

THE ARBITRATION ACT 1996

A COMMENTARY

FIFTH EDITION

Bruce Harris, Rowan Planterose
& Jonathan Tecks

PUBLISHED IN ASSOCIATION WITH
THE CHARTERED INSTITUTE OF ARBITRATORS

WILEY Blackwell

Contents

<i>Biographical Note</i>	viii
<i>Foreword to Fifth Edition</i>	ix
<i>Preface to Fifth Edition</i>	xi
<i>References and Abbreviations</i>	xiii
1. Materials	1
A. Arbitration Clauses	1
B. Agreements Prior to or on Constitution of Arbitration	3
C. Agreements as to Tribunal and Court Powers	8
D. Checklist for Preliminary Meetings	10
E. Agreement with Arbitrator on Resignation	13
F. Checklist for Awards	14
G. Agreements as to Costs	16
H. General Note on Arbitration Claims	17
2. The Arbitration Act 1996	21
Text of the Act and Commentary	21
Arrangement of Sections	23
3. Appendices	509
The Arbitration Act 1996 (Commencement No. 1) Order 1996	511
The Unfair Terms in Consumer Contracts Regulations 1999	513
The Arbitration Act 1950, Part II	523
<i>Table of Cases</i>	531
<i>Index to Commentary</i>	547

[1B] Summary

This section sets out the general principles on which this Part of the Act is founded and by reference to which the courts must construe the Act.

Points

[1C] Interpretation

It is unusual for a statute expressly to formulate its founding principles in this way. Having done so, these principles are essential to its construction. Where, for example, the meaning of any section in Part I has to be considered because it leaves room for doubt or is open to more than one interpretation, these principles provide the basis for interpretation.

In another respect, too, the Act breaks new ground. If the meaning of any section has to be considered in connection with the 'mischief' which it was designed to remedy, the Report of the Departmental Advisory Committee on Arbitration Law of February 1996, which gives a succinct account of how and why each section was formulated, provides a readily accessible external source of interpretative material. Hereafter we refer to this Report as the DAC Report.

Although not a statute, the Civil Procedure Rules (CPR) have similarly set out an 'Overriding Objective' in r.1.1. R.1.2 of the CPR requires the court to seek to give effect to that objective when exercising any powers under the CPR and in the interpretation thereof.

[1D] Object of arbitration — S.1(a)

Whilst there is no attempt to define arbitration, its object is set out, in the first principle, as being the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. This aim is taken up at s.33 where positive obligations are placed on the tribunal to act fairly and impartially and to adopt procedures which provide a fair means for the resolution of the matter to be determined.

In *Jitraj v. Hashwani* [2011] 2 Lloyd's Rep. 513 the Supreme Court considered the nature of an arbitrator's role and, in particular, his relationship with the parties, in the context of anti-discrimination legislation. It held that the role was not one of employment under a contract personally to do work since, although he rendered personal services which he could not delegate, he did not perform those services under the direction of the parties. On the contrary, he was an independent provider of services who was in no sense in a position of subordination to the parties but was, in effect, a 'quasi-judicial adjudicator'. In England his role was spelt out in the 1996 Act. Insofar as it was relevant, the dominant purpose of appointing an arbitrator was the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.

There is, deliberately, no express requirement of independence on the part of the tribunal. (As to the independence of the tribunal in the international context

see paragraph 24I; and in the context of statutory arbitrations, see paragraph 96D.) However an arbitrator may be removed on several grounds, including circumstances giving rise to justifiable doubts as to his impartiality and a failure or refusal on his part to conduct the proceedings properly (see s.24, and our commentary at paragraph 24C).

At s.40 there is a corresponding duty placed on the parties to do all things necessary for the proper and expeditious conduct of the proceedings. This latter section is backed up by powers to make peremptory orders (ss.41 and 42), and by sections such as s.73 which provide for the loss of certain rights in the event of delay.

In similar vein, r.1.1 of the CPR requires the court to deal with cases 'justly and at proportionate cost'. This includes

- (1) ensuring that the parties are on an equal footing;
- (2) saving expense;
- (3) dealing with the case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party;
- (4) ensuring that the case is dealt with expeditiously and fairly.

In our view the intention of both the Act and the CPR is similar, and the modern arbitrator should have at least half an eye on these provisions of the CPR, whilst not feeling constrained to follow them.

[1E] Party autonomy — S.1(b)

The second principle is that of party autonomy, or leaving the initiative, as far as possible, with the parties themselves. The principle that parties are free to choose their procedure is also a fundamental basis of the Model Law, and is equally to be found in international arbitration, (see International Chamber of Commerce (ICC) Rules Art.22 and London Court of International Arbitration (LCIA) Rules Art.14). Art.19(1) of the Model Law provides:

'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.'

This principle is reflected in the Act in a number of ways. Most significantly, apart from certain mandatory provisions (which apply in all cases, and to that extent limit party autonomy) the provisions of Part I of the Act are non-mandatory, giving the parties the opportunity to make their own choices wherever possible, and only coming into play if they do not do so, (see s.4). To a large degree, the parties can control the format of the arbitration, and consequently the cost and speed with which it is to be conducted.

We should draw particular attention to s.34 which provides that all procedural and evidential matters are for the tribunal to decide 'subject to the right of the parties to agree any matter'. This section alone gives the parties considerable scope for imposing procedures on the tribunal. We comment in paragraph 33H on the potential conflict between party autonomy, as expressed through the exercise of s.34 rights by the parties, and the tribunal's duty to adopt procedures suitable to the circumstances of the particular case, as expressed in s.33.

In *Fulham Football Club (1987) Ltd v. Sir David Richards and Ors* [2011] EWCA Civ 855, the Court of Appeal (Longmore and Rix LLJ; Patten LJ doubting this view) observed, *obiter*, that s.1(b) was not confined to the method of conducting the dispute within the arbitration itself, but was also concerned with the overarching issue of arbitrability. In this context, the role of public policy as a 'safeguard ... necessary in the public interest' was a demanding test. It followed that the principle of party autonomy applied to the choice to arbitrate – i.e. which disputes to refer to arbitration – as well as to the way the arbitration was conducted. (See paragraph 9C for a fuller discussion of this case.)

In order further to encourage party autonomy, the Act is drafted in a 'user-friendly' way, using simple language, avoiding obscure terminology and adopting provisions that are complete in themselves and do not require reference to other sources to be fully understood.

[1F] **Court intervention — S.1(c)**

The third principle deals with the role of the court. Art.5 of the Model Law provides that, 'In matters governed by this Law, no court shall intervene except where so provided in this Law'. S.1(c) therefore follows the Model Law in restricting the circumstances in which the court may intervene in arbitrations. These are broadly confined to where the court's powers support the arbitral process, for instance under s.44, or correct manifest injustice, for instance in the retention of a limited appeal process.

This sub-section was referred to in relation to an application for a declaration that there was a binding arbitration agreement in *Vale do Rio Doce Navegação SA v. Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1: see paragraph 18J below.

In *Holloway and Ors v. Chancery Mead Ltd* [2007] EWHC 2495 (TCC) Ramsey J held that there was nothing in s.1(c) that prevented the court from determining whether the contract imposed an obligation on a party to submit their dispute to a dispute resolution procedure operated by the NHBC before commencing arbitration.

It is also to be noted that the principle of non-intervention is restricted to 'this Part' of the Act. It would not appear, therefore, to apply to consumer arbitration agreements, as set out in Part II. This is plainly consistent with the wide-ranging protection given to consumers under the Unfair Terms in Consumer Contracts Regulations 1999 (as to which see the general note at paragraph 89GN).

[1G] **Rules**

Consistent with the style of drafting that contains an objective, CIMAR Rule 1.2 provides that the objective of the Rules is to provide for the fair, impartial, speedy, cost-effective and binding resolution of construction disputes. By Rule 1.7 the Rules do not exclude the powers of the court, nor any agreement between the parties concerning those powers. By Rule 1.3, after an arbitrator has been appointed under the Rules, the parties may not, without the agreement of the arbitrator, amend the Rules or impose procedures in conflict with them. For our part, in the light of section 1(b) of the Act, we think the enforceability of Rule 1.3 is open to question. Art.1.2 of the Chartered Institute of Arbitrators (CIArb)

Rules contains a similar provision and must therefore be subject to the same reservation.

Rule 1.1 of the Institution of Civil Engineers (ICE) Arbitration Procedure recites the object of arbitration in the terms of s.1(a). There is no attempt *per se* to limit s.1(b), but Rule 23.3 provides that:

'If after the appointment of the Arbitrator any agreement is reached between the parties which is inconsistent with this Procedure the Arbitrator shall be entitled upon giving reasonable notice to terminate his appointment, and shall be entitled to payment of his reasonable fees and expenses incurred up to the date of termination.'

As we have intimated above, the principle of party autonomy prevails in international arbitration. Thus Art.14.1 of the LCIA Rules provides that the parties are encouraged to agree on the conduct of their arbitral proceedings (within the confines of the tribunal's s.33 duties) and the ICC Rules (Art.19) permit the parties to settle on other rules (the IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration, for example) where the ICC Rules are silent.

Section 2 — Scope of Application of Provisions

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

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

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

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

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

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

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

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

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

Definitions

- 'arbitration agreement': ss.6, 5(1).
- 'the court': s.105.
- 'legal proceedings': s.82(1).

- 'party': ss.82(2), 106(4).
- 'seat of the arbitration': s.3.

[2A] Status

This is a new provision in the sense that the 1950 Act contains no equivalent. It reflects Art.1(2) of the Model Law. See our comment as to the mandatory/non-mandatory status of ss.1 to 6 at paragraph 1A.

[2B] Summary

This section sets out the scope of application of Part I of the Act. The section was evidently difficult to draft, and there were several attempts to reach a satisfactory solution. In the end, the scope of this Part of the Act is based on the concept of the 'seat' of the arbitration, so that in general Part I applies to arbitrations where the 'seat' of the arbitration is in England, Wales or Northern Ireland. The 'seat' is defined in s.3. It is designated either by the parties to the arbitration agreement, or by an institution or third party with such power, or by the arbitral tribunal if authorised by the parties, or lastly (in the absence of a designation) by the court.

Certain sections of Part I apply even if the seat is outside England, Wales or Northern Ireland, but the Act refrains from trespassing upon other jurisdictions by exercising powers in relation to arbitrations abroad other than in a very limited and necessary way, even if the parties have chosen English law as the substantive law.

Points

[2C] Importance of identifying the seat — Subs.(1)

Part I of the Act applies without exception where the seat of the arbitration is in England, Wales or Northern Ireland.

Since 'seat' is carefully defined, and to avoid complexities arising under s.3, it seems to us important that parties to an arbitration agreement to which the Act is intended to apply should specifically provide that the seat of the arbitration is agreed to be in one of those countries.

In *C v. D* [2008] 1 Lloyd's Rep. 139 the Court of Appeal held that where parties had chosen London as the seat of the arbitration (with English arbitration law as the 'curial' law), and New York law as the law governing substantive issues, they must be taken to have agreed that proceedings on the award should be only those permitted by English law. Choice of seat of the arbitration was also a choice of forum for remedies seeking to attack the award, and was analogous to an exclusive jurisdiction clause.

[2D] Stay and enforcement — Subs.(2)

Certain sections of Part I concerning, for example, a stay of legal proceedings and enforcement of the arbitral award, apply irrespective of the location of the seat. Thus any legal proceedings brought in England, Wales or Northern Ireland may be stayed, pursuant to s.9, in favour of an arbitration agreement that provided for arbitration in, say Switzerland; and any resulting Swiss award may, pursuant to s.66, be enforced in England, Wales and Northern Ireland; notwithstanding that the seat of the arbitration was designated as Switzerland.

This subsection ensures that the United Kingdom's obligations under the New York Convention on the Recognition and Enforcement of Foreign Awards are fulfilled. As to these generally, see the commentary on Part III of the Act.

See, in this context, *A v. B* [2006] EWHC 2006 (Comm.) (which concerns the full application in *Weissfisch v. Julius*, below, cited anonymously), relating to an

arbitration that was unquestionably agreed to have its seat in Switzerland and to be governed by Swiss law. The respondent (a party to the arbitration agreement who brought the arbitration claim) sought a declaration that the arbitration agreement and all orders or awards made under it were void and unenforceable. He claimed (amongst other things) an injunction against the arbitrator preventing the latter from continuing to take any steps or exercise any jurisdiction as arbitrator, and damages against the arbitrator and other parties to the arbitration agreement for breach of contract or duty or misrepresentation. The arbitrator applied for a stay of this claim, and the other applicants — who included other parties to the arbitration agreement — asked for the claim and service of it upon them (which had been effected outside the jurisdiction) to be set aside.

Colman J held that there had to be strong cause or reasons in the interests of justice for the English courts to restrain a foreign arbitral tribunal from proceeding with the reference where the courts of a foreign jurisdiction had been agreed to be exclusively vested with that function (which was the effect of the arbitration agreement in this case). For the English courts to determine the threshold issue of substantive jurisdiction would not only be contrary to the parties' agreement as to the seat of the arbitration but would also represent a serious judicial invasion of international arbitral territory. No strong cause or reason in favour of the respondent's arbitration claims against the arbitrator having been shown in this case, they were accordingly stayed, the court having an inherent jurisdiction in this regard. The personal claims against the arbitrator were also stayed on case management grounds, and those against the other applicants were set aside because of the likelihood of a stay being granted under s.9 (in order to permit the arbitrator to determine his own jurisdiction) had they not been.

Note that in the related costs application cited as *A v. B* [2007] EWHC 54 (Comm.), Colman J awarded the successful applicants their costs on the indemnity basis. If costs were confined to the standard basis, there would be an unindemnified portion of loss which, on the authorities, would be unrecoverable since the cause of action claiming them as damages for breach of the arbitration agreement would effectively be repeating the cause of action for the original relief. That outcome would be fundamentally unjust. Costs incurred in successfully seeking relief for breach of an arbitration or jurisdiction clause should normally be recoverable on the indemnity basis.

[2E] **Powers in support of foreign arbitrations — Subs.(3)**

The powers referred to in this subsection (which supersedes parts of s.25 of the Civil Jurisdiction and Judgments Act 1982) apply notwithstanding that the seat is not in England, Wales or Northern Ireland. This means that if the seat were in, say, Switzerland, and subject to the discretion set out in the latter part of subs.(3), the court might order United Kingdom-based witnesses to attend a hearing being conducted in England, Wales and Northern Ireland, (s.43). It might also exercise powers under s.44, for example as to the preservation of evidence and assets, the inspection (etc.) of property, and the issuing of interim injunctions.

The exercise of these powers is, by the proviso, a matter of 'appropriateness'. Thus we would, for example, think it quite appropriate that the court accede to a request by a party to an arbitration, the seat of which is in Switzerland, that there be an inspection of property in the hands of one of the parties in England in the event that the Swiss courts could not act effectively: (s.44(2)(c) and (5)). We would also think it possible that the court might issue an injunction restraining one of the parties in this country from dealing with property that might be dissipated in this country, when the seat was elsewhere.

In *Weissfisch v. Julius and Ors* [2006] 1 Lloyd's Rep. 716, in the context of an application to stay English proceedings (for our comment on which, see *A v. B*, above), and in relation to an arbitration that was unquestionably agreed to have its seat in Switzerland and to be governed by Swiss law, the Court of Appeal declined to issue an interim injunction to restrain the arbitrator from considering his own jurisdiction. It held that in accordance with principles of the law of international arbitration recognised by the 1996 Act, any issues as to the validity of the unusual provisions of the arbitration clauses would fall to be resolved in Switzerland according to Swiss law. For the English court to restrain an arbitrator under an agreement providing for arbitration with its seat in a foreign jurisdiction would infringe those principles. Although exceptional circumstances might justify the court in taking such action, no such circumstances were shown on an interim basis.

[2F] **No seat — Subs.(2), (3)**

The provisions in subs.(2) and (3) apply notwithstanding that no seat has been designated or determined. Unless the seat is designated in the arbitration agreement, there may be a period, which could be considerable, between the commencement of the arbitration, (s.14), and identification of the seat. Alternatively, the arbitration may not have started at all but the court's assistance may be required, for instance under s.44. Hence this provision.

It leads, of course, to a complexity in the proviso to subs.(3) in that where no seat has been designated or determined, the court, in making its assessment of appropriateness, must prejudge as best it can the likely outcome of the designation or determination process.

[2G] **Powers where no seat elsewhere — Subs.(4)**

The court may also exercise any other power it has within Part I of the Act in support of an arbitration *before* the seat has been designated or determined, where it is appropriate to do so by virtue of a connection with England and Wales or Northern Ireland. If there is no seat elsewhere, then there is no risk of a conflict with other jurisdictions. The required domestic connection may well be the likelihood that the seat of the arbitration will be in England, Wales or Northern Ireland.

One of the most likely uses of this power is where an appointment procedure has begun, but failed. Thus the powers likely to be relevant prior to designation or determination of the seat would appear to be those in s.12 (power of court to extend time for beginning arbitral proceedings); s.17(3) (power of court to set aside appointment of sole arbitrator in default); s.18 (failure of appointment

procedure); s.24 (power of court to remove arbitrator); and s.32 (power to determine preliminary point of jurisdiction).

An illustration of the application of s.2(4) appears in *Chalbury McCouat International Ltd v. P.G. Foils Ltd* [2011] 1 Lloyd's Rep. 23. One of the parties sought the assistance of the court under s.18 in circumstances where no seat had been stated. In answering the question whether there was a sufficient connection with England for the court to be satisfied that it was appropriate to exercise its powers under s.18, Ramsey J held that links through the likely proper law of the contract (English law), the closer connection to the seat of arbitration (which was likely to be in Europe, and possibly England, but was unlikely to be in India) and the payment provision under the contract (in England), provided sufficient connection for the court to act under the 1996 Act.

[2H] **Provisions where English law applies — Subs.(5)**

s.7 (separability of the arbitration agreement) and s.8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland, regardless of where the seat of the arbitration may be, and regardless of whether or not a seat has yet been identified. It is important to note that what is relevant here is the law applicable to the arbitration agreement. This may differ from the law applicable to the substance of the dispute, (as to which, see s.46).

The subsection has the effect that wherever an arbitration agreement may be litigated (or arbitrated), if, according to that other state's conflict of laws rules, it is subject to the law of England and Wales or Northern Ireland, the arbitration agreement shall be treated as a distinct agreement that is separable from the main agreement, (s.7), and that will not be discharged by the death of a party, (s.8). The application of these sections regardless of the location of the seat is designed to preserve the original choice of the parties to submit their disputes to arbitration. The importance of the former is obvious; the latter prevents the revival of the common law rule that an arbitration agreement is discharged by the death of a party. Since the Act repeals earlier legislation abrogating this rule it would revive unless specifically dealt with.

[2I] **Model Law**

The Model Law has a similar, but less detailed provision. Art.1(2) provides:

'The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.'

Art.8 provides for a stay of legal proceedings to arbitration (as in s.9); Art.9 provides for interim measures of protection granted by a court (as in s.44); Arts.17H and 17I provide for the recognition and enforcement of interim measures issued by an arbitral tribunal (as to which there is some comparability with s.38, although the tribunal's powers under Art.17 of the Model Law are more extensive); Art.17J makes further provision for court-ordered interim measures; and Arts.35 and 36 provide for recognition and enforcement of awards.

Section 3 — The Seat of the Arbitration

3. In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated—

- (a) by the parties to the arbitration agreement, or
- (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
- (c) by the arbitral tribunal if so authorised by the parties,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

Definitions

'agreement': s.5(1).

'arbitration agreement': ss.6, 5(1).

'party': ss.82(2), 106(4).

'seat of the arbitration': s.3.

[3A] **Status**

This is a new provision.

See our comment as to the mandatory/non-mandatory status of ss.1 to 6 at paragraph 1A.

[3B] **Summary**

This section defines 'the seat of the arbitration' which is used as the springboard for other important sections of the Act, including the scope and applicability of Part I. It is defined as the juridical seat as designated or, in the absence of designation, as determined. The 'juridical seat' is a concept independent of the place where the hearings or other parts of the arbitral process occur, which may not be the same (see paragraph 3C below). To know the seat of the arbitration may be vital for enforcement purposes, particularly in international arbitrations, and s.52(5) thus requires it to be stated in the award.

Points

[3C] **Location of the seat**

The seat may well be synonymous with the place where the arbitration is conducted. However, not all international arbitrations are conveniently conducted in one place, and not all awards are conveniently signed in one location. The Act thus provides for a constant juridical seat regardless of where the arbitration may be conducted (s.34(2)(a) in effect allows the tribunal freedom

of choice as to the location of hearings) or where the award is signed, despatched or delivered, as to which see ss.53 and 100(2)(b). The statement that 'the seat of the arbitration means the juridical seat of the arbitration' makes it clear that the location contemplated is a particular state or territory associated with a recognisable and distinct system of law: *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc* [2001] 1 Lloyd's Rep. 65.

[3D] **Statutory arbitrations**
 Note that statutory arbitrations are deemed to have their seat in England and Wales or Northern Ireland, as appropriate (s.95(2)). Thus for their purposes, the possibility of Part I not applying because of a designation or determination of the seat outside England and Wales or Northern Ireland is eliminated.

[3E] **Designation**
 The seat of the arbitration may be designated by the parties themselves, or by an authorised third party (such as an institution), or by the arbitral tribunal, if so authorised. It will clearly be most convenient if the parties designate the seat in their arbitration agreement, or agree its location once an arbitration has been commenced, (see s.14). It has been held that where parties agree the place of an arbitration pursuant to institutional rules (e.g. Art.7.1 of the 1985 LCIA Rules) it follows that such place is to be the seat of the arbitration: *ABB Lummus Global Ltd v. Keppel Fels Ltd* [1999] 2 Lloyd's Rep. 24. (Note that the position under the 1998 LCIA Rules is quite clear: Art.16 specifically refers to the seat of an arbitration. See also our comments in paragraph 3I below.)

In the absence of agreement by the parties it will next lie with an arbitrator or other institution vested by the parties with appropriate powers to make the designation. For instance, Art.18 of the ICC Rules provides:

The place of the arbitration shall be fixed by the [International] Court [of Arbitration] unless agreed upon by the parties.'

In the absence of either of these two methods of designation, the task will fall to the tribunal, if so authorised. For instance, Art.18(1) of the UNCITRAL Arbitration Rules provides: 'If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case.'

[3F] **Determination**
 If there is a failure of the process of designation, determination by the court may become necessary. For instance, the parties may need to know if Part I applies at all, or they may need to make an application to the court in respect of a power given to it in Part I. If so, and if no seat has been designated, it is likely to be necessary for a determination to be made by the court.

Some guidance as to the approach of the courts was given in *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc* (referred to at paragraph 3C above). It is apparent that the court will look at 'the parties' agreement and all the relevant circumstances'. This analysis will be done with reference to the point in time at

which the arbitration began, rather than at any later stage, since (*inter alia*) an arbitration must have had a seat at that time, and it would not be expected to change.

In *Arab National Bank v. El-Abdali* [2005] 1 Lloyd's Rep. 541 Morison J went further and, perhaps controversially, decided that England was the seat of the arbitration and the English court had jurisdiction despite having accepted the applicant's contentions that there was no arbitration agreement and that the arbitral award had been obtained by fraud, so that none of the provisions of s.3(a), (b) or (c) could apparently apply. Referring to the 'determination of the seat' as a sweeping up provision, he took various circumstances into account in reaching his decision. These included the fact that from the award, it did not appear that any law other than English was applicable, procedurally or substantively; the arbitrator held himself out as a Member of the London Court of International Arbitration (under whose rules London was presumed to be the seat of the arbitration in the absence of any agreement to the contrary); and steps required to publish and to enforce the award were to be taken in England.

Note the decision of Akenhead J in the case of *Braes of Doune Wind Farm (Scotland) Ltd v. Alfred McAlpine Business Services Limited* [2008] 1 Lloyd's Rep. 608, where he held that an apparent express choice of 'seat' by the parties, 'Glasgow, Scotland', must relate to the place in which the hearings should take place since, by all the other references, the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales. It followed that England and Wales was the true, juridical seat of the arbitration, being the jurisdiction whose laws would govern and control it; and the choice of a place where the arbitration was to be heard would not affect that determination.

Contrast the decision of Cooke J in *Shashoua and Ors v. Sharma*, [2009] 2 Lloyd's Rep. 376, to the effect that where an arbitration clause provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration should be London, United Kingdom, amounted to the designation of a juridical seat. The parties had not simply provided for the location of hearings to be in London for the sake of convenience (and there was, indeed, no suggestion that London would in itself be convenient). In *Enercon GmbH and Anor v. Enercon (India) Ltd* [2012] 1 Lloyd's Rep. 519, Eder J concurred with the approach in *Shashoua* and observed, *obiter*, that in respect of an arbitration clause which provided, 'The venue of the arbitration proceedings shall be London ... The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply', he would have reached the conclusion that the seat of the arbitration was London. The approach in *Shashoua* was also followed by Blair J in *U&M Mining Zambia Limited v. Konkola Copper Mines Plc* [2013] EWHC 260 (Comm.), where he held that a clause referring disputes to LCIA arbitration in London and further providing that 'the place of the arbitration shall be England ...' made it plain that the parties had agreed that the seat of the arbitration should be England. (However that conclusion did not prevent them from applying to a local court for interim measures supportive of the arbitration where their agreement to LCIA arbitration and the relevant LCIA rules made such recourse available.)

[3G]

Delay

Whilst we endorse the principle of identifying a 'seat' for the arbitration which operates as a springboard for other provisions and as a cornerstone of enforcement, the provision is complex and may be used as a source of delay. As we have suggested above, much the best course is for the parties to make an agreement. Otherwise, an alternative mechanism avoiding reference to the court is to be preferred.

[3H]

Model Law

Art.20(1) of the Model Law provides:

The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.'

The nature and purpose of this Article is similar to s.3, but the options are clearly more limited.

[3I]

Rules

CIMAR Rule 1.6 states that the Rules apply where the seat of the arbitration is in England and Wales or Northern Ireland. It does not follow that this is a designation of the seat. In contrast, Rule 23.2 of the ICE Arbitration Procedure states that where an arbitration is governed by the law of a country other than England and Wales or Northern Ireland the Procedure applies to the extent that the applicable law permits. We have covered the international rules in paragraph 3E above.

We have cited Art.18(1) of the UNCITRAL Arbitration Rules in that paragraph. Use of this Article will clearly satisfy the needs of s.3.

Section 4 — Mandatory and Non-mandatory Provisions

4.—(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the 'non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

Definitions

'agreement', 'agree': s.5(1).
'party': ss.82(2), 106(4).

[4A] Status

Although the 1950 Act contained some provisions which might fall away where there was contrary agreement, in this form this is a new provision central to the 1996 Act's operation.

See our comment as to the mandatory/non-mandatory status of ss.1 to 6 at paragraph 1A.

[4B] Summary

This section has the effect of rendering certain sections of Part I of the Act 'mandatory', in the sense that they cannot be overridden by agreement of the parties, whilst leaving others 'non-mandatory', so that agreement to the contrary may be made. It is fundamental to the scheme of Part I of the Act.

Points

[4C] **Effect**
The section reflects the principle of party autonomy declared in s.1(b), so far as practicable. Thus the majority of sections in Part I are in the 'non-mandatory' category. The parties have been given the freedom to make their own arrangements by agreement. Where they do not do so, rules set out in each of these sections apply by default.

The balance of the sections (listed in Sched.1) are, however, 'mandatory'. Mandatory status means that these provisions cannot be overridden by contrary agreement. The scope of party autonomy is thereby restricted. The mandatory sections are generally those which are fundamental to the Act's regime or its founding principles, as set out in s.1. Agreement contrary to such principles would undermine the contemplated arbitral process unacceptably.

Mandatory sections include such important supportive and regulatory provisions as the court's powers to stay legal proceedings (ss.9 to 11); to remove an arbitrator (s.24); to secure the attendance of witnesses (s.43); to enforce the award (s.66); and to deal with challenges to the award (ss.67 and 68). They also include provisions reflecting the basic tenets of the Act such as the duty of the tribunal to act fairly and expeditiously, (s.33), and the corresponding duty of the parties, (s.40).

[4D] **Application**
It should be borne in mind that the mandatory provisions of Part I only apply if Part I itself applies. It does so if the seat of the arbitration is in England and Wales or Northern Ireland, (s.2(1)). Thus, for instance, Part I would not be applicable to an arbitration concerning a contract the proper law of which was English, but where the seat of the arbitration was Scotland.

[4E] **Mandatory provisions — Subs.(1)**
It is vital to an understanding of the scheme of the Act to appreciate that mandatory provisions have effect 'notwithstanding any agreement to the contrary'.

Thus whether a conflicting provision is asserted by reason of specific agreement between the parties or because it is contained in rules adopted by the parties, it is ineffective. The same is, we think, true of any ancillary provision of the ineffective rule which would also be rendered ineffective, although the extent of that ineffectiveness may be debatable in each instance. We consider, however, that the ineffectiveness of some rules would not render the balance ineffective, and they would then form the arrangement contemplated by subs.(2).

[4F] **Non-mandatory provisions — Subs.(2)**
In respect of non-mandatory provisions, the parties may make their own arrangements by agreement, but the Act provides rules that apply in the absence of such agreement.

We originally thought that this system was, at least initially, likely to present considerable difficulty for lay parties and considerable scope for lawyers. However, we have seen no evidence that this has in fact been the case. There are

now many sets of rules compatible with the Act. Nonetheless, in our experience, in some *ad hoc* arbitrations the parties choose to rely on the default provisions of the Act. In those cases it still behoves the parties to check the consequences of so doing, and to make contrary agreements (if they can reach agreement on terms) where the default provisions do not meet their needs. The checklists we compiled for the first edition and which are repeated in this edition in Part 1, 'Materials', remain helpful.

It should be noted that comparison of the operative wording of some of the non-mandatory sections reveals that different formulae are used, with different consequences. For example, s.14 provides: 'The parties are free to agree when arbitral proceedings are to be regarded as commenced ... If there is no such agreement, the following provisions apply ...' Here, *any* agreement will oust *all* the default rules. By contrast, s.16 provides: 'The parties are free to agree on the procedure for appointing the arbitrator ... If or to the extent that there is no such agreement, the following provisions apply ...' Here the default rules continue to apply save to the extent that they are expressly contradicted or, presumably, obviously rendered inapplicable by contrary agreement.

[4G] **Institutional rules — Subs.(3)**

The first part of this subsection expressly contemplates the use of institutional rules as a means by which the parties may make their own arrangements. We would caution against the use of rules which have not been specifically drafted or adapted to suit the provisions of the Act, unless the parties or their representatives have carried out a close analysis of them against both mandatory and non-mandatory sections. There is currently a wide range of rules which take the Act into account.

An important question arises as to the effect of incorporating into an arbitration agreement rules which are silent on one or more of the topics covered by some provisions of the Act, e.g. ss.38 and 41. The answer depends on the proper reading to be given to s.4(2) and (3). In our view unless the incorporated rules or the parties' particular agreement expressly address the matter in question, the Act's default provisions apply. Otherwise, in the unlikely but possible situation where parties incorporated a set of rules that did not deal at all with any of the default powers given under the Act a tribunal would find itself without any of these powers. In our view that was neither the intention of Parliament, nor the intention that should be inferred from a proper reading of the words used.

[4H] **Agreement in writing**

The effect of s.5(1) is to require any agreement between the parties to be in writing if it is to be 'effective for the purposes of this Part'. It follows that agreements between the parties to change or make substitutions for the non-mandatory provisions of this Part must be in writing, as defined by s.5.

[4I] **Law applicable to agreement — Subs.(4)**

The law applicable to the agreement making the parties' arrangement in respect of a non-mandatory provision is immaterial.