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# Arbitration law: 2018 in review

In association with Quadrant Chambers

Edited by James M Turner QC

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Editor: James M Turner QC

James M Turner QC is a highly regarded and well-known commercial advocate. His practice encompasses commercial contractual disputes across sectors including international and commercial arbitration, energy, shipbuilding, offshore construction, shipping and banking. In the UK he appears frequently in the Commercial Court and the appellate courts, and has extensive experience of arbitration, appearing before all the main domestic and international arbitral bodies (HKIAC, UNCITRAL, LCIA, ICC, LMAA) as well as in ad hoc matters.

James has extensive experience in dealing with foreign law and multi-jurisdictional disputes, and has given written expert evidence of English law in courts worldwide. He is regularly appointed arbitrator, particularly in shipping disputes, and has extensive experience of mediation, both as mediator and as counsel.

# Arbitration law: 2018 in review

## INTRODUCTION

This review covers the most important court decisions in England and Wales in the field of arbitration law in 2018, in particular as regards jurisdiction, arbitrators' powers, challenges under sections 68 and 69, and the enforcement of awards.

We have also sought to provide information on major developments in international arbitration rules, such as the HKIAC (Hong Kong International Arbitration Centre) Rules 2018 and the Prague Rules.

The major arbitration event of 2018 was the CJEU's decision in *Slovak Republic v Achmea BV*, even if it has little bearing on the great majority of arbitrations conducted in the UK. To a jurisdiction as arbitration-friendly as England and Wales, the blow to the ICSID edifice was startling and a rise in jurisdiction challenges in that field is to be expected in 2019.

Of potentially more far-reaching importance was the publication of the much-anticipated Prague Rules. Trailed as the inquisitorial answer to the adversarial IBA Rules, the Prague Rules may offer the Anglo-Saxon arbitration community an alternative to our current procedural model.

These developments aside, 2018 was a solid "business as usual" sort of a year. Practitioners would do well to note the courts' determination to cut down on the costs wasted by hopeless applications under section 68 of the Arbitration Act 1996, and to confine witness statements to the giving of evidence.

## ARBITRATION RULES

There were two major developments in the area of international arbitration rules in 2018. The first was the HKIAC's new version of their Administered Arbitration Rules ("the 2018 Rules"). The second was the publication on 14 December 2018 of the Rules on the Efficient Conduct of Proceedings in International Arbitration ("the Prague Rules").

In addition, there were two developments in respect of investment treaty disputes. On 3 August 2018 the ICSID Secretariat published proposals for rule amendments (the fourth time the rules and regulations will have been updated). The central goals are to modernise, simplify and streamline the rules, while also leveraging information technology to reduce the environmental footprint of the ICSID process. Additionally, in late 2018 the IBA published its report on ISDS Reform, "Consistency, efficiency and transparency in investment treaty arbitration", which concluded that increasing consistency, efficiency and transparency would foster the ISDS's legitimacy.

Finally, both GAFTA and FOSFA published changes to their arbitration rules in the course of 2018. Those changes are not addressed in this document, but a review of them can be found online.

### HKIAC Rules 2018

The 2018 Rules introduced amendments relevant to the use of technology (articles 3.1(e), 3.3, 3.4 and 13.1), third-party funding (articles 34.4, 44 and 45.3(e)), multi-party contract arbitrations (article 29), the early determination of disputes (article 43), ADR (article 13.8), emergency arbitration proceedings (article 23.1 and Schedule 4) and time limits for the delivery of awards (within three months) (article 31.2).

In addition, the 2018 Rules provide an express basis for an arbitral tribunal to conduct multiple arbitrations at the same time, one immediately after another, or to suspend any of the arbitrations until the determination of any other of them (article 30).

The 2018 Rules came into force on 1 November 2018.

### The Prague Rules

The Prague Rules were launched on 14 December 2018. Like the IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules") the Prague Rules will work as guidelines and will only apply if adopted by the parties. The Prague Rules and IBA Rules offer different options to parties depending on whether they want a more inquisitorial/civilian approach (the Prague Rules) or a more adversarial/common law one (the IBA Rules).

In broad terms the Prague Rules encourage the tribunal to play a more active role in a bid to increase the efficiency and cost-effectiveness of international arbitration. The Prague Rules Working Group identified three main culprits in taking evidence which it considered extended time and cost in the arbitration procedure, namely:

(1) *Document production* – which often entails broad categories of document requests leading to lengthy and tedious document disclosure processes;
(2) *Too many factual and expert witnesses* – which often include witnesses who testify on irrelevant facts that do not assist the tribunal in resolving the issues in dispute; and
(3) *Extended cross-examination at lengthy oral hearings* – including cross-examination on issues the tribunal considers irrelevant.

Dealing with those specific issues the Prague Rules provide for:

(1) *Document production* – the tribunal "are encouraged to avoid extensive production of documents, including any form of e-discovery" (article 4.2). Parties may only request specific documents as opposed to categories of documents;
(2) *Factual and expert witnesses* – the parties are given an opportunity to comment on which witnesses should be called. However, the tribunal will determine which witnesses to call for examination (article 5.2). The tribunal will have greater control of expert witnesses but that does not preclude a party from submitting its own expert reports (article 6); and
(3) *Hearing* – the default position is that if (and to the extent) possible, the dispute should be resolved on documents only [illegible] is to take place [illegible]

## JURISDICTION

### Overview

In 2018 the English courts considered section 73 of the Arbitration Act 1996, the nature of a challenge under section 67 of the 1996 Act, the scope of arbitration agreements/clauses and whether there was an agreement to arbitrate. In one case the court amended (applying principles of construction rather than rectification) an exclusive sales agency agreement to substitute the correct parties and imply the correct contractual details, with the result that the arbitrator had jurisdiction to make awards for damages for breach of the agreements (*SEA2011 Inc v ICT Ltd*). If there is a general theme, it is that in the main the court has upheld the arbitral tribunal's jurisdiction.

In its landmark decision in *Slovak Republic v Achmea BV*, the Court of Justice of the European Union ("CJEU") declared that arbitration clauses in bilateral investment treaties between EU member states are incompatible with EU law. Applications to the English courts challenging jurisdiction on the basis of Achmea are likely to be heard in 2019.

### Section 67 challenge

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction (section 30(1) of the 1996 Act). That determination includes whether there is a valid arbitration agreement and what matters have been submitted to arbitration in accordance with the arbitration agreement (section 30(1)(a) and (c) of the 1996 Act).

A party to arbitral proceedings may apply to the court to challenge jurisdiction by either: (a) challenging any award of the arbitral tribunal as to its [illegible]



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