# Arbitrating in England: Mind some Distinct Features

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## London Arbitration: Multifaceted and Diverse

London as a seat of arbitration, and English law as a law governing contracts, are probably the most popular options for trans-border dispute resolution clauses in transactions involving Ukrainian business.

LCIA (London Court of International Arbitration) arbitration is often agreed in M&A, international capital markets, banking and finance transactions, not to mention corporate disputes involving Ukrainian business. There is also a significant share of different specialized arbitrations seated in London, among which, the most popular are maritime and trade commodities arbitrations.

Ukraine has 22 sea ports and 11 river ports. It is one of the world's leading grain and sunflower oil exporter countries.

The latter explains wider usage by the Ukrainian parties of the standard contracts and documents elaborated by the international associations to meet the needs of a particular industry. In particular, (i) the Baltic and International Maritime Council (BIMCO), (ii) Grain and Feed Trade Association (GAFTA) and (iii) Federation of Oils, Seeds and Fats Associations (FOSFA). By coincidence or not, but the standard contracts elaborated by these international associations contain standard or default provisions on application of English law and arbitration in London under the Arbitration Rules of the LMAA (London Maritime Arbitrators Association), GAFTA and FOSFA, respectively.

Needless to say, that the latter significantly increases the number of arbitrations in England involving Ukrainian element. The more so, the Ukrainian parties themselves for different reasons contribute to this trend, as they rarely deviate from the dispute resolution clauses proposed in standard contracts or insist on application of other arbitration rules and applicable law.

By no means always all the particularities of English arbitration law are taken into account while choosing arbitration in London.

## Lex Arbitri in England: Principal Tips

England is not a UNCITRAL Model Law jurisdiction. The authors of its *Arbitration Act 1996* rejected the UNCITRAL Model Law on International Commercial Arbitration as the legislative framework for England and did not even use it as a pattern.

The supervisory jurisdiction of English courts over arbitration traditionally is more extensive than in UNCITRAL Model Law countries. However, the number of provisions of the *Arbitration Act* is not mandatory, and the parties may contract out of them. In particular, the parties are permitted to limit the court intervention on certain issues before, within and after arbitral proceedings.

Such limits could be established either in a respective clause of the arbitration agreement or in agreed arbitration rules.

In case of *ad hoc* arbitration in England the parties should also take into account that it is precisely state courts that are vested with powers to assist in arbitral proceedings, first of all with regard to formation of the arbitral tribunal.

## Appointment of Arbitrators

The parties are free to agree on number of arbitrators. According to the default rule (section 15(3)) of the *Arbitration Act 1996*) if there is no such agreement, the tribunal shall consist of a sole arbitrator.

However, in addition to the traditional three-member tribunal, there is also a possibility to agree that the tribunal shall consist of two arbitrators and umpire. This means that the dispute could be resolved solely by two party-appointed arbitrators, unless they cannot agree on a matter related to arbitration and need to appoint an umpire.

Sometimes Ukrainian parties do not pay due attention to the stage of formation of the arbitral tribunal. Some of them by unawareness or failure to retain a counsel in a timely manner simply miss the opportunity to appoint an arbitrator given rather tight deadlines for appointment (28 or 14 days). Others carelessly expect to use such default to appoint an arbitrator as a delaying tactic.

But when provisions of section 17 of *Arbitration Act* are applicable, in case of such a default or refusal to appoint an arbitrator within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator. In other words, failure to appoint an arbitrator could lead to a situation when the dispute is resolved by the arbitrator appointed by the other party, whose award shall be binding on both parties as if he had been so appointed by agreement.

## Third Parties in Arbitration

When Ukrainian parties agree to submit their contractual disputes to arbitration in London governed by English law, not all of them bear in mind the existence and possible effects of *Contracts (Rights of Third Parties) Act 1999*. The latter grants to a person who is not a party to a contract (a "third party") rather broad right to enforce a term of the contract if (a) the contract expressly provides that he may, or (b) the term purports to confer a benefit on him, unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

If this right to enforce a term is subject to the arbitration agreement in writing, the third party shall be treated for the purposes of the *Arbitration Act 1996* as a party to that agreement for certain categories of disputes.

In practice this mean that a third party which is expressly named or even identified as a member of a class or as answering a particular description which need not be in existence when the contract is entered into, may join the pending arbitration or even request arbitration under the contract.

This is alarming for Ukrainian parties to a contract, but the good news is that they are permitted to opt out of application of the *Contracts (Rights of Third Parties) Act 1999*, but they should better consider this possibility at the stage of entering into the contract and provide for the latter in direct and clear wording.

## Certain Procedural and Evidential Peculiarities

The *Arbitration Act 1996* empowers the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree on any matter. These include not only traditional matters like sequence, timing, form and scope of the parties' submissions, applicable rules of evidence or language of the arbitral proceedings. The tribunal is also expressly empowered to decide whether any and if so which documents or classes of documents should be disclosed between and produced by the parties.

In view of distinct legal culture and traditions the Ukrainian business is often not prepared for documentary disclosure, not to mention so called e-disclosure, in arbitration. As a result, the latter could create both practical and ethical difficulties in the arbitral proceedings especially if such perspective was not analysed at the time of signing of the arbitration clause.

This could be one of the reasons why some parties prefer to specifically agree in their contract on limiting the powers of the arbitral tribunal to order documents production.

## Challenge or Appeal?

According to the *Arbitration Act* an award may be not only challenged, but also appealed.

In particular, a party to arbitration may challenge an award on the ground of (1) lack of jurisdiction under section 67 or (2) serious irregularity affecting the tribunal, the proceedings or the award under section 68 of the *Arbitration Act 1996*.

In addition, 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 under section 69 of the *Arbitration Act 1996*. Put in other words, the English courts are empowered to correct errors of law committed by the arbitral tribunal, if the latter applied English law.

On an appeal under this section the court may by order (a) confirm the award, (b) vary the award, (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or (d) set aside the award in whole or in part.

Under section 70(3) of the *Arbitration Act 1996* any application or appeal under sections 67, 68, 69 must be brought within 28 days of the date of the award. This period could be extended by the court under CPR 62.9 only in exceptional circumstances. In exercising this discretion the court will give weight to various considerations identified by Mr Justice Colman in Kalmneft v Glencore [2001] 2 All ER (Comm) 577 at [59].

The above comments are only part of the specific features that make arbitration in England, on the one hand, attractive and, on the other, force careful deliberation of the arbitration clause. Just a reminder that the "choices we make are ultimately our own responsibility" (Eleanor Roosevelt).

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Sayenko Kharenko enjoys a global reputation as a leading Ukrainian full-service law firm. The firm specializes in complex cross-border and local matters and regularly handles the largest and most innovative projects in the areas of antitrust, banking and finance, capital markets, corporate and M&A, debt restructuring, IP, international arbitration, international trade, labor and employment, litigation, real estate, taxation and white-collar crime.

For eight years in a row Sayenko Kharenko has been No.1 by the number of the largest transactions in Ukraine, according to TOP 50 Law Firms 2012 research by Yuridicheskaya Practika Publishing. Sayenko Kharenko's excellent reputation has been recognized by all major local and international legal directories and publications (The Lawyer European Awards, The Chambers Europe Awards for Excellence, The International Tax Review European Tax Awards, Yuridicheskaya Practika Legal Awards for M&A, Corporate, Antitrust, Finance and Real Estate).