COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

TIME TABLE

9.30 - 9.35:	Introduction
9.35 - 10.15:	Arbitration – the statutory and contractual framework.
10.15 - 11.00:	Beginning an arbitration and constituting the tribunal
11.00 - 11.15:	Morning coffee
11.15 - 12.00:	Enforcing the right to arbitrate and dealing with jurisdictional disputes
12.00 - 12.45:	The duties of the tribunal and the parties – the tribunal's procedural and evidential powers
12.45 - 1.45:	Lunch
1.45 - 2.30:	The tribunal's general powers and sanctions
2.30 - 3.15:	The arbitral award
3.15 - 3.30:	Afternoon tea
3.30 - 4.15:	Enforcing an arbitral award and obtaining assistance from the court
4.15 - 5.00:	Supervisory powers of the court

INTRODUCTION

This one-day seminar, which is a companion seminar to "**International Commercial Arbitration**", provides a comprehensive review of the law and practice of arbitration conducted under the Arbitration Act 1996. It is intended for those who are involved in arbitral proceedings or who engage in areas of commerce were arbitration is commonly used for the resolution of disputes. In addition to explaining the legal framework that governs arbitral proceedings and reviewing recent case law, this seminar explores the role of both the tribunal and of the court in arbitral proceedings. It gives practical guidance on how arbitration can be used to achieve a just and cost-effective resolution of disputes. Those attending the course are expected to have some familiarity with the Arbitration Act 1996 and with litigation procedures.

Further material relevant to the topics covered by these notes can be found at www.aeberli.com.

A PRACTICAL EXERCISE

By the end of the course, you should be able to answer the following questions.

1. How does arbitration differ from litigation and other methods of dispute resolution such as expert determination and mediation?

2. In what circumstances does a person have the right to arbitrate a dispute with another person and how can that right be enforced if the other party to that dispute commences proceedings in court in respect of that dispute?

3. How are arbitral proceedings commenced and why is it important that the correct procedure is followed?

4. What is a jurisdictional challenge and what are various ways in which such challenges can be determined?

5. What are the principal powers that an arbitral tribunal has to manage the proceedings and what principles govern its exercise of these powers?

6. What powers, if any, does the court have to intervene in the conduct of arbitral proceedings?

7. If a party obtains an arbitral award in its favour, how can that award be enforced if it is ignored by the other party?

8. What are the principal ways in which a party can dispute an arbitral award that is adverse to its interests?

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 1: ARBITRATION
THE STATUTORY AND CONTRACTUAL FRAMEWORK

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: METHODS OF DISPUTE RESOLUTION

Arbitration is only one of a number of different methods by which disputes can be resolved.

1. The Court

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

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

Advantages/disadvantages: Public, subsidised, but still expensive, little party control, non-consensual joinder of parties, wide rights of appeal, competence of judiciary, legal aid, restricted rights of audience, limited international enforceability of judgements.

2. Private Arbitration

Jurisdiction is founded on agreement of the parties, but augmented by the Arbitration Act 1996. Arbitration is a consensual, generally adversarial method of dispute resolution, conducted in accordance with procedures agreed by the parties or determined by the tribunal. It is concerned with disputes and differences, in practice, with legal rights and remedies. The outcome is a binding third party determination, an award. Limited court assistance and supervision is available during the process and once an award is made.

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

3. Statutory adjudication (construction disputes)

Construction adjudication is a quasi-statutory procedure for the determination of disputes under construction contracts governed by Part II of the Housing Grants, Construction and Regeneration Act 1996. It is a non-consensual, rapid (28 days), generally inquisitorial method of dispute resolution conducted in accordance with agreed or implied procedures that comply with the statutory requirements. It is concerned with contractual rights. The outcome is not final but is binding until the dispute has been determined by litigation,

arbitration, if applicable, or agreement. If appropriate, and subject to limited rights of challenge (no jurisdiction, want of impartiality), a Court will enforce the decision.

Advantages/disadvantages: Limited to construction disputes. Private, not subsidised, flexibility and speed of outcome, rough justice. Although not final the decision affects litigation/arbitration risk, little possibility of joinder, no legal aid, wide choice of representation, party costs generally irrecoverable.

4. Expert determination

This is similar to statutory adjudication, but the expert's jurisdiction is founded solely on the parties' agreement, which is not constrained by statutory requirements. The court may provide limited assistance to the process, Channel Tunnel Group v. Balfour Beatty [1993] 1 WLR 262.[1] Expert determination may concern the creation as well as the determination of legal rights. The outcome is generally final and binding on the parties and will be enforced by the court as a contractual entitlement. There may be a right of action against the expert. Consider Jones v. Sherwood Computer [1992] 1 WLR 277.[2] Bernhard Schulte v. Nile Holdings [2004] EWHC 977 (Comm); [2004] 2 Lloyd's Rep 352.[3]

Advantages/disadvantages: As statutory adjudication, but the decision is final and binding.

5. Mediation/conciliation

This is a consensual process, possibly with court support. It is facilitative/generally non-evaluative without a third party determination. Resolution of the dispute remains in the parties' hands. If settled, the agreement can be enforced by action for breach of contract.

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

PART B: THE NATURE OF ARBITRATION

There is no statutory definition of arbitration. The common law requirements are a formulated dispute or difference between the parties, the submission of that dispute or difference by agreement to a third party for resolution in a judicial manner and an opportunity for parties to present evidence or submissions in support of their claims in the dispute;

---

1 **Channel Tunnel**: The court has inherent jurisdiction to stay proceedings brought in breach of dispute resolution procedure. Would do so where, as here, the parties were at arms length and equal commercial advantage.

2 **Jones**: Grounds of challenge are limited to answering the wrong question, fraud.

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

Arenson v. Arenson [1977] AC 405 (HL), Lord Wheatley; see David Wilson Homes v. Survey Services Ltd [2001] BLR 267 (CA).[4]

1. The sources of arbitration law

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

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

- The law of the arbitration agreement, which is not necessarily the same as the either the curial law or the proper law of the contract. Consider JSCZestafoni v. Ronly Holdings [2004] 2 Lloyd's Rep 335 (Comm);[5]Halpern v. Halpern [2006] EWHC 603 (Comm); [2006] 2 Lloyd's Rep 83[6](common law principles apply as arbitration agreements not governed by the Rome Convention, law must be that of a country. Law of the seat had also to be a municipal system of law). Issues as to the identity of the parties to an arbitration agreement are governed by the law of that agreement, Musawi v. RE International [2007] EWHC 2981 (Ch); [2008] 1 Lloyd's Rep 326.[7]

- The curial law of the arbitration, the law of the seat of the arbitration, see Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] 1 WLR

---

4 **David Wilson**: Dispute under an issuance policy to be referred to a QC, on appointment by Chairman of the Bar if not agreed. The Court concluded that the parties expected a judicial enquiry to hear cases decide on evidence, also wanted more than a non binding opinion. Thus an arbitration clause.
Cape v. Rosser & Russell (1995) 46 Con LR 75. Use of the word adjudication is not decisive. The agreement had the essential features of arbitration. Consider InCrouch P.670, the role of an arbitrator was said to be to find facts apply the law, grant relief, litigation in the private sector. Discussion of different meanings of adjudication, a dispute resolved in a judicial manner, but may be an initial summary determination. Unlikely that parties intended disputes to be submitted to a procedure without possibility of review or reversal. Hence an arbitration agreement.

5 **JSCZestafoni**: Four parties concluded contract, governed by English law, for electricity and services, provided for arbitration before a panel of three. Subsequent disputes between two of them JSCZ (Georgian) and Ronly (English) agreed to arbitration before a sole arbitrator. After award made JSCZ challenged it, *inter alia*, on grounds that agreement to arbitrate before a single arbitrator void under law of Georgia. Court said estopped from taking the point under s. 73, but even if could be taken, arbitration agreement was impliedly governed by English law as made in course of an agreement which provided for English Law and provided for arbitration in England and made by fax send by JSCZ received in England. Since arbitration agreement was made in England and to be performed in England, and concerned acts lawful in England, not contrary to public policy to enforce it on grounds that it was illegal and/or void under law of a foreign friendly state.

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

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

262, Lord Mustill.[8] The choice of the seat is the choice of the forum for remedies seeking to attach the award, C v. D [2007] EWCACiv 1282; [2008] 2 Lloyd's Rep 239 (injunction issued to stop D seeking to challenge an Award made by a tribunal seated in London, in courts of the USA (NY)).[9] Note also Syska v. Vivendi Universal [2009] EWCACiv 67 (Under the EU Insolvency Regulations, the effect of insolvency proceedings on a pending lawsuit are determined solely by the law of the MemberState in which the law suit is pending. There is nothing in English law that voids an arbitration agreement or reference on insolvency, thus an English Arbitration agreement was not voided under Polish law as a result of the Polish party being subject to a bankruptcy order in Poland.)

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

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

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

- Contract law, the agreement between the parties.

- The court's inherent powers. These may be less important than under the old law, see AA1996, s. 1(c).The implications of AA1996, s. 1(c) have been considered in a number of cases concerned with the court's power to determine jurisdictional questions outside of the framework of the 1996 Act. SeeABB Lummus Global Ltd v. Keppel Fils Ltd[1999] 2 Lloyd's Rep. 24[10] (s. 1(c) precludes this). . Vale de Rio DoceNavegaçao SA v. Shanghai Bao[2000] 2 Lloyd's Rep. 1[11] (s. 1(c) does not preclude this).

---

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

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

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

11 **Vale**: The court held that the restriction on court intervention in s. 1(c) was not, like article 5 of the Model Law, an absolute prohibition. It only expressed a general intention that the courts should not usually intervene except in the circumstances specified in Part I of the 1996 Act; ABB Lummus Global Ltd v. Keppel Fils Ltdwas considered but not followed. But, in this case, which concerned an application by a claimant who had initiated arbitration to determine a jurisdictional objection raised by a non-participating respondent, the court refused to

- These inherent powers may also be relevant in circumstances where the Arbitration Act is silent. See for example.

  University of Reading v. Miller (1994) 75 Build LR 91[12](CA) (concurrent proceedings between the same parties on overlapping issues in court and in arbitration, arbitration stayed). But note, Elektrim v. Vivendi Universal (No 2) [2007] 2 Lloyd's Rep 8 (Comm Ct) (application for injunction under s. 37 SCA 1981 to restrain one of two arbitrations between overlapping parties, refused),[13]also Jarvis v. Blue Circle [2007] BLR 439 (application for injunction to retrain one of two arbitrations refused, also Jackson J said that possibility of parallel proceedings in arbitration and court an inevitable consequence of s. 9 AA1996, and not, of itself, an abuse of process or vexatious). Compare Albon v. Naza Motor Trading [2007] EWCACiv 1124; [2008] 1 Lloyd's Rep 1 (CA), injunction to restrain arbitration granted where issue as to whether signature on the contract containing the arbitration agreement a forgery already before the English court.[14]

---

intervene under this inherent power since it considered that such circumstances must have been anticipated by Parliament. The proper course was for the claimant to procure the appointment of the tribunal and have the jurisdictional objection dealt with by it under s. 31. The court rejected the argument that, as a matter of general convenience, it should deal with the jurisdictional objection immediately rather than wait for it to come back to the court on a s. 67 challenge. It observed that one of the underlying principles of the 1996 Act was that the parties should resolve their dispute by the method they had chosen: arbitration. See *JT Mackley& Co. Ltd* v. *Gossport Marina Ltd*[2002] BLR 367, where the court did determine the jurisdictional point under its inherent jurisdiction.

12 **Reading**: The court had jurisdiction to restrain arbitral proceedings where concurrent legal proceedings, if no injustice to claimant in arbitration, and applicant shows that continuance of arbitration, oppressive, vexatious or abuse of process (In this case it was because a race between tribunals, and a risk of inconsistent findings in the different proceedings (Miller was in arbitration against Reading. Reading commenced proceedings against Miller and others, stay of action against Miller refused. See also Oxford Shipping Co Ltd v. Nippon Yuesn Kaisha [1984] 2 Lloyd's Rep 373; Order for concurrent hearings made in excess of jurisdiction set aside. Trafalgar House Construction (Regions) Ltd v. RailtrackPlc (1995) 75 Build LR 55; declaration as to the tribunal's power to make orders for joinder under JCTNSC/4 joinder provisions, although would not indicate how he should exercise his jurisdiction.

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

14 **Albon**: For court to have discretion, defendant must be amendable to English territorial and personal jurisdiction, and it must be just and convent to grant the injunction, s. 37 SCA. Discretion exercisable where threatened conduct unconscionable, that is oppressive or vexatious or interferes with the due process of the court and where

The court's jurisdiction to grant injunctions: Hiscox Underwriting. V. Dickson [2004] 2 Lloyd's Rep 438 (Comm) where both parties accepted that the courts had, under s. 37 of the Supreme Court Act 1981,[15] a residual jurisdiction to intervene outside the framework of the Arbitration Act 1996). For an example of this see Glidepath Holdings v. Thompson [2005] 1 All ER (Comm) 434 (Com Ct)[16] (freezing, disclosure and disk imagingorders against intended parties to arbitration in support of pending arbitral proceedings, Norwich Pharmacal orders against non parties). But note Cetelem SA v. Roust Holdings Ltd [2005] EWCACiv 618 (CA) where it was said that the relationship between AA1996, s. 44 and s. 37 SCA 1981 was yet to be worked out.

- Statute, now principally the Arbitration Act 1996.

This course is concerned with arbitral proceedings whose seat is in England and Wales or Northern Ireland.

2. What matters can be arbitrated?

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

3. Approach of the court to arbitration

The court had, historically, a somewhat ambivalent attitude to arbitration. There is a history of excessive court intervention continuing up to repeal of the Arbitration Act 1950.

Under the Arbitration Act 1996, the court's powers of intervention have been codified, and thus curtailed; see s. 1(c).

---

the jurisdiction is necessary to protect the applicant's legitimate interest in proceeding in England, the natural forum for the litigation. This was the case here as Albion had a good arguable case that justified in issuing and continuing proceedings in England, the English court will be the final judge of the authenticity question, there is a good arguable case of forgery after proceedings instituted in England, arbitration a needless expose with proliferation of pleadings and disclosure, thus unconscionable, in the sense of oppressive, to allow arbitrator to continue.

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

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

PART C: THE CONTRACTUAL BASIS

Arbitration is founded on contract, an arbitration agreement. This contractual foundation has implications for the nature of the process.

1. Privity

Arbitral proceedings bind only the parties to the arbitration agreement, and those claiming under or through them, AA1996, s. 82(2).

- This can create problems with joinder, such as in Oxford Shipping Co Ltd v. Nippon Yusen Kaisha [1984] 2 Lloyd's Rep 373[17] unless such procedures are agreed by all concerned, see AA1996, s. 35 and, for example, CIMAR, Rule 3.

- This can create problems on assignment, such as in Baytur SA v. Fingaro [1992] QB 610.[18]

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

- Third Parties (Rights against Insurers) Act 1930; consider The Padre Island [1984] 2 Lloyd's Rep 408.[19]

- Contract (Rights of Third Parties) Act 1999; consider Nisshin Shipping v. Cleaves & Co [2004] 1 Lloyd's Rep 38.[20]

2. The doctrine of seperability

An arbitration agreement is regarded as conceptually distinct from any substantive contract in which it is embodied and thus is not necessarily affected by the invalidity or premature termination of the substantive contract. This is known as the doctrine of

---

17 **Oxford**: No power to order concurrent hearings in different arbitrations under different agreements (owners/charterers, charterers/sub-charterers, same issues.

18 **Baytur**: Equitable assignment not sufficient to make assignee a party to arbitral proceedings, had to notify the other side and submit to the tribunal's jurisdiction. Had not done so. Assignor had ceased to exist (company dissolved), so arbitration had lapsed as one of the parties had ceased to exist.

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

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

seperability and is now embodied in AA1996, s. 7. Consider Harbour Assurance v. Kansa [1993] 1 Lloyd's Rep 455 (CA);[21] Vee Networks v. Econet International [2005] 1 Lloyd's Rep 192 (Comm).[22]

In Fiona Trust &Holding Corp v. Yuri Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254, the HL, applying these principles, held that an arbitral tribunal's authority is not impeached by an allegation that contract in which the arbitration agreement is found, was procured by bribery. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contact. Note in El Nasharty v. J Sainsbury [2007] EWHC 360 (Comm); [2008] 1 Lloyd's Rep 360, the suggestion that an arbitration agreement had been procured by duress was rejected on the grounds that while the claimant might have been under duress in purchasing shares, that duress did not prevent him exercising free will in relation to the dispute resolution machinery.

3. Confidentiality

Arbitral proceedings (subject to English law, where these are implied terms of the arbitration agreement) are a private process, hearings being conducted in private, and are confidential in the sense that parties are under an obligation of confidence to sue documents disclosed or generated in an arbitration only for the purpose of the arbitration even if they did not contain anything which was itself confidential, see Dolling-Baker v. Merrett [1990] 1 WLR 1205 (CA);[23] Emmott v. Michael Wilson [2008] EWHCCiv 184; [2008] 1 Lloyd's Rep 616 (CA).

- This can create problems where the same tribunal is appointed in different arbitrations involving different parties concerned in the same project, as in Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp (1982) 21 Build LR 117[24] or where a party wishes to rely on an arbitral award in other proceedings, for

---

21 **Kansa**: The arbitration agreement could survive an allegation that the substantive contract was void for illegality.

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

23 **Dolling**: An implied obligation on parties not to disclose or use for any other purpose documents prepared for or used in the arbitration, or disclosed or produced in the proceedings, or transcripts or notes of evidence or the award, other than with consent of other party, or permission of court. But the mere fact that a document was used in arbitration does not impose confidentiality. See also Hassneh v. Mew [1993] 1 Lloyd's Rep 243, the award and reasons could be disclosed where reasonably necessary to found claim or defence against third party. But not otherwise, see Insurance Company v. Lloyd's Syndicate [1995] 1 Lloyd's Rep 272.

24 **Abu Dhabi**: Problems where same arbitrator appointed in related

instance to found an issue estoppel; consider Ali Shipping Corporation v Shipyard Trogir [1999] 1 WLR 314.[25]

- Emmott v. Michael Wilson [2008] EWHCCiv 184; [2008] 1 Lloyd's Rep 616 (CA). If issues relating to privacy and confidentiality come up during a pending arbitration they are for the tribunal, unless the right to a stay is waived. The court did not have a general unlimited discretion to consider exceptions to confidentiality. The exceptions were compulsion by law, public interest, including the interests of justice, protection of a party's legal rights and consent. Running inconsistent cases in arbitration and in subsequent litigating, here alleging fraud in the latter, having abandoned it in the former, entitled an order for disclosure of material from the arbitration, this being in the interests of justice.

This principle of confidentiality may also affect any court proceedings relating to the arbitration. It is for the court to decide, under CPR Parts 39 and 62.10 whether the hearing of such proceedings should be in private (in secret, not just in chambers) and whether any resulting judgment should also be private; City of Moscow v. Bankers Trust Co [2004] 2 Lloyd's Rep 179 (CA).[26] There is no presumption in favour of privacy, C v. D [2007] EWCACiv 1282; [2008] 2 Lloyd's Rep 239, there has to be a special reason for it.

4. Party autonomy

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

PART C: THE STATUTORY FRAMEWORK

1. Introduction

---

proceedings between overlapping parties, but with no power to order concurrent hearings or consolidation. Party might be prejudiced by not being able to comment on matters raised before tribunal, and thus influenced opinion, in proceedings to which not a party.

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

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

The statutory framework for arbitration is provided by the Arbitration Act 1996. This repealed the earlier legislation apart from most of Part II of the Arbitration Act 1950. The Act was prepared by the Departmental Advisory Committee on Arbitration, and its reports (the DAC Reports of February and September 1996) were read into the parliamentary debates and thus can, in appropriate circumstances, be referred to as aids to its interpretation. The court will also seek guidance from UNCITRAL ("the model law").

2. Structure of the 1996 Act

The 1996 Act is divided into Parts.

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

Part II Special provisions concerned with domestic and consumer arbitrations. (ss. 89-91). Note ss. 85-87 have not been brought into force.

Part III Recognition and enforcement of New York Convention awards (s. 99-104); see Part II of the 1950 Act for similar provisions relating to Geneva Convention awards.

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

3. Application of the 1996 Act

The 1996 Act applies to England and Wales and to Northern Ireland (which was not subject to the 1950 Act). It does not apply in Scotland. For transitional procedures see AA1996, s. 84.

Part I of the 1996 Act includes mandatory and non-mandatory provisions, see AA1996, s. 4(1), 4(2) and Schedule 1. Most non-mandatory provisions apply in the absence of contrary agreement between the parties. Two, one concerned with joinder, the other with relief on a provisional basis, only apply if agreed.

4. Overview of Part I of the 1996 Act

The principal sections in Part I the 1996 Act are as follows

<u>Application of the Act</u>

AA1996, s. 2. When does Act apply**.**
AA1996, s. 3. Identifying the seat of the arbitration.
AA1996, s. 4. Mandatory and non-mandatory provisions.
AA1996, s. 5. Application only to agreements in writing.
AA1996, ss. 6, 7, 8. Nature and meaning of an arbitration agreement.

<u>General principles</u>

AA1996, s. 1. Overriding objectives.
AA1996, s. 33. The tribunal's duty, see also s. 1.
AA1996, s. 40. The parties' duty.

<u>Beginning arbitral proceedings</u>

AA1996, s. 9. Stay of legal proceedings.

AA1996, s. 12. Extending time for beginning proceedings.
AA1996, s. 13. Application of the Limitation Acts.
AA1996, s. 14. Beginning proceedings.

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

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

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

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

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

Supportive powers of the court
AA1996, ss. 9 (stay of proceedings), 12, 42-45, 50, 66. See also CPR Part 62.

Supervisory powers of the court
AA1996, s. 24, 66-71 (see also ss. 72, 73). Note AA1996, s. 1(c). See also CPR Part 62.

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 2: BEGINNING AN ARBITRATION AND CONSTITUTING THE TRIBUNAL

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: THE AGREEMENT TO ARBITRATE

The right to bring arbitral proceedings depends on there being an arbitration agreement between the parties to the proposed proceedings.

1. Characteristics of an arbitration agreement

An arbitration agreement is an agreement under which the parties promise that specified disputes or differences between them will be resolved by a third person acting as arbitrator, and that they will honour valid decisions (awards) made by that person.

Such an agreement, sometimes known as a submission, may be ad hoc, or relate to future disputes. In the latter case, a specific arbitration conducted under such an agreement is known as a reference (or arbitral proceedings). The arbitrator is often referred to as the tribunal; particularly where there is a panel of arbitrators. If the reference is managed by an arbitral institution it is referred to as an administered arbitration.

An arbitration agreement may incorporate procedural (institutional) rules selected by the parties as appropriate to the types of dispute they may encounter. Examples include the Construction Industry Model Arbitration Rules (CIMAR), the Grain and Feed Association (GAFTA) Rules and the London Court of International Arbitration (LCIA) Rules.

2. Contractual requirements

An arbitration agreement is, in principle, little different from any other contract. The usual contractual requirements must be satisfied.

- Capacity of parties.
- Agreement, consideration, intent and certainty.
- Not vitiated at common law or by statute.
- Public policy may prevent matters being arbitrated, for example criminal matters.

But, because the effect of such an agreement is to limit recourse to the courts, there are a number of extra considerations.

- Where an arbitration agreement is to be incorporated by reference, clear words are required. But (other than in cases concerned with incorporation from charterparty to bill of lading) express words are, probably, unnecessary, at any rate where the

incorporated clause is applicable, without amendment, to the parties' relationship. See Aughton v. Kent (1991) 57 Build LR 1 (CA)[27] and subsequent cases such as Roche Products Ltd v. Freeman Process Systems Ltd (1996) 80 Build LR 102,[28]Sea Trade v. Hellenic Mutual [2007] 1 Lloyd's Rep 280 (Com Ct) (general words of incorporation to clause immediately applicable held to be sufficient). Consider also AA1996, ss. 6(2), 7.

- In UR Power v. Kuok Oils [2009] EWHC 1940 (Comm) the court expressed the view that an arbitration agreement could be binding even though the negotiations had not lead to the underlying contractinto existence.

- A one-sided choice of arbitration clause is valid; NB Three Shipping v. Harebell Shipping [2005] 1 Lloyd's Rep 507 (Comm).[29]

- Arbitration agreements may fall foul of the Unfair Terms in Consumer Contracts Regulations 1994/1999, and the amendments to these provided for in AA1996, s. 89, 90, 91 (claims under £5,000). SeeZealander v. Laing Homes [2000] 2 TCLR 724;[30]Mylcrist Builders v. Buck [2008] EWHC 2172 (TCC); [2008] BLR 611 (arbitration clause in builder's standard terms invalid, as not properly drawn to her attention, and impact unclear to a consumer. It created a significant imbalance as excluded or hindered her right to take legal action. Arbitrator's fees, about £2,000, being significant in respect of a small dispute (with VAT, just over the £5,000 threshold) also relevant.Arbitration agreements, including terms relating to the conduct of the arbitration, are, however, excluded from the controls in the Unfair Contracts Terms Act 1977;Kaye v. Nu Skin Ltd [2011] 1 Lloyd's Rep 41.

- There has been some debate about whether arbitration infringes the Human Rights Act 1998, see Article 6(1) of the Convention. This is not the case since arbitration is a purely consensual process and the parties can agree to waive certain of their Article 6 rights, Weelex v. Rosa Marine [2002] 1 All ER (Comm) 939;[31]Stretford

---

27 **Aughton**: Sir John Megaw considered express words of incorporation needed, because excluded right to have matter dealt with by court, important that a deliberate and conscious act, doctrine of seperability. Gibson J, more *lessezfair*: No special rules of construction, did the parties clearly intend to incorporate, but the greater the modification needed, the clearer the words of incorporation must be.

28 **Roche**, preferred Gibson J. Where clause immediately applicable then general words of incorporation, ok (as here).If needs modification, then more specific reference needed.Giffen v. Drake and Scull (1993) 37 ConstLR 84 (CA), appeared to support Gibson J, Astel-Reinger Joint Venture v. Argos Engineering etc [1995] ADRLJ 41 (Sir John Megaw's reasoning not followed in Hong Kong).

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

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

31 **Wheelex**: Article 6 is irrelevant to the question of whether an arbitration agreement was entered into since the right to a public

v. Football Association [2007] 2 Lloyd's Rep 31 (CA)[32] (An arbitration agreement entered into voluntarily and freely amounted to a waiver of those Article 6 rights, public hearing, independent tribunal established by law, and public judgement, that were not provided for in the AA1996).

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

3. Scott v. Avery clauses

A Scott v. Avery clause makes the obtaining of an arbitral award a precondition to the commencement of legal proceedings. It may either be in the form of a provision that no action shall be brought until an arbitration has been conducted and an award made, or in the form of a stipulation that the defendant's only obligation is to pay such sum as an arbitrator determines.[33]

4. Statutory formalities

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

- It must be in writing and concern disputes or differences, see AA1996, ss. 5, 6 (the definition of writing is extremely wide and may have affected the requirement, under the old law, that any words of incorporation to be in writing, Aughton v. Kent (1991) 57 Build LR 1 (CA)).[34]

- Other than in respect of Part III (enforcement of New York Convention Awards) and a few provisions in Part I, being ss. 9-11, 43, 44 and 66, which apply wherever the seat is or if no seat is designated or determined identified, see AA1996, ss. 2(2) – 2(5),[35] the seat of the arbitration must be in England and Wales or Northern Ireland, AA1996, ss. 2(1), 3. However, by s. 2(4) the court may exercise any Part I power for the purpose of supporting the arbitral process where no seat has been designated or determined andby reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.[36] This was considered in ChalburyMcCouat v. PG Foils Ltd [2011] 1 Lloyd's Rep 23

---

hearing can be waived.

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

33 See **Scott v. Avery** (1856) 5 HL Cas 811, where the effectiveness of such provisions as a defence to proceedings, rather than as invalidating such proceedings, was upheld.

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

35 Principally ss. 9-11 and 66, and ss. 42 and 44. Section 7 applies if the law of the arbitration agreement is that of England and Wales, or Northern Ireland, irrespective of the seat.

36 Not also the link between this test and the ability to serve an arbitration claim form out of the jurisdiction, CPR Part 62.5

(TCC)[37] where the court, on a s. 18 application for the appointment of an arbitrator, said that one of the relevant considerations was whetherthe applicable law of the contact was likely to be that of England and Wales and, finding that this was so, declared that the appointment should be made by the LCIA.

- The seat of the arbitration is the juridical seat of the arbitration, see AA1996, s. 3. See Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] 1 WLR 262, Lord Mustill;[38] Dubai Islamic Bank v. Paymentech, [2000] 1 Lloyd's Rep 65.[39] But the use of the word "seat" is not conclusive, see Braes of Doune v. Alfred McAlpine [2008] EWHC 426 (TCC).[40]

- Note: ChalburyMccouat v. P.G.Foils Limited [2010] EWHC 2050 (TCC), para 19, disputes as to the seat to be resolved by the arbitral tribunal, not the court.

Even if these formalities are not satisfied, an arbitration agreement may still be valid at common law, see AA 1996, s. 81. If the seat is outside England and Wales or Northern Ireland, the arbitration agreement will be governed by some other applicable law, such as UNCITRAL. Nevertheless, the court retains some of its supportive powers, see AA1996, ss. 2(2) - 2(5).

5. Discharging an arbitration agreement or reference

An arbitration agreement and/or a reference can be terminated by agreement (whether or not in writing), see AA1996, s. 23(4).

---

37 **Chalbury**: The parties were English and Indian and the work was to dismantle a plant in the Netherlands and, under a separate agreement, reassemble it in India.

38 **Channel Tunnel**: There may be an express choice of curial law that is not the law of the place where arbitration to be held, but in absence of clear or express words to this effect, the irresistible inference is that the parties by contracting to arbitrate in a particular place intend the arbitral process to be governed by the law of that place.

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

40 **Braes**: A contract for work in Scotland was stated to be governed by English Law. One provision identified the courts of England and Wales as having exclusive jurisdiction to settle disputes another provided for arbitration stated to be a reference to arbitration under the Arbitration Act 1996 but with the "seat of the arbitration to be Glasgow, Scotland". The court held that the reference to the court's jurisdictional was to its supervisory jurisdiction over the arbitration, thus the seat must have been intended to be in England and Wales, this also being apparent form the referenced to the English Act. The reference to Glasgow was to the place where hearings should take place.

It is a matter of construction whether parties who agree to terminate a substantive agreement also intend to terminate any arbitration agreement contained in it, ChimimportPlc v. G D'Alesio SAS [1994] 2 Lloyd's Rep 366.[41]

The termination of arbitral proceedings does not, in itself, discharge the arbitration agreement, Furness Withy (Australia) Pty Ltd v. Metal Distributors (UK) Ltd [1990] 1 Lloyd's Rep 236 (CA).[42]

Discharge of a substantive contract, for instance by breach or frustration, does not ordinarily discharge an arbitration agreement,Heyman v. Darwins Ltd [1942] AC 356 .[43]

Discharge of an arbitration agreement or a particular reference by frustration or repudiatory breach is rare; Bremer Vulkanetc v. South India Shipping Corp [1981] AC 909.[44]But note John Downing v, Al Tameer [2002] BLR 323 (CA).[4546] Now see Enticov.

---

41 **Chimimport**: Where the parties terminate the substantive contract by agreement, it is a matter of construction whether they also intended to terminate their arbitration agreement as well.

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

43 **Hayman**: Where an arbitration clause is included as a term of a substantive contract, the principle of separability means that the arbitration agreement will not be discharged by the discharge of the substantive agreement through, for example, frustration or repudiatory breach, AA1996, s. 7(1).

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

Neither does inactivity frustrate an arbitration agreement. This is because both parties are obliged to take steps to progress arbitral proceedings by applying to the tribunal for directions necessary to prevent delay and a contract cannot be frustrated by the default of a party to that contract, Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal [1983] AC 854.

45 **Downing**: Defendant refused to recognise the existence of contract, incorporating an arbitration agreement. Claimant commenced legal proceedings. The defendant's contentions amounted to a repudiatory breach of the arbitration agreement, accepted by conduct when, in the face of those contentions, legal proceedings were commenced.

46 Note: Commencing proceedings in breach of an arbitration agreement is not, itself, repudiatory, unless done in circumstances that show that the party in question no longer intended to be bound to arbitrate. This was common ground in BAE Hotels v. Bellway [2007] 2 Lloyd's Rep

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

PART B: BEGINNING ARBITRAL PROCEEDINGS

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

1. Preconditions to the service of a Notice to Concur

There are a number of preconditions that must be satisfied before a Notice to Concur can be issued.

- There must be a prior dispute or difference between the parties, considerEllerine Bros (Pty) Ltd v. Klinger [1982] 1 WLR 1275 (CA).[47] The meaning of the word "dispute" was reviewed in Collins v. Baltic Quay [2005] BLR 63 (CA).[48]

- The dispute or difference must come within the scope of the arbitration agreement. Words such as "Disputes arising under ..." have a narrower meaning than "Disputes in connection with/ arising out of ..."; a contract, Heyman v. Darwins Ltd [1942] AC 356; Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63 (CA).[49] Thus, the

---

493 (Comm Ct).

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

There is no difference or dispute where a party is not told and is unaware of the respects in which a claim is made against it and is not in a position to admit or deny that claim (Cruden Construction Ltd v. Commissioner for New Towns (1994) 75 Build LR 134). Neither can there be a dispute or difference where a claim is made and admitted, Ellerine Bros (Pty) Ltd v. Klinger [1982] 1 WLR 1275 (CA).

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

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

words "in connection with" are wide enough to encompass claims in misrepresentation and in negligent misstatement and allegations of mistake; Ashville Investments v. Elmer Contractors [1989] 1 QB 488 (CA).

- But now see Fiona Trust&Holding Corp v. Yuri Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254, where it has been held, at any rate in an international commercial contract, the words "arising under a contract" should no longer be given a narrower meaning than the words "arising out of a contract".

- If the word agreement is used, rather than contract, the wider form of wording may be sufficient to encompass disputes about whether the agreement is void, for instance for illegality; Harbour Assurance v. Kansa [1993] 1 Lloyd's Rep 455 (CA);[50] AA1996, s. 7.

- The old law still may have relevance; Norscot Rig v. Essar Oilfields [2010] 2 Lloyd's Rep 209 (Comm); (Counterclaims arising under an earlier contract did not arise out of the later contract – that with the arbitration agreement – but did relate to it, these words also being used in the arbitration agreement, thus were within the jurisdiction of the arbitrator).

- There may be contractual preconditions, or limits on the service of a Notice to Concur, for example prior mediation, review by a third person or time bars.

2. Preparing a Notice of to Concur (a Notice of Arbitration)

The wording of the Notice to Concur merits careful consideration.

- The Notice identifies the matters that have been referred and, together with the arbitration agreement and the Arbitration Act 1996, defines the jurisdiction and powers of the tribunal. If the notice is unclear, previous correspondence can be considered to establish what disputes are encompassed by it, CasilloGrani v. Napier Shipping Co [1984] 2 Lloyd's Rep 481.[51]

---

connection with" or "arising out of" a contract are generally regarded as synonymous, and as having wide meaning. For a recent example, adopting this approach, see El Nashatry v. J Sainsbury [2004] 1 Lloyd's Rep 309 (Comm Ct). Held: dispute concerning a variation to 1999 Share Sale Agreements (which provided for arbitration) were in relation to that agreement, whether dispute was as to the construction or effect of an admitted variation or as to its terms or as to whether there was a variation at all.

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

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

- Claims made later, for instance in case statements, must be encompassed by the description of the dispute in the Notice.[52]

- The availability of defences by way of set-off depends on the nature of the set off and the width of the arbitration clause. Transaction set-offs are more likely to be within the scope of a widely drawn arbitration agreement than independent set-offs; see discussion in Metal Distributors v. ZCCM Investment Holdings [2006] 2 Lloyd's Rep 37 (Comm).[53] If the words "relating to" are used, then counterclaims arising under a related contract may be within the tribunal's jurisdiction; Norscot Rig v. Essar Oilfields [2010] 2 Lloyd's Rep 209 (Comm).

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

3. The commencement arbitral proceedings for limitation purposes

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

- To have this effect, the Notice must be worded appropriately to the manner in which the tribunal is to be constituted and served on the right person. (Subject to contrary agreement: designated/named arbitrator – serve on other party requiring dispute to be referred to arbitrator: party appointed arbitrator or arbitrators serve onother party requiring it to appoint or agree to appointment of arbitrator; third party appointed arbitrator give notice to that person requiring him to make the appointment) see AA1996, s. 14.[54] But a failure in these respectsprovided the right person is served was not fatal under the pre 1996 Act law, see NeaAgrex SA v. Baltic Shipping Co Ltd [1976] 2 Lloyd's Rep 47

---

52 Consider claims, defences, abatements, set-offs and counterclaims. But the parties can alter the tribunal's jurisdiction and powers by subsequent agreement, estoppel or waiver.

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

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

(CA),[55] and may still not be fatal. Consider AtlanskaPlovidba v. ConsignacionesAsturianas SA [2004] 2 Lloyd's Rep 109 (Comm) where it was said that arbitration being used by commercial men, the court should concentrate on the substance, not the form, of the notice.[56]

- The Notice must unequivocally require the disputes or differences to be referred to arbitration; Allienzetc v. SFI Rotterdam BV [1999] 1 Lloyd's Rep 68;[57]Taylor Woodrow v. RMDKwikform [2008] EWHC 825 (TCC); [2008] 2 Lloyd's Rep 345 (notice must make clear that the party is intending to refer the dispute to arbitration, not merely threatening to do so if demands not met). Contrast Bulk & Metal Transport v. VOC Bulk [2009] EWHC 288 (Comm); [2009] 1 Lloyd's Rep 481, s. 14(4) should be interpreted broadly and flexibly concentrating on substance not form.[58]

---

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

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

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

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

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

PART D: CONSTITUTING THE TRIBUNAL

Once arbitral proceedings are commenced, the tribunal is, if not already agreed, appointed either by agreement between the parties, on application to an agreed third party or, if the agreed appointment procedure has failed, by the court.

1. Methods of appointment

The parties can agree on how the tribunal is to be constituted, AA1996, ss. 15(1), 16(1). Apart for a single arbitrator, the most usual alternatives are three arbitrators, one appointed as chairman, or party arbitrators with a substitute umpire.

- Panels of three arbitrators sit together and take decisions by majority (AA1996, ss. 20, 22).

- Party arbitrators have sole responsibility for the reference until they disagree whereupon the umpire takes over (AA1996, s. 21), whereupon the party arbitrators may become advocates before the umpire.

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

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

- In the case of a two or three arbitrator tribunal, it is usual for each party to appoint one arbitrator and for the chairman or umpire to be chosen by agreement between the arbitrators or by a nominated third person.

- Party arbitrators, particularly those who may be replaced by an umpire, have a somewhat anomalous status, see Redfern& Hunter, 2nd edition, p 198-201.

- An arbitration agreement which stipulates a specific religious requirement for the arbitrators does not fall foul of the Employment Equality (religion or Belif) Regulations 2003, or the EU Directive they implement. Arbitrators are not employees within the meaning of these Regulations; Jivraj v. Haswani[2011] UKSC 40.

There is, apparently, no implied term that the contractual right to apply to a third party for an appointment will be excised reasonably and as such within a reasonable period of time from issuing the notice to concur. Neither, ordinarily, will the right to apply for an appointment lapse through effluxion of time; Indescon Ltd v. Ogden [2005] BLR 152 (TTC).[59]

---

arbitration.

[59] **Indescon**: Notice to concur issued in 1992, application for appointment first made many years later. Court held that the right to seek an appointment continued to subsist. The solution was, once tribunal

If an arbitration agreement does not make adequate arrangements for the constitution of the tribunal, or for how it is to be appointed the default provisions in the Arbitration Act 1996 apply, AA1996, ss. 15, 16, 29, 21, 22. The appointments can, if necessary, be made by the court, AA1996, ss. 17, 18, 19. The court will have regard to AA1996, s. 1 in deciding whether to exercise its s. 18, discretion, Durntnell v. S of S for Trade and Industry [2000] BLR 771.[60] Consider also AtlanskaPlovidba v. ConsignacionesAsturianas SA [2004] 2 Lloyd's Rep 109;[61] ChalburyMccouat v. P.G.Foils Limited [2010] EWHC 2050 (TCC) (exercise of s. 18 power where no seat designated);[62] Noble Denton Middle East v. Noble Denton International [2011] 1 Lloyd's Rep 387 (s. 18 is a gateway, it is sufficient for an appointment to be made that there is a good arguable case that there is an arbitration agreement, it is then for the arbitrator to determine its validity or not, neither was the pendency of litigation in Texas, a reason not to appoint, the probable arbitration agreement acting like an exclusive jurisdictionclause, and no exceptionalcircumstances why it should not be upheld.

An appointment takes effect when the arbitrator communicates his acceptance, Tradax Export SA v. Volkswagenwerk AG [1970] QB 537.[63]

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

2. Remuneration

The basis of the arbitrator's remuneration can be agreed with the parties, either before accepting the appointment or subsequently. Excessive fees and cancellation charges bring arbitration into disrepute.

---

appointed, to seek to dismiss the claim for "want of prosecution".

60 **Durtnell**: Application to appoint under s. 18. Discretion governed by s. 1 AA1996, Court could consider delay in deciding whether possible to obtain a fair resolution of the dispute. Can refuse to appoint if no longer possible to have a fair resolution of the dispute before an impartial tribunal without unnecessary delay. But here delay not too long, also contributed to by S of S.

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

62 **Chalbury**: where parties have not agreed the seat, court has, under s. 2, s. 18 power to appoint, provided there is a sufficient connection with England and Wales, such as where the agreed substantive law is or is likely to be the Law of England and Wales and a foreign court is not or is not likely to be seized of the matter..

63 **Tradax**: Appointment takes effect when arbitrator communicates acceptance.

- Agreements should not be made with only one of the parties, K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd [1992] 1 QB 863; Turner v. Stevenage Borough Council [1997] 2 Lloyd's Rep 129 (CA).[64]

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

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

- The court can, on application, consider and adjust an arbitrator's fees, but not so as to override a contractual entitlement, AA1996, s. 28; see Agrimex v. Tradgrain [2003] 2 Lloyd's Rep 537.[65] The position is different where an arbitrator is removed, AA1996, s. 24(4). Consider also the position on resignation, AA1996, s. 25(3)(b).

3. Revocation, removal and resignation

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

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

---

64 **Hyundai**: To do so may call the tribunal's impartiality into question, as may refusing to progress the reference (once appointed) until terms agreed by both parties, Turner.

65 **Agrimex**: Application under s. 28(2) and (3) by party ordered to pay GAFTA board of appeal's fees for court to consider an adjust the Appeal Board's costs in particular the item for legal fees of £9,000 (incurred through employing a solicitor to attend the hearing and draft the award), on grounds that excessive and disproportionate. Court considered that there was no reason why a competent arbitrator should not be expected to produce its own reasoned award. It appears that if GAFTA had not advised that it was reforming the system, court would have concluded a draftsman was not justified in this case. Court considered that there was no reason why the solicitor should have attended the hearing, or been used at £190 per hour when a lay draftsman could have done the work at £35 per hour. The court also expressed concern at the suggestion that the draftsman might have a role in providing a legal analysis. The court considered that neither he nor the board had regard to the principle of proportionality in what he was doing or charging. Court regarded rate and hours expended (in excess of 30 hours on drafting a 50 page award, plus attendance at hearing) as excessive and the work disproportionate given the solicitor's limited role as draftsman, and a charge for proof reading by a trainee solicitor as unjustified. It reduced his fee to £5,000.00. The balance in excess of this had to be repaid by GAFTA. Claim was for about £40,000. Fees of appeal board were about £20,000. Note, the award was only released on payment of the demanded fees; this application was commenced about four weeks later. Note, also, the judge reduced the defendant's costs of the application by just under half to £6,500.00.

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

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

- Resignation, AA1996, s. 25.

4. Consequence of revocation, removal or resignation

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

- A replacement will have to be appointed, by the court if necessary, and arrangements made about the status of the existing proceedings, AA1996, s. 27, consider Fox v. PG Welfair Ltd [1981] 2 Lloyd's Rep 514, 520.[66]

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

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

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

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

---

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

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 3: ENFORCING THE RIGHT TO ARBITRATE AND DEALING WITH JURISDICTIONAL DISPUTES

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: ENFORCING THE RIGHT TO ARBITRATE

The court will not specifically enforce an arbitration agreement, but a claim for damages is, in theory, possible, see Tracomin SA v. Sudan Oil Seeds Co Ltd [1983] 2 Lloyd's Rep 629 (CA).[67]

The usual remedy is to seek a stay of proceedings, if commenced in the High Court or a county court or, if commenced in some other forum, an injunction from the High Court.

1. Obtaining a statutory stay of proceedings

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

- The timing of the application for a stay is critical. The application may not be made before taking the appropriate procedural step, if any, to acknowledge the proceedings, or after taking a step in those proceedings to answer the substantive claim, see AA1996, s. 9(3); Capital Trust v. Radio Design [2002] 2 All ER 150 (CA);[68] for an example, see Patel v. Patel [2000] QB 551 (CA).[69] Note Bilta (UK) Ltd. V. Nazir [2010] EWHC 1086 (Ch), a failure to comply with CPR Part 11[70] did not mean the right to arbitrate was lost, as s. 9(1) and 9(3) displaced it. While asking the court for an extension of time to serve a defence is a step to answer the

---

67 **Tracomin**: Statutory stay was first possible under the Common Law Procedure Act 1854. Tracomin discusses the difficulty in proving damages, i.e. have to show tribunal would reach a different decision.

68 **Capital**: Application for a stay but also for summary judgement in the event that a stay was not granted. The conduct must be such as to demonstrate an election to abandon the right to a stay in favour of allowing the action to proceed, and the act must have the effect of invoking the jurisdiction of the court. Not the case here, so a stay granted.

69 **Patel**: Application to set aside judgement in default and for consequential directions, not a step to answer the substantive claim, the test under the new Act. Application for leave to defence and counterclaim, not necessary, so not such a step.

70 CPR Pt 11 requires a defendant who wishes to contest the jurisdiction of the court to apply the court for an order after filing acknowledgment of service.

substantive claim, since the defendant in question had made clear in correspondence (although not copied to the court) that it reserved its right to apply for a stay, the right to apply for a stay had not been lost.

- An arbitration agreement may be inoperative if it contravenes consumer legislation, Zealander v. Laing Homes Ltd ([2000] 2 TCLR 724.[71]

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

- The power to refuse a stay where the arbitration agreement is null and void, inoperative or incapable of being performed, assumes that an arbitration agreement has been concluded, and is concerned with whether it is derived of legal effect, Albon v. Naza Motor Trading (No 3) [2007] 2 Lloyd's Rep 1 (Ch D).[72]

- A dispute about whether the court should exercise its supervisory (or supportive) jurisdiction is not encompassed by a normally worded arbitration agreement, thus is not amenable to a stay under s. 9 AA1996, Sheffield United v. West Ham United [2008] EWHC 2855 (Comm).

If there is a dispute about whether an arbitration agreement has been concluded or whether it encompasses the dispute, the court should ordinarily determine this, not leave it to the tribunal. It should do so either by hearing a preliminary issue on the question or, if the parties agree or if there are no disputed issues of fact, on affidavit evidence. Alternatively, the court can stay the proceedings under the court's inherent jurisdiction, where in the interests of good sense and litigation management it would be preferable for the arbitrator to decide the issue;Birse Construction v. St David [2000] BLR 57 (CA); Al-Nami v. Islamic Press Agency [2000] BLR 150 (CA).[73]

---

71 **Zelander**: Unfair Terms in Consumer Contracts Regulations 1994/1999, see also AA1996, ss. 90 (consumer includes legal persons), 91 (claims up to £5,000, where one part a consumer, arbitration agreement unfair). In Zelander the claim was for more than £5,000, but consumer had no opportunity to negotiate arbitration agreement in the terms of NHBC scheme. It restricted recourse to legal action, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, Schedule 3 paragraph 1 (q), imbalance in bargaining power. Arbitration agreement could not be relied on, stay not granted.

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

73 **Birse**: If there is a triable issue then, unless the parties agree, it should be dealt with at a hearing. On application for stay, the court should resolve whether there is an arbitration clause (existence and extent). The 1996 Act did not require this to be decided by Arbitrator. JCT conditions were incorporated by reference in letter; contact was concluded by conduct. If reasonably clear there was a

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

Abolition of the discretion not to stay proceedings

The court no longer has discretion as to whether to stay proceedings, or to not do so if there is "in fact" no dispute between the parties. Contrast AA1950, s. 4(1), AA1975, s. 1 (both now repealed) and AA1996, s. 86 (not brought into force). SeeHalki Shipping Corp v. Sopex Oils Ltd [1998] 1 Lloyd's Rep 465 (CA).[74]

- The court can no longer give summary judgment before staying proceedings "pending arbitration". This is in contrast to the position under the old law, Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd [1989] 1 Lloyd's Rep 473 (CA) (AA1950, s. 4, now repealed) SL Sethia Liners Ltd v. State Corporation of India Ltd [1981] 1 Lloyd's Rep 31 (CA) (AA1975, s. 1,[75] now repealed).

- It is unclear whether the court could still order an interim payment before staying the proceedings as it did in Imodco Ltd. v Wimpey Major Projects Ltd (1987) 40 Build LR 1 (CA). Consider Van Uden BV v. Kommandigfesellshaft etc.[76] [1998] ECR I-7091, see [1999] 2 WLR 1181.[77]

---

clause and only dispute concerned its extent, this could be left to the arbitrator.

Al-Nami. Under s. 9, judge should decide if there is an arbitration agreement applicable to the claim, not leave it to the arbitrator. A number of options. Decide on affidavit evidence that there is, and stay. Order the issue to be tried as a preliminary issue. Decide that there is no arbitration agreement and dismiss the application. Or stay, under the court's inherent jurisdiction, so that the tribunal can decide the issue where this was in the interests of good sense and litigation management (ie where some matters clearly within the tribunal's jurisdiction).

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

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

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

77 **Van Uden:** Dispute arose under space charter providing for arbitration in the Netherlands, Van Uden instituted arbitration against Deco in the Netherlands for non payment of certain invoices, also applied for interim relief to the Rotterdam court seeking a provisional order from the debtor to cover the debts claimed before the arbitrators (note under art 1022(2) of the Code of Civil Procedure, an arbitration clause did not preclude a party's right to seek interim relief). The

Effect of a stay of proceedings

A stay of proceedings does not, of itself, amount to a referral to arbitration of the dispute which was at issue in the stayed proceedings. A Notice to Concur (a Notice of Arbitration) must be issued. This can cause limitation problems if legal proceedings are commenced without a protective notice to concur, at the end of the applicable limitation period.

2. Obtaining a stay of proceedings by (anti suit) injunction

The High Court can, by injunction, prevent proceedings being commenced or prosecuted in a foreign court, or other forum, see Sheffield United v. West Ham United [2008] EWHC 2855 (Comm)[78]in contravention of an arbitration agreement. It will do so, unless there are good reasons to do otherwise, provided relief is sought promptly and before the foreign proceedings are too far advanced and it is clear that there is an arbitration clause (and that the applicant has a good case on the merits?); Bankers Trust Co v. PT Jakarta International [1999] 1 Lloyd's Rep 910; but note the less onerous test for such an injunction in AggelikiCharisCompaniaMaritima SA v. PagnanSpA [1995] 1 Lloyd's Rep 87 (CA),[79] now confirmed in Donohue v. Armco [2001] UKHL 64[80](reasoning no longer relevant in Lugano/Brussels Convention or Judgment Regulation States, see Turner v Grovit [2004] 2 Lloyd's Rep 169 (ECJ)). See also Glencore International v. Exeter Shipping [2002] 2 All ER (Comm) 1, paras 42, 43 (CA) where it was said that the defendant must be amendable to English territorial and personal jurisdiction. This will be

---

ECJ said that such measures were not, in principle, ancillary to arbitration proceedings, but were parallel to it and concerned the protection of other rights, the nature of those rights determining the place of such orders in the scope of the convention. The ECJ held that, before such orders could be made, there had (a) to be a real connection between the subject matter of the measure and the court's territorial jurisdiction and, (b) the measure must have merely a protective and provisional character.

78 **Sheffield**: In that case an attempt to appeal, in contravention of the arbitration agreement, an arbitral award to the Court of Arbitration for Sport in Lausanne.

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

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

the case and service out of the jurisdiction permitted under CPR 6.20(5), both where the arbitration agreement is governed by English law and where the seat is in England. It is also the case if the contract is governed by English law, Steamship Mutual v. Sulpicio Lines [2009] EWHC 914 (Comm); [2008] 2 Lloyd's Rep 269.

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

- The injunction, if interim, can be granted under s. 44 AA 1996, but also under s. 37 of the SCA 1981. The latter was appropriate if arbitration proceedings were not on foot or intended; AES Ust-Kamenogorsk v. Ust-KamenogorskJSC [2010] 2 Lloyd's Rep 493, or if a final injunction was sought;REC Wafer Norway v. Moser Baer [2011] 1 Lloyd's Rep 410.

- The question of whether such injunctions are compatible with EU law,in particular the Judgments Regulation, was referred to the ECJ, West Tankers v. RasRiunioneAdriatica [2007] 1 Lloyd's Rep 391 (HL), the HL expressing the view that proceedings for such injunctions do fall outside the scope of the Regulation. The ECJ disagreed Allianz SpA v. West Tankers (ECJ 10th February 2009); [2009] 2 Lloyd's Rep 413.[81] Proceedings concerning the subject matter of the dispute came within the scope of the Regulations. A preliminary issue in those proceedings, including the scope of an arbitration agreement, also came within the scope of the Regulation. Thus the question of the Italian court's lack of jurisdiction was a matter exclusively for that court. The English court could not issue an injunction restraining a party from commencing or continuing proceedings before the courts of another member state on the grounds that such proceedings would be contrary to an arbitration agreement. Changes to the Regulations to address these problems are currently under consideration by the EU Commission.

- Similarly, the decision of a competent court of an EU state that a contract did not incorporate an arbitration clause made in the context of proceedings in which the main subject was within the Judgments Regulation and, not being manifestly contrary to public policy, had to be recognised by the English Court under the Regulation; National Navigation v. EndesaGeneracion [2009] EWCACiv 1396.[82]

A way around West Tankers?

In West Tankers v. Allianz SPA [2011] EWHC 829 (Comm), the court refused to set aside permission granted under s. 66 to enforce the declaratory award of the arbitral tribunal, that West Tankers had no liability to Allianz. The court said that, ordinarily, a

---

81 This does not affect the court's jurisdiction to grant such injunctions where the proceedings are not in the EU, Shashoua v. Sharma [2009] EWHC 957 (Comm).

82 **Navigation**: The court said that if Endesa was entitled to challenge the incorporation of the arbitration clause in the Spanish court and if the English court was bound to recognise that decision there was no room for any argument that public policy was being infringed as the English court was precluded form examining for itself whether the clause was incorporated. Not contrary to public policy to recognise a judgment of a foreign court simply on the grounds that an English court would have come to a different decision

declaratory award would not be enforced under s. 66 because no benefit, beyond that provided by the award, could not be shown. But here there was a benefit in that the intention was to establish the primacy of the award over an inconsistent judgment of the Italian Court, so as to defeat an application to recognise the court judgment under Article 34(3) of the Judgments Regulations. It was not necessary for the court on the s. 66 applicationto finally decide that hypothetical question, it was enough that there was a real prospect of establishing the primacy of the award.

3. Costs orders consequent on a stay or anti suit injunction

See A v. B (No. 2) [2007] 1 Lloyd's Rep 358; where proceedings bought in England in breach of an arbitration agreement, costs should ordinarily be awarded on an indemnity basis, because the damages flowing from the breach were all costs reasonably incurred by the party entitled to the stay.

4. Contesting arbitral jurisdiction by an anti-arbitration injunction

If a party considers that arbitration has been wrongfully commenced against it, the matter being amenable to the English Courts, it may be able to obtain an anti-arbitrationinjunction, restraining the arbitration, even if the arbitration is commenced elsewhere in the EU, since the Judgments Regulation does not apply; Claxton Engineering Services v. TXMOlaj-esGazkutato [2011] 1 Lloyd's Rep 510 (Comm).[83]But this is an exceptional remedy. It is necessary to show that the applicant's legal or equitable rights have been infringed or are threatened by the continuation of the arbitration or that its continuance would be vexatious, oppressive or unconscionable.

PART B: QUESTIONS OF JURISDICTION

The tribunal's jurisdiction derives from the terms of the arbitration agreement, the Notice to Concur and the Arbitration Act 1996. Its jurisdiction can be expanded by agreement, waiver or estoppel, see for example, Jones Engineering Services Ltd v. Balfour Beatty Building Ltd (1992) 42 ConstLR 1.[84] An exchange of case statements may also create jurisdiction by creating a written agreement to arbitrate where none existed before, see AA1996, s. 5(5), or extend jurisdiction by encompassing a wider range of disputes than those identified in the Notice to Concur.

1. The nature of jurisdiction

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

---

83 **Claxton:** In this case the court had previously held that there was no arbitration agreement (a matter usually left to the tribunal) and that there was an agreement giving the English Court exclusive jurisdiction.

84 **Jones**: If parties commence arbitral proceedings in respect of a particular dispute, wrongly believing that they have concluded a valid arbitration agreement relating to that dispute, appoint a tribunal and appear before it, their conduct may give rise to an *ad hoc* arbitration agreement in respect of that dispute. Alternatively, their conduct may give rise to a waiver or an estoppel preventing either party for denying the validity of the original arbitration agreement. But note mistake as a counter-argument, discussed in Furness Withy (Australia) Pty Ltd v. Metal Distributors (UK) Ltd [1990] 1 Lloyd's Rep 236 (CA).

- Substantive jurisdiction concerns the questions of whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters have been submitted (referred) to arbitration in accordance with the arbitration agreement, AA1996, s. 30(1). The tribunal may lack substantive jurisdiction altogether or may exceed its substantive jurisdiction during the course of the proceedings.

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

2. The position under the old law

Prior to the Arbitration Act 1996, jurisdictional problems bedeviled arbitration because the tribunal had, unless the parties agreed otherwise, no power to determine its own jurisdiction. Provided such objections were made and not waived, they could be brought before the court at any time during the proceedings or after, to resist enforcement of the tribunal's award. For the position under the 1950 and earlier Acts see Brown (Christopher) Ltd v. Genossenshaftetc [1954] 1 QB 8.[85]

3. The position under the Arbitration Act 1996

Under the Arbitration Act 1996, the position is significantly altered. Unless the parties agree otherwise, the tribunal can determine its own substantive jurisdiction, AA1996, s. 30. The effect of this and the related statutory machinery, particularly the statutory estoppel in s. 73,[86] is that the onus is on the party disputing the tribunal's determination to take immediate steps to have that determination reversed by the court.

An objection that the tribunal lacks substantive jurisdiction at the outset must be raised by a party not later than the time that it take the first step in the proceedings to contest the merits of any matter in relation to which it challenges the tribunal's jurisdiction, AA1996, s. 31(1). An objection during the course of the proceedings that the tribunal is exceeding its substantive jurisdiction must be raised as soon as possible after the matter alleged to be beyond its jurisdiction is raised, AA1996, s. 31(2). The tribunal may admit late objections if it considers the delay justified, AA1996, s. 31(3). See also the statutory estoppel, AA1996, s. 73. Consider Vee Networks v. Econet International [2005] 1 Lloyd's Rep 192 (Comm).[87]

---

85 **Brown**: Tribunal could not determine its own jurisdiction although could express a view. Parties had to seek declaration or injunction from the court. This could be used tactically.

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

87 **Vee**: Allegation that contract for support services concerning mobile phone network in Nigeria was ultra vires Econet's memorandum of

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

- In UR Power v. Kwok Oils [2009] EWHC 1940 (Comm) the court expressed the view that in the case of a two tier arbitration, a party should, to preserve its s. 31 rights, challenge jurisdiction before the first tier tribunal.

- An application may also be made to the court to determine a preliminary point of jurisdiction with the agreement of the parties or the permission of the tribunal (of doubtful use), AA1996, ss. 32. In the latter case, the court must be satisfied that determination of the question is likely to produce substantial savings in cost, that the application is made without delay, and that there is a good reason why the matter should be decided by the court.

Challenging jurisdictional awards and awards on jurisdictional grounds

Other than as regards time, there is an unfettered right to challenge the tribunal's award on or dealing with its jurisdiction, AA1996, ss. 67, 70(3), at any rate on the grounds put to the tribunal: Athletic Union v. NBA [2002] 1 Lloyd's Rep 305,[88] applying AA1996, s. 73; approved, obiter, in JSCZestafoni v. Ronly Holdings [2004] 2 Lloyd's Rep 335 (Comm).[89]

---

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

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

89 **JSCZestafoni**: Four parties concluded contract, governed by English law, for electricity and services, provided for arbitration before a panel of three. Subsequent disputes between two of them JSCZ (Georgian) and Ronly (English) agreed to arbitration before a sole arbitrator. After award made JSCZ challenged it, *inter alia*, on grounds that agreement to arbitrate before a single arbitrator void under law of Georgia. Court said JSCZ estopped from taking the point under s. 73, as point was first raised in correspondence with the arbitrator 11 days after the Award and had not brought itself within the "unless" words in s. 73(1) which provide "unless he shows that, at the time he took part or continued to take part in the proceedings, he

- Consider Primetrade v. Ythan Ltd [2006] 1 Lloyd's Rep 457 (Comm):[90] Objection in s. 73 means "ground of objection". Thus new grounds of objection, not put to the tribunal on a jurisdictional challenge, cannot be raised before the court on a s. 67 application, but new evidence or arguments to support a ground that was raised before the tribunal, can be with leave of the court, which may be refused if prejudice to the other party.

- The court, on such a challenge, will not be fettered by the fact that the matter has been dealt with by the tribunal. Thus if a hearing is necessary, it will be ordered even though there has already been a hearing before the tribunal, Azov Shipping Co v. Baltic Shipping Co [1999] 1 Lloyd's Rep 68.

Immediate access to the court

A party who takes no part in the proceedings can have questions of substantive jurisdiction determined by the court by way of declaration or injunction, AA1996, s. 72. See, for example Law Debenture Trust v. Elektrim Finance [2005] 2 Lloyd's Rep 755 (Ch).[91]Making submissions whether on the jurisdictional issue or on the substantive issues after an award on jurisdiction is made is taking part, Broda Agro v. Alfred C Toepfer [2011] 1 Lloyd's Rep 243 (CA). Simply writing to state that the tribunal has no jurisdiction is not participating, Caparo Group v. Fagor [2000] ADRLJ 254.Note also AA1996, s. 73 and the need to apply promptly for discretionary relief, consider Zahorozhye Productions v. Aluminium etc [2002] EWHC 1410 (Comm.).[92]

- Some doubt has emerged about whether s. 72 applies where the issue concerns whether an arbitration agreement was concluded at all, but the authorities that suggest this, reviewed in British Telecommunications v. SAE Group [2009] EWHC 523 (TCC); [2009] BLR 321, are probably wrong (see BLR commentary). See now Broda Agro v. Alfred C Toepfer[2011] 1 Lloyd's Rep 243 (CA) which confirms that it does. Note, at first instance [2009] EWHC 3318

---

did not know and could not with reasonable diligence have discovered the grounds for the objection".

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

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

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

(Comm) it was held that s. 72 does not breach Article 6 of the ECHR by not requiring there to be a waiver of the right to a public hearing of the jurisdictional question.

- The court, relying on the words "should not", in s. 1(c) of the 1996 Act, as meaning something different from "shall not", has occasionally concluded that it retains an residual jurisdiction to consider jurisdictional challenges, even if the requirements of ss. 31, 32 and 72 are not satisfied. Vale de Rio DoceNavegaçao SA v. Shanghai Bao[2000] 2 Lloyd's Rep. 1.[93]For a recent example see British Telecommunications v. SAE Group [2009] EWHC 523 (TCC); [2009] BLR 321.

Jurisdictional challenges in practice

This somewhat confusing range of options has been considered by the court in Azov Shipping Co v. Baltic Shipping Co [1999] 1 Lloyd's Rep 68[94] where it was suggested that a party relying on complex questions of fact to dispute a tribunal's substantive jurisdiction should consider standing back from the proceedings and seeking a declaration under AA1996, s. 72. A claimant disputing the existence of an arbitration agreement would ordinarily commence proceedings in court with a view to resisting any application for a stay.

The position may be further complicated where the parties agree to give the tribunal power to determine its own jurisdiction. In such a case the unfettered right to remove the jurisdictional question into the court may be lost; consider LG Caltex v. China National Petroleum [2001] BLR 325 (CA).[95]

---

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

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

95 **LG Caltex**: Parties could give a tribunal *ad hoc* jurisdiction to determine its own jurisdiction. If so, a challenge under s. 67 would

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

---

not be possible. But no such agreement here, so right of challenge preserved.

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 4: THE DUTIES OF THE TRIBUNAL AND THE PARTIES - THE TRIBUNAL'S MANAGEMENT POWERS

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: THE TRIBUNAL'S DUTIES

The tribunal's duties are concerned both with procedural and substantive issues.

1. The tribunal's general duty

The tribunal's general duty is concerned with the principles of natural justice and cost effective justice that it must apply in conducting the proceedings and exercising its powers, AA1996, ss. 1(a), 33; note also ss. 24 and 68.

2. Natural justice

Natural justice is concerned both with impartiality and procedural fairness.

Impartiality

The parties are entitled to an impartial tribunal.

- The tribunal must be impartial; AA1996, s. 24(1)(a). The test for impartiality encompasses actual and apparent bias; the modern test being whether all the circumstances 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, Magill v. Porter [2002] 2WLR 37 (HL).[96]

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; 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.[97]

---

96 **Magill**: The test in R v. Gough was modified in the light of the light of the HRA 1998 and related ECHR Jurisprudence, and the "real danger" wording dropped.

97 Arbitrator gave directions, inter alia, for security for costs and his fees, on his own motion without inviting relevant evidence and representations from the parties. A serious breach of AA1996, s. 33.

- 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, consider Fox v. Welfair Ltd. [1981] 2 Lloyd's Rep 514.[98]

- The requirements of procedural fairness differ depending on the nature of the decision making body, judicial, quasi-judicial or administrative, the interests or issues at stake, and whether its decision will be final or provisional, Ridge v. Baldwin [1964] AC 40. Arbitral proceedings are closer to the judicial 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).[99] Furthermore, the parties can agree 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 Services v. Lindner Ceilings [1999] 2 All ER (Comm) 374.[100]

The requirement to act fairly may impose a requirement to give brief reasons for procedural decisions (this is certainly good practice). Consider comments to this effect in Al Hadha Trading v. Tradigrain [2002] 2 Lloyd's Rep 512,[101]but note the contrary view in Three Valleys Water Co v. Binnie (1999) 52 Build LR 61.

3. The requirement to act judicially

Concerns with natural justice were, under the 1950 Act, encompassed in the notion that the tribunal should act judicially. This meant that arbitration was, like litigation, an essentially adversarial process and the tribunal had to apply similar principles to a court in exercising its powers. It is unclear whether this principle still applies under the AA1996. Contrast Wicketts v. Brine Builders (2001) CILL 1805 (arbitrator had to apply same principles as a court when ordering security for costs) with Fence Gate v. NEL (2002) CILL 1817[102](requirement to act judicially is no longer relevant in allocating costs).

---

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

99 **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.

100 **How:** Arbitrator tried to force a without prejudice meeting of experts, attended by himself, but without lawyers, on parties to narrow issues. Court regarded idea with suspicion, but since did not happen, and since parties would not be bound and would be free to make representations on the outcome, not unfair. The court also noted that the arbitrator's interventions had created confusion.

101 **Al Hadha**: The tribunal should have given reasons for not admitting a late claim.

102 **Fence Gate**: The applicable principles are to be found in the Arbitration Act and any agreed rules.

4. Cost effective justice

This principle embodies concerns with proportionality and the view that justice beyond the reach of those of modest means or long delayed, is not justice at all. Similar concerns underlie the Civil Procedure Rules, see CPR, Rule 1.1.

- The tribunal's active management role is important in this respect, AA1996, ss 33(1)(b), 34(1); 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.

5. 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.[103]

- 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 Tiefbohr GmbH v. Ras Al Khaimah National Oil Co[1990] 1 AC 295[104](CA), reversed by HL on other grounds) and in Amiable composition, a learning curve. Hong-lin-Yu (2000) 17(1) J IntArb 79.

PART B: THE PARTIES' GENERAL DUTY

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,[105] 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

---

103 Note Halpern v. Halpern [2007 2 Lloyd's Rep 56, in which the court noted that in court proceedings, the choice of a non-municipal system of law was precluded by article 1 of the Rome Convention. If parties wished some form of rule or law, not of a country to apply to their contract, they could agree this provided there was an arbitration clause.

104 **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.

105 **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.

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, unless the objecting party can show that, at the time of its taking part or continuing to take part in the proceedings, it did not know and could not with reasonable diligence have discovered the grounds of the objection.[106]

- Rustal Trading v. Gill &Duffus [2000] 1 Lloyd's Rep 14 (Comm). 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 principal 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):[107] 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 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."

---

106 But note the gloss in Sumukan v. Commonwealth Secretariat [2007] EWCACiv 243; [2007] 2 Lloyd's Rep 87 (CA), where Strasbourg jurisprudence to the effect that unless a person is in full possession of all the facts, an alleged waiver of the right to an impartial and independent must be rejected as not being unequivocal, was applied, to hold that the right to challenge an award on the ground that there was a defect in the tribunal's appointment had not been waived.

107 Note ASM Shipping Ltd of India v TTMI Ltd [2006] EWCACiv 1341: Judge refused leave to appeal. Court of Appeal said that it had no jurisdiction to re-consider this unless judge's decision contravened ECHR, which it didn't. CA made clear that it had no difficulty with the judge's reasoning. Note, in **ASM Shipping v. Harris** [2007] EWHC 1513; [2008] 1 Lloyd's Rep 61, ASM sought unsuccessfully to argue that the other arbitrators should also be removed because tainted by X QC's apparent bias. This did not follow as a matter of law.

PART C: THE TRIBUNAL'S MANAGEMENT POWERS

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

1. The tribunal's procedural and evidential powers

The tribunal's procedural and evidential powers are set out in AA1996, s. 34. Procedural matters include the following.

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(1) (c)
Case statements are essential to define the issues in dispute and provide an agenda for the procedural stages and the eventual hearing. Consideration must be given to the content timing and method of their exchange, in particular if one or more of the parties are represented by persons who are unfamiliar with English court practice.

To avoid unnecessary proliferation of issues, sequential exchange is generally preferable to concurrent exchange.

In deciding whether to allow amendments, the tribunal must consider any jurisdictional issues before balancing questions of procedural fairness and cost effective justice; Leif Hoegh& Co A/S v. PetrolseaInc [1992] 1 Lloyd's Rep 45.

Disclosure and production of documents, AA1996, s. 34(2) (d)
A document is anything on which information 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.[108]

- The simplest order is for production of documents on which reliance is placed with case statements.

- In more 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.

- In some cases standard disclosure (CPR, Part 31), after case statements are exchanged, may be appropriate.[109]

---

[108] O Co v. M Co [1997] 1 Lloyd's Rep 347; Lovell Partnerships (Northern) Ltd. v AW Construction Plc (1996) 81 Build LR 83.

[109] This encompasses all documents on which a party relies together with

Consideration should be given to the timing and mechanics of production. Often production by provision of copies or inspection of files may be appropriate.

Questioning the parties, AA1996, s. 34(2) (e)
This power is concerned with requests for further information addressed by one party to the other. A principal issue in deciding whether to make such orders will be whether the information is needed to enable a party to present its case or known the case it has to meet; Damond Lock Grabowskie v. Laing Investments (Bucknell) Ltd (1993) 60 Build LR 112.

Application of rules of evidence and the form evidence should take AA1996, s. 34(2) (f)
This power is concerned with two matters. The applicability or otherwise of rules concerning the admissibility of evidence, and procedures for exchanging evidence between the parties and presenting it to the tribunal.

The general principle is that relevant evidence is admissible, unless excluded by a rule of evidence. This tribunal's power is concerned with the exclusionary rules, not the general principle; Michaelides v. Wilkinson, The Times, 14th April 1999 (CA)[110]

- The tribunal can dis-apply procedural or exclusionary rules of evidence (the strict rules of evidence), principally the hearsay rule and the best evidence rule. But hearsay is, in any case admissible under the Civil Evidence Act 1995.[111] ConsiderBrandeis Brokers v. Black [2001] 2 Lloyd's Rep 359.[112]

- It is doubtful that the tribunal can disregard rules of law based (at least partly) on public policy, such as the rules that exclude evidence on grounds of privilege or public interest immunity.[113]

- It is doubtful that the tribunal can disregard rules of law that govern how particular matters are proved, for instance the parole evidence rule, the rules concerning the evidence that is admissible for construing written contracts and statutes.

The tribunal should, if proposing to depart from the evidential rules applicable in court proceedings, make sure that the parties are aware of this.

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.

---

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).

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

111 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 non expert opinion evidence.

112 **Brandeis**: Not an irregularity to allow an expert to adduce evidence that would not be admissible in legal proceedings.

113 Consider AA1996, s. 43(3), AA1950, s. 12(1), now repealed.

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, if done with care, is acceptable. See JD Weatherspoon v. Jay Mar Estates [2007] BLR 285 (TCC).[114] 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.

- Can the tribunal take the questioning of witnesses out of the parties' hands, or is the right of a party to directly question the other party's witness a fundamental requirement, in a common law jurisdiction, of natural justice? 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).[115]

- The tribunal acting inquisitorially by obtaining evidence that the parties have not chosen to adduce or taking the questioning of witnesses out of the parties' hands. The tribunal could not do this under the old law and, given the uncertainties over how the parties can test any evidence obtained, it remains problematic.[116]

---

114 **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.

115 See, on witness conferencing, Edmond, *Secrets of the Hot Tub …*" Civil Justice Quarterly (2008) Vol 27/1 pp51-81.

116 **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

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 otherwise, an oral hearing is generally appropriate where there are material conflicts of evidence. This is not the case with procedural matters where there is more scope for dispensing with oral hearings.

- The court has tended to link procedural fairness with the right to a hearing of the substantive issues; Town & City Properties (Development) Ltd v. Wiltshire Southern Ltd [1988] 44 Build LR 106. See also AA1996, ss. 38(3), 41(3));

- Costs sanctions may be a suitable way of controlling "unnecessary" hearings. Timetabling and guillotines can be used to focus attention on the key issues.

- 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.

Fixing and extending time for complying with directions, AA1996, s. 34(3)
In programming the procedure, considerations of speed need to be balanced against those of fairness, Damond Lock Grabowskie v. Laing Investments (Bucknell) Ltd (1993) 60 Build LR 112. As in court proceedings, extensions that do not affect hearing dates are likely to be more readily granted that those that lead to the adjournment of hearings.

2. Consolidation and concurrent hearings

If the tribunal has power to order consolidation or concurrent hearings in different arbitrations, see AA1996, s. 35, the following should be considered.

- The rules under which such orders are to be made. In some rules, joinder goes to the tribunal's jurisdiction, in others it is a procedural matter.

- 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 claim against a number of respondents. If the respondent claims against a third party or another

---

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.
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, natural justice?

respondent, concurrent hearings for these claims may be appropriate: Trafalgar House Construction (Regions) Ltd v. RailtrackPlc (1995) 75 Build LR 55.

If the same tribunal is appointed on different arbitrations between different or overlapping parties involved in the same transaction, there may be concerns about impartiality or procedural natural justice if joinder is not possible; Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp (1982) 21 Build LR 117.[117]

3. Appointing experts, legal advisors or assessors

The tribunal may 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. An assessor does not usurp that function or investigate facts or act as the tribunal's witness, but educates the tribunal in complex technical matters so that tribunal can evaluate the parties' evidence and submissions. An assessor can suggest questions to ask to test evidence or clarify its meaning, and should preferably sit with the tribunal during relevant hearings; Esso Petroleum Co Ltd v. Southport Corporation [1956] AC 218, 222-3.[118]

- 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);[119] Hussman v. Al Ameen [2000] 2 Lloyd's Rep 83.[120]

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.[121] Before

---

117 **Abu Dhabi**: Problems where same arbitrator appointed in related proceedings between overlapping parties, but with no power to order concurrent hearings or consolidation. Party might be prejudiced by not being able to comment on matters raised before tribunal, and thus influenced opinion, in proceedings to which not a party. Note Higgs & Hill v. Campbell (Denis) Ltd (1982) 28 Build LR 47 (see commentary, which discusses the problem of joinder).

118 See also Richardson v. Redpath Brown & Co Ltd [1944] AC 62.

119 **Abbey**: 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.

120 **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.

121 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.

an appointment is made names, programme and terms of reference and remuneration should be discussed with the parties and, preferably, agreed with them.

Commenting on the report

The parties must be given a reasonable opportunity to comment on any information, opinion or advice of the appointed expert, advisor or assessor, AA1996, s. 37(1) (b).

The tribunal is not bound by the expert's 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. A useful discussion of the problems can be found in Skinner & Edwards (Builders) Pty Ltd v. The Australian Telecommunications Corp [1993] ADRLJ 239.[122] The tribunal should not delegate the decision making on important issues to the expert; Branderis Brokers v. Black [2002] 2 Lloyd's Rep 359.[123]

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 will seek security for these costs.

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.[124]

4. Cost effective management of 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.

---

122 **Skinner**: 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.

123 **Branderis**: The tribunal considered the expert's report but did not accept all of it, so did not fall foul of this principle.

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

- 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.

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 5: THE TRIBUNAL'S GENERAL POWERS AND SANCTIONS

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: 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.

1. 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 in 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 or whether the interim remedy is intended to reflect of the likely outcome of that determination.[125]

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.[126]

---

125 In the former case, it is arguable that principles analogous to those considered in in American Cyanamid Co v. Ethicon Ltd [1975] AC 396, as refined by Bath v. Mowlem[2004] BLR 153 (CA), should apply. Is there a serious issue to be tried, are damages an adequate remedy; if not, consider 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.

126 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

- If 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.

- If a procedural direction, the tribunal need not give reasons for its decision. The tribunal's decision cannot be challenged or appealed, and the order will have to be expressed in peremptory form to be enforceable 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.

2. Security for costs

Unless the parties otherwise agree, the tribunal can make an order for security for costs against a claimant or counter-claimant, AA1996, s. 38(2), 38(3).[127]

Such an order cannot 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).[128]

Deciding the appropriate order

In exercising this power, the tribunal should consider both fairness and cost-effective justice.[129] This involves balancing 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. In practice factors such as those discussed in cases such as Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] QB 609 (CA); Keary Developments Ltd v.

---

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 recognized in AA1996, s. 58.

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

128 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.

129 **Azov Shipping Co v. Baltic Shipping Co (No 2) [1999] 2 Lloyd's Rep 39.**Court considered power to order security for costs on challenge or appeal under AA1996, s. 70(6). Discretion unfettered, other than that no order could be made simply because a corporation incorporated outside the UK. But had to have regard to the principal in s. 1(3) the object of arbitration, thus orders would be rare if the applicant had sufficient assets to meet order for costs and those assets available to satisfy any such order, the merits of the decision being challenged less important but may be relevant if no cogent reason for suggesting it is wrong. There were no readily available assets, Azov was simply having a second bite of the cherry, so security was ordered.

Tarmac Construction Ltd [1995] 3 All ER 534 (CA),[130] are considered; note also Wicketts v. Brine Builders (2001) CILL 1805.[131]

The method for giving security requires consideration. Payment into court is not an option: consider for example, bond, trustee stakeholder (the CIArb provides this service).

3. Property owned by or in the possession of a party

Subject to any 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.[132]

---

130 **Keary**: 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 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.

131 **Wicketts**: The arbitrator had to apply same principles as a court when ordering security for costs and could only do so on the basis of evidence provided by the parties.

132 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

4. 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 the oath or affirmation, AA1996, s. 38(5).[133]

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.[134] 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.

PART B: DEALING WITH UNMERITORIOUS CLAIMS OR DEFENCES

In litigation there are a number of procedures for dealing with unmeritorious cases without the need for a full hearing, such as summary judgement, interim payment, or the striking out of statements of case. The tribunal does not have equivalent powers. Consider Departmental Advisory Committee (February 1996), page 45.

There are, nevertheless, a number of techniques that a tribunal can use for dealing with unmeritorious defences in arbitral proceedings.

1. Procedures available to the tribunal for dealing with unmeritorious defences

---

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)). Contrast the court's wider powers in regard to assets under s. 44(3), Cetlem v. Roust [2005] EWCACiv 681.

The tribunal cannot make orders analogous to a freezing (formerly a Mareva) 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).

133 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.

134 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.

If the respondent does not dispute the claim, but relies on a set-off or cross claim, the set-off may be 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.[135]

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, notwithstanding the existence of an arbitration clause, enforce that decision, pending consideration of the merits of the underlying dispute in arbitration, Bouygues UK Ltd v. Dahl-Jensen [2000] BLR 522 (CA).[136]

If the parties have agreed to give the tribunal 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.[137]

2. Procedures available to the tribunal for dealing with unmeritorious claims

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 is argued that a claim is unsustainable on the alleged facts, the tribunal could order a preliminary issue to determine, on the basis of those facts, whether the claim is sustainable in law.[138]

---

135 **Federal**; **Sethia**: 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.

136 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.

137 **Sethia**: Under the old law, the tribunal had no power to order relief on a 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.

138 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.

PART C: 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.[139]

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.[140]

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 now has statutory power to dismiss a claim without consideration of the merits. The tribunal's powers are underpinned by the parties' duties, AA1996, s. 40.

1. Dismissing a stale claim

Unless otherwise agreed by the parties, the tribunal can deal with stale claims without consideration of the merits, AA1996, s. 41(3). To do so there must be "inordinate and inexcusable delay" by the claimant in pursuing its claim and this delay must either give rise, or be 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 have caused, or be 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[141] and the tribunal must apply the same principles as

---

139 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 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.

140 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.

141 In deciding whether there has been inordinate and inexcusable delay on

in that case. Lazenby v. Nicholas [1995] 1 WLR 615.[142]

- Such applications are generally determined on written evidence and oral submissions. If the tribunal strikes out a claim, it must do so by reasoned award. This can be challenged or appealed in the same manner as any other award.[143]

2. Dismissing a claim for a failure to provide ordered security for costs

If a, without showing 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 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.

142 **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 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).

143 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.

- The tribunal makes a peremptory order requiring the ordered security to be provided within a stated period.[144]

- If this peremptory order is not complied with, the tribunal may make an award dismissing the claim.[145]

- The tribunal's dismissal of the claim must be by reasoned award. The award can be challenged or appealed in the same manner as any other award of the tribunal.[146]

It is unclear whether the tribunal can order a stay, pending provision of the ordered security; consider DAC (February 1996), p. 45.

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 due notice, the tribunal may 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).[147]

- 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 often means an adjournment.

- If proceeding in the absence of a party, the tribunal must take care not to become an advocate for that party or to advance a case on its behalf. If the tribunal has any substantial criticisms of the evidence or submissions being advanced by the attending party, it should raise those criticisms so that they can

---

144 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.

145 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.

146 There is 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.

147 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).

be dealt with; Fox v. Welfair [1981] 2 Lloyd's Rep 514 (CA); Fairclough v. Vale of Belvoir Superstore (1990) 56 Build LR 74.[148]

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 previously issuing 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 for example 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.[149]

- 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 usual practice to identify that an order is peremptory and to state the consequences that may follow if it is not observed.[150]

5. Sanctions for failure to comply with a peremptory order

If a party fails to comply with a peremptory order the tribunal may impose the following sanctions, see AA1996, s. 41(7).

- 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.[151]

- The tribunal may draw such adverse inferences from the "act of non-compliance" as the circumstances justify.[152]

---

148 In such a case it may be appropriate to produce a draft award and invite written representations on it.

149 A peremptory order should not be made without giving the party in default an opportunity to explain the 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.

150 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 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.

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

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

- The tribunal may proceed to an award on the basis of such materials as have been properly provided to it.[153]

- 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.[154]

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).

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).

---

153 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.

154 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.

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 6: THE ARBITRAL AWARD

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: THE NATURE AND FORM OF AN ARBITRAL AWARD

The Arbitration Act 1996 identifies various circumstances in which an award should be made, and identifies various requirements for an award. It is not, however, a complete code.

1. The purpose of an arbitral award

An award can be distinguished from a procedural order or direction 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. See also Michael Wilson v. Emmott [2008] EWHC 2684 (Comm); [2009] 1 Lloyd's Rep 162. Whether a decision is or is not an award is a question of substance, not form. The test is how the reasonable recipient would have viewed it. He would know what the tribunal was asked to determine, and the submissions, and would observe they contents of the decision and how that decision was described by the tribunal. Here asked to determine procedural questions and did so by Procedural Order, without the formal language usually to be found in an award. Not an award.

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).

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).[155]

2. Final awards and awards on different issues

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 ("part awards"), AA1996, s. 47.[156]

---

[155] **Charles:** Tribunal will be functus officio. Even if a procedural decision is made by award, the court may not entertain an appeal if it considers the decision to be one of pure discretion or the question of law is insufficiently important to merit leave to appeal being granted. Thus, an award on a procedural or evidential matter will only be appropriate, if at all, where the decision raises a point of principle 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.

[156] Preliminary issues are not always desirable; for instance if not

3. Agreed (Consent) Awards

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).[157] But note Dawes v. Treasure & Son [2011] BLR 194 where it was held that the arbitrator still had jurisdiction, not merely to deal with disputes about whether the matter had settled but to consider disputes not encompassed by the settlement. It is not clear, however, this was because the CIMAR Rules, providing for the referral of further disputes to the same arbitrator, applied.

4. Identifying the matters to be determined

Irrespective of whether the tribunal is making a final or part award, both it and the parties must be clear as to the matters to be dealt with in that award. Where a part 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.

5. The requirements of an arbitral award

Unless otherwise agreed by the parties, an award must comply with the requirements in AA1996, s. 52. In particular, it must be in writing, state the date on which it is made, state the seat of the arbitration and be signed by the arbitrator.[158] An award must also contain the reasons for it unless it is either an agreed award, or the parties have agreed, in writing, to dispense with reasons..[159]

If the tribunal comprises more than one arbitrator, an award must be signed by the arbitrators who assent to it. They do not need sign the award at the same time, but should only do so once the award has been agreed by them and drawn up, European Grain & Shipping Ltd v. Johnson [1983] QB 520, see also AA1996, s. 54(2).[160]

If there is a dissenting opinion, it may be relevant on a challenge such as where it states

---

determinative or on assumed facts. Consider CompagnieD'Armement Maritime SA v. CompagnieTunisienne De Navigation SA [1971] AC 572, discussed in Mustill& Boyd. French law, decided by HL, irrelevant to eventual decision.

157 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.

158 There is no requirement for attestation, although many arbitrators do have their signature witnessed.

159 The effect of such an agreement is to exclude the court's jurisdiction to determine preliminary questions of law or appeals on questions of law, AA1996, ss. 45(1), 69(1).

160 Dissenting arbitrators do not need to sign, nor is there any requirement in English law for dissenting views to be contained in the award.

that an important point was decided by the majority without reference to the parties; F Ltd v. M Ltd [2009] EWHC 275 (TCC); [2009] 1 Lloyd's Rep 537.

The operative part of an award should be in a form that can be summarily enforced in the same manner as a judgement; Margulies Brothers Ltd v. DafinisThomaides& Co (UK) Ltd [1958] 1 Lloyd's Rep 205 (CA). The award should, to that end, identify the parties and the basis of the tribunal's jurisdiction. It should be unambiguous and internally consistent. It should finally determine all the disputes it is required to deal with and only those disputes. It should not leave matters to the discretion of others.

The award must be final as to all matters decided and complete as to all matters before the Tribunal. The Tribunal has no power to reserve to others the resolution of a decision on issues before it unless it proceeds by way of interim award; Ronly Holdings v. JSCZestafoni [2004] BLR 323 (Comm).[161]

6. If reasons are required, what should be provided?

The duty to give reasons under 1996 Arbitration Act may be wider than under the old law.[162] The court's power to require the tribunal to provide further reasons is no longer limited to having sufficient reasons to consider an appeal on a question of law. The court can also require the tribunal to state reasons where the award gives insufficient detail to enable it to consider challenges to an award for want of substantive jurisdiction or serious irregularity. Compare AA1996, s. 1(5), now repealed, with AA1996, s. 70(4).

7. Time limits for making an award

In the absence of a time limit fixed by the parties, by statute or by court order, an award must be made with all reasonable despatch, see AA1996, AA1996, ss. 24(1)(d)(ii).

If the tribunal is required to reconsider an award either under the "slip rule", AA1996, s. 57, or because it has been remitted by the court, following a successful challenge or appeal, AA1996, s. 71, the tribunal must do so within the statutory time limits.

8. Making and notifying an award to the parties

---

161 **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.

162 Under the old law, the tribunal's statutory duty was, if requested to give reasons for its award, to give reasons in sufficient detail to enable the court, should an appeal be brought, to consider any question of law arising out of the award, AA1979, s. 1(5), now repealed; TraveSchiffartsgesellschaftmbH v. Ninemia Maritime Corporation [1986] QB 802, at 807, 808 (CA). The statutory duty was not to inform the parties why they had 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 merited the grant of leave to appeal and, if so, to decide the appeal.Lord Justice Bingham, The Difference between a Judgement and a Reasoned Award, unpublished conference paper.

Unless otherwise agreed by the parties, the tribunal may decide what is to be taken as the date on which an award is made (the date of the award). Otherwise, an award is made on the date it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last assenting arbitrator, AA1996, s. 52(3), 54.

Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or in Northern Ireland, an award is treated as made there regardless of where it was signed, dispatched or delivered to any of the parties, AA1996, s. 53.[163]

In the absence of a contrary agreement between the parties notification is effected by service of copies of the award on the parties and, subject to the tribunal's right to exercise a lien on the award, this must be done without delay after the award is made, AA1996, s. 55, see also s. 56(1),

Notification does not affect the period for challenging or appealing an award. This runs from the date of the award, A1996, s. 70(3). Where there is an arbitral process of appeal or review, the time available for bringing a challenge or appeal runs from the date on which the applicant or appellant is notified of the result of that process, AA1966, s. 70(3).

PART B; THE EFFECT OF AN ARBITRAL AWARD

The making of an arbitral award has implications both for the tribunal and the parties.

1. Implications for the tribunal

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 those matters, unless consented to by the parties or provided for by AA1996; Fidelitas Shipping Co Ltd v. V/O Exportchleb [1965] 1 Lloyd's Rep 223 (CA).

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.

- 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.Consider Garnett Shipping v. Eastrade Corp [2002] 1 Lloyd's Rep 713.[164]

---

163 Reversing Hiscox v. Outhwaite [1992] 1 AC 562 (HL), which held, under the old law, that an award was made in the place where it was stated to have signed or, if the place of signing was not stated, at the place it was made available to the parties, irrespective of the place of the seat of the arbitration

164 **Garnett**: Under s. 57 a tribunal can correct mistakes due to a

- The tribunal may 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.[165] Note Pirtek (UK) Ltd v. Deanswood Ltd [2005] 2 Lloyd's Rep 728 (Comm): There was no power to make an additional award in respect of a claim for interest not presented to the tribunal but first applied for several months after an award intended to be the final award on quantum.

- In Torch Offshore v. Cable Shipping [2004] 2 Lloyd's Rep 446 (Comm), 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 reasons there was ambiguity in the award, such ambiguity being apparent in a genuine disagreement about whether the issue had been decided.

- If the tribunal is asked to deal with an issue, but by its award reserves consideration of it, that is not a failure to deal with the issue; Sea Trade Maritime v. Hellenic Mutual [2006] EWHC 578 (Comm); [2006] 2 Lloyd's Rep 147.[166]

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).

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.

2. The effect of an award on the parties and those claiming through or under them

---

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.

165 Any correction must be made within 28 days of the date on which the application is 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.

166 **Sea Trade**: Thus, the argument that the tribunal having failed to deal with costs in its Award, had no jurisdiction to make an award on costs out with the s. 57 time scales was rejected.

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.

- If an award decides the merits of a claim in damages (not debt),[167] 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.

- It is probable that an award creates a cause 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.

- An award creates an issue estoppel, such that neither party can re-litigate or arbitrate any issue determined by that award which is relevant to the tribunal's decision in that award, Fidelitas Shipping Co v. V/O Exportchleb [1965] 1 Lloyd's Rep 223 (CA); 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).[168]

- The principles in Henderson v. Henderson[169] and in Conquer v. Boot[170] apply to

---

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

168 **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 the court accepted that such an award might be relevant to the assessment of damages if liability were proved, see Stargas v. Petredec Ltd [1994] 1 Lloyd's Rep 414 (Comm), 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 issues, not facts, that could found an issue estoppel.

169 **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 were 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.

170 **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.

an award subject to the qualification that they only apply to matters encompassed by the Notice to Concur. A Notice to Concur need not encompass all the disputes between the parties at the time.

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.[171]

PART C: REMEDIES AVAILABLE TO THE TRIBUNAL

The principal sources of the tribunal's power to grant remedies upon its determination of the substantive disputes between the parties are the Arbitration Act 1996 and the agreement of the parties.

1. General remedies that the tribunal can award

Unless otherwise agreed by the parties the tribunal has, under AA1996, s. 48, power to grant declarations, order payment of money, order a party to do or refrain from doing anything, order specific performance of a contract, other than a contract relating to land, and to order the rectification, setting aside or cancellation of a deed or other document.[172]

In Kastner v. Jason [2004] 2 Lloyd's Rep 233 (Ch D) it was said that the power to order a party to do or refrain from doing anything, order specific performance of a contract, other than a contract relating to land, and to order the rectification, setting aside or cancellation of a deed or other document, being, under s. 48(5) expressed as "the same powers as the Court", referred to the generality of powers conferred on the High Court and County Court powers. It did not give the tribunal powers conferred only on certain courts, such as the power to grant freezing injunctions, conferred on the High Court and designated County Court judges. On appeal, CA declined to express a view, as no appeal on this issue; [2005] 1 Lloyd's Rep 397.

The tribunal may have power to grant other remedies by express or implied agreement of the parties. Thus it can award contribution under the Civil Liability (Contribution) Act 1978; Wealands v. CLC Contractors [1999] 2 Lloyd's Rep 739 (CA).[173]

---

171 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.

172 **Kastner v. Jason [2004] 2 Lloyd's Rep 233**: These powers, unless extended by party agreement, are only concerned with relief made by final award. On appeal, CA declined to express a view, [2005] 1 Lloyd's Rep 397.

173 **Wealands**: Arbitrator had power to order contribution under the Civil Liability (Contribution) Act 1978. Note the court had no jurisdiction not to stay, despite multiplicity of proceedings (ie Mrs Wealands' claim against sub-contractor in court). Claims between Contractor and Sub-contractor arising out of death of Mr Wealands in arbitration. Third party proceedings stayed.

2. Interest

Unless otherwise agreed by the parties, the tribunal can award simple or compound interest to the date of the award on claimed amounts outstanding at the commencement of the arbitration and on amounts awarded by it (pre-award interest), AA1996, s. 49(3).[174]

Unless otherwise agreed by the parties, the tribunal can award simple or compound interest on the outstanding amount of any award (including interest and costs) from the date of the award (or later) until payment (post-award interest), AA1996, s. 49(4).

PART D: COSTS

The tribunal has, under the Arbitration Act, a range of powers both to allocate and determine the costs of the arbitration and to limit such costs.

1. The costs of the arbitration

The costs of the arbitration comprise the arbitrator's fees and expenses (the costs of the award), the fees and expenses of any arbitral institution concerned and the legal or other costs of the parties (costs of the reference). They include the costs of or incidental to any proceedings to determine recoverable costs of the arbitration, AA1996, s. 59.

- The costs of the arbitration do not include the costs of applications to the court. The court should deal with such costs but may reserve the costs of such applications to the tribunal, in which case the tribunal should deal with those costs.[175]

2. Allocating the costs of the arbitration

Subject to any agreement between the parties, the tribunal may allocate the costs of the arbitration between the parties by award. In doing so it must apply the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate for the whole or part of the costs, AA1996, s. 61.

- Under the old law, a tribunal had to act judicially when exercising its discretion in allocating costs. This meant it had to do so in accordance with the same principles as a court would adopt, albeit the weight it gave to those principles was a matter for the tribunal.[176] It is arguable that the new Act and the reforms to court procedure embodied in the Civil Procedure Rules 1998, have altered the old law in this respect; Fence Gate v. NEL (2002) CILL 1817[177]

---

174 The tribunal cannot award statutory interest on sums not outstanding at the commencement of the proceedings, but may have a contractual right to do so, or a power to do so under legalisation such as that concerned with late payments of debts.

175 See for example, CompagnieFinanciereetc v. OYVehna AB [1963] 2 Lloyd's Rep 178.

176 SmeatonHanscomb& Co v. Sasson I Setty, Son & Co (No 2) [1953] 2 Lloyd's Rep 585; Everglade Maritime Inc v. SchiffahrtsgesellschaftDetlef Van AppenmbH [1993] 2 Lloyd's Rep 168 (CA).

177 **Fence Gate**: The applicable principles are those in the Arbitration Act and any agreed rules. Cases decided under the CPR or the RSC are irrelevant.

3. Agreements as to costs

The Arbitration Act 1996 is not particularly consistent in its approach to agreements between the parties as to costs. On the one hand, the Act recognises the effectiveness of such agreements by providing that the parties may agree how costs between them are to be allocated and what costs will be recoverable, AA1996, ss. 61, 62, 63. On the other hand, the Act provides that an agreement that has the effect that a party is to pay the whole or the part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen, AA1996, s. 60.

4. The tribunal's power to limit recoverable costs

Subject to any contrary agreement by the parties, the tribunal may direct that the recoverable costs of the arbitration, or any part of the arbitral proceedings, shall be limited to a specified amount. Any direction limiting recoverable costs, or varying such a limit, must be made sufficiently in advance of the incurring of the costs to which it relates or the taking of any steps in the proceedings that may be affected by it, for the limit to be taken into account AA1996, s. 65(1).[178] See J Tackaberry, *Making of Offers and Cappping of Costs*, (2003) 69 Arbitration 116.

- The tribunal cannot directly limit the sums that a party can incur in respect of the proceedings, only the extent to which those costs can be recovered from the other party. The principal concern is with fair and cost effective justice.

- The court is beginning to develop a similar jurisdiction and the principles that should govern it. Consider cases such as Eirikur Mar Petursson v. Hutchison [2005] BLR 210 (TTC).[179]

5. Determining the recoverable costs of the arbitration

The recoverable costs of the arbitration can be determined in one of three ways, by agreement between the parties, by the tribunal or, if the tribunal is not prepared to undertake this task, by the court, AA1996, s. 63.[180]

---

178 In House of Homes v. Hammersmith and Fulham LBC (2003) 92 Con LR 48, an arbitrator's decision to cap costs at £90,000, in a claim for about £260,000 was stated by the court to be commendable and the amount reasonable. His decision to do so could not be characterised as a serious irregularity.

179 **Eirikur**: It was suggested that in prospective cost capping, the court should take into account all relevant matters, these including the claimants' conduct, in the proceedings, and any delay in seeking a cost cap. The judge also considered whether, without a cost cap, there was a risk that future costs would disproportionately or unreasonably incurred or could not be managed by conventional case management and a detailed assessment of costs after trial. The judge suggested that the appropriate time to consider a costs cap was at an early stage of the action when the parties and the court can together plan the steps needed to bring the matter to trial, the cost implications of those steps, and whether a cap is was appropriate.

180 It is, ordinarily, more cost effective for the tribunal to determine the recoverable costs of the arbitration. It will have a greater insight as to how the proceedings were conducted and should be able to deal with the matter more quickly and cheaply then a court.

Unlike in the CPR,[181] there is no definition of recoverable costs. But AA1996, s. 64 provides that, unless otherwise agreed by the parties and subject to any order of the court as to his entitlement to fees or expenses in the case of removal or resignation of an arbitrator, the recoverable costs of the arbitration shall include, in respect of the arbitrator's fees and expenses, only such reasonable fees and expenses as are appropriate in the circumstances.

Determination of recoverable costs by the tribunal

Unless agreed by the parties, the tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. It must specify the basis and the items of recoverable costs and the amount referable to each, AA1996, ss. 63(2) 63(3).[182]

Unless the tribunal decides otherwise, the recoverable costs are determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, with any doubt about either of these matters resolved in favour of the paying party.[183]

The tribunal is not bound to determine recoverable costs on the basis provided for in the Arbitration Act 1996. In practise the two most commonly encountered alternatives are the standard basis and the indemnity basis, as now defined in the Civil Procedure Rules.

Determination of recoverable costs by the court

If the tribunal does not determine the recoverable costs of the arbitration than, unless otherwise agreed by the parties, the court may, on the application of either party, determine the recoverable costs of the arbitration on such basis as it thinks fit, or order that they be determined by such means and upon such terms as it specifies, AA1996, s. 63(4).

6. Determining recoverable costs in respect of an arbitrator's fees and expenses[184]

---

181 The recoverable costs of the arbitration include fees, charges, disbursements, expenses and remuneration and, in the case of a litigant in person, reimbursement in respect of its own time. CPR, Rule 43.2(1)(a), but equally applicable to arbitral proceedings.

182 The Arbitration Act 1996 provides that, unless the parties agree otherwise, the basis of costs is decided not when costs are allocated but when recoverable costs are determined. This is unsatisfactory.

183 Prior to the introduction of the Civil Procedure rules this was conventionally referred to as the standard basis (AA1996, s. 63(5). The wording is identical to Order 62 rule 12(1), now repealed). Under the Civil Procedure Rules, the standard basis definition has diverged from the wording in the Arbitration Act 1996, principally by introducing an additional requirement that only costs proportionate to the matters in issue will be allowed. It is probably no longer correct to refer to the basis of costs defined in the Arbitration Act 1996 as the standard basis. Some tribunals set out the definition in the Arbitration Act in full when applying that basis to the determination of recoverable costs.

184 The intention of these provisions, the margin note to which reads "Recoverable fees and expenses of arbitrators", was according to the Departmental Advisory Committee, to avoid the tribunal being in the invidious position of dealing with disputes about whether the arbitrators had overcharged. They were intended to allow either party to have the question of what amounts should be recoverable in respect of the arbitrators' fees and expenses dealt with by the court. It is doubtful, however, whether they achieve that intention. The recoverable costs of the arbitration are those costs that are recoverable between

The Arbitration Act 1996 provides a special regime for dealing with recoverable costs in respect of an arbitrator's fees and expenses, AA1996, s. 64. The intention is to avoid possible conflicts of interest where there is a dispute about such costs.

If there is any question as to what reasonable fees and expenses of an arbitrator are appropriate, and the matter is not already before the court on an application for it to determine the recoverable costs of the arbitration, the court may, on the application of either party, determine that matter or order that it be determined by such means and upon such terms as the court may specify.

---

the parties. The determination of recoverable costs is not concerned with fixing the level of remuneration of a party's advisors, nor is it concerned with fixing the level of remuneration of the arbitrators.

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 7: ENFORCING AN ARBITRAL AWARD AND OBTAINING ASSISTANCE FROM THE COURT

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: ENFORCING AN ARBITRAL AWARD

If, an award is not honoured it can be enforced by action on the award or, with the court's permission, by entering judgement in the terms of the award, provided that the applicable limitation period (six years from failure to honour it unless the submission is under seal, LA 1980, s. 7)) has not expired; consider Good Challenger v. Metal Exportimport [2004] 1 Lloyd's Rep 67 (CA)[185]also National Ability v. Tinna Oils [2009] EWCACiv 1330.[186]

Enforcement by entering judgement in terms of the award is a summary process. It is suitable in most cases where the award is for the payment of money or requires a party to do or refrain from doing something.[187] Enforcement by action on the award, preserved by AA1996, s. 66(4), is appropriate where summary enforcement has been refused or would not be granted.

On the status of an award prior to enforcement, note Kastner v. Jason [2004] 2 Lloyd's Rep 233 (Ch D), Tribunal's "freezing" order, even if by Award (under agreed s. 39 powers), did not, of itself, create a property right capable of being registered as a caution so as to bind third parties. This was accepted to be the case on appeal; [2005] 1 Lloyd's Rep 397.

1. Enforcement by action on an award

Although not universally accepted, the general view is that an action on an award is founded on breach of the implied term of the arbitration agreement that the award will be honoured, AgrometMotoimport v. Maulden Engineering Co (Beds) Ltd [1985] 1 WLR 762; Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223.

The claimant must prove the arbitration agreement under which the award is made, the referral of disputes encompassed by that agreement to arbitration, the appointment of the

---

185 **Good Challenger**: For the purposes of s. 26 AA1950 and action on award the 6 year limitation period ran from date award not honoured (usually shortly after published) not from date of award. Note limitation period extended in this case by part payments.

186 Note ED&F Man Sugar v. Lenodouis [2007] 2 Lloyd's Rep 579 (Comm Ct). If judgment in enforcement proceedings is obtained, there is no public policy reason why there should not be a further 6 years to enforce the judgment.

187 If the court refuses to allow summary enforcement, this does not finally determine the merits of the respondent's contentions, for instance as regards jurisdiction or illegality. The applicant can seek to enforce the award by action on the award and it will be for the court hearing that action to determine whether the award is valid

tribunal in respect of that referral, the making of the award and that it has not been honoured, The Saint Anna [1983] 1 Lloyd's Rep 637. The principal defences to such an action are likely to concern the tribunal's jurisdiction, questions of public policy, want of finality, uncertainty of meaning and time bars.[188]

2. Summary enforcement

An award may, with the permission of the court, be enforced in the same manner as a judgement or order of the court to the same effect, s. 66(1). The application is made without notice. If successful, the defendant must then apply to set aside.[189]

If permission is given, judgement can be entered in terms of the award, AA1996, s. 66(2).[190] The court must enforce in the terms of the award, thus it cannot order interest for the period between the award and summary enforcement;Walker v. Rowe [2000] 1 Lloyd's Rep 116.[191] But once court had given judgement on the application interest runs at the statutory rate applicable to judgement debts, Gater Assets v. NAKNaftogazUkrainiy (No 3) [2008] EWHC 1108 (Comm); [2008] 2 Lloyd's Rep 295.

Provided that the award is final, in that it is not subject to a pending challenge or appeal,[192] the court will permit enforcement unless there are real grounds to doubt its validity or there are matters that require further investigation that can only be undertaken in an action on the award; Middlemass& Gould (a firm) v. Hartlepool Corporation [1972] 1 WLR 1643 (CA);[193]Deutsche Schachtbauetc v. Ras al Khaimah National Oil Co [1987] 2 Lloyd's Rep 246 (CA). An award can be enforced in part where the part to be enforced can be identified on the face of the award, Nigerian National Petroleum v. IPCO(Nr 2) [2008] EWHC 1157.

- The principal grounds on which summary enforcement is likely to be refused are concerns over jurisdiction, contravention of English public policy[194] and where

---

188 The defences are similar to those on summary enforcement.

189 For consideration of the procedure, see Colliers International v. Colliers Jordan Lee [2008] EWHC 1524 (Comm); [2008] 2 Lloyd's Rep 368.

190 Note: An order under s. 66(1) is not a judgement of the court, that must be sought separately, see discussion in ASM Shipping v. TTMI [2007] 2 Lloyd's Rep 155 (Comm Ct). Thus, failure to honour an award after a s. 66(1) order not, unlike failure to honour a judgment, capable of being a contempt of court.

191 **Walker v. Rowe** [2000] 1 Lloyd's Rep 116. Court no longer had power to award interest on amount of award unpaid after that award. Post award interest is a matter for the tribunal. Judgement had to be entered in terms of the award under s. 66.

192 After the award has become final, matters that could have been raised on a challenge to or appeal from an award, or which have been the subject of an unsuccessful challenge or appeal, do not provide grounds for refusing summary enforcement, unless permission is given to challenge or appeal the award out of time, Hall and Wodehouse Ltd v. Panorama Hotel Properties Ltd [1974] 2 Lloyd's Rep 413 (CA).

193 **Middlemas**: Matters that were before the tribunal and are, thus, subject to *res judicata* do not provide grounds for refusing summary enforcement of an award.

194 Soleimany v. Soleimany [1999] QB 785 (CA). Tribunal found that contract was illegal, but, nevertheless, ordered payment of sums under it. The Award was not enforced on public policy grounds. Although not referred to as a ground to refuse enforcement in AA1996, s. 66,

the operative part of the award is not in a form that can be summarily enforced.[195]

- To resist enforcement on public policy grounds, nothing short of reprehensible or unconscionable conduct will suffice, conduct that can comfortably be described as fraud, conduct dishonestly intended to mislead; Gater Assets v. NAKNaftogazUkrainiy (No 2) [2008] EWHC 237 (Comm); [2008] 1 Lloyd's Rep 479 (considering public policy under s. 68 and s. 103 and applying Profilati Italia and Electrim SA). But note R v. V [2009] EWHC 1531 (Comm); [2009] 1 Lloyd's Rep 97, Contravention of English Public policy may be grounds to resist enforcement of an award on a contract subject to English law or to be performed in England. But other than in cases such as terrorism or drug trafficking, if the contract is not to English law, English public policy may not be a ground to resist enforcement unless the Award is also contrary to public policy under the law to which the contact is subject. For more on this, and a consideration of whether, on questions of illegality, the arbitrator's findings can be re-opened see Soleimany v. Soleimany [1999] QB 785 and Westacre Investments v. Jugoimport [2000] 1 QB 288.

- The right to resist enforcement on jurisdictional grounds may be lost by operation of the statutory waiver, see AA1996, ss. 66(3), 73.

- Remission of an award to the Tribunal may, if it does not affect the operative part, not be a bar to enforcement meantime; consider Carter v. Simpson Associates [2004] 2 Lloyd's Rep 512 (PC).[196]

---

the court's power to refuse recognition or enforcement of an award on grounds of public policy is expressly preserved in AA1996, s. 81(1)(c). The CA suggested that where there was prima facie evidence of illegality, the court should enquire into the matter to some extent. Without conducting a full trial it should consider whether there was evidence from the other party to the contrary, whether there was material from which the tribunal could conclude that the contract was not illegal and whether there was anything, such as collusion or bad faith, to suggest that the tribunal was not competent to conduct that enquiry. Westacre Investments Inc v. Jugoimport [2000] QB 288(CA). Public policy grounds to resist enforcement. Was it against public policy to refuse to enforce an agreement where performance of the contract arbitrated was against public policy of the place of performance but not so under the public policy of the proper law of the contract or the curial law. Contract governed by Swiss law and arbitrators had not found illegality in their award. There were some breaches of rules of public policy that will lead to non-enforcement in England whatever the proper law or place of performance, but this not one of them.

195 The court can sever the good from the bad, Graig Shipping Co Ltd v. International Paint and Compositions Co Ltd (1944) 77 Ll L Rep 220.

196 Carter: There is no rule that remittal to the tribunal necessarily means meant that the award ceases to have any effect. The tribunal's jurisdiction is only revived on the remitted matters. The rest of the award can properly form the subject matter of the action to enforce it.

- The existence of a prima facie counterclaim is not a ground to refuse enforcement, Margulies Bros v. DafnisThomaides [1958] 1 Lloyd's Rep 250. But contrast Workspace Management v. YJL London [2009] EWHC 2017 (TCC) where the court allowed a construction adjudicator's decision to be set off against an Arbitral Award for costs.[197]

Once the court has given permission for the award to be enforced, judgement can be entered in terms of the award. Once judgement is entered, interest will run on sums awarded by the tribunal including in respect of interest, at the judgement debt rate.

3. Summary enforcement of foreign awards

A New York Convention award may, with the permission of the court, be enforced in the same manner as a judgement or order of the court to the same effect. If permission is given, judgement can then be entered in terms of the award, AA1996, s. 101.[198]

The court's powers in respect of such an application are similar to those in proceedings to enforce an award under s. 66 of the Arbitration Act 1996, but the grounds on which enforcement can be refused are specified by closed list.

Certain foreign awards, other than New York Convention awards,[199] may be enforced in the same manner as under AA1996, s. 66, see AA1950, ss. 36(1), 37 as amended.

Issue estoppel arising in previous enforcement proceedings

A foreign court judgment, concerned with enforcement before that court, may give rise, in the courts of England and Wales, to an issue estoppel if (a) given by a court of competent jurisdiction, (b) judgement final and conclusive, (c) identity of parties, (d) identity of subject matter (the issue in decided by the foreign court the same as arising in the English proceedings, Carl Zeiss v. Rayner& Keeler Ltd (No 2) 1AC 853 (HL), (e) a full contestation and clear decision on that issue, which was necessary for the foreign court's decision, Good Challenger v. Metal Exportimport [2004] 1 Lloyd's Rep 67 (CA).[200]

---

197 **Workspace**: Since the adjudicator's decision created, like the award, a debt, and both arose out of the same transaction and dispute.

198 Minmetals Germany v. Ferco Steel Ltd [1999] 1 All ER (Comm) 315, application to overturn leave to enforce obtained ex parte. NY Convention Award, if procedural irregularity waived before the tribunal cannot be relied on to resist enforcement under s. 103(30)(e). In deciding whether to refuse enforcement on public policy grounds, court should consider the nature of the procedural injustice, whether party seeking to enforce has invoked supervisory jurisdiction of the seat of the arbitration, whether a remedy available under that jurisdiction, whether courts of that jurisdiction had conclusively determined the complaint in favour of upholding the award, and if that jurisdiction not invoked, for what reason, was he unreasonable in failing to do so.

199 Awards made in a territory declared by Order in Counsel to be a territory to which the 1927 Geneva Convention applies. Principally certain commonwealth countries.

200 **Good Challenger:** If issue estoppel was made out, it irrelevant whether the English court formed the view that the foreign court decision on the issue was wrong. But the court had to be cautious before concluding that the foreign court made a clear decision on the issue, and principles of issue estoppel were are subject to overriding

4. Procedure on enforcement

Other than in the case of an action on the award (where a Part 7 Claim Form should be issued), enforcement proceedings are governed by CPR, Part 62 and the related Practice Direction. The application is made by arbitration claim form, CPR Rule 62.18.

PART B: THE COURT'S SUPPORTIVE POWERS

There may be circumstances in which the tribunal's powers are inadequate, for instance because it is not yet constituted or because the desired orders will affect persons other than the parties. In such cases, the court may be able to assist.

1. Preliminary questions of law

AA1996, s. 45 provides that application may be made to the court to determine a preliminary point of law with the agreement of the parties or the permission of the tribunal (of doubtful use). In the latter case, the court must be satisfied that determination of the question is likely to produce substantial savings in costs, that the application is made without delay, and there is a good reason why the matter should be decided by the court.

- Taylor Woodrow Holdings v. Barnes [2006] EWHC 1693 (TCC) (In both cases, the court retains a discretion whether or not to consider the application, the fact that the parties have agreed it as the tribunal for such questions, being a strong factor in favour of hearing the application).

2. Enforcing the tribunal's peremptory orders

Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal, AA1996, s; 42.

An application can be made either by the tribunal (ill advised) or by a party where this is permitted by the parties' agreement, or the tribunal has given permission.

- Before granting such an application, the court must be satisfied that the applicant for the order has exhausted any available arbitral process in respect of failure to comply with the tribunal's order. It must also be satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the prescribed time or, if no time was prescribed, within a reasonable time.

- On such an application the court's discretion is limited the question of whether or not it should order compliance with the tribunal's peremptory order within a specified period. Thus, the court cannot, itself, decide what sanctions to impose

---

consideration that must work justice and not injustice. Here the question was whether the Romanian court had, on proceedings to enforce the award there, made a decision on the limitation position under English law, concluding that the claim on the award was statute barred, which bound the English court under the doctrine of issue estoppel. The Court of Appeal concluded that while the Romanian court's decision on the Romanian law limitation point was necessary for its decision, its decision on the English law limitation point was not, thus there was no issue estoppel.

on a party for failing to comply with the tribunal's orders, for instance by striking out a claim or a defence in the arbitral proceedings. Neither can the court modify or amend the tribunal's peremptory order, for instance because it considers that order insufficiently clear.

- This power was considered in Emmott v. Michael Wilson (No. 2) [2009 EWHC 1 (Comm; [2009] 1 Lloyd's Rep 233: The court's power under s. 42 is discretionary, it is not a rubber stamp. But the court is not required to satisfy itself that the tribunal's order was properly made or to rehear the application for that order, at least where the tribunal gave reasons that might reasonably be considered to support that decision, nor was it appropriate for the court to review the merits of the underlying claim in the arbitration. The court could decline to enforce where the order was not required in the interest of justice to assist the proper functioning of the arbitral process, as where there had been a material change of circumstances after the order was made, where the tribunal had not acted fairly and impartially, in breach of its duty, in making the order, or where it made an order it had no power to make.

- The court may be reluctant to grant what is, in effect, a mandatory injunction; consider Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93.

3. Securing the attendance of witnesses

The tribunal only has authority over the parties to the proceedings before it. Thus, it cannot compel a reluctant witness to attend before it.

A party may use the same court procedures as are available in legal proceedings to secure the attendance before the tribunal (wherever its seat) of a witness in order to give oral testimony or produce documents or other material evidence, AA1996, s. 43.

- Tajik Aluminium v. Hydro Aluminium [2006] 1 Lloyd's Rep 155 (CA): To obtain production of documents under this provision, the documents must be specifically identified or at least described in some compendious manner that enabled the individual documents falling within the scope of the summons to be clearly identified. Ideally each document should be individually identified, but it was not necessary to go that far in every case.

- Note BNP Paribas v. Deloitte and Touche [2004] 1 Lloyd's Rep 233 (Comm)[201] (Section 43 is concerned with particular documents required as evidence of some

[201] **BNP Paribas:** Arbitration between BNP and Avis, Audit partner in D&T made witness statement in support of Avis. BNP applied to issue and serve a witness summons on basis that D&T had in its power, possession, custody or control certain documents relevant to the arbitration, required a witness to attend the Court (sic) on a date to be specified to produce listed documents, the categories of which were wide and included "notes, memoranda and/or other documents relating to the preparation of the statutory accounts for December 1999 and adjustments included therein. Application dismissed, since it was an application for disclosure rather than production in evidence of documents brought to the tribunal under a witness summons. Court had to be astute that a

fact, not with ordering general discovery);Assimina Maritime v. Pakistan Shipping [2005] 1 Lloyd's Rep 525 (Comm)(the court ordered a witness to attend to give evidence, although rejecting the application that he produce insufficiently defined documents (instead it ordered certain of those documents, which were sufficiently identified to be produced for copying, under s. 44(2)).

These procedures can only be used with the permission of the tribunal or the agreement of the other parties to the arbitral proceedings.

4. Service of documents

AA1996, s. 76(3) allows, subject to contrary agreement, for service by any effective means and provides that delivery by pre-paid post to the addressee's last principal residence, or in the case of a corporation, to its registered or principal address is effective. Bernuth v. High Seas Shipping [2005] EWHC 3020 (Comm); [2006] 1 Lloyd's Rep 537 (an effective means is one by a recognised means of communication effective to deliver the notice or document to the addressee, whether by post, fax, telex or e-mail. If by e-mail, must the dispatched to what in fact was the e-mail address of the intended recipient and not be rejected by the system. The sender had to show that receipt had occurred; the fact that, after receipt, it never then reached the relevant manager or legal staff was not relevant).

5. Problems with service of documents

The court may make orders dispensing with or substituting service where the method of service otherwise applicable is not reasonably practicable, AA1996, s. 77. An application for such an order can only be made by party to the arbitration agreement and after it has exhausted any available arbitral process for resolving the matter.

6. Extending time limits

The court has a limited power to extend contractual time limits for commencing arbitral proceedings, AA1996, s. 12; Harbour and General Works Ltd v. Environment Agency [2000] I Lloyd's Rep 65[202] (CA), but note Crown Estates Commissioners v. John Mowlem & Co (1994) 70 Build LR 1 (CA)).[203] In Lantic Sugar v. Baffin

---

discovery exercise was not disguised as an application to produce particular documents. A distinction between requiring documents to be produced as evidence of some fact, and asking for disclosure to trawl through documents to see if they supported the applicant's case or undermined the value of a witness's testimony. Court had no power under s. 43 to order disclosure against a third party (ie a power like in CPR 31.17). Nor was there anything in the Model Law which gave such a power, Art. 27 concerned with taking evidence, not with disclosure.

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

203 In that case a distinction was made between clauses that directly

Investments[2009] EWHC 3335 (Comm) service of an arbitration notice was made on a P&I club which did not have authority to accept service on behalf of a ship owner, but during a subsequenttelephone conversation with the shipper did not say so. The court held that its failure to do so went beyond mere silence. It was a reasonable impressionfrom the conversation that the P&I club was taking instructions on the substance of the notice rather than its procedural propriety. Thus there were grounds to extend time to commence proceedings, the claimant applying promptly once it realised there was a difficulty.

Unless otherwise agreed by the parties, the court has power, where substantial injustice would otherwise be caused, to extend the time for making an award where that time is limited by or in pursuance of an arbitration agreement, AA1996, s. 50.

Unless otherwise agreed, the court has a general power, where substantial injustice would otherwise be caused, to extend time limits agreed by the parties in relation to arbitral proceedings or specified in a non-mandatory provision of Part I of the Arbitration Act 1996, AA1996, s. 79. See for example, Gold Coast v. Naval Gijon SA [2006] EWHC 1044 (Comm); [2006] 2 Lloyd's Rep 400[204] (The question of whether substantial injustice would be caused involved not only the question of whether failure to comply with the time limit was excusable, but also whether the application or step for which a time was laid down had a substantial prospect of success).

- Aoot v. Glencore [2002] 1 Lloyd's Rep 128.[205] (ss. 70(3) and 79 compared).

- Equatorial Traders v. Louis Dreyfus [2002] 2 Lloyd's Rep 638 (must apply for discretionary relief promptly);[206]See also Rotenberg v. Sucafina SA [2011] 2 Lloyd's Rep 159 (no substantial injustice, even though failure to grant extensionmeant no award on costs, reasons for not paying the remaining fees for taking up the appellate award within the period required by the Coffee Trade Federation Rules sketchy and unpersuasive, time not extended).

- John Mowlem v. SS for Defence (2000) CILL 1655 (parties stipulating that, unless they agreed, the arbitration was to be concluded in six months, did not

---

barred claims and those that did so collaterally by, as in that case, making matters evidentially conclusive (see JCT final certificate clause) Is there a difference between substantive and evidential rights?

204 **Gold Coast**: Application for extension of s. 57 time limits. Also relevant were the Aoot v. Glenclorefactors for s. 80; eg the need to avoid unnecessary delay and expense by court intervention, whether the delay was reasonable and explicable, and weigh these against any substantial injustice to the applicant of not extending time.

205 **Aoot**: Section 79 does not apply to time limit in s. 70(3), as the 28 day period does not apply in default of party agreement.

206 **Equatorial**: Party seeking interlocutory relief should apply as soon as reasonably possible after it out to have appreciated that such relief was required. Did not do so here, so application to extend 21 day period for appeal to Board of Appeal refused. Note comments that an inexperienced party, lacking legal advice, might be treated more leniently

exclude the court's s. 79 power. Court could extend this period where necessary to avoid substantial hardship).

7. Obtaining evidence and preserving property and assets

Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power to make orders about the following matters as it has for the purposes of and in relation to legal proceedings, AA1996, s. 44.[207]

The relevant matters are listed in s. 44(2). They are the taking of the evidence of witnesses, preserving of evidence, making of orders relating to property that is the subject of the proceedings or as to which any question arises in the proceedings, selling of goods that are the subject of the proceedings and the granting of interim injunctions and appointing receivers.

- Assimina Maritime v. Pakistan Shipping [2005] 1 Lloyd's Rep 525 (Com Ct)[208] (there is no power under s. 44(2) to order disclosure from a third party).

- For an example of an interim injunction obtained in support of arbitral proceedings, see Lauritzencool v. Lady Navigation [2005] 1 Lloyd's Rep 260.[209]

- Note, EDO v. Ultra Electronics [2009] EWHC 682 (Ch), s. 33(2) does not give court jurisdiction to make orders for pre-action disclosure in favour of arbitration, as the parties are not likely to be parties to subsequent proceedings in the High Court as required by that section, nor does such application come within s. 44(2) or (3) of the Arbitration Act.

Taking the evidence of witnesses

Different procedures apply depending on whether the witness is in England and Wales and their evidence in required in respect of domestic or non-domestic proceedings, and where the witness is out of the jurisdiction. Consider Commerce Insurance v. Lloyd's

---

207 **Re Q's Estate**[1999] 1 Lloyd's Rep 931. A clause providing for exclusive jurisdiction of arbitration in London was not such an agreement ousting the court's power to grant Mareva injunctions as a conservatory measure. More specific words were required to achieve this. The injunction was discharged on the merits, not for want of jurisdiction.

208 **Assimina**: Arbitration concerned grounding of vessel in a port. Claimant sought disclosure of report from W, prepared for the port. Court held that power to preserve, inspect or preserve documents only concerned those that could be specifically described, not, as in an application for ordinary disclosure, merely by reference to issues. Court ordered inspection and copying of documents which it considered met this test, as these concerned a question in the arbitration and if order, not made, might cease to exist or be rendered unobtainable.

209 **Lauritzencool**: The substance of the injunction was that the defendant was not, until the final award in the arbitration, to employ two named ships in a manner inconsistent with the time charter or fix them with any third party for employment during the period of that charter. In reaching this conclusion the court applied the American Cyanamid test, as refined in Bath v. Mowlem [2004] BLR 153, serious issue to be tried, damages not an adequate remedy, balance of convenience.

[2002] 1 WLR 1323(Comm)[210] (The court has a discretionary jurisdiction to make an order for the examination of witnesses in England and Wales in support of arbitral proceedings, even though the seat of the arbitration is in New York and the curial law is the law of New York).

Preserving evidence

The court can, for instance, make a search order (formerly an Anton Piller order) to secure the preservation of evidence that is or may be relevant to the proceedings. Such an order is exceptional as it requires the party to whom it is directed to allow named representatives of the applicant to enter the specified premises and search for, examine and remove or copy the articles specified in the order.

Property relevant to the proceedings

The court has for the purpose of and in relation to arbitral proceedings the same power as it has in legal proceedings to make orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings.

The orders that the court can make in support of arbitral proceedings are for the inspection, photographing, preservation, custody or detention of the property, or for the taking of samples from, the making of observations of or the conducting of experiments on the property. The court can, for the purpose of such orders, authorise any person to enter any premises in the possession or control of a party to the arbitration. These powers are more limited than those available in legal proceedings.[211]

The sale of goods

The court's power to sell goods in support of arbitral proceedings is also more limited than in the case of legal proceedings. Although it can order the sale of goods of a perishable nature or which for any other good reason it is desirable to sell quickly, CPR, Rule 25.1(1)(c)(iv), it can only do so if they are the subject of the proceedings, not where any question arises in respect of them on a claim. Neither can it order the sale of land. Compare CPR, Rule 25.1(2) with AA1996, s. 44(2)(d).[212]

---

210 **Commerce**: Because s. 44 was available irrespective of whether the seat was, see s. 2(3). The court's power in support of proceedings before it is contained in CPR 34.8. But, since the purpose of the application was to obtain a deposition, not to obtain evidence for use in the proceedings, the order sought was inappropriate. Also the application did not give any indication of the issues for which the requested evidence was required, and why it is necessary. Thus, refused.

211 These powers are limited to property that is the subject of the proceedings or as to which a question arises in the proceedings. This is a more limited jurisdiction than the court has in legal proceedings before it. Consider CPR, Rules 25.1(1)(i) and 25.1(2). The court can also, in the case of legal proceedings before it, make orders relating to property against a person who is not a party to those proceedings, CPR, Rule 25.1(1)(j) and Supreme Court Act 1991, s. 34(3). It is doubtful whether it can make such orders in support of arbitral proceedings.

212 It is unclear whether the limitation on the court's power of sale in support of arbitral proceedings to "goods", as opposed to "property" (The word used in CPR, Rules 25.1(1)(c) and 25.1(2)) was intended to further limit this power to the sale of chattels or whether it

Interim injunctions

The court can grant interim injunctions in support of arbitral proceedings, CPR, Rule 25.1(1)(a). In addition to the usual interim injunctions, the court can grant freezing injunctions (formerly Mareva injunctions) restraining a party from dealing with its assets. Note, in Pacific Maritime v. Holystone Overseas Ltd [2007] EWHC 2319 (Comm); [2008] 1 Lloyd's Rep 371 the court held, in respect of an application for the preservation of assets, that since any order the tribunal might make would not bind third parties or be buttressed by sufficient sanctions, this was a case where the tribunal, even though appointed, lacked the power to act effectively.

Appointing receivers

The court can appoint a receiver by interim or final order when it appears just and convenient to do so, Supreme Court Act 1981, s. 37. See also CPR, Schedule 1 (RSC Order 30). A court appointed receiver is an officer of the court. His duty is to submit accounts to the parties as directed by the court, collect the property identified in the order appointing him and pay it into court or as the court directs.[213]

8. Limits on the court's powers in respect of evidence, property and assets

The court can only exercise these supportive powers if or to the extent that the tribunal, and any arbitral or other institution or person vested by the parties in that regard, cannot or is unable, for the time being, to act effectively, AA1996, s. 44(5).[214]

The court's powers differ depending on whether or not the case is one of urgency.

- In a case of urgency the court can make such orders as in thinks necessary for the purpose of preserving assets or evidence, on the application (without notice) of a party or intended party to the arbitral proceedings; s. 44(3). Assets can include chooses in action, such as contractual entitlements, as well as tangible assets: Cetelem SA v. Roust Holdings Ltd [2005] EWCACiv 618. Thus, Sabmiller Africa v. East African Breweries [2009] EWHC 2140 (Comm) a court can give interim injunctive relief to preserve contractual rights. The court held that its discretion under s. 44 was exercisable in a broadly similar way to under s. 37 of the SCA1981,

---

encompasses all forms of personal property, for instance financial instruments such as shares. RSC 1883 Order L rule 2, the predecessor to RSC Order 29 rule 4 and CPR, Rule 25.1(c)(iv) referred to "goods", not "property". Nevertheless, it was held to be wide enough to enable the court to order the sale of shares in a company on the grounds that these were perishable in the sense of being capable of falling in value, Evans v. Davis [1893] 2 Ch 216. But note Mustill& Boyd (1989), p. 331.

213 A receiver may be appropriate where the property in question, for instance business assets or investment land, must be actively managed or commercially utilised in order to retain its value and its management or use is being neglected, whether because of the impasse created by the dispute or because of the attitude of the party in possession of the property.

214 The two most likely situations in which this requirement will be satisfied are where the tribunal has not yet been appointed or where the order sought concerns, or will only be effective if observed by persons who are not parties to the relevant arbitration agreement.

thus had a greater reluctance to grant mandatory as opposed to prohibitive injunctions.

Note Cetelem SA v. Roust Holdings Ltd [2005] EWCACiv 618 (CA)[215] (court's powers under s. 44(3) are limited to cases of necessity and where necessary to preserve evidence or assets, but could exercise any s. 44(2) power, including an interim mandatory injunction, to this end). The CA held that, on this point, Hiscox Underwriting. V. Dickson [2004] 2 Lloyd's Rep 438 (Comm)[216] (where, in effect, a limited form of early disclosure against a party was granted under s. 44(2)), was wrongly decided. See also NB Three Shipping v. Harebell Shipping [2005] 1 Lloyd's Rep 507 (Comm)[217] (Order for early disclosure refused, tribunal's powers, when constituted, considered sufficient).

- In all other cases the court can only act on the application of a party to the arbitral proceedings, made on notice to the other parties and with the agreement of those parties or the permission of the tribunal. This means that proceedings must have commenced and, in most cases, the tribunal established before the application is made; s. 44(4).

9. Discharging court orders in respect of evidence, property and assets

If the court makes an interim order in respect of evidence, property and assets it will, have to consider what further orders are necessary if circumstances change and once the arbitral proceedings end.

---

215 **Cetelem**: First instance judge had granted an interim freezing injunction ex party and, considering its powers to act in emergency were not limited to those in s. 44(3), granted a mandatory induction for the signing of and delivery up of documents necessary for a share transfer. CA held that, even though *ex parte* powers were limited to s. 44(3), court could do this since, necessary for preserving of an asset, a contractual right in this case. The fact that the granting of such an interim injunction might be determinative of the issues in the arbitration, did not preclude the use of the s. 44(3)jurisdiction, but might be relevant to its exercise.

216 **Hiscox**: Hiscox sought an order requiring SM to give it access to documents evidencing insurances written by D&M under the terms of a biding authority agreement between Hiscox and D&M which D&M, in alleged breach of that agreement, proposed to divert to a new binding authority granted by a third party. Held: court could grant an interim injunction of this type since tribunal (not fully constituted, and reluctance by D&M to appoint its arbitrator until day of court hearing) could not act effectively. The s. 44(2)(e) power not limited to the s. 44(3) matters, despite views of DAC to the contrary. The principle that interim injunctions would not readily be granted if the effect of doing so was to effectively deicide the matter at issue, which was to be determined by the arbitrator, and if the effect of so dong would be to usurp the arbitrator's function, could yield to the requirements of justice if urgency and fairness required it in order that justice could be administered. The Court decided it should grant an interim injunction in narrow terms. The case was one of urgency, and damages were not an adequate remedy since difficulties in showing what business the applicant would or would not have been obtained if not able, though access to the records, to offer quotes for renewal.

217 **Three Shipping**: Disclosure a matter for the arbitrators. If early disclosure wanted, apply to them.

Where such an order is made in support of arbitral proceedings, the court can, in effect, delegate the decision of when its order is to cease to have effect, in whole or in part, to the tribunal, AA1996, s. 44(6).

10. Procedural issues

Applications to the court for the exercise of its supportive powers should be made in accordance with CPR Part 62 and the related Practice Direction. Such applications are generally commenced by arbitration claim form. The Practice Direction sets out standard directions governing the procedure to be followed.

COURSE FOR BPP PROFESSIONAL EDUCATION
ARBITRATION – LAW AND PRACTICE

SESSION 8: SUPERVISORY POWERS OF THE COURT

Peter Aeberli
RIBA, ARIAS, FCIArb, Barrister
Chartered Arbitrator, Adjudicator, Registered CEDR Mediator

PART A: COURT SUPERVISION OF THE PROCEEDINGS

The court has no inherent jurisdiction to supervise the conduct of arbitral proceedings so as, for instance, to correct errors in or remit procedural rulings, or to make declarations about matters entrusted to the tribunal.[218] The court's powers to intervene during the course of arbitral proceedings are statutory and thus limited to situations that merit the draconian remedy of removing an arbitrator; Bremer Vulkan v. South India Shipping Corporation[1981] AC 909.

1. The statutory power to remove an arbitrator

The court may remove on an arbitrator on any of the following grounds, AA1996, s. 24.

Section 24(1)(a): Where circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality:

- The test is whether the circumstances 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.[219]

- In the case of a party appointed arbitrator, the court appears to be willing to accept a greater degree of ongoing professional relationship with the appointing party than would otherwise be acceptable; Transcomin SA v. Gibbs [1985] 1 Lloyd's Rep 586.[220]

- Apparent bias usually arises from a relationship between the arbitrator and a party or with the subject matter of the proceedings, but it can also arise because of the manner in which the arbitrator conducts the proceedings.[221] Consider

---

218 There may be a residual jurisdiction to make declarations, where a legal right has been infringed.

219 Magill v. Porter [2002] 2 WLR 37 (HL).

220 See also Bremer HandelsgesellschaftmbH v. ETSSoulesetCie [1985] 2 Lloyd's Rep 199.

221 The arbitrator expressing concluded views, as opposed to a mere predisposition to prefer the case of one party, about issues relevant to the parties' dispute. If this is done in circumstances which demonstrate that he has prejudged the issues prior to considering the parties' evidence and submissions and will be unable to approach the matter with an open mind, HagopArdahalian v. Unifert International SA [1984] 2 Lloyd's Rep 84.
The arbitrator failing to conduct the proceedings impartially, for instance, by repeatedly making unjustified accusations of deliberate delay against one of the parties, Damond Lock Grabowski v. Laing Investments (Bracknell) Ltd (1992) 60 Build LR 112.

Norbrook Laboratories v. Tank [2006] EWHC 1055 (Comm); [2006] 2 Lloyd's Rep 485 (direct contact with witnesses without keeping an accurate record of what the witness said and giving to the parties for comment, gave rise to a real possibility that the tribunal was biased).

Section 24(1)(b): Where an arbitrator does not possess the qualifications required by the arbitration agreement.[222]

Section 24(1)(c): Where an arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts about his capacity to do so.

Section 24(1)(d): Where an arbitrator has refused or failed to properly conduct the proceedings, or to use all reasonable dispatch in making an award, and substantial injustice has been or will be caused to the applicant. This is, ordinarily, the only remedy available to a party who is seriously dissatisfied with the manner in which the tribunal is conducting the proceedings or with the tribunal's procedural decisions.

- This ground for possible removal encompasses the categories of serious irregularity, AA1996, s. 68.[223] But the court will only remove in exceptional circumstances. It must be satisfied that a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues, James Moore Earthmoving v. Miller Construction Ltd [2001] BLR 322 (CA).[224]

- The substantial injustice relied on must have a real existence. The test is that it has been or will be caused, not that it might be; Groundshire v. VHE Construction [2001] BLR 395.[225]

If there is an arbitral or other institution or person vested by the parties with the power to remove an arbitrator, the court shall not exercise its power to remove an arbitrator unless satisfied that the applicant has first exhausted any available recourse to that institution or person, AA1996, s. 24(2).

---

222 The purpose of this provision is somewhat obscure since the appointment of a person who does not have the qualifications required by the parties arbitration agreement is, in general, invalid and he will not have substantive jurisdiction.

223 The s. 24(1) (d) grounds may be wider in that repeated errors of law in procedure or in substantive issues might be sufficient to justify removal. See comment in Port Sudan Cotton Co v. GovindaswamyChettier& Sons [1977] 1 Lloyd's Rep 166, 178, reversed on other grounds, [1977] 2 Lloyd's Rep 5.

224 **Moore**: Applying the test in Lovell Partnerships Northern Ltd v. AW Construction PLC (1996) 81 BLR 83, 89 (CA).

225 **Groundshire**: Only remove where there are reasons for loss of confidence in the arbitrator, despite similarities of wording with s. 68. Policy of the Act is to remit in preference to setting aside or declaring it to be of no effect or removing the arbitrator. Sections. 24 and 68 apply where substantial injustice has been or will be (not may be) caused. Substantial means having a real existence, not just more than de *minimus*.

The tribunal may continue the arbitral proceedings and make an award while an application to remove an arbitrator is pending before the court, AA1996, s. 24(3).

Where the court removes an arbitrator it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid, AA1996, s. 24(4). The parties must consider how he is to be replaced and the implications of his removal on the proceedings at that time.

2. Procedure

An application to the court to remove an arbitrator must be made by arbitration claim form in accordance with CPR Part 62. The application must be made on notice to the other parties, the arbitrator concerned and any other arbitrators

PART B: COURT SUPERVISION OVER AN AWARD

The principal methods for disputing an arbitral award are by recourse to the court under its statutory powers to set aside or vary and award or to declare it to be of no effect or, if the parties have agreed to an arbitral process of appeal or review, by recourse to that procedure and, if dissatisfied with the outcome of that procedure, then by recourse to the court.

1. Agreed procedures for disputing an award

If the parties have agreed or the Arbitration Act 1996 provides procedures for disputing an award, these must be exhausted before a challenge or appeal is brought before the court, AA1996, s. 70 (2). For an example of such procedures considerRotenberg v. Sucafina SA [2011] 2 Lloyd's Rep 159 (Coffee Trade Federation Rules).[226]

2. Statutory grounds for disputing an award

In contrast to its restricted power to supervise the course of arbitral proceedings, the court has wider powers over an award. These are principally concerned with the tribunal's jurisdiction to make that award, the process by which it came to be made and the legal principles on which it is based.

3. Jurisdictional challenges to an award

A party to arbitral proceedings may apply to the court on notice to the other parties and the tribunal, AA1996, s. 67, challenging an award as to the tribunal's substantive jurisdiction; or for an order declaring an award made by the tribunal on the merits to be of no effect in whole or in part because the tribunal did not have substantive jurisdiction. Where the jurisdictional dispute has been raised before the tribunal and determined by it in an award on jurisdiction, the court my by order confirm the award, vary the award or set aside the award in whole or in part. For an example, see Peterson Farms v. C&M Farming [2004] 1 Lloyd's Rep 603.[227]

---

226 Court considered meaning of interim award in Rule 48, meant final award on an issue, a partial award. Considered effect of interim Appellate Award on first –tier Award; set it aside in total, even in respect of matters, here costs, not addressed in the interim Appellate Award.

227 **Peterson**: Tribunal, seat in England, applied the group of companies doctrine (arbitration agreement signed by one party in a group of companies may entitle and bind the others if circumstances show this

The remedies differ depending on whether the award being disputed is as to the tribunal's substantive jurisdiction, s. 67(1)(a), or an award on the merits, s. 67(1)(b). In the former case the court can confirm, vary or set aside the award in whole or in part. In the latter case the court declares it to be of no effect in whole or in part because the tribunal did not have jurisdiction.

- The categorisation of an award can be difficult and may differ depending on whether the tribunal concludes it did or did not have jurisdiction. In the latter case the award can never be on the merits, in the former case it may be. Contrast the awards considered in LG Caltex Gas Co Ltd v. China National Petroleum Corp [2001] 2 All ER (Comm) 97 (CA) (tribunal concluded it did not have jurisdiction) with AootKalmneft v. Glencore International AG [2002] 1 Lloyd's Rep 128.[228]

- There is no difference in principle or effect between a declaration that an award is of no effect and an order setting aside an award. The tribunal is no longer functus officio as regards the matters decided by that award; Hussman (Europe) Ltd v. Ahmed Pharam[2003] EWCA (Civ) 266.[229]

- An error in the application of the chosen law of the contract does not involve a lack of substantive jurisdiction, if there is a breach of s. 46 AA, this is at most a matter to be addressed under s. 68(2)(b) (excess of jurisdiction); B v. A [2010] 2 Lloyd's Rep 681 (Comm).

The right to have the jurisdictional question re-heard is unfettered other than by operation of AA1996, ss. 70(2), 70(3) and the statutory waiver, ss. 73. ConsiderAzov Shipping Co v. Baltic Shipping Co [1999] 1 Lloyd's Rep 68;[230]Athletic Union v. NBA [2002] 1

---

was the parties' intention) to hold that it had jurisdiction to award damages in favour of claimant who had not signed the arbitration agreement/contract. The English court set aside its award against that party under s. 67 for want of jurisdiction, as proper law of the contract (Arkansas, USA) did not recognise this doctrine), also unknown in the law of England. The tribunal appears to have considered the Group of Companies doctrine to be a general principle of the *lexmercatoria* of international arbitration.

228 If the tribunal rules that it does not have jurisdiction, its award is an award as to its substantive jurisdiction since the tribunal is precluded for dealing with any aspect of the merits of the parties' dispute. If the tribunal rules that it has jurisdiction, its award will be an award on the merits since, in reaching its conclusion, it will have determined the related substantive issue concerning whether the parties contracted at all.

229 **Haussman**: The tribunal's earlier award was set aside in previous proceedings, not declared to be of no effect. In either case, the tribunal is no longer *functus officio* as regards the matters decided in the invalid award and the arbitration continues or revives as necessary. The revival of the tribunal's jurisdiction is not dependent on the invalid award being remitted to it for reconsideration.

230 **Azov**: A consideration of the different ways to resolve jurisdictional questions. Where no complex issues of fact, s. 31 could be appropriate. But appeal under s. 67 unfettered, takes effect as rehearing of fact and law as court should not be in a weaker position that arbitrator when considering challenge. Alternatives are to ask

Lloyd's Rep 305.[231]

4. Challenging an award for serious irregularity

A party to arbitral proceedings may apply to the court on notice to the other parties and the tribunal, AA1996, s. 68, challenging an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

Serious irregularity is defined by reference to a closed list of kinds of irregularity [232]and by the requirement that the category relied on has caused or will cause substantial injustice. The requirement imposes a high threshold; London Underground v. Citylink [2007] BLR 391 (TCC).

- AA1996, s. 68(2)(a): Failure by the arbitrator to comply with its general duty under s. 33. For example, an award that determines matters on a basis that was not pleaded or argued by the parties could be open to challenge on this ground; ONO Northern Shipping v. Remolcadores [2007] 2 Lloyd's Rep 302 (Comm Ct)(tribunal made award on basis of representation point when case before it had proceeded on the basis that the point was no longer pursued).[233]

  But, by analogy with the old cases on misconduct, a tribunal does not breach its general duty by making an error of fact or law, Moran v. Lloyd's [1983] QB 542.[234]

  As regards the exercise of powers the test is whether the tribunal arrived at a conclusion that no reasonable arbitrator could have arrived at having regard to his s. 33 duties; AootKalmneft v. Glencore [2002] 1 Lloyd's Rep 128. As regards a challenge under this head for want of impartiality, see ASM Shipping v. TTMI Ltd [2006] 1 Lloyd's Rep 375 (Comm).[235] Note ABB v.

---

court to determine preliminary question of jurisdiction under AA1996, s. 32, or for party to stand back from the proceedings and seek a declaration under s. 72.

231 **Athletic**: The effect of s. 73 was that a party challenging an award on jurisdiction could not dispute jurisdiction on grounds not argued before the tribunal.

232 Unlike s. 22 AA 1950 the court does not have an unfettered power to remit for procedural mishap, reversing King v. Thomas McKenna Ltd [1991] 1 All ER 653.

233 See alsoInterbulk Ltd v. Aiden Shipping Co Ltd [1984] 2 Lloyd's Rep 66 (CA).

234 To arrive at decision on no evidence is not misconduct, it is an error of law, Citland Ltd v. Aanchan Oil etc [1980] 2 Lloyd's Rep 275. An arbitrator erroneously admitting evidence, such as without prejudice correspondence is not misconduct. But reliance on such evidence in making an award might provide grounds for a successful challenge to that award, K/S A/S Bill Baikh v. Hyundai Corporation [1988] 1 Lloyd's Rep 187.

235 **ASM**: This is a ground for challenge under s. 68(2)(a) as impartiality a requirement of ss. 1 and 33. The test is "a real possibility of bias", not real danger, Magill v. Porter. If this test is satisfied, that it, in itself, a species of serous irregularity which has caused substantial injustice to the applicant, no need for a separate enquiry about this.

HochtiefAirport [2006] EWHC 388 (Comm);[236] [2006] 2 Lloyd's Rep 1 (inadequacies in reasoning given in support of the rejection of a party's case on an issue not, of itself a serous irregularity, nor was rejection of an application for disclosure on grounds of lack of sufficient relevance or materiality).

- AA1996, s. 68(2)(b): The tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction). Ordinarily, an error of law or fact is not an excess of jurisdiction;[237] Lesotho Highlands v. Impreglio [2005] 2 Lloyd's Rep 310 (HL).[238] An error of law, however grave, does not involve an excess of jurisdiction. A conscious disregard of provisions of the chosen law would be a necessary but not a sufficient requirement for such a challenge to have any prospect of success; B v. A [2010] 2 Lloyd's Rep 681 (Comm).

-

- AA1996, s. 68(2)(c): Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.

- AA1996, s. 68(2)(d): Failure by the tribunal to deal with all the issues put to it.[239] This does mean that the tribunal need set out each step by which it reached

---

236 ABB: Arbitrators had directed that IBA Rules of evidence apply, and adopted the principles in those Rules in rejecting the disclosure application. Tomlinson J considered that giving clearly expressed reasons responsive to the issues debated would avoid time consuming and costly challenges.

237 CompagnieEuropeenne v. Tradax [1986] 2 Lloyd's Rep 301.

238 **Lesotho**: Contract governed by the law of Lesotho, provided for payment in Maloti (Lesotho currency). Arbitration agreement, ad hoc, provided for ICC arbitration under the Arbitration Act 1996. The tribunal concluded that questions of currency and interest were procedural matters governed by ss. 48 and 49. It ordered payment in various European Currencies and the payment of interest on a commercial rate. HL accepted that, in regard to the currency of damages, the tribunal had erred in law in deciding that it had discretion under s. 48 to disregard the substantive law in relation to the currency of damages, but that the wrong use of an available discretion was not an excess of jurisdiction. It held that, on the assumption that the tribunal erred in law in exercising its discretion over interest the way it did, this was at most an error of law, and not an excess of jurisdiction, and there was, in any case, no substantial injustice caused by this error. The implication is that only if the tribunal exercises a power that it does not have, will there be an excess of jurisdiction.

239 **Interbulk v. Aiden Shipping Co** [2004] 2 Lloyd's Rep 66 (CA): AcknerLJ "The essential feature of an arbitrator, or indeed, a Judge is to resolve the issues raised by the parties. The pleading record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness, or, as it is sometimes described, as a matter of natural justice to put the point to them so that they have an opportunity of considering it." Approved, Bandwidth Shipping Corp. v. Intaari [2007] EWCACiv 998 [2008] 1 Lloyd's Law Rep 7 (where the court held that there was not such unfairness if the arbitrators had not appreciated that counsel, particularly highly experienced counsel who shows a detailed knowledge of the case, had

its conclusions or that it must deal with each point made by a party, Petroships v. Pytech Trading [2001] 2 Lloyd's Rep 348. But if a central point is not dealt with, this will be a serious irregularity, Ascot Commodities v. Olan [2002] CLC 3277 (Comm). An issues must be an important or fundamental issue that was put to the tribunal. There is a difference between failing to deal with such an issue and failure to provide any or any sufficient reasons for a decision, FidelityManagement v. Myriad International [2005] 2 Lloyd's Rep 508 (Comm), the latter can be dealt with under s. 70(4); Van der Giessen v. Imtech Marine [2008] EWHC 2904 (Comm); [2009] 1 Lloyd's Rep 273.

Ronly Holdings v. JSCZestafoni [2004] BLR 323 (Comm)[240] (reserving a question for determination by a third party, is a failure to deal with all the issues).

Claims included in the parties' case statements should be dealt with unless expressly abandoned, even if not supported by evidence or submissions; Cobelfret NV v. Cyclades Shipping Corp Ltd [1994] 1 Lloyd's Rep 28. But claims encompassed by a Notice to Concur are deemed abandoned, and need not be dealt with, if they are not referred to in the parties' case statements; Excomm Ltd v. Guan Guan Shipping (Pte) Ltd [1987] 1 Lloyd's Rep 330. Note also Bandwidth Shipping v. Intarri [2007] EWCA (Civ) 998; [2008] 1 Lloyd's Rep 7 (arbitrators did not act unfairly in not checking with counsel understood what was being said by the other side in circumstances where they did not appreciate that he had missed a point. If had appreciated this should have raised the point so it could be dealt with. There is a high hurdle in the way of a party seeking to challenge an Award under s. 68, in particular by reference to s. 33).

A failure to consider specific documents or evidence on an issue or to attach sufficient weight to such documents, is not a failure to deal with an issue, nor is a mistake in findings of primary fact or in drawing inferences from such facts; World Trade Corp. v. Czarnikow Sugar [2005] 1 Lloyd's Rep 422 (Comm).

- AA1996, s. 68(2)(e): Any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers.

- AA1996, s. 68(2)(f): Uncertainty or ambiguity as to the effect of the award.

- AA1996, s. 68(2)(g): The award being obtained by fraud or the award, or the way in which it was procured, being contrary to public policy. To succeed on this ground the applicant must show that some form of reprehensible, some unconscionable conduct, on its opponent's part contributed in a substantial way

---

missed the point.

240 **Ronly**: Tribunal 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. Court considered this to be a failure to deal with all the issues rather than an excess of jurisdiction.

to obtaining an award in the latter's favour; Profilati Italia v. Paine Webber [2001] 1 Lloyds' Rep 715; Cuflet Chartering v. Carousel [2001] 1 Lloyd's Rep 707.[241] See also Thyssen Canada v. Marina Maritime [2005] 1 Lloyd's Rep 641 (Com Ct)[242] (allegation that award had been obtained on basis of perjured evidenced, and that evidence had been deliberately destroyed). See also Elektrim SA v. Vivendi Universal [2007] 1 Lloyd's LR 693 (Com Ct). The court said, obiter, that a causative link between the deliberate concealment of the document or the fraudulent failure to produce it, the perjured evidence, and the conclusions in the award must be shown (another hurdle in the way of successfully arguing this ground).

- AA1996, s. 68(2)(h): Failure to comply with the requirements as to the form of the award.

- AA1996, s. 68(2)(i): Any irregularity in the conduct of the proceedings or in the award that is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

The mere fact that such an irregularity has occurred is not enough; Groundshire v. VHE Construction [2001] BLR 395, Petroships v. Pytech Trading [2001] 2 Lloyd's Rep 348.[243]

---

241 **Profilati**: Attempt to remit under s. 68(2)(g) on grounds part procured in a way contrary to public policy. Documents wrongfully withheld, tribunal misled. Deliberate withholding of an important document could satisfy this test, but not innocent withholding, otherwise would expand s. 68 categories. The way parties had dealt with disclosure meant no breach of duty to disclose, since party seeking disclosure had, under the procedure, to identify in a general way the documents it was seeking. **Cuflet Chartering v. Carousel** [2001] 1 Lloyd's Rep 707 to succeed on the public policy ground must show unconscionable conduct by the party being criticised. Inadvertent misleading of one party by another (ie that the arbitration would be suspended), not sufficient.

242 **Thyssen**: Whichever limb of s. 68(2)(g) of the Act is relied on, it must be shown that the defendants acted in such a way as to obtain the award by fraud or procure it in a way that was reprehensible or involved unconscionable conduct. If challenged on basis of false evidence, this can only be done where the defendant can fairly be blamed for the adducing of that evidence and the deception of the tribunal; that it is responsible for the fabrication of the perjured evidence. This necessitates a trial where the evidence put forward is tested, a hearing of those witnesses. It is not sufficient merely to produce cogent evidence; the allegation of fraud must be proved.

243 **Petroships**: Section 68 is only available where the tribunal has gone so wrong it its conduct, in one of the listed respects that justice calls out for it to be corrected. It should not be used to circumvent the restrictions on the court's power to intervene in arbitral proceedings. Purpose of serous irregularity test is to support arbitral proceedings, not interference. A similar view was expressed by the HL in Losotho.

- ONO Northern Shipping v. Remolcadores [2007] 2 Lloyd's Rep 302 (Comm Ct) (there is substantial injustice where a party deprived, by breach of s. 33, of opportunity to advance submissions which were "at least reasonably arguable" or even "something better than hopeless", it is not for the court to second guess the arbitrators).

- London Underground v. Citylink [2007] BLR 391 (TCC).The issue is whether the arbitrator has come by impropriate means to one conclusion whereas had appropriate means been adopted he might realistically have reached a conclusion favourable to the applicant. It does not require the court to try the issue so as to determine, based on the outcome, whether substantial injustice has been caused. Van der Giessen v. Imtech Marine [2008] EWHC 2904 (Comm); [2009] 1 Lloyd's Rep 273 (the court is not required to decide what would have happened if there had been no irregularity. Provided that the point was one where the tribunal might well have reached a different view the court should enquire no further)

- But note ASM Shipping v. TTMI Ltd [2006] 1 Lloyd's Rep 375 (Comm):[244] Where apparent bias is shown, this is, itself a species of serious irregularity causing substantial injustice. There is no need for a separate enquiry about this (this view has been criticised).

5. Appealing an award on a question of law

Unless otherwise agreed by the parties, a party may (on notice to the other parties and the tribunal) appeal to the court on a question of law arising out of an award, AA1996, s. 69. An agreement to dispense with reasons is sufficient to exclude the court's jurisdiction to consider such an appeal, AA1996, s. 69(1).

- Sumukanv. Commonwealth Secretariat [2007] EWCACiv 243; [2007] 2 Lloyd's Rep 87 (CA) (such an agreement, provided it was voluntary, did not infringe human rights, eg Article 6 of the ECHR).

- An arbitration agreement which provides that the award will be final and binding, is not an exclusion agreement for the purpose of s. 69; Essex CC v. Premier Recycling Ltd [2007] BLR 233 (TCC), nor are the words "final, binding and conclusive", Shell Egypt v. Dana Gas [2009] EWHC (Comm) 2097.

- Gunagzhou Dockyards v. EneAegiali [2011] 1 Lloyd's Rep 30; there is no appeal on questions of fact and it is very doubtful that the court had an inherent jurisdiction to hear an appeal on such questions, even if the parties agreed to such an appeal.

An appeal can only be brought with the agreement of the other parties to the proceedings or with the leave of the court. In addition to these fetters, the right to appeal is subject to the AA1996, s. 70(2) and 70(3) restrictions; AA1996, s. 69(2). There were no special

---

[244] **ASM**: The judge disagreed with comments in Groundshire, to the contrary,

requirements for how an agreement that an appeal might be brought should be worded, Royal & Sun Alliance v. BAE Systems [2008] EWHC 743; [2008] 1 Lloyd's Rep 712.[245]

If leave to appeal is required it will only be given if the court is satisfied:

- That the determination of the question will substantially affect the rights of one or more of the parties;

- that the question is one which the tribunal was asked to determine;

- that on the basis of the findings of fact in the award the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.[246] See CMA v. Beteiligungs etc. [2003] 1 Lloyd's Rep 212 (CA);[247]

- and that, despite the agreement of the parties to resolve the matter by arbitration it is just and proper in all the circumstances for the court to determine the question Note Icon Navigation v. Snochem [2003] 1 All ER (Comm) 405 (on s. 69(3)(d)).[248] In Essex CC v. Premier Recycling [2007] BLR 233 (TCC) the judge considered that the provision in the arbitration agreement that awards were to be final and binding, the appointment of an expert as arbitrator, and the use of written

---

245 **Royal:** "Any party to the Dispute may appeal to the court on a question of law" is sufficient.

246 These tests preserve a presumption of finality. But note comments in CMA v. Beteiligungs etc. [2002] EWCA (Civ) 1878 that these are closer to the broader guidelines in AntaiosCompania SA v Salen AB [1985] AC 191 than the narrower requirements in Pioneer Shipping Ltd v. BTPToxide Ltd, the Nema [1982] AC 724.

247 **CMA**: Open to serous doubt test, more generous than the old Nema/ Antios "probably wrong" test. Issue concerned the interpretation and application of a war clause in a charter party. CA concluded that judge was correct to refuse leave to appeal to the Commercial Court. Although tribunal's finding open to serious doubt, the determination of the question as to its construction and whether had to be exercised in a reasonable time did not substantially affect the rights of one or more of the parties. Because of the delay in exercising cancellation rights, these rights would, either under an implied term of exercise in a reasonable time, or under the doctrine of waver/estoppel or election have been lost (the tribunal had adopted the implied term analysis). Had it not been for s. 69(3)(a), leave would have been given since, unlike under the old law, a difference in view on this point, here by the arbitrators, sufficient to suggest serous doubt.

248 **Icon**: Claim for freight and counterclaim by charterer for short delivery. One issue relevant to the counterclaim concerned whether charterer in breach of cause 31. Issue first emerged in closing submissions, charterer objected, but nothing turned on this since tribunal held, on construction of clause 31, no breach. Owner appealed. Court had to consider how charterer could raise allegation of serous irregularity if appeal allowed. Court considered that it would not be appropriate to issue a protective cross application under s. 68. Rather, the issue should be raised to resist application for leave on ground that it was not just and proper to determine the question. If a hearing desired, party should ask for one.

submissions to archive a quick procedure were of great weight in considering the s. 69(3)(d) discretion.

- In deciding whether to give leave, the courts try to uphold arbitral awards, reading them in a reasonable and commercial way expecting that there will be no substantial fault with them, and bearing in mind that the parties chose an autonomous process under which they agree to be bound by the facts as found by the arbitrators; London Underground v. Citylink [2007] BLR 391 (TCC).

- If the respondent wishes to contend that the award should be upheld for reasons not expressed or fully expressed in the Award, he should state those reasons when opposing leave; Vitol SA v. Norelf Ltd [1996] AC 800, 814 (CPR PD 62, para 12.3(3). Such reasons much be questions of law and, if not pronounced on by the tribunal, the court will reach its own view, if pronounced on by the tribunal the statutory tests for error of law apply, see CTI Group v. Tarnsclear (No 2) [2007] EWHC 2340 (Comm); [2008] 1 All ER 203.

An application for leave to appeal will ordinarily be determined without a hearing, AA1996, s. 69(4). Unlike under the old law, brief reasons for a refusal to give leave should be given; North Range Shipping v. Seatrans [2002] EWCACiv 405; [2002] 1WLR 2397[249](CA) overruling Mousaka v. Golden Seagull [2001] 2 Lloyd's Rep 657, on this point. Note comments on procedure in CMA v. Beteiligungs [2002] EWCACiv 1878; [2003] 1 Lloyd's Rep 212 (CA).[250]

On hearing an appeal the court will simply decide whether, on its view of the facts found by the arbitrator, the arbitrator was correct in law.[251]

The proper subject appeal on law

There are three stages in the arbitral process. (i) The arbitrator ascertains the facts; (ii) the arbitrator ascertains the law, including the identification of all material rules of statute and common law and the identification and interpretation of relevant parts of the contract, and the identification of those facts that must be taken into account when the decision is reached; (iii) in the light of the facts and law so ascertained, the arbitrator reaches his conclusion. It is the second stage that is the proper subject of an appeal. In some cases the error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It may also possible to infer an error of law in those cases were a correct application of the law to the facts found would inevitably let to one answer whereas the arbitrator has arrived at another This can be so even if the arbitrator has stated the law in an manner which appears to be correct. The Chrysalis [1983] 1 Lloyd's Rep 503, Mustill J.

---

249 **North Range**: Having regard to article 6 of HRC, the Court had to give sufficient reasons when refusing leave to enable the loosing party to understand why the judge had reached his decision.

250 **CMA**: CA castigated length and complexity of submissions on the application for leave. Should be such as a judge could read and digest in half an hour. Also the giving of reasons should not be used as an opportunity for further submissions before the order drawn.

251 Pioneer Shipping Ltd v. BTPToxide Ltd [1982] AC 724, Gill &Duffus SA v. Societepurl'Exploration etc. [1986] 1 Lloyd's rep 322.

Some examples:

- The law in question must be that of England and Wales (or Northern Ireland), AA1996, s. 81(1); Athletic Union v. NBA [2002] 1 Lloyd's Rep 305.

- A question of law may concern the determination and application of legal principles to the facts or to the exercise of a judicial discretion, such as the discretion to allocate costs. It may concern the construction of documents[252]. But note, CTI Group v. Transclear SA [2007] EWHC 2340 (Comm); [2008] 1 Lloyd's Rep 250, in the case of mixed findings of act and law, the is only an error of law if the tribunal misdirected itself or no tribunal properly instructed as to the relevant law could come to the determination reached. To decide de novo a question of mixed fact and law decided by the tribunal would be to act contrary to the clear policy of the Act.

- The question of whether there is insufficient evidence to support a particular finding is not a question of law; Demco v. SE BankenForsakring [2005] 2 Lloyd's Rep 650 (Comm) There is some doubt about whether the question of whether there is no evidence to support a finding question is a question of law.[253]

- The exercise by the tribunal of a power may give rise to questions of law, Fence Gate v. NEL Construction (2002) CILL 1817 (the power to allocate costs).[254]

- The exercise of a discretion may involve an error of law, if made on the basis of incorrect legal principles. That is where there were no grounds on which the arbitrator could have made the order he did or he made the order on ground which he could not properly in law have taken into account or, indeed failed to exercise the discretion at all. But where the arbitrator has an absolute discretion, he can only be challenged on grounds of bad faith or where he takes into account wholly extraneous matters; SOSCorporacion v. Inerco Trade SA [2010] 2 Lloyd's Rep 345 (Comm).

The requirement to act judicially

Concerns with natural justice were, under the 1950 Act, encompassed in the notion that the tribunal should act judicially. This meant that arbitration was, like litigation, an essentially adversarial process and the tribunal had to apply similar principles to a court in exercising its powers. It is unclear whether this principle still applies under the AA1996.

---

252 President of India v. JadranskaSlobodnaPlovidba [1992] 2 Lloyd's Rep 274; Everglade Maritime v. Schiffahrtsgesellshaftetc [1992] QB 780.

253 Consider Mondial Trading Co GmbH v. Gill &Duffus etc. [1980] 2 Lloyd's Rep 376, Universal Petroleum Co Ltd v. Handels und Transport GmBH [1987] 1 WLR 1178

254 **Fence Gate**: The tribunal should act in accordance with its powers. It should not take into account matters which the law or the power preclude it from considering and must give effect to matters that the law and the power require it to consider. In addition the overall discretionary exercise must not be perverse, nor one that a reasonable tribunal properly conducting itself could not have rendered (a test similar to Wednesbury reasonableness.

Contrast Wicketts v. Brine Builders (2001) CILL 1805[255] with Fence Gate v. NEL (2002) CILL 1817.[256]

6. Relief available on a challenge or appeal

Where an award is successfully challenged on grounds of serious irregularity the court may remit the award to the tribunal in whole or part, for reconsideration, set the award aside in whole or in part, or declare the award to be of no effect in whole or in part, AA1996, s. 68(3).

Where an award is appealed, the court may confirm the award, vary it, remit it to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or set it aside in whole or in part, AA1996, s. 69(7).

The court should not set aside an award or declare it to be of no effect, in whole or in part, unless satisfied that remission of the matters in question to the arbitrator is inappropriate, AA1996, ss 68(3), 69(7); Groundshire v. VHE Construction [2001] BLR 395.[257]

Ancillary court powers concerning successful challenges

By AA1996, s. 13, the court may order the period of an arbitration to be disregarded for the purposes of the Limitation Acts when an award is set aside or declared to be of no effect, AA1996, s. 13. Although, unlike under the old law, the court can no longer set aside an arbitration agreement (see AA1950, ss. 24, 25, now repealed) this may be necessary if a tribunal is found, after an award is made, to have lacked substantive jurisdiction.

If the court set asides an award or declares it to be of no effect, it may order that any provision that an award is to be a condition precedent to the bringing of legal proceedings is of no effect as regards the award or as the case may be the relevant part of it, AA1996, s. 71(4). It is unclear what purpose this serves since the court cannot set aside the arbitration agreement itself.

7. Supplementary provisions relating to challenges and appeals

There are two preconditions to bringing an application or appeal from an award.

---

255 **Wicketts**: The arbitrator had to apply same principles as a court when ordering security for costs and could only do so on the basis of evidence provided by the parties.

256 **Fence Gate**: The requirement to act judicially is no longer relevant to a tribunal allocating costs The applicable principles are to be found in the Arbitration Act and any agreed rules.

257 **Groundshire**: Only remove where there are reasons for loss of confidence in the arbitrator, despite similarities of wording with s. 68. Policy of the Act is to remit in preference to setting aside or declaring it to be of no effect or removing the arbitrator. Sections. 24 and 68 apply where substantial injustice has been or will be (not may be) caused. Substantial means having a real existence, not just more than *de minimus*. Since the applicant had not exhausted its recourse under s. 57 (did not ask the arbitrator for clarification and to explain his reasons) court had no alternative but to refuse the application, see s. 70(2)(b).

- Any available arbitral process of appeal or review and any available recourse to the tribunal to correct its award or make an additional award, must have been exhausted, AA1996, s. 70(2). Consider Groundshire v. VHE Construction [2001] BLR 395;[258] Torch Offshore v. Cable Shipping [2004] 2 Lloyd's Rep 446 (Comm).[259]

- The application or appeal must be brought [260] within 28 days of the date of the award or if there has been an arbitral process of appeal or review within 28 days of the date when the applicant or appellant was notified of the result of that process, AA1996, s. 70(3).[261] In the case of corrections, it has been held that the 28 day period runs from the date of publication of the corrected award, Al Hadha Trading v. Tradigrain [2002] 2 Lloyd's Rep 512.[262] In UR Power v. Kwok Oils [2009] EWHC 1940 (Comm) the position in regard to appeal awards was considered and it was held, the wording of s.70(3) being regarded as puzzling, that time runs from when the appeal award is made, not from when it is notified.

- This 28-day period may be extended by the court, AA1996, s. 80(5), CPR Parts 3.1.3 and 62.9; AootKalmneft v. Glencore [2002] 1 Lloyd's Rep[263] 128. Colman J

---

258 **Groundshire**: In respect of one complaint, concerning the arbitrator's method of valuation, the court held that since the applicant had not exhausted its recourse under s. 57 (did not ask the arbitrator for clarification and to explain his reasons) court had no alternative but to refuse the application, see s. 70(2)(b).

259 **Torch**: Arbitration concerning alleged misrepresentations inducing a charter party. Torch challenged award under s. 68 on grounds that Tribunal had failed to address the question of whether the second misrepresentation induced it to enter into the contract. Court held that s. 57(3)(a) could have been used by Torch to seek clarification from the tribunal as to whether it has decided against it on the issue of inducement, an issue on which the Award was silent. It failure to do so was, by operation of s. 70(2), an insurmountable bar to its s. 68 application.

260 The 28 day period will not be complied with unless the Arbitration Claim Form relating to the application or appeal has been issued, and all the affidavits or witness statements in support have been filed, by the expiry of that period, Arbitration Practice Direction, paragraph 22.1. See AA1996, s. 80(4).

261 It is unclear whether the application to the tribunal to correct its award will be regarded as an arbitral process of review, such that the 28 day time limit for challenging the initial award in court will, if the tribunal dismisses the application, run from the date on which the application is notified of that decision. This is because recourse to AA1996, s. 57 is expressly distinguished from "an available process of appeal or review, see AA1996, s. 70(2) and it is only that latter this is stated to affect the time limit in AA1996, s. 70(3).

262 Al Hadha: This conclusion reached on construction of s. 70(3).

263 **Aoot**: The broad discretionary approach to applications to extend time in CPR Part 3.1.2 applies. A broader discretion than the substantial injustice test under s. 79. In this case, the court principally asked whether the applicant acted reasonably in allowing the time limit to elapse. Failure of a foreign party to instruct English solicitors to advise when aware of the urgency, was not a reasonable excuse for its non compliance with the time scales.

In Thyssen v. Mariana [2005] 1 Lloyd's Rep 640, the court noted

suggested the following factors to consider (approved in Broda Agro v. Alfred C Toepfer [2011] 1 Lloyd's Rep 243 (CA)):

> (i) Length of delay; (ii) whether the applicant was acting reasonably in permitting time limit to expire and the subsequent delay to occur; (iii) whether the respondent or the arbitrator caused or contributed to the delay; (iv) whether the respondent would, by reason of the delay, suffer irredeemable prejudice in addition to the mere loss of time if the applicant were permitted to proceed; (v) whether the arbitration had continued during the period of the delay and, if so, what impact determining the application might would have on its progress or costs incurred; (vi) the strength of the application; (vii) whether in the broadest sense it would be unfair to the applicant if denied a determination of the application.

The CA in NagusinaNaviera v. Allied Maritime [2002] EWCACiv 1147 identified (i) and (iii) as the primary factors. It said that factor (iv) was not an essential precondition, and that factor (v) was relatively minor. As for factor (vi) this was expressed as whether the claim could be regarded as so strong that it would obviously be a hardship for them not to be able to pursue it. As for factor (vii) it was said that this must be viewed in the context that Parliament and the courts have emphasised the importance of finality and time limits for any court intervention in the arbitral process.

- The right to dispute an award under ss. 67 and s. 68 may be lost by operation of the statutory waiver, AA1996, s. 73. Consider Athletic Union v. NBA [2002] 1 Lloyd's Rep 305;[264] Thyssen Canada v. Marina Maritime [2005] 1 Lloyd's Rep 641 (Com Ct).[265] In respect of appeals, a similar principle is found in s. 69(3)(b).

On any application or appeal, the court my order the tribunal to state the reasons for its award in sufficient detail to enable the application or appeal to be considered, either if the award contains no reasons or the reasons given are not in sufficient detail, s. 70(4). The court can also make orders for security for costs, s. 70(6) and for the securing of any

---

Nagusina v. Allied Maritime [2002] EWCACiv 1147 (CA), where CA said that length of delay, reasonableness of action of party who allowed time limit to expire, and extent to which defendant or arbitrators had caused or contributed to the delay were the most important, and that prejudice to the defendant was not a prerequisite to refusal. Court also took account of the s. 73(1) question in deciding, despite the seriousness of the allegations, not to allow an extension of time, of some months.

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

265 **Thyssen**: Claimant were found to have known of the allegations of perjury at a time when (between about late November 2003 and late May 2004) they participated in the arbitration by collecting the award an making submission to the tribunal about the award, about the admission of fresh evidence, and on the issue of costs.

money payable under the award, AA1996, ss. 70(6), 70(7). But note comments on this power in Margulead v. Exide Technologies [2005] 1 Lloyd's Rep 324 (Comm).[266]

- On security for costs, see Azov Shipping Co v. Baltic Shipping Co (No 2) [1999] 2 Lloyd's Rep 39.[267]

- On securing money payable, see Peterson Farms v. C&M Farming [2004] 1 Lloyd's Rep 603.[268] See also A v. B [2011] 1 Lloyd's LR 363 (Where the security was sought in response to a s. 67 challenge, it had to be shown that the jurisdictional challenge was flimsy or otherwise lacked substance. This was because, on a s. 67 challenge the award, unlike in the case of a s. 68 or s. 69 challenge did not have a presumptive validity. In all cases it had also to be shown that challenge (or appeal) would prejudice the applicant's ability to enforce the award, for example by demonstrating some risk of dissipation of assets. Where leave to appeal had been granted it was, in any case, unlikely that security would be ordered given the stringent requirements for obtaining leave unless, for example, the application was being used as a delaying tactic and assets might be dissipated.)

8. Procedure

---

266 **Margulead**: A failure to give reasons is not the same as a failure to deal with an issue. The latter concerns a tribunal's failure to reach a conclusion on a specific claim or defence, not merely a failure to give reasons for the Tribunal's conclusion on such as claim or defence.

267 **Azov**: The Court considered power to order security for costs on challenge or appeal under AA1996, s. 70(6). Discretion unfettered, other than that no order could be made simply because a corporation incorporated outside the UK. But had to have regard to the principle in s. 1(3), as to the object of arbitration. Thus orders would be rare if the applicant had sufficient assets to meet order for costs and those assets available to satisfy any such order. The merits of the decision being challenged was less important but may be relevant if there is no cogent reason for suggesting it is wrong. In this case, no readily available assets to satisfy an any order for costs, also Azov was simply having a second bite of the cherry, so security ordered.

268 **Peterson**: Should the court order amount of award to be secured pending a challenge under s. 67. Judge stated that he could well understand why such an order would be appropriate on a s. 68 challenge since parties had chosen arbitration and would not necessarily have the same formalities and safeguards as proceedings in court. It is less clear why, if leave to appeal a question of law has been given, such an order would be appropriate since the court has already accepted that the award is open to serious doubt. As for challenges under s. 67, there is an anomaly in that this power is only available if the jurisdictional issue comes to the court under s. 67, not if under s. 32 or s. 72, and reason for the route adopted may be fortuitous, and this may be a relevant circumstance. But a circumstance that must weigh heavily with the court in deciding whether an order under s 70(7) is appropriate is whether the challenge to the award appears to have any substance. In most cases it seems likely that a threshold requirement for such an order will be that the challenge is flimsy or otherwise lacks substance. That threshold is not crossed in this case.

An application or appeal from an award must be made by arbitration claim form in accordance with CPR Part 62 and the related Practice Direction. The application must be made on notice to the other parties and the tribunal.

The material that the court will consider depends on whether the application concerns questions of substantive jurisdiction or serious irregularity, or concerns an appeal on a point of law.

- If the application concerns the tribunal's substantive jurisdiction, the court will consider all the material that is relevant to the jurisdictional question by way of rehearing of that question.

- If the application concerns a challenge for serious irregularity, the court will consider all the material relevant to that application whether or not it is referred to on the face of the award.

- If the application concerns an appeal on a point of law the court will only consider the award and documents accompanying and forming part of the award; for a recent discussion of this and the court's role in determining the appeal see Kershaw Mechanical Services v. Kendrick [2006] EWHC 81 (TCC).[269] See also Bulk & Metal Transport v. VOC Bulk [2009] EWHC 288 (Comm); [2009] 1 Lloyd's Rep 481, arbitrators referred to part of document in award, court could look at the whole document on an appeal. Thus if the award identifies documents as having contractual effect but summarises them or does not set out their terms then the documents are admissible;Dolphin Tanker v. Westport Petroleum [2011] 1 Lloyd's Rep 550 (Comm).

- If a "non-speaking" award is given, with confidential reasons issued separately, these may still be admitted by the court in evidence on a s. 68 challenge, if the court considered it right to do so; Tame Shipping v. Easy Navigation [2004] 1 Lloyd's Rep 626 (Comm).

- If an allegation of perjury or fraud is relied on, it may be necessary for the court to hold a hearing at which evidence relevant to those allegations can be tested; Thyssen Canada v. Marina Maritime [2005] 1 Lloyd's Rep 641 (Com Ct)[270]

9. Appeals to the Court of Appeal

---

269 **Kershaw**: The court should answer the question of law raised by the appeal correctly, on the basis of the Award and correspondence or documents referred to in it, reading the award in a fair and reasonable way, avoiding minute technical analysis. If arbitrator's experience is of assistance in determining the question, such as an interpretation of contract documents or correspondence, than some deference should be paid to his decision and only reverse it if satisfied that he had come to the wrong answer.

270 **Thyssen**: Application under s. 68(2)(g) of the Act on grounds that witnesses lied and destroyed evidence. This necessitates a trial where the evidence put forward is tested, a hearing of those witnesses. Not sufficient to merely produce cogent evidence, the allegation of fraud must be proved.

In most instances, the Arbitration Act 1996 expressly provides that the leave of the court is required for an appeal from its decision. The court should give brief reasons if it refuses leave, North Range Shipping v. Seatrans Shipping [2002] EWCA (civ) 405[271]. The principles that the first instance court should apply were considered in CMA v. Beteiligungs [2002] EWCACiv 1878; [2003] 1 Lloyd's Rep 212 (CA).[272]

- The effect of those provisions stating that leave of the court is required (contrast s. 9 AA1996) coupled with AA1996, s. 105(1) is that the Court of Appeal has no power to give itself leave or review a first instance court's refusal to allow leave; Henry Boot Construction v. Malmaison Hotel [2000] 2 All ER (Comm) 960 (CA);[273]Athletic Union v. NBA [2002] 1 Lloyd's Rep 305[274] (CA).[275]

- But note North Range Shipping v. Seatrans Shipping [2002] EWCA (Civ) 405[276] (The CA had an inherent jurisdiction to set aside the first instance court's decision not to grant leave where there was misconduct or unfairness in reaching that decision).

- Where, however, the appeal concerns the first instance court's decision on its jurisdiction, in this case as to whether the parties concluded an agreement excluding its right to hear appeals on law, the CA could give permission to appeal the decision on that question; Sumukanv. Commonwealth Secretariat [2007] EWCACiv 243; [2007] 2 Lloyd's Rep 87.

---

271 **North Range**: Article 6 of the ECHR applied to the court when considering whether or not to allow leave to appeal, under s. 69(3). Thus brief reasons had to be given. A party was entitled to know why its application for leave had been dismissed.

272 **CMA**: Only give leave if, in his view, the particular case called for some elucidation of the statutory guidelines. Rare since, guidelines are clear, and judge should have courage of conviction in applying them.

273 **Henry Boot**: Where the Act expressly deals with appeals and leave to appeal, eg s. 69(8) leave to appeal can only be given by the High Court or County Court dealing with the matter. The CA cannot give itself leave to appeal or review the judge's refusal to allow leave.

274 **Athletic**: Only the first instance judge can give leave to appeal, the CA has no such jurisdiction under the AA1996.

275 Note, in Republic of Kazakhstan v. Istil Group [2007] 2 Lloyd's Rep 548 (CA) it was held that these provisions were not incompatible with the ECHR.

276 **North Range**: It was argued that such a restriction was a breach of Article 6 of the ECHR. The CA held that it had an inherent jurisdiction (see also CPR 52.10(2)(a)), to set aside the first instance court's decision not to grant leave where misconduct or unfairness in reaching that decision. It seems that the lack of reasons for the first instance judge's decision was regarded as unfair. But having allowed leave to appeal, the appeal was dismissed. Note, where judge gives a fair hearing of the substantive matter and the application for leave to appeal, there is no place for this residual jurisdiction, ASM Shipping v. TTMI Ltd [2007] 1 Lloyd's Rep 136 (CA).

PART C: A PRACTICAL EXERCISE

Having completed the course, can you now answer the following questions?

1. How does arbitration differ from litigation and other methods of dispute resolution such as expert determination and mediation?

2. In what circumstances does a person have the right to arbitrate a dispute with another person and how can that right be enforced if the other party to that dispute commences proceedings in court in respect of that dispute?

3. How are arbitral proceedings commenced and why is it important that the correct procedure is followed?

4. What is a jurisdictional challenge and what are various ways in which such challenges can be determined?

5. What are the principal powers that an arbitral tribunal has to manage the proceedings and what principles govern its exercise of these powers?

6. What powers, if any, does the court have to intervene in the conduct of arbitral proceedings?

7. If a party obtains an arbitral award in its favour, how can that award be enforced if it is ignored by the other party?

8. What are the principal ways in which a party can dispute an arbitral award that is adverse to its interests?
