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A Comment on the 1996 United Kingdom Arbitration Act

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I. INTRODUCTION

The 1996 United Kingdom Arbitration Act[1] is a remarkable piece of legislation. It is a highly accessible statutory framework both from a linguistic and organizational standpoint. The 1996 Act represents a substantial improvement over prior English arbitration statutes, including the 1979 Act.[2] The new legislation is comprehensive, thorough, cogent

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1. United Kingdom Arbitration Act, 1996, ch. 23.
2. United Kingdom Arbitration Act, 1979.

and coherent. In its presentation and content, it easily rivals both longstanding and recent legislative enactments on arbitration. It is built upon a wealth of knowledge and expertise of arbitration law and practice, and embodies a very contemporary and integrated concept of arbitration.

The content of the 1996 Act intermediates effectively between legal regulatory principles and the practical realities of the arbitral process. The statutory provisions read as a hybrid of standard legislative enactments and institutional rules on arbitration. The fundamental precepts of the "world law" on arbitration—party autonomy, the validity of arbitration agreements, judicial assistance and cooperation, limited scrutiny of awards, the requirement of basic procedural fairness, and the need for finality and arbitral autonomy—are everywhere present in the statutory provisions. These principles are not new to English arbitration law, but the clarity of the codification and the cohesion of expression in the 1996 Act give them new vitality and a stronger presence.

Notwithstanding its substantial quality, the 1996 Act does not achieve absolute perfection. For example, it retains a version of the right of judicial appeal of the merits of arbitral awards and a restricted right of appeal on questions of law during the proceeding. For good or ill, England remains one of the few national jurisdictions that allows judicial supervision of arbitration on the merits. Moreover, the statute is less limpid about the place and standing of international commercial arbitration within its regulatory scheme. It still employs a nationality-based definition of international or nondomestic arbitration and allows "exclusion agreements" as long as the New York Arbitration Convention[3] or other treaties do not govern enforcement. The treatment of international arbitration is less unified and suffers from the complication of internal and external cross-references. These attributes bring confusion rather than clarity to the regulation of the subject area. Given the significance of London as an international center for maritime and other forms of commercial arbitration, a more transparent set of regulatory provisions would have been useful.

The 1996 Act is unquestionably comprehensive. Its content, organized according to standard headings, mirrors the logical progression of the arbitral proceeding and consists of 110 provisions that regulate the various stages of the arbitral process and the relationship that exists between that process, the legal system, and the right of contract. Despite

3. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

their number, the rules never submerge the essential regulatory perspective and objective. The rules are linked, consistent, and respond to a uniform regulatory philosophy. This commentary endeavors to highlight and appraise the most significant aspects of the 1996 Act.

II. BASIC PRINCIPLES

Section 1 of the Act describes the basic principles that underlie the statute and its regulation of arbitration. It is an exceedingly important and useful provision in that it makes clear both the regulatory objectives of the statute and the policy of promoting the privatization of adjudication through arbitration.

Section 1(a) defines the recourse to arbitration as a means of adjudicating claims in a fair and impartial manner without incurring the expense and time commitment required by judicial litigation. The purpose of arbitration, therefore, is to achieve efficiency in the resolution of disputes. Referring matters to arbitration involves an acceptance of an abbreviated and more expeditious process, but not an abandonment of fundamental procedural fairness. Comparatively uncomplicated but basically fair adjudicatory procedures are the essence of the bargain for arbitration and characterize the underlying adjudicatory rationale of the process.

Section 1(b) announces the principle of party autonomy and provides for its nearly unrestricted scope of application. As a matter of law, the parties have the legal right to choose the means by which to resolve their disputes. The exercise of this right is subject "only" to the limitations that arise from those "safeguards" that "are necessary in the public interest."[4] The notion of "safeguarding the public interest" can be interpreted widely, but given the syntactical position of these phrases and the qualification "only," it likely refers exclusively to matters of substance and procedure that are vital to the integrity of the legal system and fundamental social interests. Certainly the external, noncontractual constraints on arbitration would include compliance with the requirements of basic adjudicatory fairness in terms of procedure.[5]

Whether the notion of "safeguards" demands arbitral compliance with a court-imposed standard for the application of substantive law rules is unclear. The possible recourse to the courts on preliminary questions of

4. United Kingdom Arbitration Act, 1996, ch. 23, § 1(b).

5. *See id.* § 68(2) (providing an illustrative list of events that constitute "serious [procedural] irregularity").

law[6] and the right of appeal on a point of law[7] appear to integrate substantive law safeguards into the statutory standard. Both actions, however, can be excluded by party agreement and are subject to a number of restrictions, making it unlikely that they could be used to preempt the reference to arbitration.

Whether section 1(b) might be construed as containing a substantive inarbitrability defense is also a matter of speculation. As noted at the end of this commentary, the 1996 Act does not expressly address the question of subject matter inarbitrability. Sections 89-91 indicate that the validity of an arbitration agreement can be challenged for reasons of unfairness or over-reaching in the context of consumer transactions. "[Safeguarding] ... the public interest,"[8] then, might involve placing subject matter restraints on the recourse to arbitration, like the "unfair terms regulations in consumer arbitration agreements"[9] or through limitations articulated on a statute-by-statute basis. While it might contain some subject matter limits on arbitration, section 1(b) nonetheless consecrates the right of contractual recourse to nonjudicial remedies and procedures.

Section 1(c) reinforces the principle of arbitral autonomy and contractual freedom. It provides that judicial intervention in arbitration can only take place when it is specifically authorized by statute. As a matter of statutory policy, judicial activism in regard to arbitration or open-ended scrutiny of arbitration agreements and awards is excluded. The courts must have an express statutory basis for questioning the recourse to arbitration or the results of the arbitral process.

III. JUDICIAL JURISDICTION TO ASSIST ARBITRATION

Under section 1, a statutory policy favoring arbitration and the deregulation of arbitration emerges. Arbitration provides parties with a cheaper and less involved means of resolving disputes. The section emphasizes that parties have a basic right to pursue remedies outside of judicial adjudication, provided such recourse does not infringe upon vital social policies and compromise the fairness that is essential to the legitimacy of adjudicatory processes. Finally, the law must allow arbitration to operate independently of the courts. This limitation of

6. *See id.* § 45.
7. *See id.* § 69.
8. *Id.*
9. *Id.* § 89.

judicial supervision is necessary to maintain the effectiveness of the arbitral remedy.

From an international perspective, section 2 of the Act contains a number of significant provisions. It endorses the basic premise of "anational" arbitration by giving extraterritorial reach to English court jurisdiction over arbitral proceedings, benefiting the operation of transborder arbitrations. Under the legislation, English courts can assist arbitral proceedings that are not located in the United Kingdom or that have yet to be localized in a particular national jurisdiction. An order to stay judicial proceedings[10] or to compel the appearance of witnesses,[11] among other judicial rulings, can be indispensable to the operation of an international arbitration. The statute thereby makes the benefits of the lex loci arbitri available to arbitrating parties "for the purpose of supporting the arbitral process."[12]

Under section 2(3), courts may decline to use some of these powers when they determine that the localization of the arbitration abroad would make the intervention of an English court "inappropriate." Conversely, English courts may use their general judicial powers under the statute to assist an arbitral proceeding that has not been localized in any jurisdiction and has "a connection" with the United Kingdom where the court deems its assistance to be "appropriate."[13] Finally, certain provisions of the statute relating to the separability of the arbitration agreement and the effect of the death of a party are applicable to a nonlocalized arbitration or one with a seat outside of the United Kingdom if English law governs the arbitration agreement.[14]

IV. HIERARCHY OF AUTHORITY

Section 3, which defines the term "seat of the arbitration," is also instructive on the question of controlling authority in matters of arbitration. The provision establishes a hierarchy of sources for determining the seat of the arbitration and presumably for determining other issues that might arise in arbitration. The statute gives the principle of party autonomy primacy as a source of controlling authority. While the wisdom of this delegation of regulatory authority to contract and the privatization that it entails can be questioned, there is no doubt that it

10. *See id.* § 9.
11. *See id.* § 43.
12. *Id.* § 2(4).
13. *See id.* § 2(4).
14. *See id.* § 2(5).

aligns the English legislation with the consensus approach to the regulation of arbitration. Through their contract of arbitration, the parties can supply the fundamental rules of the process. The right of contractual freedom is limited only by what the statute deems are its "mandatory provisions,"[15] but these provisions foster the recourse to and the functionality and finality of arbitration. The exercise of contractual freedom, therefore, is basically unfettered and constitutes (with the support of the statute and of the enacting state) the basic means for regulating the arbitral process.

When the parties do not exercise their contractual prerogatives, institutional processes or agents to whom the parties have delegated their rule- or decision-making authority can establish the perimeters of the arbitration. The English statute thereby continues to recognize the central significance of contract provisions to the regulation of arbitration and also acknowledges the vital role that supervisory institutions play in the arbitration process. When the institutional apparatus fails to supply the necessary predicate of decision, the arbitral tribunal can decide the matter, if the parties have authorized it to do so, or a court can resolve the matter in light of the parties agreement and the circumstances of the transaction.

V. THE REQUIREMENT OF A WRITING

Section 5 pertains to the "in-writing" requirement and contains a very flexible definition of that requirement. For example, the writing need not be signed by the parties; it need only be "evidenced" in writing and can be made indirectly by reference to written-terms. It also can be presumed to exist if its material existence goes uncontested in adjudicatory proceedings. The English statute adopts and improves considerably upon the New York Arbitration Convention's liberal definition of the "in-writing" requirement. It adds to the implementation of the requirement the considerable practical experience that accounts in detail for the circumstances of commercial transactions. It does not go as far as allowing courts to imply an arbitration agreement in a commercial setting where such agreements are commonplace, but it does lessen substantially the legal formalities ordinarily associated with the "in writing" requirement. Needless to say, the provision is intended to be supportive of the commercial recourse to arbitration.

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15. *Id.* § 4(1); *see also id.* sched. 1.

VI. THE ARBITRATION AGREEMENT

The definition of arbitration agreements in section 6 exhibits the clarity and concision which is characteristic of the statute's provisions. The language and content of the statute are very clear and generally do not create problems in interpreting their meaning or underlying policy. Section 7 incorporates the separability doctrine into the statutory framework, with the proviso that its application can be defeated by party agreement to the contrary. The separability doctrine is part of all major modern legislative enactments on arbitration and is instrumental to jurisdictional issues that can arise in arbitration and to the autonomy of the arbitral process. The failure to incorporate expressly the separability doctrine into the statute would have constituted a significant lacuna in the legislation, making it a much less vital and adapted regulatory framework.

VII. STAYING LEGAL PROCEEDINGS

Section 9 elaborates rules regulating a stay of legal proceedings. It contains provisions that codify the standard principles of international arbitration law on this matter, for example: mandating judicial cooperation with the arbitral process, recognizing the jurisdictional effect and remedial exclusivity of an arbitration agreement, and providing for a contractual defense to the enforcement of the arbitration agreement. This section also contains an innovative feature. The application for a stay cannot be defeated by the fact that the reference to arbitration is part of a larger dispute resolution clause that conditions the recourse to arbitration upon the "exhaustion of other dispute resolution procedures."[16] The acknowledgement that the reference to arbitration can be part of a more complex provision for alternative or nonjudicial dispute resolution aligns the statute with contemporary contracting practices.

It is now relatively commonplace to bargain for "staggered" or "multi-leveled" dispute resolution provisions in which the parties agree to engage in some form of structured negotiations, conciliation, or mediation before they have recourse to an adjudicatory remedy, namely, the arbitral procedure. The English legislation, in effect, recognizes this practice and—at least impliedly—legitimates it by providing that it cannot block the eventual reference to arbitration. Whether the court can coerce party participation in these preliminary procedures—i.e., whether the governing and coercive authority of the arbitration statute extends to nonarbitral

16. *Id.* § 9(2).

alternative remedies—is left unresolved by the statute. Nonetheless, the statute attributes significant importance to this practice and its impact upon arbitration; it refers to the coexistence of arbitration and other nonjudicial remedies in at least four other provisions.[17]

Furthermore, section 9, along with section 10(2), contains a novel procedural refinement that indicates, once more, that the English statute is built upon an expert acquaintance with arbitral practice and the problems that can attend it. The provision states that the denial of a stay remains effective even when the arbitration agreement provides that the rendition of an award is a condition precedent to the filing of a court action. To maintain the exclusive reference to arbitration, parties sometimes provide in their agreement that court action cannot be invoked except for purposes of enforcement of the award. In this setting, even requesting that a court enforce an interim award can be viewed as a betrayal of the agreement.

Despite such a contractual provision and party intent, the statute preserves the court's authority to determine whether there is a proper legal basis for the reference to arbitration. The parties can stipulate that arbitration is their exclusive adjudicatory remedy and court intervention is limited to the supervision of the award. A court determination, however, that the reference to arbitration is legally invalid cannot be defeated by party stipulation. At a policy level, the statute thereby establishes a basic practical balance between the exercise of legal authority and party autonomy.

VIII. MARITIME ARBITRATION

Section 11 addresses an essential aspect of maritime arbitration: the provision of security in maritime arbitral proceedings.[18] The rules dealing with the effect of a stay upon the provision of security are clearly articulated and grounded in common sense and in a cooperative attitude between the judiciary and the arbitral process. The express reference to maritime arbitration is the distinctive aspect of the provision. It is rare for regulatory frameworks on arbitration to single out particular forms of arbitration and elaborate specific rules for their operation. Maritime arbitration unquestionably constitutes a large portion of the arbitration business in London. The specific reference to maritime arbitration points to the statute's innovative character and its focus upon the realities of

17. *See id.* §§ 12(1)(b), 51(2), 56(4), 70(2)(a).

18. The new German law on arbitration, which came into effect on January 1, 1998, also contains an express inference to maritime arbitration. *See* § 1031(4) ZPO.

arbitral practice as well as its objective to provide for a meaningful and practical legal regulation of the arbitral process.

IX. TIME LIMITS

Section 12 addresses the topic of time extensions and gives the courts discretion in exceptional circumstances to salvage the recourse to arbitration despite the tolling of an agreed-upon time limit. The statute, in effect, bends the principle of contractual control of arbitration in situations of inadvertence or in circumstances that involve the failure to comply with technical requirements. Where a party fails to act in a timely fashion upon its right to arbitrate, the court can extend the time limit for arbitration when the delay could not reasonably be anticipated or the other party took advantage of the circumstances. The remedial authority of the court ostensibly is intended to relieve inequity; its practical effect is to sustain the reference to arbitration despite nonconformity with agreed-upon terms. This form of judicial assistance represents a departure from the contractualist view of arbitration that has become so popular in the United States. It introduces less predictable equitable considerations into the enforcement of arbitration agreements, which can have the consequence of disturbing the implementation of the parties' intent. The circumstances of application, however, are narrow and involve the dislodging of contractual terms that are relatively uncommon in standard provisions for arbitration. Moreover, the court's authority only applies to deficiencies in implementing an arbitral clause in which the passage of time leads to unpredictable circumstances or to a greater likelihood of party noncompliance. Finally, under section 12(4), the court has wide discretion to remedy the situation as it deems fit.

X. THE ARBITRAL TRIBUNAL

Section 15 deals with the constitution of the arbitral tribunal. It recognizes the controlling authority of the party autonomy principle by stating that the parties "are free to agree on the number of arbitrators . . . and whether there is to be a chairman or umpire."[19] Paragraph 2 contains, subject to party agreement, the standard fail-safe device against a deadlock, providing that the designation of an even number of arbitrators by the parties presumes the appointment of an additional arbitrator. Paragraph 3 contains the additional presumption that a lack of agreement

19. *See* United Kingdom Arbitration Act, 1996, ch. 23, § 15(1). The role and function of the umpire is described in detail in section 21.

on the number of arbitrators means that that there shall be a sole arbitrator.[20] These rules are part of the standard regulatory fare on arbitration and are intended to promote the functionality of the arbitral process.

The reference to the appointment of an umpire is not usually a part of national arbitral regulation. It represents a special feature of English arbitration, more particularly, of maritime arbitrations conducted in London. In order to expedite arbitral proceedings and to make them less costly, maritime parties sometimes only appoint two party-designated arbitrators to the arbitral tribunal. The parties assume that these experts can come to a unitary resolution of the dispute by way of their technical expertise. In the event of a deadlock, the arbitrators, the parties, a supervising agency, or a court can name an umpire to assist the party-designated arbitrators in overcoming their decisional impasse or to decide the dispute. The Act's provision regarding the umpire may have the effect of generalizing it as an arbitral practice and encouraging expedited and more economical arbitrations.

XI. THE ARBITRAL PROCESS

Both sections 14 and 16, along with several others,[21] illustrate the central significance that the statute attaches to the party autonomy principle. As to both the commencement of the arbitral proceedings and the appointment of arbitrators, party disposition and intent control. In these and many other arbitral matters, the statutory regulations have a default and gap-filling role. When the arbitration agreement is silent and a problem surfaces, the statute establishes a procedure or a set of rules that allows the parties to express their mutual agreement on the resolution of the matter or to invoke a substitute mechanism by which to preserve the reference to arbitration and to maintain the functionality of the arbitral remedy.[22] The rules are sufficiently extensive to cover the problems that are likely to arise in arbitral practice, once again demonstrating the depth of doctrinal and practical knowledge upon which the statute is founded.

Throughout these sections, court intervention is restricted to resolving the problems that impede the functioning of the arbitral process.[23] Once a solution is reached, further judicial intervention is

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20. Section 17 describes the role and function of sole arbitrators and the circumstances of their appointment.

21. *See* United Kingdom Arbitration Act, 1996, ch. 23, §§ 15, 18, 20, 23, 25.

22. *See id.* §§ 14-25.

23. *See id.* §§ 18(2)-(3), 19, 23(5), 24, 25(4).

minimized by the "leave to appeal" procedure, under which the court must give the parties permission to lodge their appeal.[24] For the last several years, the standard practice of English courts has been to grant "leave" only when the question raises a significant issue of law. The statute affirms that practice. The guiding or core principles of the statutory regulation are clear. First, the parties have the right—perhaps even the responsibility—to establish rules for the operation of their arbitration. Second, when the parties have failed to make the necessary provisions, the law provides them with an opportunity to exercise their mutual intent once problematic circumstances arise.[25] Third, if judicial intervention is necessary, it shall provide an expedient remedy that converges with the parties' agreement to arbitrate and the circumstances of their transaction, maintains the integrity of and gives effect to the arbitral process, and preserves the efficiency and functionality of arbitration.[26]

The statute comprehensively treats the various stages of the arbitral process and the procedural problems that can arise in these settings.[27] The statute also gives the payment of and liability for arbitrator fees and arbitral costs a relatively important place in the regulatory framework.[28] This type of attention is somewhat unusual in a national law of arbitration. It appears more commonly in institutional rules of arbitration. The consideration of this subject matter reveals that the statute is intended to be a highly functional law of arbitration that effectively addresses the central administrative details of the arbitral process. As noted earlier, the statute effectively intermediates between the traditional statement of statutory rules and principles and the standard provisions of institutional rules on arbitration. This characteristic of the statute accounts for its length, comprehensiveness, innovative character, and exemplary appeal. Finally, it establishes that the arbitrating parties are jointly and severally liable for the payment of fees and expenses.[29]

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24. *See id.* §§ 17(4), 18(5), 21(6), 24(6), 25(5).

25. *See id.* §§ 14-25.

26. *See, e.g., id.* §§ 18, 24.

27. These procedural problems can include death (section 26), disqualification (section 24), or resignation of an arbitrator (section 24), the filling of vacancies (section 27), and the like.

28. *See* United Kingdom Arbitration Act, 1996, ch. 23, § 28.

29. *See id.* Section 28, which addresses the payment of arbitrator fees and expenses, is aligned with section 49 (on calculation of interest), section 56 (on withholding the award for non-payment), and sections 59-65 (on the costs of arbitration).

XII. ARBITRATOR LIABILITY

On the question of arbitrator liability for the performance of adjudicatory tasks, section 29 of the statute adopts a rule of general immunity except for conduct that amounts to bad faith.[30] It also incorporates a vicarious liability principle, making arbitrators liable for the bad faith conduct of their agents or employees. Paragraph 3 coordinates the general liability rule with the more complex provision for arbitrator liability in the event of resignation under section 25.

The bad faith rule is one of several standard positions on the question of arbitrator malpractice. Other jurisdictions, like France, hold arbitrators liable on a general contractual basis, while some, such as the United States, attribute a nearly absolute, judge-like immunity to arbitrators. A number of institutional rules also address the question and generally provide for complete arbitrator immunity from malpractice liability. Given the nature of adjudication and the need for arbitral autonomy and impartiality, it is difficult to see how a rule of ordinary professional liability could be integrated into the effective functioning of the arbitral process.

There is a great deal of wisdom to the English rule in that it strikes a workable balance between the need for some level of professional accountability and the need to maintain the integrity of the arbitral adjudicatory function. The statute, however, leaves the critical question of determining what constitutes arbitrator bad faith conduct unresolved. Once the general principle is established, the drafters may have thought it better to let the courts and the case law deal with that difficult and highly circumstantial issue.

XIII. KOMPETENZ-KOMPETENZ

Section 30 codifies the *kompetenz-kompetenz* doctrine. As with the other provisions of the statute, the codification is remarkably terse and clear; the substantive architecture of the rule is comprehensive and cohesive. The recognition of the arbitrators' authority to rule on jurisdictional challenges is a basic feature of all modern legislative enactments on arbitration. Unlike other national statutes, the English legislation identifies three (rather than two) grounds for contesting the adjudicatory authority of arbitrators.[31] To the invalidity or inadequate

30. The content of section 29 is coordinated with section 74, dealing with the immunity of arbitral institutions.

31. *See* United Kingdom Arbitration Act, 1996, ch. 23, § 30(1).

scope of the arbitration agreement, it adds the ground of improper constitution of the arbitral tribunal. At first blush, it is difficult to see what impact such a procedural irregularity might have upon what the statute terms the "substantive jurisdiction" of the arbitral tribunal, or what French law, for example, refers to as the basis for the arbitrators' adjudicatory investiture. Upon reflection, however, the three grounds appear to be equivalent in that they are all traditionally listed (without any evaluative distinction) in the means of recourse against the enforcement of arbitral awards. Moreover, the proper constitution of the arbitral tribunal (presumably, pursuant to the dictates of the arbitration agreement), if done deficiently, is arguably as critical to the integrity of the arbitration as an invalid arbitration agreement or one that lacks sufficient scope. Under this expansive reasoning, however, any of the standard grounds for opposing the enforcement of arbitral awards could be given an equivalent weighting. Accordingly, the question arises as to why the other grounds for challenging an award were not included as falling under *kompetenz-kompetenz* authority.

The answer may reside in a development of practice. Parties may have begun challenging the right of arbitrators to rule on the basis that the constitution of the arbitral tribunal was flawed. This type of challenge, therefore, may have created a need to determine whether the arbitrators or the courts would have the "first look" at the objection when it was raised at the outset of the arbitral proceedings. Be that as it may, the rule, as articulated, unquestionably favors the autonomy of arbitration and, once again, testifies to the statute's alignment with the realities of arbitral practice and the contemporary developments in the field.

The impact of practice upon the statute is further in evidence in the second paragraph of section 30. There, the statute provides for appeal against the arbitrators' ruling on jurisdictional challenges, recognizing that appeal can lie not only to a court, but also to "any available arbitral process of appeal or review."[32] It is now part of standard arbitral practice—specifically recognized in the 1986 Netherlands Arbitration Statute[33] and, more recently, in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,[34] decided pursuant to the United States Supreme Court precedent in *First Options, Inc. v. Kaplan*[35]—to allow

32. *Id.* § 30(2).

33. Netherlands Arbitration Statute § 1050, 4 Civ. Proc. Code 1 (1986).

34. 62 F.3d 993, 996-97 (5th Cir. 1995).

35. 514 U.S. 938, 942-45 (1995); *see also* LaPine Tech. v. Kyocera, 130 F.3d 884 (9th Cir. 1997).

parties to provide for an internal arbitral appeal mechanism and/or to provide for a form of review that raises or lowers the statutory or decisional standard for judicial supervision. While the content of section 30 aligns the statute with the modern developments of arbitral practice, it leaves a number of questions unanswered.

First, given the general provisions of section 30, could the parties exclude any review whatsoever of the arbitrators' rulings on jurisdictional matters? In other words, does the recognition of party discretion to establish a private means of review imply party discretion to achieve or implement a negative? Does the general exclusion of all review give the sitting arbitrators absolute authority in these matters? Second, would the effective exclusion of review at this stage of the process also amount to an exclusion of review on these grounds later for the enforcement of the award (assuming English law governed the matter of enforcement)? Third, more specifically, when provision is made for internal arbitral review, does section 30(2) exclude a reference of arbitrator determinations of jurisdictional matters to the courts? In other words, how does the provision for internal arbitral review coexist with the supervisory authority of the courts? Section 30(2) provides that any ruling by an arbitral tribunal on its own substantive jurisdiction "may be challenged by any available arbitral process of appeal or review *or* in accordance with the provisions of this part."[36] The use of "or" in the provision seems to provide that procedures for internal arbitral review can dislodge the judicial reference in these matters.

When there is recourse to the courts on an arbitrator's determination of a jurisdictional matter, section 31 requires a party to raise its jurisdictional objections in a timely fashion.[37] Such challenges are meant to constitute serious preliminary objections to arbitration and should be evident early in the proceedings. They are not intended to function as desperate eleventh-hour afterthoughts for a losing party. The statute gives the arbitrators wide discretion to acknowledge and to rule upon such claims. It conveys the clear impression that jurisdictional challenges should not be used to disrupt the operation of the arbitration or become a means of exercising dilatory tactics. Once the parties have agreed to resolve their disputes through arbitration, they are bound by that agreement and, unless there are true concerns with the legal validity of the

36. United Kingdom Arbitration Act, 1996, ch. 23, § 30(2) (emphasis added).
37. *See also id.* § 73.

instituted proceedings, the parties must cooperate and comply with the implementation of the remedy.

Section 32, which outlines the framework for judicial supervision in these circumstances, is in keeping with the intendment of the forgoing provisions. Judicial intervention is warranted in exceptional circumstances, essentially to assist the process in overcoming a substantial hurdle. Paragraph 1, however, contains a facial contradiction with the right of arbitrators to rule on jurisdictional challenges provided for in section 30. It states that a "court may, on the application of . . . [an arbitrating] party . . ., determine any question as to the substantive jurisdiction of the tribunal."[38] Paragraph 2 clarifies the apparent contradiction by providing that mutual party agreement or the acquiescence of the arbitral tribunal is necessary in order for the court to rule on this basis. Moreover, even when the arbitral tribunal acquiesces, the court can refuse to rule if it believes its intervention is likely to have no useful practical impact upon the arbitration, the request is made too late, or there is no "good reason" for a court's determination of the matter. In other words, judicial intervention can only take place if the parties agree or because judicial assistance is indispensable to the proper functioning of the arbitration. The statute places substantial reliance upon the sound discretion of the court in exercising its supervisory powers and, in paragraph 6, limits considerably the right of appeal from an initial court determination. Leave to appeal can only be granted when "the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."[39]

The statute thereby codifies a version of *kompetenz-kompetenz* that decidedly fosters the autonomous operation of the arbitral process. The critical issues of *kompetenz-kompetenz* under English arbitration law no longer are related to the timing of judicial review or to the question of whether the arbitrators or the courts have the final say on the validity of the arbitrators' adjudicatory authority. Assuming the parties do not provide otherwise in their agreement, the statutory rules provide for arbitrator determination of jurisdictional challenges with a very limited possibility for judicial supervision of that determination. In fact, a party provision for internal arbitral review appears to eliminate the prospect of judicial intervention altogether. The rule is constructed to uphold the

38. *Id.* § 32(1).
39. *Id.* § 32.

reference to and operation of arbitration and to confine the exercise of judicial power to instances that involve vital concerns, that reflect fundamental abuse, or that would serve the necessary practical interests of the process.

XIV. ARBITRAL DUE PROCESS

Section 33 has central significance in that it embodies the statute's concept of the adjudicatory mission of the arbitrators and defines the due process standard applicable to arbitral proceedings. The arbitral tribunal's "general duty" in the conduct of the proceedings and in the performance of its adjudicatory tasks is to "act fairly and impartially" and give each party "a reasonable opportunity" to present its case and to respond to the opponent.[40] Under section 68, the enforcement of an award can be challenged on the basis of a "serious irregularity" of procedure. The provision lists nine illustrative grounds or types of adjudicatory conduct that constitute a "serious irregularity" of procedure. A court can deny enforcement of an award on the enumerated basis if that adjudicatory conduct would result in "substantial injustice" to a party. The great utility of sections 33 and 68 is that they clearly establish what constitutes inadequate arbitral due process and articulate the basic principle for determining the legitimacy of arbitral proceedings and determinations: the avoidance of "substantial injustice" to the party or parties.

Further under section 33, the objective of arbitral adjudication is "to provide a fair means" for resolving the matters submitted, taking into account considerations of time and expense as well as the special needs of the particular case.[41] It is rare for legislative enactments on arbitration to provide such a concise and compelling description of the purpose and rationale of arbitration. Most of them are preoccupied with elaborating the traditional demarcations and distinctions between arbitration and the legal process. As a result, they only imply a concept and understanding of arbitration and sometimes generate confusion or become riddled with legal formalities. There is no mistaking the English statute's intent to regulate the arbitral process or the concept of arbitration that it embodies. The purpose of arbitration is to provide parties with a procedural means of achieving expedited and legitimate justice—specifically, among merchant parties, to arrive at commercially-adapted results through a

40. *Id.* § 33(1)(a), (2). The procedural imperatives that apply to arbitral proceedings are defined in greater detail in section 68, aligning it with section 33.

41. *Id.* § 33(1)(b).

sound but unoppressive procedure. Once again, the statute intermediates effectively between legislation and institutional rules on arbitration and produces a regulatory vehicle which contains a set of sound, accurate, and realistic provisions on arbitration.

XV. ARBITRATOR AUTHORITY

In regulating the conduct of arbitral proceedings, the statute shifts away from its emphasis on party autonomy and restricting the supervisory role of the courts. Instead, the statute focuses upon the procedural authority of arbitrators and, in the main, gives them the primary right and responsibility to conduct the arbitral proceeding.[42] The statute thereby appears to incorporate the view advanced by arbitral institutions and followed in arbitral practice: through contract, the parties have the exclusive right to initiate the arbitral process. Once the process is initiated, however, the parties relinquish some of their power to the process itself and its basic principles of operation. In order to provide for reasonable, efficient, and expedited adjudication, the arbitrators must have the authority to make critical procedural decisions. By agreeing to arbitration, the parties acquiesce to the basic rationale of arbitration: they must allow the arbitrators to preserve the functionality of the arbitral mechanism.

Section 34(1) illustrates the point and provides: "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree on any matter."[43] The reversal of the usual syntactical ordering of the phrase is significant. In most other provisions, the statute first refers to the right of the parties to establish the applicable rule by stating that "the parties are free to agree . . .," thereby giving priority to the party autonomy principle in arbitration. But, in section 34(1), first reference is made to the authority of the arbitral tribunal, thereby impliedly giving it priority in matters involving the conduct of the arbitral trial, and a secondary, qualifying reference is made to the authority of the parties to decide these matters. It is, therefore, clear that the power and responsibility to conduct the arbitral proceeding presumptively resides with the arbitrators, subject to the acquiescence of the parties. The rule not only accords with accepted arbitral practice, but also is grounded in common sense and coincides with the underlying rationale for the recourse to arbitration.

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42. *See id.* § 34.
43. *Id.* § 34(1).

Section 34(2) then outlines the specific procedural powers that the arbitral tribunal may exercise as a matter of law, subject to passive party approval. The list is comprehensive and useful; it addresses the most significant aspects of the procedural protocol for an arbitral hearing: location, language, the filing of claims and defenses, the means of supplying evidence, the presentation and evaluation of evidence, the method of questioning witnesses, and time limits. Other provisions—sections 37, 38, 39, and 41—describe other procedural powers the tribunal may exercise, but give the principle of party autonomy its customary primary status. These powers include: the payment of security, the administration of oaths, the conservation of property, the ordering of interim relief, and the right to rule in default proceedings. The drafters of the statute made an important statement of policy when they distinguished between, in effect, first and second level procedural powers on the basis of the significance of the party autonomy principle. By placing certain essential procedural powers at the outer limit of the principle of party autonomy, the drafters implicitly incorporated into the statute the view that the agreement to arbitrate, once made, presumes some necessary restriction on the freedom of contract. The arbitral process requires the surrender of some procedural prerogatives, unless the parties intend to establish a remedial mechanism that can be threatened by elementary procedural dysfunctionality.

XVI. JUDICIAL SUPERVISION

The statutory section on "arbitral proceedings" also contains provisions on judicial supervision.[44] Most of these provisions can be more aptly described as rules for the judicial assistance of the proceedings. Sections 42, 43, and 44 list those instances or circumstances in the arbitral procedure in which the compulsion of judicial authority might be necessary to the effective functioning of an arbitral proceeding. By and large, the parties have a contractual right to exclude judicial reference in these matters and the statute makes clear that the intervention of a court is meant to foster the reference to arbitration and not to be antagonistic to the aims and operation of the arbitral process. The contemplated relationship between the courts and the arbitral process is distinctly complementary and cooperative, grounded in common sense and practicality. Appeal from initial judicial relief is restricted by the

44. *See id.* §§ 42-44, 69, 87.

leave procedure.[45] As a result, a court can compel compliance, for example, with the peremptory orders of the arbitral tribunal, the request for testimony and supply of documents by the arbitrating parties or third parties, and the enforcement of interim awards for security or for the taking, inspection, or preservation of evidence.

Section 45 is more controversial, perhaps less adaptive or modern, and a more uniquely English provision for judicial supervision. It establishes a basis for court intervention in arbitral proceedings on a substantive law basis. In addition, section 69 contains a parallel rule for application at the enforcement stage of the award. As stated earlier, the rule in sections 45 and 69 continues the English tradition of the defunct case-stated procedure or the limited right of appeal on questions of law to the High Court established by the 1979 Arbitration Act.[46] Under the language of section 87 (conjoined by sections 99-104), the parties, it appears, may exclude this form of judicial supervision by agreement in an international arbitration through what has been known as an "exemption agreement." The right of contractual exclusion is more restricted in a domestic context. In matters of domestic arbitration, the exclusion of the judicial determination of questions of law that arise during the arbitration, either at the time they surface or at the stage of the enforcement of the award, can be effective only if the exclusion agreement is "entered into after the commencement of the arbitral proceedings" at a time when mutual agreement may not be as likely.[47]

The statute does place a number of restrictions on the provisions for a judicial ruling on the law. If raised during the proceedings, the court must be "satisfied [that the question of law] substantially affects the rights of one or more of the parties."[48] Moreover, the application to the court either must be "made with the agreement of all the other parties"[49] or "with the permission of the tribunal."[50] In the latter case, the court further must be satisfied that the application was timely and that its ruling "is likely to produce substantial savings in costs."[51] Finally, party agreement that the arbitral tribunal need not give reasons with the award amounts to a waiver of the right to judicial supervision on this ground. Presumably, the consequences would be the same in a domestic arbitration even

45. *See id.* §§ 42(5), 44(7).
46. *See* United Kingdom Arbitration Act, 1979, ch. 42.
47. United Kingdom Arbitration Act, 1996, ch. 23, § 87(1).
48. *Id.* § 69(3)(a).
49. *Id.* § 45(2)(a).
50. *Id.* § 45(2)(b).
51. *Id.*

though the requirement of section 87 technically would not have been satisfied.

Section 69 provides for similar restrictions on the judicial procedure for substantive law supervision in the setting of enforcement. It adds a few more limitations given that the question of substantive law viability of the arbitral determination arises when that determination has already been made by the arbitrators, at which stage the issue is whether enforcement of the award should take place. Under section 69(3), the court can grant a leave to appeal only if the arbitral tribunal was asked to resolve the legal question, the tribunal's determination has a substantial impact upon party rights, the arbitrators either reached a clearly erroneous legal decision or their determination "is at least open to serious doubt"[52] and involves a question "of general public importance,"[53] and "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."[54] There are further restrictions in section 69, but they either restate the content of section 45 or provide for the special circumstances of enforcement. Finally, it would seem logical to assume that international arbitral awards[55] would not be subject to this form of review, but rather would be enforceable under article V of the New York Arbitration Convention.[56]

The statutory availability of substantive judicial supervision during the proceedings or at the stage of enforcement, as noted earlier, reinforces a unique feature of English arbitration law. In the name of arbitral autonomy, most arbitration statutes exclude judicial second-guessing or scrutiny on the merits. Although it reaffirms the unique English practice, the 1996 Arbitration Act clearly modifies the underlying rationale for the procedure. Distrust of arbitration—a belief that it is incapable of reaching legal determinations and can only serve a fact-finding adjudicatory function—no longer is the keynote motivation for the English practice. The objective of substantive recourse to the courts is to provide the consumers of arbitral services with a remedy in those exceptional circumstances when an arbitral ruling on the merits would significantly compromise the parties' rights, the legitimacy of the arbitral process, or

52. *Id.* § 69(3)(c)(ii).
53. *Id.*
54. *Id.* § 69(3)(d).
55. *See id.* §§ 85, 99-104.
56. *See id.* § 103; *see also* United Nations Convention on the Recognition and enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

the integrity of the law itself. The right of judicial recourse in section 69 makes it abundantly clear that its aim is to act as a means of avoiding or repairing instances of fundamental injustice. The procedure described in section 45 is not as restrained because the adjudicatory process has not yet gone to completion and the need to salvage it is not as strong. Even here, however, judicial intervention is conditioned upon the substantial impact of the arbitral determination upon the rights of the parties. The integration of substantive accountability into the regulatory regime parallels the procedural accountability that is a traditional part of legislative frameworks on arbitration. It operates with the same aim of correcting the exceptionally gross or flagrant abuse of adjudicatory authority.

The development of arbitration as a mainstream transborder and commercial remedy, with a wider scope of application in the resolution of civil and statutory disputes, makes the English tradition of judicial merits supervision more desirable to the regulation of arbitration. Its desirability is enhanced when the purpose of the procedure is aligned to the basic ethic of the arbitral process—thereby making the objective of the appeals procedure more remedial than regulatory. In the quest to corral arbitration business, it also expresses the not insignificant view that the State remains interested in the legitimacy of adjudicatory services (even private ones) and that the demands of arbitral autonomy do not prohibit the imposition of minimum standards of procedural *and* substantive accountability upon arbitrators.

XVII. THE AWARD

The statutory section regulating the arbitral awards has all of the positive attributes that are generally present in the statute. Selected individual provisions warrant particular comment. For instance, section 46 states that the arbitral tribunal shall rule according to the law designated by the parties or "such other considerations as are agreed by them or determined by the tribunal."[57] The open-ended recognition of agreed-upon "considerations" demonstrates the malleability of the requirement that the tribunal rule according to law and the strength of the party autonomy principle. In effect, the arbitrating parties can decide to empower the arbitrators to rule pursuant to whatever substantive predicate of decision they choose. Moreover, they can authorize the tribunal to modify the governing law in reaching its determination. The "other

57. *See* United Kingdom Arbitration Act, 1996, ch. 23, § 46(1)(b).

considerations" language invites the parties or the arbitrators (if so authorized) to take trade usages and commercial customs into account in resolving the dispute. If so stated in the agreement, flexible substantive rulings become part of the bargain for arbitration. The rule effectively accounts for the variegated circumstances of practice and implies some recognition of amiable composition and equity arbitration.

XVIII. REMEDIES

Section 48 recognizes, subject to party amendment, that arbitrators have the authority to issue declaratory, injunctive, and compensatory relief. No mention is made of punitive or treble damages because that issue is not as germane to English law as it is to United States arbitration law. In an international arbitration involving a U.S. party and the application of the U.S. statutory law that takes place in England perhaps under the controlling authority of the 1996 Arbitration Act, the question of the award of punitive or other forms of exemplary relief might arise. In these circumstances, the parties should make an appropriate provision in the arbitral clause or the submission. Otherwise, the question is not provided for and may create difficulties either in the conduct of the arbitral proceedings or in the enforcement of the award. The section also contains extensive provisions on the awarding of interest,[58] regulates the impact of settlement on the arbitration,[59] and articulates a comprehensive and balanced framework of rules for withholding the award in the event of the nonpayment of fees.[60] Finally, the section provides that, as a general matter, awards shall contain reasons unless the parties agree otherwise or the award represents the parties' settlement of the matter.[61]

XIX. MISCELLANEOUS

The statute contains an extensive set of provisions on the "[c]osts of the arbitration,"[62] reflecting its hybrid legislative and institutional character and the importance it attributes to the practical operation of the arbitral process. The role of judicial supervision in the enforcement of arbitral awards[63] has been discussed earlier in relation to the commentary

58. *See id.* § 49.
59. *See id.* § 51.
60. *See id.* § 56.
61. *See id.* § 52(4).
62. *See id.* §§ 59-65.
63. *See id.* §§ 66-71.

on other provisions. Several additional observations, however, can usefully be made.

Section 66(4) establishes that the statute does not affect the enforcement of awards under parallel statutes or treaties.[64] The remedial options available to the court in the event of nonenforcement give it leeway to sustain the arbitral process. Under the Act, the court can vary the award, remit the award to the tribunal for reconsideration, set it aside in whole or in part, enforce it in part, or declare the award of no effect. In sections 68(3) and 69(7), the statute provides: "The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."[65] The language makes transparent the regulatory philosophy that underlies the enforcement of awards under the statute. In addition to the other restrictions that have already been discussed, section 70 establishes other limitations on the right to challenge the enforcement of an award, including the requirement that other forms of relief be exhausted. The other forms of relief can be internal to the arbitral process[66] or external and statutory.[67]

Finally, there appears to be at least a facial contradiction between section 70(4) and sections 45(1)-(2) and 69(1)-(2). The power of the court to "order the tribunal to state the reasons for its award in sufficient detail"[68] to effectuate judicial review for purposes of enforcement is inconsistent with the provision that "[a]n agreement to dispense with reasons for the tribunal's award"[69] amounts to a waiver of the court's authority to determine a preliminary point of law or review "a question of law arising out of an award."[70] The review contemplated under section 70(4) must be the scrutiny of the merits of an arbitral determination; otherwise, there would not be any purpose for the court to order the tribunal to either state reasons or elaborate upon them. The failure to provide sufficiently elaborate rules perhaps explains the contradiction between the various provisions. The apparent contradiction must arise

64. *See id.* §§ 99-104 (awards under the Geneva Convention or the New York Arbitration Convention).

65. *Id.* §§ 68(3), 69(7).

66. *Id.* § 70(2)(a) ("any available arbitral process of appeal or review").

67. *Id.* § 70(2)(b) ("any available recourse under section 57 (correction of award or additional awards)").

68. *Id.* § 70(4).

69. *Id.* § 69(1).

70. *Id.*

from the different circumstances in which the tribunal can omit a statement of reasons. If the tribunal failed to give reasons because it was specifically authorized to do so by the parties' agreement, court supervision is excluded and section 70(4) is inapplicable. If the tribunal decided to forego giving reasons on its own because the party agreement was silent on the matter, judicial review is not excluded and section 70(4) can have its intended effect. This interpretation coincides with the requirement in section 52(4) that awards be rendered with reasons unless the award codifies a party settlement or the parties agree "to dispense with reasons."[71] The statute could have included additional language to clarify this inter-textual confusion.

The remainder of the statutory provisions either have been discussed previously or address relatively minor aspects of the arbitral process or administrative details. It is significant that the statute nowhere explicitly covers the question of subject matter inarbitrability, except for an elliptical reference to consumer protection legislation in sections 89 and 90 and the formalistic reference to the New York Arbitration Convention in section 103(3). It is difficult to understand why a statute that admits of judicial review on questions of law and the merits does not treat an issue so critical to the lawful jurisdiction of arbitral tribunals. Perhaps the drafters believed that other statutes would address the question of subject matter inarbitrability on an individual basis.

XX. CONCLUSION

Despite some minor flaws, the 1996 United Kingdom Arbitration Act is an outstanding, indeed masterful, legislative framework on arbitration. It embodies both depth and breadth; it is lucid, coherent, and cohesive. It marries well the legislative and institutional regulation of arbitration and brings the practical operation of the arbitral process to center stage within the regulatory framework. The Act rehabilitates the English tradition of substantive review by integrating it into a statutory setting that unequivocally supports arbitration and understands the gravamen of the process and its need for autonomy. The 1996 Arbitration Act is a truly excellent law of arbitration, worthy of international emulation.

71. *Id.* § 52(4).