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# Public-Private Arbitration and the Public Interest under English Law

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Together with the increase in the number of public-private contracts, recent years have seen a marked proliferation in public-private arbitrations. This article explores the public interest implications which may arise in such arbitrations and examines how public-private arbitration is treated under English law. We argue that, due to the lack of a developed administrative law sphere in England and the historical development of arbitration as an exclusively private mode of dispute resolution, the current legal framework of arbitration in England has developed around the private law paradigm of a commercial dispute involving private actors. This private law paradigm results in a conceptual and legal void in respect of how public interest is accounted for, and protected, in arbitrations involving public bodies under English law. Therefore, we suggest that English arbitration law needs to reconceptualise public-private arbitration and embed it in a public law narrative.

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## INTRODUCTION

The last forty years have witnessed an increased interaction between public and private sectors and increased reliance on private actors to perform public functions in a wide range of areas, including complex infrastructure projects, welfare accommodation, crime and justice and military and defence. These developments have led to a substantial increase in the number of public-private contracts, many of which favour arbitration and other private forms of dispute resolution over the traditional resolution of disputes in the national courts. Although, like a typical commercial arbitration between private parties, public-private arbitrations arise out of a contractual dispute, the crucial point of distinction is the public interest implications associated with the latter and it is these implications that make public-private arbitration important to examine.

This article aims to clarify the concept of public-private arbitration and to critique the way in which public-private arbitration is treated under English arbitration law. The main thesis of this article is that the private law paradigm upon which English arbitration law is based leaves the public interest both unaccounted for, and unprotected, in respect of public-private arbitrations.

The article proceeds as follows: the first section offers an account of the rise of public-private arbitration and the next examines more closely the definition

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of public-private arbitration and, in particular, the concept of the public interest. The third part examines the treatment of public-private arbitration under English law and demonstrates that English law fails to distinguish between private arbitrations and public-private arbitrations and has developed around the private law paradigm of a commercial dispute.

While English law applies a private law paradigm to public-private arbitrations, as the next section shows, other jurisdictions have recognised the distinct nature of public-private arbitration. The lack of a distinct legal and conceptual framework for public-private arbitration in England raises two important questions. The first question is why such a framework is lacking under English law. As the next section, covering the reasons underlying the English approach to public-private arbitration, argues, this can be attributed to the lack of a developed administrative law sphere in England and to the fact that English arbitration law has developed as an exclusively private mode of dispute resolution. The second, possibly more important, question is whether the existing private law paradigm on which English arbitration law is based can adequately protect the public interest. This question is addressed in the final section, which argues that the private law paradigm underlying English arbitration law leaves the public interest both unaccounted for, and unprotected, in respect of public-private arbitrations. The concluding section makes some proposals as to how this deficit may be addressed.

### THE RISE OF PUBLIC-PRIVATE ARBITRATION

Traditionally, arbitration has been the predominant mode of dispute resolution for contractual disputes between two private parties, typically corporations. However, in recent years with the collapse of the non-arbitrability doctrine, the scope of arbitration has greatly expanded. In the area of commercial arbitration, for example, it is now accepted that arbitrators have authority to determine not only claims pertaining to the formation, interpretation and performance of commercial contracts, but also statutory claims that may have crucial social implications,<sup>1</sup> such as competition law claims, tax claims or claims arising out of securities transactions.<sup>2</sup> Similarly, in the area of investment law, international arbitration tribunals regularly review investor claims concerning government measures, including financial and environmental measures, which concern the regulatory sovereignty of the host nation and would normally fall within the exclusive jurisdiction of national courts.<sup>3</sup>

Concurrent with this development, a combination of economic and ideological factors has led to increased interaction between public and private

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1 T. Carbonneau, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability' (1994) 2 *Tul J Intl & Comp L* 196.

2 K. Youssef, 'The Death of Inarbitrability' in L. Mistelis and S. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Alphen aan den Rijn: Kluwer, 2009) 47. See generally, Mistelis and Brekoulakis (eds), *ibid.*

3 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (New York and Geneva: UNCTAD, 2015) xi.

sectors and increased reliance on private actors to perform public functions in virtually every industrialised state.<sup>4</sup> In the UK, the transfer of government powers to the private sector gathered pace during the 1980s.<sup>5</sup> Such outsourcing arrangements can take various forms including entrusting private partners with the legal responsibility to provide such services ('contracting out') and collaborating with private parties for the purpose of achieving a public function, albeit that ultimate legal responsibility to the public remains with the public body.<sup>6</sup> Legislative developments have lent impetus to this movement by, for example, requiring local authorities to engage in competitive tendering processes<sup>7</sup> and by facilitating the exercise of certain public powers by private entities.<sup>8</sup> These developments, in turn, have led to a marked increase in the number of public-private contracts (ie contracts entered into by public bodies with private entities).<sup>9</sup>

The connection between these two developments – the expansion of arbitration's domain and the rise of the 'contracting state' – is the fact that many public-private contracts favour arbitration and other private forms of dispute resolution over resolution of disputes in the national courts.<sup>10</sup> For example, the Model Terms and Conditions of Contracts for Goods issued by the UK Office of Government Commerce provide for a multi-tiered dispute resolution process which ends in arbitration in the event that informal negotiation and mediation are unsuccessful<sup>11</sup> and similar dispute resolution provisions are common in standard forms of international construction contracts, typically adopted for procurement of public works.<sup>12</sup> Recent years have therefore seen both the general expansion of arbitration's domain as well as an increase in the number of public-private contracts providing for arbitration.

The expansion of arbitrations arising under public-private contracts has been accompanied by an increase in other forms of arbitration between public and private entities. In particular, since the registration of the first dispute under

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4 J. Freeman, 'The Private Role in Public Governance' (2000) 75 NYU L Rev 543; J. B. Auby, 'Contracting Out and 'Public Values': A Theoretical and Comparative Approach' in S. Rose-Ackerman and P. L. Lindseth (eds), *Comparative Administrative Law* (Cheltenham: Edward Elgar Publishing, 2013) 512.

5 A. C. L. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford: OUP, 2001) 3.

6 See M. Freedland, 'Public law and private finance – placing the Private Finance Initiative in a public frame' [1998] PL 288; C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: CUP, 3<sup>rd</sup> ed, 2009) ch 9.

7 See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242.

8 See, Deregulation and Contracting Out Act 1994.

9 J. B. Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' [2007] PL 40, 41. See also A. Davies, *The Public Law of Government Contracts* (Oxford: OUP, 2008) 61.

10 G. S. Tawil, 'On the Internationalisation of Administrative Contracts, Arbitration and the Calvo Doctrine' in A. van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series No 15 (Alphen aan den Rijn: Kluwer, 2011) 325.

11 Office of Government Commerce, 'OGC Model Terms and Conditions of Contracts for Services' (OGC, 2009) clause I2. See also HM Treasury, *Standardisation of PFI Contracts* (London: TSO, 4<sup>th</sup> ed, 2007) ch 28.

12 See, for example, FIDIC, 'Conditions of Contract for Construction, which are recommended for building or engineering works designed by the Employer or by his representative, the Engineer' (FIDIC, 1999) clause 20.6.

a bilateral investment treaty in 1987,<sup>13</sup> the number of investment treaty arbitration cases (ie international arbitrations between a state entity and a foreign investor under an international investment treaty) has increased exponentially.<sup>14</sup> However, investment treaty arbitration can be distinguished from contractual arbitrations between public and private bodies in a number of ways. In particular, while in contractual arbitrations consent to arbitration is provided in the form of an arbitration clause, international investment treaties hold out to investors the right to consent to submit their dispute with the state hosting their investments to arbitration.<sup>15</sup>

Secondly, while contractual disputes are required to be determined in accordance with the governing law of the contract, disputes in investment treaty arbitration often arise out of the regulatory actions of the state hosting the investor's investment and concern rights and obligations at the level of public international law under international treaties.<sup>16</sup>

Both forms of arbitration may, however, have implications for the public interest. The public interest implications associated with investment treaty arbitrations<sup>17</sup> and the question of whether investment treaty arbitration should be considered to form part of private or public law have been the subject of extensive discourse.<sup>18</sup> However, the issues associated with contractual arbitrations between public and private bodies are less well traversed and the question of whether such arbitrations should be viewed through a private law or a public law lens has not been sufficiently explored under domestic law and certainly not under English law.<sup>19</sup> This article examines these issues and therefore, while acknowledging that the term 'public-private arbitration' may be defined to encompass investment treaty arbitration,<sup>20</sup> uses that term to describe a

13 *Asian Agricultural Products Ltd v Sri Lanka* ICSID Case No ARB/87/3, 4 ICSID Rep 245.

14 As of July 2016, the total number of known treaty-based investor-state arbitrations is 696: see UNCTAD, Investment Dispute Settlement Navigator at <http://investmentpolicyhub.unctad.org/isds> (last accessed 26 July 2016).

15 See *Occidental Exploration and Production Company v Ecuador* [2005] EWHC 774 (Comm); *Occidental Exploration and Production Company v Ecuador* [2006] 2 WLR 70.

16 In relation to a third form of investment arbitration, namely that under national legislation, see C. Schreuer, 'Investment Arbitration based on National Legislation' in G. Hafner, F. Matscher and K. Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte, Liber Amicorum Wölfram Karl* (Berlin: Facultas, 2012).

17 See, for example, P. Dupuy, E. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009); M. Cordonier Segger, M. W. Gehring and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer, 2011).

18 See, for example, G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: OUP, 2007); S. W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford: OUP, 2010).

19 There has been some debate on this topic in relation to other jurisdictions: see, for example, D. Renders, P. Delvolvé and T. Tanquerel (eds), *L'arbitrage en droit public* (Brussels: Bruylant, 2010); M. Audit (ed), *Contrats publics et arbitrage international* (Brussels: Bruylant, 2011).

20 See, for example, S. Schill, 'Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica' at <http://acil.uva.nl/research/research-projects/content/transnational-private-public-arbitration-lexmercpub.html> (last accessed 26 July 2016).

contractual arbitration between a public body and a private body which implicates the public interest.<sup>21</sup>

While certain issues pertinent to public-private arbitration have been touched upon in existing literature, the phenomenon of public-private arbitration has not been focussed upon. Thus, while a number of authors have recognised that arbitration does not fit neatly into the category of ‘private’ governance, as it depends upon state support,<sup>22</sup> and as arbitrators may need to take account of mandatory rules of law,<sup>23</sup> this analysis has not focussed on the role of public bodies as participants in arbitrations. In addition, the ‘vanishing trial’ phenomenon (ie the increasing tendency to resolve disputes other than by judicial determination and, in particular, through alternative dispute resolution (ADR)) and its effect on the protection of certain public interests has been the subject of commentary<sup>24</sup> as have the issues associated with using ADR to resolve public law cases in particular.<sup>25</sup> However, this analysis has concentrated primarily on the negotiated settlement of public law disputes<sup>26</sup> or on the use of facilitative ADR processes such as mediation.<sup>27</sup> Finally, a considerable body of literature has developed in the UK which describes the rise of ‘government by contract’ and highlights the need for public law to evolve to take account of this contractualisation process.<sup>28</sup>

However, this literature does not focus on the implications of the use of arbitration, as a private dispute resolution mechanism, in respect of disputes under public-private contracts.<sup>29</sup> Therefore, while, in different contexts, it has been

21 See section headed ‘Public-private arbitration and the public interest’ below.

22 See, for example, C. A. Whytock, ‘Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration’ (2010) 12 *Business & Politics*: Article 10. See also A. Stone Sweet, ‘The new *Lex Mercatoria* and Transnational Governance’ (2006) 13 *J Eur Pub Pol’y* 627.

23 A. F. M. Maniruzzaman, ‘International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview’ (1990) 7 *J Int’l Arb* 53; M. Blessing, ‘Mandatory Rules of Law versus Party Autonomy in International Arbitration’ (1997) 14 *J Int’l Arb* 23; A. Barraclough and J. Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 *Melb J Int’l L* 205; A. Sheppard, ‘Mandatory Rules in International Commercial Arbitration – An English Law Perspective’ (2007) 18 *Am Rev Int’l Arb* 121.

24 See, for example, M. Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 *J Emp Leg Stud* 459; R. Dingwall and E. Cloatre, ‘Vanishing Trials?: An English Perspective’ (2006) *J Disp Resol* 51; Lord Neuberger of Abbotsbury, ‘The Fourth Keating Lecture: Equity, ADR, Arbitration and The Law: Different Dimensions of Justice’ (19 May 2010); L. Mulcahy, ‘The Collective Interest in Private Dispute Resolution’ (2013) 33 *OJLS* 59.

25 See, for example, V. Bondy, M. Doyle and V. Reid, ‘Mediation and Judicial Review – Mind the Research Gap’ (2005) 10 *Jud Rev* 220; M. Supperstone, D. Stilitz and C. Sheldon, ‘ADR and Public Law’ [2006] *PL* 299.

26 See, for example, O. M. Fiss, ‘Against Settlement’ (1983–1984) 98 *Yale LJ* 1073; D. Luban, ‘Settlements and the Erosion of the Public Realm’ (1994–1995) 83 *Geo LJ* 2619; V. Bondy and M. Sunkin, ‘Settlement in judicial review proceedings’ [2009] *PL* 237.

27 See, for example, V. Bondy and L. Mulcahy, *Mediation and Judicial Review: An empirical research study* (London: The Public Law Project, 2009).

28 See, for example, G. S. Morris and S. Fredman, ‘The Costs of Exclusivity: Public and Private Re-examined’ [1994] *PL* 69; M. R. Freedland, ‘Government by Contract and Public Law’ [1994] *PL* 86; Freedland, ‘Public law and private finance – placing the Private Finance Initiative in a public frame’ n 6 above; P. Vincent-Jones, ‘The regulation of contractualisation in quasi-markets for public services’ [1999] *PL* 304; Davies, n 5 above.

29 cf Davies, n 9 above, 224–227.

recognised that contracts with public bodies are not purely creatures of private law, that arbitration does not fit neatly into the category of ‘private’ governance and that the use of ADR may, in certain cases, adversely affect certain public interests, the rise of public-private arbitration and its legal treatment, which straddles these issues, has remained largely uncharted.

### PUBLIC-PRIVATE ARBITRATION AND THE PUBLIC INTEREST

This section further explores what is meant by the term public-private arbitration and, in particular, the concept of the public interest. However, it is first necessary to consider what is meant by a ‘public body’ in the context of public-private arbitration. In determining what is meant by this term, a ‘source’ based test or a ‘functions’ based test may be applied. The former test focuses on the source of power of the body in question and considers whether the body’s power derives from statute or prerogative (or perhaps some ‘third-source’ power). On the other hand, a ‘functional’ test examines the nature of the power exercised by the body and, in particular, whether it has a ‘public element’ or is under some ‘public duty’.<sup>30</sup> Application of this ‘functional’ test is not without its difficulties.<sup>31</sup> However, as its inherent flexibility has the potential to address the increasing exercise of public power and performance of public functions by private parties (a problem which also lies at the heart of this article), the term ‘public body’ is, for the purposes of this article, used to describe not only ‘obvious’ public authorities but also those bodies that perform a public function or are under some public duty.

Crucially however, the definition of public-private arbitration requires not only that a contractual dispute between a public and private body has been submitted to arbitration but also that the dispute implicates the public interest.<sup>32</sup> Therefore, as the concept of public interest is an integral part of the definition of public-private arbitration and as it informs the approach taken in this article, it is necessary to take a closer look at its meaning. Defining what is meant by the public interest is difficult,<sup>33</sup> as the term carries a variety of meanings depending on the context in which it is used: for example, the term public interest may have a different meaning in constitutional discourse than it has in discourse relating to economics, sociology, political theory or regulation.<sup>34</sup>

As Held’s seminal work demonstrated, there are three types of approaches to public interest: common interest theories, preponderance theories and unitary

30 *R v Panel on Take-Overs and Mergers, ex p Datafin* [1987] 2 WLR 699.

31 See section headed ‘Reasons underlying the English approach to public-private arbitration’ below.

32 Similarly, under English law, not all decisions made by a public body are subject to judicial review. An additional ‘public law’ element is required: see, J. Beatson, ‘Which Regulatory Bodies are Subject to the Human Rights Act?’ in J. Beatson (ed), *The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford: Hart Publishing, 1999) 102.

33 See, generally, S. M. King, B. S. Chilton and G. E. Roberts, ‘Reflections on Defining the Public Interest’ (2010) 41 *Administration & Society* 954.

34 *ibid.*, 966.

conceptions.<sup>35</sup> Common interest theories are based on the hypothetical of the existence of interests common to all members of society, while preponderance theories look to a majority of interests. Common and preponderance interest theories thus tend to conceptualise public interest on a majoritarian basis. On the other hand, the unitary conception takes a normative approach and places emphasis on what ought to be in the public interest from a social welfare viewpoint.<sup>36</sup>

While a crude conception of democracy would favour a majoritarian approach to public interest, in a system displaying constitutional features the public interest can, and should, be directed towards serving fundamental constitutional values, including values reflecting minority interests.<sup>37</sup> In the context of English law therefore, we subscribe to an inclusive definition of public interest as a set of interests reflecting the minimal value structure underpinning society, as these values are shaped by constitutional and administrative law principles, and democratic institutions and traditions.<sup>38</sup> Such a normative approach allows us to identify a core meaning of public interest in considering disputes under public-private contracts.

Thus, where economic and social policy considerations arise in connection with a contractual dispute between a public body and a private body, the public interest is implicated. Economic considerations include considerations such as 'value for money' (which arise, for example, in relation to procurement contracts), the allocation of public resources and the development of important infrastructure needed for the operation of an economy (such as airports and highways).<sup>39</sup> Social policy considerations include issues relating to the implementation of governmental policies in sectors that are sensitive for the public, such as health, education, social welfare and immigration. Where a contractor is involved in providing services directly to members of the public, it can be considered more likely that a dispute under that contract will implicate the public interest<sup>40</sup> than where the contractor is merely contributing to an activity which is controlled and co-ordinated by the public body (eg, where the contractor is supplying goods or support services to the public body).<sup>41</sup> However, it is not possible to draw a bright line distinction between these two categories of contract as disputes under the latter category of contract can also implicate the public interest where, for example, the contract is high-value and where performance of the contract is essential to the provision of an essential public service or to the implementation of important governmental policies. In requiring more than just the presence of a contract with a public body to trigger the application of a public interest analysis, this approach is consistent

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35 V. Held, *The Public Interest and Individual Interests* (New York: Basic Books, 1970).

36 M. Feintuck, *The Public Interest in Regulation* (Oxford: OUP, 2014) 11.

37 A. Kulick, *Global Public Interest in International Investment Law* (Cambridge: CUP, 2012) 151-152. See also I. O'Flynn, 'Deliberating About the Public Interest' (2010) 16 *Res Publica* 299, 313.

38 n 33 above, 958.

39 See G. Niemeyer, 'Public Interest and Private Utility' in C. J. Friedrich (ed), *Nomos V: The Public Interest* (New York: Atherton Press, 1962).

40 For a related argument, see Davies, n 9 above, ch 8.

41 *ibid*, 55 and 79 referring to a contract to supply paper clips to a public authority as an archetypal example of a contract to which application of public law norms would be inappropriate.

with that taken by the English courts to the analogous issue of determining the applicability of public law to the actions of a private service provider.<sup>42</sup>

Having established a working definition of public interest, a recent example of a public-private arbitration with public interest implications is worth considering. This concerned a dispute between the Secretary of State for the Home Department and the US defence company, Raytheon Systems Limited, in respect of a 2007 contract for the design, development and delivery of a multimillion pound technology system (*e-Borders*) which would reform UK border controls by establishing an electronic system to vet travellers entering and leaving the UK. When the Home Office terminated the contract in 2010 for significant delays in progress of the works, Raytheon commenced arbitration proceedings claiming substantial damages for unlawful termination. The arbitration proceedings under the rules of the London Court of International Arbitration were confidential with the arbitrators being English and American (nominated by the Home Office and Raytheon respectively) and the chairman being Canadian. The arbitrators decided, apparently within an exclusive private law setting, that the Home Office had unlawfully terminated the contract and awarded damages to Raytheon of the amount of approximately £190 million plus £38 million in respect of interest and the claimant's costs. The *e-Borders* award raised serious concerns in the British government and attracted intensive media and public interest, with the focus being on the impact of the award on the public finances and on UK border security.<sup>43</sup> While the award was challenged by the Home Office and was subsequently set aside by the High Court for serious irregularity,<sup>44</sup> the High Court ultimately determined that the dispute should be referred back to arbitration before a different panel of arbitrators.<sup>45</sup> Following the issuance of the High Court judgment in February 2015, Keith Vaz, the chairman of the Commons home affairs select committee, observed that the *e-Borders* dispute had 'cost the British taxpayer millions of pounds. We still do not have an e-borders programme, nor do we have information that can help us determine what went wrong with the Raytheon contract'.<sup>46</sup> Despite the Home Office's success in challenging the arbitration award, the Home Office announced in March 2015 that it had reached a negotiated resolution with Raytheon and was to pay £150 million to Raytheon in full and final settlement of the dispute.<sup>47</sup>

Overall, public-private arbitrations can have far-reaching implications for the public interest and, as will be elaborated upon below, may give rise to threats to fundamental public law norms. This makes it important to analyse

42 See section headed 'Reasons underlying the English approach to public-private arbitration' below.

43 See B. Quinn, 'UK taxpayer faces £220m bill over e-borders contract termination' *The Guardian* 19 August 2014.

44 *The Secretary of State for the Home Department v Raytheon Systems Limited* [2014] EWHC 4375 (TCC).

45 *The Secretary of State for the Home Department v Raytheon Systems Limited* [2015] EWHC 311 (TCC).

46 Quoted in A. Travis, 'Award for cancellation of e-Borders contract is set aside by court' *The Guardian* 17 February 2015.

47 Home Office letter on e-Borders settlement, 27 March 2015 at <https://www.gov.uk/government/news/home-secretary-letter-on-e-borders-settlement> (last accessed 26 July 2016).

how English law views public-private arbitration and, in particular, to examine how the public interest is accounted for under English arbitration law.

### ENGLISH ARBITRATION LAW AND PUBLIC-PRIVATE ARBITRATION

While the use of arbitration to resolve disputes between a public body and a private party has become more common,<sup>48</sup> English law does not distinguish between private arbitrations and public-private arbitrations. Indeed, having developed around the private law paradigm of a commercial dispute involving private actors,<sup>49</sup> English arbitration law has adopted party autonomy as its cardinal principle. Thus, the submission of a dispute to arbitration is conceptualised as a process whereby the parties (archetypically sophisticated commercial parties negotiating at arm's length) choose to contract out of the system of public justice and submit their disputes to a private dispute resolution mechanism. In accordance with this 'contractual' understanding of arbitration,<sup>50</sup> the Arbitration Act 1996 (the 1996 Act) requires the English courts to adopt a non-interventionist approach in respect of the arbitration process. This means that the role of the courts up to the point at which the award is made does not vary depending on whether or not the arbitration involves a public body.

Further, English law does not differentiate between public-private arbitrations and private arbitrations in considering whether a particular dispute may be submitted to arbitration or whether public bodies can submit to arbitration. This lack of differentiation also extends to the conduct of the proceedings, including the appointment of arbitrators, the qualifications which arbitrators are required to have, the presentation of evidence, the grounds for intervention by third parties (including members of the public) and, significantly, the question of whether the arbitration proceedings will be private and confidential.

Similarly, after the arbitration is concluded, the scope of review of arbitration awards by English courts does not depend on whether or not the arbitration involves a public body or implicates the public interest. Once the arbitration tribunal has rendered its award, a party may generally only challenge the award on the basis that the tribunal lacked substantive jurisdiction (under section 67 of the 1996 Act), that there was a serious irregularity affecting the tribunal, proceedings or award (under section 68 of the 1996 Act)<sup>51</sup> or, in certain

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48 A. Wald and J. Kalicki, 'The Settlement of Disputes between the Public Administration and Private Companies by Arbitration under Brazilian Law' (2009) 26 J Int'l Arb 557, 559.

49 See generally J. D. M. Lew and M. Holm, 'Development of the Arbitral System in England' in J. D. M. Lew et al (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Alphen aan den Rijn: Kluwer Law International, 2013).

50 See, generally, Barraclough and Waincymer, n 23 above, 209-210.

51 See *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* [1983] 1 Lloyd's Rep 503; *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm).

limited circumstances, on a question of law (under section 69 of the 1996 Act).<sup>52</sup>

Thus, under section 68, the challenging party must demonstrate conduct amounting to a serious irregularity which falls within the exhaustive list of categories in section 68(2) and that the irregularities identified caused, or will cause, the party substantial injustice. Accordingly, the House of Lords has remarked that section 68 was conceived of ‘as a long stop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.’<sup>53</sup> Similarly, as section 69 of the 1996 Act is not mandatory in nature,<sup>54</sup> parties often agree in advance that an arbitration award will be final and binding and cannot be appealed.<sup>55</sup> Furthermore, even where the possibility of an appeal under section 69 has not been excluded, unless all other parties to the proceedings agree to such appeal, leave of the court must be sought to bring the appeal and leave will only be granted if certain requirements specified in section 69(3) of the 1996 Act are satisfied. For these reasons, leave to appeal on a point of law is rarely granted by English courts and successful section 69 applications are rare.<sup>56</sup> Overall therefore, the grounds for challenge of arbitration awards under English law are framed narrowly, fall short of providing for a review of the award on the merits (including an error in law) and do not differentiate as between public-private and private arbitrations.

To date, the rise of public-private arbitration has left undisturbed the private law paradigm underlying English arbitration law. This means that arbitration and public law have been regarded as occupying separate legal spheres and neither area of law has substantially influenced the design or practice of the other.<sup>57</sup> In adopting this approach, English law differs from the approach taken in a number of other jurisdictions, in which the potential for overlap between arbitration law and public law has been recognised.

## PUBLIC-PRIVATE ARBITRATION IN OTHER JURISDICTIONS

While English law applies a private law paradigm to public-private arbitrations, certain distinctions between public-private arbitration and private arbitration have been recognised in other jurisdictions. For a start, many jurisdictions have imposed restrictions on the extent to which public bodies can submit disputes

52 Admittedly, in allowing for an appeal on a question of law at all, English law permits greater judicial intervention than those jurisdictions that have adopted the UNCITRAL Model Law: see D. Wolfson and S. Charlwood, ‘Challenges to Arbitration Awards’ in Lew et al (eds), n 49 above at [25–68] – [25–69].

53 *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] 3 All ER 789 at [27], citing the Report of the Departmental Advisory Committee of Arbitration Law on the then Arbitration Bill at [280].

54 Arbitration Act 1996, s 4(1) and Sched 1.

55 Sheppard, n 23 above, 136.

56 M. Marshall, ‘Section 69 almost 20 years on . . .’ Kluwer Arbitration Blog 24 June 2015 at <http://kluwerarbitrationblog.com/blog/2015/06/24/section-69-almost-20-years-on/> (last accessed 26 July 2016).

57 On a similar topic see Supperstone, Stiltz and Sheldon, n 25 above.

to arbitration.<sup>58</sup> While recent years have seen a loosening of some of these restrictions,<sup>59</sup> they are indicative of a different perspective on the relationship between arbitration law and public law. For example, in France, public bodies are generally prohibited from entering into arbitration agreements by Article 2060 of the Civil Code which provides to the effect that ‘there can be no arbitration . . . in disputes concerning public bodies and institutions and more generally in all matters in which public policy is concerned.’ This rule, which is regarded as a general principle of French public law,<sup>60</sup> recognises that arbitration may not be an appropriate forum to deal with public interest matters. Over the years and because of the growth in commercial collaborations between the public and private sectors, a number of exceptions to this rule have emerged.<sup>61</sup> For example, in the *Galakis* case, the *Cour de Cassation* ruled that a French public body may consent to an arbitration agreement in connection with an international commercial contract.<sup>62</sup> However, notwithstanding this trend, in *INSERM v Fondation Letten F Saugstad* it was recognised that, while the judicial courts will normally review an award between a French public body and a foreign legal entity, public-private arbitration awards should be subject to review by the administrative rather than the judicial courts where ‘mandatory rules of French public law’ are implicated.

The *INSERM* decision can be interpreted as representing a resurgence of the public-private law divide in French arbitration law.<sup>63</sup> This resurgence can also be seen in recent amendments to the procedure for arbitration proceedings: while the procedure for arbitration proceedings is substantially the same under French law whether these proceedings involve private or public entities, in the recent amendment of the French arbitration law in 2011, the principle of confidentiality of arbitration proceedings, which is normally applicable by default to domestic arbitrations, was not extended to international arbitrations.<sup>64</sup> As is generally accepted, one of the main reasons for this distinction was to ensure that arbitrations involving public bodies are conducted in a transparent manner.<sup>65</sup> Similarly, in Brazil, a recently enacted arbitration law<sup>66</sup> provides that public-private arbitration is subject to ‘the principle of publicity’ and all other laws governing transparency in public affairs.<sup>67</sup>

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58 n 48 above, 559-563. See also J. D. M. Lew, L. A. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (Alphen aan den Rijn: Kluwer, 2003) 733-737.

59 *ibid.*

60 See Conseil d’Etat, Legal Opinion (Avis) of 6 March 1986, No 339710.

61 See, for example, Law No 75-596 of 9 July 1975. See generally T. A. Brabant, ‘Arbitration and Company Law in France’ (2015) 12 *Eur Company L* 144, 144-148.

62 *Cour de Cassation* 2 May 1966, 1966 Bull Civ I 199. See also H. Batiffol, ‘Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties’ (1968) 7 *Colum J Transnat’l L* 32.

63 cf the recent decision of the *Cour de Cassation* (8 July 2015) in *Syndicat mixte des Aéroports de Charente v Ryanair* Arrêt n° 797 du 8 juillet 2015 (13-25.846).

64 Decree No 2011-48 of 13 January 2011.

65 E. Gaillard and P. de Lapasse, ‘Commentaire analytique du décret du 13 janvier 2011 portant réforme du droit français de l’arbitrage’ (2011) 2 *Cahiers de l’Arbitrage* 263 at [106].

66 Law No 13,129 of 26 May 2015.

67 *ibid.*, Article 1 § 1o and Article 2 § 3o.

**REASONS UNDERLYING THE ENGLISH APPROACH  
TO PUBLIC-PRIVATE ARBITRATION**

The lack of a distinct legal and conceptual framework for public-private arbitration in England raises two important questions. The first question is why such a framework is lacking. The second, and possibly more important, question is whether the existing private law paradigm on which English arbitration law is based can adequately account for the public interest in arbitrations involving public bodies. We examine both questions in turn.

There are two reasons that can explain the lack of a distinct legal and conceptual framework for public-private arbitration in England. The first is the lack of a developed administrative law sphere and of a separate body of administrative courts which would claim an interest in the regulation of public-private arbitrations. In England, disputes involving public bodies with public interest implications have traditionally been submitted to the same ordinary courts as disputes between two private parties, and largely have been subject to the same procedure.<sup>68</sup> The absence of a body of administrative law rules extraneous to the common law can be contrasted with the emergence of administrative power and the strict separation between administration and justice in Continental Europe. In this regard, the French revolution of 1789 was the catalyst for the emergence of *administration publique*.<sup>69</sup> While previously the space between the state and the citizen was occupied by monarchy and a corporate society (the *ancien régime*),<sup>70</sup> after the French revolution this space came to be occupied by the state, which developed its own institutional capacities in order to pursue the interests of the public. Therefore, under the law of 16–24 August 1790, the ordinary courts in France were prohibited from reviewing administrative acts. However, while the lawmakers of the revolutionary period originally intended that claims against the administration should be judged by the administration itself, the separation between justice and administration led to the opposite result<sup>71</sup> as a separate body of courts developed to review such acts.<sup>72</sup> With the development of this separate system of administrative courts came the development of a *droit administratif*, whereby the activities of the state were subjected to legal principles and norms.<sup>73</sup> The French model of administration and administrative law then effectively emerged as the prevailing system of administration on the European continent.<sup>74</sup>

Like France, Germany also has a long tradition of administrative law, albeit that the emergence of administrative law in the Germanic tradition was the

68 cf Civil Procedure Rules, Part 54.

69 B. Sordi 'Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence of administrative law in Europe' in Rose-Ackerman and Lindseth (eds), n 4 above, 25. cf A. Venn Dicey, 'Droit Administratif in Modern French Law' (1901) 17 LQR 302, 307.

70 C. Sumner Lobingier, 'Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model' (1942) U Penn L Rev 36, 37–39.

71 J. Massot, 'The Powers and Duties of the French Administrative Judge' in Rose-Ackerman and Lindseth (eds), n 4 above, 415.

72 L. Duguit, 'The French Administrative Courts' (1914) 29 *Political Science Quarterly* 385, 407.

73 *ibid*, 407.

74 n 69 above, 28.

result of evolution rather than revolution.<sup>75</sup> During the nineteenth century, German liberals strove to establish legal structures to limit the unfettered exercise of state power by the monarchs of the various German states.<sup>76</sup> The idea of *Rechtsstaat* was therefore constructed in order to reconcile the freedom of action of the state with the rights of the citizen and it gave birth to administrative law having the task of setting legal boundaries to central administration.<sup>77</sup> This development was ‘perfected’ by the creation of a separate system of administrative law courts through which substantive principles of administrative law were developed.<sup>78</sup>

Thus, in France and Germany (and much of continental Europe), review of administrative action came to be placed outside of the purview of ordinary courts which gave rise to a self-conscious divide between public and private law. However, in England, it was only during the course of the twentieth century and because of the growth of a more centralised government that a distinct discipline of administrative law started to emerge.<sup>79</sup> Until well into the nineteenth century, the English administrative apparatus had developed on a case-by-case basis focusing on certain aspects of public life, such as regulation of work, railways, health, public education and poor relief,<sup>80</sup> with authority being assigned to the body which experience had shown best fitted to perform the work in question.<sup>81</sup> For the same reasons, administrative review was performed by ordinary courts rather than by separate administrative courts.<sup>82</sup> While the emergence of a more centralised form of government in England resulted in the creation of independent tribunals to hear appeals from decisions of certain administrative bodies and governmental departments, the adjudication of a large number of disputes involving public bodies still remained within the purview of the ordinary courts. In addition, the function of such tribunals has been conceptualised as essentially judicial (as opposed to administrative) in nature.<sup>83</sup> Similarly, although the administrative division of the High Court handles judicial review applications, this court constitutes a specialised ordinary (or judicial) court, which ‘operates inside the framework of the unitary legal system to which it remains firmly attached’.<sup>84</sup>

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<sup>75</sup> *ibid.*

<sup>76</sup> G. Nolte, ‘General Principles of German and European Administrative Law - A Comparison in Historical Perspective’ (1994) 57 MLR 191, 198.

<sup>77</sup> R. Gosalbo-Bono, ‘The Significance of the Rule of Law and its Implications for the European Union and the United States’ (2010) 72 U Pittsburgh L Rev 229, 241.

<sup>78</sup> K. F. Ledford, ‘Formalising the Rule of Law in Prussia: the Supreme Administrative Law Court 1876–1914’ (2004) 37 *Central European History* 203, 204.

<sup>79</sup> A. Venn Dicey, ‘The Development of Administrative Law in England’ (1915) 31 LQR 148, 149.

<sup>80</sup> n 69 above, 31.

<sup>81</sup> J. Willis, ‘Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional’ (1935) 1 U Toronto L J 53, 75.

<sup>82</sup> n 69 above, 32.

<sup>83</sup> *Report of the Committee on Administrative Tribunals and Enquiries* Cmnd 218 (1957) at [40]; Report of the Review of Tribunals by Sir A. Leggatt, *Tribunals for Users: One System, One Service* (London: TSO, 2001); Department for Constitutional Affairs, *Transforming Public Services, Complaints, Redress and Tribunals* Cm 6243 (2004). See also J. Boughey, ‘Administrative law: the next frontier for comparative law’ (2013) 67 ICLQ 55, 67.

<sup>84</sup> Harlow and Rawlings, n 6 above, 19.

The distinct approach taken under English law to the private-public law divide has also been significantly influenced by the lack of a written UK constitution and the resulting uncertainty as to the constitution's content.<sup>85</sup> In particular, the loose, largely convention-based, nature of UK constitutional law has made it difficult for English administrative law to develop in a coherent manner.<sup>86</sup> In addition, the primacy of the rule of law within the UK constitutional system has served to shape the views of those (such as Albert Venn Dicey) who have argued that no distinction is required under English law between private and public law. Indeed, the influence of Dicey's views is such that they can be considered to constitute a separate factor contributing to the view that a public-private law distinction does not form part of English law.<sup>87</sup> Dicey was suspicious of the very concept of administrative or public law and argued that English law, in general, subjects citizens and officials to the same rules of ordinary common law and that the rule of law, which he regarded as a private law concept from which Britain's unwritten constitution was derived,<sup>88</sup> was sufficient to keep in check administrative power and governmental discretion.

Admittedly, the distinction between public and private law (and the concept of administrative law in particular) has become increasingly significant in English law, which can largely be attributed to the rapid development since the 1960s of the law relating to judicial review of administrative action.<sup>89</sup> Fundamentally however, the idea of an autonomous body of public law rules extraneous to the common law remains a 'cuckoo in the nest'.<sup>90</sup>

This lack of a well-embedded distinction between public and private law could, somewhat paradoxically, have assisted English law in responding to the increasing contractualisation of government over the last forty years and, more importantly, to the hybrid legal phenomena which have resulted from such contractualisation, such as public-private contracts and public-private arbitrations. However, while English law has evolved to take account of these phenomena, this evolution has not been an unqualified success. Thus, while initially the English courts applied a 'source' test in holding that public law applied only to the decisions of authorities which derived their power from statute or prerogative,<sup>91</sup> the decision of the Court of Appeal in *R v Panel on Take-Overs and Mergers, ex p Datafin*<sup>92</sup> (*Datafin*) marked a move to a 'functional' test. In *Datafin*, the Court of Appeal held that the nature of the functions of an entity, and in

85 See, generally, E. Barendt, 'Is there a United Kingdom Constitution?' (1997) 17 OJLS 137. See also House of Commons Political and Constitutional Reform Committee, 'A new Magna Carta?: Second Report of Session 2014-15' (3 July 2014) 12-28, outlining the advantages and disadvantages of codifying the UK constitution.

86 Freedland, 'Government by Contract and Public Law' n 28 above, 95.

87 C. Harlow, "'Public" and "Private" Law: Definition Without Distinction' (1980) 43 MLR 241; J. Beatson, "'Public" and "Private" in English administrative law' (1987) 103 LQR 34.

88 A. Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London, 8th ed, 1915; reprint ed, Indianapolis, 1982; 1st ed, London, 1885) 107-122 and 202-203.

89 Beatson, n 87 above, 34-40. See also M. Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in M. Freedland and J. B. Auby (eds), *The Public-Private Divide – Une Entente Assez Cordiale?* (Oxford: Hart Publishing, 2006) 111.

90 See *Davy v Spelthorne BC* [1984] AC 262, 276. See also Harlow, n 87 above, 241.

91 n 89 above, 47-50.

92 [1987] 2 WLR 699.

particular whether that entity has a ‘public element’<sup>93</sup> or is under some ‘public duty’,<sup>94</sup> rather than just the formal source of its powers, must be taken into account.<sup>95</sup> The *Datafin* test therefore aimed to adapt the principles of judicial review to modern government practices and, in particular, the exercise of public power and performance of public functions by private parties.<sup>96</sup> Consistent application of the test has, however, proven difficult<sup>97</sup> and it has been described as being ‘singularly difficult to apply with any degree of certainty’.<sup>98</sup>

The manner in which English law has defined the boundaries between administrative law and contract law can, consistent with the differing manner in which they conceptualise the public-private law divide more generally, be contrasted to the approach taken in other European states.<sup>99</sup> For example, under French law, the jurisdiction of the administrative courts does not depend on whether an authority is exercising a statutory or prerogative power or whether it has a ‘public element’, but is instead based on the notion of *public service* and crucially the notion of *public interest*, namely whether the body whose actions are disputed was ‘set up in the public interest to carry out a public service function’.<sup>100</sup> Thus, service of the public interest is regarded as the foundational principle of French administrative law and, therefore, as the litmus test for defining not only the ultimate purpose of the public administration but also for delimiting its permissible scope of action.<sup>101</sup> This means that administrative action and entities in charge of a *service public* are generally governed by specific provisions which differ from private law.<sup>102</sup> A contract will therefore be dealt with by the administrative courts where it relates to a public service duty, where it contains a clause that is not typical of a private contract or where it is categorised by the law as an administrative contract.<sup>103</sup> Where a contract falls within these parameters, a separate body of procedural and substantive rules of administrative law is applied by the administrative courts, supported by a strong jurisprudence ensuring that the contract meets social needs.<sup>104</sup> In particular,

93 *ibid*, 715.

94 *ibid*, 714.

95 See J. Beatson, ‘Which Regulatory Bodies are Subject to the Human Rights Act?’ in J. Beatson (ed), *The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford: Hart Publishing, 1999) 101 for an outline of the functional tests applied by the English courts in determining whether a decision of a particular body is subject to judicial review.

96 See *CECA Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552 at [99].

97 S. H. Bailey, ‘Judicial Review and the Public Procurement Regulations’ (2005) 6 PPLR 291, 294.

98 Morris and Fredman, n 28 above, 72.

99 Auby, n 9 above, 47-48.

100 J. Bell, ‘Administrative Law’ in J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Oxford: OUP, 2008) 172.

101 G. Merland, ‘L’intérêt général, instrument efficace de protection des droits fondamentaux?’ (2004) 16 *Les Cahiers du Conseil constitutionnel* 155, 155.

102 See R. Geiger, ‘The Unilateral Change of Economic Development Agreements’ (1974) 23 *ICLQ* 73, 95-99.

103 J. Arnould, ‘French public contracts law after the reform of March 2001’ (2001) PPLR 324, 335-336. See also Davies, n 9 above, 55-58.

104 T. Prosser, *Law and the Regulators* (Oxford: Clarendon Press, 1997) 287. See also C. Donnelly, ‘Public-Private Partnerships: Award, Performance and Remedies’ in Schill (ed), n 18 above, 491-493.

even in the absence of any stipulation in the contract (or even if the contract states to the contrary), the public authority may always terminate the contract unilaterally and on the grounds of the general interest. Further, the principle of the adaptability of the public service means the public authority can oblige the private service provider to adapt the service or to terminate the contract. Finally, to ensure continuity of service in all circumstances, drastic changes in the conditions of performance of an administrative contract confer the right on the service provider to ask for a specific indemnity or, where appropriate, to increase its charges to consumers.<sup>105</sup> This focus on the public interest as the core principle of administrative law has also prevailed in those administrative law systems influenced by French law, such as Belgium, Greece, Luxembourg, Italy, Portugal, Spain and Turkey.<sup>106</sup>

In contrast, in England, while legislation exists which allows for statutory powers to be conferred on private parties,<sup>107</sup> there is an absence of legislation or case law laying down analogous principles to ensure that public-private contracts meet social needs.<sup>108</sup> As a result, concerns such as those relating to the adaptability of the contract or continuity of service must instead be addressed through contractual provisions (ie by private law means).<sup>109</sup> Thus, the manner in which the public-private law divide has been conceptualised in England takes no account of the hybrid nature of public-private contracts or of public-private arbitrations and has not been conducive to the development of a distinct legal and conceptual framework for public-private arbitration.

The second, related, reason to which the underdeveloped conception of public-private arbitration in England can be attributed is that arbitration in England has traditionally been embedded in private law and developed as an exclusively private mode of dispute resolution. English merchants and guilds have been using arbitration since the Middle Ages, mainly because the royal courts were deemed ill-suited to deal with commercial disputes.<sup>110</sup> Arbitration in England was therefore conceived, designed and developed over the course of more than four centuries to accommodate contractual disputes between private parties, typically disputes arising out of maritime and sales of goods transactions or construction projects.<sup>111</sup> By the time public entities started to enter into contracts including arbitration clauses in the late twentieth century, the private character of arbitration law was well crystallised. Accordingly, the resolution of disputes involving public law and public entities was effectively

105 S. Whittaker, 'Unfair contract terms, public services and the construction of a European conception of contract' (2000) 116 LQR 95, 106-113. See also R. Geiger, 'The Unilateral Change of Economic Development Agreements' (1974) 23 ICLQ 73, 89.

106 J. Bell, 'Mechanisms for Cross-Fertilisation of Administrative Law in Europe' in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* (Oxford: Hart Publishing, 1998) 149; E. Örüçü, 'Conseil D'Etat: the French layer of Turkish administrative law' (2000) 49 ICLQ 679.

107 See, for example, Deregulation and Contracting Out Act 1994.

108 Harlow and Rawlings, n 6 above, 343-345.

109 See P. Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 566, 559-560. See also C. Donnelly, 'Public-Private Partnerships: Award, Performance and Remedies' in Schill (ed), n 18 above, 483-486.

110 Lew and Holm, n 49 above at [1.01].

111 *ibid.* See also G. B. Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2nd ed, 2014) 34-38.

shoehorned into a dispute resolution framework which had been operating as an entirely private mode of dispute resolution for a very long time. The result is that the significant expansion of the scope of judicial review of administrative action over the last 50 years has left undisturbed the private law paradigm on which arbitration is based.

### **DOES ENGLISH ARBITRATION LAW ADEQUATELY PROTECT THE PUBLIC INTEREST IN PUBLIC-PRIVATE ARBITRATIONS?**

While administrative law scholars are familiar with the tension between public and private law norms in the context of the resolution of public-private disputes before English courts,<sup>112</sup> the issues arising from such tension within the setting of private dispute resolution, such as arbitration, are both uncharted and exacerbated. The private law paradigm upon which English arbitration law is based leaves the public interest both unaccounted for, and unprotected, in public-private arbitrations. Specifically, the primacy afforded to the principle of party autonomy will typically prevent the English courts from intervening in public-private arbitrations, even when issues of public interest may arise. For example, while an application may be brought by a party to the courts under section 45 of the 1996 Act for the determination of ‘any question of law arising in the course of proceedings’ and while such applications may bring points of law of general interest before the courts,<sup>113</sup> the scope of this section is subject to several limitations, including the fact that the arbitration tribunal itself may not refer a question of law for determination.<sup>114</sup>

Similarly, while the possibility for court review of the arbitration process under sections 67 to 69 of 1996 Act is intended to act as a public policy safeguard to some extent, the threshold for court intervention is set at a high level. The 1996 Act does not reference in any guise the concept of public interest as a possible ground for challenging an award nor does the case law in this area. Instead, the case law generally emphasises the deference that should be afforded to the arbitration process and confines itself to the specific grounds for challenge enumerated under sections 67 to 69.<sup>115</sup>

While certain elements of the law of arbitration are not encompassed within the parameters of the 1996 Act and are subject to common law principles,<sup>116</sup> jurisprudence in those areas has, to date, failed to develop a coherent account of how the public interest may interact with the arbitration process. For example, under English law, arbitrability is a broad concept with few prescriptive rules as

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112 See, for example, J. W. F. Allison, *A Continental Distinction in the Common Law: a Historical and Comparative Perspective on English Public Law* (Oxford: OUP: 1996); D. Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999).

113 Departmental Advisory Committee on Arbitration Law, ‘1996 Report on the Arbitration Bill’ (Chairman The Rt Hon Lord Justice Saville) (1997) 13 *Arbitration Int’l* 275 at [218].

114 For further detail see section headed ‘Does English arbitration law adequately protect the public interest in public-private arbitrations?’ below.

115 See, for example, *The Secretary of State for the Home Department v Raytheon Systems Limited* n 44 above.

116 See Arbitration Act 1996, s 81.

to its scope and application.<sup>117</sup> Instead, the English courts have approached the question of whether or not a particular dispute is arbitrable on a case-by-case basis, considering whether:

the matters in dispute . . . 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.<sup>118</sup>

However, Longmore LJ's judgment confirmed that what is considered a matter of public interest in this context is narrow in scope: '[t]o the extent therefore that public policy has a part to play it can only be a "safeguard . . . necessary in the public interest"'. This is a demanding test'.<sup>119</sup>

Similarly, the common law recognises that it is an implied term of arbitration that the parties' desire for confidentiality and privacy generally outweighs the public interest in a public hearing.<sup>120</sup> This obligation of confidentiality also applies to any documents prepared for the arbitration, or disclosed or produced in the course of the arbitration and to transcripts or notes of the evidence in the arbitration.<sup>121</sup> It also generally applies to the arbitral award itself, save that disclosure of the award in separate proceedings to enforce or protect the legal rights of a party to the arbitration agreement may be permissible.<sup>122</sup> A number of exceptions to this general principle of confidentiality have developed,<sup>123</sup> including exceptions allowing for disclosure where it is required in the interests of justice or in the public interest.<sup>124</sup> However, while these exceptions could potentially be of particular relevance in the context of public-private arbitration, the public interest-based exception is not well-established under English law.<sup>125</sup> In delineating the scope of such exceptions, the English courts have not distinguished between public-private arbitration and private arbitrations. This means that even in respect of public-private disputes with clear public interest implications confidentiality remains the default rule.<sup>126</sup>

Finally, it is often argued that any public interest concerns with regard to arbitration awards can be addressed at the conclusion of the arbitration process when English courts may refuse to recognise or enforce a domestic or international arbitration award where it would be contrary to English public policy to do so.<sup>127</sup> However, the public policy ground under English arbitration law has

117 See, generally, J. D. M. Lew and O. Marsden, 'Arbitrability' in Lew et al (eds), n 49 above.

118 *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 at [40].

119 *ibid* at [98]-[99].

120 *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314. See also Civil Procedure Rule 62.10.

121 *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

122 See *Hassneh Insurance Co of Israel and others v Mew* [1993] 2 Lloyd's Rep 243; *Associated Electric and Gas v European Reinsurance Co of Zurich* [2003] 1 WLR 1041.

123 See, generally, H. R. Dundas, 'Confidentiality in English Arbitration: The Final Word? Emmott v Michael Wilson & Partners Ltd' (2008) 74 *Arbitration* 458.

124 See *John Forster Emmott v Michael Wilson & Partners Ltd* n 121 above at [107].

125 A. Tweedale, 'Confidentiality in Arbitration and the Public Interest Exception' (2005) 21 *Arbitration Int'l* 61.

126 See Departmental Advisory Committee on Arbitration Law, n 113 above at [13]-[16].

127 In respect of domestic awards, this ground for refusing recognition or enforcement is not included in the 1996 Act, but has been recognised by case law: see *Soleimany v Soleimany* [1998] EWCA

generally been narrowly construed.<sup>128</sup> The Court of Appeal has stated that, in order for enforcement of an award to be contrary to public policy, there would have to be some element of illegality or if the underlying contract or activity violates principles of public policy which are ‘of the greatest importance’.<sup>129</sup> While the public policy ground has largely been considered in the context of arbitration awards rendered in disputes between private parties, there is no indication that the English courts would expand its scope where public-private arbitrations are concerned.

While the concept of the public interest has occasionally been touched upon in arbitration case law, then, there is little indication that the public interest concerns that arise in the context of public-private arbitration are capable of being addressed within the existing private law understanding of arbitration under English law. This private law approach, endorsed by the legislature and judiciary, is reinforced by the manner in which arbitrators perceive their role. While the function and training of national judges is directed at serving the interests of the public and while judges are, particularly in public law cases, required to have regard to the broader societal implications of their judgments,<sup>130</sup> arbitrators (who are typically private lawyers) and who are appointed and paid by the parties may perceive their role and function as more akin to a service provider whose mandate comes from a private contract and who is responsible for resolving the dispute between the parties rather than protecting the public interest.<sup>131</sup>

These factors have all contributed to a conceptual and legal disconnect between the private law sphere of arbitration and the public law sphere of administrative law. This disconnect exists despite the close connection that has been established by case law in other contexts between matters of public interest and the scope of public law. For example, in *Re McBride’s Application*, Kerr J stated that ‘an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally’ and where it ‘affect[s] the public’ in particular.<sup>132</sup>

This conceptual and legal disconnect is best illustrated by contrasting the narrow scope of review of arbitration awards by English courts with the approach taken by the English courts in respect of the judicial review of administrative action. Judicial review of administrative action in England, at least in its modern guise, has a substantially broad scope.<sup>133</sup> In particular, since the House

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Civ 285 and Arbitration Act 1996, s 81(1)(c). In respect of international awards, see Arbitration Act 1996, ss 101-104.

128 See, generally, A. Sheppard and S. Brekoulakis, *Policies and Public Policy in English Arbitration Law* (Oxford: OUP, 2017 forthcoming).

129 *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] EWCA Civ 1401. See also *Soleimany v Soleimany* n 127 above.

130 See A. Chayes, ‘The Role of the Judge in Public Law Litigation’ (1975-1976) 89 Harv L Rev 1281.

131 P. Hodges and J. Greenaway, ‘Duties of Arbitrators’ in Lew et al (eds), n 49 above at [15.49]-[15.52]. See also M. R. Baniassadi, ‘Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration’ (1992) 10 Berkeley J Int’l L 59, 83.

132 [1999] NI 299, 310. See also *R v Legal Aid Board, ex p Donn* [1996] 3 All ER 1, 11.

133 J. Beatson, ‘“Public” and “Private” in English administrative law’ n 87 above. See generally Harlow and Rawlings, n 6 above, ch 3.

of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission*<sup>134</sup> the scope of judicial review encompasses virtually all errors of law, including jurisdictional and non-jurisdictional errors.<sup>135</sup> Crucially, the concept of error of law is broader than a mistake in the interpretation of a statute as English courts tend to characterise all inferences from primary facts as questions of law.<sup>136</sup> Thus, a public body will commit an error of law if it acts where there is no evidence to support the action or comes to a conclusion to which on the evidence it could not reasonably have come.<sup>137</sup> Similarly, while public bodies are accorded discretionary powers when choosing between several decisions or courses of action, courts will supervise a decision in terms of whether the public body has, intentionally or inadvertently, unlawfully exercised its discretion, albeit the court will not substitute its own decision for the decision made by the public body.<sup>138</sup> Finally, the introduction of the Human Rights Act 1998 has had significant implications for administrative law, including the introduction of new rules of statutory interpretation, and the requirement that public authorities act consistently with Convention rights, which has to some extent expanded the scope of judicial review, not least through the introduction of proportionality as the test of substantive view where Convention rights are at issue.<sup>139</sup> While the low-intensity irrationality review<sup>140</sup> which applies under the well-established *Wednesbury* test<sup>141</sup> ensures that courts do not interfere lightly with the substance of administrative decisions, judicial review is nonetheless notably broader than the review of arbitration awards by English courts.

Resolution of public-private disputes within this private law framework gives rise to a number of potential threats to the public interest. While not exhaustive of the possible ways in which public-private arbitration may conflict with fundamental public law norms,<sup>142</sup> two particular threats will be elaborated upon to illustrate the conceptual and legal void in respect of how public interest is accounted for in public-private arbitration.

The first threat is associated with the likely non-application of public law norms, including administrative law doctrines. Due to the hybrid nature of public-private contracts, the legal regime applicable to such contracts consists

134 [1969] 2 AC 147.

135 *Re Racal Communications Ltd* [1981] AC 374, 383; *R v Lord President of the Privy Council, ex p Page* [1993] 2 AC 682. See also B. Gould, 'Anisminic and Judicial Review' [1970] PL 358, 365.

136 J. Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4 OJLS 22, 39-44. See also Harlow and Rawlings, n 6 above, 511-513.

137 *ibid.* 30. See also *Railtrack Plc v Guinness Ltd* [2003] EWCA Civ 188 at [51].

138 *Padfield v Minister of Agriculture* [1968] AC 997, 1030. See also A. W. Bradley, K. W. Ewing and C. J. S. Knight, *Constitutional & Administrative Law* (Harlow: Pearson, 16<sup>th</sup> ed, 2014) 636.

139 T. Poole, 'The Reformation of English Administrative Law' (2009) 68 CLJ 142, 144-148.

140 See, generally, E. C. Ip, 'Taking a "Hard Look" at "Irrationality": Substantive Review of Administrative Discretion in the US and UK Supreme Courts' (2014) 34 OJLS 481.

141 *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1.

142 For example, the fact that third parties are generally not permitted to intervene in arbitration proceedings (unless the parties otherwise agree) can be considered problematic in the context of public-private arbitration. This contrasts with judicial review proceedings in which third parties are permitted to intervene and put forward public interest-related arguments: see Public Law Project, 'Third Party Interventions in Judicial Review: an action research study' (2001); A. Asteriti and C. J. Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' in Schill (ed), n 18 above, 801-803.

of private law and certain public law rules and, as such, public-private disputes may give rise to conflicts between private and public law. Let us assume, for example, that in the *E-Borders* case, the UK government had decided, in the light of new developments on immigration and security (for example the recent influx of immigrants and refugees from conflict zones and terrorist attacks in Europe), to significantly amend the specifications for the e-border system, or alternatively to cancel the contract altogether with a view to reconsidering UK immigration and border policy.

In such circumstances, the government's conduct would likely give rise to a dispute prompting the contractor to commence arbitration. This would almost certainly implicate the fundamental question of whether a contract may preclude a government from implementing important governmental policies, which would bring into play administrative law doctrines such as the *ultra vires* doctrine and the rule against fettering. The *ultra vires* doctrine reflects public law's concern with democratic accountability by requiring the government's actions to be authorised by elected representatives of the people.<sup>143</sup> The rule against fettering provides that, where a statute confers a discretionary power on a public body to act in the public interest, it is not permissible for that public body to put itself in a position in which it will not be able to exercise its discretion.<sup>144</sup> This rule allows government to change policies in order to reflect the will of the people (particularly after a change in government) or to reflect new circumstances (such as the new developments in immigration and security described above).<sup>145</sup> This could result in a public body disrupting a public-private contract to pursue a competing public interest goal.<sup>146</sup>

Of course, this tension between public and private law norms can arise whenever a dispute arises under a public-private contract and is not unique to public-private arbitration.<sup>147</sup> However, while courts in the common law tradition are required to take judicial notice of the public laws of their own state, without the need for such laws to be specifically pleaded or proved,<sup>148</sup> it is questionable whether this is the case in respect of arbitration tribunals.<sup>149</sup> Instead, arbitrators tend to take a predominately or exclusively private law approach to such disputes. The risk that mandatory rules of public law<sup>150</sup>

143 See generally A. C. L. Davies, 'Ultra vires problems in government contracts' (2006) 122 LQR 98.

144 See *British Oxygen Co Ltd v Board of Trade* [1971] AC 610. See also C. Hilson, 'Judicial Review, Policies and the Fettering of Discretion' [2002] PL 111.

145 n 143 above, 105.

146 See, for example, HM Treasury, n 11 above at [1.4.5] which recognises the possibility of conflict between contractual obligations and the rule against fettering.

147 See, generally, Davies, n 9 above, ch 6.

148 P. Capper, "'Proving" the Contents of the Applicable Substantive Law(s)' in F. Bortolotti and P. Mayer (eds), *The Application of Substantive Law by International Arbitrators* (Alphen aan den Rijn: Kluwer Law International, 2014) 39.

149 See J. D. M. Lew, 'The Basis for Applying Competition Law from an English Law Perspective' in G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Alphen aan den Rijn: Kluwer Law International, 2011) at [14-026]-[14-029]; Sheppard, n 23 above, 144-145.

150 For a definition of mandatory rules of law see D. F. Donovan, 'The Relevance (or Lack Thereof) of the Notion of "Mandatory Rules of Law" to Investment Treaty Arbitration' (2007) 18 Am Rev Int'l Arb 205, 205. See also Baniassadi, n 131 above, 69.

are not considered in public-private arbitrations is further heightened by the narrow scope of review of arbitration awards by the English courts and by the lack of an arbitrator-driven mechanism for referring questions on points of law to the courts.

To illustrate this, in *Cory v London Corporation*,<sup>151</sup> the public authority (London Corporation), in its capacity as a sanitary authority, entered into a waste collection contract with a private contractor. Subsequently, London Corporation, in its capacity as port health authority, changed its by-laws with the aim of improving hygiene standards. Such amendment rendered the contract unprofitable for the contractor. The waste collection contract contained an arbitration clause and the contractor referred the dispute to arbitration claiming a declaration that it was no longer bound by the (more onerous) contract. Given the public law aspects of the dispute, the arbitrator referred a question of law to the courts. Taking English public law into account, the Court of Appeal refused to imply into the contract a term that the contract would not be made more onerous (on the basis that such a clause would be *ultra vires*) and held that London Corporation was under a duty to make the by-laws regardless of their impact on its contracting partner and that the making of the by-laws did not constitute a breach or a repudiation of the contract.<sup>152</sup> Crucially however, the reference to the English courts was only possible because the dispute was decided under section 21 of the Arbitration Act 1950, which was a mandatory provision which specified a 'stated case' appellate procedure.<sup>153</sup> However, the 1996 Act does not provide for such a procedure (indeed, it has not been a feature of English arbitration law since 1979).<sup>154</sup> In addition, as described above, both section 45 and section 69 of the 1996 Act are frequently contracted out of and their scope is subject to several limitations. Therefore, as there is currently no arbitrator-driven mechanism for referring questions on points of law to the courts and no appellate procedure for disputes implicating public law, it is likely that the *Cory* dispute would today not have been referred to, or substantively reviewed by, the English courts under the 1996 Act. Furthermore, if the matter were to come before the courts in the course of setting aside or enforcement proceedings, the restrictive approach taken by the English courts to date in respect of the public policy ground would preclude consideration of administrative law doctrines.

The second possible threat identified is the threat to the fundamental public law norms of openness and accountability.<sup>155</sup> This threat arises from the fact that the details of the dispute before an arbitration tribunal, the conduct of

151 [1951] 2 KB 476.

152 n 143 above, 105-110. See also *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] WLR 204.

153 Section 21(1) provides: 'An arbitrator or umpire may, and shall if so directed by the High Court, state- (a) any question of law arising in the course of the reference; or (b) an award or any part of an award, in the form of a special case for the decision of the High Court.'

154 See, generally, Lord Hacking, 'The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979' (1980) 14 Int Lawyer 95.

155 Harlow and Rawlings, n 6 above, 46-47.

arbitration, and the final award are generally private and confidential.<sup>156</sup> As public bodies are given their powers on the basis that they are to be exercised in the public interest, the public has an interest in ensuring such powers are not abused. However, this objective cannot be achieved where the public law norms of openness and accountability are not applied.<sup>157</sup> This rationale applies equally to the powers exercised by public bodies in respect of public-private contracts as to any other power, given the potential impact of contracting out on the public<sup>158</sup> and given that public-private contracts have, to some extent, replaced legislative commands as the paradigm of public administration and regulation.<sup>159</sup> As these types of disputes have repercussions for taxpayers and may affect the implementation of important governmental policies, it is in the interest of the public that these disputes, and the outcome of these disputes, become known to the public, and that the public body and its responsible officers are held accountable.<sup>160</sup>

In the *E-Borders* case,<sup>161</sup> for example, the arbitration proceedings were conducted in private and the arbitration award, including the details of the contractor's claims and the names of the arbitrators, remain confidential. Similarly, the details of a recent dispute between the National Health Service and Fujitsu in respect of the cancellation of an £896 million IT contract, which was submitted to arbitration, remain confidential, although industry reports claim that the dispute was settled in favour of Fujitsu.<sup>162</sup> By keeping these types of public-private disputes and their resolution private and confidential, the public is deprived of the opportunity to consider 'what went wrong' and to attribute accountability to either the public body (in which case political accountability should ensue) or to the private party (in which case civil liability should follow).<sup>163</sup> Thus, as recently noted by Lord Chief Justice Thomas, while open court proceedings 'enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power', arbitration does not do so.<sup>164</sup>

156 This point has been discussed in the field of investment treaty arbitration and in the context of the 'contracting out' of public functions: see, for example, Van Harten, n 18 above, ch 7; G. Borrie, 'The Regulation of Public and Private Power' [1989] PL 552.

157 *R (on the application of Molinaro) v Kensington and Chelsea RLBC* [2001] EWHC Admin 896 at [67].

158 *ibid.*

159 M. Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M. Taggart (ed), *The Province of Administrative Law* (Oxford: Hart Publishing 1997) 21. See also T. Daintith, 'Regulation by contract: The new prerogative' (1979) 32 CLP 41, 41-42.

160 Davies, n 9 above, 227.

161 See section headed 'Public-private arbitration and the public interest' above.

162 See S. Cameron, 'Oh dear, is this another costly IT failure?: Taxpayers deserve to know why Whitehall computer contracts keep going wrong' *The Telegraph* 24 July 2014.

163 J. Freeman, 'The Contracting State' (2000-2001) 28 Fla St U L Rev 155, 200.

164 Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration' The Bailii Lecture, 9 March 2016 at [49].

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**PROPOSALS TO REFORM ENGLISH ARBITRATION LAW TO TAKE  
ACCOUNT OF THE PUBLIC INTEREST**

The previous sections demonstrated that there is a conceptual and legal void in respect of how the public interest is protected in public-private arbitration under English law. This section puts forward proposals to reform English arbitration law, with particular focus on addressing the two threats to the public interest identified in the previous section. These suggestions do not include the removal of public-private disputes from the arbitral sphere entirely. The collapse of the non-arbitrability doctrine, the preponderance of arbitration clauses in public-private contracts and the established policy of English law favouring arbitration mean that it is neither practical nor desirable that arbitrators would be precluded from hearing disputes under public-private contracts. Furthermore, to deprive public bodies of the opportunity to enjoy the notable advantages of arbitration over litigation in terms of speed and flexibility could, of itself, have adverse implications for public welfare.

The thrust of our proposals is that the existing legal framework of English arbitration law should be revised, first, to allow for more extensive court involvement in public-private arbitrations and, second, to restrict the application of the confidentiality principle. Implementing these proposals will require parliament and the courts to introduce a distinction between the legal treatment of purely commercial arbitrations and public-private arbitrations and, in respect of the latter, to restrict the application of the ‘contractual’ or private law understanding of arbitration.

We turn first to the suggestion of amending the existing statutory framework to allow for more extensive court involvement in public-private arbitrations to ensure that public law norms are considered. Such intervention should be directed at providing determinations on questions of public law and should be available at two stages, namely during the course of an arbitration and at its conclusion. Thus, during the course of arbitral proceedings, the ability to apply to the courts for a preliminary determination of a point of law should be expanded in respect of public-private disputes. While, under section 45 of the 1996 Act, an application for a determination on any question of law may currently be made during the course of arbitral proceedings, several limitations apply to the scope of this section. In particular, the parties may agree in advance not to bring such applications and, even where the possibility of bringing such applications has not been excluded, the application may only be brought at a party’s initiative. Furthermore, unless all of the parties to the arbitration agree to the making of such an application, before such application may be considered, under section 45(2)(b), the arbitration tribunal must grant its permission and the court must be satisfied both that the determination of the question is likely to produce substantial savings in costs and that the application was made without delay. For these reasons, section 45 has rarely been used.<sup>165</sup> In addition, while arbitrators historically enjoyed the ability to refer a question of law to

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<sup>165</sup> R. Merkin and L. Flannery, *Arbitration Act 1996* (Oxford and New York: informa law, 5<sup>th</sup> ed, 2014) 200. See *Beegas Nominees v Deco Ltd* [2003] EWHC 1891 (Ch); *Taylor Woodrow Holdings*

the English courts,<sup>166</sup> an arbitrator, who should observe the mandatory laws of the chosen law,<sup>167</sup> currently cannot apply of his or her own initiative to the English courts for an authoritative determination on a point of English public law, even where the arbitrator in question has no legal training or no training in English law in particular.

A new subsection should therefore be added to section 45 of the 1996 Act which would permit applications to be made in respect of public-private arbitrations either by a party to the arbitral proceedings or by the arbitral tribunal referring a point of public law for determination to the English courts. This subsection, a proposed draft of which is outlined in the Appendix, should be expressed to be without prejudice to the existing ability of parties to arbitral proceedings to refer questions of law to the courts under section 45(1) and should include definitions of the terms 'public-private arbitral proceedings' and 'public body'.<sup>168</sup> The term 'public-private arbitral proceedings' should encompass all arbitral proceedings involving a public body and another person who is not a public body and the term 'public body' should be defined in accordance with the established boundaries of English public law so as to encompass not only statutory bodies but also any person or body having functions of a public nature.<sup>169</sup> Definitions of these terms for the purposes of the proposed new subsection are included in the Appendix.

The new subsection of section 45 relating to public-private arbitral proceedings should also be included in the list of mandatory provisions in Schedule 1 to the 1996 Act so that its application may not be excluded by the parties' contrary agreement.<sup>170</sup> As outlined in the Appendix, the requirement under section 45(1) that the court is satisfied that the question of law 'substantially affects the rights of one of more of the parties' should also be included in the new subsection as to permit an application for a determination on a point of law which is inconsequential to the dispute would run contrary to both the autonomy of the arbitration process and to the principle of judicial economy. However, given the public interest implications involved, it is submitted that the criteria under the current section 45(2) should not apply to applications made under the new subsection and their application should, by means of an amendment similar to that included in the Appendix, be confined to applications made under section 45(1).

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*Ltd v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC); *Secretary of State for Defence v Turner Estate Solutions Limited* [2015] EWHC 1150 (TCC).

166 See B. J. Conrick, "Where the Kings Writ does not run": The Origins and Effects of the Arbitration Act 1979 (1985) 12 QUT Law Rev 1, 2 and 12.

167 Blessing, n 23 above, 27.

168 The term 'public law' has not been defined in English legislation to date and it is therefore not proposed to define it for these purposes. However, a definition of the term 'question of public law' should be included in the 1996 Act, s 82(1) which, consistent with the definition of the term 'question of law' would state that the term means '(a) for a court in England and Wales, a question of the public law of England and Wales, and (b) for a court in Northern Ireland, a question of the public law of Northern Ireland'.

169 The term 'public body' or 'public authority' has been defined by reference to such public functions in other UK legislation: see, for example, Companies Act 2006, s 54; The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009, regs 2, 4-9 and 11.

170 See Arbitration Act 1996, s 4 and Schedule 1.

Turning next to our proposal regarding increased judicial intervention at the conclusion of the arbitral process, the existing power of the courts to review public-private arbitration awards for errors of law under section 69 of the 1996 Act should be expanded. For this purpose, section 69 should be amended to draw a distinction between commercial arbitrations and public-private arbitrations. Section 69(1), which codified criteria developed by the courts in the context of commercial disputes,<sup>171</sup> should continue to apply in respect of the former and a new subsection should be inserted into section 69 of the 1996 Act which, in respect of public-private arbitrations, would permit an appeal on a question of public law arising out of, or in connection with, the arbitration. This wording is broader than that under section 69(1), which refers to an appeal on ‘a question of law arising out of an award’ and which has been interpreted as meaning that the question of law must already have been considered by the arbitration tribunal in its award.<sup>172</sup> As with section 45, this new subsection, a proposed draft of which is included in the Appendix, should be expressed to be without prejudice to the existing ability of parties to arbitral proceedings to refer questions of law to the courts under section 69(1) and should be included in the list of mandatory provisions in Schedule 1 to the 1996 Act so that, unlike the existing right of appeal under section 69(1), its application may not be excluded by the parties’ contrary agreement.<sup>173</sup> Finally, while leave to appeal should be required in respect of applications under the new subsection (where all of the parties have not agreed to the appeal being brought), not all of the conditions specified in section 69(3) for leave to appeal to be granted should apply and, for this purpose, a new subsection could be inserted to outline the test applicable for leave to appeal for public-private arbitrations. Thus, while for the same reasons as outlined above in respect of section 45(1), the requirement under section 69(3)(a) that ‘the determination of the question . . . substantially affect[s] the rights of one or more of the parties’ should be included in that test, the requirement under section 69(3)(b) that the ‘question is one which the tribunal was asked to determine’ should not be included as the parties should not have the power to exclude application of public law rules by not bringing such matters before the tribunal.

Neither of the alternative tests of correctness specified in section 69(3)(c) should be applied in determining whether to grant leave to appeal a public-private arbitration award. First, the test under the current section 69(3)(c)(i), which requires the applicant to demonstrate that the decision of the tribunal was ‘obviously wrong’, is too narrow to address the public interest implications associated with public-private arbitrations as it requires that the alleged error be quickly and easily demonstrable.<sup>174</sup> While the alternative test under

171 See *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724. See also Lord Thomas of Cwmgiedd, n 164 above at [19]–[20].

172 *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch). See also *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 WLR 1187.

173 It is notable that the 1996 Act, s 87 imposes restrictions on the ability of parties to a domestic arbitration agreement to exclude the jurisdiction of the courts under s 69 but this section was never commenced: see Departmental Advisory Committee, *Supplement to the DAC Report on the Arbitration Bill of February 1996* (1997) 13 *Arbitration Int'l* 317 at [47]–[49].

174 See *AMEC Group Limited v Secretary of State for Defence* [2013] EWHC 110.

section 69(3)(c)(ii), in requiring that the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, is potentially less onerous, it has principally been developed in light of the restrictive interpretation of the requirement that the question be one 'of general public importance' as referring to a question which may arise frequently in particular fields of commercial law and which needs to be judicially settled.<sup>175</sup> This interpretation is unnecessarily restrictive for disputes engaging the public interest, the general public importance of which should be assumed. A new test of correctness should be applied for leave to appeal against public-private arbitration awards, which would require only that, on the basis of the findings of fact in the award, the decision of the tribunal is open to doubt. This test would strike an appropriate balance between the finality and autonomy of the arbitral process, on one hand, and the public interest in reviewing the correct application of fundamental provisions of public law, on the other.

Finally, the requirement under section 69(3)(d) that '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' should not apply in respect of the new right of appeal. Under the existing right to appeal under section 69(1), whether this requirement is satisfied has been held by the English courts to be affected by a number of factors including the arbitrator's knowledge of the law<sup>176</sup> and whether the respondent can show that it would suffer substantial injustice if leave was granted.<sup>177</sup> However, such factors should not constrain the possibility of an appeal on a point of public law in respect of public-private arbitration awards.

Turning to the appropriate scope of courts' review of public-private arbitration awards under this revised statutory framework, this question depends on two interrelated but distinct issues: first, whether the issue requiring determination (under section 45) or the alleged error of an arbitration tribunal (under section 69) involves a 'question of law'; and, secondly, the test that the courts should apply in determining whether an arbitration tribunal has erred in law. While the term 'question of law' clearly suggests that findings of fact are not reviewable by English courts under section 69 of the 1996 Act,<sup>178</sup> a separate question arises as to whether English courts may review the issue of whether there was any evidence to support a tribunal's factual findings.

While, for commercial arbitrations, a narrow interpretation of the term 'question of law', which excludes review by the courts of whether or not the evidence supports the factual findings of the tribunal, has a sound policy and doctrinal basis<sup>179</sup> - and is supported by the preponderance of case law

175 See D. St John Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (London: Sweet & Maxwell, 24<sup>th</sup> ed, 2015) 540. See also *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (No 2) n 171 above, 742-743.

176 *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd* [2004] EWHC 996 (Ch) at [23]-[25].

177 *HOK Sport Ltd (formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC) at [56].

178 Merkin and Flannery, n 165 above, 325-327.

179 See Arbitration Act 1996, s 34(2)(f) which leaves to the tribunal the decision of 'whether to apply the strict rules of evidence as to the admissibility, relevance or weight of any material (oral,

in the commercial arbitration context<sup>180</sup> – a broader interpretation of the term permitting judicial scrutiny of this issue is warranted for public-private arbitrations. This proposal was supported by Steyn LJ in *Geogas SA v Trammo Gas Ltd (The Baleares)*<sup>181</sup> who rejected this broader interpretation of the term ‘question of law’ in the commercial arbitration context as a ‘redundant piece of baggage from an era when the statutory regime governing arbitration and the judicial philosophy towards arbitration, was far more interventionist than it is today’,<sup>182</sup> but went on to note that the power to review a finding of fact of a tribunal on the ground that there is no evidence to support it, and that there is therefore an error of law, is appropriate for public law cases.<sup>183</sup>

This broader interpretation of the term ‘question of law’ is also consistent with leading authorities in the area of judicial review. In the House of Lords’ decision in *Edwards v Bairstow*,<sup>184</sup> where the defendant claimed that the General Commissioners of Income Tax had made an error of law in finding that a transaction to which he was a party was not ‘an adventure or concern in the nature of trade’ for tax purposes, Viscount Simonds stated that the finding that the transaction was not ‘an adventure or concern in the nature of trade’ is an inference of fact but could be set aside because it appeared that the Commissioners had acted without any evidence or on a view of the facts which could not reasonably be entertained.<sup>185</sup> Similarly, Lord Radcliffe stated that an error in law arises if the facts found are such that ‘no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal’.<sup>186</sup>

Turning to the test that the courts should use to determine whether the tribunal has erred in law in the context of public-private arbitration awards, the appeal process under section 69 comprises two stages – first, the leave to appeal stage which acts as an initial filter and, secondly, the appeal itself. For the leave stage, as outlined above, the test for correctness should require only that, on the basis of the findings of fact in the award, the decision of the tribunal is open to doubt. Once the leave stage has been passed, a stricter approach at the appeal

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written or other) . . .’ See also, Departmental Advisory Committee on Arbitration Law, n 113 above at [170] and Departmental Advisory Committee on Arbitration Law, ‘1996 Report on the Arbitration Bill’ (Chairman The Rt Hon Lord Justice Saville) (1999) 15 *Arbitration Int’l* 413 at [286].

180 See *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd’s Rep 215, 228; *Demco Investments & Commercial SA v SE Banken Forsakring Holding AB* [2005] EWHC 1398; *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749; *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800. cf *Fence Gate Ltd v NEL Construction Ltd* (2001) 82 Con LR 41; *Guardcliffe Properties Ltd v City & St James* [2003] EWHC 215 (Ch); *Benaim (UK) Ltd v Davies, Middleton & Davies Ltd* [2005] 1370 (TCC).

181 *Geogas SA v Trammo Gas Ltd (The Baleares)* *ibid.*

182 *ibid.*, 228.

183 *ibid.*, 232.

184 [1956] AC 14. See also the following arbitration case-law citing this line of authority: *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (No 2) n 171 above, 742; *London Underground Ltd v Citylink Telecommunications Ltd* n 180 above at [53]-[56]; *Mary Harvey v Motor Insurers’ Bureau* (QBD (Merc) (Manchester), Claim No OMA40077, 21 December 2011) at [20]-[25] and [55]-[56].

185 *ibid.*, 29-31.

186 *ibid.*, 36.

stage is justified<sup>187</sup> and, while the manner in which a tribunal ascertains the facts should not be reviewable, the manner in which it ascertains the law and its final conclusion, in light of both the facts and the law, should be subject to review. Thus, an error of law should be inferred not only when the tribunal has stated the law wrongly, but also when the tribunal has stated the law correctly but it has arrived at a different conclusion from the one to which a correct application of the law to the facts would inevitably lead.<sup>188</sup> Accordingly, while the fact that the court would have arrived at a different answer than the one arrived at by the tribunal is insufficient to overturn the award, the tribunal's conclusion on a question of public law should be reviewable as to whether it is 'out of conformity with the only correct answer or lies outside the range of correct answers'.<sup>189</sup>

Turning to our second proposal which is designed to address the threat posed by the private and confidential nature of arbitration to the public law norms of openness and accountability, we argue that a distinction should be introduced between purely commercial arbitrations and public-private arbitrations and greater weight should be given to the public law norms of openness and accountability in relation to the latter.<sup>190</sup> In respect of public-private arbitration claims which come before the courts, public hearings should be permitted more frequently. This could be achieved through amending Rule 62.10(2) of the Civil Procedure Rules to provide that Rule 39.2 of the Civil Procedure Rules (which states that the general rule is that a hearing is to be in public) should apply to public-private arbitration claims. Rule 39.2 also recognises that a private hearing may be required in certain exceptional circumstances (for example, where it involves confidential information and publicity would damage that confidentiality). The application of these exceptions in relation to public-private arbitration claims would ensure that the legitimate interests of the parties are protected and that inherently confidential information (such as commercially sensitive information of a financial, scientific or technical nature) does not enter the public domain. In conjunction with this amendment, a carve-out should also be inserted into Rule 62.10(3) to clarify that the default position that arbitration claims (apart from those under sections 45 and 69) are held in private does not apply to public-private arbitration claims.

Jurisprudential developments could also assist in ensuring that the public law norms of openness and accountability are applied in respect of public-private arbitrations. For example, as under Rule 62.10(1) it is open to the courts to make an order that an arbitration claim be held in public in any case, an increased willingness on the part of the courts to make such orders could have a similar effect to the proposed amendments to Rule 62.10(2) and (3). Furthermore, the scope of the current public interest-related exception to the general principle of confidentiality should be further defined (and possibly expanded) in respect of public-private arbitrations to allow for disclosure of information related to such arbitrations where there is an overriding public

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187 Merkin and Flannery, n 165 above, 331.

188 *Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis)* n 51 above, 507.

189 *ibid.*

190 See Lord Thomas of Cwmgiedd, n 164 above at [23] and [49].

interest in doing so. Finally, while there has already been some recognition in English case law that, in contrast to documents and information disclosed in arbitration proceedings, arbitration awards should be capable of being published (at least in a redacted or summary form),<sup>191</sup> this jurisprudence should be further developed in respect of public-private arbitration awards.<sup>192</sup>

While these proposals, and in particular the suggested expansion of the scope of sections 45 and 69, may appear to run counter to the trend, worldwide and in England, towards reduction of court intervention in the arbitration process,<sup>193</sup> the proposals go no further than is necessary to address specific threats to the public interest identified in respect of public-private arbitrations. First, introduction of a ground for review of factual errors is not proposed as there are no grounds to suggest that the ability of arbitrators to make findings of fact is reduced where disputes implicating the public interest are concerned and as permitting an extensive re-assessment of arbitral fact-finding would undermine the autonomy of the arbitration process.<sup>194</sup> Secondly, in order to ensure that the benefits of arbitration in terms of finality and expediency are preserved to the greatest extent possible, many of the existing limitations on the scope of sections 45 and 69 should also apply to the new form of review proposed in respect of public-private arbitrations. Such restrictions include the limits placed on the right to appeal the decision of the court under sections 45(6) and 69(8) respectively and the requirement to obtain leave to appeal in respect of section 69 applications. In relation to section 69 in particular, the proposed tests for determining whether the tribunal has erred in law at both the leave to appeal and appeal stages strike an appropriate balance between the autonomy of the arbitral process and the public interest in ensuring that public laws are considered in public-private arbitrations by preventing the reviewing court from substituting its own decision for that of the tribunal. Thirdly, application of the current requirement under sections 45(4) and 69(4) (requiring that the question of law be identified as well as the grounds on which it is said that the question should be decided by the court or that leave to appeal should be granted), together with the well-embedded policy in English law for minimal judicial intervention,<sup>195</sup> will ensure that attempts to take advantage of the expanded scope of review under sections 45 and 69 to delay or disrupt the arbitral process are likely to fail. Moreover, given that the vast majority of international disputes being arbitrated in England are of an exclusively commercial nature and that, in many cases, the law applicable to the substance of the dispute will not be English law (meaning that sections 45 and 69 will, in any event, not be applicable),<sup>196</sup> the suggested amendments will

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191 n 122 above.

192 See B. Rix, 'Confidentiality in International Arbitration: Virtue or Vice?' Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, 12 March 2015 arguing for curtailment of the confidentiality principle in respect of arbitration awards.

193 cf R. Finch, 'London: still the cornerstone of international commercial arbitration and commercial law?' (2004) 70 *Arbitration* 256, 264-265; Lord Thomas of Cwmgiedd, n 164 above at [32]-[34].

194 See *Geogas SA v Trammo Gas Ltd (The Baleares)* n 180 above, 228.

195 See Arbitration Act 1996, s 1(c).

196 See Arbitration Act 1996, s 82(1).

not affect the framework for resolving such disputes. Accordingly, any concerns that the amendments would have reputational implications for England as an arbitration-friendly jurisdiction, particularly in the context of the prolonged uncertainty associated with the outcome of the recent referendum suggesting that the UK leaves the EU, are misplaced.

Finally, the proposals are in line with developments in the law of judicial review, in particular, the abandonment of the distinction between jurisdictional and non-jurisdictional errors of law.<sup>197</sup> The proposals are also consistent with developments in other jurisdictions, for example, the recognition by the French courts that, where the application of mandatory public laws is concerned, a different approach to the review of arbitral awards is warranted<sup>198</sup> and, more generally, with the application in many civil law jurisdictions of a distinct set of legal principles to public-private contracts where disputes under such contracts have public interest implications.<sup>199</sup> Further, the proposals relating to transparency would serve to bring English arbitration law in line with legislative developments in other jurisdictions such as France and Brazil, which have recognised the need for increased transparency in arbitrations involving public bodies,<sup>200</sup> and with developments in the area of investment treaty arbitration such as the recent advent of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.<sup>201</sup>

## CONCLUSION

English arbitration law has been characterised as a mature and highly developed body of law. While this is certainly the case in relation to commercial disputes, as English law lacks a distinct legal and conceptual framework for public-private arbitration and regards arbitration and public law as occupying separate legal spheres, the same cannot be said in respect of public-private arbitration. Rather, the existing arbitration framework does not adequately account for the public interest in public-private arbitration. This article argues that there is a need to reconceptualise public-private arbitration and to subject it to public law values. While engaging with this reconceptualisation process would require a willingness to depart from existing practices and principles, this reconceptualisation is necessary to ensure that the rise of public-private arbitration does not lead to the subjugation of the public interest to the hallowed arbitral principle of party autonomy.

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197 *Anisminic Ltd v Foreign Compensation Commission* n 134 above.

198 See section headed 'Public-private arbitration in other jurisdictions' above.

199 See section headed 'Reasons underlying the English approach to public-private arbitration' above.

200 See section headed 'Public-private arbitration in other jurisdictions' above.

201 UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration* (effective date 1 April 2014). See also United Nations, *Convention on Transparency in Treaty-based Investor-State Arbitration*, adopted by resolution of the General Assembly on 10 December 2014 and opened for signature on 17 March 2015.

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**APPENDIX- SCHEDULE OF PROPOSED AMENDMENTS**

**PROPOSED AMENDMENTS TO 1996 ACT**

*Section 45: Determination of preliminary point of law*

- (1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) 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.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this subsection (1).

- (2) Without prejudice to the generality of subsection (1), the court may, in respect of public-private arbitral proceedings, on the application of a party to arbitral proceedings (upon notice to the other parties) or on the application of the arbitral tribunal (upon notice to all of the parties to the proceedings) determine any question of public law<sup>202</sup> arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.<sup>203</sup>

The following definitions apply for the purposes of subsection (2):

'public-private arbitral proceedings' means arbitral proceedings between a public body and another person who is not a public body;

'public body' means a State, regional or local authority (including the Crown, but not including Her Majesty in her private capacity) and any other person or body having functions of a public nature.

- (3) An application under subsection (1) 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.
- (4) The application under either subsection (1) or subsection (2) shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

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202 A definition of the term 'question of public law' should be included in section 82(1) of the 1996 Act, which, consistent with the definition of the term 'question of law' would state that the term means '(a) for a court in England and Wales, a question of the public law of England and Wales, and (b) for a court in Northern Ireland, a question of the public law of Northern Ireland'.

203 Reference to section 45(2) should also be inserted into the list of mandatory provisions in Schedule 1 to the 1996 Act.

- (5) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
- (6) Unless the court gives leave, in respect of applications made under subsection (1), no appeal lies from a decision of the court whether the conditions specified in subsection (3) are met.
- (7) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.

*Section 69: Appeal on point of law*

- (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this subsection (1).

- (2) Without prejudice to the generality of subsection (1), a party to public-private arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of public law arising out of, or in connection with, an award made in the proceedings, whether or not such a question of law is referred to in the award in question.<sup>204</sup>

The following definitions apply for the purposes of subsection (2):

'public-private arbitral proceedings' means arbitral proceedings between a public body and another person who is not a public body;

'public body' means a State, regional or local authority (including the Crown, but not including Her Majesty in her private capacity) and any other person or body having functions of a public nature.

- (3) An appeal shall not be brought under this section except—
  - (a) with the agreement of all the other parties to the proceedings, or
  - (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

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<sup>204</sup> Reference to section 69(2) should also be inserted into the list of mandatory provisions in Schedule 1 to the 1996 Act.

- (4) Leave to appeal shall be given in respect of appeals under subsection (1) only if the court is satisfied—
  - (a) that the determination of the question will substantially affect the rights of one or more of the parties,
  - (b) that the question is one which the tribunal was asked to determine,
  - (c) that, on the basis of the findings of fact in the award—
    - (i) the decision of the tribunal on the question is obviously wrong, or
    - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
  - (d) that, 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.
- (5) Leave to appeal shall be given in respect of appeals under subsection (2) only if the court is satisfied –
  - (a) that the determination of the question will substantially affect the rights of one or more of the parties, and
  - (b) that, on the basis of the findings of fact in the award, the decision of the tribunal is open to doubt.
- (6) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
- (7) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
- (8) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
- (9) 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.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

- (10) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance

or is one which for some other special reason should be considered by the Court of Appeal.

## **PROPOSED AMENDMENTS TO CIVIL PROCEDURE RULES**

### *Rule 62.10*

- (1) The court may order that an arbitration claim be heard either in public or in private.
- (2) Save in respect of public-private arbitration claims,<sup>205</sup> Rule 39.2 does not apply.
- (3) Subject to any order made under paragraph (1) and to the application of Rule 39.2 to public-private arbitration claims –
  - (a) the determination of –
    - (i) a preliminary point of law under section 45 of the 1996 Act; or
    - (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award,will be heard in public; and
  - (b) all other arbitration claims will be heard in private.
- (4) Paragraph (3)(a) does not apply to –
  - (a) the preliminary question of whether the court is satisfied of the matters set out in section 45(3)(b); or
  - (b) an application for permission to appeal under section 69(3)(b).

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<sup>205</sup> A definition of the term ‘public-private arbitration claim’ should also be included in Rule 62.2. This should be defined in a manner similar to that proposed in respect of sections 45 and 69 of the 1996 Act and should include the same definition of ‘public body’.