# ARBITRATION LAW REPORTS AND REVIEW

## ANNUAL REVIEW OF ENGLISH JUDICIAL DECISIONS ON ARBITRATION 2011

*Editor*

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OXFORD
UNIVERSITY PRESS

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English courts rendered more than 80 arbitration-related judgments in 2011: over 70 judgments at first instance are available as well as 9 by the Court of Appeal. There was one decision by the Supreme Court.[1]

## I. Introduction

Appeals from arbitration awards on questions of law continue to represent the largest category of decisions under the Arbitration Act. Several decisions in 2011 considered when an award is 'final' and not subject to appeal, a question that also arose in relation to enforcement of an award subject to setting aside proceedings in its jurisdiction of origin. The courts confirmed a weak principle of *compétence-compétence* where an arbitration agreement is contested in applications for a stay of proceedings or for anti-arbitration or anti-suit injunctions. In 2011, English courts significantly extended their discretion to injunct arbitration, even where proceedings are seated abroad under the supervisory jurisdiction of other courts.

Application of international standards by English courts was chequered. For Flaux J, the IBA Guidelines on Conflicts of Interest in International Arbitration took a back seat to domestic law: '. . . if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion.'[2] He chose to apply a domestic test for bias of the 'fair-minded and informed observer who is presumed to know how the legal profession in this country works' in deciding whether there was a real possibility of bias in circumstances where a barrister-arbitrator also acted as counsel to one of parties' solicitors.[3] In contrast, Burton J construed Tanzanian law 'in the confident expectation that, in applying that law, the Tanzanian court will have full regard to the international approach to the undesirability of interfering with the careful decisions by arbitrators.'[4] The judge also took into account the 'predominant international view' in interpreting the New York Convention.[5] When considering

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[1] References to 'England' include England and Wales and Northern Ireland. This count is based on transcripts of decisions available as of March 2012. Decisions not available for publication in 2011 ArbLR will be included in 2012 ArbLR.

[2] See *A v B* [2011] ArbLR 43 at para 73.

[3] Ibid at para 60.

[4] *Dowans Holdings v Tanzania Electric Supply Co Ltd* [2011] ArbLR 21 at para 42.

[5] Ibid at para 24.

the validity of an arbitrator's appointment, the Supreme Court drew on 'the general international legal understanding of the nature of an arbitrator's engagement'.[6]

## II. Enforcement of Arbitration

Despite entrenchment of UNCITRAL Model Law inspired provisions in the Arbitration Act 1996, English courts have, thus far, recognized only weak principles of separability and *compétence-compétence* out of line with international practice (and opinion).

Following entry into force of the 1996 Arbitration Act, English courts expressed divergent views about the extent to which questions of arbitral jurisdiction should be referred to arbitrators.[7] The Court of Appeal decision in *Ahmad Al-Naimi v Islamic Press Agency*,[8] which determined that the courts should decide threshold questions concerning the existence, scope and validity of arbitration agreements, significantly weakened *compétence-compétence* in England. In *Al-Naimi*, their Lordships adopted the analysis of HH Judge Humphrey LLoyd in *Birse Construction Ltd v St David Ltd*,[9] a first-instance decision rendered in a domestic arbitration. Judge LLoyd privileged judicial determination of arbitral jurisdiction on grounds of cost effectiveness and what he viewed as practical considerations. Just four months after *Al-Naimi*, Thomas J, as he then was, formulated an alternative view of the courts' role in *Vale do Rio Doce Navagaçao SA and Anr v Shanghai Bao Steel Ocean Shipping Co Ltd*,[10] namely that the courts should intervene only after an award was rendered, and should otherwise refer issues of arbitral jurisdiction to arbitrators. Thomas J expressly rejected considerations of convenience for early court assessment of jurisdiction set out in *Birse Construction* and endorsed by the Court of Appeal in *Al-Naimi*.[11]

[6] See *Jirvaj v Hashwani* [2011] ArbLR 28.

[7] See *Great Ormond Street Hospital NHS Trust v The Secretary of State for Health and Wates Construction Ltd* (1997) 56 ConLR 1 at 16 and *Inco Europe Ltd v First Choice Distribution* [1999] 1 WLR 270 at 275–276. See, *contra*, Clarke J, as he then was, who indicated, in *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyds Rep 24 at 30 that 'the purpose of the [Arbitration] Act was to restrict the role of the court at an early stage of the arbitration'. See also, in favour of a strong principle of *compétence-compétence*, *West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Hellenic Industrial Development Bank* [1998] CLC 1431.

[8] [2000] 1 Lloyd's Rep 522.

[9] [1999] BLR 194 at 196–197.

[10] [2000] 2 Lloyd's Rep 1.

[11] Ibid at 11. In *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, a decision rendered several months after *Vale do Rio Doce Navigaçao*, Toulson J, as he then was, at 509, rejected arguments that the validity of an arbitration agreement should be determined by the courts for reasons of convenience. He enforced arbitration by way of anti-suit injunction, although the validity of the arbitration agreement was in dispute: 'under the arbitration clause and the provisions of the Act, it will be for the arbitral tribunal to rule on the validity of the arbitration agreement, if Owens Corning challenges its jurisdiction on that ground, unless the matter is referred to the Court for determination under Clause 32 . . . .' See also *Cygnet Healthcare plc v Higgins City Ltd* (2000) 16 Const LJ 394. Although the parties agreed to submit all disputes, including the respondent's contention that the contract did not exist, to arbitration, enforcement

Strong principles of *compétence-compétence* and separability, both adopted from the Model Law, are not indigenous to English law. In their analysis of arbitral jurisdiction, English courts often confuse two distinct issues: (a) the strong principle of *compétence-compétence* which provides a jurisdictional basis for arbitrators to determine jurisdiction, in the first instance, reducing court involvement in arbitral proceedings; and (b) ultimate judicial control over questions of jurisdiction after an award has been rendered. For many English practitioners, and judges, whatever jurisdictional powers of *compétence-compétence* might have been conferred upon arbitrators under the Arbitration Act, they are rendered *caduc* by the court's review powers on a challenge of the award. The courts often interpret the interplay of these two competences as meaning that arbitrators do not have 'exclusive' arbitral jurisdiction, but merely a competence which is shared by the courts, and exercisable only at the courts' discretion. Thus, where arbitral jurisdiction is contested in applications before the courts, even before any award is issued, the courts and not the arbitrators decide the issue. In coming to this view, the courts have relied on s 1 of the Arbitration Act which provides only that the courts 'should' not intervene, a modification to the UNCITRAL Model Law's prescription that they 'shall' not intervene, and the general principal, at s 1(c) of the Act that arbitration should be 'cost effective', which has been understood to qualify the principle of party (and arbitral) autonomy formulated at s 1(b) of the Act.[12]

In *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC*, Lord Justice Rix expressed some disagreement with Thomas J's view of *compétence-compétence* in *Vale do Rio*:

> I do not with respect agree with an interpretation of *Vale do Rio* which regards it as laying down a rule of jurisdiction that it is in all circumstances necessary for a party who wishes to raise with the court an issue of the effectiveness of an arbitration clause first to commence an arbitration and go through the procedures and provisions of sections 30–32 and/or section 67 and/or section 72. If, however, that is what Thomas J was saying in *Vale do Rio*, then I would not with respect agree with that view.[13]

of an adjudicator's decision rendered in parallel proceedings between the same parties raised the question before the courts. HH Judge Thornton QC, refused, at 399, to take any step that might pre-empt arbitral jurisdiction, albeit on case management grounds and costs considerations: '. . . as a matter of good case management, and in compliance with the overriding objective, which of course all business in this court is conducted pursuant to, namely that the parties should save expense and should have the case dealt with in ways that are proportionate given the amount of money involved, expeditiously and fairly the arbitrator's decision as to the existence of the contract should come first . . . [T]he appropriate course is to take such steps as will least interfere with, and least potentially affect, the outcome of the arbitration of the dispute as to the question of the existence of the underlying contract . . . .'

[12] See, however, *Grimaldi Compagnia v Sekihyo Line* [1998] 3 All ER 943, where Mance J, as he then was, set out a different hierarchy of the general principles expressed in s 1 of the Arbitration Act 1996, more in line with international practice: 'the dominant icon where litigation and arbitration inter-net is now party autonomy'. On this basis, it was not for the courts to intervene to protect what they might view as the parties' interests.

[13] [2011] ArbLR 15 at para 99.

In *JSC BTA Bank v Ablyazov and Ors*, the commercial court declared that although arbitrators enjoy *compétence-compétence*, 'in general', where the question of the existence of an arbitration agreement arises on a stay application, the court should determine the issue.[14] Likewise, in *Excalibur Ventures LLC v Texas Keystone Inc*, Gloster J confirmed: the ' "contention that the English court would, pursuant to s 30 of the Arbitration Act 1996, defer to the tribunal on questions of jurisdiction in first instance" is wrong as a matter of law.'[15] The judge viewed the matter as governed not by party autonomy, but costs considerations. A stay was mandatory only where an arbitration agreement could be proved to exist. In the event of a prima facie case for arbitral jurisdiction, a stay of proceedings was only discretionary:

> . . . if the issue is whether an arbitration agreement was ever concluded, then the court can clearly determine such an issue, if it considers it appropriate to do so: see *Al-Naimi* (supra) at 524. Indeed, if the stay is sought pursuant to s 9, the court has to be satisfied, in order to exercise its powers under the section to grant a stay, that an arbitration agreement has in fact been concluded . . . . If the court decides that the arbitrators should decide the issue, and therefore, *ex hypothesi,* is not satisfied as to the existence of such an agreement, then the stay is granted pursuant to the inherent jurisdiction as now set out in CPR 3.1(2)(f): see ibid, pp 525 and 527. The court looks for the most economical way to decide where the real dispute should be resolved.[16]

Gloster J decided, in *Excalibur*, that the English court, and not a New York ICC arbitral tribunal, was 'the appropriate tribunal' to decide whether non-signatories had agreed arbitration in light of related litigation commenced in England and 'cost and case management considerations'.[17] Indeed, the court injuncted the New York proceedings, as far as non-signatory parties were concerned, refusing to give effect to a decision of the ICC Court that arbitrators should proceed to decide jurisdiction. For the commercial court, this was merely 'a purely administrative act based on a low test as to whether or not the ICC was satisfied that there was a prima facie case that an arbitration agreement might exist' and it was 'clear . . . that the issue of arbitrability has not been determined . . .'.[18]

In deciding against *compétence-compétence*, Gloster J relied on statements by Lords Mance and Collins on the court's powers to review arbitral jurisdiction in a challenge to the enforcement of an arbitration award in *Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan.*[19] She also relied on

[14] [2011] ArbLR 6.

[15] [2011] ArbLR 27 at para 64.

[16] Ibid at para 67.

[17] Ibid at para 68.

[18] Ibid at para 45. In common with most administering institutions, the ICC Rules require only a prima facie case that there 'may be' an arbitration agreement. This institutional support for *compétence-compétence* accords with international practice and gives full effect to the New York Convention requirements under which arbitral jurisdiction to decide matters of jurisdiction does not depend on a 'binding' arbitration agreement, but requires only an arbitration agreement evidenced in writing.

[19] [2010] UKSC 46.

doctrine cited before the Supreme Court in that case, namely Fouchard, Gaillard and Goldman, on the powers of State courts ultimately to review and decide questions of jurisdiction after an award has been rendered. In relation to the different question of arbitrators' *compétence-compétence*, which had arisen before Gloster J, however, Fouchard, Gaillard and Goldman also state the practice followed in France, and internationally, of referring questions of arbitral jurisdiction, in the first instance, to arbitrators:

> When the dispute is not before an arbitral tribunal, the courts must also decline jurisdiction unless the arbitration is 'patently void'. This amounts to a prima facie review of the existence and validity of the arbitration agreement. As the French Cour de cassation held in its *V 2000* decision, without even referring to this hypothesis of the arbitration being patently void, the arbitrators must apply the arbitration clause subject to subsequent review by the courts in order to verify their own competence, particularly as regards the arbitrability of the dispute. At the same time, when the French courts hear a request for the appointment of an arbitrator on the basis of an arbitration agreement the existence or validity of which is contested, they do not address the substance of the dispute and must, at the very most, make a prima facie assessment of the existence and validity of the agreement.[20]

The decision in *Excalibur* suggests that a different approach applies in England where courts will refer jurisdictional disputes to arbitrators, on an application to stay proceedings under s 9 of the Arbitration Act, only where the courts first establish that it is 'virtually certain' there is an agreement to arbitrate (and may order a trial of the issue to determine the matter).[21] For Gloster J, 'to force [parties] to participate in a jurisdiction dispute before New York arbitrators (which would be the effect of a refusal of the anti-arbitration injunction and the grant of a stay of the commercial court proceedings) would involve, in practical terms, determining the [issue of arbitral jurisdiction] "by the back door", and thus be likely to lead to a gross

[20] Fouchard, Gaillard and Goldman (1999) *International Commercial Arbitration*, The Hague, Kluwer at 407–408. See also Emmanuel Gaillard and Yas Banefatemi (2008) 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in E Gaillard, D Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, Cameron May at 257; and Emmanuel Gaillard (1999), 'L'effet négatif de la compétence-compétence', in J Haldy, J-M Rapp and Phidias Ferari (eds) *Études de Procédure et d'Arbitrage en l'Honneur de Jean-François Poudret*, at 385. See the decision of the French Cour de cassation in *Jules Verne*, no 937 of 7 June 2006, 1ère ch civile [2006] *Revue de l'arbitrage* at 944, note E Gaillard: 'le principe de validité de la convention d'arbitrage international et celui selon lequel il appartient à l'arbitre de statuer sur sa propre compétence sont des règles matérielles du droit français de l'arbitrage international, qui consacrent, d'une part, la licéité de la clause d'arbitrage indépendamment de toute référence à une loi étatique et, d'autre part, l'efficacité de l'arbitrage en permettant à l'arbitre, saisi d'une contestation de son pouvoir juridictionnel, de la trancher par priorité; que la combinaison des principes de validité et de compétence-compétence interdit, par voie de conséquence, au juge étatique français de procéder à un examen substantiel et approfondi de la convention d'arbitrage, et ce, quel que soit le lieu où siège le tribunal arbitral, la seule limite dans laquelle le juge peut examiner la clause d'arbitrage avant qu'il ne soit amené à en contrôler l'existence ou la validité dans le cadre d'un recours contre la sentence, étant celle de sa nullité ou de son inapplicabilité manifeste.'

[21] [2011] ArbLR 27 at para 70.

injustice.'[22] The courts do not fully recognize arbitral jurisdiction or properly distinguish it from the court's own review powers, and the courts seem to overlook the fact that arbitral tribunals are, themselves, capable of resolving such issues and providing appropriate relief.

The Court of Appeal indicated a need to review practice in England in *Claxton Engineering v TXM*.[23] Lord Justice Rix granted permission to appeal against a decision at first instance, which had determined that a Budapest arbitration agreement did not exist. Permission was granted expressly on grounds of *compétence-compétence*, an issue the Court of Appeal had earlier refused to consider in *Midgulf v Groupe Chimique Tunisien*.[24] Lord Justice Rix considered there was an arguable issue that the court should not intervene where there was no common ground between the parties that arbitral jurisdiction be decided by English courts.[25] In the decision at first instance, the commercial court had relied on *Ahmad Al-Naimi v Islamic Press Agency*[26] as authority for the court's powers to review the existence, scope, and validity of an arbitration agreement (rather than refer the question to the arbitral tribunal). In declaring that the Budapest arbitration agreement did not 'exist', the lower court disregarded an HCCI arbitration agreement contained in a series of purchase orders, many of which had been signed, in part, on the basis that these were 'post-contractual' materials (although such documents are not 'inadmissible' evidence before an international tribunal or supervisory courts in Hungary).[27] Lord Justice Rix stated: 'in my judgment there is an arguable issue suitable for appeal as to the effect of the *Ahmad Al Naimi* judgement . . . .'[28]

[22] Ibid. Gloster J cited with approval the statement of Deputy Judge, Mr Julian Flaux QC, as he then was, in *El Nasharty v J Sainsbury Plc* [2003] ArbLR 20 at para 29: '. . . it would require the case to be an exceptional [case] before the Court would leave it to the arbitrator if the Court were uncertain on the material before it whether or not there was an arbitration agreement.'

[23] [2011] ArbLR 16.

[24] See Shackleton (2010) 'The High Cost of London as an Arbitration Venue–the Court of Appeal Rejects Compétence-Compétence and Separability in *Midgulf v Groupe Chimique Tunisien*', *International Arbitration Law Review*, vol 2 at 50.

[25] The courts at first instance remain divided on the issue. See, eg, *Noble Denton Middle East v Noble Denton International* [2010] EWHC 2574 (Comm Ct) where Burton J stated at paras 10 and 11: 'In those circumstances it is not surprising and indeed, in my judgment, is correct that the test on [appointment of arbitrators] is only one of whether there is an arguable case. It does appear that this point was overlooked at first instance in *Midgulf International Limited v Groupe Chimique Tunisien* [2010] 2 Lloyd's Reports 411, and that when it was attempted to be put right in the Court of Appeal in *Midgulf International Limited* [2010] EWCA Civ 66, the Court of Appeal understandably concluded that it was too late for the point to be taken. But, that apart, it seems quite clear to me that all the authorities, and particularly those that I have mentioned, drive in one direction, namely (a) that the proper international approach to arbitrations means that it is not for the court to decide this kind of question; and (b) that the arbitrator can and will decide that very question.'

[26] [2000] 1 Lloyd's Rep 522.

[27] In addition, the parties' arbitration agreement incorporated the HCCI Rules, art 1(4) of which states: 'An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.'

[28] [2011] ArbLR 16 at para 5. See also the Court of Appeal decision in *Fiona Trust* which considered the application of *Birse Construction* and *Al Naimi* by Morrison J who, at first instance, determined that arbitrators in that matter did not have subject matter jurisdiction. In overturning Morrison J, the Court of Appeal held, per Longmore LJ: 'The reference to section 67 in section 72

## A. Existence of Arbitration Agreement

A stay was granted where it was alleged that loans in dispute were only voidable, not void, in *JSC BTA Bank v Ablyazov and Ors*.[29] For the court, this pleading sufficed to establish the existence of an arbitration agreement contained in the loan agreements.

No stay was granted in *Wilky Property Holdings Plc v London & Surrey Investments Ltd*,[30] under an agreement to appoint an 'independent expert' to determine 'any difference or dispute as to the meaning or effect of the terms of this letter of appointment, or the calculation of the Profit Share to be paid thereunder . . . .' In deciding the provision was not an arbitration agreement, Mr Richard Snowden QC, sitting as Deputy Judge of the High Court, privileged a textual analysis over the 'substance' of cl 22. He found the clause did not include disputes and differences as to whether the agreement was properly performed, breached or terminated, nor did it allow for the assessment of any claims of damages. Such a reading of the

reminds the reader that once an award has been made an application to the court can be made challenging the award on jurisdictional grounds. It is also important to be aware that sections 30–32 of the 1996 Act relate to the jurisdiction of the arbitral tribunal. Section 30 provides that the arbitral tribunal may rule on its own substantive jurisdiction including (in the same words as used in section 72) the question whether there is a valid arbitration agreement. Section 31 provides that any objection as to jurisdiction must be taken before any step is taken to contest the merits of the matter and section 32 provides for the court to be able to determine a preliminary point of jurisdiction if all the parties agree in writing or the tribunal itself permits the court (for good reason) to do so. This combination of sections shows, together with the prescriptive section 9(4), that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute.' In comments on the effect of *Al-Naimi*, Colman J noted, in *A v B* [2006] ArbLR 1 at para 136: 'Further, as appears from Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, 11.24–11.26, where a less strict approach to resolution of s 9 issues is proposed, a number of jurisdictions notably Ontario and British Columbia, a stay has been granted where the applicant for a stay has established a prima facie case of substantive jurisdiction so as to refer the issue to the arbitral tribunal. In Hong Kong a stay has been granted where the Applicant has established a prima facie case or a strongly arguable case. The French Cour de cassation has indicated that a stay is appropriate unless it its 'manifest' that the arbitration agreement is inapplicable.' In *Midgulf v Groupe Chimique Tunisien* [2010] EWCA Civ 66 at para 27, the Court of Appeal considered that a decision by the commercial court to decide issues of jurisdiction itself, rather than refer the issues to arbitrators pursuant to *compétence-compétence*, could be appealed to the Court of Appeal, although in that case it declined to do so because Midgulf had participated in a second merits hearing ordered by Mr Justice Teare without appealing the Judge's order for a trial on the question of arbitral jurisdiction. The Court of Appeal did not consider the enforcement of an international arbitration agreement to be a treaty obligation under the New York Convention which might be relied on at any time: 'Mr Shackleton, who has appeared for Midgulf on this appeal but did not represent it in the proceeding at first instance, has sought to argue that the judge was wrong to have tried the issue whether the July contract was subject to a London arbitration agreement. He wished to submit that the judge should have done no more than to decide whether there was a good arguable case to support the existence of an English arbitration agreement, for which there was no need to hear oral evidence, and that he should then have ordered the appointment of an arbitrator and granted an anti-suit injunction pending the arbitrator's decision on his own jurisdiction. At the outset of the appeal the court ruled that it was too late for Midgulf to seek to raise such an argument when it had not sought to appeal against the order made by Teare J on 11 May 2009 and the trial of the issue which he had then ordered had taken place.'

[29] [2011] ArbLR 6.

[30] [2011] ArbLR 38.

provision was 'unnaturally expansive'. Somewhat surprisingly, the judge held that it was not permissible to apply presumptions in favour of a broad interpretation, set out by the House of Lords in *Fiona Trust*,[31] unless and until the provision was first determined to be an arbitration agreement in accordance with more traditional contractual hermeneutics. While the court accepted that 'it is less obvious that expert determination is an appropriate mechanism for the resolution of disputes as to the general meaning of an agreement in its commercial context', the parties 'should be held to their contractual choice of dispute resolution, even though the court might regard the choice as inappropriate'.[32]

In *States of Guernsey v Jacobs UK*,[33] no arbitration agreement was formed where Jacobs initially proposed a contract that contained no provision for arbitration and Guernsey subsequently sought to amend it, including the addition of an arbitration clause. While Jacobs accepted the amended contract, it would only finally agree the contract if other issues (unrelated to the arbitration agreement) were dealt with, even if they were minor. No objection was raised to the arbitration agreement contained in the proposal. Rather than focus on whether the parties had agreed arbitration, the court applied a contractual 'counter offer' analysis to the entire contract. The arbitration agreement shared the fate of the main contract.[34]

In contrast, separability was applied in *Novasen SA v Alimenta SA*,[35] to establish the formation of an arbitration agreement where a contract had been concluded by an undisclosed agent acting for Alimenta. The court found that Novasen was under economic pressure and would not, in principle, have refused to enter into a contract with Alimenta. Further, the court held that an arbitration agreement between Novasen and Alimenta arose independently of whether or not a valid contract was formed since there was an agreement between Alimenta and Sogescol that Sogescol would act as undisclosed agent. Those arrangements included a separable arbitration agreement.

## B. Scope

Difficulties arose involving disputes arising under groups of contracts governed by competing dispute resolution provisions. English courts have demonstrated some ambivalence to maximum arbitral jurisdiction where decision-making appears divided between arbitrators and the courts.[36] Where a single transaction contains

[31] [2007] ArbLR 24.

[32] Ibid at paras 58 and 80 citing Thomas LJ in *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826.

[33] [2011] ArbLR 32.

[34] See Shackleton (2002) 'Arbitration without a Contract', *Mealey's International Arbitration Report*, September, vol 17, no 9.

[35] [2011] ArbLR 2.

[36] An arbitration agreement was extended to a related contract in *Wedlake Bell v Jones* [2007] ArbLR 60. The Court of Appeal, per Walker LJ, refused to construe such agreements restrictively against arbitration in *Keith Peters v Dylan Jones*, 22 May 2000, CA, Gibson and Walker LJJ, unreported: 'it would be an unusual and inefficient form of compromise which provided both for arbitration and for further substantive issues to have to be argued before the court and decided

both an arbitration clause and a jurisdiction clause, English courts will favour arbitration and narrowly construe the jurisdiction clause as identifying only the supervisory jurisdiction.[37] Problems arise, however, where the competing dispute

by the court'. On the other hand, in *MH Alshaya Co WLL v Retek Information Systems Inc and Anr*, 15 December 2000, Comm Ct, unreported, Garland J struck out an arbitration clause in order to allow consolidation, before the courts, of all disputes arising under agreements covering identical subject matter between the same parties: (a) a software licence that contained an AAA arbitration clause; (b) a related software maintenance agreement that contained an exclusive jurisdiction clause in favour of English courts; and (c) a related confidentiality agreement that also contained an AAA arbitration agreement. Disputes potentially arose under both the licence and the maintenance agreement. Garland J did not have regard to the unity of the transaction that underlay the two related agreements: 'an attempt to squeeze the dispute under the maintenance agreement into arbitration by saying that it arises in connection with the licensing agreement is, in my view, a step too far'. See also *China Petroleum Technology and Development Co v LL Caltex Gas Co Ltd and Ors*, 5 December 2000, Comm Ct, Andrew Smith J, unreported, where the court considered that it had the power to issue injunctive relief against arbitral proceedings in order to avoid litigation before separate tribunals. In contrast, multiplication of *fora* did not deter Toulson J, as he then was, from enforcing arbitration in *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500 at 509: 'I recognise the inconvenience to Owens Corning of not being able to sue all their insurers in the same proceedings, but that is a consequence of having different contracts with them. It is not a good reason for depriving XL of its contractual rights.' See also *Hadjisawas v Zampelas and Ors*, 29 June 2000, Comm Ct, Judge Dean, QC, unreported, where the underlying unity of the transaction did play a role. In *Hadjisawas*, the court had to construe a principal partnership agreement that was subject to arbitration together with a 'supplemental' agreement that contained no arbitration clause: 'Admittedly there is no express reference to the arbitration clause in the supplemental agreement, but it would be destructive of the commercial intent of that agreement if one partner alone of all the partners could say the disputes between him and the other partners had to be determined in the Greek courts.' Likewise, the Court of Appeal extended an arbitration clause in a JCT contract to extra work the parties agreed in addition to the original contract in *Ahmad Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 at 527. In *Fiona Trust* [2007] ArbLR 22 at para 17, Longmore LJ stated: 'any jurisdiction or arbitration clause in an international commercial contract should be liberally construed . . . . One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration . . . . This is indeed a powerful reason for a liberal construction.' This approach was applied to questions of incorporation by reference in *Heifer International Inc v Helge Christiansen and Ors* [2007] ArbLR 31. Longmore J's reasoning was approved by the House of Lords [2007] ArbLR 24.

[37] In *AXA Re v ACE Global Markets Ltd* [2006] ArbLR 7, arbitral jurisdiction was upheld under a reinsurance slip which provided 'Full wording as Exel 1.1.90 with additional clauses, deletions, endorsements, special condition and warranties . . . . This Contract shall be subject to English law and jurisdiction.' The mention of 'Exel 1.1.90', referred to a pre-existing 'Joint Excess Loss Committee Excess Loss Claims' containing an arbitration agreement in the following terms: 'The parties agree that prior to recourse to courts of law any dispute between them concerning the provisions of this contract shall first be the subject of arbitration . . . . The seat of the arbitration shall be in London and the arbitration tribunal shall apply the laws of England as the proper law of this contract unless indicated.' Relying on consistent English jurisprudence, Gloster J enforced the arbitration agreement on the basis that it was compatible with the reference to English courts contained in the later slip which was, in the presence of an earlier, but still operative and controlling arbitration agreement, to be construed as mere identification of the supervisory jurisdiction. Another example, referred to by Gloster J, is the decision of Moore-Bick J, as he then was, in *Shell International Petroleum Co Ltd v Coral Oil Ltd* [1999] 1 Lloyd's Rep 72 where a services agreement contained an LCIA arbitration agreement and the following jurisdiction clause: 'This Agreement, its interpretation and the relationship of the parties hereto shall be governed and construed in accordance with English law and any dispute under this provision shall be referred to

resolution clauses are contained in related but separate agreements, in particular, where they are concluded with different members of the same corporate group.

In *Deutsche Bank v Tungkah Harbour*,[38] related parties concluded two agreements, one for refinancing and another export agreement for the sale of gold to Deutsche Bank's London branch. These agreements were governed by an English jurisdiction clause, but also specified the bank's right to elect London arbitration. Tungkah guaranteed the liability of its subsidiary in a further agreement with the Amsterdam branch of Deutsche Bank. The guarantee was governed by an English jurisdiction clause without any provision for arbitration. Deutsche Bank terminated the refinancing and export agreements alleging default and commenced litigation in the English courts as well as arbitration under the export agreement. At the same time, Deutsche Bank brought action in the English courts under the guarantee. Litigation under the two contracts was stayed on the basis of Deutsche Bank's election of arbitration. Blair J accepted that disputes under the guarantee and the two agreements all arose out of the same contractual arrangements, especially as the export contract was the means for financing payments, and all raised similar issues and events of default; however, the guarantee was given by a different party, and the parties had agreed the jurisdiction of English courts. For Blair J, it was commercially rational to allow the claim under the guarantee to proceed in the courts even if this resulted in fragmentation of the overall dispute resolution.

In *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal*,[39] Blair J refused to stay litigation despite a finding that the claims in arbitration and litigation overlapped. There was nothing unusual about parties choosing to submit a contractual dispute to arbitration while referring matters relating to security to the jurisdiction of one or more courts. On this basis, issues arising in the litigation could not be said to come within the arbitration agreement and were not required to be referred to arbitration within the wording of s 9 of the Arbitration Act. Further, an order of the English court was necessary to bind a third party bank which held the dispute account and was not a party to the arbitration agreement.

the jurisdiction of the English Courts.' Moore-Bick J considered, at p 5, that the two clauses could be reconciled, although this required any dispute on the proper law of the contract to be referred to the English court while all other disputes were referred to arbitration. Likewise, in *Ace Capital Ltd v CMS Energy Corp* [2008] EWHC 1843, an insurance policy containing a provision referring all disputes to LCIA arbitration in London also contained a 'Service of Suit Clause' pursuant to which the underwriters agreed to submit to the jurisdiction of any court of competent jurisdiction in the United States. Clarke J considered, at paras 81 and 82, that the arbitration clause ought to be accorded primacy and that the 'Service of Suit Clause' was only concerned only with ensuring that the underwriters were amenable to United States jurisdiction in proceedings to enforce any arbitration award.

[38] [2011] ArbLR 20.

[39] [2011] ArbLR 26. See also *Alliance Bank JSC v Aquanta Corp and Ors* [2011] EWHC 3281 where a stay was refused in respect of disputes arising under a number of loan agreements which contained an arbitration agreement, but also an option for litigation. No claims were found to have been made in relation to another category of loan agreements which contained an arbitration agreement and no litigation option.

In *Lesley McCaughan v Belwood Homes Ltd*,[40] on the other hand, two related contracts between the same parties were considered together to form a 'single transaction', but with the result that an arbitration agreement in one of them could not be enforced by a stay of litigation. Disputes arose under a building agreement and a sales agreement. Only the building agreement referred disputes to arbitration. For the Northern Ireland High Court, the two agreements were 'interdependent' and formed 'a single conveyancing transaction, if not a single contract'. Claims for specific performance of the building contract, notably obligations relative to a sewerage scheme, were a matter 'in connection with' the construction of the dwelling under the construction contract and fell within the arbitration agreement. However, as this obligation was also to be regarded as arising out of the sales contract, it related to a transfer of an interest in land. Section 48(5)(b) of the Arbitration Act excludes arbitrators' powers to order specific performance of an obligation relating to land.

## C. Arbitrability

In *Cosco Bulk Carrier Ltd v Armada Shipping SA*,[41] the court enforced arbitration of a dispute over competing claims, by the owners of a vessel and the charterer, to payments made into an escrow account by the sub-charterer. The payments were also the subject of bankruptcy proceedings concerning the charterer in Switzerland. Briggs J decided that the disputes should be determined in the first of two arbitration proceedings underway, provided that Armada, who was in bankruptcy proceedings, could be joined as a party. The London arbitration would properly protect the interests of Armada, its creditors and all other interested parties.

In *Fulham Football Club (1987) Ltd v Sir David Richards and Ors*,[42] the Court of Appeal ruled that arbitrators were capable of determining whether there had been unfair prejudice or unconscionable behaviour and granting appropriate relief under relevant provisions of the Companies Act 2006. Although arbitrators could not make a winding-up order affecting third parties, this did not mean it was impossible for the underlying disputes to be submitted to arbitration. The tribunal could authorise shareholders to seek relief from the court once unfair prejudice issues had been determined.

In *Clyde & Co v Van Winkelhof*,[43] on the other hand, arbitrators were held not to have jurisdiction over employment disputes. The court refused to require a party to 'consent' to a stay of proceedings commenced before an employment tribunal in favour of an arbitration agreement contained in a partnership deed. The arbitration agreement was held to be void under s 203 of the Employment Rights Act 1996, since it purported to be an agreement preventing a person from bringing claims before an employment tribunal. Further, s 144(1) of the Equality Act 2010, rendered

[40] [2011] ArbLR 53.
[41] [2011] ArbLR 5.
[42] [2011] ArbLR 22.
[43] [2011] ArbLR 7. Permission to appeal granted by the Court of Appeal [2011] ArbLR 18.

unenforceable any agreement to preclude or limit sex discrimination proceedings. Slade J also noted that no reason had been put forward explaining why a stay had not been sought before the employment tribunal itself.

## D. Incorporation by Reference

Court proceedings were stayed in *Londonderry Port and Harbour Commissioners v AS Atkins Consultants*[44] on the basis of a letter proposing that works be accepted on 1995 ACE Conditions which contain an arbitration agreement. The letter was sufficient to incorporate the arbitration agreement and the contract was accepted by conduct in receiving the services offered.

## E. Time Bars

The Court of Appeal had to consider the operation of a time bar requiring disputes under an insurance policy to be referred to arbitration within nine months in *McIlroy Swindon v Quinn Insurance*.[45] When notified of claims in respect of fire damage, the insurer asserted in correspondence that the insured was not entitled to an indemnity. The insured went bankrupt. Third parties obtained damages in litigation and subsequently sought to recover against the insurer under the Third Parties (Rights against Insurers) Act 1930. The insurer contended, unsuccessfully, that recovery was precluded by the nine-month time bar. The Court of Appeal held that the insurer's liability under the policy could not have accrued unless the claims by third party claimants had first been established. For Rix LJ, the arbitration agreement did not require reference to arbitration of a mere refusal to indemnify in response to a notice. The time bar operated only in respect of a 'dispute . . . on our liability in respect of a claim or the amount to be paid' and could only be referring to a claim under the policy.

## F. Step in Proceedings

Section 9(3) of the Arbitration Act provides that an application to stay litigation in favour of arbitration may not be made by a party who takes a step in court proceedings to answer a substantive claim. In *Londonderry Port and Harbour Commissioners v WS Atkins Consultants*,[46] a party who entered an appearance, requested disclosure of documents and conducted correspondence concerning the timetable for its statement of defence was held not to have evinced an unequivocal intention to proceed with litigation. The request for discovery was part of an investigation related to matters referred to in the statement of claim and included the contractual documents relied on for the claim, which contained an agreement to arbitrate. The discussion of a timetable for delivery of the defence was in the course of exchanges about the contractual basis for the claim.

[44] [2011] ArbLR 45.
[45] [2011] ArbLR 41.
[46] [2011] ArbLR 45.

In *Excalibur Ventures LLC v Texas Keystone Inc*,[47] on the other hand, Gloster J held that a party who commenced both arbitration and litigation proceedings at the same time did take a step in the proceedings precluding arbitration. The litigation was accompanied by an application for world-wide injunctive relief from the English courts, a form of relief not available at the seat of arbitration, New York. The statement of claim did not reference the arbitration or suggest the litigation was only protective or intended to be subsidiary. Nor had the limitation issues, said to justify commencement of litigation, been sufficiently articulated. The arbitration provision was not disputed and commencement of arbitral proceedings secured the limitation position in any event. An application for permission to serve the claim form out of the jurisdiction was made and it was served, although service was unnecessary had the intention been merely to protect against the expiry of an alleged time limitation. On foot of the litigation, an application for specific disclosure of documents was made and particulars of claim were prepared before any application was brought to stay the proceedings.

### G. Extensions of Time

The court refused to extend time limits under an administering institution's rules for the payment of fees and expenses in *Rotenberg v Sucafina SA*.[48] As a result of a failure to pay, a final appeal award was never issued. The application to extend time under the rules for payment was made almost a year after the deadline for the application expired. The reasons for the delay were found to be sketchy and unpersuasive.

## III. Anti-Suit Injunctions

The European Court of Justice held anti-suit injunctions to be contrary to the principle of mutual respect of European courts.[49] English courts retain powers, however, to injunct proceedings taking place outside Europe.

The Court of Appeal confirmed powers to injunct foreign litigation, even where no arbitral proceeding was under way or contemplated, in *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC*.[50] In the absence of arbitral proceedings, s 44 of the Arbitration Act did not apply; however, injunctive relief could be granted against litigation which threatened a London arbitration agreement under s 37 of the Superior Courts Act. The validity of the arbitration agreement was not an issue to be left to arbitrators, nor was there any requirement that arbitration be commenced. It did not follow simply because a tribunal 'may' rule on its own jurisdiction, that there was any obligation on the parties, or arbitrators, to do so. Where the issue of the existence of an arbitration agreement arose before the courts, this was a question the courts might determine. The principle of

[47] [2011] ArbLR 27.
[48] [2011] ArbLR 14. Upheld by the Court of Appeal [2012] EWCA Civ 637.
[49] *Allianz SpA v West Tankers Inc* (C-185/07) [2009] ECR I-663.
[50] [2011] ArbLR 15.

party autonomy, at s 1(c) of the Arbitration Act, restricted a court's intervention in arbitral proceedings, but not in foreign litigation commenced in breach of an arbitration agreement.

English courts do not recognize the group of companies doctrine for the purposes of extending an arbitration agreement to a non-signatory which may have participated in or assumed the performance of a contract in dispute.[51] In *BNP Paribas SA v OJSC Russian Machines*,[52] however, the court held that it had jurisdiction over a non-signatory member of a corporate group for the purposes of an anti-suit injunction where the related company had engaged in 'unconscionable' conduct by commencing legal proceedings in Russia in breach of a London arbitration agreement. Blair J confirmed that s 44(3) of the Arbitration Act conferring powers on the court to grant injunctions for the preservation of assets in support of arbitration included the parties' contractual right to arbitration. Rejecting an objection that the arbitration itself did not require joinder of the non-signatory, Blair J held that the non-signatory company was a 'necessary and proper party' for the purposes of an anti-suit injunction: 'where the allegation is that parties are acting in consort, one party will usually be a necessary or a proper party to the claim against the other party . . .'.[53]

Likewise, in *Niagara Maritime SA v Tianjin Iron & Steel Group Co Ltd*,[54] the court intervened, in part, on the basis that an arbitral tribunal would not have jurisdiction over a non-party. Hamblen J granted an interim anti-suit injunction, under s 44(3) of the Arbitration Act, to preserve a contractual right to arbitration. Alternatively, the judge considered jurisdiction was to be found under the court's general powers to grant injunctions (s 37(1) of the Senior Courts Act). In issue was an arbitration provision on the reverse side of bill of lading in the Congen Bill form. For the Tianjiin Maritime Court, this was insufficient to incorporate the arbitration provision. An appeal was brought against the first instance decision in China. Before the appeal could be heard, however, the English court restrained both the cargo receiver and its insurer from pursuing claims in Chinese courts.

The English court was satisfied there was a 'high probability' that an arbitration clause existed. Urgency was established because the Chinese courts were expected to move quickly to consider the merits, once an appeal against the first instance decision on jurisdiction was heard. Hamblen J found that Niagara Maritime would have insufficient time to request injunctive relief from the arbitral tribunal. In addition, the arbitral tribunal would not have jurisdiction over the insurer who was not a party to the contract, but was a party to the Chinese litigation. Injunctive relief was required to avoid concurrent or parallel proceedings with the risk of inconsistent judgments.

An application to discharge an anti-suit injunction on the basis that the parties had not concluded the contract containing the arbitration agreement failed in

[51] See *Peterson Farms v C&M Farming Ltd* [2004] ArbLR 51.

[52] [2011] ArbLR 49. Upheld by the Court of Appeal [2012] EWCA Civ 644.

[53] Ibid at para 52.

[54] '*The Good Luck*' [2011] ArbLR 54.

*The Athena*.[55] The court noted that in the salvage industry, daily rate services were only agreed on standard terms. A proposal for 'BIMCO' terms, which contained an arbitration agreement, had not been rejected and it could be inferred that services were commenced on BIMCO terms. Following CPT's dismissal, replacement salvors were engaged on Wreckhire terms which also contained a London arbitration agreement.

## IV. Anti-Arbitration Injunctions

English judges confirmed powers to issue anti-arbitration injunctions where the courts consider an arbitrator has no jurisdiction. These powers arise as a consequence of the application, in England, of a weak principle of *compétence-compétence*; it is the courts, and not the arbitral tribunal, who decide threshold questions of arbitral jurisdiction, including the existence, scope, and validity of an arbitration agreement where such questions present themselves in applications before the courts.[56]

[55] [2011] ArbLR 36. An anti-suit injunction was set aside in *Sideridraulic Systems SpA and Anor v BBC Chartering and Logistic GmbH & Co KG (m/v BBC Greenland)* [2011] EWHC 3106. The injunction was obtained on the basis of a bill of lading which contained provision for LMAA arbitration in London, incorporated the Hague-Visby Rules and provided that in case the United States Carriage of Goods by Sea Act, 1936 was applicable, the Carrier, at its election, may commence suit in United States courts which shall have exclusive jurisdiction. Hamblen J found that the cargo was "deck cargo" and not "goods" such that the Rules did not apply. The contract was, therefore, subject to COGSA 1936 and the US Court had exclusive jurisdiction.

[56] The application of a strong principle of *compétence-compétence*, in both common law and civil law jurisdictions, precludes courts from issuing anti-arbitration injunctions. See the Hong Kong decision in *Lin Ming and Anr v Chen Shu Quan and Ors* [2012] HKCFI 328, 8 March 2012 where Deputy High Court Judge P Ng SC stayed litigation in favour of arbitration and declined to grant an anti-arbitration injunction against HKIAC proceedings. Arbitration was commenced against Mr Lin Ming for his alleged failure to comply with a put option under the terms of a share purchase agreement. Mr Lin Ming and one of his companies then commenced litigation against 27 defendants alleging unlawful conspiracy. The facts and issues arising in the arbitration and litigation were substantially the same. After the HKIAC arbitral tribunal refused to stay the arbitration, Mr Lin Ming applied to court for an anti-arbitration injunction. Defendants in the litigation applied for a stay of Mr Lin Ming's claims in litigation in favour of the HKIAC arbitration. Judge Ng considered that it was a 'basic principle' under the UNCITRAL Model Law that legal action should be stayed when a matter was subject to an arbitration agreement. In the presence of a prima facie case that an arbitration agreement was evidenced in writing, the court was bound to grant a stay. Accordingly, the court held, at para 35, that it was: 'immediately apparent that if this court accedes to the stay Application in favour of HKIAC arbitration, it would be self-defeating for this court then to grant an injunction restraining the 27th and 28th defendants from proceeding with the HKIAC Arbitration. Common sense compels this court to adopt one or the other course, but not both. Given that a stay under Art 8 of the Model Law is mandatory, the course which this Court has to adopt should be quite obvious'. Judge Ng went on nonetheless to address the application for an anti-arbitration injunction. The Judge declined to decide whether Hong Kong courts had jurisdiction to grant such relief, but was content to assume, for the purposes of the application before him, that the court did have such powers stating, at para 53, that its jurisdiction to injunct arbitration must be exercised 'very sparingly and with great caution'. He considered, at para 36, that an injunction would 'undermine the object of the Arbitration Ordinance viz. to facilitate the fair and speedy resolution of disputes by arbitration

One question the courts have had to consider involves the identification of special grounds for an anti-arbitration injunction. In two first instance decisions, *Intermet FZCO and Ors v Ansol Ltd and Ors*[57] and *Albon (T/A NA Carriage Co) v Naza Motor Trading Sdn Bhd*,[58] no account was taken of arbitral *compétence-compétence* or curial supervision at the seat of the arbitration. Instead, anti-arbitration applications were treated very much like an anti-suit application, subject to the same requirements and without considering the allocation of jurisdictional roles under the New York Convention. In contrast to *Intermet* and the first instance decision in *Albon*, Aikens J, as he then was, viewed the court's jurisdiction to restrain foreign arbitral proceedings as 'very limited' in *Elektrim SA v Vivendi Universal SA*.[59] In light of 'the underlying principles of the 1996 Act of party autonomy and the minimum of interference in the arbitral process by the courts, at least before an award is made', Aikens J found that the court could not interfere with an arbitrators' decision to refuse a stay and that the only remedy was a challenge to the award following completion of the proceedings.[60] Gloster J accepted, in *Excalibur Ventures LLC v Texas Keystone Inc*,

without unnecessary expense and the principles upon which the Ordinance is based', namely party autonomy and non-interference by the courts. Even if the court were satisfied that continuation of the HKIAC arbitration would be oppressive, vexatious, unconscionable or an abuse of process, Judge Ng was not inclined to exercise the discretion in view of the mandatory stay required where a prima facie case is made out for the existence of an arbitration agreement and the objectives and underlying principles of the Hong Kong Arbitration Ordinance. On the basis of a strong principle of *competence-compétence*, the French and Swiss courts have, likewise, rejected applications for anti-arbitration injunctions. See the decisions of the Tribunal de grande instance in *SA Elf Aquitaine and Total v Mattei, Lai, Kamara and Reiner*, 6 January 2010 and *Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea, de Ly, Owen and Leboulanger*, 29 March 2010 [2010] *Revue de l'arbitrage* 390. In the first of these cases, a court order for the appointment of an arbitrator was withdrawn, but not before the arbitrator was appointed. In the second case, an injunction was sought by Equitorial Guinea on the basis that a requirement, under arbitration agreement and the laws of Equitorial Guinea, that local remedies be exhausted prior to arbitration had not been complied with. Equitorial Guinea also contended that as the claimant was insolvent, only a receiver appointed by the local courts had standing to commence proceedings. A partial award by the tribunal upholding its jurisdiction was challenged before the Cour d'appel and Equitorial Guinea sought an injunction to stay the arbitration until the Cour d'appel ruled on the question of jurisdiction. The Paris Tribunal de grande Instance rejected the requests for injunctions to restrain arbitral proceedings in both cases deciding that only the arbitrators could decide issues relating to their own jurisdiction, including the consequences of the withdrawal of a court order for the appointment of the tribunal. See, as well, the decision by the Geneva Tribunal de première instance in *Air (PTY) Ltd v International Air Transport Association,* 2 May 2005, Case No C/1043/2005-15SP, *Stockholm International Arbitration Review*, 2005, vol 3, 191 at 198: 'L'ordre juridique suisse, quant à lui, ne connaît pas de 'pouvoir de tutelle' des juridictions étatiques sur les juridictions arbitrales puisqu'au contraire, il intègre pleinement le principe de 'compétence-compétence' tant dans son effet positif, par le biais de la [Convention] de New York à laquelle la Suisse a adheré . . . , que négatif . . . .'

[57] [2007] ArbLR 33.

[58] [2007] ArbLR 3.

[59] [2007] ArbLR 19 at para 67. On the basis of the decisions in *Intermet* and *Elektrim*, Jackson J stated, in *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] ArbLR 35 at para 39: 'It is clear from two decisions of the Commercial Court (with which I respectfully agree) that the jurisdiction does survive [the enactment of the 1996 Act], but its exercise will be even more sparing than before.'

[60] Ibid at para 66.

that when faced with an application for an anti-suit arbitration, 'the court should not simply apply the same approach as for the grant of the normal anti-suit injunction'.[61]

With respect to arbitral proceedings taking place abroad and in the presence of a supervisory jurisdiction other than the English courts, the operation of a stronger principle of *compétence-compétence* has been acknowledged.[62] An important limitation on discretion to injunct foreign arbitral proceedings has been the requirement of 'exceptional circumstances', such as those present in *Albon (T/A NA Carriage Co) v Naza Motor Trading Sdn Bhd* where it was alleged that the underlying contract had been forged. The Court of Appeal appeared to take some distance with Lightman J's disregard for arbitral *compétence-compétence*,[63] considering, notably, that arbitral autonomy might prevail in the ordinary case. However, in circumstances where it was arguable that the arbitration agreement had been forged in order to defeat court proceedings brought in England, arbitral autonomy was said to be 'undermined' and arbitrators in Malaysia precluded from determining the question. Even this decision was subject to criticism.[64]

[61] [2011] ArbLR 27 at para 55.

[62] See *Weissfisch v Julius & Ors* [2006] ArbLR 1 and 64. See Julian Lew QC (2009) 'Does National Court Involvement Undermine the International Arbitration Process', *American University International Law Review*, 489 and Matthias Schrerer and Werner Jahnel (2009) 'Anti-suit and Anti-arbitration Injunctions in International Arbitration: A Swiss Perspective', *International Arbitration Law Review*, 66.

[63] In the decision at first instance in *Albon* [2007] ArbLR 2, Lightman J privileged the court's role over arbitral jurisdiction holding that the English court was the final judge of the authenticity of the main contract in dispute, a question that was not to be determined by the arbitrators. The doctrine of *compétence-compétence* entrenched at s 30 of the Arbitration Act, did not preclude the court from deciding whether or not parties were bound by an arbitration agreement. Indeed, for Lightman J, a stay of proceedings required a concluded arbitration agreement, not merely a prima facie or arguable case. The judge considered that the 'rule of law' required that a party enjoy access to the courts unless grounds barring access were established by a decision of court. Until it was held that an arbitration agreement was concluded, no requirement arose to give effect to it. In *Excalibur Ventures LLC v Texas Keystone Inc*, Gloster J relied on Lightman J's decision in concluding that *compétence-compétence* did not preclude the grant of an anti-arbitration injunction: 'In fact, even when s 9 is not in issue (as a matter of jurisdiction) and a stay is sought under the court's inherent jurisdiction, it will only "very exceptionally order such a stay, e.g. if virtually certain that the arbitration agreement was concluded. (*Albon v Naza Motor Trading (No 3)* [2007] ArbLR 2 at paras 13–14 and 23–24.)' On appeal from Lightman J's decision, however, the Court of Appeal had stated [2007] ArbLR 4 at para 16: 'That leaves for consideration the argument relating to the autonomy of the arbitration tribunal. It is said that the caution exercised by the court relating to anti-suit injunctions should be increased or even re-doubled in the case of an anti-arbitration injunction. It is further said that the judge is effectively case managing the arbitration and that it should be for the arbitrators, not the English Court, to decide whether the arbitration should proceed pending resolution of the genuineness of the JVA. In the ordinary case there would be much to be said for this argument.'

[64] See Raphael (2008) *The Anti-suit Injunction*, Oxford University Press, at p 261: 'The Court of Appeal were, it seems, not taken to the authorities suggesting that, in general, if any court was to intervene it should be the court of the seat of the arbitration and they may have given insufficient expression to the policy reasons against intervention by a court that was a stranger to the arbitration.' An arbitration agreement cannot be equated to a 'jurisdiction agreement' for the reasons set out by Julian Lew QC (2009) 'Does National Court Involvement Undermine the International Arbitration Process?', *American University International Law Review*, 489 at

The ruling by the European Court of Justice that anti-suit injunctions directed against litigation in Member States were contrary to European law, has not prevented English courts from injuncting arbitral proceedings seated in Europe, notwithstanding the obvious interference they represent for supervisory jurisdictions of Member States.[65]

In a number of decisions in 2011, the courts significantly broadened the 'exceptional circumstances' test to include situations where English courts decide that no arbitration agreement exists,[66] or determine the continuation of foreign arbitration proceedings to be 'oppressive or unconscionable . . . including when the issue arising is whether or not the parties consented to a foreign arbitration'.[67] Indeed, a 'broader ground' was added, and 'exceptional circumstances' now appear to embrace just about any situation, except 'where the parties have unquestionably agreed to the foreign arbitration'.[68] Moreover, whether or not they have done so, is a question the English courts might decide.

In *Claxton Engineering v TXM*,[69] Hamblen J injuncted a Budapest arbitration on the basis that an earlier decision, by Mrs Justice Gloster, had determined that no Budapest arbitration agreement existed.[70] In arriving at her conclusion, on a stay application, Gloster J disregarded an arbitration agreement evidenced in writing and contained in purchase orders, many of which were signed both before and after Claxton proposed a draft jurisdiction clause. TXM neither acknowledged, nor commented on the proposal for English jurisdiction, but continued to transact on its own terms and conditions which were governed by Hungarian law and included an HCCI arbitration agreement. For Gloster J, however, the parties' arbitration agreement was contained in 'post-contractual' materials (i.e., issued after the 'contracts were concluded by orders placed by telephone or email') and TXM's silence, in response to a proposal for English jurisdiction, amounted to acceptance.

The commercial court's analysis is highly doubtful. Indeed, the result in *Claxton Engineering v TXM* illustrates an important disadvantage of weak

p 522: '. . . in the arbitration context, it is not a matter of a contest between rival national jurisdictions. Instead, any powers the courts have are supervisory. Proper jurisdiction lies with the arbitral tribunal. This is vital because the arbitral tribunal is not a party to any convention or agreement relating to jurisdiction and has no need to respect comity. In fact, the sole duty of the tribunal is to carry out the terms of the arbitration agreement.'

[65] See *Claxton Engineering v TXM* [2011] ArbLR 1, injunction of arbitral proceedings in Hungary, and *African Fertilizers v BD Shipsnavo* [2011] ArbLR 40 at para 4, injunction of arbitral proceedings in Romania. See also *Sovarex SA v Romero Alvarez SA* [2011] ArbLR 31 at para 58, where Hamblen J gave directions for the determination of the existence of an arbitration agreement in a dispute which was also on going before the courts in Spain: 'As to the alleged interference, it is not an interference with the Spanish proceedings for the English court, as the court of the seat, to determine the validity of the arbitration agreement.'

[66] *Claxton Engineering v TXM* [2011] ArbLR 1.

[67] *Excalibur Ventures v Texas Keystone* [2011] ArbLR 27 at para 56.

[68] Ibid at para 55.

[69] [2011] ArbLR 1.

[70] [2010] EWHC 2567.

*compétence-compétence*: the risk that arbitral jurisdiction will be assessed from the domestic perspective of a local court, including rules on the 'admissibility' of evidence. An arbitration provision would not be disregarded by an international tribunal only because it was contained in 'post-contractual' materials (a local rule of evidence applicable in English courts), in particular, under Hungarian law.[71] Further, in relation to the arbitration agreement, the court's approach was contrary to the principle of separability, now entrenched at s 7 of the Arbitration Agreement. The reliance on English rules of evidence excluding 'post contractual' materials is questionable, even as a matter of English contract law, as it has long been established that parties may conclude a contract on terms of which are subsequently recorded in a note of the agreement or purchase order.[72] Application of formal requirements for an arbitration agreement and the principle of separability, at ss 5 and 7 of the Arbitration Act, would have achieved the same result. The court, instead, applied English rules of formation of contract (in relation to the main contract, not the arbitration agreement) and local rules of evidence and procedure. With respect to the proposed jurisdiction clause, Mrs Justice Gloster accepted: '. . . there is some artificiality in the concept of an implied agreement to the counteroffer, by non-responsive silence'.[73]

Mr Justice Hamblen was nonetheless satisfied that there were 'exceptional circumstances' justifying an anti-arbitration injunction. The crux of Hamblen J's reasoning was that the English courts had already decided that an arbitration agreement did

[71] The parties' arbitration agreement incorporated the HCCI Rules, art 1(4) of which states: 'An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.'

[72] An arbitral tribunal is not required, under s 34(3)(f) of the Arbitration Act 1996, to apply local rules of evidence and procedure. As to the binding nature of notes of agreements or purchase orders after the "conclusion" of a contract, see *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, *Hardwick Game Farm v SAPPA* [1969] 2 AC 31; *SIAT di del ferro v Trodax Overseas, SA* [1980] 1 Lloyd's Rep 53 CA and [1978] 2 Lloyd's Rep 470; and *Circle Freight International Ltd v Mideast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427.

[73] [2010] EWHC 2567 at para 52. See the Privy Council decision in *Bols Distilleries (t/a as Bols Royal Distilleries) and Anor v Superior Yacht Services Ltd (Gibraltar)* [2005] UKPC 45 where their Lordships, who were considering the 'agreement in writing' requirement for jurisdiction clauses under the Brussels Convention, held that the conclusion of such a clause should not be implied only because drafts of the contract contained a jurisdiction clause. Their Lordships stressed the fact that 'the draft jurisdiction clause had not been discussed or agreed expressly and there was no reason to imply that it had been agreed because of a 'failure to object' to the draft. In granting permission to appeal from the decision of Mrs Justice Gloster, Lord Justice Rix also referred to one of his own earlier decisions *Jaayar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep 437 which had held that one party's unilateral proposal of new terms after the conclusion of a transaction was not sufficient to bind the parties. See also *The Double Happiness* [2007] ArbLR 25 at paras 46 and 47: 'I also had cited to me a number of authorities on the efficacy or otherwise of silence to give rise to binding obligations. I do not feel the need to address them. Absent exceptional or special circumstances (of which I see no sign in this case) silence is not effective for that purpose: *Leonidas D* [1985] 1 WLR 925 per Goff LJ at p 937.' In the absence of any concluded jurisdiction or arbitration agreement, the Court of Appeal set aside an anti-suit injunction in *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 stating at para 39: 'In consequence, there is, as it seems to me, something of a touch of egoistic paternalism in an English court injuncting continuation of the foreign proceedings in such a case.'

not exist. Even if these were not 'exceptional circumstances', Hamblen J considered that 'a broader approach is justified where this court has held the claim is subject to an English exclusive jurisdiction clause and/or that there is no arbitration agreement'.[74] On the basis of Gloster J's earlier decision, Mr Justice Hamblen considered the commencement of arbitration to be 'a clear breach of the claimant's legal rights as they have been held to be by the English court'.[75] No issue arose as to arbitral autonomy, interference with the supervisory jurisdiction of Hungarian courts or the United Kingdom's compliance with the New York Convention obligations to enforce arbitration agreements evidenced in writing: 'In the present case there is no question of there being a prima facie or arguable case that there is an agreement to arbitrate. The court has held that there is not.'[76]

The Court of Appeal granted permission to appeal from both the decision of Gloster J and the subsequent grant of an anti-suit injunction by Hamblen J. Lord Justice Rix held that, as there was no common ground between the parties that the English court should decide the issue, the lower court had violated the principle of *compétence-compétence*.[77] In relation to Gloster J's finding that the parties had agreed an English jurisdiction clause, Lord Justice Rix stated: 'there are also two other plainly arguable grounds available to TXM . . .': (a) Mrs Justice Gloster's reliance on TXM's silence to imply agreement to the jurisdiction clause; and (b) Claxton's signature of a TXM purchase orders both before and after the proposal of an English jurisdiction clause, 'without reserves'.[78] The New York Convention and the Arbitration Act 1996 require only evidence of an arbitration agreement in writing for the issue to be referred to arbitrators and the arbitral tribunal was not sitting in England or subject to the anti-arbitration injunction.

Before the appeal could be heard by the Court of Appeal on the merits, it came again before the first instance courts when TXM requested that the anti-arbitration injunction be lifted in light of the decision by the Court of Appeal to grant permission to appeal and, alternatively, to vary the injunction to allow payment of an additional advance on costs which the HCCI had requested in the meantime to cover the travel and accommodation of the tribunal chair. HH Judge Mackie QC refused to set aside the injunction. The Court of Appeal's grant of permission to appeal had not removed the matter from 'exceptional circumstances' required for an anti-arbitration injunction: 'unless and until that appeal is determined and the decision of Gloster J is reversed, then her decision remains valid and binding upon everyone including me.'[79] The question before Judge Mackie, however, was not Gloster J's decision that no arbitration agreement existed, but the issue of extra-territorial supervision of arbitration by English courts and Hamblen J's decision to injunct Budapest arbitral proceedings on a 'broader ground'. In granting permission to appeal from Gloster J's decision, the Court of Appeal had found that there was

[74] [2011] ArbLR 1 at para 42.
[75] Ibid at para 49.
[76] Ibid at para 38.
[77] *Claxton Engineering v TXM* [2011] ArbLR 16.
[78] Ibid at para 5.
[79] [2011] ArbLR 17 at para 17.

no common ground between the parties that the courts should decide the issue of abritral jurisdiction. Moreover, the decision of Gloster J was not binding on the Budapest arbitrators who, by the time of the anti-arbitration injunction, had already received all documents on the issue of jurisdiction. Like arbitral tribunals sitting in England, Budapest arbitrators enjoyed *compétence-compétence* to decide jurisdiction notwithstanding decisions by local courts outside Hungary. HH Judge Mackie relied on the 'broader ground' and was critical of TXM's refusal to agree to stay the arbitration. TXM relied on the foreign arbitral tribunal's *compétence-compétence*, a principle Judge Mackie 'characterized as procedural niceties . . .'.[80]

In contrast, English courts appear entirely unconcerned by arbitral tribunals sitting in England who disregard decisions by local courts elsewhere that no arbitration

[80] Ibid at para 22. See, in contrast to the views expressed by HH Judge Mackie QC, Colman J's statement in *Weissfisch v Julius & Ors* [2006] ArbLR 1 that an English court's interference with the jurisdiction of a foreign arbitrator to determine the threshold issue of jurisdiction would 'represent a serious judicial invasion of international arbitral territory as reflected in the UNCITRAL Model Law section 16(1) of which provides: 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.' See also David Joseph QC, at p 355: the whole scheme of the Arbitration Act 1996 is designed to cut down on court intervention and therefore matters covered by the Act should in the first instance be determined by the arbitrators and not the court . . . the injunction jurisdiction should be exercised sparingly. In the ordinary run of cases where the jurisdiction of the arbitrators is challenged, the balance of convenience is likely to favour no grant of injunction. It also needs to be borne in mind that, in international arbitration, arbitrators under certain institutional rules may well have an obligation to continue with the reference and ignore the injunction.' It is to be noted that s 9 of the Arbitration Act 1996 does not reflect art 8(2) of the UNCITRAL Model Law which protects arbitral jurisdiction in the event of concurrent legal proceedings: 'Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.' See the decision by the Paris Tribunal de grande instance refusing to order a stay of arbitral proceedings in *LV Finance Group c CCI*, 24 June 2004 [2005] *Revue de l'arbitrage*, note Y Derains, p 1037 at 1038: 'Le Président du Tribunal de grande instance, quel que soit le fondement invoqué, . . . n'a en aucune façon le pouvoir d'enjoindre à un tribunal international de surseoir à statuer . . . ' In *Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea, de Ly, Owen and Leboulanger*, 29 March 2010 [2010] *Revue de l'arbitrage* 390, the Tribunal de grande instance refused to grant an order restraining ICC arbitral proceedings pending the hearing of a challenge to a partial award on jurisdiction before the Cour d'appel. In *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 at para 63, Smith J refused to grant an anti-arbitration injunction against LCIA proceedings in London, even where it was prepared to accept that there was a strong case that a renewed arbitration was a breach of the arbitration agreement, that damages would be an inadequate and unsuitable remedy and that the renewed arbitration represented an attempt 'to use the legal routes available . . . to prevent enforcement of the Award' in an earlier arbitration: 'I must ask myself whether in these circumstances it would be right to restrain MTSF from pursuing the New Arbitrations. They raise the money laundering complaint that was not considered in the Award because it was not an issue presented to the Tribunal. On its face it is a complaint of the kind that the parties agreed should be determined by LCIA arbitration. If the New Arbitrations proceed, the tribunals appointed to them will have adequate powers to determine the re-arbitration complaints. I say no more about the complaints themselves other than that they do not seem to me as straightforward as Mr Beltrami submitted, but the tribunals could adopt procedures to deal with the re-arbitration complaint as a preliminary issue. It is for them to decide whether to do so.'

agreement exists and proceed to uphold their jurisdiction or decide the merits.[81] The courts themselves may take no heed of decisions by a foreign court on the existence of an arbitration agreement. Indeed, a decision by the courts in China which applied local rules of contract formation and concluded that that an arbitration agreement did not exist, in *Niagara Maritime SA v Tianjin Iron & Steel Group Co Ltd*,[82] was found to justify an anti-suit injunction restraining Chinese proceedings in order to protect the jurisdiction of an English arbitral tribunal. In that case, despite the Chinese court's ruling that an arbitration provision had not been incorporated by reference, Hamblen J found that there was a 'high probability' that an arbitration agreement existed. Indeed, the English court accepted that the prospect of the Chinese Court of Appeal determining the issue of arbitral jurisdiction presented the 'urgency' required for the issue of an anti-suit injunction. In *Sulamerica CIA Nacional de Seguros SA and Ors v Enesa Engenharia SA*, a Brazilian Court of Appeal decision that parties were not bound by an English arbitration agreement was disregarded.[83] Likewise, a decision by the Supreme Court of Kazakhstan that a London arbitration agreement did not exist was disregarded in *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC*.[84] The Court of Appeal confirmed the 'simple and plain rule in the United Kingdom . . . that foreign judgments given in proceedings brought in breach of such clauses shall not be recognized or enforced.'[85]

In *Excalibur Ventures LLC v Texas Keystone Inc*,[86] the courts injuncted an ICC proceeding in New York against three non-signatories after the ICC Court had decided the arbitration should proceed. Gloster J excluded *compétence-compétence* on the basis that the courts and not an arbitral tribunal were the ultimate review authority over jurisdiction. For Gloster J, to allow arbitrators to decide jurisdiction over non-signatories was to determine the issue of arbitral jurisdiction 'by the back door'.[87] She also held that it would be 'oppressive, unfair and unconscionable' and 'otherwise an abuse of the due process of the court' for the New York arbitration to continue and determined that the English court was best placed to determine whether the non-signatories were bound by the arbitration agreement.

[81] See *Broda Agro Trade Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100, Court of Appeal, Mummery, Lloyd and Burnton LJJ.

[82] [2011] ArbLR 54.

[83] [2012] EWHC 42, upheld by the Court of Appeal [2012] EWCA Civ 638. At para 57, Cooke J stated: 'Whilst I am therefore very conscious of the decision of the single judge of the Court of Appeal in Brazil, who on 16th December granted an interim order to the Insureds to stop the Insurers establishing or resorting to arbitration proceedings in London (at least on the Insured's view of the effect of the order), until the Insureds' right to refuse to accede to that kind of dispute resolution was considered by the court, I cannot allow such considerations to prevent the Insurers from enforcing their right to arbitrate in accordance with English law and its own conflict of laws principles.'

[84] [2011] ArbLR 15.

[85] See ibid at para 190.

[86] [2011] ArbLR 27 at para 64.

[87] Ibid at para 70(ii).

In concluding that the English court 'rather than the ICC arbitral tribunal' was the appropriate forum and that 'exceptional circumstances' were present justifying the injunction, Gloster J took into account Excalibur's conduct in commencing both ICC arbitration in New York and litigation in England (which it subsequently sought to stay in favour of the arbitration), as well as 'cost and case management considerations'.[88] These included 'a strong arguable case that the non-signatories were not parties to the arbitration agreement' on the basis of grounds which were not, in the view of an English court, 'legally or evidentially convincing',[89] the absence of any connecting factors between the non-signatories and New York or the ICC, the election by the claimant in the arbitration to commence substantive proceedings in England, the vexation for the non-signatories in being required to defend two sets of proceedings involving the same issues in two jurisdictions at the same time and the non-signatories' prima facie entitlement to a judicial determination of the question of whether they were parties to the arbitration agreement.[90] The court considered that it was, likewise, oppressive to require the non-signatories to apply to New York courts, the supervisory jurisdiction for the ICC arbitration, to determine the question of jurisdiction in circumstances where they otherwise had no link to New York, but did have links to England.[91]

Gloster J also refused to stay legal proceedings while the New York arbitration between the signatories continued. Where the party seeking a stay was also the party which commenced litigation, the question was not governed by s 9 of the Arbitration Act and, accordingly, 'exceptional circumstances' were required for a stay.[92] None were found to be present as England was 'clearly the more appropriate

[88] Ibid at para 68.

[89] Ibid at para 70(i).

[90] Compare with the decision of Jackson J, refusing to grant an anti-arbitration injunction, in *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] ArbLR 35 at paras 45–46: 'Once those proceedings have been launched, there will be concurrent proceedings both in court and before the Arbitrator concerning the same subject matter. This carries the risk of inconsistent findings. Costs will be duplicated. Both Jarvis and Blue Circle will be fighting on two fronts before different tribunals about the same subject matter. All of those observations are true, but they do not mean that the arbitration is vexatious. It is an inevitable consequence of the mandatory language of s 9 of [the] Arbitration Act that from time to time there will be concurrent proceedings in court and before an arbitrator.'

[91] See Julian Lew QC (2009) 'Does National Court Involvement Undermine the International Arbitration Process', *American University International Law Review*, 489 at p 510 with respect to the enforcement of arbitration agreements: 'only the court of the seat of arbitration has jurisdiction with respect to an arbitration and should exercise this only in very limited circumstances. There can be little justification for a court at the seat of an arbitration preventing challenge of an award by injunction. Recognition and enforcement must be the preserve of the enforcing court. No court other than the court at the seat of arbitration has a right to interfere.' David Joseph QC (*Jurisdiction and Arbitration Agreements and their Enforcement*, Sweet & Maxwell (2005)) likewise states, at p 353: 'Such injunctions are, however, rare and the restraint of an arbitration taking place overseas is most likely to be a matter more appropriately dealt with by the relevant supervisory courts.'

[92] At paras 74 and 75, Gloster J relied on the wording of s 9(1) of the Arbitration Act which appears to restrict mandatory stays to those sought by 'a party to an arbitration agreement against whom legal proceedings are brought . . . in respect of a matter which under the agreement is to be referred to arbitration . . . .' She held that the stay application was not governed by s 9 because it

forum for the determination of Excalibur's claims'.[93] Excalibur had commenced litigation in England because English courts were appropriate for the resolution of any disputes which may not be arbitrable. Various factors connected the dispute to England rather than New York and had been relied on by Excalibur in seeking a world-wide freezing order. The swift resolution of Excalibur's claims was best advanced in court proceedings 'to dispose of the case efficiently' and 'by contrast the arbitral tribunal has yet to be convened and the [non-signatories] contest its jurisdiction':

> If the issue of arbitrability were to be resolved in the Arbitration Proceedings, there will be a significant delay while the Gulf Defendants challenge the jurisdiction of the arbitral tribunal. By contrast, there are no jurisdictional objections from any party to the English court. The English court is just as able as any arbitration tribunal to determine issues of New York law which may govern Excalibur's contractual claims. However, as Excalibur accepted on their application before me, the non-contractual claims may well be governed by English law. The English court is far better qualified to decide issues of English law than a New York arbitral tribunal.[94]

Mrs Justice Gloster also cited case management considerations against a stay of the litigation proceedings. These included the fact that some claims would remain to be determined in the English courts whatever the result in the arbitration,[95] the need for expedition[96] and the desirability of a single forum where allegations of conspiracy were raised.[97]

## V. Appointment of Arbitrators

English courts had to consider the nature of an arbitrator's appointment in *Jirvaj v Hashwani*.[98] Parties to a joint venture agreement had referred disputes to arbitration by a three-member panel all of whom were required to be respected members of the Ismaili community. When disputes arose, Mr Hashwani gave notice of his intention to appoint a retired judge, who was not a member of the Ismaili community. Mr Jivraj applied to court for a declaration that this appointment was void and in breach of the arbitration agreement. Mr Hashwani applied for an order appointing the retired judge as sole arbitrator.

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had been brought by Excalibur who had initiated the litigation and was, therefore, not the party 'against whom' the legal proceedings were brought. In contrast, Art 8 of the UNCITRAL Model Law is neutral as to the identity of the party bringing an action in court: 'A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.'

[93] [2011] ArbLR 27 at para 85.

[94] Ibid at para 85(iii).

[95] Ibid at para 89.

[96] Ibid at para 90.

[97] Ibid at para 91.

[98] [2011] ArbLR 28.

At first instance, the court held that the requirement of membership in the Ismaili community was not an unlawful arrangement to discriminate on grounds of religion as the appointment of arbitrators fell outside the scope of the Employment Equality (Religion or Belief) Regulations 2003. The court also held that arbitrators were not 'employed' within the terms of the Regulations and that membership in the Ismaili community fell within exceptions permitted for genuine occupational requirements and was proportionate. The Court of Appeal took a different view ruling the arbitration agreement to be void. For the Court of Appeal, arbitrators were 'employed' and there had been unlawful religious discrimination.[99]

The Supreme Court allowed an appeal on the basis that an arbitrator is not 'employed' within the meaning of the Regulations. Membership in the Ismaili community was a condition which would have fallen within the exceptions for genuine occupational requirements if the Regulations had applied. An arbitrator was an independent provider of services and not in a relationship of subordination to the receiver of the services. An arbitrator was a quasi-judicial adjudicator whose duty was not to act in the interests of either party. A requirement that an arbitrator share a particular religion or belief could be relevant and likely to involve a procedure in which the parties would have confidence.

The Supreme Court rejected submissions that membership in the Ismaili community was not an objective requirement:

> [the] submission that an English law dispute in London under English curial law does not require an Ismaili arbitrator takes a very narrow view of the function of arbitration proceedings. This characterization reduces arbitration to no more than the application of a given national law to a dispute.[100]

In *Ghalib Hussain v Wycombe Islamic Mission*,[101] an individual involved in the mediation of religious disputes was held not to have been appointed as arbitrator. His assistance had been requested because of his spiritual leadership. There had been no intention to appoint an arbitrator and the individuals who referred disputes to his mediation lacked the capacity to appoint him as an arbitrator. Further, it was not

[99] [2010] EWCA Civ 712. See also *Virdee v Virdi* [2002] ArbLR 40 where an application was made to the High Court for the appointment of a three-member tribunal. The arbitration agreement specified that the arbitrators should be members of the Sikh religion. An order issued from the court for one arbitrator to be nominated by each of the parties and a legally qualified chairman to be appointed by the President of the Law Society of England and Wales. HH Judge Hallgarten QC ruled that there was no requirement under the Arbitration Act that arbitrators be of the Sikh religion and that the importance of religious affiliation recedes where the matter concerned legal disputes. Permission to appeal was granted by the Court of Appeal in respect of: (a) whether the parties' arbitration agreement required the appointment of arbitrators from the Sikh community; and (b) whether the arbitration agreement excluded legal representation. The Court of Appeal, per Booke LJ [2003] ArbLR 46, held that in the absence of permission from the judge at first instance, it had no jurisdiction to hear an appeal from a High Court decision under s 18 of the Arbitration Act that the parties' arbitration agreement did not preclude the appointment of a non-Sikh arbitrator.

[100] [2011] ArbLR 28 at para 60.

[101] [2011] ArbLR 23.

clear from the various 'decisions' and 'orders' whether they had been issued by the mediator, himself, or as the result of collective deliberations by the parties.

## VI. Interim Measures

The courts extended their powers to order interim relief in support of arbitration, including proceedings taking place abroad, although in *B v S*,[102] Flaux J held that a *Scott v Avery* clause, which precluded legal proceedings prior to arbitration, extended to applications for interim measures. Gloster J refused to discontinue an arbitration the courts had earlier ordered a receiver to commence in *Consolidated Contractors (Oil and Gas) Company SAL v Canadian Nexen Petroleum Yemen*.[103] Where a contractual relationship was governed by a London arbitration agreement, the English courts had jurisdiction.

The Court of Appeal affirmed jurisdiction over non-parties to a foreign arbitration in *Tedcom Finance Ltd v Vetabet Holdings Ltd*.[104] Cyprus courts had granted a freezing injunction in respect of Vetabet's assets and the arbitrators had ordered Vetabet not to dissipate assets pending an award. Tedcom's application, in England, for orders against Vetabet and four other related parties for the protection of assets which were the subject of arbitral proceedings was unsuccessful at first instance on the basis that the court did not have jurisdiction over the non-parties. The Court of Appeal held that an arguable case for jurisdiction sufficed to grant the relief. The evidence available was persuasive enough to show that Vetabet may be dissipating assets. There was an arguable case that the court had jurisdiction to make orders in support of an arbitration generally and the court's powers were not dependent on an agreement to arbitrate or any requirement that the arbitral proceedings take place in England or be governed by English law.

Disclosure of documents was ordered in support of a German arbitration in *Sunwing Vacation Inc and Ors v E-Clear (UK) Plc and Ors*.[105] The relief was ordered under the Insolvency Act 1985 which requires disclosure only if it is to the benefit of the company or its creditors. Morgan J found that if Sunwing prevailed in the arbitration, credit would be given for the amount of recovery and that it was in the interests of justice that the documents be made available to the German arbitration.

In *CMA-CGM Marseille v Petro Broker International*,[106] the Court of Appeal reversed a lower court decision and ordered payments into court to remain in court to satisfy the enforcement of an arbitration award, although the freezing order which had been the basis for the payment was no longer operative. Tomlinson LJ considered that the court had a role to play in the enforcement of arbitration awards.

[102] [2011] ArbLR 10.
[103] [2011] ArbLR 12.
[104] [2011] ArbLR 8.
[105] [2011] ArbLR 34.
[106] [2011] ArbLR 11.

The courts may refuse injunctive relief where this pre-empts arbitral jurisdiction. An application for an injunction to prevent company shareholders and others from proceeding with the issuance of shares except on the basis allegedly agreed, was unsuccessful in *Telenor East Hodling II AS v Altimo Holdings & Investment Ltd.*[107] The court could only grant relief to the extent this was necessary and arbitrators were unable to act. Any real risk of an inappropriate reduction of shareholding could be the subject matter of an application to the arbitral tribunal and satisfactory undertakings had been provided which protected the position.

The court, likewise, refused to intervene where an arbitral tribunal had already refused the relief requested in relation to a matter of evidence. A request to injunct an expert who had earlier acted for one of the parties to the arbitration and was afterwards engaged by the other party was unsuccessful in *A Lloyd's Syndicate v X.*[108] Teare J considered that even if it was likely that the expert would misuse confidential information, it was not appropriate to grant the injunction where the arbitral tribunal itself had already ruled on the question.

In *Stellar Shipping Co LLP v Cosco (Dalian) Shipyard Co Ltd*,[109] an injunction restraining the sale of a vessel without notice or allowing a first offer, as required under contract was set aside. It had not been appropriate for the application to have been brought on an ex parte basis and the evidence did not support a genuine concern that the vessel would be sold. Further, there was no evidence of dishonesty, and damages were an adequate remedy as the vessel was not unique.

## VII. Removal of Arbitrators

Should applications before English courts be treated differently if they concern an international as opposed to a domestic arbitration? The question arose in an unsuccessful application, in *A v B*, to remove a barrister-arbitrator who also acted (in unrelated litigation) for the firm of solicitors representing one of the parties to an LCIA arbitration.[110] The arbitrator disclosed the working relationship very late in the proceedings, and only just before the award was rendered, as the unrelated litigation had earlier been dormant. The LCIA refused an application to remove the arbitrator.

In issue before the court was the test to be applied for 'unconscious bias'. The IBA Guidelines on Conflicts of Interest in International Arbitration waivable 'red list' of circumstances giving rise to justifiable doubts as to an arbitrator's impartiality and independence was relied in submissions in support of removal, in particular, art 2.3.2: relationship with the parties or counsel and current representation of one of the parties or the lawyer or law firm acting as counsel to one of the parties. As far as the English test for bias was concerned, the court had to decide

[107] [2011] ArbLR 9.
[108] [2011] ArbLR 48.
[109] [2011] ArbLR 33.
[110] *A v B* [2011] ArbLR 43.

whether the 'fair-minded observer' should be considered to be 'observing' from the domestic English perspective, or from the perspective of an international arbitration.

For Flaux J, as the IBA Guidelines stipulated at para 6 of their Introduction that they were not intended to change the local law, 'it necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion'.[111] The judge also excluded the application of art 2.3.2:

> that provision is not dealing with the current situation. X was not representing Dewey & LeBoeuf; rather, he and they together were representing the lay

[111] Ibid at para 73. Para 6 of the Introduction to the IBA Guidelines states: 'These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection. 'The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation.' See, however, Otto de Witt Wijnen, Nathalie Voser and Neomi Rao (2004) 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration', *Business Law International*, vol 5, no 3, 433 at 435: 'The Working Group acknowledges that national courts may have the last word on a challenge to an arbitrator, and also that the Guidelines cannot replace or supplant mandatory rules of applicable national law. Nevertheless, on the basis of its research in a number of important jurisdictions, the Working Group has concluded that there are no specific mandatory rules with regard to conflicts in most if not all of these jurisdictions. Even where such rules exist, or have been developed in case law, the Guidelines are not, in general, inconsistent with such rules, in the opinion of the Working Group.' See, in contrast, to the approach taken in *A v B*, that adopted by the Swiss Tribunal Fédéral in *X v Y*, 28 March 2008, 4 A 506/207: 'these guidelines while having no legal effect, nevertheless constitute a precious working tool, susceptible to contribute to the harmonization and unification of the standards applied in the field of international arbitration for the ruling on conflicts of interests.' See also the decision of the US Court of Appeals (Ninth Circuit) in *New Regency Productions Inc v Nippon Herald Films Inc* 501 F. 3d 1101 (9th Cir. 2007) which relied on the IBA Guidelines, among other standards, stating: 'Although these sources are not binding authority and do not have the force of law, when considered along with an attorney's traditional duty to avoid conflicts of interest, they reinforce our holding in *Schmitz* that "a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it. That the lawyer forgot to run a conflict check . . . is not an excuse.' The Swedish Supreme Court relied on the IBA Guidelines in setting aside an award on the basis of a relationship between the arbitrator's law firm and one of the parties in *Anders Jilkén v Ericsson AB*, Case No T 2448-06, 19 November 2007, 5 Stockholm International Arbitration Review 167 (2007): '[a]t least when, as in the present case, the relationship between the law practice and the client is of commercial importance to the law practice, it must be considered that the bands of interests and loyalties between the partners of and lawyers employed in the law practice, on the one hand, and the client, on the other, constitute a circumstance that may diminish confidence in the impartiality of an arbitrator employed at the law practice, when the client is a party to the arbitration (cf Lindskog, Skiljeförfarande (Arbitration), 2005, p 453 note 63). Such a conclusion finds support in the IBA Guidelines and in case-law from the Arbitration Institute of the Stockholm Chamber of Commerce. A relationship that impairs confidence must be deemed to exist even if the arbitrator himself did not have direct client contact with the party, the arbitration work was conducted separately form the work as a lawyer or the arbitration dispute concerned matters other than those normally included in the engagement for the client.'

> clients . . . it is dealing with a case where, for example, the arbitrator as counsel is acting for the solicitors who are defendants in a professional negligence action.[112]

Despite the fact that the parties' dispute concerned, in part, the interpretation of the rules of an international administering institution,[113] Flaux J chose to apply a domestic test for bias of the 'fair-minded and informed observer who is presumed to know how the legal profession in this country works' in deciding whether there was a real possibility of bias in circumstances where a barrister-arbitrator also acted as counsel to one of parties' firm of solicitors.[114] The judge stated:

> . . . the test is an objective one and not dependent upon the characteristics of the parties, for example their nationality, so that it is nothing to the point that the claimant companies are registered in foreign jurisdictions or that the individuals who control or manage them are foreign nationals who might, for example, regard as odd the way in which a member of the English Bar can be instructed in one case by a firm of solicitors whilst acting as arbitrator in another case where the same firm of solicitors was acting for one of the parties.[115]

Flaux J relied on a decision of the Court of Appeal, arising out of domestic litigation, where a judge at first instance disclosed that one of the solicitors firms appearing before him was also drafting his will. The judge had not disclosed that the solicitors were not charging fees for their services, a circumstance which emerged

[112] [2011] ArbLR 43 at para 74.

[113] The parties had agreed the LCIA Rules Art 10.3 of which provides: 'an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.' The Arbitration Act does not include any requirement for 'independence'. However the DAC Report, at paras 101–104, clarified: '. . . the 1996 Act intends only to exclude non-partial dependence as a separate ground for disqualifying an arbitrator. An arbitrator's lack of independence could still be evidence of partiality, including a failure before appointment to disclose dependence on one of the parties . . . .' See the decision of the LCIA Division (Paulsson) in case 81132 dated 15 November 2008, [2011] *Arbitration International*, vol 27, no 3 at 439. Relying on the LCIA Rules, the Division held the arbitrator was required to be both impartial and independent.

[114] [2011] ArbLR 43 at para 60.

[115] Flaux J relied on the comments of Morrison J in *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] ArbLR 5 at para 39(2): 'It is no longer necessary, in my judgment, to draw a distinction between cases where there is a foreign party and those where there is not. The objective observer is there to ensure an even handed approach to apparent bias, whatever the nationality of the parties. The only possible justification for treating foreign parties differently could be on the basis that they may not understand as well as an indigenous party the way the legal professions in England are organised or their conventions and rules of conduct: the sorts of points, if I might say so, made by Mr Beloff QC in his submissions to the Board of the International Council of Arbitration for Sport. The interpolation of the observer does, I think, make it unnecessary in future to have to give special regard to foreigners. 'In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right . . . is properly described as fundamental.' [para 2 of Locabail]. The entitlement to that right is universal [see for example art 12(2) of the Uncitral Model Law] and not parochial and it is not to be determined by awareness or otherwise of local rules and customs.'

subsequently and formed the basis for an appeal on grounds of apparent bias. The Court of Appeal, sitting as a five-member panel, dismissed the appeal.[116]

Submissions before Mr Justice Flaux raised the example of an 'extreme case' of a barrister who received a substantial proportion of his income from a firm of solicitors acting for a party to arbitral proceedings in which the barrister was also appointed as arbitrator raised. For Flaux J, even these circumstances involved no obligation to disclose:

> However, that is emphatically not the present case, since the Y case was only the second set of instructions [he] had received from Dewey & LeBoeuf. It should also be noted that, even in that extreme case of a barrister arbitrator who receives a very substantial proportion of his instructions as counsel from one of the firms acting in the arbitration, neither any obligation to disclose nor any apparent bias are

[116] *Taylor v Lawrence* [2002] EWCA Civ 90 at paras 61–65, per Lord Woolf: 'The fact that the observer has to be 'fair minded and informed' is important. The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction. Those legal traditions and that culture have played an important role in ensuring the high standards of integrity on the part of both the judiciary and the profession which happily still exist in this jurisdiction. Our experience over centuries is that this integrity is enhanced, not damaged, by the close relations that exist between the judiciary and the legal profession. Unlike some jurisdictions the judiciary here does not isolate itself from contact with the profession. Many examples of the traditionally close relationship can be given: the practice of judges and advocates lunching and dining together at the Inns of Court; the Master of the Rolls' involvement in the activities of the Law Society; the fact that it is commonplace, particularly in specialist areas of litigation and on the circuits, for the practitioners to practise together in a small number of chambers and in a small number of firms of solicitors, and for members of the judiciary to be recruited from those chambers and firms. It is also accepted that barristers from the same chambers may appear before judges who were former members of their chambers or on opposite sides in the same case. This close relationship has not prejudiced but enhanced the administration of justice. The advantages in terms of improved professional standards which can flow from these practices have been recognised and admired in other jurisdictions. Again by way of example, in the United States they have in recent years established the rapidly expanding American Inns of Court modelled on their English counterparts with the objective of improving professional standards. The informed observer will therefore be aware that in the ordinary way contacts between the judiciary and the profession should not be regarded as giving rise to a possibility of bias. On the contrary, they promote an atmosphere which is totally inimical to the existence of bias. What is true of social relationships is equally true of normal professional relationships between a judge and the lawyers he may instruct in a private capacity. A further general comment which we would make, is that judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant's confidence in the judge. If disclosure is made, then full disclosure must be made. This case demonstrates the danger of making partial disclosure. If there has been partial disclosure and the litigant learns that this is the position, this is naturally likely to excite suspicions in the mind of the litigant concerned even though those concerns are unjustified.'

> dependent upon his acting as counsel instructed by that firm in a case being conducted concurrently with the arbitration.[117]

In relation to the appropriate test for bias, the decision in *A v B* is seriously flawed. In the first place, the test in arbitration, even domestic proceedings, cannot be compared to similar issues arising in litigation. Unlike the decision of a judge, an arbitration award is not normally subject to appeal on the merits. This is a vital distinction. The finality of an arbitration process means that the requirements of independence are much higher. Secondly, the court was wrong to apply a domestic test to an agreement to international arbitration rules, in particular, where those in question, the LCIA Rules, required both impartiality and independence.

An LCIA Division appointed to hear a challenge, in circumstances similar to those in *A v B*, adopted an international test for bias in deciding to remove an arbitrator.[118] The Division had no difficulty applying the IBA Guidelines as requiring both

[117] [2011] ArbLR 43 at para 60. See, in contrast, the various decisions of the French courts, in *J&P Avax SA v Société Tecnimont SpA*, which led to the setting aside of a partial award on liability where the chairman of an ICC tribunal failed to take the initiative to provide updated disclosure that his law firm was advising Tecnimont and related companies during the proceedings. The French courts upheld a broad obligation of continuing disclosure. At the time of his appointment, the chairman disclosed that his firm had previously worked for the parent company of Tecnimont in a matter which was concluded and confirmed that the Chairman had not personally been involved in this work. The ICC Court dismissed a challenge brought on this basis. However, further information on the relationship between the Chairman's firm and Tecnimont subsequently emerged, namely that the law firm was continuing to advise the parent company and related companies. On this basis, the Paris Cour d'appel set aside a partial award on liability. The Cour de cassation set aside the decision of the Cour d'appel on the basis that the lower court had relied on facts which came to light only after the partial award had been issued, and not the facts originally relied on, a breach of civil procedure rules. The question of the validity of the award was remitted to the Cour d'appel de Reims. In a decision on 2 November 2011, under the presidency of Dominique Hascher, the Reims Cour d'appel set aside the award. Like the Paris Cour d'appel, the Reims court found that the relationship between the tribunal chairman's law firm and one of the parties had evolved beyond the initial disclosure and had not been made known in a timely manner. The court ruled that arbitrators are under a continuous obligation to disclose relevant circumstances: 'un minimum d'objectivité est exigé de la part de l'arbitre dans l'accomplissement de son obligation d'information, . . . l'arbitre doit révéler totalement, tant ce qui lui est strictement personnel que ce qui concerne le cabinet dont il fait partie, son degré d'association au sein de ce cabinet étant indifférent.' It was irrelevant that the other instructions were not related to the matters in dispute in the arbitration. Equally irrelevant was the amount of fees which may have been charged: '. . . dès lors qu'il existe une relation de clientèle, celle-ci implique une relation qui n'est pas seulement matérielle, l'indépendance de l'arbitre n'étant pas jugée en fonction de l'importance des honoraires perçus d'une partie par son cabinet.' The chairman's failure to disclose was held to give rise to reasonable doubts concerning his independence. Under the new French arbitration law, art 1456 of the French Code of Civil Procedure, an arbitrator is obligated to 'disclose any circumstances that may affect independence or impartiality' and 'shall also promptly disclose any such circumstance arising after acceptance of appointment'.

[118] Giovannini, Rowley QC and De Ly, LCIA Reference No 81160, 28 August 2009. See a report of the Division's decision in [2011] *Arbitration International*, vol 27, no 3 at 442.

independence and impartiality. Although 'it is undisputed that they are not binding authority and do not have force of law', it was also the case that:

> [T]he courts (including English courts) have considered [the IBA Guidelines] on various occasions and held that these Guidelines, when considered along with an attorney's traditional duty to avoid conflicts of interest, might reinforce a finding of a reasonable impression of lack of independence and real possibility of bias . . . . It is the Division's view that, to a considerable degree, these Guidelines may be seen to reflect actual practice in significant parts of the international arbitration community. That practice is to apply the test of what 'a fair-minded and informed observer' would conclude when applying the standards of independence and impartiality of an arbitral tribunal to specific situations.

The LCIA Division considered that the Arbitration Act had to be applied in a manner compatible with the European Convention on Human Rights, notably art 6(1): 'In the determination of his civil rights and obligations . . . everyone is entitled by law to a public hearing . . . by an *independent* and impartial tribunal established by law' (emphasis added by the Division). The Division referred to the House of Lords decision in *Lawal v Magill*[119] as confirming that the test for bias at common law now included 'independence' under art 6 of the Convention.

In the case before the Division, a barrister appointed to act as arbitrator disclosed a relationship with the firm of solicitors acting for one of the parties as well as an ongoing relationship with one of the parties on whose behalf he had been appointed:

> The Division, while fully conscious of the traditions and cultural norms of the London insurance market and the local lawyers that serve it, notes that the case at hand relates to an international arbitration, albeit seated in London. Thus, while the applicable contractual and legal standard is that set out in the LCIA Rules and English law, it does not follow that the fair-minded observer (through whose eyes, the circumstances of the case are to be examined) should be as fully attuned with local traditions and culture as a member of the community, or wholly un-critical of it. Although the fair-minded observer, in assessing the known facts, requires to be informed as to the historic and evolving behavioural norms of the London legal community, the Division does not believe it is reasonable in an international arbitration (where the party mounting the challenge was incorporated in [country X], has its head office in [country Y] and carries on business principally in [country Z]), to clothe that observer with the sensibilities of a person long familiar with the ways of that community. Accordingly, the Division assesses the challenge of Mr X through such a person's eyes . . . . In coming to this conclusion, the Division stresses that its Decision does not pass judgment on the behavioural norms and working relationships of the UK Bar and local solicitors. Rather its Decision is limited to an assessment of how the facts of this case could reasonably be seen through the fair-minded and informed observer who is unaccustomed to those norms. Having regard to the foreign domicile of Claimant, and the indispensable requirement of public confidence

[119] [2001] UKHL 67.

> in the administration of international arbitrations seated in England, the Division believes these are the right characteristics for the fair-minded and informed observer in this case.

The LCIA Division held that this 'particular combination of facts' gave rise to justifiable doubts as to the independence of a barrister, 'it being recalled that a lack of independence is not to be equated with the presence of actual bias, but only the appearance or real possibility of bias to such an observer':

> (a) of the 25 instructions [the barrister] had received in the last two to three months since his appointment, two were from the firm of solicitors representing one of the parties to the arbitration; (b) of these new instructions one was on behalf of one of the Respondents on whose behalf he was nominated in this case. Further, [the barrister] had disclosed that 11% of his instructions over the last five years came from [the solicitors firm], adding that 'substantial' cases were included in those instructions. [The barrister] maintained that, against the backdrop of a busy London insurance practitioner, neither his current retainer by one of his nominating parties, nor his past and expected future relationship with [the solicitors firm] constituted, to his mind, a sufficient basis to raise 'any *justified* doubts as to any impartiality or independence (his emphasis)'. The Division does not agree. The notion of independence implies, at a minimum, that there should be no actual (current) dependent relationship, and there is one here.

The Division referred to two decisions of the House of Lords, *Lawal v Magill*[120] and *Pinochet*,[121] which contrast markedly with the views of the Court of Appeal in *Taylor v Lawrence* relied on by Flaux J in *A v B*.[122]

With respect to obligations of disclosure by barristers who accept appointments as arbitrators, the Division differed from Flaux J who considered that no disclosure was required, even in the 'extreme case' where a barrister receives a substantial amount of his income from the solicitors appointing him as arbitrator.[123] In the case before the Division, the barrister-arbitrator had repeatedly refused to disclose new retainers or to commit to not accepting any such retainers in the future. The Division noted

[120] Ibid per Lord Styen: 'What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirements of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.'

[121] *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No 2)* [1999] 2 WLR 272, per Lord Craigihead: 'The importance of preserving the administration of justice from anything that can cause even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured.'

[122] *A v B* [2011] ArbLR 43.

[123] See also the statement of Lord Woolf in the Court of Appeal decision in *Taylor v Lawrence* [2002] EWCA Civ 90, at paras 61 to 65, relied on by Flaux J in *A v B*: 'A further general comment which we would make, is that judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship.'

the barrister had made 'five disclosures which were by and large general, selective and incomplete':

> A fair-minded and informed observer might, thus, in the opinion of the Division have legitimate doubts as to the independence and impartiality of an arbitrator who considered that he had the privilege of deciding on his own independence and impartiality and engaged in a pattern of incomplete and untimely disclosure.[124]

## VIII. Confidentiality

The effect of a receivership order for production of all evidence filed in support of an application for interim relief, including transcripts of court proceedings, was held to override rights of confidentiality, which were not considered to be absolute, in *John Milsom v Mukhtar Ablyazov*.[125] Undertakings by receivers not to disclose the materials without notice were discharged. While parties to arbitration were under an obligation not to disclose or use documents and evidence prepared for or disclosed in arbitration, one party's use of its own documents and information in arbitral proceeding did not make the material confidential where it was not originally confidential in nature.

The courts refused to intervene in the decision of an arbitral tribunal by injuncting an expert from acting for one of the parties to the arbitration in *A Lloyd's Syndicate v X*.[126] The expert had previously been engaged by the other party in the arbitration and it was alleged he had come into confidential information. The arbitral tribunal refused an application to exclude the expert. Teare J considered that even if it was likely that the expert would misuse the information, it was not appropriate to grant the injunction where the arbitral tribunal itself had already ruled on the question.

## IX. Time Limits for Challenges or Appeals

Under s 70(3) of the Arbitration Act, a dissatisfied party has 28 days to challenge an award on grounds of procedural irregularity or jurisdiction or to apply for permission to appeal on a question of law. The courts may extend this time limit under s 79 of the Act. Initial restrictive applications of the power to extend time have given way to more flexibility.

[124] See the similar views of the Cour d'appel de Reims, 2 November 2011 in *J&P Avax SA v Société Tecnimont SpA*: 'si rien ne s'oppose à la professionnalisation des fonctions d'arbitre, celle-ci n'atténue point les exigences d'information de la part de l'arbitre sur toutes les circonstances de nature à affecter son jugement et à provoquer un doute raisonnable sur ses qualités d'impartialité et d'indépendance dans l'esprit des parties, c'est-à-dire non en raison de ce que l'arbitre pense . . . mais du point de vue des parties, en se mettant à leur place.'

[125] [2011] ArbLR 25.

[126] [2011] ArbLR 48.

An arbitration award was effectively treated as a judgment of court in a successful application for an extension in *Russian Commercial Bank v Talon Enterprises Ltd and Ors.*[127] The application was five months late, a delay which the court found to be substantial. In addition, the information which formed the basis for an extension had been available much earlier. However, in circumstances were the issues relating to the consent arbitration award were effectively identical to the claim to set aside related consent court judgments, Blair J considered that it was unsatisfactory to deny the opportunity to have the application to set aside the award determined.

Time was also extended in *The Medea K*[128] where a party was unaware that an award in its favour would not be enforceable in China until the award debtor indicated that it had not received notice of the arbitration proceedings. This came to light only during enforcement proceedings in China. The applicant did not appreciate it might have an opportunity to set aside the awards until it commenced action, in England, against the company that had claimed to be acting for the award debtor in the arbitration, for breach of warranty of representation.

## X. Jurisdiction

The courts continued to approach challenges to arbitral jurisdiction as requiring a complete rehearing including new argument and evidence, an approach confirmed by the Court of Appeal in *AES Ust-Kamenogorsk Hydropower Plant LLC v Ust-Kamenogorsk Hydropower Plant JSC.*[129]

[127] [2011] ArbLR 30.

[128] [2011] ArbLR 52. In *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383, Flaux J granted an extension of time notwithstanding that the application was filed some six months after the award. Flaux J found that Chantiers de l'Atlantique had acted reasonably by investigating significant grounds of fraud before bringing the application. An extension of time was also granted in *Harvey v Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: 0MA40077) 21 December 2011, HH Judge Hegarty QC, unreported, for a challenge on ground of procedural irregularity and an application for permission to appeal.

[129] [2011] ArbLR 15 at para 96 confirming *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 in which Rix J, as he then was, stated, at 70: 'even if there has already been a full hearing before the arbitrators, the Court, upon a challenge under s. 67, should not be placed in a worse position than the arbitrator . . . it is not as though the court is required to review a challenge through the eyes of the arbitrator or on his findings of fact . . . .' The decision in Azov has been followed in a number of first instance decisions. See *contra*, the decision of Toulson J in *Ranko Group v Antarctic Maritime SA* 12 June 1998, Comm Ct, unreported: 'The underlying philosophy of the 1996 Arbitration Act is that, wherever possible, matters which arise in an arbitration should be determined by the arbitrator including, as laid down in s 30, questions as to his own jurisdiction. The role of the court is intended essentially to be one of review, rather than rehearing, and the essence is on speed and practical justice. It would, I think, be most unfortunate if in a situation of this kind, parties could contest before the arbitrator a question for his jurisdiction and then, on a later application under s 67, seek to introduce a raft of new evidence, causing additional delay to the whole procedure.'

### A. Jurisdiction *ratione materiae*

An unusual challenge to jurisdiction by the party which had initiated arbitration outside a time limit was unsuccessful in *Nanjing Tianshun Shipbuilding Co Ldt v Orchard Tankers Pte Ltd.*[130] For Steel J, the argument that the tribunal lacked jurisdiction to determine the legitimacy of a cancellation of contract because the claimant's own failure to commence arbitration out of time was 'unsustainable' and 'based on a misconception as to the clear meaning and effect of the contractual provisions relating to termination and dispute resolution arising from it'.[131]

### B. Jurisdiction *ratione personae*

Whether or not the main contract, which contains an arbitration agreement, is concluded continues to operate as a determining factor for arbitral jurisdiction for English courts. Under a weak principle of separability, the arbitration agreement is still often held to follow the fate of the main contract.

A series of six contracts all governed by FOSFA arbitration clauses and said to have been concluded orally or by exchange of emails were in issue in *Pacific Inter-Link v EFKO Food Ingredients.*[132] Contracts containing FOSFA arbitration clauses were provided, however, a request for return of signed copies triggered an exchange of emails which raised an issue as to what terms had been agreed. The parties' discussions at no time concerned or challenged the FOSFA arbitration agreement. The parties confirmed fixations in a further written exchange. The FOSFA Board of Appeal held that the parties had concluded arbitration agreements. The commercial court found, however, that no effective sales contracts had been concluded. The documents were not stamped, signed or returned. Without a concluded contract, the arbitrators lacked substantive jurisdiction. Neither separability, in relation to the arbitration agreement, nor the formal requirements for an arbitration agreement at s 5 of the Arbitration Act 1996 were applied. For Steel J, the arbitration clause contained within the original offer could not have been agreed separately on the basis that it had not been the subject of any challenge during negotiations or at any time earlier than the time disputes arose. Steel J considered that in the absence of a conclusion of the main contracts, the arbitration clause was not binding:

> It is not arguable that the arbitration clause contained within the original offer was nevertheless accepted by the counter-offer. The submission advanced by EFKO was that, in sorting out the details of the contracts, the parties agreed FOSFA arbitration even if the terms of the main contract were never concluded. But this is a contradiction in terms. There was no contract the details of which needed to be sorted out . . . . [T]here was no mention of, let alone assent to, the FOSFA arbitration clause prior to the provision of the sale contracts. They in turn needed to be accepted or rejected as a whole or in the further alternative made the basis of a counter-offer.[133]

[130] [2011] ArbLR 4.
[131] Ibid at para 7.
[132] [2011] ArbLR 13.
[133] Ibid at paras 47 and 48.

Under the Arbitration Act, there is no requirement for an 'exchange' in the sense of a return confirmation of the main contract in order for the arbitration clause it contains to be binding. This was one of the express objectives of s 5(3) of the Arbitration Act.[134] An approach which wrongly restricts the principle of separability by focusing on the formation of the main contract and ignoring the combined effect of ss 7 and 5(3) of the Arbitration Act is also out of step with practice in other New York Convention Member States. English courts, however, continue to apply contractual (offer and counter offer) analyses to determine arbitral jurisdiction, rather than focus on the separate agreement to arbitrate and formal requirements of an arbitration agreement set out in the Arbitration Act 1996.[135] An arbitration

[134] Section 7 of the Arbitration Act provides: 'an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement . . . did not come into existence . . . and it shall for that purpose be treated as a distinct agreement.' See also the Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1996, at para 36, in relation to s 5(3) of the Arbitration Act: 'This provision would also cover agreement by conduct. For example, party A may agree to buy from party B a quantity of goods on certain terms and conditions (which include an arbitration clause) which are set out in writing and sent to party B with a request that he sign and return the order form. If, which is by no means uncommon, party B fails to sign the order form, or send any document in response to the order, but manufactures and delivers the goods in accordance with the contract to party A, who pays for them in accordance with the contract, this could constitute an 'agreement otherwise than in writing with reference to terms which are in writing . . .' and could therefore include an effective arbitration agreement. The provision therefore seeks to meet the criticisms that have been made of Art 7(2) of the Model Law in this regard (see e.g. The Sixth Goff Lecture delivered by Neil Kaplan QC in Hong Kong in November 1995 (1996) 12 Arb Int 35).'

[135] See, as well, the Court of Appeal decision in *Midgulf v Groupe Chimique Tunisien* [2010] EWCA Civ 66 at para 36, per Toulson LJ, which refused to apply separability even in circumstances where the parties had part performed obligations under the contact. The Court of Appeal wrongly required a specific return confirmation of acceptance of the arbitration agreement: 'The only reference to English arbitration in the communications between the parties during the relevant period was in the part of Midgulf's first fax of 2 July which stated that all other terms and conditions pertaining (among other things) to arbitration were to be as per the draft contract dated 27 June and in clause 15 of the draft contract. In the absence of any subsequent specific reference to the subject of arbitration, Midgulf had to show that GCT accepted its sale offer in terms broad enough to encompass the relevant arbitration clause.' See, however, the decision of Burton J *Midgulf v Groupe Chimique Tunisien*, 19 February 2009, Comm Ct, unreported. Notwithstanding the existence of a 'counter-offer' which had not mentioned the arbitration provision, Burton J found, at para 22, a prima facie case for arbitration holding that it was: '[S]trongly arguable that the second contract, and indeed the first contract, both incorporated the arbitration and jurisdiction and English law clauses . . . not only is there provision in the standard terms incorporated in both contracts on that basis, 'Arbitration, English law to govern, venue in London,' but there is also a jurisdiction clause, saying 'This contract is to be construed and governed in all respects in accordance with English law.' For Mr Justice Burton, at para 24, the alleged 'counter-offer' 'contain[ed] nothing which ousts or is inconsistent with the provisions for arbitration and jurisdiction referred to in the fax to which [GCT] was responding.' See also Shackleton (2010) 'The High Cost of London as an Arbitration Venue – the Court of Appeal Rejects Compétence-Compétence and Separability in *Midgulf v Groupe Chimique Tunisien*', *International Arbitration Law Review*, vol 2, p 50.

agreement may come into existence without the conclusion of the main contract, in particular, where consent to arbitration is challenged only when disputes arise.[136]

In *TTMI Sarl v Statoil ASA ('The Sibohelle')*,[137] a challenge to an arbitration award declining jurisdiction was successful. On the basis that a fixture recap had been concluded in the name of the wrong party, the arbitrator decided that no contract,

[136] See *Fiona Trust v Privalov* [2007] ArbLR 24 where Lord Hoffmann confirmed, at paras 17 et seq, a strong principle of separability in accordance with the express provisions of s 7 of the Arbitration Act 1996 and international practice: 'The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement . . . . Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.' Notwithstanding that these views may have been stated *obiter*, Mr Justice Gross relied on them in *UR Power GmbH v Kuok Oils and Grains PTE Ltd* [2009] EWHC 1940 (Comm Ct) at para 40: 'To my mind, the wording of s. 7 of the Act makes it plain that even though the underlying contract never came into existence, the arbitration agreement may still be binding. In this regard, it is worth underlining the wording in s.7 'or was intended to form part of' and 'or did not come into existence'. See too *Russell on Arbitration* (23rd ed.) at para. 2-008. It is in any event at least a tenable view that, in this context, too much can sometimes be made of the distinction between a contract which is void and one which never came into existence: see, *Fouchard Gaillard Goldman on International Commercial Arbitration* at para. 411. So far as concerns authority, even if Lord Hoffmann's observations at [18] of his speech in *Fiona Trust* (supra) are *obiter*, they are, with respect, of very great persuasive force. Moreover, they are very much in point. For my part, I do not read anything said by Colman J in *Vee Networks* (supra), as telling against the provisional conclusion to which I am attracted; the observations of Colman J at the end of [19] were directed at a somewhat different situation. In principle, therefore, an arbitration agreement may be binding even though the underlying contract has not come into existence. With respect to Mr Collett's argument to the contrary, it does not follow that in every case where pre-contractual negotiations have not resulted in a binding (underlying or matrix) contract, an arbitration clause discussed in the course of those negotiations would be binding. Whether it is or not will necessarily be a question of fact and degree, depending on the circumstances of the individual case. In the present case, by the 25th October and even more so by the 27th October, 2006, there was on any view a very considerable measure of agreement between the parties. By the 27th October, as set out in para. 6.15 of the Appeal Award, such agreement extended to: (1) the goods (Nigerian crude palm oil); (2) the quantity (10,000 mt); (3) the CIF nature of the transaction, including a nominated load and discharge port; (4) the price ($480.00 per mt); (5) the incorporation of FOSFA 80, so including the agreement to arbitrate (cl. 30 of FOSFA 80); (6) payment by transferable letter of credit to be opened and confirmed after delivery of the POP Certificate, with detailed documentary instructions. Against this background, it is at least strongly arguable that the outline of the agreement of which the agreed arbitration clause (cl. 30 of FOSFA 80) was intended to form part, was clear indeed. There was in particular no doubt and had not been since the 18th October that the parties intended their disputes arising out of their (intended) contract to be referred to arbitration; the incorporation of FOSFA 80 had been agreed since then. All that remained was the discrete question of whether Kuok's obligation to open a conforming letter of credit was or (on one view) remained a contingent condition precedent and so stood in the way of the parties having entered into a binding contract. There is, to my mind, at least a powerful argument for concluding that the parties must be taken to have intended that discrete question to be referred to arbitration in accordance with FOSFA 80. It is perhaps to be underlined that the question here went not to the existence of any consensus ad idem but instead to the nature of Kuok's obligation.'

[137] [2011] ArbLR 35.

or arbitration agreement, had come into existence between the parties to the arbitration. Beatson J found, however, that a contract had been concluded with the party to the arbitration by performance of the voyage and payment of freight, an analysis the courts have otherwise refused to extend to non-signatory members of groups of companies.[138]

### C. *Functus Officio*

An arbitrator was *functus officio* following a final award and without jurisdiction to render further awards, even after it emerged that one of the parties had no notice of the proceedings.[139] The arbitrator considered that he had, at the very least, jurisdiction to consider an application as to whether or not he had jurisdiction to issue a further award. For Field J, however, there was no basis for the arbitrator's continued jurisdiction. If there had been a breach of natural justice or some other irregularity in the course of the arbitration, the only recourse was an application under s 68. Where, however, the arbitrator had rendered an award in proceedings in which one of the parties did not participate, it might be considered that the arbitrator's mission had not been completed notwithstanding the award.

## XI. Procedural Irregularity

English courts confirmed their practice of reading arbitration awards indulgently against technical allegations of serious irregularity.[140] The courts were also pointedly unwilling to 'second guess' arbitrators' procedural decisions.

In one case, *The Medea K*,[141] serious irregularity was held to require a 'failing' or 'fault' on the part of the tribunal. This construction of the Arbitration Act relies on a strict, if not technical, approach to the wording of the Arbitration Act. Section 68(2)(a), for example, provides for setting aside where substantial injustice is caused by a 'failure' by the tribunal to comply with its s 33 duties (fairness) while s 68(2)(c) requires a 'failure' failure by the tribunal to conduct the proceedings in accordance with procedure agreed by the parties. For Field J, in the absence of any 'failure' by the arbitrator, in circumstances where a party had not authorized its insurance agents to represent it in the arbitration and, thus, had no notice of the proceedings, there was no serious irregularity and the award could not be set aside.

Field J's interpretation was undoubtedly not the intention of the drafters of the Arbitration Act. Section 34 of the UNCITRAL Model Law contains no reference to 'fault' or 'error' on the part of the arbitral tribunal. The UNCITRAL provision might have been used by the court to interpret the corresponding provisions in the Arbitration Act.[142] For example, s 34(2)(a)(iii) of the UNCITRAL Model Law does

[138] See *Peterson Farms v C&M Farming Ltd* [2004] ArbLR 51.

[139] *The Medea K* [2011] ArbLR 52.

[140] See, eg, *AK Kablo Imalat San Ve Tic As v Intamex SA* [2011] ArbLR 47.

[141] [2011] ArbLR 52.

[142] See *Patel v Patel* [2000] QB 551 where the Court of Appeal, per Lord Woolf endorsed use of the Model Law as an aid to interpretation of the Arbitration Act: 'the terms of the UNCITRAL

not require any 'fault' by the tribunal, but provides for setting aside where: 'the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'.

### A. Not in Accordance with Arbitration Agreement

In *The Medea K*,[143] the court held there was no failure to comply with agreed procedure under the Lloyd's Standard Salvage Agreement which required parties to appoint a representative. As there was no reason for the arbitrator to think that representatives had not been properly appointed and, therefore, no 'failure' by the tribunal and no 'breach' of the duty of fairness. For Field J, procedural irregularity required a 'fault' on the part of the arbitrator.

### B. Fairness

Arbitrators' compliance with their own procedural directions were in issue in *The Angeliki B*.[144] The tribunal had ruled that it would disregard new submissions on the issue of standing, but then determined that issue in its award on the basis of title established by the Carriage of Goods by Sea Act 1992 ('COGSA') which had been referred to in submissions by Milan Nigeria after the arbitrators' ruling. The court found there had been no unfairness. While the COGSA had not been expressly referred to in earlier submissions, prior to the tribunal's ruling, by repeatedly claiming that they were the 'lawful holders' and the 'endorsees' of the bills of lading, it had been clear that Milan Nigeria were putting a case based on the COGSA. In the same case, a challenge to the tribunal's award of damages in US dollars failed, as Milan Nigeria's claim had always been asserted in US dollars and there had been ample opportunity to address the point during the arbitration.

Likewise in *Michael Wilson & Partners Ltd v John Forster Emmott*,[145] arbitrators who limited a first hearing to issues of liability did not breach their own procedural directions or commit serious irregularity by deciding what remedies were available. Smith J considered that the tribunal was correct to determine the nature of the relief to be awarded. The tribunal had deferred the quantum of damages, not the question as to whether any damages had been caused by the alleged breaches of duty. Only a taking of accounts was deferred, not decisions about whether or not accounts and what accounts should be ordered. The tribunal's consideration of a claim for undercharging necessarily involved consideration of the extent of it.

In the same case, the arbitrators were held not to have acted unfairly or have gone off on a frolic of their own by expressing a view on the reasonableness of a settlement, a matter not among preliminary issues referred to the tribunal, but one which the

Model Law on International Commercial Arbitration should be taken into account, because it is clear that those responsible for drafting the Act had the provisions of the Model Law in mind when doing so.'

[143] [2011] ArbLR 52.

[144] [2011] ArbLR 24.

[145] [2011] ArbLR 55.

parties nonetheless made submissions on.[146] The arbitrators were found to be entitled, if not obliged, to make findings in relation to the submissions. There was, likewise, no serious irregularity where the arbitrators expressed findings on an interest in or control over shares when this issue was clearly before the tribunal and a necessary part of a contention that the shares represented secret profit. The tribunal was entitled to make its own analysis of the legal position in light of the parties' contentions.[147]

Arbitrators were not obligated to invite submissions by the parties in *The MV Amplify*.[148] The court was satisfied that the tribunal had given each party a reasonable opportunity to put its case. While arbitrators were entitled to raise new points with the parties, they were not obligated to do so. Nor were the arbitrators required to draw a party's attention to an argument the party had not advanced. The sums at state were modest and in the context of a documents-only procedure, the arbitrators may have been unwilling to incur further costs by inviting submissions.

In *The Medea K*,[149] an attempt to set aside an award on the basis that insurance agents had not been authorized to represent a party to the proceedings. Field J found there had been no serious irregularity on the basis that the arbitrator was not at fault. There had been no 'failure' by the tribunal and, therefore, no 'breach' of the duty to act fairly as nothing before the tribunal put the arbitrator on notice that further investigations were required in order to determine the representatives' authority.

The courts would not intervene in procedural orders by arbitral tribunals. Arbitrators who admitted a witness statement on the eve of an oral hearing or who did not order disclosure of documents were held not to have committed a serious irregularity.[150] Likewise, arbitrators who refused to defer their findings pending any investigation by regulatory authorities into alleged irregularities concerning disputed shares did not commit a procedural irregularity. Nor had the applicant proposed that the tribunal adopt this course of action in the arbitration.[151]

## C. Issues

A challenge based on a contention that majority arbitrators had not dealt with all issues by failing to address points raised in a dissenting opinion was unsuccessful in *Ispat Industries Ltd v Western Bulk Pte Ltd*.[152] Likewise, arbitrators did not fail to deal with issues when they accepted the testimony of a witness without making findings as credibility.[153]

[146] *Micoperi SrL v The Shipowners Mutual Protection & Idemnity Association* [2011] ArbLR 51.
[147] *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] ArbLR 55.
[148] [2011] ArbLR 50.
[149] [2011] ArbLR 52.
[150] *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] ArbLR 3.
[151] *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] ArbLR 55.
[152] [2011] ArbLR 3 at para 33.
[153] *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] ArbLR 3. See also *Department of Economic Policy & Development of the City of Moscow and Ors v Bankers Trust Co Anr (No 1)* [2003] ArbLR 16(a) where Cooke J rejected a challenge based, in part, on an arbitrator's failure to make findings on the credibility of witnesses.

In *Cordoba Holdings Ltd v Ballymore Properties Ltd*,[154] Sir Andrew Morritt CVO dismissed a challenge where the issue in question had not been put to the arbitrator and had not been not supported by any evidence during the proceedings.

On the other hand, an award was remitted in *Soeximex SAS v Agrocorp International Pte Ltd*[155] on the basis that the Appeal Board had failed to deal with all issues that were put to it. A clear and separate argument that the United States Regulations rendered the transaction void was before the arbitrators in the form of specific pleadings and unchallenged expert evidence. The Board overlooked the issue. If the Board had been addressing the wider argument, it is inconceivable that it would not have addressed its reasons for not accepting—or treating as irrelevant—the unchallenged expert evidence.

Challenges on the ground of failure to deal with an issue will be unsuccessful where a careful reading of the award shows that, in fact, the relevant claim was considered and rejected or where the alleged issue was not pleaded in the arbitration.[156]

## D. Admission by Arbitrator

An arbitrator's admission that a procedural irregularity had occurred must be clear in order to ground a setting aside. Field J did not accept that it could be 'presumed' that an arbitrator who merely indicated that he might not be *functus officio*, in order to continue a reference when it emerged that one party had not had notice of the proceedings, was acknowledging that the party did not have notice in *The Medea K*.[157]

## E. Public Policy

In *Michael Wilson & Partners Ltd v John Forster*,[158] arbitrators who adopted a novel analysis of beneficial ownership of disputed shares, which had not been advanced in the arbitration, were alleged to have given effect to a dishonest scheme contrary to public policy. In addition, it was alleged that the tribunal had not had the benefit of documents which established irregularities concerning the ownership and control of the shares. Smith J dismissed the challenge. Even if the reason for the shares being issued was dishonest, the award did not in any way advance the scheme. The arbitrators simply rejected the claim that the shares had been received by way of commission or a secret profit. Documents not put in evidence before the tribunal because they were overlooked or because their potential significance was not appreciated could not be a basis for challenging an award.

[154] [2011] ArbLR 46.

[155] [2011] ArbLR 19.

[156] *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] ArbLR 55.

[157] [2011] ArbLR 52.

[158] [2011] ArbLR 55. A challenge on ground of fraud was unsuccessful in *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383. Flaux J found that that while evidence had been deliberately and dishonestly concealed from the arbitrators, it could not be shown that disclosure would have affected the result in the arbitration. As a result, the arbitration award was not obtained by fraud and no substantial injustice had been caused.

## XII. Appeals

It remains possible in England to appeal the legal merits of an arbitration award before local courts, whether disputes are domestic or international.

A two-step process is involved. A party must first apply to the High Court for permission or 'leave' to appeal. If permission is granted, the merits will be debated in a separate hearing, usually before a different judge. Before giving permission, the courts must be satisfied that the question was raised during the arbitration and that the arbitrators' decision is 'obviously wrong'. If the question of law is of 'general public interest', the courts may allow an appeal to proceed where the arbitrators' decision is 'open to serious doubt'. The recourse is further limited to questions of English law. The courts must in all circumstances be satisfied, under s 69(3)(d), that it is 'just and proper' to intervene despite the parties' choice to arbitrate rather than litigate.

Applications for permission to appeal on a question of law are normally determined on the basis of limited supporting evidence and without an oral hearing.[159] However, the practice of applying for permission to appeal and formulating parallel challenges in respect of the same point of law, on grounds of jurisdiction or serious irregularity, has continued.[160] This ensures an oral hearing on the matter and allows review of additional evidence. Indeed, in *Cordoba Holdings Ltd v Ballymore Properties Ltd*,[161] Mann J found that an application for permission contained no identification of the relevant point of law and the issue did not appear to have been determined by tribunal. On this basis, he directed that the application be renewed as a challenge on ground of serious procedural irregularity with a further application for an extension of time for that application. Permission to appeal was ultimately

[159] Oral hearings of permission to appeal applications are, however, allowed with a decision on the merits in the event permission is granted, the "rolled-up procedure." See *House of Fraser v Scottish Widows Plc* [2011] ArbLR 44. See also *Reliant Building Contractors Ltd v BRB (Residuary) Ltd* [2011] EWHC 1439 (TCC) and *Harvey v Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: 0MA40077) 21 December 2011, HH Judge Hegarty QC, unreported. See, however, *HMV v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708, at para 41, where the Court of Appeal, per Lady Justice Arden, expressed reservations about allowing an oral hearing on the merits of an application for permission to appeal: '. . . it must be rare that a court finds it necessary to call for further argument orally and also to direct a rolled-up procedure, as in this case. The danger of a rolled-up process is that the judge does not answer the anterior statutory questions in s 69, namely whether the pre-conditions to the grant of leave to appeal in s 69 are all satisfied. Those questions are ones which statute requires to be answered before the substantive issue on the appeal is fully argued.' At para 45, Longmore LJ agreed with Lady Justice Arden's reservations.

[160] See, eg, *AK Kablo Imlat San Ve Tic AS v Tramex SA* [2011] ArbLR 47; *Michael Wilson & Partners Ltd v John Forster Emmott* [2011] ArbLR 55; and *Nanjing Tianshun Shipbuilding Co Ldt v Orchard Tankers Pte Ltd* [2011] ArbLR 4. In *Harvey v Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: 0MA40077) 21 December 2011, HH Judge Hegarty QC, unreported, an award was challenged on ground of serious irregularity and a parallel application was made for permission to appeal on a question of law. Just prior to the hearing, the challenge was abandoned leaving only the application for permission to appeal. HH Judge Hegarty QC observed, at para 14: 'It is at least doubtful whether such a "rolled up" hearing of an application under section 69 would have been ordered in the absence of an application under section 68 . . .'

[161] [2011] ArbLR 19.

dismissed by Sir Andrew Morritt CVO who held that the question of law did not arise out of the award or any findings of fact in the award.

Despite high thresholds of 'obviously wrong' and 'open to serious doubt', which must be met to secure permission to appeal, the courts uphold a high number of arbitrators' decisions on the merits.[162] In one case, where an oral hearing was granted on an application for permission to appeal with the appeal 'effectively to be allowed' if the court found the arbitrator's award to be 'obviously wrong,' the arbitrator's decision was upheld while in another, an arbitration award survived an oral hearing at both first instance and the Court of Appeal.[163]

## A. Exclusion of Appeals

Parties may exclude appeals on questions of law in their arbitration agreement. The English courts have, thus far, been unclear as to the requirements for a valid exclusion agreement, notably as to whether the words 'final and binding' operate to preclude appeals.[164] In *Dollingston Football Club v The Irish Football*

[162] In *HMV v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708, at para 5, the Court of Appeal, per Lady Justice Arden, held that rights of appeal under s 69 were 'severely restricted': 'the alleged error must be transparent. It must also, at the least, be clear. The word 'obvious' is a word of emphasis which means that the courts must not whittle away the restriction on rights of appeal in subsection (c)(i) by being over generous in their determination of the clarity of the wrong'. See as well *National Trust v Fleming* [2009] EWHC 1789 where Hendersen J stated, at para 12: 'The "obviously wrong" test is, self-evidently, a stringent one which will seldom be satisfied. It carrie[s] with it the implication that the error should normally be demonstrable on the face of the award itself, and that it should not require too close a scrutiny to expose it. The threshold is very much higher than the usual test of "a real prospect of success" which the court applies to applications for permission to appeal under CPR Rule 52.3(6)(a).' Three questions in respect of which permission to appeal was granted, were upheld on the merits in *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] ArbLR 3. An arbitrator's award was upheld despite permission granted in relation to three questions of law arising from a GAFTA Board of Appeal award in *Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd* [2011] EWHC 2494. In *Micoperi SrL v Owners' Mutual Protection & Indemnity Association (Luxembourg)* [2011] ArbLR 51, an award was upheld on two questions of law in respect of which the judge who had granted permission to appeal found, on the merits, that there was 'no basis for this appeal'. In *Pacific Basin IHX Ltd v Bulkhandling Handymax AS* [2011] EWHC 2862, permission to appeal on four questions of law was found to involve, in fact, two questions only one of which was allowed. Arbitration awards were also upheld on the merits following grant of permission to appeal in *MH Progress Lines SA v Orient Shipping Rotterdam BV* [2011] EWHC 3083; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028; *X v Y* [2011] EWHC 152; *Parbulk II A/S v Heritage Maritime Ltd SA (The 'Mahakam')* [2011] EWHC 2917; and *Pec Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306.

[163] *Reliant Building Contractors Ltd v BRB (Residuary) Ltd* [2011] EWHC 1439 (TCC) and *HMV v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708.

[164] In *Virdee v Virdi* [2002] ArbLR 40, an arbitration agreement specified that the parties 'have agreed irrevocably, unconditionally and unreservedly to be fully bound in all respects and for all purposes by the decision of the appointed committee of Arbitrators'. The agreement further stated that the award was to be 'final and binding on both parties' and reaffirmed that the parties 'irrevocably and unconditionally agree to be bound, to accept and proceed to perform the decision . . . immediately'. The court at first instance decided that this language did not exclude appeals on questions of law. The Court of Appeal refused permission to appeal the lower court's conclusion because the arbitration agreement could not be interpreted to exclude appeals [2003] ArbLR 46. The use of such language, particularly the references 'unreservedly' and 'for all respects and for all purposes . . .', might well have supported a different result, especially if considered together with

the statutory requirement that the court should be satisfied, under s 69(3)(d), that it must be 'just and proper' to intervene despite the parties' choice to arbitrate. The specific context of the parties' wish, in *Virdee v Virdi*, to have their dispute settled by a tribunal drawn from their own religious tradition might also have supported an intention to exclude recourse to secular State courts. The words 'final and binding' were, alone, considered insufficient to exclude a right of appeal in *Essex County Council v Premier Recycling Ltd* [2006] ArbLR 22. On the other hand, 'final, conclusive and binding' were thought sufficient to preclude an appeal in *Al Hada Trading Co v Tradigrain* [2002] 2 Lloyd's Rep 512. In *Sukuman Ltd v Commonwealth Secretariat* [2006] ArbLR 58, an arbitration agreement which provided that decisions by the Commonwealth Secretariat Arbitration Tribunal 'shall be final and binding . . . and shall not be subject to appeal' was an enforceable exclusion of rights of appeal. In *Sanghi Polyesters Ltd (India) v The International Investor (KCFC) (Kuwait)* [2000] 1 Lloyd's Rep 480, rights of appeal were found to have been excluded by parties who agreed to arbitrate under the 1988 ICC Rules, art 24 of which provides that 'the arbitral award shall be final' and that by submitting the dispute to ICC arbitration, 'the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal . . .'. See also *Arab African Energy Co Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419 at 423 and *Marine Contractors Ltd v Shell Petroleum Development Co of Nigeria Ltd* [1984] 2 Lloyd's Rep 77 at 79. See, however, *Dowans Holdings SA v Tanzania Electric Supply Co* [2011] ArbLR 21, where the court adjourned enforcement of an ICC award which was subject to appeal proceedings brought in the place of arbitration, Tanzania. The English court was satisfied that under the ICC Rules, the parties had agreed that the award was to be final and not appealable. Despite the court's conclusion that the binding nature of the award was to be determined by whether a UK court was in a position to recognize and enforce the award, not by reference to how Tanzanian courts might view the matter, Burton J accepted to adjourn enforcement because the chances that Tanzanian courts might set aside the award on grounds of error of law on the face of the award could not be excluded as fanciful. Somewhat surprisingly, in *Demco Investments & Commercial SA and Ors v SE Banken Forsakring Holding Aktiebolag* [2005] ArbLR 20, an oral hearing and extensive submissions were allowed in support of an application for permission to appeal from an arbitration award rendered under the rules of the Stockholm Chamber of Commerce. Article 40 of the SCC Rules states: 'an award shall be final and binding on the parties when rendered'. Although Cooke J accepted that 'as a matter of logic, any objection that the court lacked jurisdiction to hear the application for permission to appeal from an SCC award 'should be determined in priority . . .' because it raised 'a point which is not without difficulty', he preferred to reject the application on the merits (at para 6). Moreover, the judge in that case criticized the applicants for failing to formulate questions of law: 'the diffuse and varied nature of what the Sellers put forward is an indication of the difficulties they have in identifying clear questions of law "arising out of" the award'. In *DDT Trucks of North America Ltd and Ors v DDT Holdings Ltd* [2007] ArbLR 14, the court held that permission to appeal from an award rendered under the AAA Rules would have been granted (art 27(1) of the AAA Rules states that an award 'shall be final and binding on the parties' who 'undertake to carry out any such award without delay'). In *London Underground Ltd v Citylink Telecommunications Ltd* [2007] ArbLR 39, Ramsey J construed such wording in the context of the requirement, under s 69(3)(d), that it be 'just and proper' for the court to intervene despite the parties' choice to arbitrate rather than litigate. The judge was not satisfied that justice dictated that there should be an appeal where the parties had made express provision for the award to be final and binding and did not include provision for the court to resolve matters, but instead set up a three-tier dispute resolution involving a referral to the contract manager followed by adjudication and finally arbitration. The parties had also appointed a highly qualified construction barrister expressly listed in the contract as one of 15 individuals the parties agreed could act as arbitrator. However, the court stopped short of viewing these circumstances as excluding appeals finding that they operated only to require 'compelling' grounds for judicial intervention. In contrast, Ramsey J did not consider that the words 'final and binding' precluded appeals in *White Young Green Consulting v Brooke House Sixth Form College* [2007] ArbLR 63 at para 30, as no particular arbitrator had been designated by the parties, but was appointed instead under the default provisions of the contract by the President of the Chartered Institute of Arbitrators. Gloster J determined that the words 'final, conclusive and

*Association*,[165] disputes were referred to arbitration pursuant to a provision of the International Football Federation Articles of Association which required an 'Independent Arbitration Panel' to 'settle the dispute to the exclusion of any ordinary court, unless to do so is contrary to the laws of Northern Ireland'. Considering the parties had agreed to exclude appeals on questions of law, the Northern Ireland High Court refused permission to appeal. For Coghlin LJ, the provision had to be construed against the background of the organizations concerned and the activities they engaged in. He concluded that the parties had not intended to refer to the 'traditional' meaning of 'final and binding' which had earlier been held by the commercial court not to exclude appeals.[166]

In *Dowans Holdings v Tanzania Electric Supply Co Ltd*,[167] in contrast, Burton J construed 'finality' in Tanzanian law 'in the confident expectation that, in applying that law, the Tanzanian court will have full regard to the international approach to the undesirability of interfering with the careful decisions by arbitrators.'

## B. Grounds

In order to secure permission to appeal, the question of law must have been raised before the arbitrators, their decision must be 'obviously wrong' and the issue must substantially affect the rights of one of the parties. If the question raises issues of public importance, a lower threshold of 'open to serious doubt' will apply in determining whether to grant permission.

binding on the parties' did not operate to exclude appeals in *Shell Egypt West Manzala GmbH and Anr v Dana Gas Egypt Ltd* [2009] EWHC 2097. See the New Zealand decision, *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at 334, where Blanchard J stated that although the expression 'final and binding' is not determinative it 'will indicate that the parties did not contemplate becoming involved in litigation over the arbitral award' and that 'the High Court should lean towards giving effect to the stated preference of the parties for finality'. In Canada, the Ontario courts have held that the words 'final and binding' reflect an intention to exclude rights of appeal on questions of law from an arbitration award. See *Superior Propane Inc v Valley Propane (Ottawa) Ltd* [1992] OJ 2773 (Ont Ct Gen Div) and *Labourers International Union of North America, Local 183 v Carpenters and Allied Workers, Local* (1997) 34 OR (3d) 472. However, where parties used only the term 'binding', but not the expression 'final and binding', and referred to a 'final' determination precluding any further recourse to the arbitral process, not the courts, they were held not to have excluded appeals on a question of law in *National Ballet of Canada v Glasco* (2000) 186 DLR (4th) 347. A similar position has developed in Australia. In *Corner v C&C News Pty Ltd*, 28 April 1989, unreported, Yeldham J considered that an agreement that an arbitration award would be 'final and binding' did not operate to exclude an appeal on questions of law. In *Raguz v Sullivan and Ors* (2000) 50 NSWLR 236 the New South Wales Court of Appeal stated, at 254, that 'insofar as Yeldham J suggested . . . that an exclusion agreement should expressly refer to the right of appeal . . . we are of the view that this reasoning is wrong'. It must be noted that the jurisprudence from Australia, Canada and New Zealand arises from legislation regulating domestic arbitration. Appeals against awards on questions of law in an international arbitration are precluded in each those jurisdictions by statutes adopting the UNCITRAL Model Law.

[165] [2011] ArbLR 21.

[166] *Shell Egypt West Manzala GmbH and Anr v Dana Gas Egypt Ltd* [2009] EWHC 2097.

[167] [2011] ArbLR 42 at para 42.

The retention of rights of appeal against the merits of an arbitration award was controversial at the time of the reforms to arbitration law in 1996. The application of s 69 criteria for permission to appeal continues to be problematic, notably as to what constitutes an appealable 'question of law'. In *Micoperi SrL v Owners' Mutual Protection & Indemnity Association (Luxembourg)*, for example, Burton J explained his refusal, ultimately, to allow an appeal in that case:

> . . . I gave permission, stating in my decision that 'the conclusion by the Tribunal in relation to the question . . . may constitute a serious error of fact, not capable of appeal. However, it appears to me sufficiently arguable that the Tribunal may have reached their conclusion by reason of an application of one or other of the two errors of law which Miss Masters has alleged.' The matter has now been fully argued, and, as is so often the case in an arbitration appeal dependent upon a short analysis of the arbitrators' reasons and without nitpicking examination of them, the answer is clear.[168]

In *Ispat Industries Ltd v Western Bulk Pte Ltd*, permission to appeal was granted in respect of a point which the judge deciding the merits considered '[did] not identify with clarity the precise question of law which the charterer wishes the court to determine.'[169] Teare J was 'reluctant to analyse and discuss the tribunal's decision at length because, on the facts found by the tribunal', the point of law made no difference and 'the tribunal would still have found in favour of Owner', but he proceeded nonetheless to hear and to determine the question.[170] Other appeals were dismissed where the questions of law were found not to have been properly identified[171] or where the arbitrators based their reasoning on a finding as to standard business practice in a specific area.[172]

In common with most arbitration venues, international arbitrators sitting in England are not required to apply local rules of procedure and evidence.[173] Arbitrators' decisions on matters of evidence and procedure were nonetheless found to be appealable in *The Angeliki B*, where an award was remitted to arbitrators 'for reconsideration in accordance with the law—namely that the burden of proof is upon Owners to establish that some part of the cargo damage fell within an excepted peril'.[174] Gloster J rejected a submission that the tribunal had otherwise carefully weighed all evidence as well as its relevance to the causes of alleged damage and then undertaken an apportionment which was not based on a simple application of

[168] [2011] ArbLR 51 at paras 17 and 18. See also *HMV v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708, where the court at first instance refused permission to appeal, but granted permission to appeal from its decision to refuse permission to the Court of Appeal which upheld the lower court decision refusing permission. At para 45, Longmore LJ stated: 'This case is not . . . a particularly good advertisement for the arbitration process.'

[169] [2011] ArbLR 3 at para 33.

[170] Ibid at para 34.

[171] *London Underground Ltd v Citylink Telecommunications Ltd* [2007] ArbLR 39.

[172] *AK Kablo Imlat San Ve Tic AS v Tramex SA* [2011] ArbLR 47 at para 31.

[173] See the Arbitration Act 1996, s 34(2)(f).

[174] *Milan Nigeria Ltd v Angeliki B Maritime Co ('The Angeliki B')* [2011] ArbLR 24 at para 25.

burden of proof.[175] In *House of Fraser Ltd v Scottish Widows Plc*,[176] in contrast, Smith J refused to grant permission to appeal against an arbitrator's weighing of evidence.

## C. Merits

An error of law may involve the arbitrator's application of legal principles or the interpretation of either statutory or contractual provisions. In some instances, errors of evidence have been held to raise appealable questions of law.

In *Polestar Maritime Ltd v YHM Shipping Co Ltd and Anr*,[177] the court reversed an arbitrator's strict reading of a contractual provision concerning the scope of certificates to be made available on handover of a vessel. In *Caboex SA v Louis Dreyfus Commodities Suisse SA*,[178] arbitrators who decided to construe a clause limiting the circumstances in which demurrage might be claimed *contra proferentem* were held to have erred in law.

In *Milan Nigeria Limited v Angeliki B Maritime Company*,[179] an arbitral tribunal was found to have erred in law in holding that, despite breaches of contract in respect of the loading, carrying and care of the cargo and/or the state of the vessel by the owners of the vessel, cargo owners bore the burden of proving that the owners of

[175] Ibid at para 21. See, in contrast to the decision of Gloster J, *Harvey v Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: 0MA40077) 21 December 2011, unreported, where HH Judge Hegarty QC, at para 38, considered that the application of the principle of *res ipsa loquitur* to shift the burden of proof was a rule of evidence, not a rule of law. At para 38, HH Judge Hegarty stated: 'it is for the arbitrator in arbitral proceedings to weigh the evidence and make any necessary findings of fact, whether on the basis of direct evidence or by inference. It does not seem to me, therefore, that a failure to adopt the approach enshrined in the maxim [*res ipsa loquitur*], if such be established, can amount to an error of law. Even if the position had been different under the previous law and procedure, the matter would now seem to have been put beyond any real doubt by virtue of the provisions of s 34(2)(f) of the Arbitration Act 1996. In reality, if the court were to interfere with the arbitrator's determination, it would simply be substituting its own assessment of the evidence for that of the arbitrator.'

[176] [2011] ArbLR 44. See, as well, *Harvey v Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: 0MA40077) 21 December 2011, unreported, where HH Judge Hegarty QC, at para 22, 'doubt[ed] if even a total absence of any evidential basis for a finding of fact can give rise to a question of law for the purposes of section 69 of the Arbitration Act 1996, though it might conceivably amount to a serious irregularity under section 68(2)(a) . . .'

[177] *The 'Rewa'* [2011] EWHC 894. Upheld by the Court of Appeal [2012] EWCA Civ 153. See also *RG Grain Trade LLP (UK) v Feed Factors International Ltd* [2011] EWHC 1889 where a GAFTA Appeal Board was held to have erred in law in concluding that buyers were entitled to reject documents (and goods) and that the issue should be remitted to the Board.

[178] [2011] EWHC 1165. See also *Pacific Basin IHX Ltd v Bulkhandling Handymax* AS [2011] EWHC 2862, where arbitrators' interpretation of the meaning of the words 'may be, or are likely to be, exposed to War Risks' in a CONWARTIME 1993 provision incorporated into a time charter was held to be in error with the result that the award was remitted, after an additional hearing ([2012] EWHC 70), to the arbitrators for further findings of fact in order to determine whether in the reasonable judgment of the owners, there was a real likelihood that the vessel would, on account of acts of piracy, be in danger.

[179] [2011] ArbLR 24.

the vessel were not entitled to rely on the exceptions in art IV rule 2 of the Hague Rules.

Arbitrators committed no error of law in deciding that it was not a breach of an arbitration agreement for a party to a London arbitration to apply for security by way of a Rule B attachment in New York.[180] Nor did arbitrators who construed a charter party as a time, and not a voyage charter, in *Ispat Industries Ltd v Western Bulk Pte Ltd*, err in law.[181] References in the contract documents to the 'intended voyage' and the 'intended cargo' were not sufficient to make the charter party a voyage charter. Majority arbitrators made no error of law in failing to hold that the owner of a vessel was precluded from recovering on ground of remoteness based on an assumption of responsibility.[182]

The courts disagreed with the measure of damages applied by arbitrators in *Glory Wealth Shipping Pte Ltd v Korea Line Corporation*.[183] When charterers returned a vessel to the ship owners after only five months of a thirty-six month time charter, arbitrators awarded both actual and market damages. The court held that the arbitrators were not entitled to award market damages where it was accepted that there was no market during the relevant period. For Blair J, the arbitrators had impermissibly departed from the principle that damages were only recoverable to return the injured party to the same position it would have been in if the contract had been performed:

> The distinguished maritime arbitrators who decided this matter sought to reach a practical result. They did not however have the benefit of the *Zodiac* decision in their deliberations. I have carefully considered whether the Award should be upheld on the ground suggested by Mr Lewis, namely it was a reasonable valuation of the Owners' loss in the circumstances. But the arbitrators approached the matter as one of principle, and on this appeal the court must do likewise.[184]

## XIII. Enforcement

There were no successful challenges to enforcement of awards, although enforcement was adjourned in one matter. The courts had to consider questions of parallel proceedings and the grant of 'declaratory' decisions as to jurisdiction.

### A. Declaratory Awards

The English courts granted permission to enforce awards of merely declaratory, as opposed to monetary, relief in order to secure the benefit of the award in circumstances where competing court proceedings were underway in other jurisdictions.

[180] *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] ArbLR 3.
[181] Ibid.
[182] Ibid.
[183] *The 'Wren'* [2011] EWHC 1819.
[184] Ibid at para 30.

An application to set aside an order for permission to enforce a declaratory award was successful in *The Front Comor*.[185] Enforcement was sought for the purposes of establishing primacy over any decision by Italian courts arising out of the same controversy, the European Court having earlier precluded the English courts from injuncting the proceedings in Italy. For Field J, the purpose of ss 66(1) and (2) was to allow a successful party to obtain the benefit of an arbitration award. Where the prevailing party's objective was to establish the primacy of a declaratory arbitration award over an inconsistent judgment, the court had jurisdiction to make an order to enforce. The court's role was to 'make a positive contribution to the securing of the material benefit of the award'.[186]

In *African Fertilizers v BD Shipsnavo*,[187] English courts had already injuncted a Romanian arbitration and declared arbitration proceedings and litigation commenced by African Fertilizers in Romania to be in breach of a London arbitration agreement. Shipsnavo applied for enforcement of the English award to preclude the enforcement of any decision rendered by the Romanian courts under art 34 of the Brussels Regulation 44/2001. On foot of an English court decision, Shipsnavo intended to resist enforcement of any inconsistent judgment by Romanian courts. Beatson J declined to draw a distinction between 'recognition' and enforcement. Following the decision of Field J in *West Tankers*, he considered that Shipsnavo was entitled to the benefit of the award. The court also rejected an argument that enforcement of a declaratory award under s 66 of the Arbitration Act would not constitute a 'judgment' within the meaning of art 34 of the Brussels Convention. For Beatson J, the English court could not grant permission to enforce and then be required to recognise and enforce a foreign decision which undermined or contradicted the award.

The Court of Appeal considered the issue on appeal from the decision of Field J in *West Tankers*.[188] In upholding the lower court, and approving the reasoning of Beatson J in *African Fertilizers*, the Court of Appeal, per Toulson LJ, confirmed judicial support for 'the efficacy of any award by an arbitral body'. [189] A negative declaratory decision by arbitrators was enforceable. A broad interpretation of 'enforced' was consistent with the purpose of the act and 'the way in which arbitration works'.[190] The enforcement of a judgment or an award was 'the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established'.[191]

[185] [2011] ArbLR 37.
[186] Ibid at para 28.
[187] [2011] ArbLR 40.
[188] [2012] EWCA Civ 27.
[189] Ibid at para 36.
[190] Ibid.
[191] Ibid.

## B. Freezing Orders

In *Mobile Telesystems Finance SA v Nomihold Securities Inc*,[192] the Court of Appeal allowed an appeal from a decision at first instance which had refused to vary a freezing order to allow payments of interest to note holders. The Court of Appeal held that a party could not be treated as a judgment debtor while a challenge to the registration of an LCIA award was pending. The freezing order granted for enforcement of the award should, therefore, contain an 'ordinary course of business' exception. Payment of interest owing to note holders was not a dissipation of assets aimed at avoiding enforcement. Nor was it the purpose of a freezing order to confer a preference for repayment from an insolvent party.

## C. Parallel proceedings

In *Dowans Holdings SA v Tanzania Electric Supply Co*,[193] English courts adjourned enforcement of an ICC award on the basis of appeal proceedings brought against the merits of the award in the place of arbitration, Tanzania, despite finding that the final and binding nature of the award was a question to be determined by reference to whether a UK court was in a position to recognise and enforce it (not how the matter might be regarded by a Tanzanian court). Burton J concluded that the award remained binding despite the applications in Tanzania on the basis 'not only of . . . the effect of the New York Convention, but by the predominant international view'.[194] Because the chances that Tanzanian courts would set aside the award on grounds of error of law on the face of the award were not fanciful, however, the court considered an adjournment of English enforcement proceedings to be justified.[195] In light of the conclusions reached by the court as to the final and binding nature of the award, it is not clear why adjournment followed as art III of the New York Convention requires that Member States 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon', ie, the United Kingdom.

The result in *Dowans Holdings* may be contrasted with *Yukos Capital Sral v OJSC Rosneft Oil Co*.[196] A decision by Hamblen J on two preliminary issues indicated that English courts might well chose to enforce an award set aside at the place of arbitration. Rosneft was found to be issue estopped from denying that the setting aside of awards in its favour by courts in Russia was the result of a judicial process which

[192] [2011] ArbLR 29. Permission to appeal granted by the Court of Appeal [2012] EWCA Civ 40 and 41.

[193] [2011] ArbLR 21.

[194] Ibid at para 24.

[195] See, in contrast to the approach taken in *Dowans Holdings*, the decision by the French Cour de cassation, 1ère civ 29 juin 2007, in *Société PT Putrabali Adyamulia c/ SA Rena Holdings*, to enforce an award which was subject to appeal on a question of law in England. The English courts upheld the appeal and ordered the award to be remitted to the tribunal which issued a second award. The French Supreme Court enforced the tribunal's first award.

[196] [2011] ArbLR 39. The decision was upheld, in part, [2012] EWCA Civ 855. The Court of Appeal decided that there was no issue estoppel in relation to findings by the Amsterdam Court of Appeal on the question of the independence of Russian courts in setting aside the award in Russia, a matter which fell to be determined by reference to English public policy.

lacked independence as a result of the decision by the Amsterdam Court of Appeal to enforce the award notwithstanding the setting aside in Russia.[197] The English court also found that it was not precluded by Act of State or non-justiciability from taking into account flagrant breaches of international law or human rights which formed the basis for exceptions to the principle of Act of State.

In *Sovarex SA v Romero Alvarez SA*,[198] the courts held that there was no requirement to enforce an award by an action on an award, even where the defence raised questions of fact. In dispute was an alleged contract governed by English law which referred disputes to arbitration in England under FOSFA rules. Alvarez contended that no contract had been concluded and commenced court proceedings in Spain. The Spanish courts dismissed an application by Sovarex for a stay of their proceedings in favour of the arbitration agreement, but also declined a request by Romero for a negative declaration that no contract existed. As the right to object to the jurisdiction of the tribunal had not been lost, Hamblen J directed a proceeding for the determination of the issues.

Hamblen J considered that there was no interference with the Spanish proceedings as the courts in Spain had taken the position that they would not determine the existence of the contract. Nor did the decision of the Spanish courts give rise to issue estoppel, as they had not decided the existence of the arbitration agreement. Since England was the 'seat' of the arbitration, the English courts ought to determine the validity of the arbitration agreement.

### D. Effect of Arbitration Award

The court had to decide the status of partial awards in circumstances where the final award was never published in *Rotenberg v Sucafina SA*.[199] Eder J held that the tribunal had the power to make final partial awards which would stand if the final appeal award was not published.

## XIV. Conclusions

It is apparent from judicial decisions in 2011 that the full potential of the Arbitration Act 1996 is still not being exploited as English courts continue to struggle with the principles of separability and *compétence-compétence*. These emerge weakened with the assumption by the courts of authority to intervene to determine arbitral jurisdiction before an award is issued even where proceedings are seated abroad.

Adherence to a policy of judicial support for 'the efficacy of any award by an arbitral body'[200] is not yet matched by a similar doctrine in relation to the enforcement of arbitration agreements, although both are obligations which the English courts assume under the New York Convention. As a result of judicial pre-emption of

[197] Court of Appeal of Amsterdam, 28 April 2009, LJN B12451.
[198] [2011] ArbLR 31.
[199] [2011] ArbLR 14. Upheld by the Court of Appeal [2012] EWCA Civ 637.
[200] *West Tankers*, per Toulson LJ [2012] EWCA Civ 27 at para 36.

arbitral jurisdiction, the formation of arbitration agreements continues often to be assessed with reference to domestic English norms governing contract formation, including rules of evidence and procedure, which may be irrelevant to an international tribunal. Insufficient account is taken of the formal requirements for an arbitration agreement enshrined in the Arbitration Act and the intentions of that legislation to reform English arbitration law in line with international practice.

The English courts are not assisted by the lack of a coherent approach to arbitration or international arbitration, as distinct from domestic litigation. A restricted normative reference and the courts' assumption of a full—and extraterritorial—review of arbitral jurisdiction at the early stages of an arbitration has led to an increased willingness to injunct arbitration and override allocations of jurisdiction set out in the New York Convention.

In their interpretation of the Arbitration Act, the lower courts appear to have moved away from their earlier use of the UNCITRAL Model Law in preference to a technical and literal approach to the statutory provisions.

The appeal on questions of law regime continues to be uncertain and problematic with the courts adopting inconsistent approaches in procedure and application.