Arbitration of M&A Transactions

A Practical Global Guide

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England and Wales

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1. Introduction

Given the often complex, specialised and sensitive nature of many M&A transactions, arbitration is increasingly viewed as the most preferable forum in which to resolve disputes arising from such transactions. Through arbitration, disputes can be resolved speedily and, often more importantly, confidentially with the assistance of decision makers who are experienced in the matters at issue.

London is one of the most popular venues for arbitration, and the English courts are very proactive in encouraging parties to settle their disputes through arbitration.

During the drafting of an arbitration agreement under the law of England and Wales to cover a potential dispute in an M&A transaction – whether arising from a shareholder agreement, joint venture agreement or other document – particular care needs to be taken in order to ensure that the arbitration agreement covers each of the relevant parties to a potential dispute. An arbitration clause should be drafted as widely as possible to catch all intended disputes. However, certain disputes will not be subject to arbitration under English law. Parties will also need to consider what they wish to achieve by submitting the dispute to arbitration rather than litigation, and accordingly build this into the arbitration clause or agreement.

2. Choice of law

2.1 Shareholder agreements and internal corporate disputes

(a) Governing law

A company incorporated in England and Wales is required to file articles of association with Companies House, where companies are registered in the United Kingdom. The articles should set out the main provisions relating to the incorporation, operation and termination of the company.[1] A shareholder agreement is not required, but many companies choose to enter into one to further regulate relations among the shareholders.

While the articles of association must be registered, the existence and terms of a shareholder agreement can remain private between the parties to the agreement. As the articles of association are subject to the provisions of company law,[2] the parties'

1 Section 18, Companies Act 2006.
2 Principally the Companies Act 2006, the Companies Act 1985 and the Insolvency Act 1986.

freedom to prescribe the contents is limited by the operative law. A shareholder agreement is governed by the general law of contract, and therefore the parties have much greater freedom to agree the terms – subject, of course, to the application of mandatory provisions of company law.

Typically, a shareholder agreement will supplement the normal rules and protection available to shareholders, particularly those who have a minority holding. For example, the Companies Act 2006 allows certain actions (such as an alteration – although not a reduction – to share capital,[3] or removal of a director[4]) to be taken subject to the approval of 50% or more of the votes of shareholders. In addition, shareholders may have certain rights if they hold more than a particular percentage of the votes – eg, a shareholder must have at least a 10% shareholding in order to call for the company's annual accounts to be audited,[5] or more than 5% to circulate a written statement[6] or call a general meeting of the company.[7] However, a shareholder agreement may supplement this by providing that an action cannot be taken without receiving a higher proportion of the shareholder vote (or unanimous approval) or, conversely, that a shareholder can exercise such a right with a lower percentage of shareholding.

(b) Practical effect

The practical – and sometimes controversial – effect is that a shareholder agreement can frustrate or alter the operation of company law and the articles of association.

As a general rule, a company cannot itself restrict its powers, either in the articles themselves or in an agreement outside; however, an agreement among the shareholders that achieves the same purpose is permissible. In *Russell v Northern Bank Development Corporation Ltd*,[8] the shareholders and the company entered into an agreement which provided that no further share capital would be issued or created in the company without the written consent of all parties. The House of Lords found that the clause was invalid in respect of the company because the company could not restrict its powers, but such a provision may well be enforceable in respect of the shareholders. The effect of Russell is to allow the displacement of otherwise mandatory provisions, but only to the extent that these are enforceable among shareholders.

A shareholder agreement is not the only method of circumventing company law provisions. *Bushell v Faith*[9] shows the efficacy of clever drafting in the articles themselves. In that case, the articles provided that in the event of a resolution being proposed at a general meeting of the company for the removal of a director, any share held by him should carry three votes per share. The issued capital of the company was equally divided between three shareholders, and an attempt by two shareholders to remove the third failed because his 300 votes (one hundred shares,

3 Sections 617–618, Companies Act 2006.
4 Section 168, Companies Act 2006.
5 Section 476, Companies Act 2006.
6 Section 314, Companies Act 2006.
7 Section 303, Companies Act 2006.
8 [1992] WLR 588.
9 [1969] 2 Ch 438.

tripled according to the provision in the articles) outnumbered the 200 votes of the other shareholders. Surprisingly, while the court was aware that the intention and effect of the provision was to frustrate the operation of the statute, it nonetheless upheld the provision, stating that, while an alteration preventing the resolution from being passed was not permitted, a provision that had the practical effect of preventing that resolution from being passed was permitted.

The Companies Act 2006 also introduced a new regime which allowed shareholders to 'entrench' provisions in the articles, so that the provision can only be amended or complied with if conditions are met, or procedures followed, that are more restrictive than those that apply to a special resolution.[10] A notification regime applies to entrenched provisions: where articles are adopted or amended to include or remove entrenched provisions, Companies House must be notified. This requirement gives notice that the articles contain such entrenchment.[11] However, the notification only applies to the articles; and so by including restrictions in a shareholder agreement which effectively entrench certain articles, parties can circumvent the notification requirement.

The cases above focus on the extent to which the shareholders can agree to modify the constitutional aspects of the company by way of a separate agreement. A number of cases have examined whether, under a shareholder agreement, the shareholders can choose to submit disputes to arbitration rather than following the statutory processes (including unfair-prejudice petitions under Section 994 of the Companies Act 2006, as well as a statutory winding-up petition under the Insolvency Act 1986). A more thorough discussion of these cases is contained in section 3 below.

2.2 Joint ventures

The most common ways of structuring a joint venture in England and Wales are the formation of a (typically private) limited company, a partnership or a contractual joint venture. The choice of vehicle will be influenced by various factors, including the type of venture, the liability of the parties, tax considerations, publicity and regulation. The choice of vehicle will affect the mandatory laws that apply to the venture, and the extent to which and the means by which those laws can be excluded. The three structures are described further next.

(a) Limited company

Where a joint venture is established by way of a limited company, the key documents will be the articles and the joint venture agreement, which will typically take effect in much the same way as a shareholder agreement. In contrast with a regular shareholder agreement, though, the emphasis of the provisions of the agreement will focus on joint control for the parties (including the parties' ability to nominate directors and key positions in the company) and include more stringent restrictions on the transfer of shares. The ability of the parties to exclude mandatory laws will be the same as discussed in section 2.1(a) above.

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10 Section 22, Companies Act 2006.
11 Section 23, Companies Act 2006.

(b) Contractual joint venture

If the joint venture is a one-off transaction rather than an ongoing business, the parties may choose to enter into a contractual joint venture. In that case, no separate entity is established but the parties merely enter into a contractual arrangement to work together. The arrangement is therefore not subject to the normal mandatory laws that govern a company or partnership, but instead to the general law of contract. Accordingly, provided the contract does not fall foul of the normal rules (illegality etc), the parties can agree to determine their disputes in whichever way they choose.

The parties should ensure that the arrangements cannot be regarded as acting in partnership and thus subject to the full weight of partnership law. The application of competition law should also be considered, because such provisions cannot be excluded. A detailed review of these provisions is outside the scope of this chapter.

(c) Partnership

A joint venture can also be structured as a partnership, a limited partnership or a limited liability partnership (LLP). The arrangements will be governed by the relevant statute, respectively the Partnership Act 1890, the Limited Partnership Act 1907 or the Limited Liability Partnership Act 2000 (and related Statutory Instruments).

Where a joint venture is established by way of a partnership, the partners have greater scope to agree their own arrangements. The interests of partners in the partnership property and their rights and duties in relation to the partnership are subject to any express or implied agreement between the members. Where no agreement exists, default rules apply.[12] Thus, generally the question of excluding mandatory law does not arise in relation to a partnership as there are no mandatory provisions.

An LLP is a partnership/company hybrid;[13] it is a separate legal entity and members have limited liability. The members can participate in the management of the LLP's business without losing their limited liability (by contrast, in a partnership there is no limited liability; and in a limited partnership, participation in the management will strip a member of his limited liability).

The rights and obligations are governed by agreement among the members, or between the LLP and its members.[14] However, owing to the LLP's peculiar status as a partnership/corporate hybrid, the LLP is subject to some statutory provisions – including the ability of a member to bring an unfair-prejudice petition under the Companies Act 2006, and the ability of a member to bring a winding-up petition under the Insolvency Act 1986. While the members can, pursuant to statutory provisions, exclude the operation of the unfair-prejudice rules, the right to present a statutory winding-up provision cannot be so excluded (see *Re Magi Capital Partners*[15]).

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12 Section 24, Partnership Act 1890.

13 "The LLP's existence as a separate legal entity makes it more closely akin to a company than to a partnership (except insofar as the internal relations are governed by agreement between the members)." (Explanatory Notes, Limited Liability Partnership Act 2000).

14 Section 5(1), Limited Liability Partnership Act 2000.

15 *In the matter of Magi Capital Partners LLP (Re: A Company No 5758 of 2003)* [2003] EWHC 2790 (Ch).

3. Arbitrability

3.1 Introduction to arbitration in England and Wales

The Arbitration Act 1996 applies to all arbitrations (whether institutional or ad hoc) that have their seat in England. The 1996 act is based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law, but with modifications – in particular, the 1996 Act applies to all types of arbitration and not solely international commercial arbitration.

Subject to certain rules concerning matters such as the general duty of the tribunal, its substantive jurisdiction and the process for challenging an award,[16] parties are free to agree their own procedure or adopt institutional rules. The provisions of the 1996 act apply, however, unless the parties agree otherwise. The act gives the tribunal a wide discretion to decide procedural matters (including the extent of disclosure, and the extent and form of factual and expert evidence), subject always not only to the overriding principle that the tribunal must act fairly and impartially, but also to the right of the parties to agree matters of procedure.

There is no specialist arbitration court in England and Wales, but many of the arbitration cases are heard by the Commercial Court, which will generally be the first stop for applications in respect of arbitrations.

The main arbitration bodies located within England and Wales are the London Court of International Arbitration (LCIA) and the London Maritime Arbitrators Association (LMAA). Parties may nonetheless opt to use a different arbitral institution – eg, the International Chamber of Commerce (ICC) – and choose the seat of arbitration as England.

There are also various specialised bodies, which parties in a M&A transaction may prefer in a joint venture, including the Insurance and Reinsurance Arbitration Society (ARIAS (UK)) for insurance disputes, and the Grain & Feed Trade Association, the Federation of Oils, Seeds & Fats Associations and the London Metal Exchange (LME) (each of which acts as an appointing authority) in commodity disputes. In addition, the Panel for Recognised International Market Experts (specialising in disputes arising from the financial markets) has recently been established in The Hague.

For determination of whether the parties can choose arbitration for a particular dispute arising out of an M&A transaction, the key issue will be the drafting of the arbitration clause and whether this is sufficient to cover the dispute. Further guidance on drafting a suitable arbitration clause is given in section 3.2 below.

In order to subject a dispute to the laws of England and Wales, the parties should specifically provide in the arbitration agreement that both the law of the seat and the governing law are English law. The tribunal will decide the dispute in accordance with the law chosen by the parties or, if the parties agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.[17] In the absence of such a choice or agreement, the tribunal will apply the law determined by

16 A comprehensive list is set out in Schedule 1 to the Arbitration Act 1996.
17 Section 46(1), Arbitration Act 1996.

the conflict-of-laws rules that it considers applicable,[18] or by the doctrine of severability.

As seen in *Sulamérica Cia Nacional De Seguros SA v Enesa Engenharia SA*,[19] the English courts take a proactive approach to using the law of the seat of England as the law governing the arbitration agreement, even where the stated intent of the parties may be different. In *Sulamérica*, while the insurance policy at issue provided that any arbitration was to be held in London, other provisions of the policy stated that the governing law of the policy and the law relating to mediation was the law of Brazil, and that the courts of Brazil had exclusive jurisdiction. Nonetheless, the English courts held that the governing law of the arbitration clause was English law.

3.2 Shareholder agreements and internal corporate disputes

(a) Advantages of arbitration

Arbitration offers numerous advantages for those dealing with a dispute under a shareholder agreement or an internal corporate dispute. Often, the main advantage is confidentiality. Arbitration proceedings are generally held in private and the parties can be bound by strict confidentiality obligations. This is in contrast with court proceedings, which are often held in public and may be well publicised before any hearing has even taken place. The desire by parties not to wash dirty laundry in public is often crucial to ensuring the continuing operation of the company, minimising the impact on employees and directors not directly involved in the dispute, and maintaining the goodwill and reputation of the company at the centre of the dispute. It may also alleviate pressure by preventing one party from exercising undue influence over another by threatening adverse publicity.

Arbitration also has various other advantages. Most arbitration centres offer a fast-track process, allowing for speedy resolution of the dispute – highly important when one of the main focuses of the parties will be to resolve the dispute and get back to efficient operation of the company. Shareholder disputes are also likely to have multiple parties (an undetermined number of shareholders, and potentially the company itself), and the arbitration processes are well equipped to deal with disputes involving multiple parties, particularly as they are not required to follow the less flexible procedures that would need to be adhered to in court proceedings.

Generally, arbitration awards will be expressed to be final and binding, and except in limited cases there will be no way to appeal. While this can be a double-edged sword, parties will often be relieved to achieve a speedy and final resolution that allows them to focus on the viability and future operation of the business.

(b) Legal ability to choose arbitration

Although a shareholder agreement, and by extension an arbitration clause in that agreement, is enforceable under the general law of contract, the ability to choose arbitration can be limited by statute. In the cases which have examined a

18 Section 46(3), Arbitration Act 1996.
19 [2012] EWCA Civ 638.

shareholder's ability to choose arbitration over statutory processes, the prevailing view that emerges is that, in many circumstances, the parties can choose to arbitrate a dispute rather than rely on the mandatory provisions in company law.

In *Fulham Football Club (1987) Ltd v Richards and another*,[20] the Court of Appeal confirmed that neither Section 994 of the Companies Act 2006 (either expressedly or impliedly) nor public policy prohibits the resolution by arbitration of disputes arising out of an unfair-prejudice petition. Fulham FC brought court proceedings against the Football Association Premier League (FAPL) and Sir Dave Richards, the chairman of the FAPL, seeking an injunction prohibiting Sir Dave from acting as unauthorised agent and, alternatively, requesting his removal as chairman. The articles of association of the FAPL, which bound the FAPL and its member clubs (including Fulham FC), contained a clause that referred all disputes to arbitration, and the respondents sought to enforce this provision. The Court of Appeal upheld the arbitration clause, and held that the dispute should indeed be referred to arbitration. Patten LJ added *obiter* (in passing) that the only restriction on the arbitrator is hence in respect of the kind of relief that can be granted; if a remedy which was outside his ambit would be considered necessary, a shareholder would then be entitled to present the requisite petition to the court.[21]

In contrast, the right to present a winding-up petition cannot be excluded. In *Fulham* the court, while disagreeing with other aspects of the judgment in the *Exeter City* case,[22] agreed that an order for the winding-up of a company was a matter that was within the exclusive jurisdiction of the court, and could not be exercised by an arbitrator. The driving force behind such a rationale is public policy – the question in determining whether a matter can be submitted to arbitration is whether the matter will "engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process."[23]

(c) Parties to arbitration

Typically, the parties to an agreement to arbitration under a shareholder agreement will be the shareholders, although the company may also be a party.

Given the often frequent transfers of shares, parties to a potential dispute are likely to change on a regular basis, and it is therefore important to ensure that the arbitration clause binds both original and successor shareholders. Under English law, assignment of arbitration agreements is permissible (discussed further in section 3.3(c) below). Alternatively, a straightforward way to bind future shareholders is to include a provision in the shareholder agreement that, upon any transfer of shares, the transferee must accede to the shareholder agreement.

A major advantage of arbitration in shareholder disputes is the greater flexibility to adopt special rules and processes where the arbitration comprises multiple parties. Although some of these can be agreed at the outset of the arbitration or determined

20 [2012] Ch 333.
21 Per Patten LJ, at 356.
22 *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] 1 WLR 2910.
23 Per Patten LJ, at 344.

by the arbitrator as the matter progresses, one important element that should be agreed in advance is the selection of the arbitrator. Typically, an arbitration agreement will allow the claimant and respondent to each select an arbitrator, and those arbitrators will then select a chairman. In a dispute involving multiple shareholders, allowing each party to choose an arbitrator may make it unworkable – but one way of dealing with this would be to include in the arbitration agreement language that states which parties can select an arbitrator (whether this be claimant/respondent, or classes of shareholder).

3.3 Joint venture agreements

(a) Advantages of arbitration

The benefits set out in relation to the arbitration of shareholder disputes – confidentiality, speed and multiple parties – will apply equally in the case of a joint venture. In fact, confidentiality may be even more important in this case, particularly when the parties entering into a joint venture are corporate bodies, and the reputation and goodwill of multiple entities is at stake.

In addition, joint ventures can often include complex issues – whether these are the joint venture arrangements and operation, or the subject matter – where the parties may wish to have the dispute resolved by an expert who understands the particular issues of that industry or profession.

(b) Legal ability to choose arbitration

Whether the parties to a joint venture have the ability to arbitrate a dispute arising from the joint venture will depend in part on the type of vehicle set up to give effect to the joint venture.

Where a joint venture is established as a company, then the joint venture agreement will operate in much the same way as the shareholder agreement. Accordingly, the ability of the parties to arbitrate will be the same as discussed under section 3.1 above. In contrast, in a contractual joint venture, the parties can agree to determine their disputes in whichever way they choose (provided the contract does not fall foul of the normal rules – illegality, etc).

Where a joint venture is established by way of a partnership, then, as set out in section 2.2 above, the partners have the ability to determine the arrangements between themselves and can therefore agree to submit any dispute arising from the partnership to arbitration – including the winding-up of the partnership. However, in an LLP, different rules determine the extent to which an agreement between the members can exclude the operation of any statutory provisions. As a company/partnership hybrid, various statutory provisions apply to the LLP – including the unfair-prejudice provisions or the right to submit a winding-up petition.

In contrast to the position for a private company, specific statutory provision exists permitting an LLP to exclude the operation of the unfair-prejudice provisions if it is so agreed by the members. Section 459(1A) of the Companies Act 2006 states: "The members of a limited liability partnership may by unanimous agreement

exclude the right contained in subsection 459(1) for such period as shall be agreed. The agreement referred to in this subsection shall be recorded in writing."

There is no equivalent statutory provision allowing an LLP to exclude a member's right to present a winding-up petition to the court. In *Re Magi*,[24] the court accepted that, while in the case of a partnership the right to a winding-up could be excluded, a limited liability partnership was a different entity and a 'creature of statute', and it was therefore not possible to exclude the statutory right to apply to have the statutory entity wound up by the court.[25]

In *Re Magi*, the LLP agreement contained a provision that referred disputes to a single arbitration in accordance with the provisions of the Arbitration Act 1996. Following a dispute between the partners of the LLP, two of the partners petitioned the court for an order winding up the partnership, while the other partner sought to have the matter referred to arbitration in accordance with the provisions of the LLP agreement. The decision of the court to send the dispute to arbitration was based very much on the specific facts of the case – in particular, the arbitration was already afoot, the allegations in the arbitration were (potentially) material to the decisions that would be made by the court on the winding-up, there would be no publicity during the arbitration, and the parties had agreed to refer disputes to arbitration. However, the court refused to grant an open-ended stay and provided that the dispute was to return to the courts following the arbitrator's decision. Accordingly, while this case does not stand for the general proposition that winding-up disputes can be referred to an arbitrator, it does show that, in exceptional circumstances, the court has the discretion to be flexible.

(c) Parties to arbitration

Any dispute arising from a joint venture will have a number of different parties. In addition to the main joint venture partners, the dispute may also encompass (most commonly): parent companies or subsidiaries; guarantors; subcontractors; and shareholders/partners of the joint venture parties. An arbitration agreement must be prepared to deal with each of these parties, along with any past or future parties to the joint venture and arbitration.

Under English law, although historically it was suggested that the arbitration provisions of a contract were not assignable because an agreement to arbitrate was a personal covenant,[26] it is now accepted that arbitration clauses are assignable (subject to the usual rules of notifying the other party, and complying with any restrictions or prohibitions on assignment).[27]

A particular issue is the extent to which an agreement to arbitrate can be extended to non-signatories, which is especially relevant where the transaction involves groups of companies, or a series of contracts. In contrast with many other jurisdictions, the 'groups of companies' doctrine, which permits two separate legal

24 *In the matter of Magi Capital Partners LLP (Re: A Company No 5758 of 2003)* [2003] EWHC 2790 (Ch).
25 In contrast, the court stated that had it been a normal partnership, the parties would have had the right to seek a winding-up from an arbitration. (See Weeks J at 2790.)
26 *Cottage Club Estates Limited v Woodside Assets Company Limited* [1928] 2KB 463.
27 *Shayler v Woolf* [1946] Ch 320.

entities in the same group to be regarded as 'one and the same economic reality', is not accepted under English law.[28] Accordingly, where it is intended that all members of a corporate group are to be bound by an arbitration clause, each of those parties should be a signatory to the agreement.

Attention should also be paid to agreements arising from the main joint venture agreement – often there will be a main agreement, with a number of subsidiary agreements, either between the parties or with subcontractors. The parties should ensure that the dispute resolution provisions in these agreements do not clash with each other or the main agreement; and include the same arbitration provisions in each agreement if it is intended to deal with all disputes by arbitration.

In certain cases, non-signatories to the arbitration agreement may be able to enforce the agreement, for example under agency rules. Parties should also consider the influence of the Contracts (Rights of Third Parties) Act 1999. That act contains a specific section applying to arbitration, which permits a third party who is not a party to the arbitration agreement to bring arbitration proceedings against a promisor provided that the arbitration agreement is in writing and the term that purports to confer a benefit to it is subject to a term providing for the submission of disputes to arbitration. Depending on whether the joint venture parties wish third parties to be protected, they should consider including a clause either applying or excluding the Contracts (Rights of Third Parties) Act 1999 for certainty.

3.4 Allegations of fraud

Historically, under the Arbitration Act 1950, where a dispute involved the question of whether a party had been guilty of fraud, the court had the power to order that the arbitration agreement had no effect and to enable the question to be decided by the courts.[29] No equivalent provision exists in the Arbitration Act 1996. Nowadays, it is accepted that arbitrators can deal with fraud/bribery allegations, which commonly arise in arbitrations.[30]

4. Enforceability

4.1 Ability to enforce awards arising from M&A disputes

As a general principle, the arbitral tribunal can make an award based on the power granted to it by the parties (whether under the arbitration clause, or by the rules of the arbitration adopted by the parties) and on the power granted to them under the Arbitration Act 1996 (unless otherwise agreed by the parties). The tribunal has the power to grant declaratory relief or order the payment of a sum of money; and it also has the same powers as the court to order a party to refrain from doing something, to order specific performance of a contract, and to order the rectification, setting-aside or cancellation of a deed or other documents.[31]

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28 *City of London v Sancheti* [2008] EWCA Civ 1283.
29 Section 24(2), Arbitration Act 1950.
30 *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm); *Fiona Trust v Privalov* [2007] All ER (D) 233 (Oct); *Bilta (UK) Ltd v Muhammad Nazir* [2010] All ER (D) 146 (May).
31 Section 48, Arbitration Act 1996.

Domestic arbitration awards may be enforced, with the permission of the court, as if they were a court judgment.[32] In order to be enforced, the award must: be in writing and signed by all arbitrators (or those assenting to it); contain reasons, unless it is an agreed award or the parties have agreed to dispense with reasons; and state the seat of the arbitration and the date on which it is made.[33] Leave to enforce may then only be refused if the person against whom the award was made can show that the tribunal lacked substantive jurisdiction to make the award.[34]

Where the seat of arbitration is outside England and Wales, an arbitration award can be enforced in the English courts if it is a New York Convention award, ie, one made pursuant to a written arbitration agreement in a state that is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[35]

In certain circumstances, the English courts may refuse to uphold an award.[36] However, this is rare – in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*,[37] the court enforced an award despite public policy considerations relating to alleged illegality. In contrast, the Supreme Court ruled in 2010 in *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*[38] that an award given against the Government of Pakistan, which the Supreme Court found was not a party to an agreement under which the arbitration was brought (but which the arbitral tribunal concluded was bound by the arbitration agreement), was not enforceable under English law. In its judgment, the Supreme Court stated that it was permitted to revisit the arbitral tribunal's decision on jurisdiction for the purposes of determining whether the award could be enforced as a New York Convention award under the Arbitration Act 1996.

4.2 Practical tips

As discussed in section 3 above, arbitration has a number of advantages when dealing with disputes in M&A transactions, not least speed, confidentiality and availability of market expertise. To capitalise fully on these advantages, parties can make specific provision in the arbitration agreement to deal with them. When drafting such bespoke clauses, the key thing is what the parties wish to achieve from the agreement – and not all of the suggestions below will be appropriate for parties in all circumstances. With that in mind, key issues are as follows:

- *Speed*. A number of provisions can be included to ensure that the dispute

32 Section 66, Arbitration Act 1996.
33 Section 52, Arbitration Act 1996.
34 Section 66(3), Arbitration Act 1996.
35 Under Section 99 of the English Arbitration Act, the Arbitration Act 1950 continues to apply to the recognition and enforcement of awards under the 1927 Geneva Convention, which continues to apply in relation to certain awards that cannot be enforced under the New York Convention.
36 Refusal can be based on the following grounds: incapacity of a party to the arbitration agreement; invalidity of the arbitration agreement; lack of due notice or opportunity to present its case; lack of substantive jurisdiction of the arbitral tribunal; irregularity in the composition of the arbitral tribunal or conduct of the arbitral proceedings; award not binding on parties, set aside or suspended; subject matter of the arbitration not capable of settlement by arbitration; or recognition and enforcement of the award would be contrary to public policy.
37 [1999] 3 WLR 811.
38 [2010] UKSC 46

resolution process is expedited. In relation to matters before the arbitration, the clause may include provision that the parties have a limited amount of time (eg, 30 days) to resolve the matters amicably before the dispute is referred to arbitration – making this referral mandatory avoids delays caused by parties debating whether the arbitration clause is mandatory or discretionary, or attempting to refer the dispute to court. For the arbitration itself, particular rules can be included to speed up the process, including imposing limits on discovery or the length of the arbitration. Parties may consider whether they wish to appoint only one arbitrator – scheduling meetings and hearings with three arbitrators can be time consuming and delay the process, but it does increase the availability of expertise in the arbitration. Crucially, the arbitration should provide that after a decision has been reached by the arbitrator, it will be full and final and binding on all parties to the arbitration, thereby reducing the ability of parties to appeal the decision and prolong the dispute.

- *Confidentiality.* Although there is no express provision to that effect in the Arbitration Act 1996, it is an implied term of an arbitration agreement under English law that arbitrations are confidential and that certain documents generated in relation to the arbitration will be confidential.[39] Notwithstanding this, the parties may choose to include a confidentiality provision in the arbitration agreement. Note that the confidentiality obligation, whether under statute or contract, will be subject to certain limitations: confidentiality will certainly be limited if the award is challenged in court, or if the courts make an order for disclosure.
- *Market expertise* where the parties to the arbitration agreement are engaged in a particular industry or sector, the parties may wish to agree that, in the event of any disputes, an arbitrator is selected who has experience in the same field. This can be achieved either by the parties providing for the appointment of an arbitrator with particular qualifications (the difficulty with this being that the parties cannot know in advance the precise nature of the dispute, so these qualifications may not be the most useful), or by providing that an arbitrator will be chosen by an appointing authority that specialises in that particular area.

39 *Michael Wilson & Partners Ltd v Emmott* [2008] EWCA Civ 184.