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Introduction
One of the oft-cited attractions of choosing arbitration over litigation in court is the finality of arbitral awards which brings with it both certainty and savings in terms of time and expense which may otherwise arise from the threat of multiple layers of appeals. Parties will often agree in their arbitration agreement, either expressly or by incorporation of a set of arbitration rules, that the decision of the arbitrator(s) will be “final and binding”. Further, in an arbitration in England the decision of the arbitrator(s) will be “final and binding” on them by virtue of the Arbitration Act 1996 (the “Act”). But just how “final and binding” are arbitral awards in England and what scope is there for a mischief-making party to seek to keep the dispute alive after the final award has been delivered? If arbitration is to retain its credibility as an autonomous, party-led process, the courts must strike a balance between, on the one hand, limiting the grounds for review while, on the other, ensuring that truly serious errors arising in the arbitral process can be corrected.

This article examines the scope for challenging arbitral awards under the Act and current judicial trends in relation to such challenges.

Relevant provisions of the Act
Unusually for a piece of English legislation, section 1 of the Act sets out the principles upon which it is founded. These principles include that “the courts should not intervene, except where this is specifically provided for by [the Act]” (emphasis added)⁴. Challenges to arbitral awards made under the Act are permitted only on the grounds set out in the Act itself⁵, namely in sections 67 (lack of substantive jurisdiction), 68 (serious irregularity) and 69 (appeal on point of law). Parties can contract out of the right to appeal on a point of law (only) and it is usual for arbitral rules to exclude appeals as part of the wording on finality: for example Article 26.9 of the LCIA Rules states that the parties “… irrevocably waive their right to any form of appeal, review or recourse to any state court … in so far as such waiver may be validly made”⁶.

Before considering the current scope of the grounds for challenge under the Act, it is worth looking briefly at their predecessors and some of the background to the Act.

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1 Jonathan Cotton is a Partner and Caroline Edwards is a Senior Associate in Slaughter and May’s Dispute Resolution Group. Caroline was the Senior Associate in the successful Slaughter and May team on the landmark Lesotho case in the House of Lords which is considered in part later in this article.

2 Eg Article 32(2) of the UNCITRAL Arbitration Rules, Article 26.9 of the LCIA Rules, Article 28(6) of the ICC Rules and Article 27(1) AAA International Arbitration Rules

3 Section 58(1) Arbitration Act 1996

4 Section 1(c) Arbitration Act 1996

5 Section 58 Arbitration Act 1996

6 See also Article 28(6) of the ICC Rules and section 22(b) of the LMAA Terms (2006)
Historical background

The predecessors to sections 67, 68 and 69 of the Act were found in sections 22 and 23 of the Arbitration Act 1950. Section 22(1) gave the court very broad powers to remit arbitral awards to the arbitrator. The case law made clear that this was a very wide jurisdiction which applied in cases of "procedural mishap" or "misunderstanding". Section 23 provided that "where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration award has been improperly procured, the High Court may set that award aside". Misconduct did not require bad faith and the courts came to identify two categories of misconduct: misconduct of a personal nature and technical misconduct.

The Arbitration Act 1979 removed the High Court’s wide jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award. This jurisdiction had previously been claimed by the English courts on the basis of the common law principle that the courts had control over all civil disputes within their jurisdiction and such jurisdiction could not be ousted by the parties. The 1979 Act provided for appeals on questions of law only in limited circumstances. It had to be shown that the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration before leave to appeal would be given. Parties could contract out of this right in certain cases.

In practice, following the introduction of the 1979 Act, appeals on points of law became limited by the principle set out in Lord Diplock’s judgment in Pioneer Shipping Limited and others v B.T.P. Tioxide Limited (the Nema): "In deciding how to exercise his discretion whether to give leave to appeal under section 1(2) [of the 1979 Act] what the judge should normally ask himself … is not whether he agrees with the decision reached by the arbitrator but: Does it appear upon perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach". (These subsequently became known as the Nema Guidelines and were expressly identified as the basis for some of the limitations on the rights to appeal contained in section 69 of the Act.)

However, the 1979 Act left the court’s powers under sections 22 and 23 of the 1950 Act in place and, although there was a tendency towards judicial restraint in relation to abusive challenges to arbitral awards following the 1979 Act, there were a number of decisions made pursuant to the court’s powers under sections 22 and 23 which provoked criticism of the court’s powers to interfere with the arbitral process and of the exercise of those powers. As Lord Justice Saville (as he then was) recognised in the Departmental Advisory Committee’s Report on the Arbitration Bill (the "DAC Report"), which formed the basis of the Act and is often cited as an aid to its construction:

"… there is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means of resolving their dispute".

It was thus widely recognised that English arbitration law was in need of further reform.

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7 Per Lord Donaldson MR in King v McKenna Limited [1991] 2 QB 480: "Parties to arbitration … are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate".

8 Section 1(1) Arbitration Act 1979

9 Section 1(2)-(4) Arbitration Act 1979

10 Sections 3 and 4 Arbitration Act 1979

11 (1981) 2 All ER 1030

12 See paragraphs 286 et seq of the DAC Report


14 Paragraphs 20-22 Departmental Advisory Committee Report on the Arbitration Bill
The 1996 Act

As is well known, one of the main purposes of the Act was to bring England and Wales into line with internationally recognised standards of respect for the autonomy of arbitral tribunals and the finality of arbitral awards; in Lord Steyn’s words, “... the legislative purpose of the 1996 Act ... [was] to promote one-stop adjudication”15.

While the DAC did not recommend the wholesale adoption of the UNCITRAL Model Law, the DAC Report made clear that “at every stage in preparing the new draft Bill, very close regard was paid to the Model Law ...”16. In connection with what became section 68, reference was made to Article 34 of the Model Law and the “internationally accepted view that the Court should be able to correct serious failure to comply with the ‘due process’ of arbitral proceedings”17.

During the second reading of the 1995 Arbitration Bill, which ultimately became the Act, Lord Wilberforce said:

“I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a free-standing system, free to settle its own procedure and free to develop its own substantive law ... That is not the position which has generally been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts. Other countries adopt a different attitude and so does the UNCITRAL model law. The difference between our system and that of others has, and is, I believe, quite a substantial deterrent to people sending arbitrations here ... [the Bill] has moved very substantially in this direction. It has given to the court only those essential powers which I believe the court should have: that is, rendering assistance [inter alia] ... in the direction of correcting very fundamental errors”18.

This, said Lord Steyn in his leading judgment some 10 years later in *Lesotho Highlands Development Authority v Impregilo SpA and others*19, “reflects the ethos of the 1996 Act”.

In considering the issues raised in the *Lesotho* case, Lord Steyn made clear that the “radical nature of the alteration of our arbitration law brought about by the 1996 Act”20 had to be taken into account and there can be no doubt that the Act did represent a radical alteration to the position of the English courts under the 1950 and 1979 Acts to review awards.

The three grounds of challenge to an award under the Act

Lack of substantive jurisdiction

Section 67 provides a ground for challenge on the basis that the tribunal lacked substantive jurisdiction. Section 67 is a mandatory provision of the Act and therefore cannot be excluded by agreement of the parties, although the right to make such a challenge can however be lost if the parties delay in raising their objection21. There have been relatively few reported section 67 challenges, and even fewer examples of challenges which have been successful. Section 67 was relied on as a ground for challenge in the *Lesotho* case but this challenge was rejected at first instance and, as Lord Steyn said, was “rightly abandoned”.

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15 *Lesotho* at 804d
16 DAC Report, paragraph 4
17 DAC Report, paragraph 282
19 [2005] UKHL 43 at 779
20 At 800d
21 Section 73 Arbitration Act 1996
Serious irregularity

A challenge can be brought under section 68 on the ground of "serious irregularity affecting the tribunal, the proceedings or the award". Section 68 is a mandatory provision of the Act and therefore cannot be excluded by agreement of the parties but, as with a challenge on jurisdictional grounds, the right to make such a challenge can be lost if the parties delay in raising their objection. The scope of challenge under this section was examined at length by the House of Lords in the Lesotho case.

Serious irregularity was a new concept in English arbitration law introduced by the Act and "plainly a high threshold must be satisfied". Section 68 sets out an exhaustive list of the types of serious irregularity in respect of which a challenge can be made:

“(a) failure by the tribunal to comply with section 33 (general duty of tribunal);
(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
(d) failure by the tribunal to deal with all the issues that were put to it;
(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) uncertainty or ambiguity as to the effect of the award;
(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

To succeed in a challenge based on serious irregularity, the challenger must satisfy the court not only that one of the grounds identified in section 68 is satisfied, but also that the irregularity "has caused or will cause substantial injustice to the applicant". In the DAC Report, the DAC stated that “[t]he test of "substantive injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated… In short, [section 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in the conduct of the arbitration that justice calls out for it to be corrected" (emphasis added).

In Lesotho Lord Steyn observed that the concept of "substantial injustice" was new in English arbitration law and that it was introduced in order to "eliminate technical and unmeritorious challenges". He made clear that the assumption of substantial injustice was not good enough and that the burden was on the applicant invoking the exceptional remedy under section 68 to secure findings of fact which establish substantial injustice. No such facts had been demonstrated in Lesotho.

22 Lord Steyn in Lesotho at 803b
23 Section 68(2) Arbitration Act 1996
24 Id., paragraph 280
In the Lesotho case Lord Steyn also made clear that section 68 (and in particular section 68(2)(b) which permits challenge on the basis of the tribunal having exceeded its powers) cannot be used to challenge a mere error of law and thus that the erroneous exercise of a power which was in fact available to the tribunal will not amount to an excess of power for the purpose of section 68 of the Act.

**Errors of law**

Section 69 of the Act permits appeals to the court on a question of law arising out of an award made in the proceedings. Such appeals are only permitted with permission of the court (unless all the other parties agree). Before granting permission to appeal the court must be satisfied that, among other things, the determination of the issue will substantially affect the rights of one or more of the parties, the decision was obviously wrong or the question is one of general public importance and the decision is at least open to some doubt and it is just and proper in all the circumstances for the court to determine the question despite the parties’ agreement to arbitrate. In addition, as a non-mandatory provision of the Act, the parties by their agreement to arbitrate often exclude appeals on questions of law. The exclusion of appeals on questions of law by way of incorporation by reference has recently been considered by the English courts and is discussed further below.

**The Lesotho case**

References to the 2005 House of Lords’ decision in Lesotho have already been made above. In the Lesotho case the parties had submitted their dispute to arbitration and a partial award had been made. The partial award provided for the payment of the amounts awarded to the appellants to be made in Pounds Sterling and Euro, which were not the currencies in which payments under the contract had to be made. It also provided for the payment of interest. The respondents challenged the currency and interest elements of the partial award on the basis that the tribunal did not have jurisdiction to make an award other than in the currencies stipulated in the contract or to award interest other than in accordance with the applicable law of the contract (the section 67 challenge), alternatively that they had exceeded their powers in doing so (the section 68 challenge). The section 67 challenge was rejected at first instance (and not appealed) but the section 68 challenge succeeded at first instance and was upheld by the Court of Appeal.

If the first instance and Court of Appeal decisions in favour of the challenge had been allowed to stand, this would have represented a very serious retrograde step in the position of the English courts, and England as a place of arbitration. As Lord Steyn himself said in his judgment on the currency point: “I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the Act … If the contrary view of the Court of Appeal had prevailed, it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point”. In the opinion of one commentator on the case, “… if upheld, the decision of the Court of Appeal would have seriously threatened the future of international arbitration in England, Wales and Northern Ireland”.

As will be clear from the references already made to Lord Steyn’s judgment, the Lesotho case represents a very clear statement from one of England’s most senior judges as to the limited powers of the English courts to intervene in the decisions of arbitrators under the Act. Perhaps some measure of this, and of the value of Lord Steyn’s firm statement in Lesotho of the principles applicable to challenges under the Act, lies in the small number of successful challenges to arbitral awards brought in the almost two years since the case was decided in May 2005, and the approach which the courts have adopted in respect of those challenges.

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25 Section 69(3) Arbitration Act 1996
26 Paragraph 34
27 All’s well that ends well: London remains a suitable venue for international arbitration – but only thanks to the House of Lords, Antonio Crivellaro, The International Construction Law Review Vol. 22 Part 4 October 2005
Cases since Lesotho

The authors are aware of very few cases that have been decided under section 67 of the Act since Lesotho. In Leibinger and another v Stryker Trauma GmbH an award had been challenged under section 67 of the Act but the necessary pleadings and evidence in support of the claimant’s challenge had not been filed within the applicable time limits. In declining to exercise his discretion to extend the time limits, and in rejecting the claimant’s application, Mr Justice Cooke referred more than once to the public policy of finality of awards which underlies the Act and to the paramount importance of this policy, particularly in relation to jurisdictional challenges.

There have been a number of decided challenges brought under section 68 since Lesotho. The decisions in these challenges, some examples of which are discussed briefly below, evidence a clear intention on the part of the English judiciary to comply with the “ethos of the Act”, as identified by Lord Steyn.

Elektrim SA v Vivendi Universal SA and others concerned allegations of deliberate concealment of (on the challenger’s case) a crucial piece of evidence which did not come to light until after the award was made. The grounds of the application were that the award had been obtained by fraud or, in the alternative, that the way in which the award was procured was contrary to public policy pursuant to section 68(2)(g). In that case the Judge contrasted the position under the 1950 Arbitration Act, where the court had frequently held that it had power to remit an award in cases where fresh evidence came to light after the award, with the 1996 Act which gives the court no such power and found that “[t]his omission is clearly intended to mark a deliberate change in the court’s role and approach in relation to “fresh evidence” which comes to light after an award has been made”. The Judge referred to Lesotho, and in particular the discussion of the requirements of section 68, and said that this was the approach to the construction of section 68 and to applications made under that section. The Judge found that the words “obtained by fraud” must refer to an award being obtained by the fraud of a party to the arbitration or by the fraud of another to which a party to the arbitration was privy. This, he said, “fits with the general ethos of the Act, which is to give the courts as little chance to interfere with arbitrations as possible”. He found that an award would only be obtained by fraud if a party has deliberately concealed the document (with a high standard of proof said to apply) and has, as a consequence of that concealment, obtained an award in its favour. He also found that, in the context of allegations of perjury and deliberate concealment of documents, “an award procured contrary to public policy” did not go any wider than “an award procured by fraud” for the purposes of section 68(2)(g).

In ABB AG v Hochtief Airport GmbH and another Tomlinson J made clear, having reviewed the authorities, including Lesotho, that it “is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore, it is particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they must find language with which each is comfortable”. He rejected the claimant’s claim that the arbitrators had decided the case on a basis not argued and/or without giving the parties an opportunity to deal with the particular point.

However Tomlinson J also observed that “Challenges to awards under ss 67 and 68 of the Act now appear to exceed in number applications for leave to appeal under section 69. A challenge under s 67 and s 68 can be mounted as of right without leave. Those who resort to and practise in international commercial arbitration are rightly jealous of the autonomy of the process, and the case law which has developed in this field demonstrates that the court will respect that autonomy. Challenges such as this are immensely time-consuming and therefore costly”.

28 [2005] EWHC 690 (Comm)
29 [2007] EWHC 11 (Comm)
30 At paragraph 80
31 [2006] All ER (D) 172 (Mar)
One of the few successful challenges under section 68 of the Act since Lesotho is BTC Bulk Transport Corporation v Glencore International AG. In that case, the respondent had made a counterclaim and the applicant had applied for it to be decided summarily, on the basis that the respondent had indicated that it did not intend to submit any further evidence and the evidence submitted was insufficient to enable the respondent to succeed. The applicant had thought that what was being decided was whether the counterclaim stood a good arguable chance of success or whether it should be dismissed at that stage without further evidence. However when the Tribunal came to make its award it determined the counterclaim itself, and not just the application to dismiss the counterclaim summarily which was the only application before it. The Judge in that case referred to the high standard to be applied in section 68 cases, as set out in Lesotho, and said that he bore very much in mind the fact that section 68 was only available in extreme cases. However he found on the facts that there had been a serious irregularity and that it had caused the applicant substantial injustice: “Where one party is expecting a hearing to take place on one basis and that expectation and understanding is, or should have been, clear to the tribunal and to the solicitors on the other side, it is a substantial injustice for the hearing to take place on an altogether different basis.”

Another successful challenge which has been brought under section 68 since Lesotho was Norbrook Laboratories Ltd v A Tank and another. In that case Colman J found that there had been various procedural irregularities. However only one of these produced the necessary substantial injustice, being direct contact between the arbitrator and witnesses which would lead an independent and fair-minded observer to entertain great reservations as to whether the arbitrator’s judgment had been affected by what he had been told. Colman J agreed with Morison J in ASM Shipping Ltd of India v TTMI Ltd of England who had found that if the properly informed independent observer would conclude that there was a real possibility of bias, then he would regard this as a serious irregularity which has caused substantial injustice to the applicant (although on the facts of that case the opportunity to object had been lost through the claimant’s delay in raising the objection). In ASM Shipping Morison J had considered that there could be “no more serious or substantial injustice than having a Tribunal which was not, ex hypothesi, impartial, determine parties’ rights. The right to a fair hearing by an impartial Tribunal is fundamental.” To this Colman J in Norbrook added that where there is a sole arbitrator whose impartiality has been shown to have been impaired, substantial injustice will normally be inferred. The conclusion in this case is perhaps not surprising in that, to be credible, arbitration must be seen to be a fair process. The court’s intervention to guard against actual or perceived bias is both supportive of the credibility of the arbitration process while, at the same time, unlikely to provide a mechanism which encourages unmeritorious challenges to arbitral awards.

There have also been a number of decided challenges which have been brought under section 69 of the Act since Lesotho, but very few with any success. In Sumukan Ltd v The Commonwealth Secretariat, which involved a challenge to the incorporation by reference to arbitral rules of an exclusion against appeals, the Court of Appeal found that there was nothing onerous or unusual in the parties to an arbitration agreeing to exclude rights of appeal. Referring to Legatt J’s judgment in Arab African Energy Corp v Olie Producten Nederland BV which recognised that section 3 of the 1979 Act stated that it was no longer contrary to public policy to oust the jurisdiction of the court, the Court of Appeal said, “That has been emphasised again in the 1996 Act and, indeed if anything the policy of that Act is to encourage the notion that persons should be entitled to arbitrate and keep resolution of disputes out of the courts”. The Court of Appeal in Sumukan also had to consider whether the exclusion by the parties of their rights to appeal on points of law in that particular case was contrary to the parties’ right to a fair trial under Article 6 of the European Convention on Human Rights. The Court of Appeal held that it was not. It found that the rights which were waived were limited in nature, that it was common in a commercial context when arbitration was agreed to limit the right of appeal and that the domestic legislation provided sufficient protection so as not to require a “reading down” of section 69 under section 3 of the Human Rights Act to give effect to the Convention.
In Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd his Honour Judge Peter Coulson QC considered the requirement under section 69 that the applicant demonstrate that the outcome of the legal question will substantially affect the rights of one or more of the parties. He said that too often this requirement is "taken as read" and referred to Lord Steyn's judgment in Lesotho which made clear in relation to challenges under section 68, "it was not good enough for the parties simply to assume that there was a substantial injustice". Judge Peter Coulson QC said that he also was of the view that "it is not good enough simply for a party to assert that an alleged issue in question must affect their rights because it goes to an aspect of the dispute in the arbitration. The party asserting that its rights are adversely affected needs to demonstrate the various options open to the arbitrator and how and why the particular point which the arbitrator has erroneously decided has a substantial effect on the rights of the claiming party".

Conclusions
The English courts have now undoubtedly thrown their full weight behind the autonomy of the arbitration process and are reluctant to intervene to overturn arbitral awards. It will be in only the most obvious cases that the court will be prepared to exercise its powers and, in doing so, it would be supporting the credibility of the arbitral process by correcting fundamental mistakes rather than interfering with the autonomy of the arbitral process. It is, of course, equally incumbent on arbitrators to seek to ensure that, through their conduct, they do not give grounds for a losing party to continue the dispute by taking challenges alleging lack of jurisdiction or serious irregularity.

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38 [2005] EWHC 2715 (TCC)