

ELA ARBITRATION AND ADR GROUP

A SUMMARY OF THE ARBITRATION ACT 1996

Mandatory provisions

1. The Act contains certain mandatory provisions that have effect notwithstanding any agreement to the contrary (section 4). These are listed in Schedule 1 to the Act and include:
 - 1.1. sections 9 to 11 (stay of legal proceedings);
 - 1.2. section 12 (power of court to extend agreed time limits);
 - 1.3. section 13 (application of Limitation Acts);
 - 1.4. section 24 (power of court to remove arbitrator);
 - 1.5. section 33 (general duty of tribunal);
 - 1.6. section 40 (general duty of parties);
 - 1.7. section 43 (securing the attendance of witnesses);
 - 1.8. section 66 (enforcement of award);
 - 1.9. sections 67 and 68 (challenging the award; substantive jurisdiction and serious irregularity).

Stay of legal proceedings

2. A party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration may apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. The court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed (section 9).

The arbitral tribunal

3. The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman. If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator (section 15). The parties are

also free to agree on the procedure for appointing the arbitrator(s) with a default mechanism provided in the absence of agreement (section 16). A party to arbitral proceedings may apply to the court to remove an arbitrator on a number of specified grounds (section 24).

Jurisdiction of the arbitral tribunal

4. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement (section 30).
5. The court may, on the application of a party to arbitral proceedings, determine any question as to the substantive jurisdiction of the tribunal (section 32).

The arbitral proceedings

6. The arbitral tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent. It shall also adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined (section 33).
7. It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter (section 34). The parties are free to agree that the arbitral proceedings shall be consolidated with other arbitral proceedings (section 35). Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him (section 36).
8. The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings. Unless otherwise agreed by the parties, the tribunal has the power to order a claimant to provide security for the costs of the arbitration, and to give directions for the preservation of property or evidence (section 38).
9. The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes (a) complying without delay with any

determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (section 40).

10. The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration. Unless otherwise agreed by the parties, certain default powers apply including to dismiss the claim, continue the proceedings in the absence of a party or without written evidence or submissions on his behalf, make a peremptory order prescribing such time for compliance with it as the tribunal considers appropriate, and make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance (section 41).

Powers of court in relation to arbitral proceedings

11. Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal (section 42).
12. A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence (section 43).
13. Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders as it has for the purposes of and in relation to legal proceedings about the taking of evidence of witnesses, the preservation of evidence, making orders relating to property which is the subject of proceedings, the sale of any goods the subject of proceedings, and the granting of an interim injunction or the appointment of a receiver. In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively (section 44).
14. Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more

of the parties. Such an application shall not be considered unless (a) it is made with the agreement of all the other parties to the proceedings, or (b) it is made with the permission of the tribunal and the court is satisfied (i) that the determination of the question is likely to produce substantial savings in costs, and (ii) that the application was made without delay (section 45).

The award

15. The arbitral tribunal shall decide the dispute (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (section 46).
16. The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies. Unless otherwise agreed by the parties, the tribunal has power to make a declaration, order the payment of a sum of money, and the same power as the court to order a party to do or refrain from doing anything, to order specific performance of a contract, and to order rectification, setting aside or cancellation of a deed or other document (section 48).
17. The parties are free to agree on the form of an award. If or to the extent that there is no such agreement, the award shall be in writing, shall contain the reasons, and shall state the seat of the arbitration and the date when the award is made (section 52).
18. Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them (section 58).

Costs of the arbitration

19. The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties. Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs (section 61). For this purpose, costs of the arbitration includes (a) the arbitrators' fees and expenses, (b) the fees and expenses of

any arbitral institution concerned, and (c) the legal or other costs of the parties (section 59).

20. Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances (section 64).

Powers of the court in relation to award

21. An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is so given, judgment may be entered in terms of the award (section 66). Foreign awards may also be recognised and enforced under the New York Convention (section 66).
22. A party to arbitral proceedings may apply to the court challenging any award of the arbitral tribunal as to its substantive jurisdiction (section 67), or on ground of serious irregularity (sections 100-104).
23. Unless otherwise agreed by the parties, a party to arbitral proceedings may appeal to the court on a question of law arising out of an award made in the proceedings. Such an appeal shall not be brought except with the agreement of all other parties, or with leave of the court. Leave to appeal shall be given only if the court is satisfied of specific matters, including that the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, 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 (section 69).