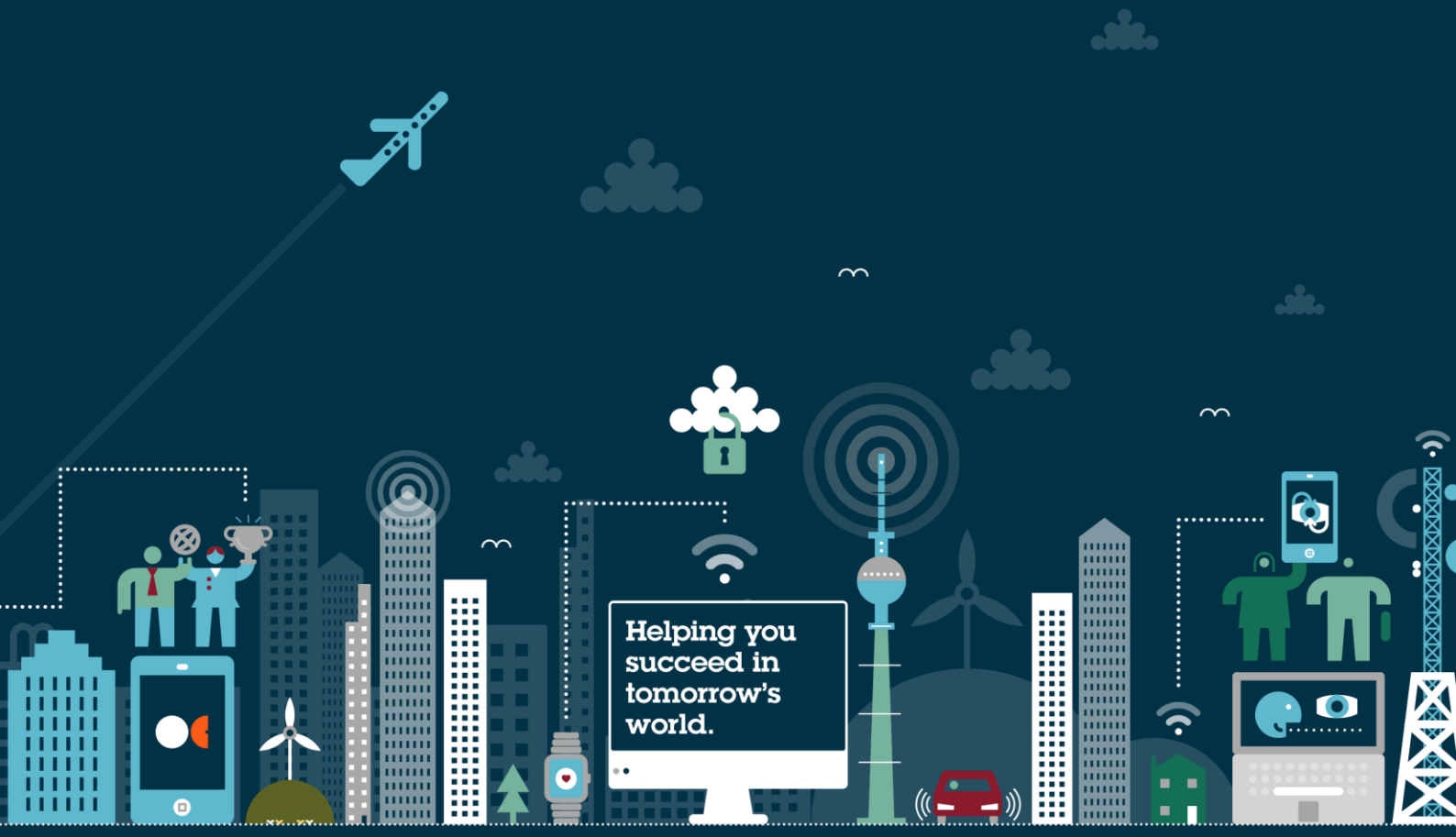
Arbitration in Court

Observations on over a decade of arbitration-related cases in the English courts



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Arbitration in London is thriving. A recent 2021 survey[1] found that London is joint first for the most preferred seat in international arbitration (a position that it has held for some time). For many years, arbitration practitioners have cited the arbitration-friendly approach of the English courts as a key reason for this popularity. Our report of arbitration cases before the English courts between 2010 and 2020 provides the empirical evidence regarding instances of interaction between arbitration and litigation and, in the authors' views, demonstrates that the English courts remain highly supportive of both domestic and international arbitration.

"This year sees the 25th anniversary of the Arbitration Act 1996. With possible Law Commission-led reform in the air, this report is timely. Driven by data, it explains why the interface between arbitral tribunal and court that the Act establishes is so effective and non-invasive. The statistics will intrigue and the conclusions enlighten. My congratulations go to Sir Bernard Eder and my Osborne Clarke colleagues Artem Doudko, Daniel Harrison, Michelle Radom and Charlie Hennig for their dedication and hard work in putting this together" - Greg Fullelove

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[1]The QMUL/White & Case 2021 International Arbitration Survey: Adapting Arbitration to a Changing World.

Foreword - Sir Bernard Eder

Since starting as a young lawyer over 40 years ago, there is no doubt that international arbitration has grown exponentially and that crucial to that development has been the delicate relationship between the arbitral process and the supervisory jurisdiction of the seat courts.

Over the years, I have sometimes heard murmurings from those abroad that the English courts meddle too much in the arbitral process and, in particular, that the system for challenging arbitration awards (for example, by disputing the jurisdiction of the arbitral tribunal or by challenging any award on the basis of some alleged "serious irregularity" or by way of an appeal on a question of law) is flawed because it constitutes an excessive and unjustified interference in the arbitral process, and causes unnecessary delay and additional cost.

If that were true, it would certainly be a Very Bad Thing. But the statistics show that any such suggestion is completely unfounded. This was obvious to me from my own somewhat elementary rough-and-ready analysis of the reported cases which I carried out myself annually from 2012. However, it has always been plain to me that a more thorough and rigorous analysis was necessary to silence the rumbling critics.

Hence, I was very pleased to hear that Artem Doudko of Osborne Clarke agreed to take responsibility for carrying out further work. Together with his colleagues (Michelle Radom, Daniel Harrison and Charlie Hennig), the attached report is the result of that research based on an analysis of some 538 arbitration cases which came before the English courts over an 11-year period from 2010-2020. Needless to say, that exercise has taken up a huge amount of time and effort. They deserve to be warmly congratulated. Bravo!

One of the difficulties in evaluating the statistics based on arbitration cases that come before the English courts is that (i) ideally, they have to be viewed against the backdrop of the total number of arbitrations which are commenced in London every year and result in an award but that (ii) those numbers are unknown or at least very uncertain. Looking simply at the published figures from the major institutions including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the London Maritime Arbitrators Association (LMAA), one can, I think, safely say that the total number of arbitrations commenced in London since 2010 must be, at least, about 3,000 per annum i.e. a total of over 30,000. Of those, it appears that on average there were, at least, 1,000 arbitration awards made every year – a total of at least 10,000 over the relevant 11-year period in question.

These figures provide the benchmark when considering the statistics referred to in the attached report. On any view therefore, the statistics demonstrate that any suggestion that the English courts meddle too much in the arbitral process is quite simply untrue. On the contrary, it seems to me that the statistics demonstrate that the arbitral regime created by the Arbitration Act 1996 has provided - and continues to provide – the perfect interface between, on the one hand, the English courts and the large number of arbitrations with London seats. I have no doubt that it is one of the reasons why London continues to be the pre-eminent choice of seat for international arbitration.

I would urge all interested in international arbitration to read the attached report carefully. I do not propose to repeat what is there set out but, to my mind, at least five major points stand out and are worth highlighting.

First, the total number of cases that come before the English courts is miniscule when compared with the total number of arbitrations commenced in London – perhaps no more than about 2 or 3%.

Second, the total number of successful challenges to an award (whether on the basis of lack of jurisdiction under section 67 of the 1996 Act or on the basis of "serious irregularity" under section 68 of the 1996 Act or by way of appeal under section 69 of the 1996 Act) is even smaller – less than 1% - when compared with the total number of awards.

Third, more specifically, the number of successful challenges on the basis of "serious irregularity" under section 68 of the 1996 Act is truly infinitesimal (less than the fingers on one hand) and demonstrates the strong pro-arbitration approach of the English courts. This should be strong encouragement to any arbitrator who might otherwise be tempted to succumb to "due process paranoia". However, it is important to bear in mind that a successful challenge under section 68 for serious irregularity does not mean that the court is adopting anything other than a pro-arbitration approach. On the contrary, in the very small number of cases where such challenges are upheld, the court is, in truth, adopting a pro-arbitration approach to ensure that the highest standards of the arbitral process are maintained.

Foreword - Sir Bernard Eder

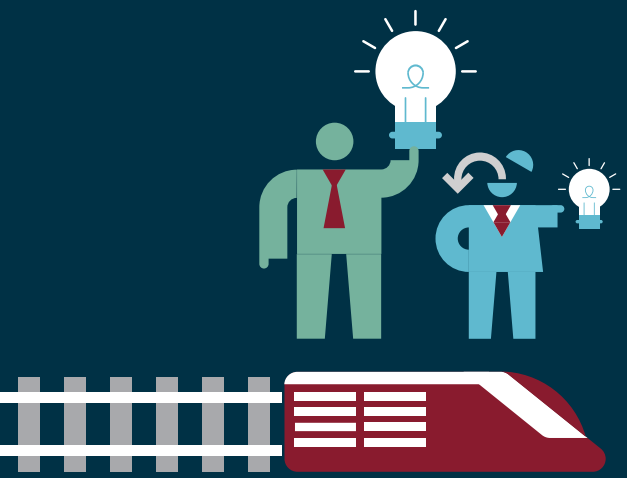
Fourth, the number of appeals (both successful and unsuccessful) on a question of law under s.69 of the 1996 Act is also very low – again less than 1% of the total number of awards. This is perhaps due to two main reasons viz (i) the fact that such appeals can only be brought with the leave of the court in very limited circumstances which process provides an effective and efficient filtering system[2]; and (ii) the fact that it is open to the parties to exclude the right of appeal. In this context, it is worth noting that the vast majority of appeals under section 69 of the 1996 Act are shipping cases where there is a strong and long-standing tradition of recourse to the courts on a question of law.

Fifth, the number of appeals to the Court of Appeal and the Supreme Court is again infinitesimal. This reinforces the point that although there is the theoretical possibility of a disgruntled party pursuing an appeal from a first instance court to the Court of Appeal and even the Supreme Court, it is exceptionally rare for any arbitration case to reach these exalted heights – and it appears that even when this blue-moon event occurs, the near certainty is that the hapless appellant will find that its appeal will usually fall on stony ground and have to pay the costs of the respondent.

All these points (and many others) underline the strong robust pro-arbitration approach of the English courts.

So – bravo to Artem, Michelle, Daniel and Charlie.
On behalf of the arbitration community, you deserve our grateful thanks.

Bernard Eder
July 2021



[2] Attached to the Report is what I hope is a helpful flowchart which I prepared some years ago indicating the various steps which must be considered in order for the court to grant leave to appeal.

Summary Table of Report

Section of the Arbitration Act 1996	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total	Result of the case: W=won application L=Lost application
7 (separability of arbitration agreement)	2	2	9	2		1	1		2			19	N/A
9 (stay of legal proceedings)	8	14	2	6	13	7	3	7	7	1	4	72	23W 35L
12 (extend time to begin arbitration)	3	1	1			1			2		1	9	4W 1L
14 (commencing arbitration)					2		1					3	N/A
18 (appointing arbitrator)	3		1	3	2	1		1			1	12	5W 2L
24 (removing arbitrator)	1	1				2	1	5	2		3	15	12W 3L
32 (court rules on tribunal's jurisdiction)	1	2			2				1			6	3W 1L
42 (court enforcement of tribunal's orders)				1		1						2	1W 1L
43 (securing attendance of witness)				1					1			2	2W 0L
44 (court powers of interim relief)	3	10	13	5	8	5	2	7	3	2	1	59	25W 22L (W=intervention to support arbitration)
51 (settlement)						1			1			2	N/A
57 (correcting award)			1							1		2	2W 0L
66 (enforcing award)		4	3	4		4				2	2	19	6W 2L
67 sole (challenge re substantive jurisdiction)[3]	1	1	6	3	1	8		4	12	4	3	43	10W 33L
68 sole (challenge re serious irregularity)	1	6		3	7	4	5	5	13	5	5	54	13W 41L
69 sole (appeal on point of law)	6	11	11	15	9	6	11	6	10	8	2	95	38W 51L
67+[4]	4	13	3	3	4	4	6	1	2	7	2	49	4W 26L
68+	4	6	2	8	4	5	10	4	15	11	2	71	1W 50L
69+	2	8	3	9	2	1	4	5	5	9		48	6W 31L
70 (exhaust tribunal appeals process first)	1	1	1	3	1	1		2	1	1		12	7W 0L
72 (challenge if not take part in arbitration)	2	1		1		2	3	2				11	5W 5L
79 (court extension of arbitration time limits)		2					1	1				4	3W 0L
80 (notice etc in connection with legal proceedings)	2	2	2									6	N/A
101 (recognition and enforcement of awards under NYC)						1	1	1	1	2	2	8	5W 2L
103 (refusal of above)	2				5	2	1	2	2	1	4	19	5W 11L
Total	46	85	58	67	60	57	50	53	80	54	32	642	

[3] This means that section 67 was the only section relied on.
[4] This means that section 67 was raised with another 67-69 section.

Introduction

In this report, we have reviewed all 538 cases decided by the English courts in this 11 year period between 2010 and 2020, which substantively concerned a provision of the Arbitration Act 1996 (the "**Act**") [5]. The Act governs all arbitral proceedings commenced on or after 31 January 1997 for which the seat of the arbitration is in England, Wales or Northern Ireland, and also governs the enforcement of awards made in other State parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). Based on the data from this comprehensive review, we can draw certain conclusions regarding the approach of the English courts on arbitration-related issues.

The first point to note is that a very small proportion of English-seated arbitrations come before the English courts. Although the number of English-seated arbitrations in any given time period is unknown, the data published by certain England-based arbitral institutions (which are likely to be administering English seated arbitrations) indicate that it would likely be many thousands over the 11 year period of this report.

For example, the LMAA handles approximately 1,700 arbitrations each year and the LCIA administered 407 arbitrations in 2020 alone. This means that the vast majority of arbitrations seated in England proceed without the need to involve the English courts and parties are therefore right to choose England as the seat if they want their disputes to stand a good chance of being finally resolved by an arbitral process. Other factors may play a role in this, including the chilling effect of the English law “loser pays” approach to costs, which means parties will generally only issue proceedings in the English courts if they consider that they have a reasonable chance of success.

> Brexit - no discernible effect on the numbers of cases before the English courts (yet).

> 538 cases is a very small proportion of the likely number of all English-seated arbitrations over an 11 year period.

The total number of 538 cases included some cases which concerned applications under more than one section of the Act, with a total of 642 separate applications. The court reached a decision in 511 cases, while in the remaining 27 cases the court made no relevant ruling and therefore these do not fall within our dataset. In total, 53 cases were heard in the Court of Appeal (so only around 10% of cases brought in England reach this stage). Of these, 24 appeals were dismissed and 12 appeals allowed (the remaining cases reaching no conclusion on the first instance judgment). Over the 11 year period, only 4 cases reached the Supreme Court (where 3 appeals were dismissed and 1 allowed).

We analyse further below the English courts' approach to applications under different sections of the Act. Our primary conclusion is that over the past decade it appears that the English courts have continued to be highly supportive of both domestic and international arbitration. Some of the data in support of this conclusion show for example that most applications to extend the time to begin arbitration succeed, most applications to appoint an arbitrator succeed and most applications to recognise and to enforce an award succeed. Some of the data in support of this conclusion show, for example, that most challenges to arbitral awards fail and this is supportive of arbitration, but even if the court decides to set aside a "bad" award it may still in fact be supporting arbitration by seeking to ensure that the arbitral process is of a high standard. The report also indicates that, at least in the period between the Brexit referendum in 2016 and 2019 (before a reduction in cases in 2020, which was most likely caused by the coronavirus pandemic), Brexit had no discernible effect on the numbers of cases before the English courts. Arbitration practitioners generally share the view that Brexit should not make England a less attractive seat for arbitration and the figures appear to support this view.

At the same time the figures do not indicate any increased popularity for arbitration as a form of dispute resolution in this jurisdiction, although this will become clearer over the next few years.

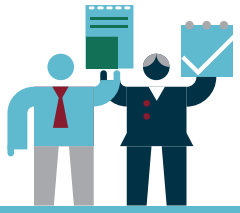
[5] This means that we did not include cases which merely referred in passing to the Act.

Summary results of the report by reference to the Act[6]

Overall, in the period of this report, the number of cases each year has remained fairly consistently between approximately 50 and 60 cases, with an anomalous rise to 80 in 2018 and a significant fall to 32 in 2020. That lower figure for 2020 may reflect a delay in new cases due to the coronavirus pandemic, although the total number of cases issued in the Commercial Court rose by 6% in 2020. There was an overall downward trend in the reliance on most sections of the Act over the ten year period, with the exception of sections 67, 68 and 69 of the Act, which saw an increase.

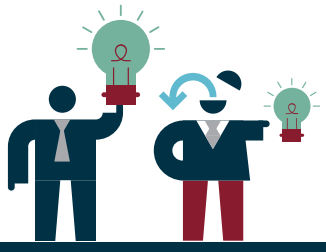
We explain below some trends by reference to four categories of cases before the English courts.

1
Appeals / challenges to an arbitral award



2
Applications for stays or other interim relief

3
Applications to remove or to appoint an arbitrator



4
Applications relating to the enforcement of an arbitral award under the New York Convention

[6] It should be noted that key criteria were missing for many cases so these observations are based on the material available.

Summary results of the report by reference to the Act

Appeals/challenges to an Arbitral Award

The majority of cases (by some margin) in the report period concerned appeals or challenges to arbitral awards. In total, 72 appeals/challenges under sections 67, 68 and 69 of the Act were successful and 232 such appeals/challenges failed. This shows a clear trend for the English courts to uphold awards. As mentioned above, even where an appeal or challenge has succeeded, that might be seen as supportive of the arbitration process: setting aside a 'wrong' or 'bad' award ensures that the arbitral process is held to a high standard by the English courts.

These cases break down as follows:

- appeals under section 69 (appeals against an award based on an error of law) were the most common, with 143 cases in the report period. Of these 143 cases, 126 resulted in a decision. Out of these 126 decided cases, 44 appeals were successful (34%);
- challenges under section 68 (challenging an award based on serious irregularity) were the second most common, with 125 cases in the report period, of which 105 resulted in a decision. Of these 105 decided cases, 14 appeals were successful (13%); and
- challenges under section 67 (challenging an award based on the lack of substantive jurisdiction) were the least common, with 92 cases, of which 73 resulted in a decision. Of these 73 decided cases, 14 challenges were successful (19%).

The number of appeals/challenges brought may seem high given the low chance of success and the fact that parties may agree to disapply section 69 (this can also be achieved by agreeing to the arbitral rules of particular arbitral institutions, which in turn include a provision to this effect), but there are often commercial reasons for bringing such an appeal/challenge.

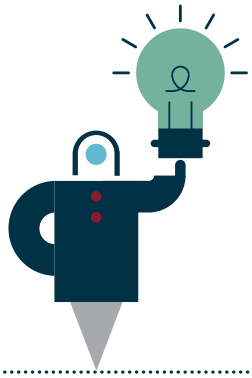
It is notable, and perhaps unexpected, that applicants successfully appealed under section 69[7] in such a high number of cases (126) and at such a high rate (34%) (out of the cases which had successfully obtained permission to appeal in the first place). Under section 69 the court must be satisfied that:

- the determination of the question of law will substantially affect the rights of one or more of the parties;
- the question of law is one which the tribunal was asked to determine;
- either the decision of the tribunal on the question of law 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
- it is *"just and proper in all the circumstances"* for the court to determine the question of law.

In order to bring a challenge under section 68, the applicant must demonstrate that there has been a serious irregularity which has affected the tribunal, proceedings or award and that this has caused or will cause the applicant substantial injustice. The Act lists categories of serious irregularity, which include the failure by the tribunal to comply with its general duty to act fairly and impartially. The parties cannot agree to disapply section 68, which is a mandatory provision of the Act.

A challenge under section 67 can be brought where the tribunal, having its seat in England and Wales (or Northern Ireland), lacked "*substantive jurisdiction*". This concerns issues such as whether there was a valid arbitration agreement, the tribunal was properly constituted and the matters submitted to arbitration fell within the scope of the arbitration agreement. The parties cannot agree to disapply section 67, which is a mandatory provision of the Act.

> The majority of cases (by some margin) in the report period concerned appeals or challenges to arbitral awards.



[7] It is not possible to ascertain how many permission to appeal applications were made before the next stage of the appeal itself.

Summary results of the report by reference to the Act

The results of the report show not only that parties frequently bring appeals/ challenges based on more than one section of the Act, but also that such combined challenges/appeals are less likely to succeed (on the basis of either section).

For example:

- where section 69 was the only basis for an appeal, 38 of 89 applications succeeded. However, when combined with other challenges, only 6 of 37 applications succeeded;
- where section 68 was the only basis for a challenge, 13 of 54 applications succeeded. However, when combined with other challenges, only 1 of 51 applications succeeded; and
- where section 67 was the only basis for a challenge, 10 of 43 applications succeeded. However, when combined with other challenges, only 4 of 30 succeeded.

> The results of the report show that parties frequently bring appeals or challenges based on more than one section of the Act. Interestingly, statistically such combined applications are less likely to succeed.

Applications for stays or other interim relief

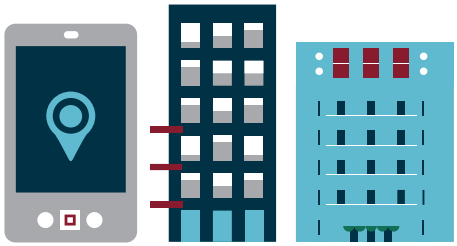
In the report period there were 72 applications to stay legal proceedings in favour of arbitration, of which 58 resulted in a decision. The courts allowed 23 (40%) and refused 35 (60%) of these applications. Overall, throughout the period there was a downward trend in bringing such applications (from 22 in 2010 and 2011 to 5 in 2019 and 2020).

Section 9 of the Act permits a party to apply to the court for a stay when it believes that the claim is being litigated in breach of an arbitration agreement. The court will refuse an application for a stay if it is satisfied that that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 9 is a mandatory provision of the Act and applies regardless of the seat of the arbitration, provided that the litigation proceedings have been commenced in England.

When parties applied to the courts in the report period to obtain other forms of interim relief under section 44 of the Act, such as freezing injunctions or other injunctions, the court granted interim relief in 53% of cases. As with applications for a stay under section 9, applications for other forms of interim relief trended downwards over the report period (from 26 applications in total during the first 3 years of the report to 6 applications in total in the last 3 years).

It is important to note that a request for interim relief should not automatically be seen as an attack on the arbitral process. The Act confers supplementary procedural powers on the court to act when a tribunal cannot act effectively itself (or has not yet been constituted). Given that arbitrators in an arbitration seated in England lack the power to make orders against third parties and have no general powers of enforcement, an application under section 44 may be an application in support of the arbitral process.

> Requests for interim relief from a court should not automatically be seen as an attack on the arbitral process.



Summary results of the report by reference to the Act

Applications to remove or to appoint an arbitrator

There are often problems in the appointment of arbitrators, for example because the parties cannot reach agreement over the arbitrators or one party does not participate in the process. Similarly, a party may seek to remove an arbitrator should be removed from, or appointed to, a tribunal. The Act contains default provisions which allow the court to break deadlocks and to rule on applications in such circumstances, including by finding that "an arbitrator should be removed from or appointed to a tribunal". Therefore, cases include decisions in support of the arbitral process when the tribunal itself has not yet been appointed and so cannot act.

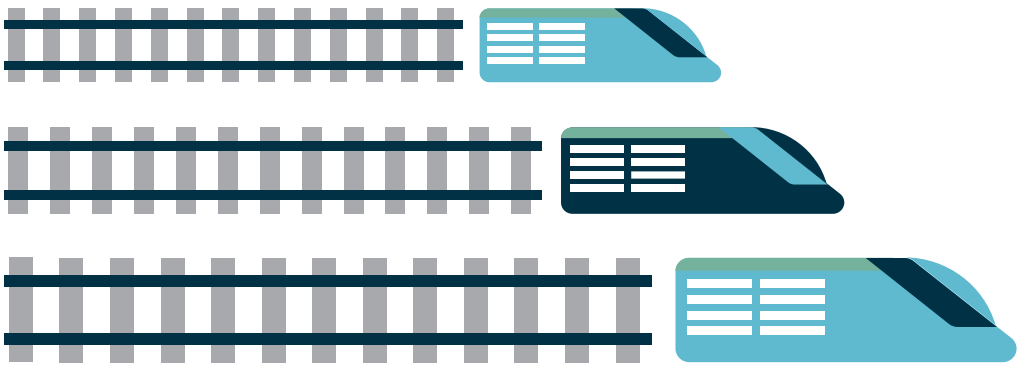
The present report reveals that applications to remove or to appoint an arbitrator are relatively rare, with only 27 cases in the report period, comprising 15 applications to remove an arbitrator and 12 applications to appoint an arbitrator. Applications to appoint an arbitrator were 70% successful and applications to remove an arbitrator were 80% successful. It will be interesting to see how this trend develops in the coming years following the 2020 Supreme Court judgment in *Halliburton Company v Chubb Bermuda Insurance Ltd*, which examined arbitrator conflicts in English-seated arbitrations (see further below).

Applications to enforce a New York Convention award

A New York Convention arbitral award (that is, an award issued in an arbitration seated in a State party to the New York Convention), which is valid on its face, will be enforceable in England unless the respondent raises a valid defence. Enforcement proceedings in this jurisdiction commonly arise when an arbitral award has been obtained in another New York Convention country and the successful party wishes to enforce against the losing party's assets located here.

Section 103 of the Act contains certain defences to enforcement, but the court retains the discretion to enforce an arbitral award even if a defence under section 103 has been properly made out. The defences include that the arbitration agreement was invalid under the law to which the parties subjected it (or where the award was made), proper notice was not given of the appointment of the arbitrator or the arbitral proceedings, or the arbitrators went beyond the scope of their reference.

The present report has revealed that a challenge to enforcement is unlikely to succeed under section 103, since the court refused 11 such challenges and allowed only 5. In such challenges, the courts have consistently recognised the pro-enforcement bias by the English courts and found that enforcement may be refused only if one of the listed grounds, which are exhaustive and narrowly interpreted, is satisfied.



> A challenge to enforcement is unlikely to succeed.

Other highlights of the report

The report allows a rare insight into the type of arbitrations which are seated in London and/or which come before the English courts. Details of otherwise confidential arbitrations have been made public only as a result of the court process.

Based on the data available, we set out below some interesting highlights from the report in relation to seven categories

1
The industry areas of the arbitrations

2
The applicable arbitral institutional rules and the amounts in dispute in arbitrations administered by different institutions

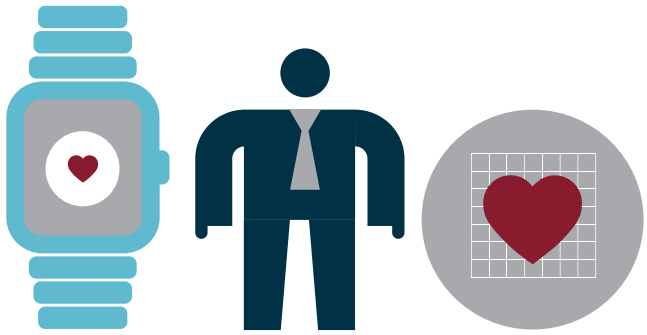
3
The nationality of the parties

4
The amounts in dispute in the arbitrations

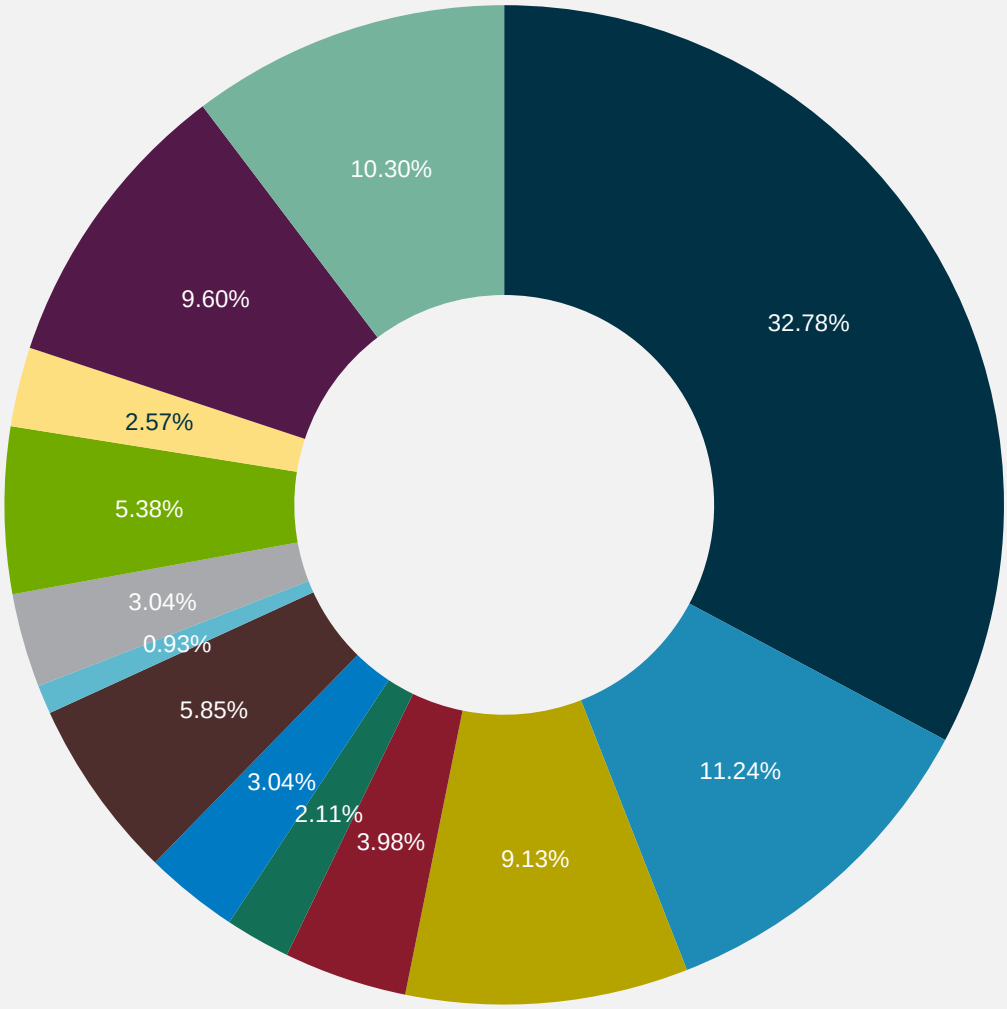
5
The precise English court to which the case was brought

6
The time period between the arbitral award and the court judgment

7
Some key institutions by reference to amount in dispute

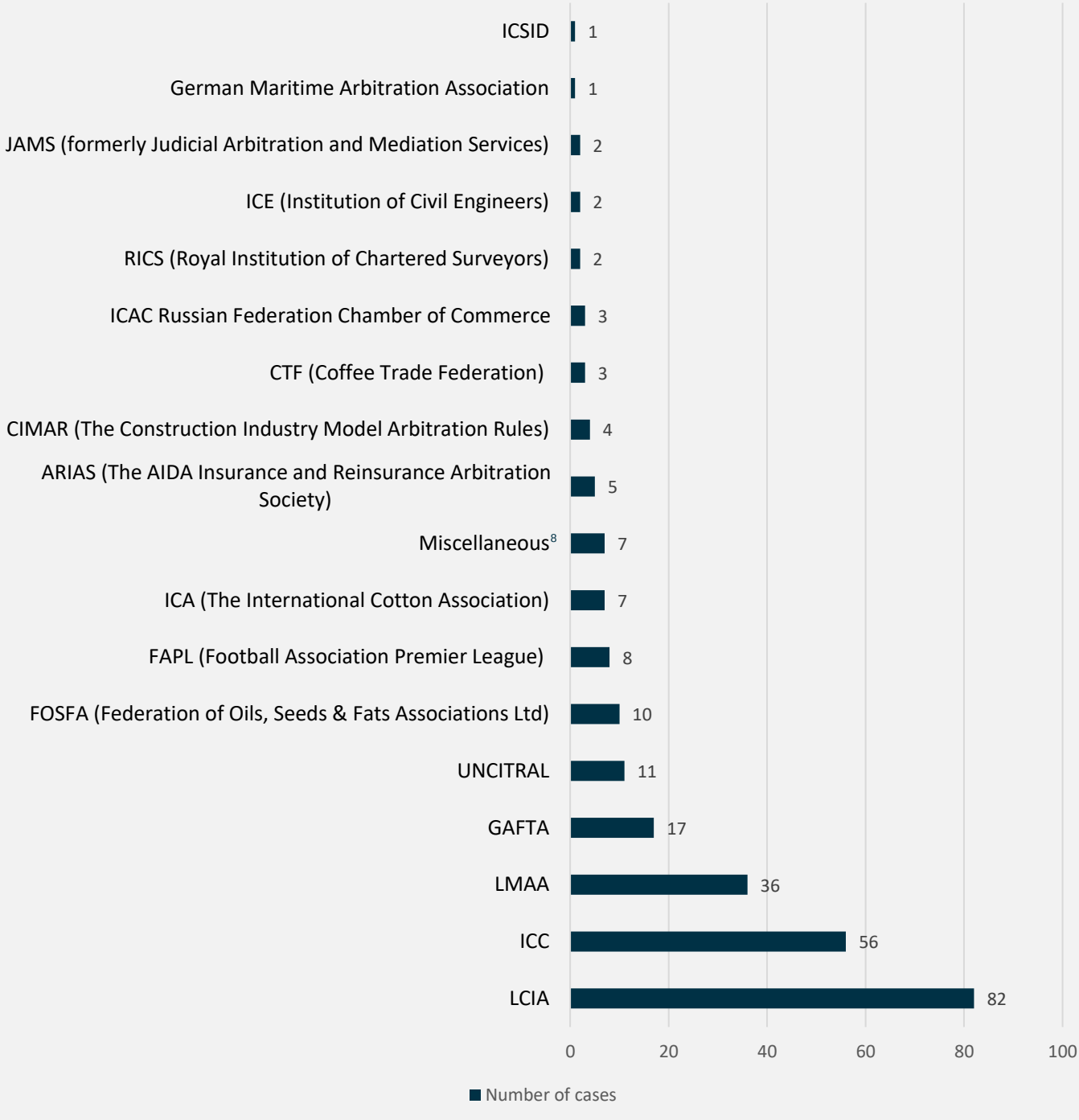


Industry area (where reported)



In this report, we have examined the industry area relevant to the underlying arbitration. This revealed that around a third of cases involved shipping disputes. This is consistent with the long-standing recognition of London as the leading global seat for maritime arbitrations, which is in large part due to the popularity of the LMAA. The data also show relatively high numbers of arbitrations in the energy, construction and insurance industries.

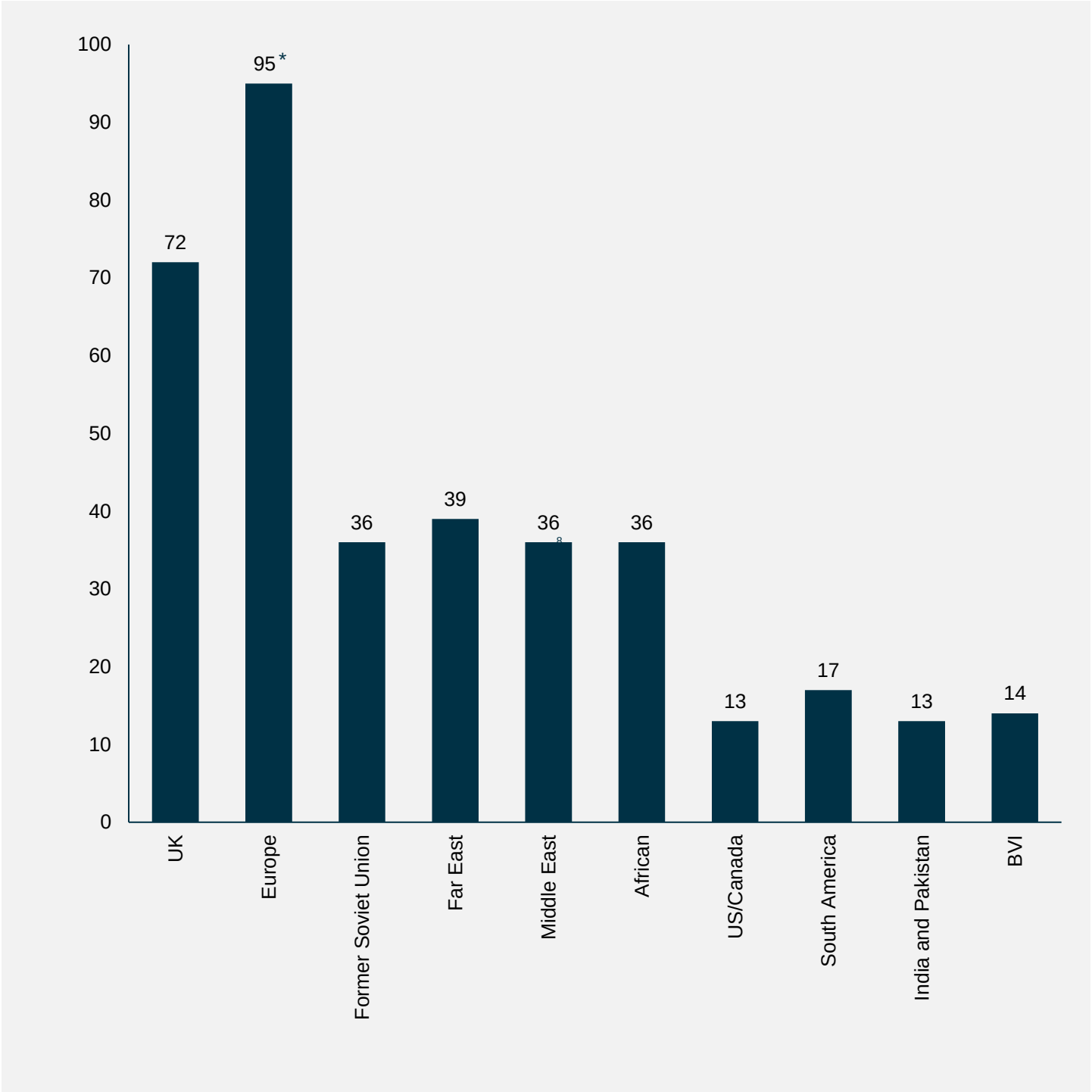
Institutional rules



In this report, unsurprisingly, the LCIA rules applied to the highest number of arbitrations. Given the predominance of shipping disputes, it is also unsurprising that the LMAA rules came in third. The ICC rules also clearly continue to be a popular choice for arbitrations seated in England.

[8] These break down as follows: Cairo Regional Centre for International Commercial Arbitration: 1, CIETAC: 1, CAS: 1, DIAC: 1, Family Law Arbitration Financial Scheme: 1 and London Metal Exchange: 2.

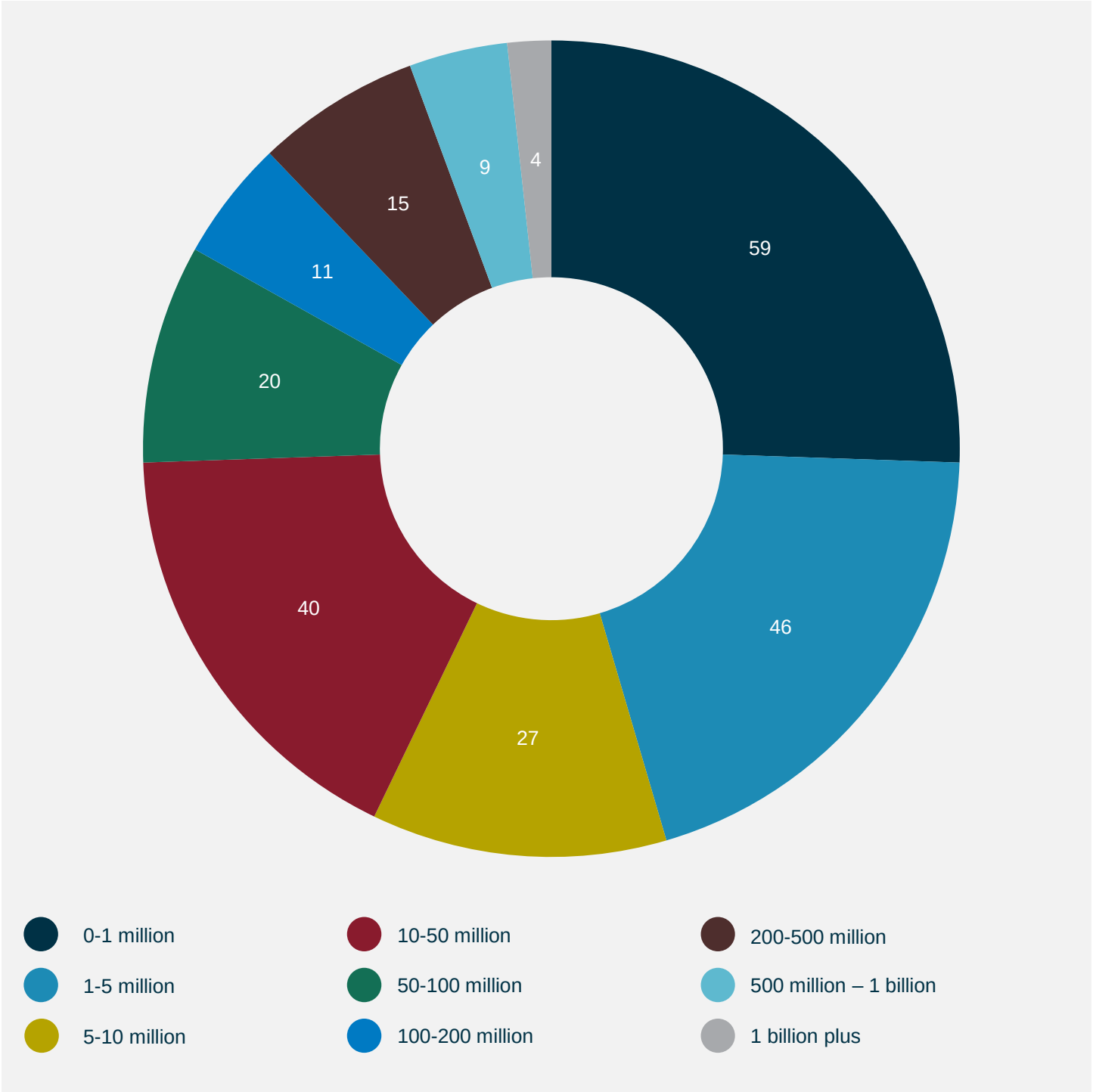
The nationality of the parties



There is a very wide range of nationalities involved in the cases, and it will be interesting to see whether Brexit has any effect on this in the future.

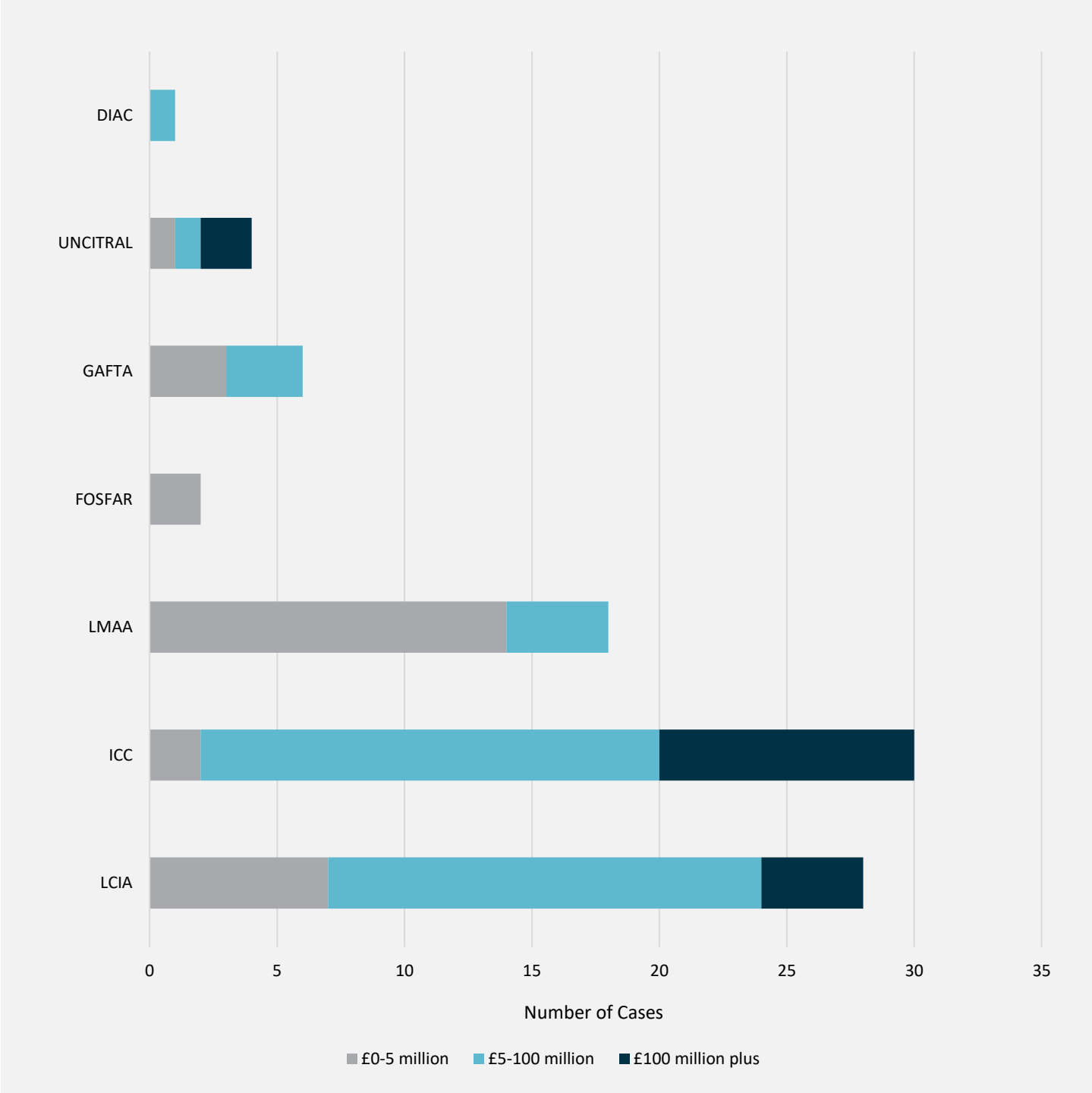
* including 12 from Switzerland, 8 from France, Spain and Cyprus and 7 from Luxembourg.

Amounts in dispute (£) (where reported)



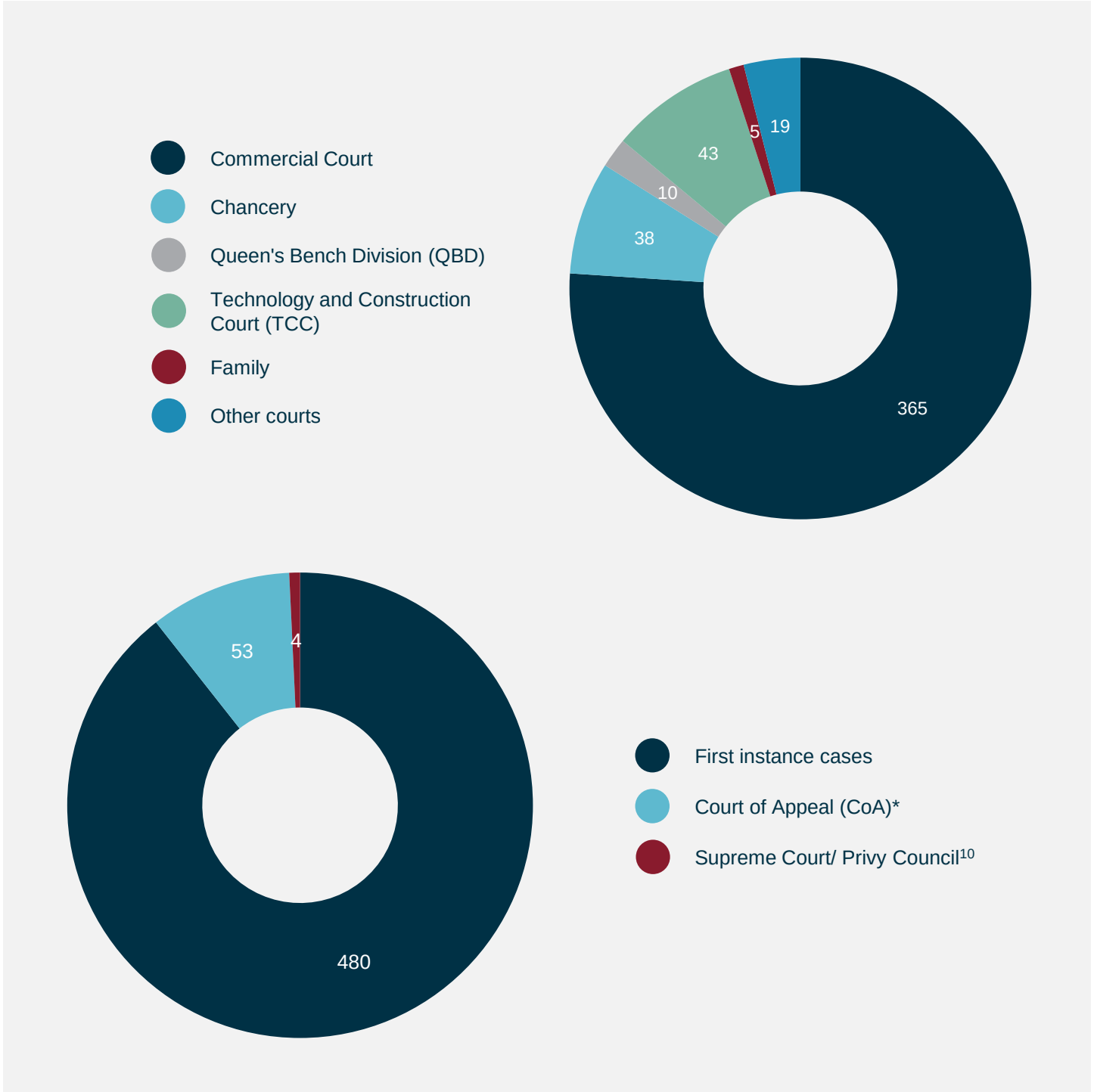
The cases did not always identify the amounts in dispute. As one might expect, there were more cases in relation to lower amounts in dispute.

Cases from key institutions by case value (where reported)



The LCIA and ICC dominate at the higher end of the scale. Given the prevalence of shipping-related arbitrations before the English courts, it is perhaps surprising that the LMAA arbitrations only concerned comparatively smaller amounts in dispute.

Courts



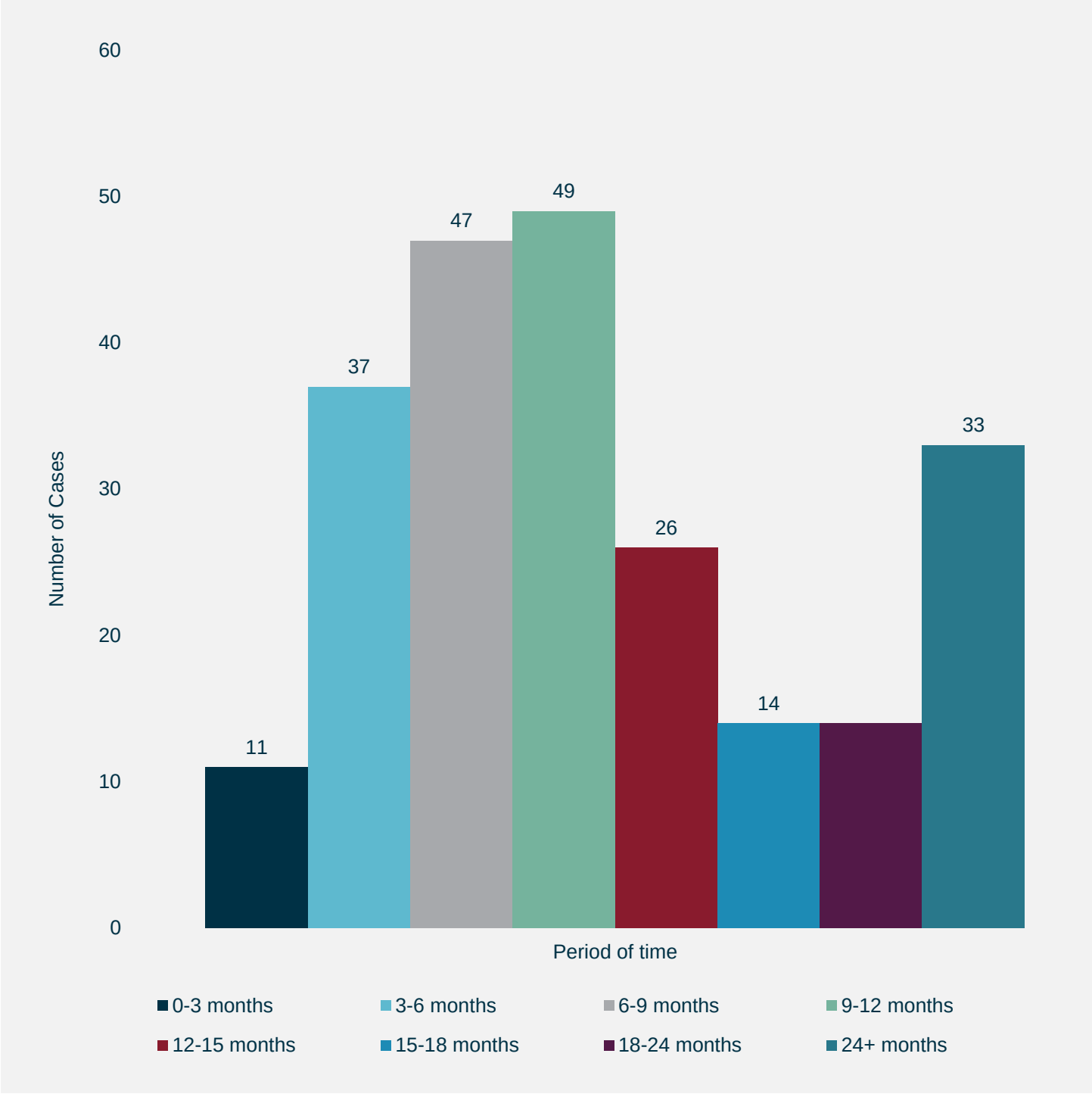
This demonstrates the wealth of experience in arbitral disputes amongst the English judiciary. The Commercial Court has seen high levels of cases involving arbitration (currently, around 25% of the Commercial Court's work is made up of arbitration-related cases)[9] and several judges have heard 10 or more cases.

*Of the cases which reached a relevant decision (i.e. excluding cases concerned only with an application for permission to appeal), 24 appeals were dismissed and 12 appeals allowed.

[9] See the Business and Property Courts' Commercial Court Report 2019-20.

[10] 3 appeals were dismissed and 1 allowed.

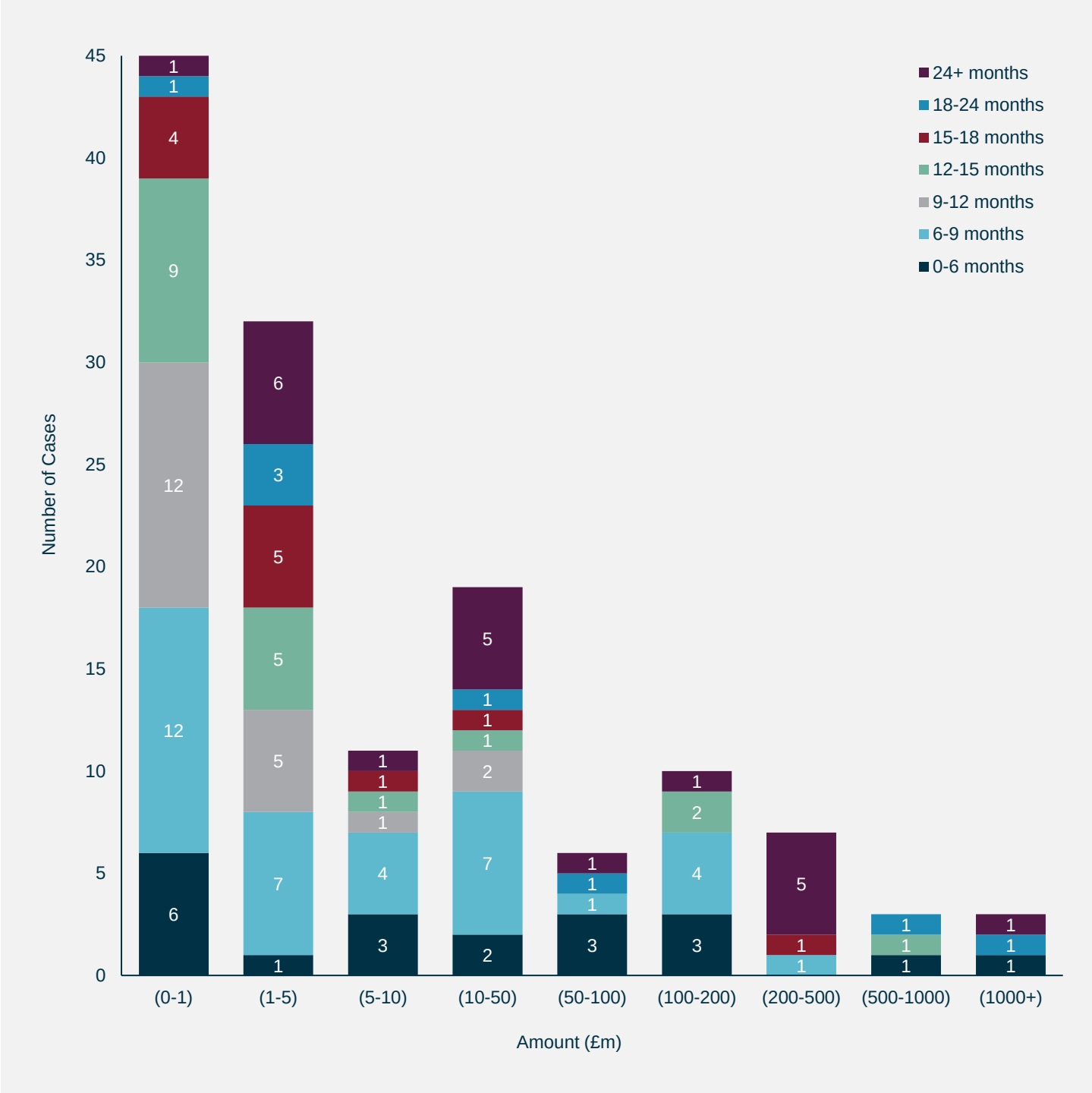
Time between arbitral award and court judgment



In the report period, cases generally reached judgment quite quickly. The majority (62%) received judgment within 1 year and over 20% received judgment within 6 months. This is quicker than other civil cases before the English courts, which typically take around a year or more to reach judgment. This may in part be due to the short deadlines under the Act for appeals/challenges under sections 67, 68 and 69.

[11] See the Business and Property Courts' Commercial Court Report 2019-20.

Time to judgment v amount in dispute



This chart suggests that disputes involving the smallest amounts may reach a final conclusion quicker, overall, than disputes involving larger amounts. A number of factors may account for that conclusion: for example, it may be that larger value disputes attract a higher degree of legal argument/disagreement which slows down the litigation process.

Section of the Act v time to judgment

		Time (months)					
		0-3	3-6	6-9	9-12	12-15	15-18
AA96 Section	7	2	3	2			
	9	1				1	
	24			1			
	32		1		1		
	33				2		
	42		2				
	44	4	2	2	1		1
	51				1		
	57	1	1	1			
	66	1	2	3	3	1	1
	67	1	13	15	8	4	7
	68	3	9	30	20	12	8
	69	1	4	29	27	25	6
	70	1	5	3	1	1	2
	72		1		2	1	
	79					1	1
	80		1	2	2	1	
	101					1	1
	103		1	1		1	2

This table supports the view that most challenges/appeals to awards are resolved within a year of the award. However, where interim relief is sought, the courts act with even greater speed: most interim relief applications are dealt with within 3 months.

Looking ahead

We intend to publish another report to cover the period from 2021 to 2029 in due course. It will be interesting to see whether Brexit has had any impact on arbitration in this jurisdiction, and show any effects of the recent UK Supreme Court judgments of *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* and *Halliburton Company v Chubb Bermuda Insurance Ltd.*

Halliburton Company v Chubb Bermuda Insurance Ltd

In this case, it came to light after the arbitrator's appointment that the arbitrator was acting in two other arbitrations involving one of the parties. The Supreme Court concluded that the objective test of the fair-minded and informed observer applies equally to judges and all arbitrators. However, the Supreme Court noted that there is a *"premium on frank disclosure"* put on arbitrators because: (a) arbitrations are private and confidential; (b) there is a limited right to challenge or to appeal an arbitrator's award; (c) arbitrators are paid by the parties rather than the public purse and so are reluctant to upset those parties; (d) arbitrators may be non-lawyers and/or come from different jurisdictions with differing ideas about ethically acceptable conduct; and (e) a party has no way of finding out how an arbitrator has decided a common issue in a separate arbitration in which the other side was involved.

The Supreme Court found that for all these reasons, arbitrators are under a legal and statutory duty (and there is an implied term too) to disclose facts or circumstances which *"are relevant and material to … an assessment of the arbitrator's impartiality and could reasonably lead to … an adverse conclusion".* Where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, this may, depending on the relevant custom and practice, give rise to an appearance of bias. There is no need to obtain the consent of that common party to the disclosure, unless such consent is customary in arbitrations in that particular field.

Although the Supreme Court concluded that there had been no apparent bias in this case, that conclusion was in part based on the fact that the applicable English case law was uncertain on this point at the relevant time. Accordingly, following the Supreme Court's clarification, the English courts are now less likely to forgive an arbitrator's failure to disclose multiple appointments in related cases and this may lead to an increase in challenges to arbitrators.

Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb

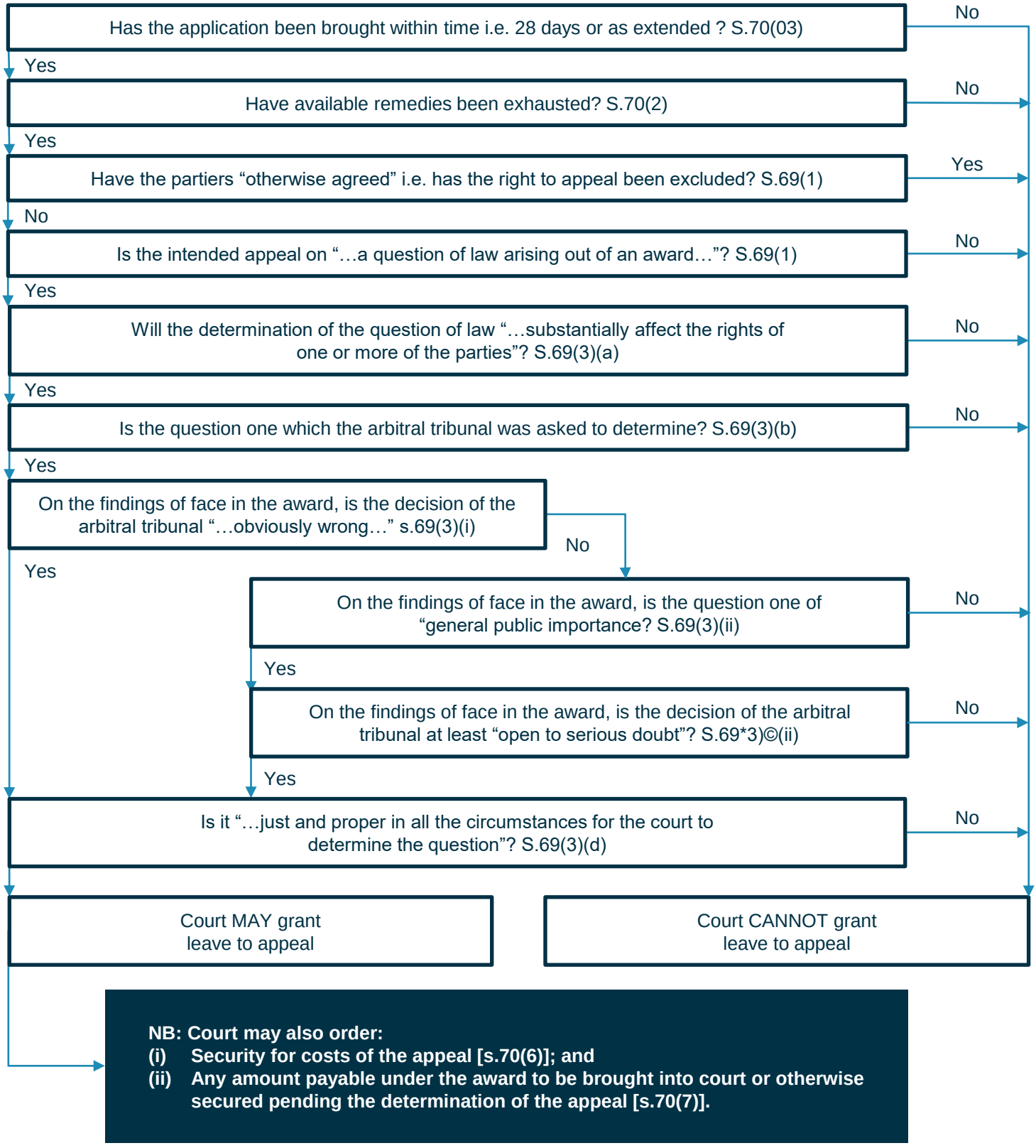
International commercial contracts which contain an arbitration agreement are governed by three systems of national law in the event of a dispute: (a) the law governing the substance of the dispute (usually the governing law of the contract); (b) the law governing the arbitration agreement; and (c) the law governing the arbitration process (generally the law of the seat of the arbitration).

After conflicting Court of Appeal judgments, in this case, the Supreme Court finally determined which law governs the arbitration agreement when: (a) the parties have not expressly agreed this; and (b) the law governing the substance of the dispute and the law governing the arbitration process are different.

The Supreme Court concluded by a 3:2 majority that in the absence of an express agreement, the law governing the arbitration agreement will be the (expressly or impliedly chosen) law governing the contract. The choice of a different country as the seat will not, without more, alter that determination. However, that determination may be altered if there is a provision under the law of the seat that arbitrations taking place in that country are governed by its law or if there is a serious risk that the default position will render the arbitration agreement ineffective. If there is no express choice of law governing the contract, the law of the arbitration agreement will be the law with which it is most closely connected (usually the law of the seat).

The Supreme Court has now resolved an issue which gave rise to a number of cases in recent years and it will be interesting to see how, and how often, the courts apply this judgment.

Application for leave to appeal under s.69 Arbitration Act 1996



NB: Court may also order:
(i) Security for costs of the appeal [s.70(6)]; and
(ii) Any amount payable under the award to be brought into court or otherwise secured pending the determination of the appeal [s.70(7)].

Methodology explained

In order to produce this report, we initially identified all cases reported on the British and Irish Legal Information Institute (BAILII) and Lawtel websites which contained any reference to one or more sections of the Act. We reviewed those cases and identified the cases with references of sufficient relevance to be considered further and included in the report. From those cases, we captured information for the purposes of the report (e.g. in relation to institutions, industry, amounts in dispute) to the extent that it was available.

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Daniel is an Associate Director in Osborne Clarke's dispute resolution team, with expertise in international arbitration.

He has acted as counsel in both international commercial and investment treaty arbitrations, representing and advising clients in a range of sectors including energy, life sciences and telecommunications. Daniel has conducted both ad hoc and institutional arbitrations, including under the LCIA, ICC, SCC, ICSID and UNCITRAL rules.

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Michelle qualified in 1993 and worked as an insurance litigator for 12 years before moving into a knowledge role. She was the sole litigation knowledge lawyer at Clyde & Co for over 13 years before joining Osborne Clarke 2 years ago. She has widespread experience of advising fee earners and clients on various aspects of dispute resolution and delivers frequent talks on the topic as well.

She has edited and contributed to several publications, including the ICLG comparative guides and Westlaw Insight series.

Sir Bernard Eder
International arbitrator
and mediator

Bernard Eder is an international arbitrator/mediator based at 24 Lincoln's Inn Fields, London. He previously practised as a barrister (QC 1990) specialising in commercial litigation and international arbitration. In 2011, he was appointed a Judge of the High Court of England and Wales. He resigned from the Bench in April 2015.

During that time, he sat mainly in the Commercial Court in London. In 2015, he was appointed an International Judge at the Singapore International Commercial Court – and re-appointed for a further term in 2018. He was formerly Senior Editor of Scrutton on Charterparties and Chair of ARIAS(UK). Over the years, he has been appointed as arbitrator in over 300 international arbitrations.

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