KINGS COLLEGE LONDON
CENTRE OF CONSTRUCTION LAW AND MANAGEMENT
PART D

AGREEING TO ARBITRATE AND COMMENCING ARBITRAL PROCEEDINGS

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1. THE ARBITRATION AGREEMENT AND ITS TERMS

The foundation of any arbitration is agreement between the parties. The arbitration agreement under which both promise that the specified matters will be resolved by a third person acting as arbitrator, and that they will honour valid decisions (awards) made by that person. See: Arbitration agreements. W Turner, (2000) 66(3) Arbitration 230.

The agreement, sometimes known as a submission, may be *ad hoc*, or relate to future disputes. In the latter case, a specific arbitration conducted under such an agreement is sometimes called to as reference (now arbitral proceedings). The 1996 Act is a bit inconsistent, see ss. 12, 30(1)(c). The arbitrator is often described as the tribunal; particularly where there is a panel of arbitrators.

An arbitration agreement may incorporate procedural (institutional) rules selected by the parties as appropriate to the types of dispute they may encounter. Examples include the Construction Industry Model Arbitration Rules (CIMAR), the Grain and Feed Association (GAFTA) Rules and the London Court of International Arbitration (LCIA) Rules. There is a presumption that the edition incorporated is that published at the date arbitral proceedings are commenced, not that current when the arbitration agreement is concluded, Bunge SA v. Kruse [1990] 2 Lloyd's Rep 142 (CA).

If the reference is managed by an arbitral institution, such as the ABTA scheme, or ICC arbitration, it is known as an administered arbitration.

1.1 Contractual requirements

An arbitration agreement is, in principle, no different from any other contract in that the usual contractual requirements must be satisfied.

- Capacity of parties.

- Agreement, consideration, intent and certainty,

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- Not vitiated at common law or by statute.

- Public policy may prevent matters being arbitrated, for example criminal matters. See also New York Convention, Article V2(a), AA1996, s. 103(3). Different considerations apply in different countries, see for example, Hunter & Redfern (4th edition), p. 138-145.

Difficulties concern matters such as the following.

- Judicial attitudes, ambivalence, to arbitration, now largely resolved by AA1996, ss. 1 and 9, but see #Aughton v. Kent (1991) 57 Build LR 1 (CA).[1]

- Incorporation by reference, Aughton v. Kent (1991) 57 Build LR 1 (CA); Giffen v. Drake and Scull (1993) 37 Const LR 84 (CA). See now AA1996, ss. 6(2), 7; Roche Products Ltd v. Freeman Process Systems Ltd (1996) 80 Build LR 102.[2] Note Astel-Reinger Joint Venture v. Argos Engineering etc [1995] ADRLJ 41 (Sir John Megaw's reasoning not followed in Hong Kong); #Sea Trade v. Hellenic Mutual [2007] 1 Lloyd's Rep 280 (Com Ct) (general words of incorporation to clause immediately applicable held to be sufficient). Consider also AA1996, ss. 6(2), 7.

- A one-sided choice of arbitration clause is valid; NB Three Shipping v. Harebell Shipping [2005] 1 Lloyd's Rep 507 (Com Ct).[3]

- Relationship with UCTA 1977 (arbitration agreements are excluded), the Unfair Terms in Consumer Contracts Regulations 1994/1999 (arbitration agreements are potentially unfair), see also AA1996, s. 89, 90, 91; consider Zealander v. Laing Homes Ltd (1999) CILL 1510; [2000] 2 TCLR 724[4]. #Mylcrist Builders v. Buck [2008] EWHC 2172 (TCC); [2008] BLR 611 (arbitration clause in builder's standard terms invalid, as not properly drawn to her attention, and impact unclear to a consumer. It created a significant imbalance as excluded or hindered her right to take legal action. Arbitrator's fees, about £2,000, being

[1] **Aughton**: Sir John Megaw considered express words of incorporation needed, because excluded right to have matter dealt with by court, important that a deliberate and conscious act, doctrine of seperability. Gibson J, more *lessez* fair, no special rules of construction, did the parties clearly intend to incorporate, more modification needed, clearer words required.

[2] **Giffen**: The CA appears to support Gibson J, Roche, also preferred Gibson J. Where clause immediately applicable then general words of incorporation, ok (as here). If needs modification, then more specific reference needed.

[3] **Three Shipping**: Courts of England to have jurisdiction to settle disputes, but owner shall have option of bringing dispute to arbitration (This was also the case under the old law).

[4] **Zealander**: NHBC arbitration clause not binding under the Unfair Terms in Consumer Contracts Regulations 1994. Consumer had no opportunity but to consider and negotiate the clause, excluded its right to take legal action.

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significant in respect of a small dispute (with VAT, just over the £5,000 threshold) also relevant.

- There is some debate about whether arbitration infringes the Human Rights Act 1998, see Article 6(1) of the Convention. This is doubtful since arbitration is a consensual process and parties can waive certain Article 6(1) rights. See, The Human Rights Act and Construction Disputes. HHJ Thornton, [1999] Society of Construction Law Paper. Now see Weelex v. Rosa Marine [2002] 1 All ER (Comm) 939;[5] Stretford v. Football Association [2007] 2 Lloyd's Rep 31 (CA)[6] (An arbitration agreement entered into voluntarily and freely amounted to a waiver of those Article 6 rights, public hearing, independent tribunal established by law, and public judgement, that were not provided for in the AA1996).

- Arbitration agreements are sometimes coupled with clauses giving exclusive jurisdiction to a court. This is often resolved by finding that the exclusive jurisdiction clause is concerned with the court's supervisory or supportive powers, thus there is no conflict with the agreement to arbitrate. See, for example, McConnell Dowell v. National Grid Gas [2007] BLR 92 (TCC).

- Note also, the doctrine of seperability (discussed previously), s. 7 AA1996.

1.2 Scott v Avery clauses

A Scott v. Avery[7] clause makes the obtaining of an arbitration award a condition precedent to the commencement of legal proceedings. It may be in the form of a provision that no action shall be brought until an arbitration has been conducted and an award made or in the form of a stipulation that a party's only obligation is to pay such sum as an arbitrator determines.

1.3 Statutory formalities

If an arbitration agreement, and any reference under it, is to be governed by Part I of the Arbitration Act 1996 it must satisfy the following requirements.

- It must be in writing and concern disputes or differences, see AA1996, ss. 5, 6. (the definition of writing is extremely wide). Has this definition reversed the decision in Aughton v. Kent (1991) 57 Build LR 1 (CA)[8] (words of incorporation must be in writing)?

- The seat of the arbitration must be in England and Wales or Northern Ireland, AA1996, ss. 2(1), 3. The seat of the arbitration is the juridical seat of the arbitration, see AA1996, s. 3, #Channel Tunnel Group Ltd v. Balfour Beatty

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5 **Weelex**: Article 6 of the ECHR irrelevant to the question of whether an arbitration agreement entered into because parties can waive their Article 6 rights.

6 **Stretford**: The CA reviewed the relevant ECHR jurisprudence in reaching its decision.

7 **Scott v. Avery** [1856] 5 HL Cas 811.

8 **Aughton**: Gibson J held that there was no written direction to the place where the clause could be found (referred to the wrong document, GC Works/1, not the Press/Kent conditions) so not a written arbitration agreement.

Construction Ltd [1993] 1 WLR 262, Lord Mustill;[9] #Dubai Islamic Bank v. Paymentech [2000] I Lloyd's Rep 65.[10]

If these formalities are not satisfied, there may be a common law arbitration, see AA 1996, 81 (can such a reference be revoked?). If the seat is outside England and Wales or Northern Ireland, it may be governed by some other applicable law, e.g. UNCITRAL, but court can provide some support, see AA1996, ss. 2(2) – 2(5).

1.4 Discharging an arbitration agreement/reference

An arbitration agreement/reference can be terminated by agreement (whether or not in writing), see AA1996, s. 23(4), but discharge of the substantive contract does not generally discharge an arbitration agreement, Heyman v. Darwins Ltd [1942] AC 356.

It is a matter of construction whether parties who agree to terminate a substantive agreement also intend to terminate any arbitration agreement contained in it; Chimimport Plc v. G D'Alesio SAS [1994] 2 Lloyd's Rep 366.[11]

Discharge of an arbitration agreement or a particular reference by frustration or repudiatory breach is rare; Bremer Vulkan etc v. South India Shipping Corp [1981] AC 909.[12] Consider John Downing v. Al Tameer [2002] BLR 323 (CA).[13] But note #Entico

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9 **Balfour Beatty**: May be an express choice of curial law 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.

10 **Dubai**: Seat of the arbitration is determined having regard to the parties' agreement and all the relevant circumstances which include any connection with one or more countries that can be identified in relation to the parties, the dispute, the proposed arbitral procedures including the place of interlocutory and final hearings, the issue of awards. This is to be determined at the date at which the relevant arbitration began. Circumstances after that date are not relevant. In this case the relevant date was when Dubai invoked the arbitration appeal process and Paymentech submitted to it. This was in California, the place where the preparatory administrative work for the appeals and the constitution of the tribunal was carried out. This was despite the appeal board sitting in London.

11 **Hayman**: Where an arbitration clause is included as a term of a substantive contract, the principle of separability means that the arbitration agreement will not be discharged by the discharge of the substantive agreement through, for example frustration or repudiatory breach, AA1996, s. 7(1). See also Chimimport: Where the parties terminate the substantive contract by agreement, it will be a matter of construction whether they also intended to terminate their arbitration agreement as well.

12 **Bremer**: Mere inactivity in the conduct of arbitral proceedings by a party to those proceedings is not capable of amounting to a repudiation of the agreement underlying those proceedings unless that party's inactivity amounts a breach of a term of the arbitration agreement of sufficient seriousness to justify the other party in treating the contract as discharged and both parties are not equally at fault.

Neither does inactivity frustrate an arbitration agreement. This is

v. UNESCO [2008] EWHC 532 (Comm); [2008] 1 Lloyd's Rep 673, para 11 where Downing was doubted in the light of Fiona Trust's affirmation of the doctrine of seperability. A court should be slow to characterise denial of the existence of a contract as necessarily repudiatory of an arbitration agreement which, if the contact was agreed, was included in it.

The termination of arbitral proceedings does not, in itself, discharge the arbitration agreement, Furness Withy (Australia) Pty Ltd v. Metal Distributors (UK) Ltd [1990] 1 Lloyd's Rep 236 (CA).[14]

2. COMMENCING ARBITRAL PROCEEDINGS

Arbitral proceedings are generally commenced when one party to an arbitration agreement serves a Notice to Concur (a Notice of Arbitration) identifying the dispute or difference and requiring it to be referred to arbitration. The Notice should be prepared and served in the manner required by the arbitration agreement or, if not stated, in the manner provided for in AA1996, s. 14. In the case of an *ad hoc* agreement to arbitrate a pre-existing dispute, the referral may be encompassed by the agreement to arbitrate.

2.1 What can be referred?

There are a number of preconditions to commencing an arbitration.

- There must be a prior dispute or difference, consider Ellerine Bros (Pty) Ltd v. Klinger [1982] 1 WLR 1275 (CA);[15] note #Collins v. Baltic Quay [2005] BLR

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because both parties are obliged to take steps to progress arbitral proceedings by applying to the tribunal for directions necessary to prevent delay and a contract cannot be frustrated by the default of a party to that contract, Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal [1983] AC 854.

13 **John Downing**: The Defendant refused to recognise the existence of contract said to incorporate an arbitration agreement. The Claimant commenced proceedings in court. The Defendant's conduct a repudiatory breach of the arbitration agreement. This was accepted by conduct when legal proceedings were commenced by the Claimant.

14 **Furness**: An agreement to refer future disputes to arbitration can be analysed as comprising an offer by each party to agree to refer a particular category of dispute to arbitration should such a dispute arise between them and when called on by the other party to do so. Such offers are irrevocable because they are supported by the consideration that each party gave when it entered into the arbitration agreement. A particular reference is thus governed by a separate agreement from the arbitration agreement. The latter can be terminated without affecting the former.

15 **Ellerine**; A dispute, as well as a difference, can arise, not only when an assertion made by one party is rejected by the other, but also where an assertion is met by silence or prevarication. But note: A situation in which the parties neither agree nor disagree about the true position is not one in which there is a dispute, M&B p. 128, approved in Alfred McAlpine v. RMG Electrical, 11th January 1995, unreported.

There can be no difference or dispute where a party is not told and is unaware of the respects in which a claim is made against it and is not

63 (CA),[16] where an attempt was made to bring arbitration and adjudication law into line on this point. Some arbitration agreements refer to "claims" being referred. It is unclear how such agreements can be brought within the ambit of the 1996 Act, other than by saying that the concept of a claim embodied the concept of something disputed.

- The dispute or difference must come within the scope of the arbitration agreement. Consider words used in the submission "Disputes arising under ..."; "Disputes in connection with ..."; "the contract"; "the agreement", Heyman v. Darwins Ltd [1942] AC 356; Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63 (CA).[17]

- But now see #Fiona Trust & Holding Corp v. Yuri Primalov [2007] UKHL 40, where it has been held, at any rate in an international commercial contract, the words "arising under a contract" should no longer be given a narrower meaning than the words "arising out of a contract".

  Do such words encompass include disputes about void, voidable or determined contracts, see Ashville Investments v. Elmer Contractors [1988] 2 Lloyd's Rep. 73;[18] #Harbour Assurance v. Kansa [1993] 1 Lloyd's Rep 455 (CA);[19] AA1996, s. 7.

  Is a dispute about enforcing an adjudicator's decision encompassed by an arbitration clause? Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93[20] is probably wrong to say they are not. Consider also Collins

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in a position to admit or deny that claim (Cruden Construction Ltd v. Commissioner for New Towns (1994) 75 Build LR 134). Neither can there be a dispute or difference where a claim is made and admitted, Ellerine Bros (Pty) Ltd v. Klinger [1982] 1 WLR 1275 (CA).

16 **Collins**: Making of a claim does not amount to a dispute. There is a dispute when it can reasonably be inferred that the claim is not admitted. Negotiation and discussion are more consistent with the existence of a dispute than the absence of one, and the court was likely to readily infer that a claim was not admitted and that a dispute existed so that it could be referred to arbitration.

17 **Hayman**: Words referring to disputes or differences "under" or "arising under" a contract are generally interpreted as narrower in meaning than those referring to disputes or differences "in respect of", "in relation to" or "in connection with" or "arising out of" a contract
AA Mutual Words such as "in respect of", "in relation to" or "in connection with" or "arising out of" a contract are generally regarded as synonymous, and as having wide meaning.

18 **Ashville**: "In connection with", wide enough to cover allegations of mistake, rectification, and claims in misrepresentation and negligent misstatement.

19 **Kansa**; By substituting "agreement" for "contract" words such as in respect of, in connection with have an even wider meaning, and can encompass disputes about whether the contract in question is void, for instance, for illegality

20 **Macob**: The court rejected the argument that because there was an arbitration clause (which did not exclude enforcement from its ambit, see JCT/ICE clauses), disputes about enforcement should be stayed to arbitration(it was wrong to do so).

v. Baltic Quay [2005] BLR 53 (CA) (proceedings for payment relying on s.111 HGCRA 1996, and the absence of a withholding notice were stayed to arbitration).

- Are there contractual preconditions, for example prior review by a third party, time limits (consider the old ICE clause 66).

2.2 Preparing a Notice to Concur (a Notice of Arbitration)

The wording of the Notice to Concur must be considered carefully.

- The Notice identifies the matters that have been referred and, together with the arbitration agreement and the Arbitration Act 1996, defines the jurisdiction and powers of the tribunal. If the notice is unclear, previous correspondence can be considered, Casillo Grani v. Napier Shipping Co [1984] 2 Lloyd's Rep 481.[21]

- Claims in later case statements, and amendments, must be encompassed by the description of the dispute in the Notice. Consider claims, defences, abatements, set-offs and counterclaims. But the parties can alter the tribunal's jurisdiction and powers by subsequent agreement, estoppel or waiver.

- The availability of defences by way of set-off depends on the nature of the set off and the width of the arbitration clause. Transaction set-offs are more likely to be within the scope of a widely drawn arbitration agreement, than independent set-offs; see discussion in #Metal Distributors v. ZCCM Investment Holdings [2006] 2 Lloyd's Rep 37 (Comm).[22]

- The Notice will, ordinarily, commence proceedings for limitation purposes.

2.3 Commencing arbitral proceedings for limitation purposes

The parties can agree when arbitral proceedings are commenced for limitation purposes. The service of Notice to Concur will ordinarily stop time running for limitation purposes, AA1996, ss. 13(1), 14 and, depending on the wording of the contract, may do so for the purpose of contractual time bars. Note #Taylor Woodrow v. RMD Kwickform [2008] EWHC 825 (TCC); [2008] 2 Lloyd's Rep 345 (provision that disputes to be referred to arbitration before a person to be agreed or failing agreement to be appointed by the CIArb was, as regards the commencement of the arbitration, subject to s. 14(4). The provision was not an agreement as to when arbitral proceedings were to be regarded as commenced for the purpose of s. 14(1))

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[21] **Casillo**: Considering s. 34(3) of the Limitation Act 1980 (now repealed, see AA1996, Schedule 4), the equivalent provision under the old law, did not require the notice to identify the matter to be referred. Nevertheless, the matter had to be identified either on the face of the notice or, if the notice was unclear, from previous correspondence between the parties.

[22] The conceptual difficulties where the set off relates to a claim under a contract over which the tribunal has no jurisdiction were discussed in Ronly Holdings v. JCS Zestafonis [2004] EWHC 1354 (Comm): The tribunal has no jurisdiction over that contract yet must make a decision on whether the set off defence is properly available, and this may give rise to an issue estoppel.

- To have this effect, the Notice must be worded appropriately to the manner in which the tribunal is to be constituted and served on the right person. (Subject to contrary agreement: designated/named arbitrator – serve on other party requiring dispute to be referred to arbitrator: party appointed arbitrator or arbitrators serve on other party requiring it to appoint or agree to appointment of arbitrator; third party appointed arbitrator give notice to that person requiring him to make the appointment) see AA1996, s. 14.[23]

- A failure to comply with the relevant requirements may not, however, be fatal if the intention of the notice is sufficiently clear and served on the right person; #Nea Agrex SA v. Baltic Shipping Co Ltd [1976] 2 Lloyd's Rep 47 (CA)[24]. Consider Atlanska Plovidba v. Consignaciones Asturianas SA [2004] 2 Lloyd's Rep 109 (Com Ct) where it was said that arbitration being used by commercial men, the court should concentrate on the substance, not the form, of the notice.[25]

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23 Most arbitration agreements providing for a sole arbitrator envisage an arbitrator being agreed or, failing agreement to a name, a third party appointment. Thus it may be that s. 14(4) applies and proceedings are commenced when the Notice is served by one party on the other requiring it to agree to the appointment of an arbitrator. The confusion arises because s. 14(5) provides that where the arbitrator is to be appointed by a person other than a party, proceedings commence when notice is give to that party. This was confirmed to be the case in Taylor Woodrow v. RMD Quickform [2008] EWHC 825 (TCC); [2008] 2 Lloyd's Rep 345.

24 **Nea Agrex**: Unless the parties have agreed otherwise, a failure to comply with requirements such as these may be regarded as an irregularity that does not invalidate a Notice to Concur but which can be cured by amendment, by subsequent correspondence or by the implication of terms into the notice itself. Thus, a Notice to Concur that required the recipient to name its arbitrator when, because the tribunal was to comprise a sole arbitrator, it should have requested the recipient to agree to the appointment of an arbitrator has been held to be effective despite this defect. (Nea Agrex SA v. Baltic Shipping Co Ltd [1976] 2 Lloyd's Rep 47 (CA). Although this case concerned a failure to comply with the requirements in s. 34(3) of the Limitation Act 1980, now repealed, the reasoning is probably applicable to commencement procedures agreed between the parties or provided for in the new Act.

It was also suggested by Lord Denning in Nea Agrex, that the Notice to Concur would have been effective had it said nothing about the requirement to agree an arbitrator, as such a requirement would be implied. This was, subsequently, doubted; see Surrendra Overseas Ltd v. Government of Sri Lanka [1977] 1 Lloyd's Rep 653.

25 **Atlanska Plovidba**: The notice referred to disputes arising under the bill of lading, whereas it arose under the booking note. Held: considering ss. 14 and 16 of the Act. To be effective the notice must, having regard to its terms and the context in which it is written, identify the dispute with sufficient particularity, and make clear that the person giving it is intending to refer the dispute to arbitration, not merely threatening to do so if his demands are not met. There are further requirements beyond this. In this case the context made clear that the party issuing the notice was also asserting that the dispute fell within the arbitration agreement in the booking note.

- To be effective, a Notice to Concur must unequivocally require the dispute or difference to be referred to arbitration; Allienz etc v. SFI Rotterdam BV [1999] 1 Lloyd's Rep 68.[26] Consider, for example, Taylor Woodrow v. RMD Kwikform [2008] EWHC 825 (TCC); [2008] 2 Lloyd's Rep 345 (notice must make clear that the party is intending to refer the dispute to arbitration, not merely threatening to do so if demands not met). Contrast Bulk & Metal Transport v. VOC Bulk [2009] EWHC 288 (Comm); [2009] 1 Lloyd's Rep 481, s. 14(4) should be interpreted broadly and fliexibly concentrating on substance not form.[27]

- Most arbitration agreements that provide for a sole arbitrator envisage a party appointed arbitrator and, failing that, a third party appointment. It is probable that s. 14(4) applies to such an agreement, thus the notice should be served by one party on the other requiring it to agree to the appointment of an arbitrator, not on the appointing body.

The court has a limited jurisdiction to extend contractual time limits for commencing proceedings (but not statutory time limits), AA1996, s. 12, Harbour and General Works Ltd v. Environment Agency [1999] BLR 409.[28] Compare AA1950, s. 27 which was wider (consider also Crown Estates Commissioners v. John Mowlem & Co (1994) 70 Build LR 1 (CA)).[29]

The 1996 Act also contains provisions concerning the disregarding of periods of time when an award is set aside or declared to be of no effect, AA1996, s. 13. (The purpose of these provisions, other than were the tribunal is found to lack jurisdiction,

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[26] **Allienz**; A notice of arbitration must unequivocally require the matter in contention between the parties to be referred to arbitration. A reference to the possibility of arbitration at some future date is not sufficient, Surrendra Overseas Ltd v. Government of Sri Lanka [1977] 1 Lloyd's Rep 653. But a notice requiring immediate arbitration, but stating that it will be withdrawn if a settlement is reached, will be effective. If that is made clear, reference to an incorrect method for appointing the tribunal will not invalidate the notice.

[27] **Bulk**: Notice stated failing payment within seven days we are instructed to commence arbitration and inviting the recipient to agree an arbitrator from one of thee names, sufficient to commence arbitration.

[28] **Harbour** Test is **(a)** whether the circumstances (of the delay) were outside reasonable contemplation of the parties when the provisions agreed and just to extend time, or **(b)** whether conduct of one makes it unjust to hold the other to the provision. Authorities applying the "undue hardship" test are no longer relevant to the question of whether time should be extended for beginning arbitral proceedings. A party's failure to comply with a time limit through oversight or negligence by itself or its advisors, however short the period of non-compliance is not outside the reasonable contemplation of the parties, nor is failing to warn that the notice is defective a justification for extending time.

[29] **Crown**: A distinction was made between clauses that directly barred claims and those that did so collaterally by, as in that case, making matters evidentially conclusive (see JCT final certificate clause). Is there a difference between substantive and evidential rights?

is unclear, since the court can no longer set aside an arbitration agreement, compare AA1950, ss. 24, 25.).

3. ESTABLISHING THE TRIBUNAL

Once a dispute or difference has emerged and been referred to arbitration by the appropriate notice, the tribunal must be established by appointing the arbitrator(s).

3.1 Methods of appointment

The parties can agree on how the tribunal is to be constituted. Apart for a single arbitrator, the most usual alternatives are three arbitrators, one appointed as chairman, and party arbitrators plus an umpire.

- Panels of three arbitrators sit together and take decisions by majority (AA1996, ss. 20, 22). Party arbitrators have sole responsibility for the reference until they disagree, whereupon the umpire takes over (AA1996, s. 21) and the party arbitrators become advocates.

- Party arbitrators, particularly those who may be replaced by an umpire, have a somewhat unusual status, see Redfern & Hunter, 2nd edition, p 198-201. Consider also Redfern & Hunter, 4th Edition, sections 4.52 to 4.66.

The parties can agree on the person(s) to be appointed.

- It is rare for an arbitrator to be named in the agreement unless it is *ad hoc.* In the case of a single arbitrator the usual arrangement is that, once a dispute has arisen, the parties can agree a name or, failing agreement either can apply to a named third party, an appointing body, for an appointment. Where a party fails to appoint a party appointed arbitrator, see AA1996, s. 17.

- As to when the appointment takes effect, consider Tradax Export SA v. Volkswagenwerk AG [1970] QB 537.[30]

There is, apparently, no implied term that the contractual right to apply to a third party for an appointment will be excised reasonably and as such within a reasonable period of time from issuing the notice to concur. Neither, ordinarily, will the right to apply for an appointment lapse through effluxion of time; Indescon Ltd v. Ogden [2005] BLR 152 (TTC).[31]

Failure of the appointing machinery

Occasionally an arbitration agreement makes no, or inadequate, arrangements for the constitution of the tribunal, or for how it is to be appointed. If so, the default provisions in the Arbitration Act 1996 apply, AA1996, ss. 15, 16, 29, 21, 22 and, if necessary, appointments can be made by the court, AA1996, ss. 17, 18, 19. The court will have

[30] **Tradax**: Appointment takes effect when arbitrator communicates acceptance.

[31] **Indescon**: 1992 notice to concur. Court held that the right to seek an appointment continued to subsist. Solution was, once tribunal appointed, to seek to dismiss claim for "want of prosecution".

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regard to AA1996, s. 1 in deciding whether to exercise its discretion, Durntnell v. S of S for Trade and Industry [2000] BLR 771.[32] Consider also Atlanska Plovidba v. Consignaciones Asturianas SA [2004] 2 Lloyd's Rep 109[33] (preconditions to the exercise of these powers are that the parties have agreed to arbitration, and that an effective notice of arbitration has been given.).

Once an appointment is accepted, there is probably a tripartite contact between the parties and the arbitrator. In the case of a third party appointment, the contract may come into existence when the selected person is advised to the parties or when that person writes to the parties accepting the appointment (nomination).

3.2 Suitability for appointment

Before accepting an appointment, either directly from the parties or from an appointing body, the following questions should be asked:

- Do I meet any requirements stipulated in the arbitration agreement, such as qualifications, experience?

- Do I know of any conflicts of interest that would lead a fair minded and informed person to conclude that there was a real possibility of bias (if in doubt advise the parties)?

- Do I have the time and the expertise to undertake the work?

To answer these questions you need to see the arbitration agreement, the Notice to Concur and, if not clear from these, a brief description of the dispute.

3.3 Remuneration

The basis of the arbitrator's remuneration can be agreed with the parties, either before accepting the appointment or subsequently. Excessive fees and cancellation charges bring arbitration into disrepute; note comments on level of arbitrator's fees in #Wicketts v. Brine Builders (2001) CILL 1805.[34]

- Agreements should not be made with only one of the parties, K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd [1992] 1 QB 863; #Turner v. Stevenage Borough Council [1997] 2 Lloyd's Rep 129 (CA).[35]

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32 **Durntnell**: Application to appoint under s. 18. Court could consider delay in deciding whether possible to obtain a fair resolution of the dispute. But here delay partly S of S's fault.

33 **Atlanska Plovidba**: Before being able to exercise its discretion under s. 18, court must be satisfied that the parties have entered into an arbitration agreement falling within the scope of the 1996 Act. Secondly that an effective notice of arbitration has been given; thirdly that there has been a failure of the contractual procedure for the appointment. Court should ordinarily exercise its jurisdiction to appoint unless satisfied that the arbitral process cannot leads to a just resolution of the dispute.

34 **Wicketts**: The arbitrator's fees were higher than the parties' costs. About £25,000 before the start of the hearing!

35 **Hyundai**: To do so my call tribunal's impartiality into question, as may refusing to progress the reference (once appointed) until terms

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- In the absence of agreement the arbitrator will have an implied entitlement to reasonable remuneration and, possibly, payment by instalments, see AA1996, s. 28(1). There is no implied entitlement to cancellation charges.

- The tribunal has a lien on its award for payment of its fees, but a party can apply to the court to have the award released on payment into court of the sum claimed or a lesser amount ordered, AA1996, s. 56, see also s. 28.

- The court can, on application, consider and adjust an arbitrator's fees, but not so as to override a contractual entitlement, AA1996, s. 28. The position is different where an arbitrator is removed, AA1996, s. 24(4). Consider also the position on resignation, AA1996, s. 25(3)(b). A lien is held on an award, AA1996, s. 56.

3.4 Revocation, removal and resignation

There are various ways in which an arbitrator can cease to hold office before completing the reference.

- Death. An arbitrator's authority is personal and ceases on death, AA1996, s. 26.

- Agreement of the parties, AA1996, s. 23.

- Removal for bias, lack of agreed qualifications, incapacity, and incompetence (misconduct), AA1996, s. 24.

- Resignation, AA1996, s. 25.

3.5 Consequence of revocation, removal or resignation

If the arbitrator ceases to hold office prior to the conclusion of the reference, there are a number of consequences to consider.

- A replacement will have to be appointed, by the court if necessary, and arrangements made about the status of the existing proceedings, AA1996, s. 27, consider Fox v. PG Wellfair Ltd [1981] 2 Lloyd's Rep 514, 520.[36]

- In principle, the circumstances in which the arbitrator ceases to hold office could amount to a breach of contract or negligence. But, except in the case of resignation, an arbitrator is immune from suit, AA 1996, s. 29, see also, s. 74.

- An arbitrator who resigns can seek relief from the court as regards any liability incurred as a result of his resignation, and for orders concerning his fees, AA1996, s. 25.

- If the court removes an arbitrator it can make orders with respect of his fees, AA1996, s. 24(4).

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agreed by both parties, Turner.

[36] **Fox**: Removal of arbitrator does not affect existing part awards. Status of procedural directions unclear but best to revisit, confirm or amend in light of parties' representations.

- Equally importantly, in almost all such cases, apart from death, both the arbitrator's reputation, and that of arbitration itself may be damaged.

4. ENFORCING AN ARBITRATION AGREEMENT

The court will not specifically enforce an arbitration agreement, but a claim for damages is, in theory, possible. See discussion in Bristol Corporation v. John Aird & Co [1913] AC 241, 256 and Doleman & Sons v. Ossett Corporation [1912] 3 KB 575 (CA); #Tracomin SA v. Sudan Oil Seeds Co Ltd [1983] 2 Lloyd's Rep 629 (CA).[37]

The usual remedy is to seek a stay of proceedings, if they are commenced in the High Court or the County Court or, if commenced in some other forum, an injunction from the High Court. On the latter remedy and its availability in the EU, see C Mulcahy, *The Impact of the Brussels Convention on Anti-suit Injunctions in Aid of Arbitration Agreements*, (2005) 71 Arbitration 211.

4.1 Obtaining a statutory stay of proceedings

A party to an arbitration agreement against whom proceedings are commenced in the High Court or County Court in respect of a matter covered by that agreement, can obtain a stay of those proceedings, unless the agreement is null and void, inoperative or incapable of being performed, AA1996, s. 9. The application is made by notice in the proceedings, CPR, Rule 62.3(2).

- The timing of the application for a stay is critical. The application may not be made before taking the appropriate procedural step, if any, to acknowledge the proceedings, or after taking a step in those proceedings to answer the substantive claim, see AA1996, s. 9(3); #Capital Trust v. Radio Design [2002] 2 All ER 150 (CA);[38] Patel v. Patel [1999] BLR 227 (CA).[39]

- An arbitration agreement may be inoperative if it contravenes consumer legislation, Zealander v. Laing Homes Ltd (1999) CILL 1510.[40]

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[37] **Bristol**: et al. The two earlier cases discuss the position at common law, statutory stay first possible under the Common Law Procedure Act 1854. Traconin discusses the difficulty in proving damages, i.e. have to show tribunal would reach a different decision.

[38] **Capital**: Application for a stay and in the alternative for summary judgement in the event that a stay not granted. The right to a stay not lost. The conduct must be such as to demonstrate an election to abandon the right to a stay in favour of allowing the action to proceed and the act must have the effect of invoking the jurisdiction of the court.

[39] **Patel**: Application to set aside judgement in default and for consequential directions, not a step to answer the substantive claim, application for leave to defence and counterclaim, not necessary, so not such a step.

[40] **Unfair Terms in Consumer Contracts Regulations** 1994 now 1999), see also AA1996, ss. 90 (legal persons), 91 (£5,000). In Zelander there had been no opportunity to negotiate the arbitration clause in the NHBC scheme. Restricted recourse to legal action, particularly by requiring consumer to take disputes exclusively to arbitration not

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- Poverty or inability to honour an award does not render an arbitration agreement inoperative, nor does the availability of remedies in court proceedings that are not available in arbitration; The Tuyuti [1984] QB 838 (point not considered at CA); Societe Commerciale v. Eras (International) Ltd [1992] 1 Lloyd's Rep 570 (CA).

- The power to refuse a stay where the arbitration agreement is null and void, inoperative or incapable of being performed, assumes that an arbitration agreement has been concluded, and is concerned with whether it is derived of legal effect, Albon v. Naza Motor Trading (No 3) [2007] 2 Lloyd's Rep 1 (Ch D).[41]

If there is a dispute about whether there is an arbitration agreement or whether it encompasses the dispute, the court should ordinarily determine this, not leave it to the tribunal. It should do so either by hearing a preliminary issue on the question or, if the parties agree or if there are no disputed issues of fact, on affidavit evidence. Alternatively, the court can stay the proceedings under the court's inherent jurisdiction, where in the interests of good sense and litigation management it would be preferable for the arbitrator to decide the issue; Birse Construction v. St David [2000] BLR 57 (CA); #Al-Nami v. Islamic Press Agency [2000] BLR 150 (CA).[42]

There is a right of appeal from the Court's decision to the Court of Appeal, despite AA1996, s. 9 being silent on the matter; Inco Europe Ltd v. First Choice [2000] BLR 159 (CA).

Effect of granting a stay

A stay of proceedings does not, of itself, require the parties to arbitrate, or commence arbitral proceedings. A Notice to Concur still has to be issued. This can cause limitation problems if legal proceedings are commenced without a protective Notice to Concur, at the end of the applicable limitation period, and those proceedings are stayed after the expiry of the limitation period.

Abolition of the court's power not to stay proceedings

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covered by legal provisions, Schedule 3 paragraph 1 (q), imbalance in bargaining power. Arbitration agreement could not be relied on, stay not granted.

41 **Albon**: In this case it was alleged that the joint venture agreement in which the arbitration agreement was found, was a forgery. The court held that it had no jurisdiction to grant a stay under s. 9 until the validity of the arbitration clause had been determined. It declined to exercise its inherent jurisdiction to grant a stay.

42 **Birse**. If there is a triable issue, then unless the parties agree, it should be dealt with at a hearing. Al-Nami. Under s. 9, judge should decide if there is an arbitration agreement applicable to the claim, not leave it to the arbitrator. Four options. Decide on affidavit evidence that there is, and stay. Order the issue to be tried as a preliminary issue. Decide that there is no arbitration agreement and dismiss the application. Or stay, under the court's inherent jurisdiction, so that the arbitrator can decide this under the court's inherent jurisdiction, where in the interests of good sense and litigation management. For example, where part of the dispute is to go to arbitration in any case.

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The court no longer has a discretion over whether to stay proceedings, or not to do so, for instance, if there is "in fact" no dispute between the parties. Contrast AA1950, s. 4(1), AA1979, s. 1, AA1996, s. 86 (not brought into force because of Phillip Alexander Securities and Futures Ltd v. Bamberger the Times, 22 July 1996). See #Halki Shipping Corp v. Sopex Oils Ltd [1998] 1 Lloyd's Rep 465 (CA).[43]

- The court can no longer give summary judgment before staying proceedings "pending arbitration", contrast the position under the old law, Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd [1989] 1 Lloyd's Rep 473 (CA) (AA1950, s. 4) SL Sethia Liners Ltd v. State Corporation of India Ltd [1981] 1 Lloyd's Rep 31 (CA) (AA1975, s. 1).[44]

- Could the court still order an interim payment as it did in Imodco Ltd. v Wimpey Major Projects Ltd (1987) 40 Build LR 1 (CA). Consider Van Uden BV v. Kommandigfesellshaft etc.[45] [1998] ECR I-7091, see [1999] 2 WLR 1181.[46]

- But with statutory adjudication, this may be less important where the contract is a construction contract, see Housing Grants Act 1996, s. 108.

4.2 Obtaining a stay of proceedings by injunction

The High Court can, by injunction, prevent proceedings being commenced in a foreign court in contravention of an arbitration agreement. It will do so, unless there are good reasons to do otherwise, provided relief is sought promptly and before the foreign proceedings are too far advanced and it is clear that there is an arbitration clause (and that the applicant has a good case on the merits?); Bankers Trust Co v. PT Jakarta

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[43] **Halki**: The Court of Appeal, after a full review of the authorities, concluded that the word "dispute" includes any claim that the other party refuses to admit or does not pay, irrespective of whether or not there is any answer to that claim in fact or in law. The jurisdiction not to stay under the old law related to the discretion under AA1950, s. 14 or the "not in fact any dispute" exception under AA1975, s. 1.

[44] **Mentor**: The court had a discretion not to stay under AA1950, s. 4(1) and could refuse a stay if there was in fact no dispute under AA1975, s. 1.

[45] **Van Uden**: The reasoning in Mentor does not appear to be affected by AA1996, s. 9 or the CPR, but was somewhat tortuous. Is not the ordering of an interim payment the exercise of a power in support of arbitration, Van Uden.

[46] **Van Uden:** Dispute arose under space charter providing for arbitration in the Netherlands, Van Uden instituted arbitration against Deco in the Netherlands for non payment of certain invoices, also applied for interim relief to the Rotterdam court seeking a provisional order from the debtor to cover the debts claimed before the arbitrators (note under art 1022(2) of the Code of Civil Procedure, an arbitration clause did not preclude a party's right to seek interim relief). The ECJ said that such measures were not, in principle, ancillary to arbitration proceedings, but were parallel to it and concerned the protection of other rights, the nature of those rights determining the place of such orders in the scope of the convention. The ECJ held that, before such orders could be made, there had (a) to be a real connection between the subject matter of the measure and the court's territorial jurisdiction and, (b) the measure must have merely a protective and provisional character.

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International [1999] 1 Lloyd's Rep 910; but note the less onerous test for such an injunction in Aggeliki Charis Compania Maritima SA v. Pagnan SpA [1995] 1 Lloyd's Rep 87 (CA),[47] now confirmed in #Donohue v. Armco [2001] UKHL 64.[48] (reasoning no longer relevant in Lugano/Brussels Convention or Judgment Regulation States, see Turner v Grovit [2004] 2 Lloyd's Rep 169 (ECJ)). See also Glencore International v. Exeter Shipping [2002] 2 All ER (Comm) 1, paras 42, 43 (CA) where it was said that the defendant must be amendable to English territorial and personal jurisdiction. This will be the case and service out of the jurisdiction permitted under CPR 6.20(5), both where the arbitration agreement is governed by English law and where the seat is in England. It is also the case if the contract is governed by English law, Steamship Mutual v. Sulpicio Lines [2009] EWHC 914 (Comm); [2008] 2 Lloyd's Rep 269.

- The High Court could, presumably, exercise a similar jurisdiction where such proceedings were commenced in an inferior tribunal in England and Wales.

- The question of whether such injunctions are compatible with EU law, in particular the Judgments Regulation, was referred to the ECJ, West Tankers v. Ras Riunione Adriatica [2007] 1 Lloyd's Rep 391 (HL), the HL expressing the view that proceedings for such injunctions do fall outside the scope of the Regulation. The ECJ disagreed #Allianz SpA v. West Tankers (ECJ 10th February 2009); [2009] 2 Lloyd's Rep 413. Proceedings concerning the subject matter of the dispute came within the scope of the Regulations. A preliminary issue in those proceedings, including the scope of an arbitration agreement, also came within the scope of the Regulation. Thus the question of the Italian court's lack of jurisdiction was a matter exclusively for that court. The English court could not issue an injunction restraining a party from commencing or continuing proceedings before the courts of another member state on the grounds that such proceedings would be contrary to an arbitration agreement.

4.3 Costs orders consequent on a stay or anti suit injunction

See A v. B (No. 2) [2007] 1 Lloyd's Rep 358; where proceedings bought in England in

[47] **Aggeliki:** Where proceedings are brought in another jurisdiction in breach of a valid agreement to arbitrate in England and Wales or Northern Ireland the court has jurisdiction to and will, without undue diffidence, restrain those proceedings by injunction, on terms if necessary. Injunctive relief is appropriate in such circumstances for, otherwise, the applicant would be deprived of a contractual right in a situation were damages would be inadequate. Note, in **Banker's** the court gave lip service to the merits test, but was principally concerned with whether the applicant should be deprived of its right to arbitrate.

[48] **Donohue**: If contracting parties agree to give a particular court exclusive jurisdiction over claims, and a claim which is subject to that agreement is made in another forum, the court will ordinarily exercise its discretion to secure compliance with the agreement unless the party suing in a non contractual forum shows strong reasons for doing so, these depending on the facts and circumstances of the case, or there are reasons, such as dilatoriness or unconscionable conduct, for denying the applicant equitable relief. For a recent example where an anti-suit injunction was given in support of arbitral proceedings in England, see Welex v. Rosa Maritime [2003] 2 Lloyd's Rep 509 (CA).

breach of an arbitration agreement, costs should ordinarily be awarded on an indemnity basis, because the damages flowing from the breach were all costs reasonably incurred by the party entitled to the stay.

5. QUESTIONS OF JURISDICTION

5.1 The source of jurisdiction

The tribunal's jurisdiction in founded on the terms of the arbitration agreement, the Notice to Concur and the 1996 Act.

Jurisdiction can be expanded by agreement, waiver or estoppel, see for example, #Jones Engineering Services Ltd v. Balfour Beatty Building Ltd (1992) 42 Const LR 1.[49] An exchange of case statements might also extend jurisdiction by creating a written arbitration agreement where none existed before, see AA1996, s. 5(5), or may extend jurisdiction, by encompassing a wider range of disputes than those encompassed by the arbitration agreement or the Notice to Concur. If, however, both parties conducted the proceedings in the mistaken view that they were obliged to arbitrate, any agreement alleged to be formed by such conduct may be vitiated by mistake; Furness Withy (Australia) Pty Ltd v. Metal Distributors (UK) Ltd [1990] 1 Lloyd's Rep 236 (CA).

5.2 The nature of jurisdiction

There are two aspects to a tribunal's jurisdiction, substantive jurisdiction and jurisdiction as to powers.

- Substantive jurisdiction is concerned with whether there is a valid arbitration agreement, whether the tribunal is properly constituted and with what matters have been submitted (referred) to arbitration in accordance with the arbitration agreement, AA1996, s. 31(1). The tribunal may lack substantive jurisdiction at the outset or may exceed its substantive jurisdiction during the proceedings.

- Jurisdiction as to powers concerns whether a validly appointed tribunal has acted in excess of powers available to it by agreement or under the Arbitration Act 1996; see AA1996, s. 68(2)(b).

5.3 Dealing with jurisdictional issues

Jurisdictional problems bedeviled arbitration until the Arbitration Act 1996, since the tribunal could not, unless the parties gave it power to do so, determine its own jurisdiction. Provided jurisdictional objections were made and not waived, they could be brought before the court at any time during the proceedings or after, to resist enforcement of the tribunal's award. For the position under the 1950 and earlier Acts, see Brown (Christopher) Ltd v. Genossenshaft etc [1954] 1 QB 8.[50]

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[49] **Jones**: If parties commence arbitral proceedings in respect of a particular dispute, wrongly believing that they have concluded a valid arbitration agreement relating to that dispute, appoint a tribunal and appear before it, their conduct may give rise to an *ad hoc* arbitration agreement in respect of that dispute. Alternatively, their conduct may give rise to a waiver or an estoppel preventing either party for denying the validity of the original arbitration agreement.

[50] **Brown**: A tribunal could not determine its own jurisdiction although

Under the Arbitration Act 1996, the position is significantly altered. Unless the parties agree otherwise, the tribunal can, subject to court review, determine its own substantive jurisdiction, AA1996, s. 30. The effect of this and the related statutory machinery, particularly the statutory estoppel in s. 73,[51] is that the onus is on the party disputing the tribunal's determination to take immediate steps to have that determination reversed by the court. See P Aeberli, *A Jurisdictional Route Map*, (2005) 21(3) Arb. Int'l 253. Note Dr S Kröll, *Recourse against Negative Decisions on Jurisdiction*, (2004) 20 Arb. Int'l 55.

- An objection that the tribunal lacks substantive jurisdiction at the outset must be raised by a party not later than the time that it take the first step in the proceedings to contest the merits of any matter in relation to which it challenges the tribunal's jurisdiction, AA1996, s. 31(1). An objection during the course of the proceedings that the tribunal is exceeding its substantive jurisdiction must be raised as soon as possible after the matter alleged to be beyond its jurisdiction is raised, AA1996, s. 31(2).

- The tribunal may admit late objections if it considers the delay justified, AA1996, s. 31(3). If it does not do so, the effect of s. 73(1) will, ordinarily, be to preclude the late objection being relied on in court proceedings either. Consider #Vee Networks v. Econet International [2005] 1 Lloyd's Rep 192 (Com Ct).[52]

- If the objection is duly taken, it may be dealt with by the tribunal either by an award on jurisdiction or in its award on the merits, AA1996, s. 31(4).

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could express a view. Parties had to seek declaration or injunction from the court. This could be used tactically.

[51] AA1996, s. 73. Objections to substantive jurisdiction must be taken forthwith or within the time allowed for in the arbitration agreement, by the tribunal or by Part I of the Act. If tribunal rules on substantive jurisdiction, a party who could have questioned that ruling by arbitral process of appeal or review, or by challenging the award, who does not do so within the applicable time scales may not object later "unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

[52] **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. Award challenged, *inter alia*, under s. 67. Held: Application rejected. Until skeleton argument served by Econet, nine days before hearing of that issue only the validity of the contract, not the arbitration clause had been disputed, till then both parties had proceeded on the basis that the tribunal could determine the validity of the contract conclusively. The skeleton argument was served far too late to preserve the right of challenge either under s. 31(1) or s. 31(2), nor had the Tribunal admitted the challenge late under s. 31(3). Application would also have been rejected since, under s. 73, Econet had not established that at the time when they too part in the proceedings by serving defence and acceding to the Tribunals' directions for the preliminary issue, it did not know or could not with reasonable diligence have discovered the grounds for their jurisdictional objection (court took this point of its own motion, as under s. 73, had to satisfy itself of this).

- Alternatively, an application may be made to the court to determine a preliminary point of jurisdiction with the agreement of the parties or the permission of the tribunal (of doubtful use), AA1996, ss. 32. In the latter case, the court must be satisfied that determination of the question is likely to produce substantial savings in costs, that the application is made without delay, and that there is a good reason why the matter should be decided by the court. The nature of the court's determination is problematic, given that s. 32 is worded similarly to s. 2 of the 1979 Act, now repealed, and it may be merely an opinion of the court, not a judgment, and thus not *res judicata*; Babanaft International Co. SA v. Avanti Petroleum Inc [1982] 1 WLR 871 (CA).[53]

Challenging jurisdictional awards and awards on jurisdictional grounds

Other than as regards time, and the need to exhaust arbitral remedies, see ss. 70(2), 70(3), there is an unfettered right to challenge the tribunal's award on or dealing with its jurisdiction, AA1996, ss. 67, 70(3), at any rate on the grounds put to the tribunal: #Athletic Union v. NBA [2002] 1 Lloyd's Rep 305,[54] applying AA1996, s. 73; approved, *obiter*, in JSC Zestafoni v. Ronly Holdings [2004] 2 Lloyd's Rep 335 (Comm).[55] See also Primetrade v. Ythan Ltd [2006] 1 Lloyd's Rep 457 (Comm):[56] Objection in s. 73 means "ground of objection". Thus new grounds of objection, not put to the tribunal on a jurisdictional challenge, cannot be raised before the court on a s. 67 application.

The court, on such a challenge, will not be fettered by the fact that the matter has been

[53] **Babanaft**: See discussion of s. 45, under Session 4.

[54] **Athletic**: AA1996, s. 73(1) prevents the parties raising arguments before the court to challenge an award on jurisdiction that were not argued before the tribunal. Before the tribunal it was accepted that there was an apparent agreement to arbitrate but argued that it should not, for various reasons, be enforced. Before the court an attempt was made to argue that there was no arbitration agreement.

[55] **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 JSCZ estopped from taking the point under s. 73, as point was first raised in correspondence with the arbitrator 11 days after the Award and had not brought itself within the "unless" words in s. 73(1) which provide "unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

[56] **Primetrade**: New evidence and new arguments, within an existing ground of objection can be raised before the court, but, in the case of new evidence, only on notice to the other side and, if its admission not agreed, with the permission of the court, since it is a principle of fair dealing that all the evidence should be before the arbitrators and the court has an inherent right to control the procedure of a re-hearing under s. 67. Permission to adduce the new evidence might not be given if it would result in substantial prejudice to the other side which cannot be fairly dealt with by costs or, if appropriate, adjournment.

dealt with by the tribunal. Thus if a hearing is necessary, it will be ordered even though there has already been a hearing before the tribunal, #Azov Shipping Co v. Baltic Shipping Co [1999] 1 Lloyd's Rep 68.

The position of a party who takes no part in the arbitral proceedings

A party who takes no part in the proceedings can have questions of substantive jurisdiction determined by the court by way of declaration or injunction, AA1996, s. 72. See, for example Law Debenture Trust v. Elektrim Finance [2005] 2 Lloyd's Rep 755 (Ch).[57] But note AA1996, s. 73 and the need to apply promptly for discretionary relief, consider #Zahorozhye Productions v. Aluminium etc [2002] EWHC 1410 (Comm).[58]

- Some doubt has emerged about whether s. 72 applies where the issue concerns whether an arbitration agreement was concluded at all, but the authorities that suggest this, reviewed in British Telecommunications v. SAE Group [2009] EWHC 523 (TCC); [2009] BLR 321, are probably wrong (see BLR commentary).

- The court, relying on the words "should not", in s. 1(c) of the 1996 Act, as meaning something different from "shall not", has occasionally concluded that it retains an residual jurisdiction to consider jurisdictional challenges, even if the requirements of ss. 31, 32 and 72 are not satisfied. Vale de Rio Doce Navegaçao SA v. Shanghai Bao [2000] 2 Lloyd's Rep. 1.[59] For a recent example see British Telecommunications v. SAE Group [2009] EWHC 523 (TCC); [2009] BLR 321.

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[57] **Law**: Merely asserting before the LCIA Registrar and later to thte arbitrators that jurisdiction does not exist, without arguing its case so that the arbitrators can consider it is not taking part for the purpose of s. 72.

[58] **Zahorozhye**: ZPAP, although notified of arbitration, did not participate. Shortly before adjourned hearing applied to court under s. 72 of an injunction restraining arbitrators on the ground of lack of jurisdiction. Injunction refused, not appropriate to grant relief at this late stage. The balance of convenience was in favour or the arbitration continuing.

[59] **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.

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Jurisdictional challenges in practice

This somewhat confusing range of options was considered by the court in Azov Shipping Co v. Baltic Shipping Co [1999] 1 Lloyd's Rep 68[60] where it was suggested that a party relying on complex questions of fact to dispute a tribunal's substantive jurisdiction should consider standing back from the proceedings and seeking a declaration under AA1996, s. 72. A claimant disputing the existence of an arbitration agreement would ordinarily commence proceedings in court with a view to resisting any application for a stay. Consider also #Birse Construction Ltd v. St David Ltd [1999] BLR 194.[61]

The position may be further complicated where the parties agree to give the tribunal power to determine its own jurisdiction. In such a case the unfettered right to remove the jurisdictional question into the court may be lost; consider LG Caltex v. China National Petroleum [2001] BLR 325 (CA).[62]

The court has no jurisdiction to make any orders in relation to the costs incurred by the parties in an abortive or invalid arbitration; Crest Nicholson v. Western [2008] EWHC 1325 (TCC); [2008] BLR 426. It may be that the arbitral tribunal, even though lacking jurisdiction, has statutory power to deal with such costs under the 1996 Act. Alternatively, to minimise the problem, recourse should be had to s. 72.

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60 **Azov**: A consideration of the different ways to resolve jurisdictional questions. Where no complex issues of fact, s. 31 could be appropriate. But appeal under s. 67 unfettered, takes effect as rehearing of fact and law. The court should not be in a weaker position than the tribunal when considering challenge. Alternatives are to ask court to determine preliminary question of jurisdiction under AA1996, s. 32, or for party to stand back from the proceedings and seek a declaration under s. 72.

61 **Birse:** On application for stay, court should resolve whether an arbitration clause (existence and extent). The 1996 Act did not require this to be decided by Arbitrator. JCT contract incorporated by reference in letter, contact concluded by conduct. If reasonably clear there was a clause and only dispute concerned its extent, this could be left to the arbitrator.

62 **LG Caltex**: Parties could give a tribunal *ad hoc* jurisdiction to determine its own jurisdiction. If so, a challenge under s. 67 would not be possible. But no such agreement here, so right of challenge preserved.

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