**Arbitration: An English seat**

The seat of an arbitration and mandatory and non-mandatory provisions.

**Arbitration Act 1996**

Where an arbitration has its seat in England, Wales or Northern Ireland, the Arbitration Act 1996 (‘the Act’) provides a framework within which the arbitration will take place. One of the reasons that commercial clients like arbitration is their ability to determine their own procedural rules for the arbitration. This is generally true, but not without exception. The Act contains ‘mandatory provisions’. The parties cannot agree in a contract that these mandatory provisions will not apply. These mandatory provisions form a bridge between arbitration and the established legal system that facilitates arbitration and allows it to co-exist with the traditional court system, whilst still upholding the essence of British legal values and safeguarding the public interest. In this way, there is a logic behind each mandatory provision.

The remaining non-mandatory provisions of the Arbitration Act can be contracted out of by the parties (e.g. in the arbitration agreement or by choosing institutional rules) but will apply in the absence of any agreement to the contrary. They are in effect, “default” provisions. However, the Act is not a complete code of arbitration law and is supplemented by common law in areas the Act does not address. An updated Arbitration Act is due in 2025 which will retain the current framework and key rules.

**General Principles**

The general principles are set out in s. 1 of the Act, as follows:

- The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

- The parties should be free to agree how their disputes are resolved, subject only to **such safeguards as are necessary in the public interest**.

- In matters governed by this Part [of the Act] the court should not intervene except as provided by this Part.

The arbitrator’s general duty is in s. 33 of the Act and governs how arbitrators are to carry out all aspects of their role. It provides:

*“The tribunal shall -*

*a. act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and*

*b. adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”.*

**Mandatory Provisions 1**

The general principles of arbitration are ensured through ‘Mandatory Provisions’ in the Act that no party may contract out of (if the arbitration has its seat in England). The Mandatory Provisions are listed in Schedule 1 of the Act:

sections 9 to 11 (stay of legal proceedings)

section 12 (power of court to extend agreed time limits)

section 13 (application of Limitation Acts)

section 26(1) (effect of death of arbitrator)

section 24 (power of court to remove arbitrator)

section 28 (liability of parties for fees and expenses of arbitrators)

section 29 (immunity of arbitrator)

section 31 (objection to substantive jurisdiction of tribunal)

section 32 (determination of preliminary point of jurisdiction)

section 33 (general duty of tribunal)

section 37(2) (items to be treated as expenses of arbitrators)

section 40 (general duty of parties)

section 43 (securing the attendance of witnesses)

section 56 (power to withhold award in case of non-payment)

section 60 (effectiveness of agreement for payment of costs in any event)

section 66 (enforcement of award)

sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections

section 72 (saving for rights of person who takes no part in proceedings)

section 73 (loss of right to object);

section 74 (immunity of arbitral institutions, &c.)

section 75 (charge to secure payment of solicitors’ costs)

**Mandatory Provisions Explained**

**The following page explain some of the mandatory provisions of the Act.**

**The arbitrator’s duties – s. 33**

As mentioned above, s. 33 of the Act is a mandatory provision and states the general duty of the arbitrator to act fairly and impartially and to avoid any unnecessary delay or expense.

**The parties’ duties – s. 40**

Similarly, the parties also have duties imposed upon them by s.40. This ensures their proper participation in the arbitration.

Both in preparing for the hearing and during the hearing itself the parties must comply with s. 40 of the Act. This states that:

“*The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings*”.

**Staying legal proceedings - Mandatory Provisions ss 9-11**

Even though there may be an arbitration agreement in existence, some parties still commence court proceedings when disputes arise. This happens when a party does not appreciate that its contract with the other side contains an arbitration agreement or when it believes it will gain an advantage by litigating rather than arbitrating.

If this happens, the purported defendant who wants to arbitrate must:

- Acknowledge service of the particulars of claim (or claim form in the Commercial Court) to stop the purported claimant from obtaining default judgment under CPR 12. In the acknowledgement of service form, they should indicate that they are contesting the court’s jurisdiction.

- Apply to the court under CPR 62.8, asking the court to stay the proceedings pursuant to s 9 of the Act so that they can be dealt with by arbitration. It is important that the purported defendant does not take any other steps in the court proceedings – if he does, he may be treated as having “submitted” to the court’s jurisdiction.

Note that CPR 11 (disputing the court’s jurisdiction) does not apply to arbitration claims falling within s. 9 of the Act. There is no specific time limit within which the application to stay should be made after the acknowledgement of service has been filed, though it should probably be done at or before the time for service of the defence.

The court is obliged to grant a stay unless it finds that the arbitration agreement is “null and void, inoperative or incapable of being performed”: see s. 9(4) of the Act.

This mandatory provision facilitates the co-existence of litigation and arbitration.

**Arbitrator’s fees – s 56**

Section 56 stipulates that “[t]he tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators”.

**The Court’s Involvement in Arbitration**

As mentioned in the element introducing arbitration, an arbitral award is ‘final and binding’ subject only to closely defined statutory rights of challenge or appeal. Under the Act, these are as follows:

**Challenging and appealing an award – ss 67 and 68 (and non-mandatory provision s 69)**

There are two basic types of challenge of an arbitrators’ decision - a challenge on jurisdiction (s. 67) and a challenge for serious irregularity (s. 68). These are explained more below.

**Issues of jurisdiction – s 67**

S. 67 of the Act is mandatory and as such it cannot be contracted out of or excluded by the parties. It gives a party the right to apply to the court to challenge an award on the grounds of lack of jurisdiction ie the arbitrator did not have the authority to make the award which they did (jurisdiction is explained in s.30(1)).

The court may:

- confirm the award;

- vary the award; or

- set the award aside (in whole or part).

Such applications are often made on the basis that the arbitration agreement is not binding or is void for ambiguity or that the arbitrator lacks the jurisdiction to deal with issues covered by his award.

A challenge under s 67 will involve a full rehearing of the facts and law by the court. In practice, it is difficult to meet the threshold required to have an award set aside.

**Serious irregularity – s 68**

It is possible to challenge the arbitrator’s award on the basis of a serious irregularity under s. 68 (which is another mandatory provision). S. 68 defines a serious irregularity as any of the following, but only to the extent that the serious irregularity has also caused or will cause ‘substantial injustice’ to the applicant:

- the tribunal failing to comply with the general duties under s. 33;

- the tribunal exceeding their powers;

- failing to follow agreed procedures;

- failing to deal with all the issues;

- uncertainty or ambiguity as to the award’s effect;

- obtaining an award by fraud;

- being contrary to public policy (either the award itself or the manner in which it was obtained);

- failing to comply with the required formalities for the award; or

- an admitted irregularity in the conduct of the proceedings.

**Appeal on a Point of Law – Non-Mandatory s 69**

It is also possible to make an appeal on a point of law arising out of the arbitration (s. 69), assuming the parties have not contracted out of this provision. In practice, it is common for parties / rules to exclude s. 69. This provision is deemed to be contracted out of by the parties if they have incorporated almost any of the main institutional rules into their contract. Most institutional rules will contain a provision confirming that the award is final and binding and that the parties waive any non-mandatory rights of challenge or appeal at the seat of arbitration.

Even where parties have not contracted out of their right to appeal the award, the English courts are cautious in granting parties leave to appeal under section 69 because of the high threshold prescribed under section 69(3):

*“69. (3) Leave to appeal shall be given only if the court is satisfied— (a) that the determination of the question will substantially affect the rights of one or more of the parties,*

*(b) that the question is one which the tribunal was asked to determine,*

*(c) that, on the basis of the findings of fact in the award -*

*(i) the decision of the tribunal on the question is obviously wrong, or*

*(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*

*(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”*

**Appeals – general points**

Pursuant to s 70, no application / appeal can be brought pursuant to ss 67, 68 or 69 unless a party first exhausted any available arbitral process first .

Pursuant to s 73, a party loses the right to object to a tribunal’s lack of jurisdiction, improper conduct, failure to comply with the arbitration agreement or other irregularity affecting the tribunal or proceedings if it takes part in arbitration proceedings without making such an objection forthwith (or in the time permitted by the arbitration agreement, tribunal or Act), unless it can show that at the time it took part in the arbitration proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objection.

The Commercial Court Guide provides that challenges to awards under ss 68 or 69 which have no real prospect of success may be dismissed without a hearing. Although the applicant has a right to apply to set aside the order and to seek directions for a hearing, the Guide explains that if such an application is made and dismissed after a hearing, the court may consider whether it is appropriate to award costs*on an indemnity basis (paragraphs O8.6-8.7).*

**Summary**

- An arbitration with a seat in England, Wales or Northern Ireland will be subject to the Arbitration Act 1996.

- The Arbitration Act contains mandatory and non-mandatory provisions.

- Mandatory provisions cannot be contracted out of.

- Non-mandatory provisions are a default ‘rule book’ for arbitrations where the parties have not contracted out of them or agreed other rules.

- Challenging the jurisdiction of the tribunal or to challenging the award because of a serious irregularity are mandatory provisions. However, the threshold for these challenges is very high and they are rarely successful.

- Parties can contract out of the ability to challenge an arbitral award on a point of law.