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PART D

THE TRIBUNAL'S AND THE PARTIES' DUTIES
THE TRIBUNAL'S POWERS

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1. INTRODUCTION

These notes consider the tribunal's duties and its procedural and evidential powers, the interim remedies that it can order to assist the parties in preparing their cases and in preserving assets, and the sanctions it can impose for non compliance with its directions. The Tribunal's powers are reinforced by duties imposed on the parties by the 1996 Act.

2. THE TRIBUNAL'S DUTIES

The tribunal's procedural powers are principally concerned with the fair and cost effective management of arbitral proceedings. They have to be exercised in accordance with the tribunal's general duty. Consider, AA1996, ss. 1(a), 33.

2.1 The tribunal's general duty

The tribunal's general duty is concerned with principles of natural justice and cost effective justice, AA1996, s. 33(1), with which it has to comply in conducting the proceedings and exercising its powers, AA1996, s. 33(2).

Impartiality

Under the first principle of natural justice, the parties are entitled to an impartial tribunal. See, M Gearing, *A Judge in his own cause*, (2000) IntALR 46; D Sandy, *Independence, Impartiality, Arbitration and the Human Rights Act in England*, (2004) 21Arb. Int'l. 305.

- The tribunal must be and be seen to be impartial, see AA1996, s. 24(1)(a). There is no separate common law requirement of independence, AT&T Corp v. Saudi Cable Co [2000] 1 Lloyd's Rep 22 (HL).[1] For the modern test for bias, seeMagill v. Porter [2002] 2 WLR 37 (HL).[2] Whether all the circumstances

[1] **AT&T**: R. v. Gough and Lochbail v. Bayfield [2000] 1 All ER 65 (HL) applied to arbitral proceedings. Satisfaction of the separate requirement of independence imposed under the ICC Rules was a matter for the ICC.

[2] Magill: A modification of the test in R v. Gough [1993] AC 646 to bring it into line with the ECHR. Note also discussion of independence, consider manner of appointment, the term of office, the existence of guarantees against outside pressures and whether tribunal presents an appearance of independence. Although closely

that have a bearing on the suggestion that the tribunal was biased (as found by the court) would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

- It has been said that there is no separate common law requirement of independence, although this can be imposed by agreement between the parties, AT&T Corp v. Saudi Cable Co [2000] 1 Lloyd's Rep 22 (HL).[3]

Procedural fairness

The parties have the right to a reasonable opportunity to put forward their cases and know and be able to deal with the case against them.

- The parties should have a reasonable time to prepare their respective cases, consider#Damond Lock Grabowskie v. Laing Investments (Bucknell) Ltd (1993) 60 Build LR 112.

- The tribunal should give the parties a reasonable opportunity to make representations before it decides an issue; #Wicketts v. Brine Builders (2001) CILL 1805.[4]

- The parties should have a reasonable opportunity to know the case they have to meet,Damond Lock Grabowskie v. Laing Investments (Bucknell) Ltd (1993) 60 Build LR 112.

- The tribunal should not give itself or receive evidence that is not made available to all the parties for consideration and comment, consider #Fox v. Welfair Ltd. [1981] 2 Lloyd's Rep 514.[5]

- The requirement to act fairly may impose a requirement to give brief reasons for procedural decisions (this is certainly good practice). Consider R v. Ministry of Defence, ex parte Murray, The Times, 17 December 1997 (CA), but note Three

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linked to impartiality, where HRA 1998 applies both independence and impartiality must be satisfied objectively and subjectively.

3 **AT&T**: R. v. Gough [1993] AC 646 and Lochbail v. Bayfield [2000] 1 All ER 65 (HL) applied to arbitral proceedings. Satisfaction of the separate requirement of independence imposed under the ICC Rules was a matter for the ICC. The tests for independence were considered in Magill v. Porter (2002) 2WLR 37 (HL). In deciding whether a tribunal is independent regard must be had to, inter alia, the manner of its appointment, the term of office, the existence of guarantees against outside pressures and the question of whether the tribunal presents an appearance of independence. Independence and impartiality are closely linked but the tribunal must satisfy both requirements subjectively and objectively.

4 **Wicketts**: A serious breach of s. 33 AA1996 to order security for costs and arbitrator's fees without inviting relevant evidence and representations.

5 **Fox**: Suggests a distinction between general expertise and knowledge of facts relevant to case. Should not rely on the latter without disclosing it to parties.

Valleys Water Co v. Binnie (1999) 52 Build LR 61.

Procedural fairness is a flexible concept imposing different requirements depending on the nature of the decision making body, judicial, quasi-judicial or administrative, the interests or issues at stake, and whether the decision to be made will be final or provisional, Ridge v. Baldwin [1964] AC 40.

- Although arbitral proceedings are closer to the judicial than the administrative end of this spectrum, but this does not mean that English court procedures must be observed, consider #Margulead v. Exide Technologies[2005] 1 Lloyd's Rep 324 (Comm).[6]

- The parties can agree to procedures that depart radically from court practice, consider London Export Corporation Ltd v. Jubilee Coffee Roasting Co Ltd [1958] 1 Lloyd's Rep 197. But unless it can bring the parties with it, the tribunal should probably be more cautious. Consider cases such as #How Engineering v. Lindner Ceilings [1999] 2 All ER (Comm) 374.[7]

Cost effective justice

This principle embodies more recent concerns with proportionality and the view that justice beyond the reach of those of modest means or long delayed, is not justice at all, See also CPR, Rule 1.1.

- The tribunal's active management role is important in this respect, AA1996, ss 33(1)(b), 34(1). Contrast the old law, Mustill& Boyd (1989), p. 17. Consider #Pillar v. Edwards (2001) CILL 1799. Many arbitrators, particularly those who have experience as construction adjudicators have become more pro-active than was normally the case under the old law.

Balancing procedural fairness and cost effective justice is difficult, even for the court.

2.2 The duty to apply the law

The tribunal must decide the parties' dispute in accordance with the substantive law. But it can, if the parties agree, have regard to other considerations, AA1996, s. 46.

- Agreements to apply considerations other than the substantive law are known as equity clauses. Such agreements may also embody concepts from European Jurisprudence such as acting as amiable compositeur, or et aequo et bono.

- A good introduction to such provisions can be found in Deutsche Schachtbau-und

[6] **Margulead**: Tribunal's (international arbitration) refusal to allow claimant a right of reply to oral submissions by respondent, not a serious irregularity. Procedure, for one round only, had been set well in advance of hearing, and no points raised by respondent's oral submissions that were new.

[7] **How**: Arbitrator tried to force a without prejudice meeting of experts attended by himself but without lawyers, on parties with a view to narrowing issues. The meeting did not happen, but court expressed suspicion of it. The count also considered that the arbitrator's procedural interventions had created confusion.

Tiefbohr GmbH v. Ras Al Khaimah National Oil Co[1990] 1 AC 295[8] (CA), reversed by HL on other grounds) and in Amiable composition, a learning curve. Hong-lin-Yu (2000) 17(1) J IntArb 79.

2. THE PARTIES' DUTIES

The parties are required to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes complying without delay with the tribunal's orders or directions and its determinations as to evidential and procedural matters and, where appropriate, taking without delay any necessary steps to obtain the court's decision on a preliminary question of jurisdiction or law, AA1996, s. 40. Note, in Elektrim SA v. Vivendi Universal [2007] 1 Lloyd's LR 693,[9] it was held that s. 40 did not create implied contractual duties, rather statutory duties the remedy for breach of which was provided in the 1996 Act.

The statutory waiver

The parties' general duty is reinforced by the statutory waiver in AA1996, s. 73 by which rights of recourse to the supervisory jurisdiction of the court may be lost if any concerns are not raised promptly before the tribunal. Consider:

Rustal Trading v. Gill &Duffus [2000] 1 Lloyd's Rep 14 (Com Ct). Section 73(1) "is designed to ensure that a party who believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings raises that objection if he wishes to do so as soon as he is, or ought reasonably to be, aware of it. He is not entitled to allow the proceeding to continue without alerting the tribunal and the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense … There is, however, a more fundamental objection of principle to a party's continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he is dissatisfied with the outcome. The unfairness inherent in doing so is, of course, magnified if the defect is one which could have been remedied if a proper objection had been made at the time."

ASM Shipping v. TTMI Ltd [2006] 1 Lloyd's Rep 375 (Comm): Objection taken to tribunal member on ground of bias on the third day of the hearing, but did not recuse himself. ASM "should have indicated that that decision was not acceptable and that an application would be made to the court to have him removed but that the hearing should be concluded, without prejudice to owners' rights. Following the hearing, an application should have been made to the court under section 24. … Instead what happened was a continuing objection to X QC conducted in correspondence. An interim award was made

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8 **Deutsche**: Questions to ask in considering such clauses, did parties 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 was enforceable. It was not an agreement to agree.

9 **Elektrim**: The court rejected the claim that breach of s. 40 could be a repudiatory breach of the arbitration agreement, or that the court had an inherent power to intervene in the case of such a breach.

and owners took it up. … By taking up the award, at the very least, the owners had lost any right they may have had to object to X QC's continued involvement in that part of the arbitral process. … Owners were faced with a straight choice: come to the court and complain and seek his removal … or let the matter drop. The could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A "heads we win and tails you lose" position is not permissible in law as section 73 makes clear."

3. THE TRIBUNAL'S PROCEDURAL AND EVIDENTIAL POWERS

The tribunal's procedural and evidential powers are set out in AA1996, s. 34 (a list largely derived from the UNCITRAL Model law). They include powers concerning the following matters.

Location and timing of proceedings, and languages to be used, AA1996, s. 34(2)(a), (b)
This should suit the convenience of the parties, their witnesses and the tribunal.

Form and timing of case statements, and their later amendment, AA1996, s. 34(2)(c).
The preparation of case statements in considered later in this course. In deciding whether to allow amendments, the tribunal must consider its jurisdiction first, before balancing questions of procedural fairness and cost effective justice.

- The jurisdictional question concerns whether matters advanced by amendments come within the scope of the notice of arbitration under which the tribunal is appointed, Kenya Railways v. Antares Co Pte Ltd [1987] 1 Lloyd's Rep 424 (CA); Leif Hoegh& Co A/S v. PetrolseaInc [1992] 1 Lloyd's Rep 45.

- Even if the notice of arbitration does not encompass the new matters, the parties' agreement may enable the tribunal to consider them, see CIMAR, Rule 3.

- Where there the matters raised by the proposed amendment are within the tribunal's jurisdiction, the tribunal should consider whether, having regard to its general duty, the amendment should be allowed.

- Historically, the general principle is that amendments should be allowed if they are necessary for determining the real question in dispute between the parties or for correcting any defect or error in the proceedings, provided that the party seeking to amend its case statement is not acting in bad faith and the amendment can be made without injustice to its opponent. There being, in general, no injustice if the other party can be compensated in costs or otherwise, Crighton v. Law Car, etc Insurance Co [1910] 2 KB 738.

- If amendments are proposed near during, or even after the hearing, other considerations apply since the opponent may need time to consider and adjust its case to deal with the new matters. The resulting delays may not be cost effective or proportionate to their significance, or may themselves be prejudicial. Consider Ketterman v. Hansel Properties Ltd [1987] AC 189; The

Mortgage Corporation Ltd v. Sandoes, Blinkhorn& Co, the Times, December 27, 1996 (CA).

Disclosure and production of documents, AA1996, s. 34(2)(d)
A document is anything on which information of any description is recorded. Disclosure involves acknowledging the existence (or previous existence) of a document. Production involves allowing inspection of a document and the information it contains and providing, if requested, a copy that document, with the means to access its information.

- The disclosure and production of documents is an important requirement of procedural fairness but can result in unnecessary or disproportionate costs, consider O Co v. M Co [1997] 1 Lloyd's Rep 347; Lovell Partnerships (Northern) Ltd. v AW Construction Plc (1996) 81 Build LR 83.

- A party may wish to rely on certain documents to support its case. It goes without saying that it will produce these to the tribunal, but when? A party may, in order to prepare its case, wish to see certain of its opponent's documents. A party may have documents on which it does not rely but which damage its case or assist its opponent's case. How can the tribunal deal with these requirements?

- The simplest order is for production of documents on which reliance is placed with case statements. In complex cases, it may be appropriate to give the parties a limited opportunity to apply for disclosure and production of further (specific) documents whose existence and relevance to specific issues can be demonstrated. The alternative is CPR standard discovery after case statements are exchanged.[10]

- Consideration much also be given to the timing and mechanics of production and inspection. For a further discussion of this, see JWHinchley, *Best Practices in Document Management for Complex Commercial and Construction Cases*, (2005) ConstLJ 353.

Questioning the parties, AA1996, s. 34(2)(e)
This power is principally concerned with obtaining of further information, other than documents, from a party where that information is necessary to enable its opponent to understand the case it has to meet or to advance its own case. For example clarifications of a party's case (formerly known as requests for further particulars) or requests for general information statement (formerly known as notices to admit and interrogatories) that, although relating to the substantive dispute between the parties, have not been referred to in exchanged documents (eg. case statements).

- Requests for further information about a party's case are often used tactically. But they may be needed ensure the proceedings are conducted fairly, openly, without surprises or unnecessary costs. Consider

[10] This encompasses all documents on which a party relies together with all documents which adversely affect its case or another party's case or which supports another party's case (CPR 31.6, compare CompagnieFinancière du Pacifique v. Peruvian Guano Co. (1882) 11 QBD 55, 62ff) (documents which may fairly lead to a train of enquiry towards these outcomes).

AstrovlanisCompaniaNavieraSA v. Linard [1972] 2 QB 611 (CA); Trust Securities Holdings v. Sir Robert McAlpine& Sons Ltd, The Times, December 21, 1994.

- General requests for information may be appropriate where material information will not otherwise be available by a party or it will only emerge at the hearing and thus disrupt case preparation, considerDetDanskeHedeselskabet v. KDM International Plc [1994] 2 Lloyd's Rep 534.

Application of rules of evidence and the form evidence should take AA1996, s. 34(2)(f)
This power is concerned with two separate matters. First the application of rules of evidence, secondly procedures for exchanging evidence between the parties and presenting it to the tribunal. There are numerous rules of evidence that govern relevance, admissibility, and weight of evidence. A possible categorisation is as follows, see Richard BuxtonQC, The Rules of Evidence as Applied to Arbitrations, 58 JCIArb 229.

The general principle that relevant evidence (logically probative or dis-probative) of a material fact is admissible, unless excluded by the rules of evidence. Can the tribunal disregard this rule? Possibly not, if it is an aspect of procedural fairness? Consider Michaelides v. Wilkinson, The Times, 14th April 19991999 (CA)[11] (small claims arbitration);DPP v. Boardman [1975] AC 421, 457.

- Procedural or exclusionary rules of evidence (the strict rules of evidence) that prevent the admissibility of otherwise relevant evidence, principally the hearsay rule (but see CEA1995) and the best evidence rule.[12] The tribunal's power clearly extends to these rules. Consider Brandeis Brokers v. Black [2001] 2 Lloyd's Rep 359.[13]

- Rules of law based (at least partly) on public policy, that exclude evidence on grounds of privilege (legal professional privilege, self-incrimination, "without prejudice" communications) or public interest immunity. Can the tribunal disregard these rules. Contrast AA1996, s. 43(3), AA1950 and s. 12(1), now repealed? Probably not, since, by AA1996, s. 1, the tribunal is subject to such public policy issues.

- Rules of law that govern how particular matters are proved, for instance the parole evidence rule, the rules for construing written contracts and statutes. Are these part of the substantive law? Consider Pioneer Shipping v. BTPTioxide, the Nema [1982] AC 724, 743.

- General principles concerning the weight of evidence

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11 **Michaelides**: Small claims (county court) arbitrator refused to allow admissible and potentially probative evidence. Award remitted.

12 Under the Civil Evidence Act 1995, questions of hearsay now go to weight not admissibility. Consider also the similar fact rule and the exclusion of no expert opinion evidence.

13 **Brandeis**: Not an irregularity for a tribunal to allow an expert to adduce evidence that would not be admissible in court proceedings.

If the tribunal is intending to exercise these powers, it should do so clearly so that the parties are clear about the implications for case preparation.

As for the form evidence should take, it is usual for as much as possible to be reduced to writing, even where there is an oral hearing, with evidence of fact exchanged before expert evidence, if any.

As for the form evidence should take, it is usual for the tribunal to require as much as possible to be reduced to writing, even where there is an oral hearing, with evidence of fact exchanged before expert evidence, if any.

In less complex matters it may be appropriate for witness statements and expert reports to accompany case statements. If so, care should to be taken to ensure that both parties have an opportunity to adjust these in the light of subsequently emerging material, such as discovered documents; consider Damond Lock Grabowskie v. Laing Investments (Bucknell) Ltd (1993) 60 Build LR 112. In complex matters, this method can result to a proliferation of statements and reports.

Taking the initiative in ascertaining the facts and the law, AA1996, s. 32(2)(g)
This power can be interpreted in various ways.

- Questioning of the parties' representatives and the witnesses to clarify, understand and test the cases presented. This is uncontroversial.

- Use by the tribunal of its own expertise in assessing and evaluating the parties' cases. This has been discussed previously and, if done with care, is acceptable. See JD Weatherspoon v. Jay Mar Estates [2007] BLR 285 (TCC).[14] An arbitrator can use his own experience I reaching his conclusion if it is of a kind and range which one would reasonably except the arbitrator to have, and it is used to evaluate evidence not to introduce new and different evidence. He cannot use his expertise to introduce new evidence, which he fails to allow the parties to address. He cannot make an award based on evidence or argument not presented to him or on a basis contrary to the common assumption of the parties as represented to him. He is entitled to arrive as his award by deploying the presented evidence in a materially different way to that which the parties' experts deployed it, provided the point was put into the arena by them or is a point with which they had an opportunity to deal.

- The tribunal obtaining evidence that the parties have not chosen to put before it (acting like an "investigating magistrate"). The tribunal could not do this under the old law and, given uncertainties over how the evidence obtained can be tested by the parties, it remains problematic. ConsiderRe Enoch and Zaretzky, Bock

[14] **Weatherspoon**: In this case the rent review arbitrator had, using the comparables contended for by the experts, valued fittings at a figure between those contended for by each expert. The court held that this was within the arena being considered, and based on the parties' submissions, it was not something new, thus the s. 68 application failed.

&Co etc [1910] 1 KB 327;[15] Royal Commission on Sugar Supply v. Trading Society KwickHoo Tong (1922) 11 Ll Rep 163 and #Town & City Properties (Development) Ltd v. Wiltshire Southern Ltd [1988] 44 Build LR 106.[16]

- The tribunal acting inquisitorially by taking the conduct of the hearing, in particular the questioning of witnesses, out of the parties' hands. Consider #Norbrook Laboratories v. Tank [2006] EWHC 1055 (Comm); [2006] 2 Lloyd's Rep 485 (a serous irregularity to do this 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, direct unilateral contact with the parties was also to be deprecated).

  In many civil law countries, the tribunal, having considered the parties written cases identifies the issues on which it wishes to hear oral evidence and submissions and which of the parties' witnesses it wishes to question on those issues. The hearing is closer, in structure, to a meeting in an adjudication, than to an adversarially conducted hearing, where each party presents its full case (evidence and submissions) to the tribunal.

  Can the tribunal depart from the conventional pattern for adducing evidence by use of, for example, witness conferencing, hearing experts together? Consider, for example, W Peter, *Witness Conferencing*, (2002) 18 Arb. Int'l. 17.

The extent of oral or written evidence and submissions, AA1996, s. 34(2)(h)
This power is concerned with whether meetings and hearings are necessary and with controlling evidence and submissions presented by the parties.

- Unless the parties agree to a documents only procedure, an oral hearing is generally appropriate where there are material conflicts of evidence that can only be resolved by questioning of those concerned. An oral hearing may also be more cost effective than written exchanges of material and, since the tribunal can question those attending, minimises the risk of misunderstandings.

- The court tends to link procedural fairness with the right to an (adversarial) hearing of the substantive issues (see also AA1996, ss. 38(3), 41(3)). Consider Oakland Metal Co Ltd v. D Banaim& Co Ltd [1953] 2 Lloyd's Rep 192; City Properties (Development Ltd v. Wiltshire Southern Ltd [1988] 44 Build LR 106.

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15 **Re Enoch and Zaretzky, Bock & Co etc [1910] 1 KB 327**: Neither judge nor arbitrator can call witness, it is 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.

16 **Town & City Properties (Development) Ltd v. Wiltshire Southern Ltd** [1988] 44 Build LR 106, 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. Is this regarded as an aspect of natural justice?

- Costs sanctions may be a suitable way of controlling "unnecessary" hearings. Timetabling and guillotines can also focus the parties and their advisors on the key issues (which the tribunal or the parties should identify in advance), particularly during cross-examination.

- The tribunal has the same powers as the court under the CPR to control expert evidence. See the Civil Evidence Act 1972, s. 5, as amended by the Civil Evidence Act 1995, and CPR, Part 35. Such evidence is expensive; it should focus on specific issues and be narrowed through discussions between experts.

Fixing and extending time for complying with directions, AA1996, s. 34(3)
In programming the procedure, considerations of speed should not override those of fairness, Damond Lock Grabowskie v. Laing Investments (Bucknell) Ltd (1993) 60 Build LR 112.

In considering applications to extend time for compliance with directions, matters such as the following may be relevant. Consider The Mortgage Corporation Ltd v. Sandoes, Blinkhorn& Co, the Times, December 27, 1996 (CA).

- Time limits should be observed and non-compliance justified because the parties are entitled to have their dispute resolved with reasonable expedition and non-compliance by a party can cause prejudice its opponent. Nevertheless, procedural fairness should not be overlooked.

- Extensions that do not affect hearing dates are more readily granted then those lead to adjournment of hearing dates, given the likely delays and disruption caused by rearranging hearings. Exceptional circumstances justifying the adjournment of a hearing might include death and serious illness.

Managing arbitral proceedings
The tribunal should be proactive in ensuring that proper procedures are in place for managing communications with the parties, for dealing with applications efficiently, and for organising documents at hearings. The tribunal must avoid uncertainty about what procedures are to be adopted, about what will be considered with at any meetings/hearing and about what will be the outcome of any meeting/hearing.

- In complex matters, the usual steps are as follows. A meeting with the parties shortly after appointment to programme the proceedings at least to exchange of case statements. A meeting after case statements are exchanged, to deal with the remaining procedural stages, including hearing dates, and applications for specific disclosure. A pre-hearing review to check that the parties are prepared and to set procedures and time tables for the hearing. The hearing itself.

- In simple matters it may be possible to dispense with the initial meeting by submitting proposed directions for written comment, or to set a complete programme the proceedings at an initial meeting.

- In the case of applications, the tribunal must decide if these will be dealt with in writing or orally. If in writing, the procedure should minimise the scope for "tit for tat" exchanges. In many cases, a hearing may be quicker, if not cheaper.

It is generally good practice for a tribunal to give procedural decisions at meetings, rather than reserve these for further consideration. This is particularly so where there are a number of interlocking decisions to be made.

2.2 Consolidation and concurrent hearings

If the tribunal has power to order consolidation or concurrent hearings under AA1996, s. 35, the following should be considered. See C Hardy, *Multi-Party Arbitration*, (2000) 66(1) Arbitration 15, M Platte, *When Should an Arbitrator Join Cases?* (2002) 18 Arb. Int'l. 47.

- The rules under which such orders are to be made, for instance, do they concern the tribunal's jurisdiction or merely the exercise of procedural powers. Compare for example, CIMAR, Rule 3 with the former JCT 80 joinder provisions.

- The implications of consolidation and concurrent hearings on the conduct of the proceedings and on the tribunal's award(s).

- The relationship between the parties and their respective claims. Consolidation may be appropriate where the same or joint claimants make claims against a number of different respondents. But if the respondent claims against a third party or another respondent, it is usual to order concurrent hearings for these claims. Consider Trafalgar House Construction (Regions) Ltd v. RailtrackPlc (1995) 75 Build LR 55.

2.3 Appointing experts, legal advisors or assessors

The tribunal may, unless otherwise agreed by the parties, appoint experts or legal advisors to report to it and the parties, or appoint assessors to assist it on technical matters, AA1996, s. 37. The tribunal may allow the appointed person to attend the proceedings.

- An assessor assists the tribunal in discharging its quasi-judicial function. Consider Richardson v. Redpath Brown & Co Ltd [1944] AC 62; Esso Petroleum Co Ltd v. Southport Corporation [1956] AC 218, 222-3.[17]

- An expert reports to the tribunal and the parties on particular issues of fact or opinion, scientific or technical matters or questions of foreign law. Consider Abbey National Mortgages Plc v. Key Surveyors Nationwide Ltd [1996] 1 WLR 1534 (CA);[18] Hussman v. Al Ameen [2000] 2 Lloyd's Rep 83.[19]

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[17] He does not usurp that function or investigate facts or act as the tribunal's witness but educates the tribunal in complex technical matters so it can evaluate the parties' evidence and submissions. He can suggest questions to ask to test evidence or clarify its meaning, and should preferable sit with the tribunal during relevant hearings.

[18] He is, in effect, the tribunal's witness, but his report can include material that would be inadmissible if adduced by a party's witness.

If a tribunal expert is proposed, care should be taken to ensure that his role is clearly defined and understood by the parties and that his work will be cost effective.[20]Before an appointment is made names, programme and terms of remuneration and reference should be discussed with the parties and, preferably, agreed with them.

Commenting on the report

If the tribunal appoints an expert, legal advisor or assessor, the parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by him, AA1996, s. 37(1)(b).

- The parties have, apparently, no right to cross-examine the maker of the report, see Richardson v. Redpath Brown & Co Ltd [1944] AC 62.

- The tribunal is not bound by the report. It should consider, in the light of the parties comments, which may include challenges to the evidence relied on by the expert as well as to his opinions and conclusions, whether to adopt, modify or reject it, Walmsley v. Mundy (1884) 13 QBD 807; Skinner & Edwards (Builders) Pty Ltd v. The Australian Telecommunications Corp [1993] ADRLJ 239.[21]

- The tribunal should not delegate decision making on important issues to the expert; Branderis Brokers v. Black [2002] 2 Lloyd's Rep 359.[22]

Remuneration

The expert, legal advisor or assessor's fees and expenses are part of the arbitrator's expenses, AA1996, s. 37(2). Nevertheless, the tribunal will generally prefer the parties to undertake direct responsibility for these costs, or for will seek security for these costs.

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19 **Hussman**: The tribunal could instruct an expert to assist with Saudi law. But should not have met with expert and discussed the case with him without the consent of the parties. An irregularity, but not serious, Condor Structures v. Kvaerner (1999) ADRLJ 305 applied.

20 If the issues are complex, such an appointment may result in unnecessary duplication with the work of the parties' advisors or a proliferation of experts. Particularly given the variety of roles, other than giving evidence at a hearing, that a party appointed expert performs, for instance, advice on lines of investigation, merits and evidence, information management. Before proposing a legal advisor or technical assessor, the tribunal should bear in mind that, by accepting the appointment, it professed to have the skills necessary to determine the parties' dispute.

21 In deciding which course of action to follow, the tribunal should consider the quality of the report itself and whether the parties were able to provide material for or make comments to the expert during its preparation. If the report appears to be a thorough analytical and, where relevant, scientific assessment of the subject matter of enquiry and the parties were able to submit evidence and make submissions to its author during the course of preparation, the tribunal should lean in favour of adopting it, given the futility and duplication of costs involved in rehearing matters decided by the expert or advisor.

22 **Branderis**: The tribunal considered the expert's report and did not accept all of it; so did not fall foul of this principle.

The tribunal must assess the reasonableness of the remuneration claimed, not merely "rubber stamp" what is sought; Agrimex v. Tradgrain [2003] 2 Lloyd's Rep 537.[23]

3. THE TRIBUNAL'S GENERAL POWERS

The tribunal has various general powers to assist the parties by, for instance preserving evidence, property and assets during the proceedings.

3.1 Security for costs

Under the old law, the tribunal could not order security for costs of an arbitration, although the court could do so. Consider Re Union StearinerieLanza and Wiener [1917] 2 KB 558;[24] AA1950, s. 12(6)(a). The position is now reversed, see AA1996, s. 38(2), 38(3).

- An order for security for costs can only be made against a claimant or counter-claimant.[25]

- It cannot not be made on the ground that the claimant, or counter-claimant is resident or based outside of the United Kingdom, AA1996, ss. 38(3)(a), 38(3)(b).[26]

Deciding the appropriate order

In exercising this power, the tribunal should, after considering relevant evidence and submissions, balance the injustice to the claimant if it is prevented from pursuing a proper claim because ordered to provide security and the injustice to the respondent if security for is not ordered and it is unable to recover its defence costs, if the claim fails. Consider Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] QB 609 (CA); Keary Developments Ltd v. Tarmac Construction Ltd [1995] 3 All ER 534 (CA).[27] There is

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23 **Agrimex**: The GAFTA board was criticised for failing to review the reasonableness and proportionality of what the legal draftsman had claimed.

24 Considering Schedule 1 to the Arbitration Act 1889, which was in similar terms to s. 12(1) of the Arbitration Act 1950. The tribunal's powers were concerned with continuing the proceedings, not staying them.

25 A claimant or counter-claimant is, for this purpose, a party claiming relief in the substantive proceedings, consider Visco v. Minter [1969] P 82.

26 This was to ensure that England and Wales remains an attractive venue for international arbitration and to avoid conflicts with European law. Consider Departmental Advisory Committee (February 1996) pp. 46, 77; SA CoppeeLavalin NV v. Ken-Ren Chemicals and Fertilisers [1995] 1 AC 38; Fitzgerald v. Williams [1996] 2 All ER 171.

27 Circumstances relevant to this balancing exercise include, without going into the detailed merits of the substantive dispute, whether the claim is bona fide, whether the claimant has a reasonably good prospect of success, whether the respondent has admitted either in its case statement or elsewhere that money is due and whether there is an open offer to the claimant from the respondent of a substantial sum. Consideration should also be given to whether the application for

also a growing jurisprudence on the interrelationship between security for costs and the right of access to justice enshrined in the Human Rights Act 1998, see for instance Nasser v United Bank of Kuwait [2002] EWCACiv 556.

It may be that the tribunal has to apply the same principles as a court in deciding whether security is appropriate, Wicketts v. Brine Builders (2001) CILL 1805.[28]

The method for giving security requires careful consideration as payment into court is not an option: bond, trustee stakeholder (the CIArb provides this service)?

3.2 Property owned by or in the possession of a party

Subject to any contrary agreement between the parties, the tribunal may give directions for the inspection, photographing, preservation, custody or detention of property by the tribunal, an expert or a party; or the ordering of samples be taken from, observations made of, or experiments conducted upon property, AA1996, ss. 38(2), 38(4)(a), 38(4)(b).

If the tribunal's powers to give directions in respect of property are deficient, or it is unable to act effectively in respect of its powers, for instance because, although proceedings have commenced, the tribunal is not yet constituted, it may be possible to obtain an appropriate order from the court. See AA1996, s. 44.[29]

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security is being used oppressively, for instance to stifle a genuine claim where the claimant's want of means was due to the respondent's conduct.

If security for costs is sought from a claimant by a counter-claiming respondent, the tribunal should consider whether the same issues will be relied on by the counter-claimant in defending the claim as in advancing its counterclaim. If so, an order giving the claimant security the costs of the arbitration may be inappropriate unless, perhaps, it is prepared to abandon its counterclaim if the ordered security is not provided and the claim struck out. Consider Crabtree (Insulation) Ltd v. GPT Communication Systems (1990) 59 Build LR 43 (CA).

In deciding what security is appropriate, the tribunal should consider details of the costs incurred and those likely to be incurred. Full security need not be ordered, full costs are seldom recovered, even if successful and, as for future costs, the claimant can always come back for more.

[28] **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.

[29] For example:
The tribunal has no power to give directions or orders in respect of property that is not yet in issue between the parties or in respect of which arbitral proceedings have not yet commenced. Contrast the court's wider powers, CPR, Rules 24.1(1)(c), (g), (i) and (j).

The property must be owned by or in the possession of a party to the proceedings. Contrast the court's wider powers, CPR, Rules 24.1(1)(i) and (j).

A sum claimed as damages or in debt is not "property which is the subject of the proceedings or as to which any question arises in the

3.3 Evidence and witnesses

Subject to any agreement between the parties to the contrary, the tribunal can:

- Give directions to a party for the preservation for the purposes of the proceedings of any evidence in its custody or control, AA1996, s. 38(6);

- Direct that a party or witness shall be examined on oath or affirmation and may, for that purpose, administer any necessary oath or take any necessary affirmation, AA1996, s. 38(5).[30]

The tribunal cannot compel the attendance of witnesses or the production of documents that are not in the control of the parties. Neither can the tribunal impose sanctions on a witness for not answering questions put to him while under oath or affirmation.[31] If a party wants to compel a witness to attend or produce documents, a witness summons should be sought from the court under AA1996, s. 43.

3.4 Orders for relief on a provisional basis

If the parties agree, the tribunal can order on a provisional basis any relief that it could grant in a final award, AA1996, s. 39(1).

The most common interim remedies, other than the interim injunction, are provisional orders for the payment of money or the disposition of property between the parties and orders to make interim payments on account of the costs of the arbitration. These are identified as examples AA1996, s. 39(2).

It is arguable that, as in court proceedings, different principles should apply depending on whether the proposed interim remedy is intended to preserve the existing position between the parties until final determination of the substantive dispute between them or

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proceedings". The tribunal cannot, therefore, give directions in respect of property to secure sums in dispute between the parties, except, probably, where the dispute concerns a specific fund held on trust. Consider The Tuyuti [1984] 2 Lloyd's Rep 51; Gebr van Velde etc. v Homeric Marine Services Ltd [1979] 2 Lloyd's Rep 117 (considering the court's powers under AA1950, s. 12(6)).

The tribunal cannot make orders analogous to a freezing (formerly a Mareava) injunction or a search (formerly an Anton Piller) order. See Departmental Advisory Committee (February 1999), p. 45.

The tribunal cannot order the sale of perishable property or to appoint a receiver. Contrast the court's wider powers, CPR, Rule 25.1(c)(v), Schedule 1 (RSC Order 30).

30 If a witness refuses to take an oath or affirmation, the tribunal could refuse to receive his evidence. A better course of action might be to admit the evidence, but advise the parties that the refusal will be taken into account in evaluating its weight.

31 The tribunal can draw adverse inferences from such a refusal unless the witness has a lawful excuse for not answering, such as a claim to privilege.

whether the interim remedy is intended to reflect of the likely outcome of that determination.[32]

The enforcement of an order for provisional relief

The Arbitration Act 1996 provides little guidance about whether an order for relief on a provisional basis is an award or a procedural direction.[33] This distinction is far from academic. It affects both the way in which the tribunal determination should be made and the method of enforcement.

- If the tribunal's determination is an award, it must comply with the requirements for an award and can be challenged, appealed and enforced in the same manner as any other award under AA1996, s. 66.

- If an order for provisional relief is a procedural direction, the tribunal need not give reasons for allowing or rejecting the application for such an order. The tribunal's decision cannot be challenged or appealed, and the order will have to be expressed in peremptory form, before capable of being enforced, as such, by the court under AA1996, s. 42.

There is support for the former analysis in BMBF (No.12) Ltd v. Harland & Wolff Shipbuilding [2001] 2 Lloyd's Rep 227 (CA) where the court, without comment on the matter being dealt with by award, upheld order for provisional relief of $27 million and £3.3 million to be paid in 14 days. This provision was also discussed in Rotenberg v. Sucafina SA [2011] 2 Lloyd's Rep 159, para. 42 to 44 (award made under s. 39 is, unlike one under made s. 47, not final and binding)

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32 In the former case, it is arguable that principles analogous to those considered in in American Cyanamid Co v. Ethicon Ltd [1975] AC 396 should apply. Is there a serious question to hear, is damages an adequate remedy, if not balance of convenience (injustice).

In the latter case, it is more likely that the provisional relief will, in effect, determine the parties' dispute. Arguably, the tribunal should be more concerned with the merits, and only grant the provisional relief if the merits of the claim to which it relates are strong and clear, see cases such as Cambridge Nutrition Ltd v. BBC [1990] 3 All ER 523.

33 The Arbitration Act 1996 makes a distinction between an order for relief on a provisional basis and a subsequent award that finally adjudicates on the merits of the parties' dispute, e.g. AA1996, s. 38(3). This suggests that an order for provisional relief is not an award but merely a procedural direction. Nevertheless, the marginal note to the relevant section refers to an order for provisional relief as a provisional award. Although this is doubtful assistance in interpreting the section (but the Departmental Advisory Committee uses the same terminology, see DAC (February 1996)) and the concept of a provisional award is not used or defined elsewhere in the Act, e.g. AA1996, s. 58, it is possible that the intention was that the an order for provisional relief was intended to be made by award. But one that is binding only until the substantive dispute is determined by the tribunal's final award. The possibility of such an award is recognised in AA1996, s. 58.

4. DEALING WITH UNMERITORIOUS CLAIMS OR DEFENCES

In court proceedings there are a number of ways of dealing with unmeritorious cases without the need for a full hearing, for instance summary judgement, interim payment, or the striking out of statements of case. The tribunal does not have equivalent powers. Consider SL Sethia Lines Ltd v. Naviagro Maritime Corporation [1981] 1 Lloyd's Rep 18; The Modern Trading Co v. Swale Building and Construction [1992] 24 Const L R 59; Departmental Advisory Committee (February 1996), page 45.

4.1 Procedures available to the tribunal

Nevertheless, there are a number of procedures available for dealing with unmeritorious defences in arbitral proceedings.

- If the respondent does not dispute the claim, but relies on a set-off or cross claim, the tribunal can consider if the set-off is excluded by the parties' contract or by operation of law. Consider Federal Commerce etc v. Molena Alpha Inc [1978] 2 Lloyd's Rep 132 (CA); SL Sethia Lines Ltd v. Naviagro Maritime Corporation [1981] 1 Lloyd's Rep 18; The Modern Trading Co v. Swale Building and Construction [1992] 24 ConstLR 59.[34]

- If, after allowing for any matters relied on by the respondent to resist the claim, there remains an amount indisputably due to the claimant, the tribunal can make a part award for that amount in the claimant's favour,The Modern Trading Co v. Swale Building and Construction [1992] 24 ConstLR 59.

- Where the dispute concerns a Construction Contract (Housing Grants, Construction and Regeneration Act 1996, s. 104) and the claimant has obtained an adjudicator's decision in its favour, the court can enforce that decision, pending consideration of the merits of the underlying dispute, Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93.[35]

- If the parties agree to the tribunal having power to make "provisional awards", AA1996, s. 39, the tribunal can order, on a provisional basis, any relief which it would have power to grant in a final award. Unless agreed the tribunal has no power to make such a "provisional award",#SL Sethia Lines Ltd v. Naviagro Maritime Corporation [1981] 1 Lloyd's Rep 18.[36]

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[34] Because, for instance, it is not advanced in good faith and on reasonable grounds, or is insufficiently connected with the claim to give rise to a set off. The tribunal should consider ordering an early preliminary hearing to determine the claim and whether the cross-claim should be allowed as a set off. If the claim is proved or admitted and the tribunal determines that the cross-claim cannot be relied on as a set off, it can make an award for the amount claimed. The claimant can then enforce this award while the cross-claim proceeds to a full hearing on the merits.

[35] This has, in effect, replaced the option under the old law, of commencing proceedings in court to seek summary judgement or an interim payment in the face of an application for a stay.

[36] Under the old law, the tribunal had no power to order relief on a

Different considerations apply where it is a claim or part of a claim, rather than a defence that is said to be unmeritorious. Here the tribunal's powers are extremely limited. If it was argued that a claim was unsustainable on the alleged facts, the tribunal could order a preliminary issue to determine, on the basis of those facts, whether the claim was sustainable in law.[37]

5. SANCTIONS AVAILABLE TO THE TRIBUNAL

Under the old law, the tribunal had a range of common law sanctions it could impose to ensure that such conduct did not prevent the determination of the substantive dispute between the parties, seeMustill& Boyd (1989), p. 537ff; The Myrion [1969] 1 Lloyd's rep 411;#Bremer Vulkan v. South India Shipping Corporation Ltd [1981] AC 909, 987. See also AA1950, s. 13A, now repealed. These could be augmented by the court, AA1979, s. 5, now repealed.[38]

The tribunal could not, merely because one party was in default or refused to participate, proceed directly to an award in the other party's favour, without consideration of the merits, but note AA1950, s. 13A (inserted 1990), now repealed.[39]

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provisional basis, for instance payment of amounts to the claimant on account of its claim, merely because it considered that, if the claim proceeded a hearing, an award for that relief would be made in the claimant's favour.

37 In other cases, the tribunal will have to proceed to a full hearing of evidence and submissions or, if the material facts in dispute are limited and readily identifiable, to a determination of those facts by way of preliminary issue.

38 If directions not complied with, the tribunal could prevent that party relying on allegations or evidence which those directions concerned.

In the face of total inactivity, the tribunal could fix a date for the hearing of the substantive dispute between the parties, and direct that evidence or representations would not be admitted that had not been advised to the other party in accordance with the tribunal's procedural directions.
If a party failed to attend, the tribunal, having previously notified the parties that it would proceed in this way, could continue with the hearing or meeting in the absence of that party and hearing representations and evidence from the party attending and considering any material from its opponent make its determination. The procedure to be followed was considered in Fairclough v. Vale of Belvoir Superstore (1990) 56 Build LR 74.

39 Under the old law, neither the court nor, until 1990, the tribunal could prevent inactive proceedings being revived, even if, because of the claimant's inactivity, prejudice had been caused to the other party, for instance because it had disposed of relevant material or lost contact with potential witnesses, Bremer Vulkan v. South India Shipping Corporation Ltd [1981] AC 909; Wilson (Paal) & Co A/S v. Partenreederei Hanna Blumenthal [1983] 1 AC 854 (not a repudiatory breach or frustrated) The tribunal was given statutory power to dismiss a claim in such circumstances by AA1950, s. 13A inserted by s. 102 of the Courts and Legal Services Act 1990, now repealed.

The position under the Arbitration Act 1996 is similar. But the tribunal's common law powers have been codified and in two situations, stale claims and failures to provide ordered security, the tribunal has statutory power to dismiss a claim without consideration of the merits. The tribunal's powers are also underpinned by the parties' duties, AA1996, s. 40.

5.1 Dismissing a stale claim

Unless otherwise agreed, the tribunal can deal with stale claims without consideration of the merits, under AA1996, s. 41(3). To do so there must be "inordinate and inexcusable delay" by the claimant in pursuing its claim and either this delay "gives rise, or is likely to give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim" or this delay "has caused, or is likely to cause, serious prejudice to the respondent".

This is, in effect a codification of the "want of prosecution" limb of Birkett v. James [1978] AC 293, 318[40] and the tribunal must, apply the same principles as the court. Lazenby v. Nicholas [1995] 1 WLR 615.[41]

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40 In deciding whether there has been inordinate and inexcusable delay on the part of the claimant in pursuing its claim, the tribunal must consider two matters. First, has there been delay on the part of the claimant in prosecuting its claim. Delays before commencement of proceedings cannot be considered. Nevertheless, the greater such delay, the greater the obligation to prosecute the claim with diligence, and the shorter the period of delay that can be regarded as inordinate, after they are commenced, Department of Transport v. Chris Smaller (Transport) Ltd [1989] 1 All ER 897 (HL). Secondly, is this delay both inordinate and inexcusable. Inordinate means materially longer than the time usually regarded acceptable by the legal profession. Inexcusable means inexcusable when viewed from the respondent's perspective or, at least, objectively, after making a reasonable allowance for matters such as illness and accidents. The best excuse is that the delay it occurred with the agreement of the opponent.

In addition to such an inordinate and inexcusable delay there must be unfairness in the proceedings or prejudice to the respondent. This should not be presumed. Matters relevant to the fairness of the proceedings include the effect of the delay on the memory or availability of witnesses, or death of relevant individuals and dissolution of relevant companies, during the period of delay. Although, in commercial matters, where contemporaneous records are available and witness statements have been taken, the failing memory of witnesses may be a less important consideration than would otherwise be the case. Prejudice to the respondent can include prejudice to its business interests or professional reputation, provided this goes beyond the anxiety that accompanies all litigation. A substantial increase in the respondent's financial risks may also be sufficient as, for instance, where the delay has increased the value of a damages claim or has resulted in the respondent loosing insurance cover to prosecute its defence.

41 **Lazenby**: Even if the grounds for summary dismissal are made out, it is seldom appropriate to strike out a claim before the end of the

Such applications are generally determined on written evidence and oral submissions. If the tribunal does strike out the claim, it must do so by reasoned award which can challenged and appealed in the same manner as any other award of the tribunal.[42]

5.2 Dismissing a claim for a failure to provide ordered security for costs

If, without showing sufficient cause, a claimant fails to comply with an order by the tribunal requiring it to give security for the costs of the arbitration, its claim can be dismissed without consideration of the merits, provided the following procedure is adopted, AA1996, ss. 41(5), 41(6).

- The tribunal makes a peremptory order requiring the ordered security to be provided within a stated period.[43]

- If this peremptory order is not complied with, the tribunal may make an award dismissing the claim.[44]

The tribunal's decision to dismiss the claim must be made by reasoned award. It can be challenged and appealed in the same manner as any other award of the tribunal.[45]

It is unclear whether the tribunal can order a stay, pending security. Even if it has the power, a stay may not be appropriate, see Departmental Advisory Committee (February 1996), p. 45.

5.3 Continuing the proceedings in the absence of a party, evidence or submissions

If a party fails to attend or be represented at an oral hearing of which it has been given

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relevant limitation period. To do so is seldom cost effective since the tribunal's award striking out the claim is not a determination of the merits of the claim, and would not, in consequence, prevent the claimant commencing a new arbitration in respect of the same matter. (But note CIMAR, Rule 11.6).

42 There is no need for the tribunal's decision to be made by award if it concludes that the claim should not be dismissed. Moreover, an award may be inappropriate in such circumstances as it would result in the tribunal being *functus officio* in respect of the matters dealt with and would create an issue estoppel between the parties. This could be inconvenient if further delays occurred and a further application made to dismiss the claim.

43 As with any peremptory order, this should only be made following submissions from the parties and, in particular after giving the party in default an opportunity to show cause why the original order has not been complied with.

44 This power is discretionary and the tribunal should not regard the dismissal of the claim as an automatic consequence of the claimant's failure to comply with the peremptory order. Rather, the tribunal should invite and consider representations from the parties on whether the claim should be struck out.

45 There is, however, no requirement for the tribunal's decision to be made by award if it concludes that the claim should not be dismissed. It is unclear whether the reasons must extend to the original decision to order security and whether on appeal that decision could, itself, be disputed. The decision to order security could be attacked, after the award was made, on grounds of serious irregularity, compare AA1996, s. 68 and s. 69.

due notice, the tribunal my continue with the proceedings in the absence of that party and make an award on the basis of the evidence before it. The tribunal can also proceed in this way where matters are to be dealt with in writing, and a party fails, after due notice, to submit written evidence or make written submissions, AA1996, s. 41(4).[46]

- The tribunal must take care to ensure that the parties have been notified of its intention to proceed in the absence of attendance or submissions or evidence from a party. In the case of a hearing, this almost invariably means an adjournment.

- If proceeding in the absence of a party, the tribunal must take care not become an advocate for that party or to advance a case on its behalf. If the tribunal has any substantial criticisms with the evidence or submissions being advanced by the attending party, it should raise those criticisms so that they can be dealt with. Consider Fox v. Welfair [1981] 2 Lloyd's Rep 514 (CA); #Fairclough v. Vale of Belvoir Superstore (1990) 56 Build LR 74.

5.4 The tribunal's power to make peremptory orders

If a party does not comply with an order or direction made by the tribunal, the tribunal may impose a variety of sanctions. The imposition of these sanctions is, however, dependant on the tribunal having previously issued a peremptory order in respect of the same matter (sometimes referred to as an "unless order"), AA1996, s. 41(5), 41(6), 41(7).

- Unless the parties agree otherwise (see CIMAR, Rule 11.3), the tribunal can only make a peremptory order if, without showing sufficient cause, a party fails to comply with a previous order or direction.[47]

- If a peremptory order is made, it should be clearly and unambiguously expressed both as to what must be done, which should be in similar terms to the original order, and when.

- It is also good practice to identify that an order is peremptory and state the consequences that may follow if it is not observed.[48]

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[46] This is sometimes referred to as proceeding *ex parte*, although the terminology is incorrect as the absent party must have been given notice of the hearing or meeting and of the tribunal's intention to proceed in this way. In court proceedings, the term *ex parte* has been replaced by the term proceeding without notice, CPR, Rule 25.3. This is not what is envisaged under AA1996, s. 41(4).

[47] A peremptory order should not be made without giving the party in default an opportunity to explain that default and make submissions on why it is inappropriate. In practice, the party in default will also be seeking an extension of time for compliance with the original order and it is usual for the tribunal to consider this application at the same time the question of whether or not a peremptory order is appropriate.

[48] See Practice Direction (Peremptory orders: Form) 1986] 1 WLR 948. Although this Practice Direction has not been carried over into the new Rules of Court, similar principles apply. See CPR, Rule 3.1(3). The consequences should be selected from AA1996, s. 41(6) and 41(7), as appropriate. Not only can this be regarded as a requirement of

5.5 **Sanctions for failure to comply with a peremptory order**

If a party fails to comply with a peremptory order, other than one concerned with the provision of security for costs, the tribunal may impose the following sanctions, see AA1996, s. 41(7). Unless the parties have agreed otherwise, these sanctions cannot be imposed until after a peremptory order has been made breached. See comments on this in Wicketts v. Brine Builders (2001) CILL 1805.

- The tribunal may direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the peremptory order.[49]

- The tribunal may draw such adverse inferences from the "act of non-compliance" as the circumstances justify.[50]

- The tribunal may proceed to an award on the basis of such materials as have been properly provided to it.[51]

- The tribunal may make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.[52]

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procedural fairness, but it means the parties can make submissions on the consequences that should follow from a failure to comply with the peremptory order at the time it is made. This will avoid the need for further submissions if the order is not complied with, and will force the party against whom the order is directed to take the initiative in persuading the tribunal why those consequences should not be imposed, despite its failure.

49 If imposed, this sanction will prevent a party from advancing that part of its positive case that relates to the default.

50 The tribunal could, for instance, draw the inference that documents were not produced because they were adverse to that party's case.

51 This power, which is similar to the tribunal's power to proceed in the absence of a party, would enable the tribunal to dispense with the remaining procedural steps and fix an early date for the hearing of the parties' dispute on the basis of the material previously exchanged (see CongimexSARL (Lisbon) v. Continental Grain Export Corp (New York) [1979] 2 Lloyd's Rep 346). This might, however, prejudice the other party, by disrupting its preparation for the hearing, and deprive both parties of the benefit, in preparing their respective cases, of later procedural steps. In consequence, it is unlikely to be appropriate unless there has been a history of repeated and wholesale disregard of the tribunal's procedural directions, and there is little to gain from continuing with the procedural stages of the arbitration.

52 The reason for this sanction is unclear. The tribunal has a general power to allocate and determine costs. There is no reason why, if considered appropriate, the tribunal could not hear submissions on and determine as well as allocate the costs of any procedural application at the end of that application, rather than leave the determination those costs to the end of the proceedings, as does the court.

The tribunal, unlike the court, cannot make an award on the substantive dispute in favour of one party without consideration of the merits, merely because its opponent has failed to comply with a procedural direction or a peremptory order. The only exception is where the peremptory order concerns the provision of security for the costs, AA1996, s. 41(6).

Even where a peremptory order is not observed the imposition of sanctions, even those specified in the order, is not automatic. The tribunal must consider, in the exercise of it discretion, whether they are appropriate, see AA1996, s. 41(7).
