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Insurance and reinsurance arbitration in England and Wales

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This note provides an overview of insurance and reinsurance arbitration. It considers, among other things, some of the benefits of arbitration over court litigation, the types of insurance and reinsurance arbitration and relevant institutional rules, the arbitration procedure and some features of Bermuda Form arbitration. It also identifies some of the issues that arise in practice in insurance and reinsurance arbitrations.

Scope of this note

This note provides an overview of insurance and reinsurance arbitration. It explains:

- Some of the benefits of arbitration over court litigation.
- How an arbitration is commenced.
- The types of insurance and reinsurance arbitration and relevant institutional rules.
- Some of the features of Bermuda Form arbitration.
- The arbitration procedure.
- The appointment of a tribunal.
- The powers of the tribunal in relation to costs.
- How awards are enforced.

It also identifies some of the issues that arise in practice in insurance and reinsurance arbitrations such as issues relating to the incorporation of arbitration agreements by reference, bias and apparent bias considerations when appointing the tribunal, confidentiality and the validity of honourable engagement clauses.

For an overview of Bermuda Form arbitration, see Practice note, Commencing a Bermuda Form Arbitration: Overview. For information on the Arbitration Act 1996, see Practice note, An introduction to the English Arbitration Act 1996.

Why choose arbitration?

It is very common for insurance policies of all kinds to contain provisions requiring the parties to resolve their disputes through arbitration rather than court proceedings. Arbitration is frequently used to determine a wide range of insurance and reinsurance disputes, including allegations of non-disclosure and questions of the proper interpretation and terms of the insurance or reinsurance policy. The objective of arbitration is described by section 1 of the Arbitration Act 1996 (AA 1996) as being "to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".

There can be many advantages to resolving disputes through arbitration rather than litigation. In the broadest sense, that is because arbitration is a more flexible procedure than litigation, in which the parties retain significantly more control over the determination of their dispute than they would be able to have in the courts. Indeed, section 1 of the AA 1996 states that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".

For instance, the parties have the power to choose the identity of the tribunal. That means the parties are often able to specify what qualifications and experience the tribunal should possess. The parties can also shape the procedural framework of the proceedings, from the law applicable to and seat of the arbitration, the timetable, and the rules applicable to the evidence that they will adduce. If appropriate, an arbitration can be conducted with limited pleadings and disclosure, and little live evidence, so that it can be completed far more quickly than the average piece of litigation in England and Wales. A notable further benefit of arbitration, and one that is particularly relevant to insurance and reinsurance disputes, is its confidentiality. Both insurers and insureds often see real benefit in the fact that, unlike litigation, the details of their dispute (and indeed its existence at all) will generally remain confidential.

The successful party to an arbitration enjoys the benefit of the 1958 New York Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (the New York Convention), which provides a comprehensive regime for the enforcement of international arbitration awards. In brief terms, the New York Convention requires the courts of contracting states to give effect to an international arbitration award, and to recognise and enforce awards made in other states, subject to limited exceptions (see Practice note, Enforcing arbitral awards under the New York Convention 1958: overview). Currently there are 169 signatories to the convention (see Checklist, New York Convention enforcement table: status). It is, however, essential that the arbitration agreement is in a form that will be recognised as valid in the seat of the arbitration and the place of enforcement; if it is not, the benefits of the New York Convention will be lost. For further guidance on these areas, see Practice note, Drafting international arbitration agreements: an overview.

Notwithstanding the benefits of arbitration, there are significant advantages to litigation. For example, it can be impractical to seek to resolve multi-party disputes by arbitration, given that the right to arbitrate is derived from the agreement between the parties. Section 35 of the AA 1996 provides that the parties are free to agree that arbitration proceedings shall be consolidated but, in the absence of such agreement, the tribunal has no power to order consolidation of proceedings or concurrent hearings. Similarly, the third edition of the ARIAS Arbitration Rules (Arias (UK) Rules), a set of procedural rules published by ARIAS (UK), ARIAS (UK) the Insurance and Reinsurance Arbitration Society (ARIAS (UK)) provide that the tribunal may "hear tripartite, multipartite or consolidated arbitrations and... make a single award in respect of such consolidated arbitration", but only if the parties have given consent in writing (rule 14.1.10) (see below, Types of insurance and reinsurance arbitration).

It is common in multi-party disputes for one or more parties to refuse consent to joinder of their action with other connected arbitrations. This in turn requires the dispute to be fought on multiple fronts, increases the cost and administrative burden of the proceedings, and gives rise to a risk of inconsistent findings across the multiple disputes. In such situations, parties often find that litigation would have been preferable.

Importantly, unlike litigation, arbitration will not produce publicly reported decisions having binding precedent value. Insurers and reinsurers may see this as a significant benefit of the arbitration as it enables the meaning of policy wordings to be decided on a case-by-case basis in private. It is accordingly possible for an insurer to run different (and possibly contradictory) arguments in subsequent arbitrations, whether against the insured or a reinsurer.

For more information on the benefits of arbitration, particularly in comparison to litigation, see Practice note, Why arbitrate?. For information of some of the common pitfalls when choosing dispute resolution provisions in insurance policies, see Checklist, Making the right choice: dispute resolution provisions in insurance policies.

Types of insurance and reinsurance arbitration

The parties are free to choose the form their arbitration will take. They can choose for the process to be supported by and conducted under the arbitration rules of an arbitral institution such as the:

- London Court of International Arbitration (LCIA).
- International Chamber of Commerce (ICC).
- Singapore International Arbitration Centre (SIAC)
- Hong Kong International Arbitration Centre (HKIAC).

For more information on institutional arbitration, see to Practice note, Which institution and why: a comparison of major international arbitration institutions.

It is relatively uncommon for insurance and reinsurance policies to contain arbitration agreements that require reference to the LCIA or ICC. In its 2021 Casework Report, the LCIA reported that 2% of arbitrations referred to the LCIA came from the insurance sector. Parties often like to choose an institution based in the jurisdiction whose law has been chosen as the governing law of the policy. This is not strictly necessary, since most major arbitral institutions administer arbitrations seated in various jurisdictions and in which the chosen applicable law can vary greatly depending on the parties' preferences and the relevant industry sector. Insurance and reinsurance contracts are often governed by English law and a choice of London as a seat is therefore popular.

Alternatively, the parties can choose to conduct the arbitration "ad hoc" by adopting an existing set of arbitral rules, writing bespoke procedures or relying on the domestic arbitration law of the seat to supplement what is in the arbitration agreement. Parties to insurance and reinsurance disputes commonly choose ad hoc arbitration. For more information about ad hoc arbitrations generally, see Practice note, Ad hoc arbitrations without institutional support.

Where the parties choose to incorporate non-institutional arbitration rules, arbitration agreements within insurance and reinsurance policies commonly adopt the ARIAS (UK) Rules. ARIAS (UK) was formed in 1994 for the purpose of establishing procedures for the resolution of insurance and reinsurance disputes in the UK and presently produces two sets of rules to govern arbitrations: the ARIAS (UK) Rules, which are now in

their third edition, and the ARIAS Fast Track Arbitration Rules (the ARIAS Fast Track Rules). ARIAS UK provides copies of the full ARIAS (UK) Rules, the ARIAS Fast Track Rules, suggested wording for arbitration clauses requiring ad hoc arbitration pursuant to the ARIAS (UK) Rules or the ARIAS Fast Track Rules (see ARIAS (UK) the Insurance and Reinsurance Arbitration Society and the Arias (UK) recommended reinsurance arbitration clause, Standard clause, ARIAS (UK) the Insurance and Reinsurance Arbitration Society (ARIAS (UK)): reinsurance arbitration clause).

As the name suggests, the purpose of the ARIAS Fast Track Rules is to produce a faster, more efficient process for lower value or less complex disputes. They provide for the referral of a dispute to a sole arbitrator (rather than three under the ARIAS (UK) Rules), for the arbitration to be conducted on the basis of documents only, for a closing date no more than four months after commencement of the arbitration, and an award to follow within 14 days thereafter.

Bermuda Form

Insurance and reinsurance disputes often arise under the Bermuda Form type of excess liability insurance policy, a standard form policy. The Supreme Court has described the Bermuda Form as follows:

> "The Bermuda Form policy was created in the 1980s to provide high excess commercial general liability insurance to companies operating in the United States after the market for such insurance collapsed in that country. Bermuda Form policies usually contain a clause providing for disputes to be resolved by arbitration."

(*Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48*, paragraph 11, considered in Legal update, Halliburton v Chubb: Supreme Court dismisses Halliburton's appeal and confirms legal duty to disclose matters that might reasonably suggest bias).

Bermuda Form policies generally have several distinctive features, including in particular:

The substantive law of the policy is the law of New York, subject to specific modifications, including in particular in respect of the law applicable to the interpretation of contracts, to avoid doctrines perceived to disadvantage insurers. Under a typical Bermuda Form policy, the parties generally agree that the provisions of the policy will be construed in an 'even handed' way between the policyholder and the insurers.

Cover is provided on an 'occurrence first reported' basis, meaning that for the insurer's liability to be triggered, the occurrence must have happened and been reported during the policy period. This arrangement is to be contrasted with simple occurrence-based or 'claims made' policies and is intended to eliminate 'long tail' liabilities, that is, liabilities that can arise long after the policy period has ended.

The policy is held on an ongoing basis, automatically renewing until it is cancelled, although the terms may change from time to time.

The parties agree that disputes will be determined by arbitration, usually seated in London or Bermuda. That usually means, notwithstanding the substantive law of the policy being that of New York (as amended), the procedural law of the arbitration will be governed by the AA 1996 or the Bermuda International Conciliation and Arbitration Act 1993 (which incorporates the United Nations Commission on International Trade Law (UNCITRAL) Model Law).

For more information about Bermuda Form arbitration, see Practice note, Commencing a Bermuda Form Arbitration: Overview and Standard document, Bermuda Form: Demand for Arbitration.

Insurance and reinsurance arbitration agreements

For there to be a right to arbitrate, there must be a valid agreement to arbitrate between the parties. In general terms, the parties should ensure that the arbitration agreement includes:

- A clear requirement for disputes to be referred to arbitration and an explanation of what disputes are intended to be captured by the clause.
- Whether the arbitration will be institutional or ad hoc. If the arbitration will be conducted ad hoc pursuant to standard form rules, the identity and source of those rules should be stated clearly.
- Information concerning the process for appointment of arbitrators and their powers. This should include the number of arbitrators, any required experience or qualifications, the timetable for their appointment, and the process for making decisions between the panel. There should be a default procedure to ensure that an appointment can be made when one party will not cooperate.
- A statement of the seat and proper law of the arbitration agreement.
- A confidentiality agreement.
- A statement that the decision will be final and binding and whether any right of appeal on the merits is excluded.

In insurance and reinsurance cases, it is common for the only written agreement between the parties to be the slip (a piece of paper presented by a broker to selected

underwriters containing a summary of the terms of a proposed insurance or reinsurance contract), which in turn refers to a list of standard form clauses that have been agreed between the parties. Some national arbitration laws require an arbitration agreement to be in writing. For example, in relation to arbitrations seated in England, section 5 of the AA 1996 requires that arbitration agreements should be made in writing, or many of the provisions of that legislation will not apply. For an explanation of the requirement in section 5 and what qualifies as a written agreement, see Practice note, Agreements in writing: the English Arbitration Act 1996. However, it is not required that the arbitration agreement must be part of a wider contract between the parties. It is therefore permissible (and common) for arbitration agreements to be incorporated into the agreement by reference.

In *Axa Re v Ace Global Markets Ltd [2006] EWHC 216 (Comm)*, a dispute arose as to whether an arbitration agreement contained in the Joint Excess Loss Committee excess loss clauses (a wording developed in the London market in 1990) had been validly incorporated into the reinsurance agreement between the parties. In that case, the reinsurance slip referred to the "[f]ull wording as EXEL 1.1.90" but also provided that the contract "shall be subject to English Law and Jurisdiction". In other words, the reinsurance slip contained both an arbitration and a jurisdiction clause. Gloster J held that the arbitration agreement contained within the EXEL 1.1.90 terms bound the parties as it had been incorporated by reference.

However, there must be express agreement between the parties for an arbitration clause to be incorporated. This is particularly relevant to reinsurance contracts, where it is common for the reinsurance to be placed pursuant to "all terms and conditions as original". In other words, the terms of the underlying insurance contract are incorporated by reference in the reinsurance. In such cases, an arbitration clause contained in the original terms is unlikely to bind the parties. In *Trygg Hansa Insurance Co Ltd v Equitas Ltd [1998] 2 Lloyd's Rep 439,* the court held that section 6(2) of the AA 1996 (which permits arbitration agreements by reference) had not changed the law that express consent was required for an arbitration agreement to bind the parties.

By contrast, in *Catlin Syndicate v Weyerhaeuser Co [2018] EWHC 3609 (Comm)*, Robin Knowles J held that the words "as per Lead Underlying Policy" under the heading "*Choice of Law and Jurisdiction*" in an excess insurance policy were sufficient to incorporate the requirement under the underlying policy that any dispute should be determined by arbitration. Robin Knowles J made clear that the decision was made on the "particular wording, fact and context" of the policy.

In practice, if the parties to a policy of insurance or reinsurance intend to incorporate the provisions of an arbitration agreement contained in another document (whether another policy or not) it is essential that clear words are used.

It is common for policies of insurance and reinsurance to contain clauses that purport to confer jurisdiction on the English Courts but also to oblige the parties to refer disputes to arbitration. Although such clauses may appear to be inconsistent, the general approach of the courts will be where possible to construe the terms as requiring disputes to be resolved by arbitration subject to the supervisory jurisdiction of the English Courts as the courts at the seat of the arbitration (see *Sulamerica CIA de Seguros v Enesa Engenharia SA [2012] EWCA Civ 638*, considered in Legal update, Sulamerica: full update on Court of Appeal decision on determining law of arbitration agreement).

Pursuant to section 35 of the AA 1996, multiple arbitrations may be consolidated into a single set of proceedings, provided that the parties agree. However, the tribunal has no power to order consolidation if there is no express agreement between the parties. It is therefore important that those tasked with drafting the arbitration agreement consider making provision for the consolidation of disputes with shared issues of fact and/or law (as often arise in the insurance and reinsurance market). In the absence of such agreement, there is a real risk of inconsistent awards being produced.

For information on drafting arbitration agreements, see Practice note, Drafting international arbitration agreements: an overview and Practice note, Multi-party and multi-contract issues in arbitration. See also the Arias (UK) recommended reinsurance arbitration clause, Standard clause, ARIAS (UK) the Insurance and Reinsurance Arbitration Society (ARIAS (UK)): reinsurance arbitration clause.

Commencing an arbitration

It is essential that the party commencing the arbitration does so in accordance with the terms of the arbitration agreement. Where the policy does not provide for specific steps to be taken and the seat of the arbitration is England, the AA 1996 sets out the steps to be followed.

Generally, an arbitration is commenced by one party providing notice (and often supporting documents) to the other of the referral of the dispute to arbitration or of the appointment of an arbitrator. For instance, the ARIAS Rules require that the claimant shall send the respondent a written Notice of Arbitration accompanied by documents and supporting information, including the full text of the arbitration clause together with

identification of the contractual documents in which the arbitration agreement is contained, and a brief description of the nature of the dispute referred to arbitration and the type of relief sought. The arbitration agreement itself may define how the arbitration is commenced. Institutional rules may also provide for a certain action to be taken.

Where applicable, section 14 of the AA 1996 provides that the parties may agree between themselves when the arbitration is commenced for the purposes of both the AA 1996 and the Limitation Act 1980. Where there is no such agreement, the AA 1996 sets out alternative provisions, depending on:

Whether the arbitrator or panel is named or designated in the arbitration agreement. In such cases, proceedings are commenced when one party serves on the other party a notice in writing requiring them to submit the matter to the designated arbitrator or panel (section 14(3)).

Whether the arbitrator or panel is to be appointed by the parties. The proceedings will be deemed commenced when the notice is served requiring the other party to appoint or agree to the appointment of an arbitrator (section 14(4)).

Whether the arbitrator or panel is to be appointed by a person other than a party to the proceedings. The proceedings will be deemed commenced when notice is given to that person requesting them to make the appointment (section 14(5)).

Pursuant to section 13 of the AA 1996, "the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings".

Institutional and other standard arbitration rules will generally provide for a commencement date. For example:

Under UNCITRAL 2010 and 2013, commencement is the date on which the arbitration notice is received by the respondent (Article 3(2)).

Under LCIA 2020 commencement is the date on which the Request (with all accompanying documents) is received electronically by the Registrar, subject to the LCIA's actual receipt of the registration fee (Article 1.4).

Under ICC 2021 commencement is the date of receipt by the Secretariat of Request for Arbitration (Article 4(2)).

Under the ARIAS (UK) Rules, commencement is the date on which the respondent receives the Notice of Arbitration or as determined by the Tribunal under Rule 16.1.1.

The proper, timely commencement of the arbitration is important for two main reasons:

The claim may be, or become, time-barred because the (ineffective) attempt to commence arbitration has failed to stop time from running for the purposes of limitation or other contractual time bars (for example, the commencement of proceedings in the wrong forum is ineffective for the purposes of limitation).

The tribunal may lack jurisdiction to determine the claims because of the failure to commence arbitration effectively.

For more information on limitation in arbitrations, see Practice note, Commencing arbitration in England and Wales: stopping time.

Appointing the tribunal

Where applicable, section 16 of the AA 1996 provides that the parties are free to agree the procedure for choosing and appointing an arbitrator. Therefore, the starting point for determining the correct process for the appointment of the tribunal is generally the parties' agreement, including provisions for appointment contained in chosen arbitration rules incorporated into the arbitration agreement. It is very uncommon (but possible) for policies of insurance and reinsurance to name an arbitrator. If the named arbitrator is unable or unwilling to act, and the parties cannot agree on an alternate candidate, the applicable national arbitration law may contain provisions to support the appointment procedure but, even then, this may slow matters down.

More commonly, the policy will provide for the appointment of a panel of arbitrators (usually three, particularly in Bermuda Form arbitrations), often with one arbitrator to be chosen by each of the parties and the other to be selected by the parties' chosen arbitrators. Subject to any other agreement between the parties, under English arbitration law, an agreement that states that the number of arbitrators should be two or any other even number "shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal" (section 14, AA 1996).

In insurance and reinsurance arbitrations, it is common for the parties to select arbitrators that have experience in the area, including in the specific form of arbitration at hand. As Lord Hodge said in *Halliburton*:

> "it is common practice for parties, and in particular insurance companies, to appoint arbitrators who have experience in interpreting the Bermuda Form policy on repeated occasions, including in arbitrations relating to the same occurrence. There are sound reasons for doing so because the Bermuda Form contains some unique provisions and there is an interest in obtaining consistency of interpretation of the policy in the absence of published reports of the awards which the arbitrators have made...parties often wish their arbitral tribunal to have particular

knowledge and expertise in the law and practices of the relevant business or market"

*(*paragraph 93*)*

In practice, it is common for senior English lawyers and judges to be appointed as arbitrators, particularly in Bermuda Form arbitrations. Indeed, in *Halliburton* it was noted that the insured had complained about the appointment of the arbitrator "because insurers had a practice of repeatedly appointing retired judges or QCs known to them" (paragraph 12) (see below, Bias and apparent bias). It is also possible for the clause to expressly state the experience and qualification required of the arbitrator. For an example of where such a clause was considered by the court, see *Allianz Insurance Plc (formerly Cornhill Insurance Plc) v Tonicstar Limited [2018] EWCA Civ 434*, considered in Legal update, No need for arbitrator to have trade experience of insurance and reinsurance (English Court of Appeal)).

Under ARIAS (UK) Rules 6.1 and 6.2, the parties are free to choose the composition of the arbitral tribunal but if no choice is made the tribunal shall consist of three arbitrators, one to be appointed by the claimant, one to be appointed by the respondent and the third to be appointed by two appointed arbitrators.

In the event that one party fails to appoint an arbitrator, or the third arbitrator cannot be agreed, it is common for insurance policies to provide for an institution such as ARIAS (UK) to be empowered to select an arbitrator upon an application.

Where there is no such contractual provision, and where applicable, sections 17 and 18 of the AA 1996 provide procedures that apply in the event of a failure of the appointment process. In summary, section 17 provides for a party's chosen arbitrator to be appointed as a sole arbitrator in the event that the other party fails (or refuses) to appoint an arbitrator themselves. Section 18 provides for the court to intervene in cases where there is "failure of the procedure for the appointment of the arbitral tribunal". Pursuant to section 18(3), the court has the power:

to give directions as to the making of any necessary appointments;

to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;

to revoke any appointments already made; and

to make any necessary appointments itself.

Bias and apparent bias

Any arbitrator owes a fundamental duty of impartiality. This is enshrined in many national arbitration laws and most arbitration rules. For example, as described by section 33 of the AA 1996:

"33 General duty of the tribunal.

(1)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.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

This duty has been subject to extensive recent examination in *Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48*, which considered the general principles as well as those specific to the Bermuda Form. In that case, Halliburton unsuccessfully applied to remove an arbitrator under section 24 of the AA 1996, arguing that there was apparent unconscious bias as the arbitrator had accepted appointments in other arbitrations relating to the same or overlapping matters, one of which involved Chubb. The arbitrator had failed to disclose such appointments (see Legal update, Halliburton v Chubb: Supreme Court dismisses Halliburton's appeal and confirms legal duty to disclose matters that might reasonably suggest bias).

In the case of apparent bias, section 24 of the AA 1996 provides for the court to intervene to remove an arbitrator on the following grounds:

"(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed—

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant."

In *Haliburton*, the Supreme Court noted that there is no material distinction between this test and the common law test for apparent bias, set out by Lord Hope in *Porter v Magill [2001] UKHL 67*:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

However, it held that there were important differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes, namely (in summary):

- Unlike litigation, arbitration is a private, consensual process over which "there is very limited public oversight". That means that there is a "premium on frank disclosure".
- It is usually significantly more difficult to appeal or review the decision of an arbitrator than a judge.
- Unlike judges, there might be a financial or commercial incentive for an arbitrator to take certain decision or for legal teams an incentive to be more assertive of their side's interests in the conduct of the arbitration than might be the case in a commercial court.
- Again, unlike judges, the experience of arbitrators may be extremely different:

  > "people who are appointed as arbitrators include lawyers and also other professionals and experts in a wide range of business activities, and trades. Some ... may have very extensive experience of arbitration practice while others may have very limited involvement in and experience of arbitration. Moreover, arbitrators in international arbitration come from many jurisdictions and legal traditions and may have divergent views on what constitutes ethically acceptable conduct."

(paragraph 60)

- The private nature of most arbitrations means that, in circumstances where there are a number of overlapping arbitrations, the party which is not common to the multiple disputes has "no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party".
- Finally, in international arbitration, there are "differing understandings of the role and obligations of the party-appointed arbitrator". This means that:

  > "[i]n arbitrations where the parties have, or one party has, an expectation that the party-nominated arbitrator will be pre-disposed towards it, it is perceived that the person chairing the tribunal, whether appointed by the party-nominated arbitrators jointly or by an appointing institution or the court, has a particular role in making sure that the tribunal acts fairly and impartially."

In relation to the disclosure of multiple appointments, the Supreme Court decided that:

> "Under English law multiple appointments...must be disclosed in the context of Bermuda Form arbitrations in the absence of an agreement to the contrary between the parties to whom disclosure would otherwise be made. Unlike in GAFTA and LMAA arbitrations, it has not been shown that there is an established custom or practice in Bermuda Form arbitrations by which parties have accepted that an arbitrator may take on such multiple appointments without disclosure. This is unsurprising as the claimant in such an arbitration may often not be a repeat player while an insurance company is much more likely to be".

(Lord Hodge paragraph 137)

Generally, in Bermuda Form arbitrations, English counsel will be instructed to represent the parties. In principle, there is no restriction on appointing an arbitrator from the same chambers as counsel, but caution must be exercised. In *Laker Airways Inc v FLS Aerospace Ltd and another [1999] EWHC B3,* the court rejected a challenge to an arbitrator based on the fact that he was in the same chambers as the barrister instructed by the claimant. In that case, Rix J emphasised that:

- The barristers were not in partnership. There was no sharing of income and therefore neither party had a financial interest in the success of the other.
- In that case, the fees of counsel were not in any way dependent on success in the arbitration.
- There was no conflict of interest and duty, because there was no partnership.
- There was no evidence of any breach of confidence.
- The suggestion that the arbitrator might favour the advocate he knew was not one which was made out. In this regard, it was impossible to generalise – each case must turn on its own facts.

This issue is the subject of the Bar Council's "Information Note regarding barristers in international arbitration", which is essential reading for any counsel instructed in international arbitrations. The Bar Council concluded, in summary that:

- As a matter of English and Welsh law, there is no prohibition against an advocate appearing before an arbitration tribunal which includes a member of his or her chambers.
- The system is premised on the client having a range of advocates to choose from. In order to ensure that the users of the bar have the greatest possible choice, and have access to the largest pool of specialist advocates,

a barrister is obliged to accept instructions unless one of the exceptions to the "cab rank" rule applies.

- Those exceptions are designed to ensure that the barrister is obliged to consider whether it is in the client's best interests that he or she accepts such instructions. If it is in the client's best interests that the barrister take on the case, then the barrister must do so.
- Nevertheless, good practice would dictate that in circumstances where a barrister comes to understand that he or she has been instructed in an arbitration where one or more of the members of the Tribunal are barristers in the same set of chambers, prompt disclosure ought to be made by those instructing the barrister advocate to the legal representatives of the other side. This will ensure as far as possible that the guidance set out in the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration is followed. A failure to make prompt disclosure, could ultimately, lead to a challenge to the independence of the member(s) of the Tribunal in question.

Nonetheless, in practice, arbitral institutions will often endeavour to appoint arbitrators that are not in the same chambers as the parties' legal representatives.

It should also be borne in mind that issues of independence and impartiality may also lead to challenges to an award. For example, a party to an arbitration with its seat in England may be able to challenge an award under section 68 of the AA 1996, on the ground that the tribunal did not comply with its duty under section 33, and this has caused or will cause substantial injustice to the applicant.

For further discussion of challenges to arbitrators based on lack of independence or impartiality, see Practice note, Challenges to arbitrators.

A further topic that may need to be considered is third party funding. A conflict of interest could arise between a funder and one of the proposed arbitrators. For example, where the arbitrator is a partner of a law firm with which the funder has a relationship. Disclosure of such a connection can cause particular difficulties where the funding is kept confidential until the arbitration process is well under way. This is a developing area with new mechanisms being introduced into institutional and other arbitration rules to address the issues that arise. For further discussion of this topic, see Practice note, Third-party funding for international arbitration claims: overview.

Confidentiality

Under English law, the parties to an arbitration and the tribunal each owe implied duties to maintain the confidentiality of the hearing, documents generated and disclosed during the arbitral proceedings, and the award (see *Dolling-Baker v Merrett [1990] 1 WLR 1205, Hassneh Insurance Co v Mew [1993] 2 Lloyd's Rep 243, Ali Shipping Corporation v Shipyard Trogir [1997] EWCA Civ 3054* (Ali Shipping)). It is important to remember that the parties' obligations of confidentiality continue after the award is issued. Although the result of an arbitration is unlikely to be confidential in itself, the content of the award is likely to be subject to an implied duty of confidentiality.

In *Insurance Company v Lloyd's Syndicate [1995] 1 Lloyds Rep 272*, a reinsured commenced an arbitration against the leading reinsurer. When the reinsured was successful, it attempted to use the award in later proceedings against the other insurers. Colman J granted an injunction restraining disclosure of the award on the basis that the contracts with the reinsurers were distinct agreements and the reinsurers had a right to defend the claims against them on their terms. He said:

> "it is sufficiently necessary to disclose an arbitration award in order to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement."

Coleman J's decision was followed by the Court of Appeal in *Ali Shipping Corporation v Shipyard Trogir [1998] 2 All ER 136.* However, the award and reasons might be disclosed if it is reasonably necessary for one party (for example, the insured) to disclose them in order to establish its legal rights against a third party (such as its broker). However, the court is unlikely to allow the disclosure of documents, such as pleadings and witness statements, produced during the arbitration (*Hassneh Insurance Co of Israel v Stuart J. Mew [1993] 2 Lloyd's Rep 243*).

(For more information on confidentiality in arbitration generally, see Practice Note, Confidentiality in English arbitration law).

Arbitrators' liability

Under English law, the tribunal will be protected by the provisions of section 29 of the AA 1996, which provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of their functions as arbitrator unless the act or omission is shown to have been in bad faith. This protection is commonly enshrined in arbitral rules. For example, article 21 of the ARIAS (UK) Rules repeats the provision in almost identical terms.

The LCIA Rules go further by limiting the liability of the arbitrator to circumstances where the act or omission is shown to have been a conscious or deliberate wrongdoing (Article 31.1). The ICC Rules simply limit liability altogether save "to the extent such limitation of liability is prohibited by applicable law" (*Article 41*).

Procedure

Under English law, the tribunal is required to "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" (section 33(1)(b), AA 1996). These principles are found in most arbitration rules and in the arbitration laws of many popular seats of arbitration (for more information, see Checklist, How to run an arbitration: an arbitrator's guide: procedure and timetable).

It is possible (and often sensible) for the determination of some issues to take place before others, including by the separation of liability and quantum. In common with some other arbitration laws and rules, section 47 of the AA 1996 provides that (unless otherwise agreed by the parties) the tribunal may make "*more than one award at different times on different aspects of the matters to be determined*". This includes making an award relating to an issue affecting the whole claim or relating to only part of the claim(s) submitted to arbitration. For an example of an arbitration in which preliminary issues of liability were determined see *Daewoo Shipbuilding And Marine Engineering Company Ltd v Songa Offshore Equinox Ltd and another [2020] EWHC 2353 (TCC)*.

The tribunal is empowered to decide any issue of procedure or evidence, subject to the agreement of the parties (section 34, AA 1996). Therefore, in the absence of any agreement between the parties, the tribunal must decide every procedural or evidential issue arising. The tribunal's powers under section 34 are subject to the duty under Section 33, which also includes a duty to act fairly and impartially.

Section 34 provides a list of common procedural and evidential matters, which include:

- The location and timing of any part of the proceedings.
- The form of written statements of claim and defence.
- Whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.
- Whether and to what extent there should be oral or written evidence or submissions.

The power (and duty) of the tribunal under section 34 to decide issues of procedure and evidence is supplemented by the provisions of section 41, which provides the tribunal with a range of powers to be used in the conduct of the arbitration. These include:

- A power to dismiss a claim where there has been inordinate and inexcusable delay on the part of the claimant.
- To conduct proceedings in the absence of a party.
- To make peremptory orders where previous orders have not been complied with.

The parties are entitled to override these provisions by agreement, save that section 4(1) of the AA 1996 provides that its mandatory provisions (listed in Schedule 1) cannot be excluded. These mandatory provisions include the general duty of the tribunal set out in section 33. Accordingly, the principle of party autonomy is not absolute as the mandatory provisions of the AA 1996 apply notwithstanding any agreement to the contrary. Parties are entitled to make their own arrangements under the non-mandatory provisions of the AA 1996 and, in the absence of agreement, the AA 1996 provides the rules which apply. Pursuant to section 4(3), the parties may make such arrangements by agreeing the application of institutional rules.

In practice, even where institutional rules are adopted, the tribunal usually retains an extremely broad discretion in respect of procedural matters. For instance, Rule 10.1 of the ARIAS (UK) Rules provides that:

> "...the Tribunal may in its sole discretion make such orders and directions as it considers necessary for the final proportionate determination of the matters in the dispute. The Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions and may overrule any Party agreement which they in their sole discretion consider does not permit the resolution of the dispute in a proportionate manner without unnecessary delay or expense."

Once the tribunal has been appointed, a meeting will usually be convened between the tribunal and the parties (and their legal representatives) to determine the matters in dispute and how the arbitration should proceed, and some arbitration rules require this to take place by a certain deadline. Such a meeting is recommended by the practice notes to rule 10 of the ARIAS (UK) Rules:

> "as early as is reasonably practical after the Tribunal is constituted at which time reasonable and proportionate directions for the conduct of the arbitration can be considered and either agreed or ordered."

Thereafter, the tribunal is likely to give directions in relation to (among other things) the form, content and timing of pleadings and submissions, the disclosure and inspection of documents, and the timetable for evidence and the hearing(s). Although the tribunal has a broad discretion in respect of these matters, in insurance and reinsurance disputes it is common for directions to be given that bear a resemblance to those given by the courts in commercial litigation, particularly where English parties and English lawyers are involved.

For more information, see Practice notes, An introduction to the English Arbitration Act 1996: procedure and evidence and Duties of the arbitral tribunal: the English Arbitration Act 1996.

Interim measures

Subject to any mandatory requirements of the law at the seat of arbitration, the arbitration agreement, any applicable arbitration rules, or the law of the seat, may confer power on the tribunal to grant interim measures. For example, section 38 of the AA 1996 provides that the parties may agree the powers exercisable by the tribunal, and provides for four important interim powers:

- To order a party to give security for costs.
- To give directions in respect of property (for example, inspection, preservation and sampling).
- To order a party to be examined on oath or affirmation (and to take that oath or affirmation).
- To give directions for the preservation of any evidence in a party's custody or control.

Section 39 of the AA 1996 allows the parties to empower the tribunal to make provisional awards, including for example for an interim payment on account of costs, but provides that the tribunal will have no such power unless agreed by the parties.

Under section 44, the court may intervene in respect of certain matters in the same way and to the same extent as it would in litigation. These matters include the taking and preservation of evidence, orders in respect of property and the granting of interim injunctions. The court may also enforce any peremptory order made by the tribunal (section 42). However, the availability of interim measures and the role of the court will depend on the agreement between the parties: the provisions of section 44 are expressly subject to any such agreement. Many arbitration rules provide for the appointment of an emergency arbitrator to grant urgent interim relief. Where such a procedure is available, the English courts may not be willing to intervene (see Legal update, LCIA emergency arbitrator provisions limit court's power to grant freezing injunction in support of arbitration (English Commercial Court)), although this is a developing area.

Rule 14.1 of the ARIAS (UK) Rules sets out a broad range of powers conferred on the tribunal, including powers to order disclosure, concurrent hearings and inspection of documents in addition to documentary disclosure.

For more information, see Practice notes, Interim, provisional and conservatory measures in international arbitration, Supportive powers of the English courts: an overview and The arbitral tribunal and English court's supportive powers: interim injunctions and receivers.

Evidence and disclosure

Most arbitration rules and many arbitration laws grant an arbitral tribunal considerable discretion in relation to the admission and weighing of evidence. For example, section 34(2)(f) of the AA 1996 grants the tribunal power to decide whether to apply strict rules of evidence as to the admissibility, relevance or weight of any material tendered by a party. For further discussion, see Practice Note, Evidence in international arbitration.

In many English (re)insurance arbitrations, orders for disclosure will resemble orders made by the English Courts for "standard disclosure". However, the tribunal has a very broad discretion as to the form and nature of disclosure that is ordered, and the parties should not assume that standard disclosure will be ordered or will be most appropriate. Many parties choose to agree a different protocol for disclosure, such as that set out in the International Bar Association's Rules on the Taking of Evidence in International Arbitration. Under article 3 of those rules, a party must produce only those documents on which it relies. The responding party may then request that further documents are produced, provided they are "relevant to the case and material to its outcome".

It is often practical for disclosure requests to be organised in a "Redfern" schedule, in which requests for documents and responses are recorded in successive columns of a table, with a final column reserved for the decision of the tribunal. Generally, the first column contains a request for certain documents or categories of documents, the second contains the reasons for the request, the third contains the responding party's response to each request, the fourth column is then completed by the requesting party, which responds to the responding party's comments and identifies which requests it seeks to maintain, and the schedule is then provided to the tribunal for the determination of any outstanding issues in the final column.

In insurance and reinsurance arbitrations, parties may find that important documents are held by third parties, such as brokers or other (re)insurers. However, unlike the courts, an arbitral tribunal has no power to order that third parties provide disclosure of documents. In the event that such disclosure is required, the party seeking disclosure will need to seek an order of the court pursuant to sections 43 or 44 of the AA 1996 (see *A v C [2020] EWCA Civ 409*). For more information, see Practice Note: Document production in international arbitration.

Importantly, the courts have no power to order pre-action disclosure pursuant to CPR 31.16 where the dispute is subject to an arbitration agreement (*Travelers Insurance Company Ltd v Countrywide Surveyors Ltd [2010] EWHC 2455 (TCC)*).

Award

Making an award

Section 54 of the AA 1996 provides that the award is deemed to have been made when it was signed by the last of the arbitrators, although the arbitrators may fix another date. Once the award is made, Section 55 of the AA 1996 requires the tribunal to provide copies of the award to the parties "without delay". The award becomes binding on the parties once it is made (Section 58, AA 1996).

Although payment of the tribunal is not a mandatory precondition of release of the award, the obligation to release the award "without delay" is subject to section 56(1) of the AA 1996, which provides that:

> "The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrator."

Form

The parties are free to agree on any formal requirements relating to an award and standard or institutional rules may provide them. For example, rule 17.2 of the ARIAS (UK) Rules provides that:

> "The award shall be in writing, in the primary language in which the arbitration has been conducted and shall state the Seat of Arbitration, the date on which the award is made and, unless otherwise agreed…the reasons for the award."

If there is no relevant agreement, the default provisions of section 52 of the AA 1996 apply. In brief summary, these require that the award must:

- Be in writing (section 52(3)).
- Be signed by all the arbitrators or all those assenting to the award (section 52(3)).
- State the reasons for the decision (section 52(4)).
- State the seat of the arbitration (section 52(5)).

Interest

The parties are free to confer a right on the tribunal to award interest (or not) and the applicable rates. Rule 17.5 of the ARIAS (UK) Rules provides that:

> "The Tribunal may award such interest whether by way of lump sum, simple or compound interest as they consider is reasonable on the whole or part of any amount awarded by the Tribunal. The Tribunal may also award such interest on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment. Interest must not be awarded for a period commencing earlier than the date the sum awarded became due and must not continue to run after the date of payment of the sum awarded."

Where the parties have not agreed in relation to the award of interest, section 49 of the AA 1996 empowers the tribunal to award interest in similar terms to rule 17.5.

Challenge

The AA 1996 provides that an award issued by an arbitral tribunal seated in London can only be challenged on very limited grounds, namely:

- That tribunal did not have substantive jurisdiction (section 67). Importantly, however, this right is subject to section 73, which provides for a party to lose its right to object if it acquiesces in the proceedings.
- That there was a serious irregularity affecting the tribunal, the arbitration or the award, and that gives rise to substantial injustice (section 68). Section 68(2) enumerates the kinds of serious irregularity that can form the basis of such a challenge, which include the tribunal exceeding its powers, failing to deal with the issues referred to it, or failing in its general duty under section 33. As with section 68, this right can be lost by acquiescence.
- That the tribunal fell into error on a point of law (section 69). However, unlike sections 67 and 68, appeals on a point of law require the agreement of the parties (which is, unsurprisingly, rarely achieved) or the leave of the court. Moreover, the court will only grant permission if (among other matters):
  - The decision was obviously wrong or the question is one of general public importance.
  - The decision of the tribunal is at least open to serious doubt.
  - It is just and proper in the circumstances for the court to determine the question, given that the parties had agreed that the dispute would be determined by arbitration.

(Section 69(3))

An award must be challenged within 28 days of its date. If there has been any arbitral process of appeal or review, the time is extended to within 28 days of the date when the applicant or appellant was notified of the result of that process (section 70(3), AA 1996).

For further discussion of challenges to awards under English law, see Practice note, Challenging awards in the English courts: an overview.

Honourable engagement clauses

Questions have arisen in respect of the applicability of section 69 to awards made pursuant to "honourable engagement" clauses, which are sometimes included in insurance and reinsurance contracts, although they are increasingly rare. These clauses are included within the arbitration clause and broadly provide that the tribunal should consider the policy as an honourable engagement rather than merely a legal obligation. Accordingly, the clause purports to give the tribunal the power, when interpreting insurance and reinsurance policies, to look beyond the literal language in the policy. They have, therefore, been used by insurers and reinsurers to argue that, for example, they are not bound by the arbitration agreement in the policy or the corresponding arbitration award (see *Home Insurance Co v Administratia Asigurarilor De Stat [1983] 2 Lloyd's Rep. 674*, where such arguments were dismissed by the court). It has been held that such clauses are unenforceable (*Orion Compania Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep 257*), but other judgments have decided that the clause allowed the tribunal to depart from perceived strict laws of construction. In *American Centennial Insurance Company v INSCO Limited [1996] LRLR 407*, it was held that the clause may perform a valuable service as it makes clear that the parties intended the policy to be interpreted in a way that gives effect to commercial realities, which reflects the modern approach to construction of commercial contracts. Moore-Bick J held that:

> "The correct approach is to give the contract its natural meaning, giving full effect to the principle set out in [the honourable agreement clause] and although I accept that it would not be right lightly to reject the conclusions of the arbitrators on matters of construction, I regard myself as entitled and bound to do so if it is clear that the words used will not fairly bear the meaning they have given to them."

Section 46(1)(b) of the AA 1996 provides tacit approval of such provisions because it allows the tribunal to decide the dispute "if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal". However, it is likely that an award would nonetheless be susceptible to challenge under section 69 if the decision is clearly inconsistent with the applicable law.

Can the right to appeal be excluded?

It is possible for the parties to exclude the right of appeal on a point of law altogether. Section 69 provides that the right to appeal "only exists unless otherwise agreed by the parties". Moreover, where the parties agree that the tribunal does not need to give reasons for its award, that is to be treated as an agreement that the appeal power under section 69 does not apply (section 69(1)). In practice, the right to appeal is often excluded by the parties; indeed, the ICC and LCIA Rules do so as standard.

Costs

Section 61 of the AA 1996 empowers the tribunal to make an award of costs, subject to any agreement of the parties. The general rule, as it is in English litigation, is that costs will follow the event (section 61(2)). However, the tribunal is permitted to depart from that rule "where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs".

The ARIAS (UK) Rules reflect these provisions, as they refer to the unsuccessful party bearing the "reasonable and proportionate" costs of the arbitration. Moreover, pursuant to rule 19.2, if requested by any of the parties, before publication of the final award, the tribunal is required to tax and fix the amount of costs and issue an award directing which party is to bear the costs and for what amount. Under section 60 of the AA 1996, an agreement that a party is to pay the whole or part of the costs of the arbitration is only valid if made after the dispute in question has arisen.

A number of institutional arbitration rules also adopt this as a starting point, subject to some other allocation being appropriate on the facts of the case or as a result of the conduct of the parties during the arbitration.

Under the AA 1996, the tribunal may, unless otherwise agreed by the parties, direct that the recoverable costs of the arbitration (or part of it) are limited to a certain amount (section 65(1)). However, this power is subject to section 65(2), which provides that:

> "Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account."

Section 65 can provide a powerful tool for tribunals to reduce costs in arbitrations, but in practice is relatively rarely used.

There is presently no standard procedure for costs budgeting in arbitration, but it has been suggested that there should be, including by Sir Rupert Jackson at the 2018 Annual International Conference for Law and Alternative Dispute Resolution. For more information, please see Practice note: Costs in arbitration under English law.

Enforcement

The time period under English law for enforcing an arbitral award is six years from the date on which the cause of action accrued (section 7, LA 1980). However, if the arbitration agreement is under seal, this period is extended to 12 years (section 8, LA 1980). Importantly, the cause of action for enforcement of an award accrues at the time of the breach of the express or implied obligation to carry out the award, and not at the date of the arbitration agreement or the date of the award (*Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd [1985] 1 WLR 762*).

Any arbitration award will be enforceable by the English courts against any party to the arbitration agreement that is within the jurisdiction. In the case of domestic arbitration awards, section 66 of the AA 1996 provides that they may, by leave of the court, be enforced in the same manner as a judgment or order of the court. In practice, such permission is routinely granted, subject to the validity of the award.

An award is generally enforceable outside of England and Wales in countries which are parties to the New York Convention (and awards made in other jurisdictions are generally enforceable in England and Wales on the same basis). There are, however, seven grounds on which recognition and enforcement of an award may be denied (see Practice note, Enforcing arbitration awards under the New York Convention 1958: an overview: Defences to and resisting enforcement: Article V).

For more information, see Enforcing arbitration awards in England and Wales, Enforcing arbitration awards under the New York Convention 1958: an overview and Enforceability of arbitral awards toolkit.

Is a subrogated insurer bound by an arbitration agreement?

Where an insurer has paid out to an insured under an indemnity insurance policy, the common law rules on subrogation enable the insurer to recoup all or some of that money from a third party who caused or contributed to the loss. An insurer is subrogated to any claim of any type that the insured is entitled to bring against a third party to diminish its loss. Subrogation rights must be exercised in the name of the insured.

In the case of an English arbitration agreement, English law governs the enforceability of the subrogated claims, including the issue of whether the subrogated insurer is bound by the arbitration agreement (*West Tankers Inc v Ras Riunione Adriatica Di Sicurta SpA [2005] EWHC 454 (Comm)*). As a general rule, subrogated insurers will be bound by any arbitration agreement that applies to the subrogated rights or claims. The insurers cannot be in a better position than the original insured, and must take the benefit of the claim with the burden of the arbitration agreement (see *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Wiener Allianz Versicherungs AG and Voest Alpine Intertrading GmbH (Schiffahrtsgesellschaft), The Jay Bola [1997] EWCA Civ 1420*; *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd, Hubei Branch and another [2007] EWHC 1893 (Comm) (Starlight Shipping)* and *Airbus SAS v Generali Italia SPA and others [2019] EWCA Civ 805*, considered in Legal update, Guidance on competing dispute resolution clauses, incorporation by reference and declarations against subrogated insurers (Court of Appeal).)

The subrogated insurer is a "party" to the arbitration agreement for the purposes of the Minor definitions found in section 82(2) of the AA 1996 (see *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 2) [2005] EWHC 455 (Comm)*). Where the subrogation takes place after arbitration has commenced, notice must be given to the other parties to the arbitration and to the arbitrators (see *The Jay Bola* and *Starlight Shipping*).

For more information on the circumstances in which third parties, who were not parties to the original agreement, may either be bound by, or take the benefit of, an arbitration agreement, see Practice note, When does an arbitration agreement bind a third party in English law?. For information on the principles relating to subrogation, see Practice note, Insurance contract law: general principles.

Are third party claimants under the Third Parties (Rights against Insurers) Act 2010 bound by an arbitration agreement in the policy?

The aim of the Third Parties (Rights against Insurers) Act 2010 (Third Parties Act 2010) is to enable a third party to receive compensation for losses caused by an insolvent defendant who has liability insurance (meaning insurance covering the risk of liability to third parties). The Third Parties Act 2010 allows a third party to claim directly against the insurer provided certain conditions are met. It applies to all types of liability insurance but does not apply to reinsurance. The Third Parties Act 2010 replaced the Third Parties (Rights against Insurers) Act 1930 (Third Parties Act 1930) from 1 August 2016, save that the Third Parties Act 1930 continues to apply where both the insured incurs liability to a third party and its insolvency occurred before that date.

The Third Parties Act 2010 and the Third Parties Act 1930 provide for a statutory assignment to the third party of

the defendant insured's rights against the insurer on the occurrence of insolvency. The third party effectively steps into the shoes of the defendant insured and may bring a claim against the insurer. Accordingly, as with other types of assignment, under the Third Parties Act 2010 and the Third Parties Act 1930, a third party is in no better position under the insurance contract than the insured. The insurer is, therefore, able to raise any defence against the third party that would have been available to it against a claim by the insured and the third party will be bound by any applicable arbitration agreement contained in the policy (*Socony Mobil Oil v West of England Shipowners Mutual Insurance Association (London) Ltd (The Padre Island) (No 2) [1990] 2 Lloyd's Rep 199*).

The question whether the third party claimant can take over arbitration proceedings already commenced against the insurer by the insolvent insured is not entirely free from doubt, however, it is likely that a court would allow a third party claimant to "adopt" the relevant arbitration proceedings (see *The Jordan Nicolov [1990] 2 Lloyd's Rep 11*).

For more information, see Practice note, When does an arbitration agreement bind a third party in English law?