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PART D

AWARDS AND THEIR DRAFTING

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A: THE PURPOSE, EFFECT AND ESSENTIALS OF AN AWARD

1. The purpose of an award:
 - 1.1 To **finally** dispose of all disputes (claims and issues) referred to the arbitrator for determination in that award, consider Cobelfret v. Cyclades [1994] 1 Lloyd's Rep. 28, including costs (allocation/determination), unless reserved for further argument. The tribunal cannot reserve matters for consideration by others, or, unless a part(ial) award, for its later determination; Ronly Holdings v. JSC Zestafoni [2004] BLR 323 (Com Ct).¹
 - 1.2 To be capable, without more, of **enforcement** and execution by action and/or under s. 66, Arbitration Act 1996 (payment, declaration, specific performance, s. 48, Arbitration Act 1996). Consider Margulies Ltd v. Dafnis Thomaides Ltd. [1958] 1 WLR 398. Also consider enforcement overseas under the New York Convention 1958 (see Article V).
 - 1.3 Except where the parties agree otherwise to give **reasons** in sufficient detail to enable the court, on challenge or appeal, to properly consider that challenge or appeal, consider s. 70(4), Arbitration Act 1996.
2. Parti(ial) awards and agreed awards.

¹ **Ronly**: Arbitrator held that a sum of \$16,083,834.57 was outstanding to Ronly, but ordered a lesser sum to be paid, because of credits originally offered by JCSZ on other contracts, but then withdrawn. Held: Tribunal should have ordered payment of the shortfall. Obiter. Arbitrator does, or should have jurisdiction to consider set offs available as defences even if arise under different contracts, but would have to determine their validity as a defence by considering those contracts.

- 2.1 A final award determines all substantive disputes and ancillary matters in the arbitration. The tribunal may also make awards at different times dealing with different issues (“parti(ial) awards”), AA1996, s. 47.²
- 2.2 Irrespective of whether the tribunal is making a final or parti(ial) award, both it and the parties must be clear as to the matters to be dealt with in that award. Where a parti(ial) award is made the matters the tribunal should clarify the matters it is to determine, Lovell Partnerships (Northern) Ltd v. AW Construction Plc (1996) 81 Build LR 83. Care should be taken to ensure that a part(ial) award is worthwhile: Consider, H Byam-Cook, *Preliminary Issues in Arbitration Proceedings and the Need for Caution*, (2002) 18 Cost LJ 391.
- 2.3 If the parties settle their dispute than, unless they otherwise agree, the tribunal terminates the substantive proceedings and, if requested by the parties and not objected to by the tribunal, records the settlement in the form of an agreed award, AA1996, s. 51. Once the tribunal terminates the proceedings then, subject to any contrary provisions in its agreed award and to its power to allocate and determine costs, if the parties have not settled these matters, the proceedings are at an end, AA1996, s. 51(5).³
3. The difference between procedural directions and awards.
- 3.1 An award can be distinguished from procedural orders or directions in that, subject to any contrary agreement between the parties and any available rights of appeal or challenge, an award finally determines the matters it concerns; AA1996, s. 58, Charles M Willie & Co (Shipping) Ltd v. Ocean Lasar Shipping Ltd [1999] 1 Lloyd’s Rep 225.
- 3.2 Although most awards are concerned with determining substantive disputes between the parties, an award is also necessary to determine costs and interest, AA1996, ss 61(1), 63(3), 59 and to dismiss a claim for failure to comply with a peremptory order for security for costs or for “want of prosecution”, AA1996, ss. 41(3) and 41(6).
- 3.3 The tribunal may have power to render any decision, for instance a procedural decision or a decision on evidence, by award; Charles M Willie & Co (Shipping) Ltd v. Ocean Lasar Shipping Ltd [1999] 1 Lloyd’s Rep 225 (this is not, generally, a good idea).⁴

² Preliminary issues not always desirable, if not determinative or on assumed facts. Consider Compagnie D'Armement Maritime SA v. Compagnie Tunisienne De Navigation SA [1971] AC 572, discussed in Mustill & Boyd. French law, decided by HL, irrelevant to eventual decision.

³ Although there is no obligation to do so, it is usual to ask the tribunal to embody terms of settlement in an agreed award. If the agreed award is in the form of a Tomlin Order, it should provide for the proceedings to be stayed (not terminated) except for the purpose of carrying the terms of the schedule into effect.

⁴ **Charles:** Tribunal will be functus officio. Even if a procedural decision is made by award, the court may not entertain an appeal if it consider the decision to be one of pure discretion or the question of law being insufficiently important to merit leave to appeal being

4. The effect of an award on the tribunal.

- 4.1 Once the tribunal makes an award it is *functus officio* as regards the matters determined by that award. The tribunal has no power to alter its award or to re-open the proceedings in respect of the matters determined by it, unless consented to by the parties or provided for by the Arbitration Act 1996; see Fidelitas Shipping Co Ltd v. V/O Exportchleb [1965] 1 Lloyd's Rep 223 (CA).
- 4.2 Correcting errors: Unless otherwise agreed by the parties, the tribunal has a limited statutory jurisdiction to correct mistakes, errors and omissions in its award either on its own initiative or on the application of a party, AA1996, s. 57. But it must do so within the time scales provided for in that section or agreed by the parties.
- 4.3 In addition to being able to correct an award to remove any clerical mistake or error arising from an accidental slip or omission (which does not enable it to have second thoughts about matters of conscious judgement or to correct errors resulting from a mistaken appreciation or application of the evidence or the law, Mutual Shipping Co v. Bayshore Shipping Corporation [1985] 1 Lloyd's Rep 189 (CA), the tribunal may correct an award so as to clarify or remove any ambiguity in the award. The tribunal may also make an additional award in respect of any claim (including a claim for interest or costs) that was presented to the tribunal but not dealt with in the award.⁵ Consider Garnett Shipping v. Eastrade Corp [2002] 1 Lloyd's Rep 713.⁶
- 4.4 In Torch Offshore v. Cable Shipping [2004] 2 Lloyd's Rep 446 (Com Ct), it was said that s. 57(3)(b), which uses the word claim, did not apply to issues, only claims; that is, a head of claim for damages or some other relief, such as interest or costs, presented to the Tribunal but not dealt with it. Section 57(3)(a) could, however, be used to ask the Tribunal for clarification of an issue, or to request further reasons or reasons where none existed, at any rate where, without such

granted. Thus an award on a procedural or evidential matter will only be appropriate, if at all, where the decision raises a point of principal of such importance that the court should have an opportunity to consider it and there is no better way for bringing the matter before the court.

⁵ Any correction must be made within 28 days of the date on which the application was received by the tribunal or, where the correction is made on the tribunal's own initiative, within 28 days of the date of the award.. If an additional award is to be made to deal with an omitted claim, the additional award must be made within 56 days of the date of the original award, AA1996, ss. 57(5), 57(6). The time scales could cause difficulties. In many cases, the tribunal will exercise a lien on its award and it may not be released to the parties until several weeks after it is made. In consequence, errors may not be drawn to the tribunal's attention within the statutory period.

⁶ Garnett: Under s. 57 a tribunal can correct mistakes due to a misreading of calculations provided by a party and follow that correction though to the amount awarded. Under LMMA rules it could go further and correct a cost award made on the basis of this erroneous amount.

reasons there was ambiguity in the award, such ambiguity being apparent in a genuine disagreement about whether the issue had been decided.

- 4.5 Awards remitted by the court: Where the court remits an award to the tribunal, the tribunal must make a fresh award in respect of the remitted matters within three months of the date of the court's order for remission or such other period as the court directs, AA1996, s. 71(3). On remission the tribunal's jurisdiction revives only to the extent that is necessary to deal with the remitted matters, Interbulk Ltd v. Aiden Shipping Co Ltd [1986] 2 Lloyd's Rep 75 (CA).
- 4.6 The effect of procedural orders and directions: Unless made by award, the tribunal is not *functus officio* in respect of matters dealt with by procedural orders and directions. It can re-consider them; Charles M Willie & Co (Shipping) Ltd v. Ocean Laser Shipping Ltd [1999] 1 Lloyd's Rep 225.
5. The effect of an award on the parties and those claiming through or under them.
 - 5.1 Unless otherwise agreed by the parties, and subject any available right of challenge or appeal or review, an award is final and binding both on the parties and on any persons claiming through or under them, AA1996, s. 58.
 - 5.2 If an award decides the merits of a claim in damages (not debt),⁷ it creates a fresh cause of action. This extinguishes the cause of action arising from the breach to which the damages relate, Richard Adler v. Sontos (Hellas) Maritime Corporation [1984] 1 Lloyd's Rep 296.
 - 5.3 It is probable that an award creates a case of action estoppel, such that neither party can bring a new claim against the other in respect of any cause of action that is determined by that award, HE Daniel Ltd v. Carmel Exporters & Importers Ltd [1953] 2 Lloyd's Rep 103.
 - 5.4 An award creates an issue estoppel, such that neither party can re-litigate or arbitrate any issue determined by that award, Fidelitas Shipping Co v. V/O Exportchleb [1965] 1 Lloyd's Rep 223 (CA). Consider Lincoln National v. Sun Life [2005] 1 Lloyd's Rep 606 (CA) (tribunal not bound by issue decided by Award of a different tribunal because conclusion on that issue was *obiter*, not necessary for its decision, also because the parties were different in the two arbitrations).⁸

⁷ Claims in debt are not extinguished, the original cause of action survives but by issue estoppel the award is conclusive as to quantum.

⁸ Lincoln: The principles of *res judicata* and issue applied between parties to the original proceedings or their privies. Nothing gave a civil judgment, still less an arbitral award evidential value in establish facts that need to be proved in separate proceedings against a stranger to the original proceedings. But court accepted that such an award by be relevant to the assessment of damages if liability were proved, see Stargas v. Petredec Ltd [1994] 1 Lloyd's Rep 414 (Com Ct), or where parties had agreed to be bound by determination in other proceedings. Neither did court consider it would be just that a third party could enjoy the benefit of such an award, while disclaiming the bits it did not like. Note court also considered that it was only

- 5.5 The principles in Henderson v. Henderson⁹ and in Conquer v. Boot¹⁰ apply to an award subject to the qualification that they only apply to matters encompassed by the Notice of Arbitration. A Notice of Arbitration need not encompass all the disputes between the parties at the time.
- 5.6 An arbitral award that does not decide the merits of the parties' dispute does not, in general, bar the parties from re-litigating or re-arbitrating that dispute. The parties are, however, estopped from disputing the bare essence of what the award decided.¹¹
- 5.7 Apart from as provided by s. 58, Arbitration Act 1996, it generally has no effect on third parties; Lincoln National v. Sun Life [2005] 1 Lloyd's Rep 606 (CA).
6. The formal requirements of an award.
- 6.1 It must comply with any prescribed requirement (time, form) imposed by the parties by statute or court order, see Arbitration Act 1996, ss. 52 (form of award), 50(1), 71(3) (time).
- 6.2 Subject to contrary agreement between the parties, it must be in writing signed by the arbitrator, and must state the date on which made and the seat (see Arbitration Act 1996, s. 3) of the arbitration, Arbitration Act 1996, ss. 52(3), (4), (5).
- 6.3 It should identify the parties and any statutory or other framework (rules) governing the proceedings.
- 6.4 It should set out briefly and uncontroversially how the arbitrator came to be writing the award and, briefly, the procedure adopted. Arguably, has become a

issues, not facts, that could found an issue estoppel.

⁹ **Henderson:** parties must exercise reasonable diligence in bringing forward their whole cases and will not, other than in exceptional circumstances, be allowed to open, in subsequent proceedings between them, matters that might have been brought forward as part of the earlier litigation, but was not through negligence, inadvertence or accident. Such matters are not, necessarily limited to issues relating to causes of action encompassed by the originating process but can include causes of action that ought to have been included in the originating process, or counterclaims that could have been brought in the same proceedings

¹⁰ **Conquer:** [1928] 2 KB 336. A claimant in legal proceedings must bring forward its whole claim in damages in relation to each cause of action relied upon. A claimant cannot bring subsequent proceedings seeking further or different damages in respect of the same cause of action as has already been the subject of a previous award of damages by the court.

¹¹ By analogy with the reasoning in Pople v. Evans [1969] 2 Ch 255. Thus an award dismissing a claim for "want of prosecution" or for a failure to provide security for costs will not, unless otherwise agreed by the parties, see CIMAR Rule 11(6), prevent the claimant commencing fresh arbitral proceedings in respect of the same claim.

requirement under the Arbitration Act 1996, see ss. 67, 70(4). This can conveniently be done in recitals.

- 6.5 It must contain in a concise form the arbitrator's orders and directions (the operative or dispositive part) on the matters he was asked to determine, usually the granting of remedies or the dismissal of claims for remedies, consider s. 48, Arbitration Act 1996.
 - 6.6 If a reasoned award is required the body of the award will set out the arbitrator's findings of fact, determinations of law and conclusions on the issues referred to his decision.
 - 6.7 The attestation section will state when the award was made and include the arbitrator's signature. It is usual practice for the arbitrator's signature to be witnessed. A backsheets gives the document a professional look.
7. The substantive requirements of an award.
- 7.1 It should be **cogent**. It should express the arbitrator's orders and directions as imperatives not expectations.
 - 7.2 It should be **complete**.
 - 7.2.1 It should adjudicate on and dispose of all the matters referred for determination that remain in issue although, provided it can be demonstrated that this has been done, it may not be necessary to deal separately and expressly with each dispute concerning these matters.
 - 7.2.2 It should not purport to decide issues that were not referred to the arbitrator for determination (excess of jurisdiction).
 - 7.3 It should be **certain**.
 - 7.3.1 It should be explicit as to the matters to be determined and as to the arbitrator's findings and determinations in respect of those matters and, in so far as necessary, as to the arbitrator's reasoning.
 - 7.3.2 The effect on the parties of the arbitrator's award should be clear and precise. The parties must know what the arbitrator's decision is and how it affects them, who must do what and when.
 - 7.4 It should be **coherent** (logical), without repetition, contradiction or ambiguity.
 - 7.5 It should be **final**. It should not leave issues to be decided by a third party or, unless an interim award, for later determination by the arbitrator. Ministerial matters, for instance the working out of interest calculations may, arguably, be left to others.
8. The award should comply both with the substantive law and procedural natural justice.

9. Prior to the Arbitration Act 1996, the requirement for reasons, if required, was that these should be stated in sufficient detail for the court to consider any question of law arising out of the award.

"The statutory duty of the arbitrator under the 1979 Act is not to inform the parties why they have won or lost but to place the Court in a position to decide whether or not there is a question of law arising out of the award which merits the grant of leave to appeal and, if so, to decide whether or not there is a question of law arising out of the award which merits the grant of leave to appeal and, if so, to decide the appeal." Bingham LJ, The Difference between a Judgement and a Reasoned Award.

10. Under the Arbitration Act 1996, the scope of the duty to give reasons may be wider. The court's power to order reasons relates not simply to appeals on points of law, Arbitration Act 1996, s. 69 (unless the parties have agreed to dispense with reasons, see s. 69(1)) but to challenges concerning serious irregularity, s. 68 and substantive jurisdiction, s. 67.
11. Even if reasons are not required, it may be desirable to formulate and record reasons in a separate document as part of the award making process. But note Mutual Shipping Corp. v. Bayshore Shipping Co. [1985] 1 Lloyd's Rep. 189.¹²
12. The making of an award is, or should be a rational process, Trave Schiffartsgesellschaft mbH v. Ninemia Maritime Corporation [1986] QB 802, at 807, 808. The parties are entitled to know why they have won or lost, or why a full claim has not been awarded.
13. Consideration should be given to the audience for the award. The parties, a judge exercising a supportive or supervisory role, third parties, eg. insurers, whose interests may be affected by it. Many of these will know nothing about the dispute, beyond what is set out in the Award. It must be able to stand alone as document.
14. Finally, the award should be professional. It should be comprehensible. It should be seen to seriously address and answer the respective contentions of the parties. It should be well written and presented.

B: WHEN SHOULD A REASONED AWARD BE GIVEN?

15. The award must contain the reasons for it unless the parties have agreed to dispense with reasons, s. 52(4), Arbitration Act 1996. Since the presumption is now in favour of reasons the guidance given by Staughton J in Warde v. Feedex International [1984] 1 Lloyd's Rep 310, in respect of the former legislation is no longer applicable.

¹² **Mutual Shipping**: The purpose of clausured reasons was to prevent reliance on such reasons as a ground for setting aside an award for error on its face. But note, in Tame Shipping v. Easy Navigation [2004] 1 Lloyd's Rep 626, it was held that such reasons could be adduced as evidence before the court in the case of an alleged serious irregularity.

C: IF REASONS ARE REQUIRED WHAT REASONS SHOULD BE GIVEN

16. Writing a reasoned award involves telling, in so far as relevant to the issues in dispute, the story you have found to have occurred with a conclusion stating what, as a result of this story, the parties must do; their resulting rights and liabilities. The following guidance from case law relates to the former legislation. While useful, it must be considered in the light of the wider purpose given to reasons under the Arbitration Act 1996.

16.1 Donaldson LJ, Bremer Handel Gasellschaft v. Westzucker (No.2) [1981] 2 Lloyd's Rep 130:

"All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award'

For example, it may be convenient to begin by explaining briefly how the arbitration came about - 'X sold to Y 200 tons of soyabean meal on the terms of GAFTA Contract 100 at US. \$Z per ton c.i.f. Bremen. X claimed damages for non-delivery and we were appointed arbitrators'. The award could then briefly tell the factual story as the arbitrators saw it. Much would be common ground and would need no elaboration. But when the award comes to matters in controversy, it would be helpful if the arbitrators not only gave their view of what occurred, but also made it clear that they have considered any alternative version and have rejected it, e.g., 'The shippers claimed that they shipped 100 tons at the end of June. We are not satisfied that this is so', or as the case may be. 'We are satisfied that this was not the case'. The arbitrators should end with their conclusion as to the resulting rights and liabilities of the parties. There is nothing about this which is remotely technical, difficult or time consuming.

It is sometimes said that this involves arbitrators in delivering judgements and that this is something which requires legal skills. This is something of a half truth. Much of the art of giving a judgement lies in telling a story logically, coherently and accurately. This is something which requires skill, but it is not a legal skill and it is not necessarily advanced by legal training."

16.2 "A reasoned award need not take any particular form; although a typical form of reasoned award is one in which the arbitrator, having set the general scene and identified the dispute between the parties, then sets out the parties' respective contentions, makes any further findings of fact which may be desirable for the purpose of considering those contentions and then sets out his conclusions and reasons for reaching those conclusions." Robert Goff J Schiffartsagentur Hamburg Middle East Line v. Virtue Shipping Corp. [1981] 2 All ER 887.

16.3 "It is not a technical operation. Imagine that you are telling a friend about the arbitration. he would want a brief outline of how the arbitration arose and what is the nature of the dispute. He would then want to know in a little more detail what really happened in so far as it is relevant to the point actually in dispute. Finally,

he will want to know why, in the circumstances as you found them, the claimant succeeds or fails, although that would usually be quite obvious once you had described what really happened." Sir John Donaldson (1975).

- 16.4 "A reasoned award is usually requested in order to lay the foundation for a possible application for leave to appeal. An arbitrator should therefore remember to deal in his reasoned awards with all issues which may be described as having a 'conclusive' nature, in the sense that he should give reasons for his decisions on all issues which lead to conclusions on liability or other major matters in dispute on which leave to appeal may subsequently be sought." Universal Petroleum Co. Ltd. v. Handels und Transportgesellschaft mbH [1987] 2 All ER 737.
- 16.5 "The function of a reasoned award is not simply to identify and determine a point which the arbitrators ultimately considered to be decisive. It is to enable the parties and the court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive point and (b) to understand the facts and so consider the position with respect to an appeal on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each, including those which the arbitrators may not themselves have thought to be determinative. Further, it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made concerning assertions of fact or law: the arbitrator's findings and brief reasoning on them are what matters." Transcatalana v. Incobrasa Industrial [1995] 1 Lloyd's Rep 215, Mance J.
17. From the above it can be seen that reasons should comprise:
- 17.1 A background narrative explaining the context of the dispute and setting out relevant contract terms and extracts from documents. In a simple dispute the narrative may be where all the factual findings are made.
- 17.2 The issues, it may be convenient to list them, that have to be addressed in order to determine whether the claims and positive defences succeed or fail.
- 17.3 Dealing with each issue in turn:
- A summary, a précis, of the parties' submissions on issue.
 - The Arbitrator's further findings of fact and determinations (holdings) on law relevant to the issue.
 - The conclusion on the issue that follows from applying the law as held to the facts as found.
- 17.4 A section concerned with the remedies that do or do not flow from the arbitrator's conclusion on each issue.
18. The following guidance is derived and developed from that given by Bingham LJ in an unpublished paper "The Difference between a Judgement and a Reasoned Award" given at a CI Arb Conference in the 1990s.

Findings of fact

- 18.1 An arbitrator does not need to give reasons for his findings of fact (but now consider ss. 68, 70(4), Arbitration Act 1996). His primary findings of fact are final and are immune from review by the Courts in the absence of misconduct (now serious irregularity), such as breaches of natural justice, or lack of jurisdiction Universal Petroleum v. Handels und Transportgesellschaft mbH [1987] 2 All ER 737. An full assessment of the evidence given by the witnesses and of the ground for preferring some of the evidence over other evidence is unnecessary and probably undesirable, although a brief remark may be appropriate to show, for instance, that an argued for allegation of fact has been found not proved rather than simply overlooked.
- 18.2 It is unnecessary and probably undesirable to summarise the evidence given by the parties on each disputed issue of fact or to set out all the evidence given by the witnesses on a point.

Findings of law and of mixed fact and law

- 18.3 A detailed analysis of the legal principles canvassed by the parties or of cited legal authorities is unnecessary. It is sufficient to summarise briefly the parties' arguments and to state, intelligibly, the conclusion you have reached and how you reached it. For example, "We regarded the conduct of the buyers, as we have described it, as constituting a repudiation of their obligations under the contract and the subsequent conduct putting an end to the contract". It can be left to others to argue that this is wrong in law and to a judge, if leave to appeal is given, to analyse the authorities.

D: DRAFTING STYLE AND LAYOUT

19. There are few ready sources of precedents, although some guidance can be found in Tackaberry & Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, 4th ed (2003), Sweet & Maxwell and in R Turner, *Arbitration Awards: A Practical Approach* (2005), Blackwell. You will have to build up your own collection of precedents as and when you come across suitable examples. They should, of course, not be followed slavishly. A possible structure for an award and a sample award are provided at Appendix A and B. Also consider M Fontain: Drafting the Award – A perspective from a Civil Law Jurist. ICC Bulletin Vol 51/1 May 194., page 30ff. H Lloyd QC: Writing Awards – A common Lawyer's Perspective. ICC Bulletin Vol 51/1 May 194, page 38ff; and, but with a critical eye, *The Awards in Meadowsweet and Bindweed*, (2000) 66 Arbitration 83

E: GETTING DOWN TO THE TASK

20. Commence work on the award promptly after the hearing when the issues are still fresh in the mind. Preliminary work should be done during or even before the hearing, at least as regards identifying the factual and legal questions that are in dispute.

21. Identify what you have been asked to do. Is your award to be Final or Interim (preliminary issues, liability, all issues but costs), reasoned or not.
22. Identify the material available and its status, pleadings, submissions, evidence (real, documentary, written/oral, fact, opinion), law.
23. Manage the material in an organised way, for instance: issues, facts, opinions, law, determinations, review.
24. Preliminary work with the pleadings, reviewed during hearing.
 - 24.1 How have the parties presented their claims and identified the issues in dispute? Pleadings, statements of case, exchange of correspondence, terms of reference, opening submissions?
 - 24.2 Analysing the claims and defences. What has the claimant asked for (money, determination of an issue, a declaration, specific performance)? Is there a counterclaim? If so, what does the respondent seek?
 - 24.3 Identifying the issues.
 - 24.3.1 What is the legal basis for the claims (the cause of action). What material facts must be proved to establish that cause of action and obtain the remedy/remedies sought. Are their disputes about the relevant law?
 - 24.3.2 Does the respondent raise a defence against the claimant by way of avoidance. What is its legal basis? What material facts must be proved to make good that defence. Is there any dispute about the relevant law?
 - 24.4 Analysing the issues:
 - 24.4.1 Has the claimant alleged the material facts necessary to obtain the remedies sought? Is this disputed? Which of these material facts are in issue?
 - 24.4.2 Has the respondent alleged the material facts that are necessary to raise any defence relied upon by way of avoidance? Is this disputed? Which material facts are in issue?
25. Preliminary work with evidence: Consideration of the burdens of proof, review of evidence.
 - 25.1 Who had the burden of proof in respect of each material fact or opinion in dispute? What is the standard of proof?
 - 25.2 As regards material conflicts of evidence, who do you prefer and why?
 - 25.3 If the evidential scales remain evenly balanced then an allegation is not proved on balance of probabilities.

26. Work during and after the hearing: Consider the evidence in relation to the issues. What is the evidence for and against each material fact in issue?
- 26.1 Has the claimant adduced convincing evidence to support its contentions on each material fact in dispute that it must prove? Has the respondent adduced convincing evidence to support its contentions on material facts that it must prove?
- 26.2 Is the factual evidence sufficient to discharge the burden of proof in respect of the material fact to which it relates: Taken alone, taken together with other relevant evidence?
- 26.2.1 Contemporary documents more likely to be reliable than witness recollection.
- 26.2.2 Is witness's evidence self serving or disinterested? Is it consistent and coherent with other, particularly contemporaneous, evidence?
- 26.2.3 Is reaction/recollection under cross-examination convincing?
- 26.2.4 Reliance on "demeanour" of witness can be misleading.
- 26.3 Is the opinion evidence sufficient to discharge the burden of proof in respect of the material fact to which it relates: Taken alone, taken together with other relevant evidence?
- 26.3.1 Are the experts competent to express the opinions they profess. Are they truly impartial or hired negotiators?
- 26.3.2 Is there any common ground between the experts?
- 26.3.3 Does the claimant's expert support some aspect of the respondent's case or vice versa (reports, examination in chief, cross-examination)?
- 26.3.4 Are any disputes due to the experts having started from different assumed facts? What, if any, are the genuine differences of opinion?
- 26.4 What do the parties say about the evidence in their closing submissions? Are any concessions made? In the light of what you have read and heard what is your finding on the evidence relating to the issue under consideration? Has the relevant material fact been proved, or not? Does your finding on this issue affect other issues in dispute, the claims?
27. Work during and after the hearing: Questions of Law.
- 27.1 Are there any legal issues in dispute. What is the substance of the dispute?
- 27.1.1 What are the parties' submissions on the point of law in dispute and its implications for their claims and defences?

- 27.1.2 How have the parties advanced their contentions of law (authoritative textbooks, statute, case law)?
- 27.1.3 Is the material cited relevant, persuasive or binding? Is it distinguishable on the basis of the facts that you have found?
- 27.2 What is your decision (holding) on the law? Why? Could you explain your reasoning to a friend in the pub?
- 28. Work during and after the hearing: Applying the law to the facts/mixed questions of law and fact.
 - 28.1 What, in the light of your holdings on the law, are the legal implications of the facts you have found? Why?
 - 28.2 What is the effect of these legal implications on the issue under consideration and on the other claims and defences being advanced by the parties (success or failure)?
- 29. Work after the hearing: Orders and Directions. What consequences for the parties flow from your determinations on the various issues in dispute considered in the light of those matters which are not in dispute.
 - 29.1 Does the overall claim succeed or fail. Who must do what, when?
 - 29.2 What award of interest should be made (period, rate). Is a departure from the general rule sought, appropriate? Why?
 - 29.3 What cost order should be made (reference, award, taxation/assessment of your costs). What is the event which costs should follow (claims, set-offs and counterclaims). Is a departure from the general rule sought, appropriate? Why?
- 30. Reviewing your draft award: Once drafted put your aside for a few days. The reconsider/re-read it.
 - 30.1 Is it **coherent**. Is it clear what you have decided and why. Can your decisions be seen to flow from a logical and unambiguous process of reasoning.
 - 30.2 Are your orders and directions clear and precise. Is your award **final** and **enforceable**.
 - 30.3 **Completeness:** Does it comply with the submission? Have all the pleaded issues been dealt with? Have interest and costs been dealt with appropriately? But check that you have not dealt with matters that were not referred to your decision.
- 31. If/when you are satisfied sign and date your award and send it to the parties or advise them by letter of the same day that it is available for collection on payment of your outstanding fees.

F: NOTIFICATION OF THE AWARD TO THE PARTIES

32. At common law an award was "made and published" when the arbitrator gave notice to the parties that it was ready, The Archipelagos [1979] Lloyd's Rep. 289. The Arbitration Act 1996 retains the concept of an award being made (see s. 54) but refers to notification rather than publication (see s. 55).
33. Notification can be achieved by serving copies of the award on the parties or by advising them that it is available on payment of the arbitrator's fees and expenses, Arbitration Act 1996, ss. 55(3), 56. Time for mounting challenges or appeals to an award runs from the date of the award, presumably a reference to the date on which it was made, Arbitration Act 1996, s. 54, see s. 70(3), CPR, Practice Direction – Arbitrations, paragraph 22.

G: ADJUDICATOR'S DECISIONS

34. In terms of form and structure there is little conceptual difference between a well drafted Adjudicator's reasoned decision and a well drafted reasoned Award. But, because of time pressures, an Adjudicator's decision will tend to be more truncated and the reasons more briefly stated, than in an Arbitrator's Award. Furthermore, since the giving of reasons is not the default under most Adjudication Rules, they can be more readily dispensed with. In either case, the operative part of the adjudicator's Decision should decide the dispute referred to in the adjudication, no more, no less. Interest may be ordered if the rules, the contract or the law provides for this and a claim for interest forms part of the referred dispute.
- It may be that if an adjudicator refuses to make a decision on a matter referred to him, he acts without jurisdiction: see Ballast Plc v. The Burrell Co, 17th December 2002 (Scotland).¹³
 - The Decision should be signed and dated by the Adjudicator, but unless expressly required by the rules, failing to sign may not be fatal to its enforcement; Treasure & Son Ltd v. Dawes [2007] EWHC 2420 (TCC); [2008] BLR 24.

If reasons are required, what should be provided

35. A reasoned decision is easier to live with than an unreasoned decision. Nevertheless, the giving of reasons or, more usually, a written explanation for the decision reached, is a skilled activity, particularly in the tight time scales required. The court has recently given some guidance about what it expects to see in a reasoned Adjudicator's Decision.

¹³ **Ballast**: Adjudicator erroneously considered that he was only concerned with value, not the contractual basis of claims made. "As a result of that error the adjudicator misconstrued his powers and in consequence failed to exercise his jurisdiction to determine the dispute. His decision is therefore a nullity."

- If reasons are required, it is good practice to summarise the parties' submissions on each issue to avoid the suggestion that points have not been taken into account. If the reasons are totally incomprehensible, this may give grounds for disputing enforcement; Gillies Ramsey v. PJW Enterprises [2004] BLR 131 (Scotland).
 - "An adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the adjudicator has decided and why"; Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd [2009] EWHC 408 (TCC).
36. Inadequacy of reasons may provide grounds for resisting enforcement. "It will only be in extreme circumstances, ... that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice"; Carillion Construction Ltd v. Devonport [2005] EWCA Civ 1358; [2006] BLR 15 (CA). Applied in Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd [2009] EWHC 408 (TCC).¹⁴
37. An adjudicator's decision which is uncertain on its face is unenforceable Vision Homes Ltd v. Lancsville Construction Ltd [2009] EWHC 2042 (TCC).

Reaching and issuing the Decision

38. An Adjudicator's decision must be reached within the period of the Adjudication and sent to the parties forthwith (fax or e-mail is best). An adjudicator, unlike an Arbitrator does not have a lien on their decision against payment and if not reached within time and sent to the parties forthwith is invalid: Ritchie Bros (PWC) Limited v David Philp (Commercials) Limited, (IHCS, Scotland)¹⁵ [2005] BLR 384. Followed in Epping Electrical v. Briggs [2007] BLR 127 (TCC) (The requirement to issue a decision

¹⁴ **Thermal Energy:** The Respondent had raised a set off defence in adjudication. Adjudicator did not expressly mention it in the Decision or any indication that he considered that it was a matter he had to decide. Thus the adjudicator had failed in his duty to give reasons. There was prejudice because it was unclear whether or not the adjudicator had considered the set-off defence on its merits. Thus the Responding party had lost the opportunity of having that defence dealt with, and had lost the prospect of the adjudicator deciding that point in its favour. If it started a further adjudication to seek to recover its losses, first it would have had to comply with this decision and second there was a risk that a second adjudicator might decline to act on the basis that the point had already been decided. Therefore there was substantial injustice and the decision would not be enforced.

¹⁵ **Ritchie:** Considering the Scheme and reversing the first instance decision which is reported at [2004] BLR 379. There was a strong dissenting judgment. Majority also considered that rules which did not provide for this were not compliant with s. 108 of the Construction Act.

forthwith means it must be issued as soon as reasonably practicable. Liens are not allowed).

Correcting slips

39. An adjudicator probably has an implied power, some rules expressly allow for this, to correct errors arising from accidental errors or omissions or to clarify or remove any ambiguity in the decision, provided this is done within a reasonable time; Bloor v. Bowmer & Kirkland [2000] BLR 314. The time for correcting the Decision is what is reasonable in all the circumstances, rarely more than a few days. If the adjudicator goes beyond this in revising a decision, the revised decision is a nullity; YMCS v. Grabiner [2009] EWHC 127 (TCC); [2009] BLR 211.
-

APPENDIX A: BASIC STRUCTURE FOR A FINAL AWARD

[The heading: Identifies the statutory framework, any rules, the parties and the type of award.]

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

UNLUCKY CLIENT

Claimant

- and -

UNHAPPY CONSULTANT

Respondent

FINAL AWARD

[The recitals: Set out briefly and uncontroversially the basis of your jurisdiction and how you came to be writing the award.]

WHEREAS (*many dispense with this word*):

- (1) Disputes having arisen (parties, substance of dispute)
- (2) Agreement to arbitrate (date, writing)
- (3) Notice of arbitration/notice to concur (date, service)
- (4) Constitution of tribunal (direct, to third party, date)
- (5) Your acceptance (date and manner, etc.)
- (6) The seat of the arbitration
- (7) Important interlocutory events and orders
- (8) Hearings (dates, witnesses, representation, etc.)
- (9) Inspections, etc. (date, nature, etc.)
- (10) Other matters, if any (sealed offers, etc.)

[Two Options for linking recitals to body of award, the operative part (directions and orders) and attestation clause.

First option: operative part after body of award]

NOW having considered the evidence and submissions presented by and on behalf of the parties
I MAKE THIS AWARD:

[The body of the award: set out in numbered paragraphs as described below, and conclude with operative part and attestation.]

[Second option: operative part after recitals, before reasons.]

NOW having considered the material and submissions presented by and on behalf of the parties I
AWARD/ADJUDGE (*either word will do*) AND DIRECT THAT:

[Set out orders and directions dealing with all matters including costs and interest, followed by attestation clauses. Set out the body of award as described below, but excluding orders and directions and attestation clauses, starting on a new page under a heading such as:

UNLUCKY CLIENT - and - UNHAPPY CONSULTANT

ARBITRATOR'S REASONS
(These reasons are given with
and form part of the award)

[The body of the award: This must be comprehensible to a third party without reference to other documents. Imagine you are telling the story to a friend in a pub. Use side headings for each section to give a structure to your award.]

Subject matter of the award

Agreed facts and background (the narrative)

Summary of the issues to be determined. Abstract these from the pleadings or list of agreed issues, if any.

Consideration of each issue of liability separately and in turn:

Common ground, if any

Contentions of the parties (briefly)

Findings of fact

Applicable law

Conclusion on issue

Consideration of each issue of quantum (may be appropriate to deal with separately, or simultaneously):

Contentions of the parties (briefly)

Findings of fact

Applicable law

Conclusion

Conclusions on liability and quantum.

Deal with interest, including interest after the award, and costs (give reasons if departing from the usual orders).

[The operative part (did the claims/counterclaim succeed for fail, what are the parties are required to do).]

ACCORDINGLY, I AWARD/ADJUDGE (either word will do) AND DIRECT THAT:

Success or failure of claims/counterclaims

Declarations, non monetary orders, if any

Payment of money (including interest) by one party to the other.

Interest

Costs.

[The attestation clause: witnessing is not strictly necessary, in an English Award, but assists in proving the arbitrator's signature if dead or incapacitated. It may be required if enforcement overseas is envisaged.]

MADE UNDER MY HAND this ... day of ... 20..

..... Arbitrator

In the presence of:

..... Witness *[if you want one, or required]*

.....

..... Address

..... Occupation

APPENDIX B: BASIC STRUCTURE FOR AN ADJUDICATOR'S DECISION

[THE HEADING: Identifies the statutory framework, the applicable rules, the parties by legal and trading name, if any, and that it is a Decision.]

IN THE MATTER OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

AND IN THE MATTER OF AN ADJUDICATION UNDER PART I OF THE SCHEME FOR CONSTRUCTION CONTRACTS (ENGLAND AND WALES) REGULATIONS 1998

BETWEEN:

HAPPY CONTRACTOR LTD

Claimant

- and -

UNLUCKY EMPLOYER PLC

Respondent

ADJUDICATOR'S DECISION

[The introduction: Set out briefly and uncontroversially the basis of your jurisdiction and how you came to be writing the Decision. Don't state the parties contentions here]

WHEREAS (*many dispense with this word*):

- (1) Parties (with addresses) and contract (eg Date, standard form incorporated and scope of parties contract (or as much about this as is not in contention))
- (2) That a construction contract, if so, and agreement to adjudicate
- (3) Disputes having arisen (parties, substance of dispute)
- (4) Notice of adjudication (date, service)
- (5) Constitution of tribunal (direct, institutional appointment, date)
- (6) Your acceptance (date and manner, etc.)
- (7) Referral (date received), period for adjudication and any extensions granted.
- (8) Response, Reply (dates)

- (9) Procedure adopted and other submissions (dates)
- (8) Meetings, and views if any (dates, nature etc.)

[THERE ARE TWO WAYS OF linking the introduction to the body of decision and the operative part (directions and orders) and attestation section.]

[FIRST OPTION: operative part after body of decision]

NOW having considered all the evidence, material and representations duly submitted to me by and on behalf of the parties I REACH THIS DECISION:

[The body of the award. Set out reasons in numbered paragraphs as described below, follow with words such as the following

ACCORDINGLY, I ORDER AND DIRECT:

[Conclude with operative part in short numbered paragraphs, as described below, and attestation.]

[SECOND OPTION: operative part after introduction, before reasons.]

NOW having considered all the evidence, material and representations duly submitted to me by and on behalf of the parties I HAVE REACHED AND HEREBY GIVE MY DECISION IN THIS ADJUDICATION:

[Set out orders and directions dealing with all matters including costs and interest, followed by attestation clauses. Set out the body of award as described below, but excluding orders and directions and attestation clauses, starting on a new page under a heading such as:]

HAPPY CONTRACTOR LTD - and - UNLUCKY EMPLOYER PLC

**ADJUDICATOR'S REASONS
(These reasons are given with
and form part of the Decision)**

THE BODY OF THE DECISION (REASONS)

This should be comprehensible to a third party without reference to other documents. Imagine you are telling the story to a friend in a pub. Use margin headings for each section to give a structure to your award.]

Details of parties and their contract (how formed, what documents incorporated)

Material contract terms (set out wording of relevant clauses)

Background to the dispute (the narrative). This should be sufficient to put the parties dispute into context and set out sufficient background facts to make the issues comprehensible to a third party. Include quotes from critical documents. Don't include parties submissions here, just identify what is in dispute and its context.

Summary list of the issues to be determined. Abstract these from the parties written cases or list of issues, if any. It is not possible to devise a sensible list of issues without some understanding of the legal basis of the claims made (the causes of action) and the substantive defences advanced to those claims.

Take each issue in turn (it is often best to deal with liability issues before quantum issues but sometimes, as in a variation account, it is best to deal with liability and quantum of each item together).

Brief description of the issue and its significance (issues can often be phrased as questions).

Contentions of the parties on the issue (in summary)

Brief discussion and decisions on the facts (if not more appropriately included in the Background)

Brief discussion and decisions on the law, if any

Conclusion on issue (apply the facts to the law). Answer the question posed.

Summary and conclusions on liability and quantum.

Deal with interest, including interest after the decision award, and adjudicator's fees (give reasons if departing from the usual orders).

THE OPERATIVE PART

(Did the claims succeed for fail, what are the parties are required to do. This should link back to the Relief claimed in the Notice of Adjudication or Referral, as appropriate).]

1. *Success or failure of claims/counterclaims*

[eg. Happy Contractor Ltd's claim succeeds in the sum of £..... net of VAT.

2. *Monetary orders and Declarations, including interest.*

[eg. Unlucky Employer Plc shall pay to Happy Contractor Ltd the said sum of £ ... together with interest of £.... (being £... in total) within seven days of the date of this Decision together with such VAT as is applicable thereon in law. If any part of this sum is not paid within the time directed Unlucky Employer Plc shall also pay simple interest to Happy Contractor Ltd on the unpaid amount at ...% per annum from the date of this Decision until payment of the unpaid amount.

2. Adjudicator's fees.

[eg. As between the parties, Happy Contractor Ltd shall bear and pay ...% of my invoiced fees and Unlucky Employer Plc shall bear and pay ...% of my invoiced fees. If either party pays a portion of those fees to me greater than that allocated to it, that excess shall be reimbursed to it by the other party within seven days of a written demand from the other party to do so.]

[The attestation clause: witnessing is not necessary]

THIS DECISION REACHED on the *[date]*

Adjudicator:

[Adjudicator's name and address]

Issued to:

...

[add names and addresses of those served, indicating their capacity if not the parties]

**APPENDIX C: SAMPLE AWARD FOR THE CHARTERED INSTITUTE OF
ARBITRATORS' PART II EXAMINATION PAPER C, 10th JUNE 1993**

[Note: prepared on the basis that Arbitration Act 1996 applies.]

**IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N:

JOE BLOGGS

Claimant

- and -

LOVELY HOLIDAYS

(a firm)

Respondent

FINAL AWARD

By an agreement in writing in a letter dated 2nd March 1993, the Claimant and the Respondent agreed to refer disputes concerning a holiday arranged by the Respondent for the Claimant to arbitration.

By that letter I,, was asked to accept appointment as arbitrator in regard to these disputes.

By letter dated 2nd April 1993, I accepted this appointment.

The seat of this arbitration is in England and Wales.

A preliminary meeting was held at my offices at 99 High Street, Greehampton on 16th April 1993 at 4.00pm, at which certain directions were made which were complied with by the parties.

There was a hearing before me at my offices on the 3rd June 1993 at which the Claimant was represented by Mr Harry Cling of Counsel and the Respondent by Mr Horatio Pugwash of Counsel and at which evidence was given by Mr Bloggs and Mr Roe for the Claimant and by Mr and Mrs Doe for the Respondent.

At the end of the hearing, I was handed sealed envelopes by Counsel for both parties which I have not opened until after completing this Award save as regards the issue of costs.

NOW having considered the evidence given on behalf of the parties and the submissions of Counsel I MAKE THIS MY FINAL AWARD.

The background

1. The following facts and matters are not in dispute.
 - 1.1 The Respondent is a holiday tour operator. It is a partnership between Mr and Mrs Roe.
 - 1.2 On about the 1st June 1992 the Claimant contracted with the Respondent for a holiday for himself, his wife and their 5 children departing from the United Kingdom on the 2nd December 1992 for 21 days. The cost of the holiday was £10,005.
 - 1.3 The holiday was illustrated in the Respondent's 1992 brochure ("the Respondent's brochure") and was described as follows:

"Tour 199
21 days in Paradise. 4 star Paradise Hotel in Paradise Island in set among 30 acres of glorious tropical gardens. This is an all inclusive resort club. Tennis, golf, horse riding, sailing, water sports, basketball, gym, sauna, cabaret shows are all included. All your meals and snacks are included in the price as well as all local drinks, plus beer and wine with dinner. You need only pay for laundry and telephone calls."

- 1.4 The Respondent's brochure also contained a number of Booking conditions including condition 10 which read as follows:

"We accept responsibility in the event that the services which we contract to provide are deficient or not of a reasonable standard. We also accept responsibility for the act and/or omissions of our employees, agents and suppliers. Our suppliers are defined as those who provide goods or services in connection with your holiday and with whom we have written contracts."

- 1.5 Some 6 months later, on the 2nd December 1992 the Claimant and his family departed for their 21 day holiday at the Paradise Hotel. Subsequently, a number of disputes arose between the parties which are now the subject of this arbitration.

The claim in misrepresentation

2. The first dispute concerns the Claimant's claim against the Respondent for damages for misrepresentation.

2.1 The Claimant says that he relied on the descriptions and illustrations of the Paradise Hotel in the Respondent's brochure and that they were false in that the Paradise Hotel was not a 4 star hotel and much of it had been demolished with the rest undergoing considerable building operations. He says it was not set among 30 acres of glorious tropical gardens, but adjoined a pig farm. The Claimant also alleges that the illustrations and descriptions of the Paradise Hotel were published fraudulently by the Respondent.

2.2 The Respondent says that the Claimant did not rely on the descriptions and illustrations in the brochure but satisfied himself about the nature of the holiday from his neighbour, Mr Roe. The Respondent denies that it published the illustrations and descriptions in its brochure fraudulently.

2.3 I find that the Claimant relied and was reasonably entitled to rely on the descriptions and illustrations of the Paradise Hotel in the Respondent's brochure when deciding to book "Tour 199" with the Respondent.

2.4 I am satisfied that at the time of his holiday the Paradise Hotel was generally as described by the Claimant in that it was undergoing extensive building works and

was situated next to a pig farm. I am also satisfied that the Paradise Hotel could not, at the time of the Claimant's visit, be accurately described as a 4 star hotel.

2.5 Nevertheless, the evidence that I have heard has not satisfied me that the Paradise Hotel was in the condition described by the Claimant some 6 months earlier when he booked his holiday with the Respondent on or about the 1st June 1992. In consequence, the Claimant has failed to prove that at the date of his contract with the Respondent the descriptions and illustrations of the Paradise Hotel in the Respondent's brochure were false and that at that time it misrepresented, whether fraudulently or innocently, the holiday that the Respondent was selling to the Claimant.

2.6 I find that the Claimant's claim for damages in fraud or misrepresentation fails.

The claim in contract

3. The second dispute concerns the Claimant's claim for damages for breach of contract.

3.1 The Claimant says that the Respondent was in breach of booking condition 10 in that the quality of the accommodation, facilities and services provided by the Paradise Hotel did not live up to the description of "Tour 199" in the Respondent's brochure.

3.2 The Respondent does not deny that booking condition 10 was a term of its contract with the Claimant. Neither does it contend that the Paradise Hotel was not its supplier within the meaning of that condition. The Respondent does deny that it was in breach of contract and contends that the Claimant got the holiday that he booked. As regards the reference in the description of "Tour 199" to free wine at dinner, the Respondent says that he warned the Claimant, before he booked the holiday, that all wines would have to be paid for.

3.3 The Respondent has failed to satisfy me that prior to booking his holiday the Claimant was told that free wine with dinner was not included in the price of the holiday.

- 3.4 I find that under booking condition 10 of the Respondent's brochure the Respondent contracted to provide the Claimant with all the services listed in the description of "Tour 199" in its brochure. I also find that, under this provision, the Respondent accepted liability for any acts and omissions of the Paradise Hotel as its supplier.
- 3.5 I find that the accommodation, facilities and services provided by the Paradise Hotel were generally as described by the Claimant. The bedrooms given to him and his family were small, cold, damp and dirty, bed linen was not changed during their stay, towels were only changed once, and then with dirty towels. The hotel did not have tennis courts, a gym, a sauna or a cabaret and the Claimant could not go sailing as the only yacht leaked and was unsafe to use. He was not served free wine at dinner, there was no choice at meals and no meat was served during his stay. The hotel staff, including the manager, were unhelpful and impolite.
- 3.6 In consequence I find that the Respondent was in breach of booking condition 10 of the contract in that the services provided to the Claimant by the Respondent and the Paradise Hotel were not of a reasonable standard and were deficient.
- 3.7 The Claimant alleges that because of the Respondent's breach of contract he and his family suffered distress, inconvenience and annoyance and their enjoyment of the holiday was materially reduced and affected. He says that the holiday was not 21 days in Paradise, but a complete disaster for him and his family. He says that both he and his wife have been under the Doctor since their return. He claims compensation for this loss and damage and has drawn my attention to Jarvis v. Swan Tours Ltd. [1973] 1 All ER 71.
- 3.8 I find that the dissatisfaction of the Claimant and his family with their holiday was due in part to the fact that, being a self employed man, this was the first holiday he had been able to take in five years and in part due to the unusually wet weather on Paradise Island at the time of their visit. These are not matters for

which the Respondent can be held responsible. Neither am I satisfied that the treatment which the Claimant says that he and his wife are receiving from their Doctor relates in any way to the Respondent's breach of contract.

3.9 Nevertheless, I find that the Claimant's enjoyment of his holiday was materially diminished and that he suffered much inconvenience and distress because of the Respondent's breach of contract, a part of his distress being due to witnessing the distress and inconvenience that the holiday caused to his family. The Claimant is entitled to be compensated for these matters under the principle in Jarvis v. Swan Tours Ltd. and, having considered all the evidence before me, I assess general damages at the date of breach at £3,000.00.

3.10 The Claimant has not made a claim for the reimbursement of payments to the Paradise Hotel for wine served with dinner, nor was I told what amount he paid to the Paradise Hotel. In consequence, I have not made a separate award for this item.

The counterclaim

4. The third area of dispute concerns the Respondent's counterclaim for telephone charges in the sum of \$265.00.

4.1 The Respondent says that it has been asked by the Paradise Hotel to recover this sum from the Claimant.

4.2 The Claimant accepts that he made various telephone calls at a cost of \$265.00 during his stay at the Paradise Hotel and that telephone calls were not included in the price for his holiday. He admits that he had not paid this sum to the Paradise Hotel but denies that he is liable to pay it to the Respondent.

4.3 While the \$265.00 may be a debt owing by the Claimant to the Paradise Hotel the Respondent has not suggested that this debt has been assigned to it. There is no legal basis on which the Respondent is entitled to recover this sum from the Claimant. I find that the Respondent's Counterclaim fails.

5. AND I ORDER AND DIRECT THAT:

5.1 The Respondent shall pay to the Claimant within 14 days of the date of publication of this Award the sum of £3,240.00 comprising £3,000.00 plus interest which I have assessed at £240.00.

5.2 The Respondent shall bear and pay to the Claimant the Claimant's costs of the arbitration.

5.3 Simple interest of 8% per annum shall be payable by the Respondent on any amount awarded in this arbitration which remains outstanding after 14 days from the date on which this award is released to the parties., such interest to accrue from the date of this Award until payment of that amount.

6. After preparing this award, I opened the two envelopes handed to me by Counsel at the conclusion of the hearing. One was empty. The other contained an offer from the Respondent to the Claimant to settle its claim for the sum of £2,750.00 inclusive of interest, with costs to be taxed if not agreed. As my award in favour of the Claimant exceeded this sum, this offer did not affect my decision as to costs.

Made under my hand this ____ day of _____ 199_

..... Arbitrator

In the presence of:

..... Witness

**IN THE MATTER OF THE ARBITRATION
ACT 1996**

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

JOE BLOGGS

Claimant

- and -

LOVELY HOLIDAYS

(a firm)

Respondent

FINAL AWARD

..... Arbitrator