379 (CA). The terms "unconscionable" and "vexatious or oppressive" are not applied uniformly, for example, in *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 (CA) 286, Hobhouse LJ characterised the breach of contract in pursuing the foreign proceedings as unconscionable conduct. In *The Angelic Grace* the Court of Appeal considered that the pursuit of proceedings in breach of the arbitration clause was in itself vexatious, see also *Sohio Supply Co v Gatoil (USA) Inc.* [1989] 1 Lloyd's Rep 588 (CA) 592 and *Continental Bank NA v Aekos Compania Naviera SA* [1994] 1 Lloyd's Rep 505 (CA) 512.

69 *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 (CA), 286–292; *Bankers Trust Co v PT Jakarta International Hotels & Development* [1999] 1 Lloyd's Rep 910 (Comm) 914; *Bouygues Offshore SA v Caspian Shipping Co (No 2)* [1997] 2 Lloyd's Rep 485 (Adm) 489.

agreement.[70] In this context the court may be willing to restrain a third party if the foreign proceedings amount to a collateral attack on an arbitration award.[71]

8.35 The English courts would not be willing to grant an anti-suit injunction to restrain arrest proceedings where their sole purpose is to obtain security for the claim to be arbitrated.[72] However, if a party was using arrest proceedings for the purpose of frustrating an arbitration agreement then relief may be available.[73]

8.36 The first threshold to be crossed in any application for an anti-suit injunction is that the party to be restrained is subject to the powers of the English court.[74] Unless the defendant is based within the United Kingdom, it will usually be necessary to establish a good arguable case that the seat of the arbitration is in England or the arbitration agreement is governed by English law.[75] This will also raise the threshold question as to whether the applicant can establish that there is a binding agreement to arbitrate in England. The applicant must also show that there is a serious issue to be tried on the merits of the application and that England is clearly the most appropriate forum for the dispute (although where the parties have chosen London this prevails over usual factors of convenience or appropriateness).[76]

8.37 If satisfied that it has jurisdiction (or the court's jurisdiction is not put in issue), the court will proceed to consider the merits of the claim and the most common issues are as to whether there is an applicable arbitration agreement and whether there has been breach (whether of a legal or equitable right). For the purpose of an interim injunction the standard of proof to be established in relation to these substantive issues of breach is usually that there is a serious issue to be tried. However, a higher standard of proof is applied if, as in the case where foreign proceedings are restrained, the injunction is likely to be determinative of the issue. Christopher Clarke J has stated that in order for the court to grant an interim anti-suit injunction, "the appropriate test is whether the applicant has shown on the material adduced at the interlocutory hearing a *high degree of probability* that there was such an [arbitration] agreement."[77] If a final injunction is sought the court must be satisfied on the ordinary civil standard of the balance of probabilities.

70 *Shipowners Mutual Protection and Indemnity Association v Containerships Denizcilik Naklayat ve Ticaret, The Yusuf Cepnioglu* [2015] EWHC 258 (Comm) 567, [2015] 1 Lloyd's Rep 567.

71 *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2007] EWHC 253 (Comm).

Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649; *Crescendo Maritime Co v Bank of Communications* [2015] EWHC 3364 (Comm), [2016] 1 Lloyd's Rep 414.

72 *Kallang Shipping SA v AXA Assurances Senegal, The Kallang* (No.1 & 2) [2006] EWHC 2825 (Comm), [2007] 1 Lloyd's Rep 8 and [2008] EWHC 2761, [2009] 1 Lloyd's Rep 124 [78].

73 ibid.

74 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871, 892; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 Lloyd's Rep 291; see CPR, Part 6 for the rules governing the English court's jurisdiction.

75 *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239; *Shashoua v Sharma* [2009] EWHC 957 (Comm) [23] and *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281 [51]. If the defendant is not within the English court's jurisdiction and the seat of the arbitration is not England the court will not ordinarily consider that it is the proper forum for enforcing the arbitration agreement, see CPR Part 6.37(3) and Part 62.5.

76 *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, [71], [81] and [88], applicable in the context of an ordinary claim form or an arbitration claim form, see e.g. *Golden Ocean Group Ltd v Humpuss Intermoda* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421 [23].

77 *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB) [52]; *Malhotra v Malhotra* [2012] EWHC 3020 (Comm) 353, [2013] 1 Lloyd's Rep 285; *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 [89].

8.38 Often jurisdictional issues will arise as to the scope and validity of an arbitration agreement. In such circumstances the court can chose to make a final ruling on the jurisdictional question or it can leave that question to be finally determined at a later stage (whether by the tribunal or the court). Considerations of efficient case management frequently cause the court to rule on the jurisdictional issue rather than deferring it, especially if the issue can be decided without a full trial and does not overlap with the substantive issues to be referred to the tribunal.[78]

8.39 As regards establishing breach: it will usually be sufficient to establish that a party has acted in breach of contract in commencing the foreign proceedings, without establishing any other "unconscionable" or "vexatious or oppressive" conduct. Millett LJ in *The Angelic Grace*[79] held that courts should not feel diffident about granting an anti-suit injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. He stated that where an injunction is sought to restrain a party from proceeding in breach of an arbitration agreement governed by English law "the justification for the grant of the 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.[80] 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." The House of Lords in *Donohue v Armco Inc*[81] preferred to use the test of "strong reason".

8.40 Breach of the arbitration agreement will be fairly easy to establish if the foreign proceedings are concerned with a contractual claim since this will usually fall clearly within the scope of the arbitration clause. Similarly, a claim for a declaration that there is no arbitration agreement would fall within its scope[82] However, where tortious or other claims are made, the question of whether they fall within the arbitration clause (and thus whether the foreign proceedings are a breach of the arbitration clause) may itself be the source of dispute.[83]

8.41 Foreign proceedings for interim relief (typically injunctions) will typically amount to a breach since the court of the seat of the arbitration will be the natural forum for seeking such relief. However, a party may exceptionally be entitled to seek interim relief in some other court, typically for practical reasons, provided that the foreign proceedings are not a disguised attempt to undermine the arbitration agreement.[84]

8.42 The court may also treat proceedings to challenge an award in a foreign jurisdiction as a breach of the arbitration agreement.[85] Even if the applicant establishes that the foreign proceedings infringe its legal or equitable rights, typically by reason of breach of the arbitration agreement, the court may refuse an injunction. Its power is discretionary and it will take into account the balance of convenience and it will influenced by any relevant factors. One relevant consideration is enforceability: the court will not grant an injunction that cannot be effectively enforced, for example because the respondent is not within the jurisdiction and has no assets there.[86]

78 e.g. *Golden Ocean Group Ltd v Humpuss Intermoda* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289 (both anti-arbitration injunctions); *Essar Shipping Ltd v Bank of China Ltd* [2015] EWHC 3266 (Comm), [2016] 1 Lloyd's Rep 427 (declaration granted but injunction refused on grounds of delay).

79 *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA).

80 The inadequacy of damages as a remedy is has been confirmed in *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230 and *Sheffield United Football Club Limited v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167.

81 [2001] UKHL 64, [2002] 1 Lloyd's Rep 425.

82 *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep 543 [52].

83 See *The Angelic Grace, Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 and chapter 6 on jurisdictional disputes.

84 *U &M Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] EWHC 260 (Comm), [2013] 2 Lloyd's Rep 218.

85 *C v D* [2007] EWHC 1541 (Comm), [2007] 2 Lloyd's Rep 367, [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239; *Shashoua v Sharma* [2009] EWHC 957 (Comm); *Terna Bahrain Holding Company WLL v Al Shamsi* [2012] EWHC 3283 (Comm).

8.43 Relevant factors going to the court's discretion include the existence of related proceedings involving third parties and the risk of conflicting decisions.[87] However, the rejection by a foreign court of a jurisdictional challenge is not usually relevant as to whether or not an anti-suit injunction should be granted, unless the foreign court is bound to apply the same principles as the English court and has applied those principles in coming to its decision.[88] Accordingly, the fact that the foreign court has refused to recognise the arbitration agreement or has been asked, but has not yet determined, whether it has jurisdiction is not in itself a ground for refusing to grant an injunction.[89] However, the stage which the foreign proceedings have reached is a material consideration to be taken into account and delay in making an application for an injunction will be an important factor since a party is expected to act promptly in seeking anti-suit relief.[90] Voluntary submission to the foreign court may be good reason for refusing an injunction, especially when the proceedings have progressed.[91]

8.44 Indeed, delay will be the most common "strong reason" that may preclude an injunction being granted, in particular since delay gives rise to stronger objections on grounds of comity (i.e. respect for the operation of other legal systems).[92] *The Angelic Grace*[93] is clear authority that a party is not required to apply first to the foreign court before seeking an anti-suit injunction. The Court of Appeal made clear that it would be the reverse of comity to await the foreign court's ruling on jurisdiction before granting injunctive relief, and that there may be diffidence in granting an injunction which is not sought promptly. Delay in making an application is likely to cause further cost and complication (for example third parties being involved) and will also increase the danger that any injunction would be regarded as inappropriate interference with the foreign court.[94] What amounts to unacceptable delay is fact sensitive but relevant yardsticks would be significant stages in the foreign proceedings and contractual time bars – anything beyond a few months will be difficult to justify.[95]

86 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871, 892; *Philip Alexander Securities & Futures Ltd v Bamberger* [1996] CLC 1757, 1789–1790.

87 *Verity Shipping SA v NV Norexa* [2008] EWHC 213 (Comm), [2008] 1 Lloyd's Rep 652; *A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559; *The El Amria* [1981] 2 Lloyd's Rep 119 (CA).

88 *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 (Comm); *Schiffahrtsgesellschaft Detlef von Appen GmbH v Voest Alpine Intertrading GmbH, The Jay Bola* [1997] 1 Lloyd's Rep 179 (Comm); *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB) [52].

89 *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA); *Continental Bank NA v Aekos Compania Naviera SA* [1994] 1 Lloyd's Rep 505 (CA). Phillips LJ expressed some caution as to this appoach in *Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379 (CA) 386.

90 *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 Lloyd's Rep 360 [137].

91 *A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559, 570, see also *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep 123 where an anti-suit injunction did not preclude enforcement where a party submitted to the foreign jurisdiction.

92 *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649 [66].

93 [1995] 1 Lloyd's Rep 87 (CA).

94 e.g. *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309.

95 *Essar Shipping Ltd v Bank of China Ltd* [2015] EWHC 3266 (Comm), see also *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649 where some delay was excusable.

In *Toepfer International GmbH v Molino Boschi SRL*[96] a dispute had arisen out of a contract for the sale of soya meal. The contract contained a London arbitration clause on the GAFTA form but the buyers had made a claim for short delivery and poor quality in the Italian courts. The sellers contested jurisdiction in Italy from the outset but seven years after the Italian proceedings commenced the sellers applied to the English court for an injunction restraining the buyers from taking further steps in the Italian proceedings. By this stage any arbitration in London would have been time-barred. Mance J refused the injunction on grounds of delay in applying for relief in England and the progress of the Italian proceedings.

In *Essar Shipping Ltd v Bank of China Ltd*[97] the applicants were disponent owners of a ship which carried iron fines under a bill of lading dated December 2013 and issued on their behalf. Cargo interests commenced proceedings in the Chinese courts in September 2014. Owners challenged those proceedings in the Chinese courts in November 2014 and only applied for an anti-suit injunction in the English court in July 2015. Walker J refused to grant an anti-suit injunction on grounds of delay, taking into account the 12 month time bar for any claim.

8.45 Factors going to the convenience or appropriateness of the foreign court will, however, have more limited weight because London arbitration is generally chosen on grounds of being a neutral forum.[98]

F. Anti-arbitration injunctions

8.46 This type of injunction is an order to restrain arbitral proceedings and the availability of such relief has, like anti-suit injunctions, been a fertile source of litigation. There are many early cases of injunctions being granted to restrain English arbitral proceedings being pursued, or even to restrain arbitrators from proceeding with an award.[99] These decisions are now of limited relevance in light of the restrictions on court intervention set out in the 1996 Act (discussed above) and also the House of Lords' decision in *Bremer Vulkan v South India Shipping Corporation*[100] to the effect that the courts have no general supervisory jurisdiction over the conduct of arbitrations beyond that conferred by the Arbitration Acts.

8.47 The modern cases following the 1996 Act[101] show that in some respects the principles applicable to this type of relief are similar to those applying to anti-suit injunctions. In particular, the court's jurisdiction to intervene arises under section 37 of the Senior Courts Act 1981 and the court will only intervene to enforce a legal or equitable right or to protect against vexatious, oppressive or unconscionable conduct. The case law shows that the relevance of the 1996 Act to the court's jurisdiction under the 1981 Act is broadly the same whether a party is

96 [1996] 1 Lloyd's Rep 510 (decided before *The Front Comor* precluded anti-suit injunctions to restrain EU proceedings). See also *Verity Shipping SA v NV Norexa* [2008] EWHC 213 (Comm), [2008] 1 Lloyd's Rep 652.

97 [2015] EWHC 3266 (Comm), [2016] 1 Lloyd's Rep 427.

98 *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 (Comm) 105, *The Angelic Grace* [25]. Colman J in *Toepfer International GmbH v Société Cargill France* [1997] 2 Lloyd's Rep 98, 110 also considered that the New York Convention meant these factors should be given little weight. See also *Golden Ocean Group Ltd v Humpuss Intermoda* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421 [64].

99 *Malmesbury Railway Co v Budd* (1876) 2 Ch D 113; *Beddow v Beddow* (1878) 9 Ch D 89 (Ch).

100 [1981] AC 909 (HL).

101 *Weissfleisch v Julius* [2006] EWCA 218, [2006] 2 Lloyd's Rep 716; *Albon v Naza Motor Trading SDN BHD (No 4)* [2007] EWHC 1879 (Ch), [2007] 2 Lloyd's Rep 420, upheld in [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep 1; *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2739 (Comm), [2008] 1 Lloyd's Rep 382; *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWHC 345 (Comm), [2011] 1 Lloyd's Rep 510; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289.

seeking an anti-suit injunction or an anti-arbitration injunction.[102] The courts have given fuller explanation for finally deciding jurisdictional issues (typically as to the validity of a disputed arbitration agreement) in the context of applications for an anti-arbitration injunction (rather than an anti-suit injunction) but the same factors, in particular effective case management, are likely to be relevant.[103]

8.48 However, the discretion to grant an anti-arbitration injunction is generally exercised much more sparingly. The modern authorities cited above make clear that such injunctions will generally only be granted in exceptional circumstances. In contrast to the courts' relatively liberal approach towards injunctions restraining the pursuit of non-EU proceedings in breach of an arbitration agreement, the courts have been much more reluctant to intervene to restrain a party pursuing arbitral proceedings. This is mainly because the appropriate remedy can be sought from the arbitral tribunal or the foreign supervisory court such that it may not be easy to show that justice requires an injunction.[104]

8.49 In particular, in relation to injunctions to restrain an arbitration with a foreign seat the court would act with extreme caution. Internationally recognised principles of *kompetenz-kompetenz* and the basic scheme of the New York Convention suggest that ordinarily any judicial supervision should be for the courts of the seat of the foreign arbitration.[105]

8.50 Further, the provisions of the 1996 Act provide statutory guidance about when the court's jurisdiction should be exercised, even where the arbitration has a foreign seat.[106] In particular, the requirements of section 44 will be relevant. However, as discussed above, earlier cases suggesting that the court's jurisdiction to grant injunctions under section 37 of the 1981 Act is limited by the 1996 Act have probably been overtaken by the Supreme Court's ruling in *Ust* which would suggest that where an anti-arbitration injunction is sought the court's jurisdiction is not limited by the statutory scheme under the 1996 Act.

8.51 Where the seat of the arbitration is in England and Wales the court will consider very carefully why the applicant cannot use the remedies available within the arbitral process or judicial relief available within the framework of the 1996 Act, for example by seeking to have the tribunal removed or challenging the award.[107] However, if the applicant has not taken part in the arbitration then section 72 of the 1996 Act allows for the court to grant an injunction on grounds that the tribunal lacks substantive jurisdiction, for example due to invalidity of the arbitration agreement.

102 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281; *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWJC 345 (Comm), [2011] 1 Lloyd's Rep 510; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289.

103 e.g. *Golden Ocean Group Ltd v Humpuss Intermoda* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWHC 345 (Comm), [2010] 1 Lloyd's Rep 2567.

104 *Weissfleisch v Julius* [2006] EWCA 218, [2006] 2 Lloyd's Rep 716; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWJC 345 (Comm), [2011] 1 Lloyd's Rep 510 [30]–[32], see also *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2739 (Comm), [2008] 1 Lloyd's Rep 382 [46] and *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8 [75].

105 *Weissfleisch v Julius* [2006] EWCA 218, [2006] 2 Lloyd's Rep 716; *Albon v Naza Motor Trading SDN BHD (No 4)* [2007] EWHC 1879 (Ch), [2007] 2 Lloyd's Rep 420, upheld in [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep 1.

106 *Nomihold, Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8, Aikens J's analysis is probably to be preferred to that of Gloster J in *Intermet FZCO v Ansol Limited* [2007] EWHC 2739 (Comm) where the issue was not argued.

107 *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8 [64].

8.52 The most common ground for seeking an injunction to restrain a party proceeding with an arbitration is that the tribunal lacks jurisdiction to make a binding decision (for example, the arbitration agreement is invalid[108] or the matter has already been litigated).[109] Other related grounds include allegations that the pursuit of the arbitration is vexatious or oppressive[110] or that there has been a breach of the arbitration agreement (for example, by disregard of an agreement on the venue of the arbitration).[111]

8.53 Quite apart from caution in intervening in foreign arbitral proceedings and respect for the statutory scheme for supervision, a further ground for the court's reluctance to intervene arises where the injunction is sought on grounds of invalidity of the arbitration agreement. In such circumstances it may be difficult to discern the infringement of right that is the basis for the court's intervention. The arbitral proceedings will lead only to an invalid, unenforceable award, and an injunction will not be granted solely on the grounds of preventing a party being harassed by futile proceedings.[112] There is, however, recognition that a party has an equitable right not to be subjected to vexatious, oppressive or unconscionable litigation.[113] However, the court will look critically to identify the basis of intervention and it is not enough for a party to assert that they should not have to face two sets of proceedings at one.[114]

> In *Elektrim SA v Vivendi Universal SA*[115] the parties had commenced LCIA arbitration under an investment agreement but then produced a draft settlement agreement containing an ICC arbitration clause. Subsequently, Elektrim denied the validity of the settlement agreement and Vivendi commenced ICC arbitration seeking a declaration that the settlement was valid. Elektrim claimed an injunction to restrain Vivendi from further pursuit of the LCIA arbitration until final determination of the ICC arbitration on grounds that the simultaneous pursuit of both arbitrations by Vivendi was vexatious and oppressive. Aikens J refused the injunction because Elektrim could not establish that the pursuit of the LCIA proceedings constituted an infringement of a legal or equitable right, or was vexatious or oppressive. Elektrim had agreed to LCIA arbitration and the two arbitrations concerned different subject matters. In addition the injunction would be inconsistent with the statutory scheme of the 1996 Act.

8.54 However, *Elektrim v Vivendi* probably marks the high water mark of the court's reluctance to intervene. Notwithstanding recognition of the international doctrine of *kompetenz-kompetenz* and the ritual incantation that the court will only intervene in exceptional cases, in recent years there has been more willingness to intervene, especially where a foreign arbitration is involved.[116] In these later cases the courts have given limited weight (if any) to the restrictions of sections 44 and 30 to 32 of the 1996 Act in deciding whether to exercise

108 e.g. *Albon v Naza Motor Trading SDN BHD (No 4)* [2007] EWHC 1879 (Ch), [2007] 2 Lloyd's Rep 420, upheld in [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep 1; *Golden Ocean Group Ltd v Humpuss Intermoda Ltd* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421.

109 *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 (Comm) 435.

110 e.g. *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8.

111 *Compagnie Europeene De Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301, 306 (Comm).

112 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909 (HL) 981. See also *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30 (CA); *London & Blackwall Railway Co v Cross* (1886) 13 Ch D 354 (CA).

113 *Compagnie Europeene De Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 (Comm) 306.

114 *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8 [65], although see *Golden Ocean Group Ltd v Humpuss Intermoda Ltd* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep. 421 [73] where avoiding inconvenience and cost was a determinative factor.

115 [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8.

116 *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWHC 345 (Comm), [2011] 1 Lloyd's Rep 510; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289.

powers to restrain arbitral proceedings under section 37 of the 1981 Act. Intervention is more likely where the English court concludes that the arbitral proceedings are vexatious, oppressive or unconscionable or that it can efficiently give a final determination of jurisdictional issues, thereby protecting a party from having to take part in an arbitration in circumstances where it denies that it ever agreed to such forum.

> In *Golden Ocean Group v Humpuss Intermoda Transportasi*[117] there was a dispute as to whether X or Y were party to a time charter with Z. The charter originally contained a London arbitration agreement but there was a dispute as to whether it was amended to provide for Singapore arbitration. Z commenced a London arbitration under the charter and the tribunal ruled that there was an London arbitration agreement between Z and X. Y commenced a Singapore arbitration under the amended charter. Z then applied to the English Commercial Court for an injunction restraining Y from pursuing the Singapore arbitration and a declaration as to the existence of a binding London arbitration agreement. Popplewell J granted an interim injunction on grounds that it was appropriate for the court to decide the question as to the validity of the London arbitration agreement and Z would be subjected to considerable inconvenience and cost if the Singapore arbitration continued in the meantime.

8.55 The court's jurisdiction remains discretionary and when an interlocutory injunction is sought the application will turn on the balance of convenience, depending on factors such as delay in applying and prejudice caused by the injunction.[118] Where the application will be determinative of the forum for a dispute, the applicant for an interim injunction will have to show a strong case on the merits.[119] In most cases involving a London arbitration the balance of convenience will lie in favour of refusing an injunction because most complaints can be resolved using procedures laid down under the 1996 Act or within the arbitral process.[120] However, in exceptional cases the court will intervene.

> In *Republic of Kazakhstan v Istil Group Inc*[121] the defendant commenced LCIA arbitration in defiance of a ruling of the French court. The defendant obtained an award in its favour but that award was successfully challenged under section 67 for lack of jurisdiction. Notwithstanding this, the defendant asked the LCIA tribunal to proceed to an award on the merits. The claimant applied for an injunction restraining the defendant from pursuing any further claims in the LCIA arbitration. Tomlinson J granted an injunction because further pursuit of the LCIA arbitration would be oppressive, vexatious and unconscionable. Were the tribunal to proceed to an award on the merits then the court would be bound, in light of the earlier court ruling on jurisdiction, to set it aside for want of jurisdiction.

117 [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421.

118 e.g. *Industrie Chimiche Italia Centrale* v *Alexander Tsavlivris & Sons Maritime Co, The Choko Star* [1987] 1 Lloyd's Rep 508 (CA); *Intermet FZCO v Ansol Limited* [2007] EWHC 2739 (Comm); *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8 [80–85]; *Magellan Spirit ApS v Vitol SA, The Magellan Spirit* [2016] EWHC 454 (Comm), [2016] 2 Lloyd's Rep 1.

119 *Sheffield United Football Club Limited v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167 [21]. Teare J's statement that the test is establishing actual entitlement to final relief probably sets the test too high. High degree of probability of success is more likely, see *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB), [52]; *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 [89].

120 *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8; *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442.

121 [2007] EWHC 2739 (Comm), [2008] 1 Lloyd's Rep 382.

G. Practice

8.56 Applications for injunctions arise in such a wide range of situations that it is beyond the scope of this chapter to provide any definitive guide to practice. Where an application for an injunction is made to the arbitral tribunal the procedure will follow that of any application, usually involving submissions in writing and sometimes an oral hearing. Where an application is made to court it should usually be made by means of an arbitration claim form.[122] Given the applicability of both the 1996 Act and the Senior Courts Act 1981(discussed above) any application to court for an interim injunction should be made by reference to the 1981 Act as well as section 44 of the 1996 Act if applicable.[123] Permanent injunctions must be sought under section 37 of the 1981 Act.

8.57 Detailed guidance on applications for interim injunctions is given in the Civil Procedure Rules. It is common for interim injunctions to be sought as a matter of urgency in the absence of one party and this sort of application will require full and frank disclosure of any matters relevant to the application, even if they are unfavourable. If the respondents are outside the jurisdiction it may be necessary to obtain permission to serve the application on them.[124] Again, guidance is to be found in the Civil Procedure Rules.

8.58 The court has a wide discretion in the granting of injunctions and may impose such conditions as it considers appropriate (for instance, undertakings as to damages are invariably required if an interim injunction is sought). Where foreign proceedings, typically arrest proceedings, are pursued for the purpose of obtaining security for a claim which the parties have agreed to refer to arbitration, then ordinarily this will not in itself be treated as a breach of the arbitration agreement.[125] The court would only grant an injunction on terms that alternative security is provided by the party applying for the injunction.[126]

8.59 Where the court has granted an anti-suit or anti-arbitration injunction on grounds that the other party has acted in breach of contract or vexatiously, it may be willing to grant costs on an indemnity basis, in particular where a party was deliberately in breach.[127]

122 CPR Part 62.2(1)(d) and Practice Direction 62.8.1.

123 As discussed above, s 37 gives broader rights. For example, regarding appeals, see *SAB Miller Africa BV v East African Breweries* [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep 422.

124 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 2 Lloyd's Rep 281[49]–[51] suggests permission may be given under CPR Part 62 or Part 6.

125 Cf *Kallang Shipping SA v AXA Assurances Senegal, The Kallang* [2006] EWHC 2825 (Comm), [2007] 1 Lloyd's Rep 8 where the arrest proceedings were used for the purpose of avoiding London arbitration.

126 *Petromin SA v Secnav Marine Ltd* [1995] 1 Lloyd's Rep 603 (Comm); *Re Q's Estate* [1999] 1 Lloyd's Rep 931 (Comm), (unless there is a very broad *Scott* v *Avery* clause), e.g. *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375.

127 *A v B (No 2),* [2007] EWHC 54 (Comm), [2007] 1 Lloyd's Rep 358. The Court of Appeal in *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239, accepted this decision but refrained from treating such a costs order as general practice. Similar orders could be made where a party had pursued vexatious or oppressive proceedings.

CHAPTER 9

Extending agreed time limits for beginning arbitral proceedings

A. Introduction

9.1 Time bars generally fall into one of two categories: those which bar the remedy by action or in arbitration, while leaving the claim in existence,[1] and those which extinguish the claim itself.[2] Time bars in either category may be statutory or contractual. This chapter is concerned with the extension of contractual time limits, in either category, for commencing arbitration pursuant to section 12 of the 1996 Act.

9.2 It is very common for a charterparty or bill of lading to provide for a contractual time bar unless arbitration is commenced within a specified period. For instance, the Centrocon arbitration clause provides that:

> All disputes from time to time arising out of this contract shall . . . be referred to . . . two Arbitrators. . . . Any claim must be made in writing and Claimant's Arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred.[3]

Contractual time limits in shipping contracts are usually much shorter than the ordinary English statutory limitation period of six years for claims in contract and tort (although cargo claims are subject to a statutory one-year limitation period where the Hague-Visby Rules apply by

1 Such as the majority of time bars under English statutes of limitation, see *Royal Norwegian Government v Constant & Constant* [1961] 2 Lloyd's Rep 431 (Comm) 442, and many contractual time bars.

2 For example, the time bar in Article III Rule 6 of the Hague and Hague-Visby Rules, see *Aries Tanker Corporation v Total Transport Ltd, The Aries* [1977] 1 WLR 185 (HL) 188. A third category of time bars, namely those which remove a right or obligation to refer disputes to arbitration, without barring the right to bring an action in court, is recognised in theory but unlikely to be encountered in practice: see the discussion of the older authorities in *Metalfer Corporation v Pan Ocean Shipping Co Ltd* [1988] 2 Lloyd's Rep 632 (Comm) 634–636. For recent unsuccessful attempts to argue that time bar provisions should be interpreted in this way, see *Nanjing Tianshun Shipbuilding Co Ltd v Orchard Tankers PTE Ltd* [2011] EWHC 164 (Comm), [2011] 2 All ER (Comm) 789 [11]–[16] (shipbuilding contract) and *Wholecrop Marketing Ltd v Wolds Produce Ltd* [2013] EWHC 2079 (Ch) [15]–[24] (commodity contract).

3 This clause extinguishes the claim, see *Alma Shipping Corporation v Union of India* [1971] 2 Lloyd's Rep 494 (Comm) 502.

reason of the Carriage of Goods by Sea Act 1971 rather than by agreement). The purpose of these relatively short time limits is normally to allow commercial parties to draw a line under transactions at a much earlier stage than the statutory limitation period would allow.[4] However, they may be seen to operate harshly where the time limit is extremely short or where it applies before the cause of action has even accrued.[5]

9.3 Before 1996, the courts had a wide statutory discretion to extend the time for commencing arbitration where a contractual time limit created undue hardship.[6] Under the 1996 Act it is much more difficult to obtain an extension. Indeed, the court's power to intervene is now so much narrower that applications have become quite rare. The change was made because the old law was considered too interventionist and inconsistent with the principle of giving effect to the parties' bargain. The drafters of the 1996 Act decided that party autonomy required full justification for any court intervention[7] and that only a narrow power to extend in the following terms adopted in section 12 of the 1996 Act could be justified:

> (1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step –
>
> (a) to begin arbitral proceedings, or
>
> (b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,
>
> the court may by order extend the time for taking that step.
>
> (2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.
>
> (3) The court shall make an order only if satisfied –
>
> (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or
>
> (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

B. The application of the power to extend time

Under section 12

9.4 Section 12 is a mandatory provision; it applies regardless of the parties' agreement to the contrary.[8] The court's power to grant an extension of time arises if the following threshold requirements are present:

(a) there is an agreement to refer future disputes to arbitration;
(b) the seat of the arbitration is in England and Wales;[9]

4 DAC Report, para 68. See also *Agro Co of Canada Ltd v Richmond Shipping Ltd, The Simonburn* [1973] 1 Lloyd's Rep 392 (CA) 394.

5 As is the case with the Centrocon arbitration clause, see *A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financiere d'Investissements Transatlantiques SA, The Himmerland* [1965] 2 Lloyd's Rep 353 (Comm).

6 Arbitration Act 1950, s 27.

7 DAC Report, para 69.

8 1996 Act, s 4(1) and Sch 1.

9 1996 Act, s 2(1).

(c) the agreement provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step
  (i) to begin arbitral proceedings, or
  (ii) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun;
(d) a claim has arisen;
(e) any available arbitral process for obtaining an extension of time has been exhausted;
(f) any limitation period applicable by statute had not expired when arbitration was begun.

An agreement to refer future disputes to arbitration

9.5 Section 12 applies to agreements to refer *future* disputes to arbitration. This reflects the previous law which was intended to relieve hardship caused by time bars unwittingly agreed to in standard form contracts.[10] Such hardship is unlikely to arise where the parties agree to arbitrate after a dispute has arisen.

9.6 Where an agreement provides for the resolution of disputes either by the court or by reference to arbitration, section 12 would probably still apply to the commencement of arbitration since there is an agreement, even if conditional, to refer future disputes to arbitration.[11] An "optional" agreement to arbitrate is valid even if the option is exercisable only by one party.[12] Nevertheless, the court will not exercise its power to extend time unless the option has been exercised, or could still be exercised. If there is a dispute as to the scope or existence of the arbitration agreement then the court will probably proceed to determine that issue but it could leave it for the arbitral tribunal to decide.[13]

The agreement provides that a claim shall be barred, or the claimant's right extinguished

9.7 The reference to agreements providing "that a claim shall be barred, or the claimant's right extinguished" makes it clear that section 12 applies to both of the principal types of time bar identified in paragraph 9.1 above (those which bar the remedy by action or arbitration, and those which extinguish the claim itself). The section applies even if the arbitration agreement expressly requires that the failure to comply with the time bar must be raised as a defence in the arbitration.[14]

10 *Report of Committee on the Law of Arbitration* (1927) Cmd 2817, [33] (commonly referred to as 'the MacKinnon Committee Report').

11 *Navigazione Alta Italia SpA v Concordia Maritime Chartering AB, The Stena Pacifica* [1990] 2 Lloyd's Rep 234 (Comm) 238–239.

12 *Pittalis v Sherefettin* [1986] QB 868 (CA).

13 *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 (CA) discussed in chapter 7 and *Grimaldi Compagnia di Navigazione SPA v Sekihyo Lines Ltd, The Seki Rolette* [1998] 2 Lloyd's Rep 638 (Comm) discussed below.

14 *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [53].

The arbitration agreement fixes a period for taking some step to begin arbitral proceedings (or other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun)

9.8 This precondition is not limited to the case where the arbitration agreement fixes a time within which arbitration must be begun. It is sufficient if the arbitration agreement requires "some step" to be taken to begin arbitration, which is not necessarily the same as commencement of arbitration.[15] It is probable that the court would apply a similar test to that which was applied under section 27 of the 1950 Act, namely whether the relevant step and the commencement of arbitration "go hand-in-hand" and the relevant provisions "are so inextricably bound together that they should be regarded as part of the same process of commencing arbitration proceedings".[16] Factors tending to favour the application of the power to extend time might include the fact that the relevant step and arbitration agreement are contained in the same clause, that these provisions are subject to the same time limit, and that the notice is to be given by the same party who is claiming arbitration, but it is not necessarily sufficient that the step is itself a precondition to arbitration.[17]

9.9 Many tanker charterparties contain an arbitration clause with a separate provision limiting the time allowed for presentation of supporting documents for any claim, or for performance of some other act related to a claim. Generally, provisions of this sort in shipping contracts have not satisfied this requirement.

> In *The Oltenia*[18] a vessel was chartered on the Asbatankvoy form providing for arbitration in London and containing an additional clause in the following terms:
>
> > "Charterers shall be discharged and released from all liability in respect of any claims owners may have under this charterparty (such as, but not limited to, claims for deadfreight, demurrage, shifting expenses or port expenses) unless a claim has been presented to charterers in writing with all available supporting documents within 90 . . . days from completion of discharge of the cargo concerned under this charterparty."
>
> The owners did not submit supporting documents to the charterers for one claim and failed to present another claim altogether within the 90-day period. The Court of Appeal held (with some reluctance) that section 27 of the 1950 Act could not be invoked since the presentation of a claim within the above clause could not be treated as a step in commencing arbitration.

9.10 However, section 12 would probably apply where a party had failed to make a claim in writing for the purposes of the Centrocon arbitration clause since performance of this step is so closely associated with the obligation to arbitrate that it should be regarded as part of the beginning of arbitration.[19]

9.11 Section 12(1) also refers to "other dispute resolution procedures". The DAC made it clear that this is intended to cover tiered dispute resolution clauses[20] which call for some other

15 *Fermanagh District Council v Gibson (Bainbridge) Ltd* [2013] NIQB 177 [18]; [2014] NICA 46 [35].
16 *Jadranska Slobodna Plovidba v Oleagine SA, The Luka Botic* [1984] 1 WLR 300 (CA) 306, approving *Tradax Export SA v Italcarbo Societa di Navigazione SpA, The Sandalion* [1983] 1 Lloyd's Rep 514 (Comm) 519.
17 *Richurst Ltd v Pimenta* [1993] 1 WLR 159 (Ch).
18 *Babanaft International Co SA v Avant Petroleum Inc* [1982] 1 WLR 871 (CA).
19 *The Luka Botic*, see also *Mariana Islands Steamship Corporation v Marimpex Mineraloel-Handelsgesellschaft GmbH & Co, The Medusa* [1986] 2 Lloyd's Rep 328 (CA).
20 Tiered clauses are discussed in chapter 3. The Euromed Charter Party 1983 (revised 1997) combines such a provision with a time bar, albeit with a proviso which permits the appointment of an arbitrator to preserve time.

method of dispute resolution (e.g., mediation or expert determination) to precede recourse to arbitration; it is not intended to widen the scope of the power to extend time beyond this.[21]

A claim has arisen

9.12 The court will take a fairly flexible approach to the requirement of a "claim". It need not be a cause of action in the strict sense of that word.[22] It is, however, implicit that the power to extend time for commencing arbitration would only be exercised if the claimant is asserting a claim which, at least arguably, comes within the scope of the arbitration agreement. If an issue arose as to whether the claim was within the scope of the arbitration clause the court would probably determine the issue of jurisdiction but it could leave it for the arbitral tribunal to decide.[23]

Any available arbitral process for obtaining an extension of time has been exhausted

9.13 The arbitration rules incorporated into many commodities contracts incorporate a time limit for commencing arbitration but expressly give arbitrators discretion to extend that time.[24] It is clear from section 12(2) that in such a case the claimant must apply first to the tribunal for an extension of time. Where the tribunal has refused an extension of time the claimant is clearly not precluded from applying to the court for an extension. However, the DAC considered that the prospect of such an application being successful was slight.

> It would be a rare case indeed where the court extended the time in circumstances where there was such a process which had not resulted in an extension, for it would in the ordinary case be difficult if not impossible to persuade the court that it would be just to extend the time or unjust not to do so, where by an arbitral process to which ex hypothesi the applying party had agreed, the opposite conclusion had been reached.[25]

The weight to be given to the tribunal's decision may depend upon the terms in which the tribunal's discretion is conferred or has been exercised. If the tribunal's discretion has been exercised on the basis of considerations which are similar to those relevant to the section 12 discretion, and the tribunal's decision is not open to challenge under sections 68 or 69 of the 1996 Act, then the court will probably place great weight on the tribunal's decision.[26]

21 DAC Report, para 74(i).
22 *Sioux Inc v China Salvage Co, The American Sioux* [1980] 1 WLR 996 (CA). See also *Cathiship SA v Allansons Ltd, The Catherine Helen* [1998] 2 Lloyd's Re 511 (Comm) 517–518.
23 See fn 13 above.
24 GAFTA and FOSFA arbitration rules provide such a discretion.
25 DAC Report, para 74(ii), approved *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [76]. See also *Grimaldi Compagnia di Navagazione SPA v Sekihyo Lines Ltd, The Seki Rolette* [1998] 2 Lloyd's Rep 638 (Comm) 645.
26 *SOS Corporacion Alimentaria* [74], doubting the relevance of *Comdel Commodities Ltd v Siporex Trade SA* [1991] AC 148 (HL) 170 (Lord Bridge), a case under the 1950 Act, to applications under s 12 of the 1996 Act. See also para 9.22 below.

The time provided by statute for commencing arbitration has not expired

9.14 Section 12 does not affect time limits imposed by statute or any other enactment relating to the limitation of actions.[27] This means that it will not provide relief where a party has failed to commence arbitration[28] within a statutory limitation period imposed by the Limitation Act 1980. If the Hague-Visby Rules (or the Hague Rules) apply as a matter of statute by reason of the Carriage of Goods by Sea Act 1971 or a foreign law[29] then the one-year time limit from the date of delivery will apply and cannot be extended.[30] The Hague-Visby Rules will apply as a matter of English statute to many claims under bills of lading for loss or damage of goods.[31] Where parties incorporate the Hague or Hague-Visby Rules into their contract, for instance by means of a clause paramount,[32] this will generally mean that those Rules apply as a matter of contract, not statute. Accordingly, the court would have power to grant an extension,[33] although it may be reluctant to exercise its discretion to extend such a well-known time limit unless there is compelling justification.[34]

C. The test for granting an extension

9.15 If the court has jurisdiction to grant an extension (in the sense that the threshold requirements identified in paragraph 9.4 above are satisfied) it will then consider whether to exercise its discretion in favour of extending time. Under section 12(3) the court may grant an extension only if satisfied that:

(a) the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question and it would be just to extend time;[35] or
(b) the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.[36]

9.16 The two limbs of section 12(3) operate in different ways. Section 12(3)(a) involves a two stage process. The court must first consider whether, as a matter of fact, the threshold requirement of circumstances "outside the reasonable contemplation of the parties when they agreed the provision" is satisfied. If that requirement is satisfied, the question whether it would

27 1996 Act, ss 12(5) and 13(4). The principal relevant statutes are the Limitation Act 1980, the Carriage of Goods by Sea Act 1971, and the Foreign Limitation Periods Act 1984.

28 Section 14(1) of the 1996 Act defines what steps must be taken to commence arbitration for the purposes of the Limitation Act. This definition is applicable generally unless the arbitration clause sets out the steps to be taken, in which case these must apply. The requirements of the 1996 Act must be satisfied but a legalistic approach to construing the notice claiming arbitration will be avoided: *Nea Agrex SA v Baltic Shipping Co Ltd, The Agios Lazaros* [1976] 2 Lloyd's Rep 47 (CA) 51; *Vosnoc Ltd v Trans Global Projects Ltd* [1998] 1 Lloyd's Rep 711 (Comm); *Allianz Versicherungs Aktiengesellschaft v Fortuna Co Inc, The Baltic Universal* [1999] 1 Lloyd's Rep 497 (Comm); *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep 388. See chapter 10 on appointments.

29 Foreign Limitation Periods Act 1984, s 1.

30 *Kenya Railways v Antares Co Pte Ltd, The Antares (No 2)* [1987] 1 Lloyd's Rep 424 (CA).

31 Carriage of Goods by Sea Act 1971, s 1.

32 See *Yemgas FZCO v Superior Pescadores SA Panama, The Superior Pescadores* [2016] EWCA Civ 101, [2016] 1 Lloyd's Rep 561.

33 *Nea Agrex SA v Baltic Shipping Co Ltd, The Agios Lazaros* [1976] 2 Lloyd's Rep 47 (CA); *Consolidated Investment & Contracting v Saponaria Shipping Co, The Virgo* [1978] 1 WLR 986 (CA).

34 Such applications failed in *Grimaldi Compagnia di Navigazione SPA v Sekihyo Lines Ltd, The Seki Rolette* [1998] 2 Lloyd's Rep 638 (Comm) and *Expofrut SA v Melville Services Inc* [2015] EWHC 1950 (Comm).

35 1996 Act, s 12(3)(a).

36 1996 Act, s 12(3)(b).

be just to extend time is considered separately and the fact the case involves circumstances outside the relevant contemplation of the parties is but one potentially relevant matter.[37] In contrast, in considering whether there has been conduct which satisfies section 12(3)(b), the evaluation of the injustice flowing from that conduct is an integral part of the assessment of the conduct itself. Both provisions are related to party autonomy and are conceptually different from the "undue hardship" approach under the 1950 Act.[38]

9.17 If the court is satisfied that the case meets the requirements of either sub-section 12(3)(a) or (b) then an extension should ordinarily be granted. The use of the word "only" in section 12(3) suggests that these requirements are the essential threshold conditions for the power to grant an extension but the court's discretion to refuse an extension is not defined by the matters set out therein.[39] The court's discretion may be influenced by other considerations relevant to whether an extension of time is appropriate (e.g., the existence of other proceedings by which the claim could be more appropriately pursued). The court's discretion is further widened by the fact that an extension under section 12 may be granted on "such terms as it thinks fit".

The circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question

9.18 The test requires not only that the relevant circumstances were outside the reasonable contemplation of the parties, but also that if the parties had contemplated them, they would also have contemplated that the time bar might not apply in such circumstances.[40] The court may have regard to all the circumstances placed before it, including not only what the parties actually contemplated but also what they reasonably would have contemplated.[41] However, the circumstances in question must include those which caused or at least significantly contributed to the applicant's failure to comply with the time bar.[42] The time at which the circumstances are to be judged is when the parties agreed the arbitration clause.[43] The court will take account of the underlying commercial purpose of the time bar in question.[44]

9.19 The probability of the circumstances in question arising is relevant in deciding whether they were outside the parties' reasonable contemplation at the time of contracting. Most types of situation could reasonably be contemplated as possible but it is much more questionable whether parties would contemplate that the time limit might not apply in that situation. If the circumstances

37 *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [69].

38 *Harbour and General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65 (Comm) 71(Colman J), approved 80–81 (Waller LJ).

39 *Perca Shipping Ltd v Cargill Inc* [2012] EWHC 3759 (QB) [10]. However, the word "shall" is used rather than the more permissive provision in s 1(c) that the courts "should" not intervene except as provided by the Act, see *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1(Comm), 11 and *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 [33].

40 The gloss placed by Toulson J in *Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) [21]–[22] on Waller LJ's judgment in *Harbour and General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65 (CA) 81.

41 *Cathiship SA v Allansons Ltd, The Catherine Helen* [1998] 2 Lloyd's Rep 511 (Comm) 520.

42 *Harbour and General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65, 71 (Comm) (Colman J), approved 80–81 (Waller LJ).

43 *Cathiship SA v Allansons Ltd, The Catherine Helen* [1998] 2 Lloyd's Rep 511 (Comm) 520. If the claim is made by a party acquiring rights of suit under a bill of lading under the Carriage of Goods by Sea Act 1992, the relevant time is when the applicant became party to the bill of lading contract, see *Thyssen Inc v Calypso Shipping Corporation SA* [2000] 2 Lloyd's Rep 243 (Comm) [27].

44 *Fox & Widley v Guram* [1998] 3 EG 142 (Comm) (Clarke J).

are such that they are "not unlikely" to occur[45] then the test will probably not be satisfied, but circumstances which are "relatively exceptional" are likely to be outside the parties' contemplation.[46]

It would be just to extend time

9.20 The second requirement for section 12(3)(a) is that it would be just to grant an extension. The circumstances which may be considered in this context are not delimited by the 1996 Act.[47] While some of the considerations identified in relation to the 1950 Act in the so-called *Aspen Trader* guidelines[48] may be relevant, the practice of setting them out as the relevant test has been discouraged. In most cases it will be neither necessary nor appropriate to refer to the pre-1996 Act case law.[49]

9.21 The following factors are likely always to be relevant:

- The length of the delay after the expiry of the time limit and whether the claimant has acted promptly in seeking an extension of time.
- Whether the delay was due to the fault of the claimant and if so, the degree of fault.
- Whether either party will suffer any prejudice in addition to the loss of the claim (by the claimant) and time bar defence (by the defendant).[50]

9.22 The fact that the court will have found that there were circumstances beyond the reasonable contemplation of the parties is a relevant factor to take into account when deciding whether it is just to extend time, and in some cases may be an important factor.[51] However, it is not necessarily determinative, particularly if the claimant has delayed after the time when those circumstances prevented compliance with the time bar.

9.23 It may be a relevant circumstance that the defendant knew of the claimant's intention to claim arbitration before the time bar expired, even though the arbitration was not commenced effectively within time.[52] However, if the claimant left it to the last moment to serve notice of arbitration, which was then ineffective for reasons outside the parties' contemplation, that may tell against the grant of an extension.[53]

9.24 The fact that the tribunal itself exercised a discretion not to extend time is relevant in determining whether it is just to grant an extension. Such a discretion gives the tribunal a means of alleviating any injustice which enforcement of the time bar may cause. In consequence, cases in which it will be just to extend time notwithstanding the tribunal's refusal to

45 In the sense used in the test of remoteness of damage.

46 *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [65]–[66]. In *Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) [25] Toulson J suggested that the section might apply to circumstances 'which parties would not ordinarily expect to occur, but which they know may conceivably occur' such as the sort of events which in other contexts might be considered force majeure or frustrating events.

47 *Cathiship SA v Allansons Ltd, The Catherine Helen* [1998] 2 Lloyd's Rep 511 (Comm) 520.

48 *Liberia Shipping and Trading Corporation Ltd v Northern Sales Ltd, The Aspen Trader* [1981] 1 Lloyd's Rep 273 (CA).

49 *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [82].

50 ibid at [85].

51 ibid at [69].

52 *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC), [2011] 1 All ER (Comm) 1143 [51].

53 *Van Oord ACZ Ltd v The Port of Mostyn Ltd* (unrep) 10 September 2003 (TCC). See also by analogy *FG Hawkes (Western) Ltd v Beli Shipping Co Ltd, The Katarina* [2009] EWHC 1740 (Comm), [2010] 1 Lloyd's Rep. 449 [30] (extension of time for service of claim form under the Civil Procedure Rules).

do so will require something out of the ordinary which will often overlap with an application under sections 68 or 69 of the 1996 Act.[54]

9.25 The size of the claim is not a factor of great weight, because it will always be matched by the prejudice to the defendant in being deprived of the right to rely upon the contractual time bar.[55] This is a change from the approach under the 1950 Act, which reflects the focus of the 1996 Act on party autonomy.

9.26 The merits of the claim have not been considered in the published decisions under the 1996 Act. However, if it is apparent without detailed investigation that the claim is doomed to fail in any event, there will be no injustice in shutting it out and the court will not exercise its discretion to extend time. Nevertheless, the court will not conduct a mini-trial of the dispute on an application under section 12.[56]

The conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question

9.27 The court's power to intervene under this part of section 12 is based upon preventing injustice arising from the conduct of the party relying upon the time bar. However, in view of the DAC's insistence upon full justification for any court intervention to override the parties' bargain, the discretion to extend time on this ground is exercised sparingly. Some conduct of the defendant must be shown that was causative of the failure to comply with the time bar or related to the injustice which would arise if relief is not granted. That conduct, however, need not amount to an estoppel or something akin to it.[57]

9.28 Mere silence, or a failure to alert the party seeking the extension to the need to comply with the time bar, is not sufficient to satisfy section 12(3)(b).[58] Similarly, the mere fact that a party took part in settlement negotiations would not be conduct making it unjust for him to rely on the time bar.[59]

9.29 The assessment of the extent to which the relevant conduct would make it unjust to rely on the time bar may require the court also to have regard to the claimant's own conduct, such as the extent to which the claimant was at fault in missing the time bar.

Application of the test under section 12(3)

9.30 There are relatively few reported cases on section 12 and given the strictness of the test applications are rare. Overall, the authorities suggest that the test will be extremely

54 *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [58], [69], [72] and [76]. See also *Grimaldi Compagnia di Navigazione SPA v Sekihyo Lines Ltd, The Seki Rolette* [1998] 2 Lloyd's Rep 638 (Comm) [73].

55 *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 [42], [83].

56 *Mediterranea Raffineria Siciliana Petroli SpA v Kuwait Oil Tanker Co SAK, The Al Faiha* [1981] 2 Lloyd's Rep 99 (Comm) 105; *First Steamship Co Ltd v CTS Commodity Transport Shipping Schiffahrtsgesellschaft mbH, The Ever Splendor* [1988] 1 Lloyd's Rep 245 (Comm) 250.

57 See the summary of the authorities in *Lantic Sugar Ltd v Baffin Investments Ltd, The Lake Michigan* [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep 141 [46].

58 *Cathiship SA v Allansons Ltd, The Catherine Helen* [1998] 2 Lloyd's Rep 511 (Comm), 522; *Harbour and General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65, 73 (Comm) (Colman J), approved 82 (Waller LJ); *Lantic Sugar Ltd v Baffin Investments Ltd, The Lake Michigan* [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep 141 [46].

59 Sentence quoted with approval by Gross J in *Lantic Sugar Ltd v Baffin Investments Ltd, The Lake Michigan* [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep 141 [46].

difficult to satisfy and an extension will probably only be granted if the circumstances are entirely out of the ordinary. The discussion in the cases gives some guidance on circumstances which might give rise to an extension of time.

- An unusual failure of communication, or sudden illness of the person handling the matter for the claimant might be within section 12(3)(a).[60]
- The lawyer handling the claim suffering a heart attack just before serving notice of the claim, or the vehicle from which the written claim was to be served being involved in a serious accident.[61]
- A loss only materialising or becoming significant after the time bar had expired might possibly justify an extension unless that situation ought to have been foreseen.[62]

  In *The Catherine Helen*,[63] a voyage charter contained the Centrocon arbitration clause with a one-year time limit from final discharge. Shortly after discharge, the owners' P&I club had provided a guarantee against third-party cargo claims and there had been correspondence with charterers relating to this indemnity. The owners did not make a claim for an indemnity within time although they did make a claim for demurrage and berthing expenses. The section 12 application was in respect of the owners' claim for an indemnity against cargo claims. Geoffrey Brice QC, sitting as a Deputy High Court judge, found that it was not outside the parties' contemplation that owners would seek an indemnity against cargo claims or that the owners might make a mistake as to the correct way of making a claim and appointing arbitrators. The application under section 12 was dismissed.

- A mistaken view of the legal situation is unlikely to justify an extension of time unless the circumstances are exceptional.

  In *Vosnoc Ltd v Trans Global Projects Ltd*[64] one of the first cases on section 12, Judge Raymond Jack QC gave a broad interpretation of the test in section 12(3)(a). A letter intended to commence arbitration was ineffective because it failed expressly to call for the appointment of an arbitrator. Judge Raymond Jack QC called this 'a near miss' which would not have been in the parties' contemplation at the time of contracting and justified an extension under section 12(3)(a).

This case is a rare example of a successful application for an extension under section 12(3)(a) and has been distinguished as "turning on its own facts".[65] Subsequent cases have adopted a narrower approach which will probably be preferred. A change in the law is unlikely to justify an extension unless, perhaps, it is wholly unexpected.[66] In *Harbour and General Works Ltd v*

60 *Vosnoc Ltd v Trans Global Projects Ltd* [1998] 1 Lloyd's Rep 711 (Comm) 719.
61 *Cathiship SA v Allanasons Ltd, The Catherine Helen* [1998] 2 Lloyd's Rep 511 (Comm) 520.
62 *Vosnoc Ltd v Trans Global Projects Ltd* [1998] 1 Lloyd's Rep 711 (Comm) 718.
63 [1998] 2 Lloyd's Rep 511 (Comm). See also *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep 345 in which the threshold requirements for granting an extension were satisfied by the occurrence of contamination to cargoes which was not reasonably discoverable within the time limit, but an extension was denied because of the claimant's culpable delay in commencing arbitration after the contamination was discovered, coupled with the trade tribunal's refusal to exercise its own discretion to extend time.
64 [1998] 1 Lloyd's Rep 711 (Comm).
65 *Cathiship SA v Allanasons Ltd, The Catherine Helen* [1998] 2 Lloyd's Rep 511 (Comm) 521; *Harbour and General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65 (CA) 72–81.
66 *Monella v Pizza Express (Restaurants) Ltd* [2003] EWHC 2966 (Ch), (2004) 12 EG 172.

The Environment Agency[67] the Court of Appeal held that a failure to read the time-bar provision properly could not trigger the court's power to extend time.

A mistake of law was also considered in *The Seki Rolette*.[68] The applicants were time charterers of a vessel which had sunk. They sought an extension of time for a claim for loss of property including lashing equipment, a fork lift truck, a car deck and bunkers. Neither party had considered that the Hague Rules applied to the claim for loss of this property until after the one year time bar had expired. Mance J expressly reserved the question of whether a misunderstanding as to the scope of application of the time bar or as to the need to commence arbitration could be within section 12(3)(a) because it might be shown that awareness of the correct legal position was outside the parties' contemplation. However, on the facts before him he found that the existence and application of the Hague Rules time bar was not outside the parties' reasonable contemplation. The Hague Rules were incorporated into the parties' charter and once they were found to apply to the claims then it would be difficult to show that the circumstances were outside the parties' reasonable contemplation.

- Conduct by the defendant which contributed to the claimant's believing that they had taken appropriate steps to commence arbitration in time.

The Lake Michigan[69] concerned a cargo claim under a bill of lading. The owners' P&I Club acted on the owners' behalf in agreeing time extensions, providing an LOU and in relation to a settlement offer. Shortly before an extended time limit expired, the claimants' lawyer sent a notice of arbitration to the Club. In a subsequent telephone conversation between the lawyer and a Club representative, the representative said that he was taking instructions with regard to the notice, but did not say that the Club did not have authority to accept service on behalf of the owners. The reasonable impression this created was that the Club was taking instructions as to the substance of the notice rather than the procedural propriety of service. If the Club had said expressly that it lacked authority, the claimant would have served the notice directly on the owners in time. The application was allowed on the grounds that the Club's conduct contributed to the claimant's failure to serve in time and made it unjust to hold the claimant to the time bar.

D. When time begins to run

9.31 The operation of the time bar will depend on the terms of the arbitration clause in question but some forms are particularly common. Under Article III, rule 6 of the Hague Rules (and the Hague-Visby Rules), suit in respect of goods carried must be brought 'within one year of their delivery or of the date when they should have been delivered'. This means arbitration must be commenced[70] within one year from when the goods were, or should have been, completely delivered.[71]

9.32 Under many arbitration clauses (e.g., the arbitration clause in the Centrocon charterparty form) time runs from the date of 'final discharge' and this generally means the date when

67 [2000] 1 Lloyd's Rep 65 (CA).
68 *Grimaldi Compagnia Di Navagazione Spa v Sekihyo Lines Ltd* [1998] 2 Lloyd's Rep 638 (Comm) 650.
69 *Lantic Sugar Ltd v Baffin Investments Ltd* [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep 141; see also *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC), [2011] 1 All ER (Comm)1143. Contrast *Perca Shipping Ltd v Cargill Inc* [2012] EWHC 3759 (QB).
70 See the 1996 Act, s 14 and chapter 10.
71 For the meaning of 'delivery' in this context, see J Cooke and Ors, *Voyage Charters* (4th edn, Informa, 2014), para 85.199.

file a skeleton/evidence in reply within 7 days of service of the respondent's notice and skeleton argument. Where the court makes an order dismissing the application without a hearing the applicant will have the right to apply to the court to set aside the order and to seek directions for the hearing of the application. If such application is made and dismissed after a hearing the court may consider whether it is appropriate to award costs on an indemnity basis.[348]

22.137 An application for security for costs is an alternative means of protecting against an unmeritorious application being run, typically as a delaying tactic, by a party who may not meet an order for costs (see chapter 17 on security for costs).

Practice on challenges for serious irregularity or lack of jurisdiction

22.138 Applications under section 67 are dealt with in more detail under chapter 6. Applications under section 67 constitute a fresh hearing of the factual issues so may more closely follow the procedure for a trial (although it is often appropriate for them to be decided using witness statements rather than calling witnesses for cross-examination). Applications under section 68 can usually be decided at an oral hearing without the attendance of witnesses. However, the court's full case management powers are available (including the use of preliminary issue hearings for commercially determinative issues)[349] and if either party seeks disclosure of documents or the attendance of witnesses then it should probably ask for a case management conference for the purpose of obtaining directions.[350]

348 Paragraph O8.8. No similar provision is made for applications under s 67. Summary judgment would be available under CPR Part 25, but this would generally involve a hearing in any event.

349 *X v Y* [2015] EWHC 395 (Comm).

350 An application notice may be required since a case management conference will not be listed as a matter of course. See Admiralty and Commercial Courts Guide, O6.5.

CHAPTER 23

Enforcement of awards

A. Introduction

23.1 An award made in a London maritime arbitration will usually take the form of an order to pay damages or a sum of money, together with costs and interest, to the successful party. This chapter summarises the available methods of enforcing that order should the unsuccessful party fail to comply with it and will focus primarily upon enforcement of an award in England. As a matter of English law an arbitration award, unlike a court judgment, does not of itself entitle the successful party to levy execution against his opponent's assets. To do so, the award must first be converted to a judgment. There are two methods of effecting that conversion: first, pursuant to the summary procedure contained in section 66 of the 1996 Act, and second (but much less commonly) at common law by means of an "action on the award". These options are discussed at sections B and C of this chapter.

23.2 The enforcement of foreign awards in England is governed principally by the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, given effect by sections 101–04 of the Act. This is considered in broad outline in section G below.

23.3 The enforcement of London awards abroad depends, ultimately, on the effect of local law. Where the country in which enforcement is sought is party to the New York Convention, then the mechanism for enforcement will be broadly similar to that for enforcement of foreign awards in England and Wales. However, the precise method of enforcement, and the scope of any defences to enforcement, will depend upon the construction which local law has placed upon the Convention, and it will usually be necessary to obtain advice from local lawyers as to the prospects of effecting enforcement.

23.4 Of course, a claimant in arbitration will usually be well advised to obtain security for its claims before any award is granted. After the award has been granted, obtaining security becomes more difficult, largely because the unsuccessful party may take steps to protect or remove its assets. Security for claims is discussed generally in chapter 18; the particular issues which arise in relation to obtaining security post-award are discussed at section F below.

B. Summary enforcement: section 66

23.5 The most common method of enforcing a London arbitration award is by making an application to the court for permission to enforce the award[1] as a judgment under section 66 of the 1996 Act. Section 66 provides:

> (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
> (2) Where leave is so given, judgment may be entered in terms of the award.
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

23.6 Section 66 largely restates the law on enforcement as it existed prior to the 1996 Act.[2]

Scope of application

23.7 Section 66 is a mandatory provision which applies even if the seat of the arbitration is outside England and Wales.[3] Therefore, foreign arbitration awards can be enforced pursuant to section 66. However, foreign arbitration awards may also attract the provisions of the Geneva Convention (given effect by the Arbitration Act 1950, which remains in force for this purpose[4]) or the New York Convention (which is given effect by Part III of the 1996 Act). In relation to such foreign awards, section 66(4) provides that nothing in section 66 is to "affect" the recognition or enforcement of awards pursuant to the Geneva or New York Conventions. It is not entirely clear whether section 66(4) is intended to exclude the possibility of enforcing such awards pursuant to the alternative regime set out in section 66. The better view is probably that a Convention award may be enforced by either route,[5] though in practice it would be unusual to seek to enforce a foreign New York Convention award under section 66. The provisions of English law giving effect to the New York and Geneva Conventions are considered in outline in section G below.

1 Part enforcement of an award is permissible under the 1996 Act provisions on enforcement and the term "award" in these provisions should be construed to mean the award or part of it – *Nigerian National Petroleum Corporation* v *IPCO (Nigeria) Ltd* [2008] EWCA Civ 1157, [2009] 1 Lloyd's Rep 89.
2 S 26 of the Arbitration Act 1950.
3 S 2(2) of the 1996 Act.
4 S 99 of the 1996 Act.
5 See also s 104 of the 1996 Act.

The remedy under section 66

23.8 Enforcement under section 66 is sometimes referred to as "summary" enforcement:[6] it is a quicker procedure than the alternative action on the award. In particular (and as discussed at section B below), the application proceeds upon the basis of documentary evidence only, and no witnesses are called to give evidence at the hearing of the application. Accordingly, the section 66 procedure is quicker and cheaper than an action on the award and, for that reason, tends to be favoured by parties seeking to enforce.[7] Indeed, as the initial application is made without notice, it is almost administrative in nature.

23.9 Sections 66(1) and (2) envisage two distinct remedies: first, an order giving leave to enforce the award as if it were a judgment (section 66(1)) and secondly a judgment in the terms of the award (section 66(2)). Usually the first of these will be sufficient for the purposes of the award creditor;[8] furthermore, entering judgment in terms of the award can have undesirable consequences. Upon entering judgment, the award merges into the judgment and no longer exists in law. However, it appears that the new judgment would not be enforceable under the Brussels Regulation.[9] That notwithstanding, there are circumstances (e.g., where enforcement abroad is envisaged, or where the judgment debtor may become insolvent) where it may be advisable to obtain a judgment. Furthermore, Judgments Act interest is available where judgment has been entered, but not where only an order giving permission to enforce has been made;[10] and failure to comply with a judgment will attract contempt of court sanctions:

> In *ASM Shipping Ltd v TTMI Ltd of England*[11] a shipowner (X) applied for an order debarring the respondent charterer (Y) from resisting an application under section 24 of the 1996 Act to remove the arbitrators in a reference pending between X and Y on grounds of contempt of court in failing to comply with an order for enforcement of an award for freight in X's favour. The application was refused. First, the court considered that Y was not in breach of an order or judgment of the court. The order giving permission to enforce the freight award was made under section 66(1), and as such it was not a judgment against Y nor was it an order requiring Y to comply with the order made by the arbitral tribunal. No contempt was established. In any event the order requested would have been a disproportionate sanction. Had the order, however, been made pursuant to section 66(2), there would have been a breach of order and thus (possibly) a contempt of court.

23.10 Because section 66 empowers the court to enter judgment "in terms of the award", the parties should be named as they are named in the award, and the dispositive part of the judgment should mirror the dispositive part of the award.[12] It is important to realise that

6 Section 66 reproduces, in almost identical terms, s 26 of the Arbitration Act 1950. The old s 26 procedure was described as "in substance a summary form" of the action on the award: see per Hobhouse J in *Coastal States Trading (UK) Ltd v Mebro Mineraloelhandelsgesellschaft GmbH* [1986] 1 Lloyd's Rep 465 (Comm) 467.
7 In *National Ability SA v Tinna Oils & Chemicals Ltd* [2009] EWCA Civ 1330, [2010] 1 Lloyd's Rep 222, Thomas LJ noted that the s 66 procedure is "by far the most common way of enforcing an award" and that the action on the award was "little used in practice" (paras 6–7).
8 In *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, [2012] 1 Lloyd's Rep 6, the court noted that it would be rare in practice for judgment to be entered formally.
9 *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1997] 1 Lloyd's Rep 531 (CA); recital (12) of the Recast Brussels I Regulation.
10 See below at para 23.40.
11 *ASM Shipping Ltd v TTMI Ltd of England* [2007] EWHC 927 (Comm); [2007] 2 Lloyd's Rep 155; see also *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep 295.
12 *Colliers International Property Consultants and anor v Colliers Jordan Lee Jafaar SDN BHD* [2008] EWHC 1524 (Comm), [2008] 2 Lloyd's Rep 368; *Tongyuan (USA) International Trading Group v Uni-Clan Limited* (Comm) unreported 19 January 2001; Admiralty and Commercial Courts Guide paragraph O18.4(b).

section 66 does not empower the court to grant post-judgment remedies of execution such as third party debt orders, appointment of receivers, charging orders and the like. Such remedies are available under the provisions of the Civil Procedure Rules, but only after judgment has been entered.

Enforcement of non-monetary awards

23.11 Although relatively uncommon in practice, non-monetary awards such as declaratory or injunctive awards are in principle enforceable under section 66.[13] This may provide a useful remedy for a party wishing to establish an issue estoppel, particularly where foreign proceedings have been commenced in breach of the arbitration agreement. However, the court will generally be reluctant to grant enforcement of such awards where there is no positive benefit to the claimant.

> In *African Fertilizers and Chemicals Nig Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei Kg*[14] disputes under a bill of lading were referred to arbitration in London. The claimant obtained a declaratory award confirming the tribunal's substantive jurisdiction. It then applied for permission to enforce that award pursuant to section 66. In the meantime, the respondent had commenced proceedings in the courts of Romania. Beatson J confirmed, following the decision of Field J in *West Tankers*, that there was no reason why a declaratory award could not be enforced under section 66, provided it was clear enough. Previous cases[15] in which enforcement had been refused were cases in which there were no competing foreign proceedings and, therefore, no appreciable risk of any inconsistent judgment. By contrast, here there was a real prospect that entering judgment would assist in establishing the primacy of the award over any inconsistent Romanian judgment.

23.12 The existing case law deals with declaratory awards. In principle injunctive awards should also be enforceable under section 66, though the court may decline to enforce as a matter of discretion where, for example, there are practical difficulties with policing or enforcing the terms of the injunction.

Limits to the section 66 procedure

23.13 As enforcement under section 66 proceeds on a summary basis, it is unsuitable for cases where the judgment debtor resists enforcement on grounds which raise factual issues requiring full investigation. In such a case, the court will order the application to proceed to a full trial, with disclosure of documents and witness evidence, and will make appropriate directions. Where, however, the defences raised by the judgment debtor involve a pure point of law, "it would be absurd for the court, having heard all the arguments, to decline to adjudicate and insist upon a full trial, where the same arguments would be duplicated at considerable extra expense".[16] The question of whether issues of mixed fact and law can be determined

13 See, e.g., *African Fertilizers and Chemicals Nig Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei Kg* [2011] EWHC 2452 (Comm), [2011] 2 Lloyd's Rep 531; *West Tankers Inc v Allianz SpA and another* [2011] EWHC 829 (Comm), [2011] 2 Lloyd's Rep 117; *The London SteamShip Owners Mutual Insurance Association Ltd v Kingdom of Spain* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309.

14 [2011] EWHC 2452 (Comm), [2011] 2 Lloyd's Rep 531.

15 In particular, *Margulies Brothers, Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 Lloyd's Rep 250 (Comm).

16 *Curacao Trading Co BV v Harkisandas & Co* [1992] 2 Lloyd's Rep 186 (Comm) 192 per Hirst J; approved and applied in *Kohn v Wagschal* [2006] EWHC 3356 (Comm); *National Ability SA v Tinna Oils & Chemicals Ltd, The Amazon Reefer* [2009] EWCA Civ 1330, [2010] 1 Lloyd's Rep 222.

under section 66 depends on whether the factual issues require a full investigation. In *Kohn v Wagschal*,[17] Morison J held that the court could deal with a question of law affecting the award in proceedings for summary enforcement of the award under section 66 of the 1996 Act if the point did not involve issues of fact which could only be resolved by a trial. Furthermore, purely factual issues which are "relatively straightforward" (such as issues relating to the existence or otherwise of an arbitration agreement) can be determined within the section 66 procedure.[18] In a clear case, the court may dispose of objections to enforcement on the basis of the summary judgment test – namely, whether there is a real prospect of successfully establishing the relevant ground.[19]

Procedure for section 66 application

23.14 In broad outline, the procedure for enforcement starts when the award creditor makes a without notice application for permission to enforce the award. In most cases, the court will make a provisional order granting enforcement – sometimes referred to as an order nisi.[20] The order nisi informs the award debtor of its right to apply to set it aside. Only after any such application is disposed of may the award creditor take steps to enforce and execute the award.

23.15 The detailed procedure is set out in CPR Part 62, rules 62.17–62.21. The application is made without notice by issuing an arbitration claim form, which must be supported by an affidavit or witness statement which exhibits the arbitration agreement and the award. The statement or affidavit must also state the name and usual or last-known place of residence or business (or, in the case of a company, the principal or registered address) of the party seeking to enforce (called the "judgment creditor") and the party ordered to pay (called the "judgment debtor") and state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application. If a judgment creditor seeks to enforce an award of interest arising after the award (as often occurs in maritime arbitration awards), then a certificate giving particulars of the interest awarded must also be filed.[21] The arbitration claim form and witness statement, together with the certificate of interest (if any) and two copies of a draft enforcement order, are then lodged with the court[22] to be considered by a judge. On receiving the papers, the court will either make the order sought, or may decide that it wishes to hear submissions from the judgment debtor,[23] in which case it will direct that the application notice and supporting statement should be served on the judgment debtor. It will also give directions for the service by the judgment debtor of any evidence or argument upon which it seeks to rely.

23.16 After the order is made, it must be served on the judgment debtor by delivering a copy personally or by sending a copy to the judgment debtor's usual or last known place of

17 *Kohn v Wagschal* [2006] EWHC 3356 (Comm); upheld by the Court of Appeal [2007] EWCA Civ 1022, [2007] 1 Lloyd's Rep 100.

18 *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm), [2011] 2 Lloyd's Rep 320.

19 *Honeywell International Middle East Limited v Meydan Group LLC (formerly known as Meydan LLC)* [2014] EWHC 1344 (TCC), [2014] 2 Lloyd's Rep 133: the court determined that the award debtor had failed to raise any defence to enforcement with a reasonable prospect of success, and dismissed its application to set aside permission to enforce on that basis; see also *A C Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098.

20 *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, [2012] 1 Lloyd's Rep 6; *Y v S* [2015] EWHC 612 (Comm), [2015] 1 Lloyd's Rep 703.

21 CPR, Part 62.19.

22 The application may be made without notice to the intended judgment debtor: CPR, Part 62.18(1).

23 CPR, Part 62.18(2).

residence or business or, in the case of a company, its registered or principal address. The judgment debtor may then, within 14 days of service, apply to set aside the order. The order itself must state the judgment debtor's right of challenge. Grounds upon which enforcement may be resisted are considered in section D below.

23.17 If the judgment debtor does not take steps to set the enforcement order aside and does not comply with it, the judgment creditor can then proceed to invoke the methods of enforcement allowed by English law (or, if the judgment is to be enforced against assets abroad, by local law), usually involving execution against assets.

23.18 If the award to be enforced is an agreed award,[24] then both the claim form and the order must state that this is the case. This reflects the view of the DAC[25] that it is desirable to place third parties (including in particular liability insurers) on notice that the award was the result of a settlement.

C. Action on the award

23.19 As indicated above, there may be cases in which the summary procedure under section 66 is unsuitable for an enforcement of a particular award. There is an alternative remedy, at common law, known as the "action on the award". This remedy is preserved by section 81, which provides for the survival of common law rights consistent with the 1996 Act. In practice it is used very rarely.

Basis of the action

23.20 An arbitration agreement incorporates an implied promise by both parties to perform a valid award. The effect of such an award is to supplant the original cause of action and replace it with an implied obligation to honour the award:

> In so far as it awards that one party shall pay, or do something for the benefit of the other, it gives rise to an independent contractual obligation to perform the award.[26]

23.21 If the award is not honoured, then the judgment creditor can sue the judgment debtor for breach of this implied obligation. If successful, such an action will result in a court judgment which can then be enforced by way of execution against the judgment debtor's assets. Although the remedy is well established in English law, its precise nature and theoretical basis is not entirely free from doubt. It is not clear from the authorities whether the cause of action is one in debt[27] or for damages or for liquidated damages.[28] These distinctions are usually of no practical importance, but may become significant where the judgment debtor asserts that it

24 For discussion of agreed awards, see chapter 19.
25 DAC Report, para 378.
26 *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243, 247 (Comm) (Colman J), citing *Bremer Oeltransport GmbH v Drewry* [1933] KB 753 (CA); *Hassneh* was cited for this proposition in *Stargas SpA v Petredec Ltd, The Sargasso* [1994] 1 Lloyd's Rep 412 (Comm) 415 (Comm); see also *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep 295.
27 *Coastal States Trading (UK) Ltd v Mebro Mineraloelhandelsgesellschaft GmbH* [1986] 1 Lloyd's Rep 465 (Comm) 467 (Hobhouse J).
28 *Birtley District Co-op v Windy Nook (No 2)* [1960] 1 QB 1 (QB); *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (Comm) 273–4 (Kerr J, citing *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753).

has counterclaims which it can set off against the action on the award.[29] Nor is it entirely clear whether it is necessary, when asserting the cause of action, to plead and prove the arbitration agreement itself. The better view is probably that it is necessary to plead and prove both the agreement and the award and, in addition, the validity of the reference (i.e., that the arbitrator was duly appointed and that the dispute fell within the terms of the agreement): by contrast, the burden of proof on defences such as lack of jurisdiction is placed on the award debtor where the section 66 summary procedure is employed[30] However, in practice an award which is valid on its face will probably provide *prima facie* proof of the validity of the reference, and the burden will then shift to the judgment debtor to prove otherwise.[31]

23.22 In addition to giving judgment for a sum of money, the court may in theory grant other remedies,[32] such as an injunction to prevent any threatened breach of the implied obligation to honour the award,[33] or a declaration of the validity or effect of an award.[34] However, a simple judgment for a sum of money will usually prove to be the quickest and simplest method of enforcing the award.

Procedure

23.23 An action on the award is probably excluded from the scope of Part III of CPR Part 62[35] and it is therefore not necessary to use the prescribed arbitration claim forms. Instead, a claimant is entitled to proceed by issuing an ordinary claim form in the Commercial Court and the action will proceed as an ordinary commercial action. The steps in the action will usually be: completion of statements of case, disclosure of documents, exchange of witness statements and then trial. As is clear from the foregoing, the procedure is much lengthier and more cumbersome than the summary section 66 procedure. If security for the claims has not already been obtained, it may well be necessary for the judgment creditor to protect its position by obtaining a freezing order before trial.

D. Defences to enforcement: section 66

23.24 Whether enforcement proceedings are brought under section 66 or by an action on the award, the judgment debtor may seek to resist enforcement. The grounds upon which enforcement of New York Convention awards may be resisted are set out in section 103(2) of the Act, discussed in outline in section G below. Defences to enforcement under section 66 are discussed in this section.

23.25 The grounds upon which enforcement may be resisted under section 66 are relatively limited, though they have never been exhaustively stated. Early drafts of the Arbitration Bill included a list of grounds upon which enforcement might be resisted, but this was omitted

29 See the discussion of *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep 410 (CA) in [2000] LMCLQ 153.
30 Mustill & Boyd (2nd edn), pp 417–418; *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer* [1954] 1 QB 8 (QB); *Norsk Hydro ASA v State Property Fund of Ukraine and ors* [2002] EWHC 2120 (Comm); *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm), [2011] 2 Lloyd's Rep 320.
31 *Kianta Osakeyhtio v Britain & Overseas Trading Co* [1954] 1 Lloyd's Rep 247 (CA) 250–1.
32 Common law remedies are preserved in so far as not inconsistent with Part 1 of the 1996 Act: s 81.
33 *Birtley District Co-op v Windy Nook (No 2)* [1960] 1 QB 1 (QB).
34 ibid; *Selby v Whitbread* [1917] 1 KB 736 (KB).
35 Paragraphs 2.1 and CPR Part 62.17.

following a House of Lords amendment.[36] Instead, the 1996 Act leaves open, in section 81, the possibility of resisting enforcement on the basis of any rule of law consistent with the Act, including in particular public policy grounds. In practice, the main grounds upon which enforcement is resisted are: lack of jurisdiction, defects in substance and/or form, limitation and public policy. It is no defence to enforcement that the award in question is being appealed or otherwise challenged, although this is one factor which the court is entitled to take into consideration when exercising its discretion to enforce the award.

Lack of jurisdiction

23.26 Section 66(3) provides that permission to enforce the award "shall not" be given where the judgment debtor shows that it was made without jurisdiction. Unlike the position in an action on the award, the burden of proving lack of jurisdiction lies upon the award debtor and the court may decide that a full trial (involving witnesses or even expert evidence) is required to determine it. However, if the award debtor has taken part in the arbitration and has not previously raised any objection to the tribunal's jurisdiction, then the right to object will probably have been lost.[37]

Defects in form or substance

23.27 The court will refuse to enforce an award which has not decided all the issues between the parties and is not, therefore, final. This may occur, for example, where no determination of a crucial issue such as quantum has been made. However, in practice, it will usually be possible to remedy such defects pursuant to sections 57 or 68 of the 1996 Act (which make provision for undetermined claims or undecided issues to be referred or remitted to the tribunal).[38]

Limitation

23.28 Section 6 of the Limitation Act 1980 stipulates a six-year time limit on actions to enforce awards. Regardless of whether proceedings are brought under section 66 or by action on the award, time runs from the date of the breach of the implied obligation to comply with the award, which arises when the award is made:

> In *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd*,[39] award debtors argued that a summary enforcement application (made pursuant to the old section 26) was time-barred because it had been brought more than six years after the breach of contract upon which the original cause of action was based. Otton J rejected that argument, stating that the action on the award was "distinct from and in no way entangled with the original contract or the breach occurring from it".[40] He held that time ran from the breach of the separate implied promise to honour the award.

36 The House of Lords deleted the list because it was not exhaustive and "parties might be led astray by thinking that matters which are not mentioned are not covered": *Hansard*, House of Lords, 18 March 1996, p 1080. See also DAC Supplementary Report, para 32.

37 See chapter 6 and s 73 of the 1996 Act.

38 See chapter 19 for further discussion.

39 [1985] 1 WLR 762 (QB).

40 772.; see also *National Ability SA v Tinna Oils & Chemicals Ltd* [2009] EWCA Civ 1330, [2010] 1 Lloyd's Rep 222.

23.29 In addition enforcement may be precluded by the court rule that an order of execution (called a "writ of execution") may not be granted without the court's permission where six years of more have lapsed since the date of the underlying court order.[41] However, there may be circumstances where it is considered appropriate for the court to disapply this time limit.

> In *Good Challenger Navegante SA v Metalexportimport SA*,[42] the Court of Appeal allowed enforcement of an award made in 1983 where the award creditor had obtained an order to enforce the award in 1993 but had not applied for execution until 2001. The party seeking to enforce the award was involved in protracted litigation in Romania, and did not seek to enforce the award until three years after the conclusion of the Romanian proceedings. However, during this same time frame, the opposing party had made two payments in respect of the award and had acknowledged the debt by telex. The Court of Appeal considered that the enforcement action accrued on the date on which the telex was sent, and therefore the proceedings to enforce the award were made within the statutory limitation period. The circumstances of the case were considered sufficiently unusual as to justify permission to allow execution outside the normal limit under court rules.

Public policy

23.30 Section 81 of the 1996 Act expressly saves the court's power to refuse to recognise or enforce an award on the ground that to do so would be contrary to English public policy. Most commonly, public policy arguments arise where the underlying contract is said to be illegal (either by English or foreign law) and where, therefore, enforcement of the award amounts to indirect enforcement of an illegal contract, or where the award was obtained by fraud or in breach of the rules of natural justice.[43]

23.31 The English authorities on public policy are not entirely consistent in their approach, but some broad principles may be stated.[44] Normally the issue of illegality will fall within the tribunal's jurisdiction. This is because the illegality of the underlying contract does not necessarily invalidate the ancillary arbitration agreement.[45] If, in such a case, the tribunal determines that the alleged illegality does not affect the main contract, then the court will, *prima facie*, enforce the award. However, the judgment debtor is entitled to challenge enforcement of the award by arguing that the overriding principle of public policy (e.g., the prevention of corruption or the need to prevent the flouting of the law of foreign friendly states) outweighs the policy in favour of finality. Ordinarily a court will be very reluctant to re-open a tribunal's findings of fact or law on an illegality issue. In deciding whether to mount a full enquiry into an issue of illegality at the enforcement stage the judge has to decide whether to give full faith and credit to the arbitrator's award. Relevant considerations are whether the tribunal specifically considered the question of illegality, whether there was incompetence on the part of the arbitrators and whether there is any reason to suspect collusion or bad faith in obtaining the award. The seriousness of the allegation of illegality will not normally be relevant in deciding

41 CPR Part 50, RSC Order 46 rule 2(1).

42 [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67.

43 By contrast, the public policy in favour of enforcement of awards outweighs the public policy of refusing to enforce contractual penalty clauses. Therefore, a (foreign) award that upholds a penalty clause will be enforced by the English court: *Pencil Hill Ltd v US Citta di Palermo Spa* (QB, 19 January 2016).

44 For a detailed discussion, see Mustill & Boyd, 2001 Companion, pp 92–95.

45 See chapter 6 on jurisdiction.

whether the court should mount a full inquiry into the award, but it would be relevant in the ultimate balancing of finality against competing public policy considerations.[46]

In *Soleimany v Soleimany*,[47] a dispute arising under a contract for the illegal export of carpets from Iran was referred to the Beth Din to be determined in England[48] but in accordance with Jewish law. The award referred on its face to the illegality of the contract, but nevertheless awarded a sum of money to the claimant. The Court of Appeal held that in those circumstances it would be contrary to public policy for the award to be enforced. *Soleimany v Soleimany* was distinguished by the Court of Appeal in *Kohn v Wagschal*,[49] again a case concerning the enforcement of a Beth Din decision. In *Kohn*, the Court of Appeal considered that the Beth Din's award had in fact prevented any illegality which could have arisen from an alleged tax evasion. Therefore, the court was not being called on to use its "executive powers to order the doing of an illegal act", and the award could be enforced.

Other cases have also distinguished *Solemainy v Soleimany*. In *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd*,[50] a consultancy contract relating to the sale of military equipment and governed by Swiss law included an arbitration clause providing for ICC arbitration. The claimant commenced arbitration, seeking payment of money due under the agreement. One of the defences raised by the defendant was that the contractual arrangements with the claimant were illegal and contrary to public policy because they involved procuring sales by fraud, through bribery or by illicit personal influence. The tribunal found in favour of the claimants, and the defendant's appeal to the Swiss Federal Tribunal on grounds of public policy was unsuccessful. In enforcement proceedings in the English court, the defendants argued that the enforcement of the award would be contrary to public policy because it had been intended by the parties that the underlying consultancy contract would involve bribery. These arguments were rejected by Colman J who, relying heavily upon the fact that the issues of illegality and public policy had already been ruled upon both by distinguished arbitrators and the Swiss Federal Court, held that the policy in favour of finality outweighed the policy against enforcing illegal contracts.[51] His decision was upheld by the Court of Appeal, who held that although the contract would be unenforceable in English law as being contrary to public policy, it did not fall into the category of contracts whose enforcement was precluded by public policy irrespective of their proper law and place of performance. The parties had chosen to determine their disputes in accordance with Swiss law and arbitration and, in the absence of any evidence of breach of Swiss public policy, the award would be enforced.[52] *Soleimany* was distinguished by the Court of Appeal in *Westacre* on the basis that, in that case, it was plain on the face of the award that performance was illegal in the place of performance.

Soleimany was also distinguished in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*,[53] in which disputes arising under a consultancy agreement were referred to ICC arbitration in Switzerland to be determined in accordance with Swiss law. The tribunal held that, although the performance of the consultancy agreement involved approaches to Algerian

46 *R v V* [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep 97.
47 [1999] QB 785 (Comm).
48 Mustill & Boyd raise the question of whether the short answer to the issues raised in the case was that there was illegality under the English *lex fori*: 2001 Companion, p 93, fn 17.
49 [2007] EWCA Civ 1022, [2007] 1 Lloyd's Rep 100.
50 [1999] QB 740.
51 The same approach was taken in *R v V* [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep 97, suggesting that in most cases it will not be permissible to re-open the tribunal's findings.
52 Reasoning approved by Mustill & Boyd, 2001 Companion, pp 94–95, stressing the importance of trusting foreign arbitrators and courts of the foreign forum, even where the judge called upon to enforce has grounds for concern.
53 [1999] 2 Lloyd's Rep 222 (Comm).

officials which were knowingly in breach of Algerian law, that did not invalidate the contract as a matter of Swiss law, because no element of corruption or bribery arose. Accordingly, the contract was enforceable and an award was made in favour of the claimant. In enforcement proceedings in England, Timothy Walker J held that it was not sufficient merely to show that the underlying agreement would be illegal as a matter of English law: here, the parties had chosen Swiss law to govern the contract. In the absence of any finding of corruption or illicit practice, the award would be enforced.

State immunity

23.32 State immunity may provide a defence to recognition, enforcement or execution of an award. The English law of state immunity is codified in the State Immunity Act 1978, and falls outside the scope of this book. Issues which frequently arises in the arbitration context include whether a respondent has waived immunity by virtue of having agreed to submit disputes to arbitration, as provided by section 9(1) of the 1978 Act,[54] and whether an award may be enforced against a state's commercial assets[55]

Suspension of award or stay of enforcement

23.33 It has been held that the English court has an inherent jurisdiction to "suspend" an English arbitration award pending an application to challenge it, thereby preventing the award from being enforced.

In *Apis AS v Fantazia Kereskedelmi KFT*,[56] an English GAFTA arbitration award was challenged by the respondents to the arbitration pursuant to section 68 of the 1996 Act. The respondents alleged a breach by the GAFTA appeal board of its duties under section 33. In the meantime, the claimants took steps to enforce the award in Slovakia. To avert such enforcement, and also to avoid the posting of default by GAFTA, the respondents applied to the English court for an order suspending the award. Despite the absence of any reference in the 1996 Act or in case law to the existence of such power, the parties agreed that the court had inherent jurisdiction to make an order "suspending" the award. HHJ Raymond Jack accepted this as correct. His conclusion was justified by reference to section 103(2)(f) of the 1996 Act, which sets out (as a ground for non-enforcement of a New York Convention award) the fact that "the award has . . . been . . . suspended by a competent authority of the country in which, or under the law of which, it was made". The existence of an inherent power to suspend an award, and to require the provision of security as a condition of suspension, was held by HHJ Raymond Jack to be "but a small step further". He went on to hold that the inherent power should be exercised by reference to the guidelines laid down by the Court of Appeal in *Soleh Boneh International Ltd* v *Government of the Republic of Uganda*,[57] a case

54 The principles are developed in *Svenska Petroleum v Government of Lithuania* [2006] EWCA Civ 1529, [2007] QB 886; *Tsavliris Salvage (International) Ltd v The Grain Board of Iraq* [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep 90; *London Steam-Ship Owners' Mutual Insurance Associatino Ltd v The Kingdom of Spain & Anor* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309; *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 Lloyd's Rep 483.
55 see, e.g., *Orascom Telecom Holding SAE v Republic of Chad & Ors* [2008] EWHC 1841 (Comm), [2008] 2 Lloyd's Rep 396; *SerVaas Incorporated v Rafidain Bank and others* [2012] UKSC 40, [2013] 1 AC 595; *La Generale des Carrieres et es Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, [2012] 2 Lloyd's Rep 443; *London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain & another* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309 (considering the situation of a state which becomes party to an arbitration agreement contained in an insurance policy).
56 [2001] 1 All ER (Comm) 348.
57 [1993] 2 Lloyd's Rep 208 (CA).

concerned with enforcement in England of a foreign award pending a challenge to that award in the foreign court. Relevant factors for the court to take into account included the strength of the application to set the award aside, and the ease or difficulty of enforcement of the award. In *Apis*, an order suspending the award was granted, but the respondents were required to provide security as a condition of that suspension.

23.34 The concept of "suspending" an award pending challenge was further developed in *Socadec SA v Pan Afric Impex Co Ltd*,[58] which applied the principles arising from *Apis*. The applicant company applied to set aside or suspend an order made by a judge on a without notice application for two arbitration awards to be enforced as judgments. The company argued that the claim on which the second award was based was time-barred pursuant to contract. Mackay J considered that there were two questions to be answered: first, the strength of the argument that the award was invalid and secondly, the difficulty in enforcing the award should enforcement be delayed. In respect of the first point, Mackay J stated that the court had to give "brief consideration" to the merits, and not conduct a mini-trial. In this instance, he could not find that the award was manifestly invalid. On the second aspect he concluded that the enforcement of the second award would be suspended for 28 days, and if within that time the defendant provided security, the suspension would continue. If no security was provided, the suspension would lapse and the award would become immediately enforceable. The source and scope of the apparent inherent power to "suspend" an award remains unclear. It may be doubted whether the existence of a wide-ranging power is consistent with section 1 of the 1996 Act, which is intended to prevent the court from intervening "except as provided by this Part". In *Y v S*,[59] Eder J stated that he was prepared to assume the existence of such a power, but noted that in most cases the award debtor will be fully protected by the provisions of CPR Part 62.18(9)(b), which prevents the award creditor from enforcing any award unless and until any defences to enforcement have been disposed of.

E. The order enforcing the award

Partial enforcement

23.35 Where part of a sum awarded has been paid, the court may make an order in respect of the unpaid portion, or may alternatively give judgment for the whole amount awarded subject to an undertaking by the judgment creditor to accept the unpaid sum in satisfaction of the judgment.[60] The court may also make an order for enforcement of part of an award, but for that part to be enforced it must be possible to enter judgment "in terms of the award" and accordingly the award must be drafted so as to make it possible to identify the part of the award to be enforced.[61]

23.36 If the judgment debtor is able to show that he has a cross-claim against the judgment creditor in other pending proceedings, or that there is a debt owing by the judgment creditor, the court may be persuaded to grant a stay of execution, or even to allow immediate enforcement of part of the award only.

58 [2003] EWHC 2086 (QB).
59 [2015] EWHC 612 (Comm), [2015] 1 Lloyd's Rep 703.
60 *ED & F Man v SATURS* [1970] 2 Lloyd's Rep 416 (Comm).
61 *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd* [2008] EWCA Civ 1157, [2009] 1 Lloyd's Rep 89.

In *ED & F Man v SATURS*,[62] the award creditors obtained an award in the amount of £52,438, but admitted that they owed £23,756 to the award debtors. The court granted an application to enforce the award pursuant to section 26 of the Arbitration Act 1950, the claimants undertaking to accept £52,438 less £23,756 in satisfaction. Donaldson J commented that any attempt to enforce the full award "would come very close to being a contempt of Court . . . and would certainly be restrained instantly by an injunction if the respondents chose to apply for such relief".[63]

Costs

23.37 The order of the court will encompass any costs awarded by the arbitrator, including his fees. The costs incurred in the court proceedings will be dealt with by a separate provision in the court's order: in most cases, the successful judgment creditor will be entitled to recover its costs from the judgment debtor.

Interest

23.38 Under section 49(4) of the 1996 Act, the tribunal has power to grant interest running after the award upon any sum awarded.[64] In arbitrations under LMAA terms, it is now standard practice for such interest to be requested and awarded. If, however, the tribunal does not award interest running after the award, then the court has no power to do so. However, once judgment has been entered in terms of the award then interest may run on the judgment at the judgment rate.[65]

In *Walker v Rowe*,[66] numerous disputes between marine underwriters and reinsurers were referred to a single arbitration panel. The underwriters' claims were dismissed, and the reinsurers were awarded their costs; however, the award did not address the question of whether interest should run, post-award, on the costs awarded. Enforcement proceedings were commenced pursuant to section 66 of the 1996 Act, in which the reinsurers sought to recover interest on the sum awarded up to the date enforcement was ordered. Aikens J held that the court had no power to grant such interest. If a party wished to recover post-award interest, it was essential that he applied to the tribunal for an award of such interest.[67]

Foreign currency

23.39 The court may enforce an award made in a foreign currency.[68] When applying to enforce a foreign award made in a foreign currency, the applicant should not convert the award into sterling.

62 [1970] 2 Lloyd's Rep 416 (Comm).
63 At 417. See also *Hillcourt v Teliasonera AB* [2006] EWHC 508 (Ch) (stay of execution).
64 Also, arguably, interest on costs incurred before the award: see, further, chapters 19 and 21.
65 *Gater Assets Limited v Nak Naftogaz Ukrainy (No 3)* [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep 295 (involving a foreign award); *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014] 2 Lloyd's Rep 252 (English award).
66 [2000] 1 Lloyd's Rep 116, see also *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301 (Comm), [2005] 2 Lloyd's Rep 728.
67 Though, where judgment is entered in terms of the award, Judgments Act interest from the date of the judgment, under the Judgments Act 1838, s 17, is available even where the tribunal has failed to grant post-award interest: see paragraph 23.9 above.
68 *Jugoslavenska Oceanska Plovidba* v *Castle Investment Co Inc* [1974] QB 292 (CA).

F. Security for enforcement

23.40 Usually, a claimant will take steps before the making of the award to secure its claims – most commonly by arresting vessels or other property, or by obtaining a freezing injunction. Security is considered in more detail in chapter 18. If no security has been sought prior to the making of the award, then it is still possible to obtain a freezing injunction[69] (including worldwide freezing injunctions[70]) or other relief with a view to enforcing the award. It is doubtful whether the court has power to order the provision of security, pursuant to section 66 of the Act, as a condition of staying enforcement pending the determination of any challenge to the award; if such power exists, it would probably be exercised very restrictively indeed.[71]

23.41 As far as freezing injunctions are concerned, the court will generally adopt a pro-enforcement attitude, and will be willing to use its powers to ensure that awards are complied with.[72]

> In *Cruz City 1 Mauritius Holdings v Unitech Limited and others*,[73] the claimant sought to enforce LCIA arbitration awards and, to this end, applied to the Commercial Court for various orders. Males J held that permission to serve an arbitration claim form out of the jurisdiction could not be granted as against third parties, where the claim form sought a freezing injunction. Claims for relief against third parties fell outside the scope of the jurisdictional gateways set out in CPR Part 62.5(1)(c). However, he went on to make an order appointing a receiver over shareholdings in four foreign companies. Males J noted the overriding policy that awards and judgments should be enforced, and concluded that there was a reasonable prospect that appointment of a receiver would aid enforcement.

23.42 However, in some respects the courts will draw a distinction between awards and judgments. Freezing injunctions will generally incorporate a "course of business exception" which entitles the injuncted party to continue to use its assets in the ordinary course of its business. In the post-judgment context, it has been held that it is inappropriate to include the course of business exception.[74] However, in *Mobile Telesystems Finance SA v Nomihold Securities Inc*[75] the Court of Appeal drew a distinction between enforcement of a judgment and enforcement of an award.

> In *Nomihold*, the award creditor was granted permission to enforce a London arbitration award, and a freezing injunction in aid of enforcement. The award debtor applied to set aside the permission to enforce, and the award creditor applied to vary the freezing injunction by omitting the course of business exception. The Court of Appeal held that there was a fundamental distinction between an immediately enforceable judgment and an award in respect of

69 e.g. *Celtic Resources Holdings v Arduina Holding BV* [2006] EWHC 2553 (Comm).
70 e.g. *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm).
71 *Y v S* [2015] EWHC 612 (Comm), [2015] 1 Lloyd's Rep 703, suggesting that the existence of the power may be inconsistent with the provisions of CPR Part 62.18, and that any such power would only be exercised in extreme cases, by analogy with the power to order security as a condition of challenging the award under s 70(7) of the Act (as to which see *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm)). See also *Diag Human v Czech Republic* [2013] EWHC 3190 (Comm), [2014] 1 Lloyd's Rep 288 (Burton J).
72 A striking example being *CMA-CGM Marseille v Petro Broker International* [2011] EWCA Civ 461, in which the Court of Appeal refused to release money paid into court as a condition of a freezing injunction that restrained the award debtor from drawing down on a P&I Club guarantee, even though the freezing injunction itself had been set aside.
73 [2014] EWHC 3131 (Comm) and [2014] EWHC 3704 (Comm), [2015] 1 Lloyd's Rep 191.
74 *Masri v Consolidated Contractors International Company Sal and anor* [2008] EWHC 2492 (Comm).
75 [2011] EWCA Civ 1040, [2012] 1 Lloyd's Rep 6.

which permission to enforce was being challenged. In the latter case, there was no immediately executable judgment, and any freezing injunction granted in aid of enforcement should include the course of ordinary business exception.

23.43 Furthermore, as a matter of English law it has been held that it is not possible to arrest a vessel in support of enforcement proceedings:

> In *The Bumbesti*,[76] judgment creditors obtained two awards in Romanian arbitrations for damages suffered as a result of early termination of charterparties. The judgment creditors arrested the *Bumbesti* in Liverpool to enforce payment of one of the awards. Aikens J granted the judgment debtors' application to set aside the arrest. He held that a claim to enforce an award arose out of a separate implied agreement to honour the arbitration award, and that such a cause of action was not sufficiently directly "in relation to the use or hire of a ship" to found the jurisdiction to arrest. The question of whether it was possible to effect an arrest based upon the original underlying cause of action (namely, in this case the early redelivery of the vessels under the relevant charterparty) was left open.[77]

23.44 *Gater Assets Ltd v Nak Naftogaz Ukrainiy*[78] suggests that in the case of enforcement of a domestic award under section 66 of the 1996 Act, an award debtor would not in principle be entitled to security for the costs of resisting enforcement. The case decides that security for costs will not be ordered against an award creditor who seeks enforcement of a foreign award under section 101 of the 1996 Act since this would impose substantially more onerous conditions for enforcement of a foreign award and thereby breach Article III of the New York Convention.[79]

G. Enforcement in the UK of foreign awards

23.45 Most foreign awards are enforceable pursuant to international conventions on the enforcement of awards (such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Execution of Foreign Arbitral Awards signed in Geneva in 1927, referred to as the New York and Geneva Conventions). The procedure for enforcement of such awards is slightly different to that which applies under section 66 of the 1996 Act. A detailed discussion of the provisions of such conventions is beyond the scope of this book, but an outline structure of the relevant provisions may be summarised as follows.

23.46 Recognition and enforcement of Geneva Convention awards is addressed in section 99 of the 1996 Act, which provides that Part II of the Arbitration Act 1950 continues to apply to foreign awards falling within that Part but which are not also New York Convention awards. Accordingly, Part II of the 1950 Act remains of relevance only for awards made in countries which are party to the Geneva, but not to the New York, Convention.

23.47 Recognition and enforcement of New York Convention awards is dealt with in sections 100 to 104 of the 1996 Act. The procedure to be followed, including the necessary supporting evidence, is addressed in sections 101–02. Section 103 sets out a list of grounds

76 [1999] 2 Lloyd's Rep 481 (Adm).
77 489–90. The argument is based upon *dicta* in *The Rena K* [1979] QB 377 (Adm) to the effect that a claim *in rem* to arrest a vessel does not merge with a judgment or award made *in personam*, but survives, thereby enabling the judgment creditor to arrest the vessel so long as the award or judgment remains unsatisfied.
78 [2007] EWCA Civ 988, [2007] 2 Lloyd's Rep 588.
79 See also *Diag Human SE v Czech Republic* [2013] EWHC 3190 (Comm), [2014] 1 Lloyd's Rep 288.

upon which recognition or enforcement may be refused. The approach of the English courts to these defences to enforcement has been considered at section D above.[80]

Defences to enforcement

23.48 Section 103(2) and (3) of the 1996 Act sets out an exhaustive list of grounds upon which the court may decline to recognise or enforce a New York Convention award. Even if any of these grounds are established, the court has a discretion entitling it to decide whether or not to enforce the award. Many of the grounds set out in section 103 (e.g., refusal to enforce where the award is made without jurisdiction or where enforcement would be contrary to public policy) correspond with the principles of common law. In brief outline, the grounds set out in section 103(2) are as follows:

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity.

23.49 This would cover, for example, a situation where a company no longer existed and was therefore incapable of conducting an arbitration, or where an individual party to the arbitration was unable to attend due to illness (*Kanoria v Guinness*).[81]

(b) that the arbitration 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.

23.50 The effect of such a finding would be that the tribunal lacked jurisdiction to make the award. In most cases, an arbitration agreement will be (expressly or impliedly) "subjected to" the law of the seat of the arbitration.

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

23.51 This overlaps to some extent with section 33 of the 1996 Act, which mandatorily requires the tribunal to give the parties a reasonable opportunity to put their case. In the case of an English arbitration, breach of this requirement of section 33 would entitle a respondent to apply have an award set aside.[82]

(d) that the 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 to arbitration (but see subsection (4)).

23.52 Again, this raises a defence based upon lack of jurisdiction. Subsection (4) permits the award to be enforced "to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted". Accordingly, where parts of the award fall within the tribunal's jurisdiction and these can be severed, the court will enforce those parts. Section 103(2)(d) is concerned with substantive jurisdiction, not with

80 See also CPR Part 62.17–62.21.

81 [2006] EWCA Civ 222, [2006] 1 Lloyd's Rep 701; respondent relied upon absence due to illness but the matter was decided on other grounds.

82 If it has caused substantial injustice: see 1996 Act, s 68.

procedural irregularities.[83] Any defences based upon procedural complaints must be advanced under section 103(2)(c) or (f) or under the general public policy head (considered below).

(e) that the 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.

23.53 Breaches in agreed procedure can be disregarded if trivial.[84] Furthermore, if a respondent has failed to object at the time to the breach, he may be held to have waived his right to object.[85]

(f) that the 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.

23.54 If the award is not yet final, then the court will decline to enforce it. If an appeal against the award is pending, the English court may stay or adjourn the enforcement proceedings until the outcome of the appeal is known.[86] Section 103(2)(f) is drafted permissively ("may") and is not triggered automatically by any challenge to the award in a court of the country of origin.[87] This raises the difficult question of whether the court should ever enforce an award even though it has been set aside at the seat. Although there has been no definitive ruling on the issue, courts have taken the view that unless the set-aside decision is itself not entitled to recognition, enforcement of the award should be refused in such cases.[88] Where there are set-aside proceedings pending at the courts of the seat, but no ruling has yet been given, the English court has discretion under section 103(5) to adjourn any enforcement proceedings. In exercising its discretion, the court will take into account a number of factors including whether the application for an adjournment is bona fide and not simply delaying tactics; whether the application has a real prospect of success; and the extent of the delay if enforcement is adjourned, and any resulting prejudice.[89] However, significant delays in the set-aside proceedings may persuade the court to lift any adjournment and proceed to enforce the award.[90] Security may be ordered as a condition of the grant of an adjournment, but only

83 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

84 *China Agribusiness Development Corp v Balli Trading* [1998] 2 Lloyd's Rep 76.

85 As was held in the *Minmetals* case, above.

86 e.g., *Soleh Boneh International v Govt of Uganda* [1993] 2 Lloyd's Rep 208 (CA); *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

87 *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726(Comm), [2005] 2 Lloyd's Rep 326.

88 *Dardana Ltd v Yukos Oil Co (No 1)* [2002] EWCA Civ 543, [2002 2 Lloyd's Rep 326; *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep 435 per Simon J at [20]; *Malicorp v Egypt* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423, per Walker J at [21]–[22]; *Y v S* [2015] EWHC 612, [2015] 1 Lloyd's Rep 703 (Comm), per Eder J at [17]–[19]. Compare the position in, for example, France, where an award may be enforced even though it has been set aside, potentially giving rise to "races" for enforcement where the tribunal subsequently renders a further award replacing the set-aside award: *PT Putrabali Adyamulia v Rena Holding,* Cass civ 1, 29 June 2007, Rev arb 2007 p 515.

89 *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326.

90 *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2015] EWCA Civ 1144, [2016] 1 Lloyd's Rep 5, where an adjournment was partially lifted so that the court could rule on a defence to enforcement raised under section 103(3), with a view to enforcement proceeding, even though this might entail decisions that were ultimately inconsistent with the view reached in the courts of the seat.