

# *Distilling Disputes Series*

Presented by Fried Frank's Disputes team, the Distilling Disputes series uses data and graphics to draw out the strategic issues that clients face when litigating disputes in the English Courts and in international commercial and investment arbitration. The third edition focuses on challenges to arbitration awards in the English Courts, summarising the bases for challenge, the procedure, average timings and base rates for success. It also provides comparative data on appeals in respect of English Court decisions and commercial and investment arbitration awards.

Fried Frank's multi-disciplinary team of barristers and solicitors has extensive experience advising clients in re-evaluating litigation strategies and tactics following their obtaining an unsuccessful outcome in an interlocutory or final decision elsewhere. Short deadlines necessitate a quick, agile and considered response at this crucial stage and the Fried Frank team is focused on results.

## *Edition 3: Challenging an arbitration award in the English Courts*

**s.67**

Challenge on  
grounds of  
jurisdiction

**s.68**

Challenge  
alleging  
irregularity

**s.69**

Appeal on a  
point of law

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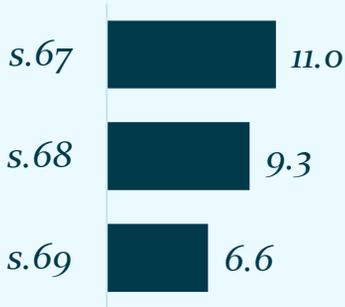
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# Challenging an arbitration award in the English Courts

## Prospects of success and duration

Success rates for challenges (%) (2018-2020)



Source: Commercial Court Report 2020-2021; Data for s.67 refers to 2019-2020 only.

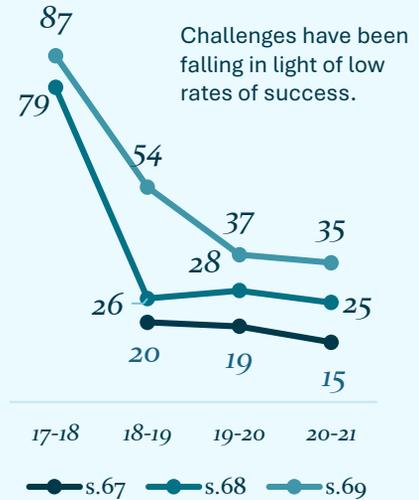


Average completion time for s.69 appeal where permission granted (2021)



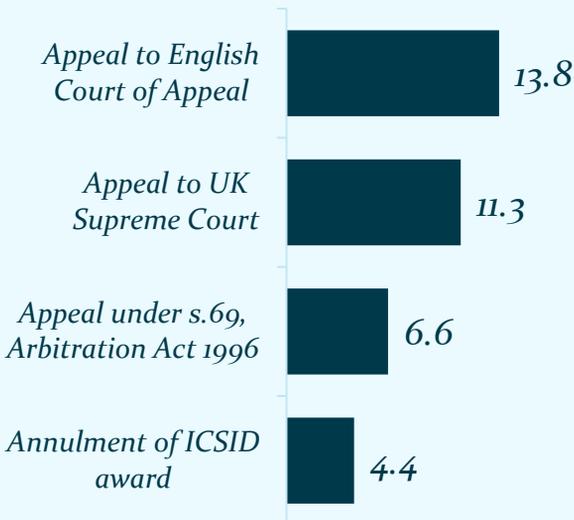
Average time for determination of permission to appeal under s.69 (2021)

Number of arbitration challenges in the English Courts (2017-2021)

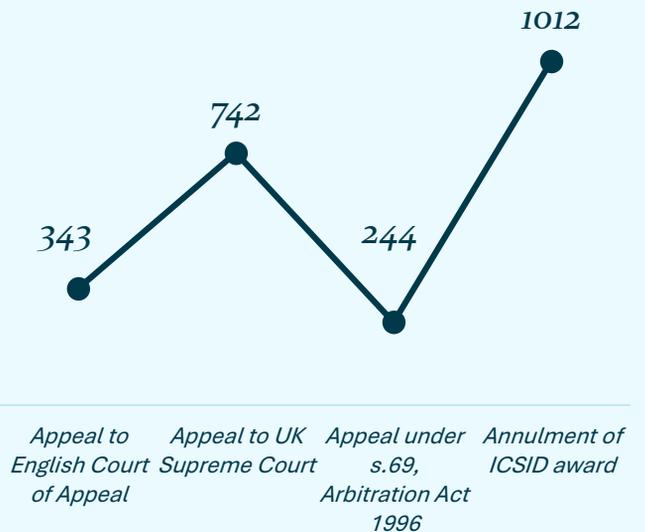


## Comparing challenges in respect of English Court decisions, and commercial and investment arbitration awards

Base rates of success (%)



Average duration (days)



Sources: See previous editions of the Distilling Disputes series. The figure in respect of annulment is the percentage of successful annulment challenges in respect of all ICSID awards in the period 2001-2022. As a proportion of annulment proceedings commenced, the success rate is 11.7%.

# Challenging an arbitration award in the English Courts

## What does the applicant/appellant have to show?

### Challenge on grounds of jurisdiction

- The applicant may challenge issues of “substantive jurisdiction” being (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement (s.82; s.30(1)).
- It operates upon (a) awards as to issues of substantive jurisdiction and (b) awards on the merits where the tribunal has dealt with the objection to substantive jurisdiction in the course of such an award. It does not enable a party to challenge an award on the merits unless that award also determines an objection already raised to substantive jurisdiction.
- A party may lose the right to object under s.67 or s.68 if it takes part or continues to take part in the arbitral proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal, objections as to the tribunal’s lack of jurisdiction or a serious irregularity: s.73.

s.67

## English Arbitration Act, 1996

s.68

### Challenge alleging irregularity

- The two key requirements are: (1) a serious irregularity has occurred which (2) has caused or will cause substantial injustice.
- The serious irregularity must fall within the closed categories under s.68(2) which include where the tribunal has failed to comply with its general duty of fairness, the tribunal has exceeded its powers, the tribunal has failed to deal with all the issues that were put to it, and where the award has been obtained by fraud or in a way which is contrary to public policy.
- The test involves a deliberately high threshold requiring an extreme case because a major purpose of the 1996 Act was to reduce the extent of intervention by courts in the arbitral process. (See recently: *Islamic Republic of Pakistan v Broadsheet LLC* [2019] EWHC 1832 (Comm), [17]; *RAV Bahamas Ltd v Therapy Beach Club* [2021] UKPC 8, [26]-[37].)

s.69

### Appeal on a point of law

- A party may appeal under s.69 where the tribunal has made an error of English law. There is no appeal on the facts. Unlike the other two grounds, permission of the Court is first needed to appeal on a point of law (see p 4).
- If any of the relevant findings are mixed findings of fact and law, there will only be an error of law if the tribunal has misdirected itself or no tribunal properly instructed could have come to the determination reached. (See recently: *MUR Shipping BV v RTI Ltd*, [2022] EWHC 467 (Comm), [50]-[53]).
- Section 69 is not a mandatory provision, and can be excluded by agreement of the parties— for instance, by their choice to apply an institutional set of rules that include an exclusion of the right to appeal (e.g. ICC and LCIA Rules). Whether or not there is such an agreement is a question of construction. (See recently: *National Iranian Oil Company v Crescent Petroleum Company* [2022] EWHC 1645 (Comm).)

# Challenging an arbitration award in the English Courts

## How will the English Courts deal with a challenge?

### Challenge on grounds of jurisdiction

- The Court has the power to dismiss a challenge on the papers without a hearing where it considers that the challenge has no real prospect of success.
- The Court will only allow s.67 (and s.68) challenges to be heard orally if there is good reason to do so or a real prospect of success. The claimant can apply to the Court seeking a hearing explaining why the judge was wrong, but if such an application is dismissed, the Court may award adverse costs on an indemnity basis.
- A challenge under s.67 proceeds by way of a de novo rehearing of the jurisdiction issue(s). The Court's role is to confirm that the tribunal reached the right decision as to jurisdiction. Awards challenged under s.67 do not have presumptive validity: they are either made with jurisdiction or not.
- An award has no automatic legal or evidential weight, but the Courts are still entitled to have regard to the decision that the arbitrators have made. (See recently: *Sea Master v Arab Bank* [2022] EWHC 1953 (Comm), [31]-[32])

s.67

English  
Arbitration  
Act, 1996

s.68

### Challenge alleging irregularity

- As with s.67 challenges, the Court can dismiss a s.68 challenge without a hearing. The claimant may request a hearing of the application at risk of adverse indemnity costs.
- The focus is on due process and not the correctness of the decision reached. In general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity.

### Appeal on a point of law

- The threshold permission application is determined without a hearing unless it appears to the Court that a hearing is required (s.69(5)). Under s.69(3), the Court must be satisfied that:
  - (1) the determination of the question of law will substantially affect the rights of one or more of the parties;
  - (2) the question of law is one which the tribunal was asked to determine;
  - (3) on the basis of the findings of fact in the award:
    - (a) the decision of the tribunal on the question of law is obviously wrong — meaning that it is demonstrable on the face of the award itself, or
    - (b) the question of law is one of general public importance and the decision of the tribunal is at least open to serious doubt; and
  - (4) 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 of law, which provides the Court with a residual discretion to refuse leave.
- Where a judge has refused permission to appeal under s.69 on the papers, the decision is final and the applicant will not be entitled to a hearing. If permission is granted, the appeal will be heard.

s.69