KINGS COLLEGE LONDON
CENTRE OF CONSTRUCTION LAW AND MANAGEMENT
PART D

INTRODUCTION: NATURE AND LAWS OF ARBITRATION

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1. INTRODUCTION

Course structure (materials, course work, assessed coursework, separate award writing module).

1.1 The content of Part D

PART D of the Course is concerned with a range of dispute resolution methods, but with the principal focus being on Arbitration (both domestic and international). Even if Adjudication is perceived as the favoured method for dispute resolution and, in the light of Beaufort Developments v. Gilbert Ash [1998] 88 Build LR 1 (HL),[1] legal proceedings are now a viable alternative, an understanding of the law and practice of Arbitration remains important.

- Arbitration provides an insight into good practice in Adjudication.

- Arbitration remains one of the preferred methods for resolving international construction disputes.

- The advantages of party control and confidentiality, uncertainties in court practice and procedure resulting from the introduction of the Civil Procedure Rules and the continued use of arbitration clauses in construction contracts mean that arbitration is likely to continue to have a place in the resolution of construction disputes.

- Charges for commencing legal proceedings, and making applications in the course of those proceedings, are increasing. There are proposals to charge parties for court hearing time. In financial terms, litigation no longer has the edge.

- An understanding of arbitral procedure provides an insight into principles and

[1] **Beaufort**: NRHA v. Crouch [1984] QB 644, overruled. Court has power to reconsider rights as determined by contract administrator's certificates, unless contract expressly states conclusive. Arbitrator did not have powers not available to the court.

concepts that are relevant to litigation and other methods of dispute resolution, such as Adjudication.

- Fashions change.

2. OVERVIEW OF DISPUTE RESOLUTION METHODS

There are a variety of different methods by which construction disputes can be resolved, each with their own characteristics. Recent articles on this topic include:

- Arbitration verses alternatives, K Franklin [2000] ADRLJ 90.

2.1 The Court

The court's jurisdiction is both inherent (High Court) and statutory. Litigation provides non-consensual, adversarial, method of dispute resolution, concerned with legal rights and remedies, conducted in accordance with detailed procedural rules. The outcome is a binding third party determination, a judgement, reviewable on appeal. Judgements can directly enforced, with court assistance, if necessary.

The Civil Procedure Rules ("CPR") and the various pre-action protocols, have lead to greater front loading of costs, and uncertainties over how those costs will be allocated by the court. The pre-action protocols also embody the view of litigation as a last resort.

Advantages/disadvantages: Public, subsidised (but not for much longer), expensive, indifferent (poor) court administration, complex (expensive) pre-commencement procedures, little party control, non-consensual joinder of parties, wide rights of appeal, competence of judiciary, legal aid, restricted rights of audience, limited international enforceability of judgements.

Comparative Table of principal procedures in litigation and arbitration

Topic	RSC Order	CPR Part	Arbitration Act 1996
Beginning	Orders 6, 7, 8, 9, 12	Parts 7, 8, 9, 10	ss. 12, 13, 14
Service	Orders 10, 11	Part 6, Orders 10,11	ss. 76, 77
Case management	Order 25, Practice directions	Parts 3, 26, 27, 28, 29, 49	s. 34
Pleadings	Orders 15, 18, 28	Parts 16, 18, 20,22	s. 34(2)(c)
Amendment	Order 20	Part 17	s. 34(2)(c)
Discovery	Order 24	Part 31	s. 34(2)(d)
Evidence	Orders 26, 38, 39	Parts 32, 33, 34	ss. 34(2)(f), 43
Experts	Orders 38, 40	Part 35	ss. 34(2)(f), (g), 37
Determination	Orders 33, 35 36, 42	Parts 39, 40	ss. 34(2)(h), 46, 49, 52
Third parties	Order 16	Parts 19, 20	s. 35
Interim remedies	Order 29	Part 25	s. 38
Summary judgement	Orders 14, 14A	Part 24	s. 39(?)
Settlement	Order 22	Part 36	s. 61(?)

offers			
Non compliance	Orders 2, 13	Parts 3, 12, 13	ss. 41, 42
Costs	Order 62	Parts 43, 44, 45, 46, 47, 48.	ss. 59, 60, 61, 62, 63, 64, 65

Impact of the Civil Procedure Rules 1999 (CPR)
The CPR came into force from 19th April 1999, implementing a major part of the Woolf Report. Some key points of the CPR are as follows.

- Rules apply throughout the civil courts, including the County Courts.

- New language, with little of the RSC language retained (except in the, decreasing number of old rules preserved in Schedule 1).

- New numbering, Parts and Rules and Practice Directions, not Orders and Rules and Practice Directions.

- Introduces the concept of case management (Parts 3, 26) and overriding objectives (Part 1).

- Introduces the "track" system, whereby cases are assigned (see Part 26) to either:

  (a) the Small Claims track (Part 27)
  (b) the Fast Track (Part 28)
  (c) the Multi Track (Part 29)

  (But see Part 60.6 all TCC claims are Multi Track).

- Gives greater scope for the court to depart from the "Costs follow the event" principle (For example, Part 44, rules 44.3, 44.4, 44.5, and the Practice Direction relating to Part 44. See also Part 36).

- Introduces new procedures, for example, summary judgement on defences (Part 24, Rule 24.2) and claimant's offers (Part 36).

- Places an emphasis on litigation as a last resort, has resulted in greater front loading of litigation costs, higher costs overall, and greater uncertainty of outcome of litigation.

2.2 **Private Arbitration**

Jurisdiction founded on agreement of the parties, but augmented by statute, the Arbitration Act 1996. A consensual, generally adversarial, method of dispute resolution, with support from the court, conducted in accordance with tailor made procedures determined by the tribunal in the context of agreed or statutory rules. It is concerned with disputes and differences, in practice, with legal rights and remedies. The outcome is a binding third party determination, an award, subject to limited supervision/review by the court. Court assistance is available for enforcement.

Advantages/disadvantages: Private, not subsidised, party control, flexibility and speed of procedure(?), technical understanding, finality, difficulties with joinder of parties, no legal aid, wide choice of representation, international enforcement of awards.

2.3 **Other methods of dispute resolution**

Statutory Adjudication

Quasi-statutory jurisdiction governed by the Housing Grants, Construction and Regeneration Act 1996 ("The Housing Grants Act 1996"). A non-consensual, rapid (28 days), generally inquisitorial method of dispute resolution conducted in accordance with tailor made procedures determined by the tribunal within the context of agreed or statutory rules. It is concerned with contractual disputes. The outcome is a binding third party determination, a decision, but one that does not restrict either party from litigating or, if provided for, arbitrating the same dispute. But, otherwise, there are only limited rights to challenge the decision (no jurisdiction, bad faith, lack of impartiality (which might include significant procedural unfairness). Court will generally enforce the decision by summery process. Consider cases such as Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93.[2]

Advantages/disadvantages: Private, not subsidised, flexibility and speed of outcome, rough justice(?), decision only of conditional finality but may alter litigation/arbitration risk, technical understanding, little possibility of joinder, no legal aid, wide choice of representation, difficulties with recovering costs or representation.

Expert determination

Some similarities with statutory adjudication but decision is generally final and binding. Jurisdiction is founded solely on parties' agreement and consensual, although the court may provide support: Channel Tunnel Group v. Balfour Beatty [1993] 1 WLR 262.[3] The determination may concern the creation as well as the determination of rights. The outcome is contractually binding on the parties and will be enforced by the court as such. There may be a right of action against the expert in negligence, but other than if there is actual bias, want of jurisdiction or a material departure from instructions, the decision is unchallengeable. Consider Jones v. Sherwood Computer [1992] 1 WLR 277; Nikko Hotels v. MEPC [1991] 28 EG 86;[4] #Bernhard Schulte v. Nile Holdings [2004] EWHC 977 (Comm); [2004] 2 Lloyd's Rep 352.[5]

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2 **Macob**: Adjudicator's decision which appears on its face to be properly issued, binding and enforceable, even if validity or merits challenged, usual relief summary judgement. Approved, Bouygues UK Ltd v. Dahl-Jensen [2000] BLR 522 (CA).

3 **Channel Tunnel**: The court has inherent jurisdiction to stay proceedings brought in breach of dispute resolution procedure, arms length parties equal commercial advantage.

4 **Jones**: Grounds of challenge limited to answering the wrong question, fraud. No challenge for procedural irregularity.

5 **Schulte**: As a matter of law, apparent or unconscious bias or unfairness was, in any case, of no assistance to N in the absence of actual bias, fraud, collusion, or material departure from instructions. The court followed, in this respect, Macro & ors v Thompson & ors (1996) BCC 707 CA. It saw expert determination as having affinities with contract certification, thus the concept of apparent bias had no place, since architects or engineers are often employed by one of the parties and cannot be challenged on that basis.

Advantages/disadvantages: Similar to statutory adjudication, but decision is final and binding.

Certification
Some affinity with expert determination is that the jurisdiction is purely contractual and there is, generally, no requirement to act judicially, but decisions are generally of temporary effect: #Amec v. S of S for Transport [2005] BLR 227 (CA).[6]

Mediation/conciliation
Wholly consensual process, but possibly with court support. A facilitative/generally non-evaluative process without a third party determination. Resolution of the dispute remains in the parties' hand. If settled, the agreement can be enforced, if necessary by action for breach of contract. See Marriott (1996) 12 Arb Int 1.[7]

Advantages/disadvantages: Private, flexible, party control, multi-party dispute resolution, speed, low cost, open to tactical abuse, uncertainty, loose-loose or win-win?

3. THE SOURCES OF ARBITRATION LAW

There may be a number of different legal systems relevant to arbitral proceedings.

- The law of the substantive agreement (the proper law of the contract).

- The law of the arbitration agreement, which is not necessarily the same as the either the *lex arbitri* or the proper law of the contract, #XL Insurance Ltd v. Owens Corning [2001] 1 All ER (Comm) 529;[8] Consider #JSC Zestafoni v. Ronly Holdings [2004] 2 Lloyd's Rep 335 (Com Ct).[9] Halpern v. Halpern

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6 **Amec**: In exercising their certification functions (including if exercising a review function, eg under ICE, clause 66) contract administrators have to act independently and honestly and fairly, but what is fair is flexible and tempered to the particular facts and occasion. A certifier's decision does not have to be reached by a judicial process (in accordance with the dictates of natural justice, hearing both sides); There was no difference in these respects between an Engineer's certification functions under the ICE conditions and his review functions under clause 66. Also his position was not the same as an adjudicator.

7 The 1995 Freshfields Lecture.

8 **XL Insurance**: Insurance contract provided under "Governing Law" that this policy should be construed in accordance with the law of New York State. Also provided for disputes to be determined in London, England under the provisions of AA1996. Court concluded that by stipulating for arbitration in London, the parties intended the proper law of the arbitration clause to be law of England and Wales (Did the court confuse the *lex arbitri* with the law of the arbitration agreement?).

9 **JSC Zestafoni**: Four parties concluded contract, governed by English law, for electricity and services, provided for arbitration before a panel of three. Subsequent disputes between two of them JSCZ (Georgian) and Ronly (English) agreed to arbitration before a sole arbitrator. After award made JSCZ challenged it, *inter alia*, on grounds that agreement to arbitrate before a single arbitrator void under law of Georgia. Court said estopped from taking the point under

[2006] EWHC 603 (Comm); [2006] 2 Lloyd's Rep 83[10](common law principles apply as arbitration agreements not governed by the Rome Convention, but law must be that of a country. Law of the seat had also to be a municipal system of law). Musawi v. RE International [2007] EWHC 2981 (Ch); [2008] 1 Lloyd's Rep 326.[11]

- The procedural law of the arbitration, the *lex arbitri*, see #Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] 1 WLR 262, Lord Mustill.[12] The choice of the seat is the choice of the forum for remedies seeking to attach the award, C v. D [2007] EWCA Civ 1282; [2008] 2 Lloyd's Rep 239 (injunction issued to stop D seeking to challenge an Award made by a tribunal seated in London, in courts of the USA (NY)).[13] Note also Syska v. Vivendi Universal [2009] EWCA Civ 67 (Under the EU Insolvency Regulations, the effect of insolvency proceedings on a pending lawsuit are determined solely by the law of the Member State in which the law suit is pending. There is nothing in English law that voids an arbitration agreement or reference on insolvency, thus an English Arbitration agreement was not voided under Polish law as a result of the Polish party being subject to a bankruptcy order in Poland.) In England, Wales and Northern Ireland, the *lex arbitri* is principally to be found in the Arbitration Act 1996.

- The law of the place(s) of enforcement of the tribunal's award.

- The law of the place or places of domicile of the parties.

Where the law of the arbitration agreement and of the seat is that of England and Wales, there are a number of sources of law to consider.

- The law of contract governs the arbitration agreement between the parties, its

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s. 73, but even if could be taken, arbitration agreement was impliedly governed by English law as made in course of an agreement which provided for English Law and provided for arbitration in England and made by fax send by JSCZ received in England. Since arbitration agreement was made in England and to be performed in England, and concerned acts lawful in England, not contrary to public policy to enforce it on grounds that it was illegal and/or void under law of a foreign friendly state.

10 **Halpern**: It was for these reasons that Jewish law, could not be the law of the arbitrator or of the agreement.

11 **Musawi**; followed Halperin on how to identify the law of the arbitration agreement.

12 **Balfour Beatty**: May be an express choice of curial law (that is the *lex arbitri*) which is not the law of the place where arbitration to be held, but in absence of clear or express words to this effect, the irresistible inference is that the parties by contracting to arbitrate in a particular place intend the arbitral process to be governed by the law of that place.

13 For an example of the difficulties that can arise in determining the seat where there are inconsistent provisions, eg seat in Glasgow, Arbitration Act 1996 to apply, courts of E&W to have exclusive jurisdiction, see Braes of Doune v. McAlpine [2008] EWHC 426 (TCC); [2008] 1 Lloyd's Rep 608.

validity and implications and also, depending on whether this is viewed as one of status or contract, the relationship between the parties and the arbitrator.

- Statute, now principally the Arbitration Act 1996, concerned mostly with the arbitral law (lex arbitri) where the seat of the arbitration is in England and Wales or Northern Ireland, AA1996, s. 2(1). For provisions that apply, or may apply were the seat is elsewhere, see AA1996, s. 2(2) – 2(5).

  The court's inherent powers over arbitral proceedings. These may be less important, see AA1996, s. 1(c)? But consider circumstances such as those in Oxford Shipping Co Ltd v. Nippon Yuesn Kaisha [1984] 2 Lloyd's Rep 373; Trafalgar House Construction (Regions) Ltd v. Railtrack Plc (1995) 75 Build LR 55; University of Reading v. Miller (1994) 75 Build LR 91[14](CA), but contrast Elektrim v. Vivendi Universal (No 2) [2007] 2 Lloyd's Rep 8 (Comm) (application for injunction under s. 37 SCA 1981 to restrain one of two arbitrations between overlapping parties, refused),[15] also Jarvis v. Blue Circle [2007] BLR 439 (application for injunction to retrain one of two arbitrations refused) in which Jackson J noted that the possibility of parallel proceedings in arbitration and court an inevitable consequence of s. 9 AA1996, and not, of itself, an abuse of process or vexatious). Contrast Albon v. Naza Motor Trading [2007] EWCA Civ 1124; [2008] 1 Lloyd's Rep 1 (CA), injunction to restrain arbitration granted where issue as to whether signature on the contract containing the arbitration agreement a forgery already before the English court.[16]

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[14] **Oxford**: Order for concurrent hearings made in excess of jurisdiction set aside. Trafalgar House, declaration as to the tribunal's power to make orders for joinder under JCT NSC/4 joinder provisions, although would not indicate how he should exercise his jurisdiction. Reading, court had jurisdiction to restrain arbitral proceedings where concurrent legal proceedings, if no injustice to claimant in arbitration, and applicant shows that continuance of arbitration, oppressive, vexatious or abuse of process (prejudice because a race between tribunals, and risk of inconsistent findings (Miller in arbitration against Reading. Reading commences proceedings against Miller and others, stay of action against Miller refused.

[15] **Elektrim**. Court assumed it had jurisdiction, but said that it was only available to enforce a substantive right or to protect against vexation or oppression, and underlying right was subject to the jurisdiction of the English Court. Here there was no right being infringed, also not oppressive or vexatious to allow both to continue. Furthermore, the scheme of the Arbitration Act 1996, limited the scope for interference of this type.

[16] **Albon**: For court to have discretion, defendant must be amendable to English territorial and personal jurisdiction, and it must be just and convent to grant the injunction, s. 37 SCA. Discretion exercisable where threatened conduct unconscionable, that is oppressive or vexatious or interferes with the due process of the court, and where the jurisdiction is necessary to protect the applicant's legitimate interest in proceeding in England, the natural forum for the litigation. This was the case here as Albion had a good arguable case that justified in issuing and continuing proceedings in England, the English court will be the final judge of the authenticity question, there is a good arguable case of forgery after proceedings initiated in England, arbitration a needless expense with proliferation of pleadings and disclosure, thus unconscionable, in the sense of

- The implications of AA1996, s. 1(c) have been considered in a number of cases concerned with the court's power to determine jurisdictional questions outside of the framework of the 1996 Act. See ABB Lummus Global Ltd v. Keppel Fils Ltd [1999] 2 Lloyd's Rep. 24[17] (s. 1(c) precludes this). . Vale de Rio Doce Navegaçao SA v. Shanghai Bao [2000] 2 Lloyd's Rep. 1[18] (s. 1(c) did not preclude this).

- The court's jurisdiction to grant injunctions: Hiscox Underwriting. V. Dickson [2004] 2 Lloyd's Rep 438 (Comm) where both parties accepted that the courts had, under s. 37 of the Supreme Court Act 1981,[19] a residual jurisdiction to intervene outside the framework of the Arbitration Act 1996). For an example of this see Glidepath Holdings v. Thompson [2005] 1 All ER (Comm) 434 (Comm)[20] (freezing, disclosure and disk imaging orders against intended

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oppressive to allow arbitration to continue.

17 **ABB**: Despite having participated in the arbitration, the respondent sought a declaration that the tribunal had no jurisdiction. The court said that the intention of the 1996 Act was to restrict the role of the court at an early stage of the arbitration and held that, because of s. 1(c), it had no jurisdiction to determine the tribunal's jurisdiction on the application of a participant in the arbitration unless the pre-conditions for a s. 32 application were met.

18 **Vale**: The court held that the restriction on court intervention in s. 1(c) was not, like article 5 of the Model Law, an absolute prohibition. It only expressed a general intention that the courts should not usually intervene except in the circumstances specified in Part I of the 1996 Act; ABB Lummus Global Ltd v. Keppel Fils Ltd was considered but not followed. But, in this case, which concerned an application by a claimant who had initiated arbitration to determine a jurisdictional objection raised by a non-participating respondent, the court refused to intervene under this inherent power since it considered that such circumstances must have been anticipated by Parliament. The proper course was for the claimant to procure the appointment of the tribunal and have the jurisdictional objection dealt with by it under s. 31. The court rejected the argument that, as a matter of general convenience, it should deal with the jurisdictional objection immediately rather than wait for it to come back to the court on a s. 67 challenge. It observed that one of the underlying principles of the 1996 Act was that the parties should resolve their dispute by the method they had chosen: arbitration. See *JT Mackley & Co. Ltd* v. *Gossport Marina Ltd* [2002] BLR 367, where the court did determine the jurisdictional point under its inherent jurisdiction.

19 Supreme Court Act 1981, s. 37(1), gives the High Court power to grant interlocutory and final injunctions, or appoint receivers "in all cases in which it appears to the court to be just and convenient to do so".

20 **Glidepath**: Orders had been obtained in support of legal proceedings, part of which subsequently stayed to arbitration by agreement. On application to discharge for no jurisdiction: Held: court had an inherent jurisdiction to grant interim relief where a need to do so, for example for protection a party against the anticipated dissipation of assets even though there was an arbitration clause which might later lead to a stay. This jurisdiction not as limited as the AA1996 jurisdiction, which was limited to the preservation of assets, but extended to the granting of any injunction where it appeared to be just and convenient to do so. Appropriate in this case because

parties to arbitration in support of pending arbitral proceedings, Norwich Pharmacal orders against non parties). But note #Cetelem SA v. Roust Holdings Ltd [2005] EWCA Civ 618 (CA) where it was said that the relationship between AA1996, s. 44 and s. 37 SCA 1981 was yet to be worked out.

4. THE NATURE OF ARBITRATION

4.1 What is arbitration?

The Arbitration Act 1996 does not define arbitration. Arenson v. Arenson [1977] AC 405 (HL), Lord Wheatley. There must be a formulated dispute or difference between the parties; submission of that dispute or difference by agreement to a third party for resolution in a judicial manner; opportunity for parties to present evidence or submissions in support of their claims in the dispute. Consider also Cape v. Rosser & Russell (1995) 46 Con LR 75;[21] David Wilson Homes v. Survey Services Ltd [2001] BLR 267 (CA).[22]

4.2 What matters can be arbitrated?

In general any matters that give rise to a dispute or difference between persons can be arbitrated other than those, such as matters of criminal law, which public policy dictates cannot be determined by arbitration.

4.3 Privity

Arbitral proceedings bind only the parties to the arbitration agreement, and those claiming under or through them, AA1996, s. 82(2). See Oxford Shipping Co Ltd v. Nippon Yuesn Kaisha [1984] 2 Lloyd's Rep 373; Baytur SA v. Fingaro [1992] QB 610;[23] Grinsberger, (1992) 8 Arb Intl 121.[24]

This creates joinder problems**.** See #Higgs & Hill v. Campbell (Denis) Ltd (1982) 28

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evidence of fraud and an apprehension of dissipation

21 **Cape**: Use of the word adjudication not decisive. Here agreement had essential features of arbitration. In Crouch P.670, role of arbitrator to find facts apply the law, grant relief, litigation in the private sector. Discussion of different meanings of adjudication, a dispute resolved in a judicial manner, but may be an initial summary determination. Unlikely that parties intended disputes to be submitted to a procedure without possibility of review or reversal. Hence an arbitration agreement.

22 **David Wilson**: Disputes under insurance policy to be referred to QC appointed by chairman of bar if not agreed. Court concluded that parties expected a judicial enquiry, where their cases would be heard, and a decision reached on the evidence. Also wanted more than a non-binding opinion. Thus an arbitration clause. (why not expert determination?)

23 Oxford no power to order concurrent hearings in different arbitrations under different agreements (owners/charterers, charterers/sub-charterers, same issues. Baytur, Equitable assignment not sufficient to make assignee a party to arbitral proceedings, had to notify the other side and submit to the tribunal's jurisdiction. Had not done so, assignor had ceased to exist (company dissolved), so arbitration had lapsed as one of the parties had ceased to exist.

24 "Assignment of Rights and Agreement to Arbitrate".

Build LR 47 (see commentary, which discusses the problem); Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp (1982) 21 Build LR 117.[25] Note also AA1996, s. 35 and CIMAR, Rule 3.

Certain statutes enable third parties to enforce benefits under a contract, but this right may be subject to arbitration, if provided for in the contract.

- Third Parties (Rights against Insurers) Act 1930; consider The Padre Island [1984] 2 Lloyd's Rep 408.[26]

- Contract (Rights of Third Parties) Act 1999;[27] consider Nisshin Shipping v. Cleaves & Co [2004] 1 Lloyd's Rep 38;[28] See: *Contracts (Rights of Third Parties) Bill – What impact on arbitration clauses?* P. Wright, (1999) 2(4) Int ALR 137.

4.4 **Confidentiality**

Arbitral proceedings (subject to English law, where these are implied terms of the arbitration agreement) are a private process, hearings being conducted in private, and confidential in the sense that parties are under an obligation of confidence to sue documents disclosed or generated in an arbitration only for the purpose of the arbitration even if they did not contain anything which was itself confidential, see #Dolling-Baker v. Merrett [1990] 1 WLR 1205 (CA);[29] Insurance Company v. Lloyd's

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25 **Abu Dhabi**: Problems where same arbitrator appointed in related proceedings between overlapping parties, but with no power to order concurrent hearings or consolidation. Party might be prejudiced by not being able to comment on matters raised before tribunal, and thus influenced opinion, in proceedings to which not a party.

26 **Padre Island**: The Act effects a statutory assignment to the third party where the assured has become bankrupt or has been wound up. But the party with the benefit of this assignment must pursue it in accordance with the arbitration agreement in the contract of insurance even if the agreement refers only to the parties to that contract.

27 This provides that a third party can enforce a term of a contract if it expressly states that the third party can, or if the contact confers a benefit on that third party unless the contract shows that the parties did not intend the term to be enforceable by the third party. The third party's rights are subject to the defences available to the contract parties, but the parties cannot vary or rescind the contact without the third party's agreement so as to affect its benefit. At present, most contacts in the construction industry seek to exclude the operation of this Act.

28 **Nisshin**: See s. 8 of the Act which deems the third party to be a party to the arbitration agreement. Since the scope of the arbitration agreement was wide enough to embrace a dispute between owners and charters about payment of the broker's commission, the broker was entitled and indeed obliged to refer disputes about its entitlement to that commission to arbitration. Since the 1999 Act provided a third party with a remedy not otherwise available to it, the obligation, in s. 8, to pursue that right by arbitration did not infringe art 6(1) of the ECHR.

29 **Dolling**: An implied obligation on parties not to disclose or use for any other purpose documents prepared for or used in the arbitration, or disclosed or produced in the proceedings, or transcripts or notes of evidence or the award, other than with consent of other party, or

Syndicate [1995] 1 Lloyd's Rep 272;[30] Emmott v. Michael Wilson [2008] EWHC Civ 184; [2008] 1 Lloyd's Rep 616 (CA). But note the contrary view in other jurisdictions, for example Australia, ESSO etc. v. The Minister for Energy and Minerals [1997] ADRLJ 109.[31]

Confidentially, can lead to problems where the same tribunal is appointed in different arbitrations involving different parties concerned in the same project, as in Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp (1982) 21 Build LR 117[32] or where a party wishes to rely on an arbitral award in other proceedings, for instance to found an issue estoppel; consider Ali Shipping Corporation v Shipyard Trogir [1999] 1 WLR 314.[33]

For how these problems are resolved see #Emmott v. Michael Wilson [2008] EWHC Civ 184; [2008] 1 Lloyd's Rep 616 (CA). If issues relating to privacy and confidentiality come up during a pending arbitration they are for the tribunal, unless the right to a stay is waived. The court did not have a general unlimited discretion to consider exceptions to confidentiality. The exceptions were compulsion by law, public interest, including the interests of justice, protection of a party's legal rights and

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permission of court. But the mere fact that the a document was used in arbitration does not impose confidentiality. See also Hassneh v. Mew [1993] 1 Lloyd's Rep 243, the award and reasons could be disclosed where reasonably necessary to found claim or defence against third party. But not otherwise, see Insurance Company v. Lloyd's Syndicate [1995] 1 Lloyd's Rep 272.

30 **Dolling**: An implied obligation on parties not to disclose or use for any other purpose documents prepared for or used in the arbitration in or disclosed or produced in the proceedings, or transcripts or notice of evidence or the award, other than with consent of other party, or permission of court. But mere fact that document used in arbitration does not impose confidentiality, see also Hassneh v. Mew [1993] 1 Lloyd's Rep 243, award and reasons could be disclosed where reasonably necessary to found claim or defence against third party, but not otherwise, Insurance Co.

31 **Esso:** Confidentiality not an essential attribute of a private arbitration, so apart from the normal court implied undertaking not to use discovered documents for any other purpose, no obligation not to disclose documents or information engendered in an arbitration.

32 **Abu Dhabi**: Problems where same arbitrator appointed in related proceedings between overlapping parties, but with no power to order concurrent hearings or consolidation. Party might be prejudiced by not being able to comment on matters raised before tribunal, and thus influenced opinion, in proceedings to which not a party.

33 **Ali Shipping** Injunction to restrain party from using certain material, including awards, from previous arbitration in subsequent arbitration made final subject to an reservation or proviso to preclude the necessity for the defendant to return to the court for exemption from its terms in respect of the transcripts of evidence, should the respondent in the earlier arbitration make an application to dismiss the defendant's claim for want of prosecution or should any witness for the respondent supply statements or give evidence inconsistent in some relevant respect with the evidence which he gave in the first arbitration (this being an extension of the "where necessary to found a claim or right" exception). The CA did not see merit in the issue estoppel argument, that formed the basis of the argument for disclosing the awards.

consent. Running inconsistent cases in arbitration and in subsequent litigating, here alleging fraud in the latter, having abandoned it in the former, entitled an order for disclosure of material from the arbitration, this being in the interests of justice.

This principle of confidentiality may also affect any court proceedings relating to the arbitration. It is for the court to decide, under CPR Parts 39 and 62.10 whether the hearing of such proceedings should be in private (in secret, not just in chambers) and whether any resulting judgment should also be private; City of Moscow v. Bankers Trust Co [2004] 2 Lloyd's Rep 179 (CA).[34] There is no presumption in favour of privacy, C v. D [2007] EWCA Civ 1282; [2008] 2 Lloyd's Rep 239, there has to be a special reason for it.

4.5 The doctrine of seperability

An arbitration agreement is regarded as conceptually distinct from any substantive contract in which it is embodied and thus is not necessarily affected by the invalidity or premature termination of the substantive contract. This is known as the doctrine of seperability and is now embodied in AA1996, s. 7. Consider Vee Networks v. Econet International [2005] 1 Lloyd's Rep 192 (Com Ct).[35]

In #Fiona Trust & Holding Corp v. Yuri Primalov [2007] UKHL 40, the HL, applying these principles, held that an arbitral tribunal's authority is not impeached by an allegation that contract in which the arbitration agreement is found, was procured by bribery. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contact. It was noted that different considerations might apply where it was contended that the contract embodying the arbitration agreement, or the signatures to it, were forgeries. Note in El Nasharty v. J Sainsbury [2007] EWHC 360 (Comm); [2008] 1 Lloyd's Rep 360, the suggestion that an arbitration agreement had been procured by duress was rejected on the grounds that while the claimant might have been under duress in purchasing shares, that duress did not prevent him exercising free will in relation to the dispute resolution machinery.

4.6 Party autonomy

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[34] Moscow: Court not bound by the parties' agreement to confidentiality. Depends on whether the proceedings involve any significant confidential information. More likely that hearing will need to be private than any judgment, since latter can be framed not to reveal such material. In this case, however, the CA upheld the judge's decision that his judgment should be private and only a Lawtel summary made available.

[35] **Vee**: Allegation that contract for support services concerning mobile phone network in Nigeria was ultra *vires* Econet's memorandum of agreement, dealt with as a preliminary issue in arbitration. Held: Effect of s. 7 (with embodied the common law doctrine of seperability, was that Tribunal had jurisdiction conclusively to determine issues on the voidness or voidablity of the contract, and decision on that question not open to challenge under s. 67. If the question of whether the arbitration agreement was also void or non-existent had been before the arbitrator, then Tribunal could not determine that conclusively, any award on that question being susceptible to challenge under s. 67. Here, only the validity of the contract had been challenged, not the arbitration agreement.

The concept of party autonomy, controlled only by public policy, is enshrined in the Arbitration Act 1996, see ss. 1(b), 4(2), 36(representation).

4.7 **The role of the tribunal**

Although arbitration, like litigation remains an essentially adversarial process in that the dispute must be decided on contentions advanced and evidence adduced by the parties, the role of the tribunal is somewhat different from a judge.

- Can the tribunal use its own specialist expertise (knowledge?), consider #Fox v. PG Welfair [1981] 2 Lloyd's Rep 514;[36] AA1996, s. 33.

- Can the tribunal make its own enquiries, A1996, ss. 34(2)(g), 37; ICC Rules art, 14.1? Consider Re Enoch and Zaretzky, Bock & Co etc [1910] 1 KB 327**;** Town & City Properties (Development) Ltd v. Wiltshire Southern Ltd [1988] 44 Build LR 109;[37] See AA1996, s. 43. Contrast #Norbrook Laboratories v. Tank [2006] EWHC 1055 (Comm); [2006] 2 Lloyd's Rep 485 (The court appeared to accept that the tribunal could act like an enquiring magistrate but said it was a serous irregularity to do so without parties having the opportunity to be present or, possibly, keeping a full note of what the witness said and disclosing it to the parties for comment.

- Can the tribunal adopt techniques derived from other methods of dispute resolution, for example med-arb? Consider Glencot Development v. Ben Barrett [2001] BLR 207.[38]

- While the tribunal must, generally, decide the parties' dispute in accordance with the substantive law, it can, if the parties agree, have regard to other considerations, AA1996, s. 46. Such agreements are known as equity clauses. See Deutsche Schachtbau-und Tiefbohr GmbH v. Ras Al Khaimah National Oil Co [1990] 1 AC 295[39](CA), reversed by HL on other grounds; Kerr,

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[36] **Fox:** Suggests a difference between knowledge of special facts relevant to case and general expert knowledge. Should not rely on the former without disclosing it to the parties so they can deal with it.

[37] **Enoch**: Neither a judge nor arbitrator can call witness, there to determine case on basis of witnesses called by parties. If arbitrator has witness, how can parties object to questions he asks, how can they ask him to reject that witness's evidence, puts parties in a difficult situation. Wilthsire, arbitrator sought to dispense with adversarial system, dispense with hearing, meet directly with parties' quantity surveyors to determine interim certificate. Became obsessed with need to avoid delay and costs, but in fact took longer. Can't dispense with arbitration in proper manner without agreement of both parties, natural justice?

[38] **Glencot:** Adjudicator attempted to mediate, including in caucus. Failed, made decision. Held because of adjudicator's participating settlement discussions, Barrett had real prospects of success in establishing that the adjudicator was no longer impartial and that there was a real possibility of him being biased. Has listened to arguments and things which may be completely irrelevant to the dispute but prejudicial to its determination. Not also caucusing confidential.

[39] **RAKOIL**: Questions to ask in considering such clauses, did parties

American Review of International Arbitration (1991) vol 2, p 377.[40] See, *Amiable composition, a learning curve*, Hong-lin-Yu (2000) 17(1) J Int Arb 79.

4.8 **Approach of the court to arbitration**

The court had, historically, a somewhat ambivalent attitude to arbitration and there is a long history of excessive intervention which continued up until the repeal of the Arbitration Act 1950, see AA1950, ss. 1(revocation), 21(case stated, repealed in 1979), 22(remission), 23(removal and setting aside). Contrast UNCITRAL, arts. 5, 6.

The court's powers of intervention have been curtailed under the Arbitration Act 1996, ss. 24(removal), ss. 32, 45(questions of jurisdiction and law), ss. 67, 68, 69 (challenges and appeals from awards). But compare s. 1(c) with UNCITRAL, art. 5.

4.9 **The requirement to act judicially**

Concerns about natural justice and procedural regularity were expressed, in cases decided under the old law, through the requirement that the tribunal act judicially. It had to adopt a generally adversarial process and apply similar principles to a court in exercising its powers. It is unclear if this principle is relevant under the 1996 Act. Compare Wicketts v. Brine Builders (2001) CILL 1805[41] and Fence Gate v. NEL (2002) CILL 1817.[42]

5. OVERVIEW OF THE ARBITRATION ACT 1996

5.1 **History**

Arbitration has been the subject of statutory intervention since the 17th Century. Over the past 100 years, there have been a number of Statutes devoted to the topic, the Arbitration Acts of 1898 and 1934, repealed and replaced by the 1950 Act which, in turn, was amended and augmented by the 1975 and 1979 Arbitration Acts. The relevant statues are now the 1950 Act, Part II, other than s. 42(3), and the 1996 Act. See Mustill & Boyd (1989), Chapter 29.

The background to the enactment of the Arbitration Act 1996 can be found in documents such as the 1989 "Mustill" Report for the DTI; Marriott, paper 28 in "Legal Obligations in Construction"; and The Departmental Advisory Committee ("DAC") Reports (February and September 1996).

5.2 **Format of the 1996 Act**

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intend to create legally enforceable rights, is the agreement sufficiently certain to be a legally enforceable contract, would it be contrary to public policy to enforce award. An agreement to accept terms imposed by a third party enforceable, not an agreement to agree.

40 "Equity Arbitration in England". Such provisions tend to be narrowly construed, as permitting departure from technical rules of law. Wide departure from law makes award un-appealable.

41 **Wicketts**: An arbitrator had to apply the same principles as a court when ordering security for costs. Note weight is a matter for the tribunal.

42 **Fence Gate**: The requirement to act judicially is no longer relevant to the tribunal's discretion to allocate costs. The relevant principles are to be found in the AA1996 and any agreed rules.

The 1950, 1975 and 1979 Acts, and aspects of the common law, are consolidated, extended and amended by the 1996 Act. The 1996 Act goes far beyond the original suggestion (Mustill Report, paragraph 108, for something relatively uncontroversial. The 1996 Act follows UNCITRAL in structure and, to some extent, in spirit, but falls short of those who desired the adoption of UNCITRAL.

A more "user friendly" language and description of powers and procedures is followed. Compare AA1950, ss. 1 and 12 with AA1996, s. 1 and 34.

The 1996 Act is divided into Parts, as follows.

Part I — General law of private Arbitration (both "domestic" and "international" (ss. 1-84).

Part II — Dis-application in certain cases (ss. 89-98, ss. 85-87 not in force.)

Part III — Recognition and enforcement of New York Convention awards (s. 99-104), see the 1950 Act for Geneva Convention awards.

Part IV — Amendments (Schedule 3) and repeals (Schedule 4).

The 1996 Act applies to England and Wales and to Northern Ireland (which was not subject to the 1950 Act). It does not apply in Scotland.

Part I of the 1996 Act applies where the seat of the Arbitration is in England and Wales, or Northern Ireland A few provisions, see AA1996, s. 2 apply wherever the seat. For transition procedures see AA1996, s. 84.

Part I of the 1996 Act includes mandatory and non-mandatory provisions (the latter generally apply in the absence of contrary agreement between the parties; a few apply if agreed). See AA1996, s. 4(1), 4(2) and Schedule 1.

5.3 **Overview of Part I of the 1996 Act**

Application of the Act
AA1996, s. 2. When does Act apply.
AA1996, s. 3. Identifying the seat of the arbitration.
AA1996, s. 4. Mandatory and no mandatory provisions.
AA1996, s. 5. Application only to agreements in writing.
AA1996, ss. 6,7,8. Nature and meaning of an arbitration agreement

General principles
AA1996, s. 1. Overriding objectives
AA1996, s. 33. Tribunal's duty. Procedural fairness and cost effective justice. Compare with UNCITRAL, art. 18 (full opportunity to present case).
AA1996, s. 40, parties' duty. Compare AA1950, s. 12(1).

Beginning arbitral proceedings
AA1996, s. 12(extending time), 13(limitation Acts), 14(beginning proceedings). See

also s. 9 (stay of legal proceedings).

Establishing the tribunal, remuneration and liability
AA1996, s. 15 – 23, 28, 29, 56, 74.

Jurisdiction and competence
AA1996, s. 7(seperability), s. 30("Kompetenz-Kompetenz"), s. 31, 32(jurisdictional objections, see also ss. 67, 72(1) and 73).

Procedural powers of the tribunal
AA1996, s. 34-39, 40,41 (generally apply in the absence of agreement to the contrary, but note ss. 35, 39).

Tribunal's powers and duties as regards the substantive dispute
AA1996, ss. 46, 47 (see also s. 39), 48, 49, 51, 52, 53, 54, 55, 57, 58.

Tribunal's powers as regards costs
AA1996, ss. 59-65.

Supportive powers of the court
AA1996, ss. 9 (stay of proceedings, but see ss. 89, 90), 12, 42-45, 50, 66. See also CPR Part 62 and the related Practice Direction – Arbitrations (White Book, Vol II).

Supervisory powers of the court
AA1996, s. 24, 66-71 (note also ss. 72, 73). Note AA1996, s. 1(c). See also CPR Part 62 and the related Practice Direction – Arbitrations (White Book, Vol II).