CHAPTER ONE

INTRODUCTION TO THE SUBSTANTIVE AND PROCEDURAL LAW OF ARBITRATION

THE ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

Introductory

The Arbitration Act 1996		*The Model Law*
1.	General principles.	Art 5, 19(1)
2.	Scope of application of provisions.	Art 1(2)
3.	The seat of the arbitration.	
4.	Mandatory and non-mandatory provisions.	
5.	Agreements to be in writing.	Art 7(2)

CONTENTS

"AN OVERVIEW OF ARBITRATION"

ADR : A User's Introduction to Some Available Methods

Sources of Arbitration Law in England and Wales.

The Departmental Advisory Committee Reports on Arbitration Law

THE ARBITRATION ACT 1996

Overriding Objectives, General Principles and The Arbitration Act 1996

Scope of the Arbitration Act 1996

The Seat of the Arbitration under the Arbitration Act 1996

Compulsory Provisions that cannot be contracted out of

Additional Reading

Self assessment exercise

CHAPTER ONE

"AN OVERVIEW OF ARBITRATION"

Introduction :

In my (*Hartwell*) study I have several shelves of books on Arbitration and other methods of dispute resolution. One leading textbook [1] has 830 Pages, another is in two volumes.[2] I find that frustrating, because commercial arbitration is the simplest and most obvious of solutions to problems between traders and their customers; as old as trade itself.

I won't attempt to distil all those books, not even the 830 pages, in this short talk. What I will try to do is explain the nature of Arbitration and discuss its application in the construction industry world wide.

First, however, it is important to understand what arbitration is not. It is not a process at law. It is not a legal process, in the strict sense. Of course it not illegal, it is a legitimate process, a licit process, but not a process at Law. By that I mean that the authority of the state is not invoked, the authority of an arbitral tribunal, such as it is, is no more and no less than the authority the disputing parties agree to give it. Of course, the Courts of the Land, whatever land that is, are available to enforce the outcome of an arbitration, but only then as any contractual arrangements fall to be enforced when parties disregard them. Arbitration is a private process and not a derogation of any Sovereign power[3].

I say that because there is a lot of misunderstanding. People talk about 'taking someone to arbitration' even about 'threatening arbitration', in much the same way as they talk about threatening a Court action. But that is nonsense, especially in construction. Arbitration is built into most forms of contract. It is a natural way to resolve issues that arise and the parties to a construction contract must have in mind that arbitration, or something like it,[4] is how they will resolve matters.

Arbitration is a method whereby the parties to a contract, or any parties in dispute, resolve their differences themselves, with the help of a third party[5] they engage for the purpose.

For a stricter definition, I refer you to the Shorter Oxford English Dictionary. ***"Arbitration:*** *The settlement of a dispute by one to whom the parties agree to refer their claims in order to obtain an equitable decision".*[6]

In the note to that definition, the compilers refer to a definition by Blackstone: ***"Arbitration Bond*** *- a bond entered into by two or more parties to abide by the decision of an Arbitrator."*

That is all there is to it. Two definitions. The first a simple statement which defines the process, the second a statement of the means which gives binding effect to the result. As it happens, modern legislation has made it unnecessary, in most countries, for there to be a formal bond. Generally a written agreement will suffice and that may be an express agreement or an agreement by reference.

Let me look at that definition again: *"The settlement of a dispute by one to whom the parties agree to refer their claims in order to obtain an equitable decision."*

Note the emphasis on agreement. No Courts, no judges, just "*one to whom the parties agree to refer*". Note also the "*equitable decision*". That is reflected in the English Arbitration Act 1996 in Section 1 *" the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"* The key word is "*fair"* . Some restrictive lawyers may argue that the Act requires only a fair process, but the English is crystal clear. The Act requires a fair resolution, a fair outcome. And that must be right. The Act was purported to be a consolidating act and the ordinary meaning of the language is unchanged.

And, in case any one doubts the freedom from procedural restraints of all kinds, the English Act goes on to state that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as

[1] *The Law and Practice of Commercial Arbitration in England*, Sir Michael J. Mustill and Stewart C. Boyd, Butterworths 1989, ISBN 0 406 31124 2.

[2] *Arbitration Law*, Robert Merkin, (looseleaf) Lloyd's of London Press, 1991 (first published) ISBN 1 85044 367 X.

[3] *Arbitration and the Sovereign Power*, Geoffrey M. Beresford Hartwell, Journal of International Arbitration 17(2) 11-18, 2000.

[4] In the United Kingdom, Adjudication, under the Housing Grants, Construction and Regeneration Act 1996, has become the principal means of determining disputes in construction.

[5] A Third Party who may be a group of three or some other number, but the principle remains the same.

[6] Shorter Oxford English Dictionary 1634

are necessary in the public interest". I should say that many countries include provisions for arbitration within codes of civil procedure, but the common feature is this essential freedom of the process.

The reason behind this approach is that arbitration is of prime importance in enabling disputed matters to be resolved by private determination without Court intervention; that is to say without State intervention. Moreover, arbitration can be truly international. Neither party has to be subject to the Courts of any State, not even the State in which the transaction is made or where one or the other party is domiciled. The New York Convention[7] enjoins signatory states to observe arbitral award made in other countries and there are some 130 or so countries who have signed the Convention. The only grounds upon which such enforcement may be refused are the common-sense grounds that there was no arbitral agreement or that the arbitration was carried out unfairly, or that the subject matter either is not amenable to arbitration or is contrary to public policy in the place where enforcement is sought.

What is the background of this state of affairs, and how is it relevant for building and engineering, for construction?

As I said when we started, the history of arbitration is as old as the history of trade itself; probably older than Law, if by Law we mean the Laws of Nation States and the apparatus for imposing them. Its roots lie in the power of humankind to communicate and interact socially. Interacting socially involves making bargains, whether in trade or in more general relationships. Implicit in the idea of a bargain is that the parties to it may or may not comply with their bargain and that there may come times when it is not equally clear to both whether the bargain has been kept or not.

For example, I grow apples on some ground I have enclosed, and you grow peaches in a similar piece of ground. An apple orchard and a peach grove. In Arcadia.

You and I agree to exchange a bag of apples for a bag of peaches. Maybe we do that every year, I don't know. Let us assume this is the first time.

Now, peaches bruise more easily and ripen and decay more rapidly than apples, and I don't think you have given me the 100% quality of peaches that I had a right to expect, that would be customary, perhaps.

We aren't going to fight over it, and the nearest Court is miles away and a thousand years in the future.

What we will do is go to our neighbour and mutual friend, whom we trust, and ask him or her to help us to find a way to settle our differences. And we can agree, if it becomes necessary, that we will comply with whatever he or she decides.

And that is all it is, or was. Arbitration. And it worked. If either you or I failed to obey our friend and refused to honour the "Award", it would become known and others would not trade with us any more. No need for enforcement by a Court, no need for the decision maker to have any special authority, we gave him or her all the authority necessary.

Nowadays, Arbitration is recognised by the legal system of almost every country. And it is more or less integrated into the systems of nation states by legislation of various kinds. So, in England, we have the Arbitration Act 1996. If you study arbitration in England and Wales, that is where you will begin.

In construction, it has been the custom for a long time that standard form contracts should include arbitration clauses.[8] Some will provide that, before arbitration, a decision must be obtained from an Engineer, Architect or other supervising officer. The use of such a supervising officer has changed over the years, but it remains the first point of decision in many forms of contract.

The typical arbitration clause will provide that, if there is a dispute (and it remains after the supervising officer has made whatever decision he has to make) one party or the other must give notice of arbitration, usually, but

[7] United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958). The Convention went into force on 7 June 1959

[8] But the Housing Grants Construction and Regeneration Act 1996 has made a provision for compulsory adjudication a part of every British domestic construction contract. Adjudication is also used extensively in international contracts such as those of FIDIC. Adjudication is very like a kind of rough and ready arbitration and is binding unless further steps (arbitration or litigation) are taken. A complete discussion is a necessary part of understanding the whole topic, but there is no time for it here.

not always, within a prescribed time. Sometimes, If there are to be three arbitrators for example (as in an international context) the party giving notice will nominate an arbitrator. Then it will be up to the other party to nominate another arbitrator and the process to find a third arbitrator or chairman will begin. If there is to be a sole arbitrator, he or she must be agreed.

On the face of it, you might think that the need for agreement could enable a reluctant party to avoid the arbitration altogether. However, the arbitration clause will provide for an appointing authority - sometime a national technical institution, some times an arbitration centre, to appoint if there is default.

Moreover, legislation, such as the Arbitration Act 1996, provides powers for the Court to make an appointment if it becomes necessary.

So when we say arbitration is consensual, it is only consensual in the sense that the original agreement is made by consent. A bit like marriage, but any contract is a bit like a marriage. All that follows is based on that first agreement.

A good arbitrator will want to know something about the dispute before making any directions. That is so he or she can decide upon an appropriate process for the particular dispute. Some disputes, especially in construction, require the arbitrator to inspect the site. Some concern interpretation of clauses and can be done completely on examination of papers. Some (not many, if the truth be known) require the oral examination of witnesses.

The arbitrator or arbitrators will never deal privately with one party only. At every stage they will write to both (or to their representatives). Each party must know what the other is saying and what the arbitrator is saying. It is one of the fundamental principles of natural justice, and supported by legislation.

Often, if the amount in issue justifies it, the arbitrator will call a preliminary meeting. The purpose of that will be to meet the parties and any representatives they may have and discuss the case sufficiently to decide upon the best directions. The purpose must always be to control the process so that it is both efficient and fair. It is a way of finding a fair answer to the dispute, not a way for professionals to make money out of the misfortunes of others.

Sometimes, the other party may not respond at all. If that happens, the arbitrator may use his powers to warn that party that he will proceed without him. He may call a preliminary meeting, to discuss with you both, or with your representatives, how the arbitration should be conducted. If one party is not responding, the arbitrator may serve a peremptory notice, saying that he will hear representations at some time and place, proceeding whether or not all are present. The sanction of course, is that he may proceed *ex parte*, that is, hearing one side only. He must be very careful about that, of course, but if he has given every opportunity, he may go on to the next stage and even to the hearing. If there is any doubt about that, the Court may give him specific powers to enable him to proceed (Arbitration Act 1979, S5).

As he is bound to make his award on what is submitted to him in an argument or presented as evidence, it follows that any arbitrator is likely to issue an award against a wilfully absent party. If the proper procedure has been observed, and the arbitrator has clearly been as fair as could be in the circumstances, that award will be as binding as the judgement of a court of law.

An arbitrator may not use his own knowledge to supply evidence which the parties have not submitted; but he will, of course, use his own skill and knowledge in interpreting the facts and in reaching his conclusion, because that is why a commercial arbitrator is used at all. It will be seen, therefore, that the arbitrator can do little or nothing to assist a party who fails to appear before him or fails to produce any evidence.

However, let us assume that both parties come to the preliminary meeting, if there is one. The arbitrator will introduce himself and invite the parties to consider how to go about things. He may remind the parties that they are about to enter on a serious judicial proceeding to determine their dispute. He will want to know if there is only one claim of if there is to be a counterclaim. He will want an idea of how much preparation is needed by each side.

At the preliminary meeting, the arbitrator may issue an 'order for directions'. That will tell everyone what to do next, generally so that each side knows what the other side is going to allege at the hearing. Depending on the

circumstances, there may be formal pleadings or he may invite each of the parties to state his case in a circumstantial letter. Nowadays, the claimant often is directed to submit a written statement of his case, accompanied by any documents on which he needs to rely. Then the respondent would give his statement in the same way. That may include a counterclaim if there is one, and the original Claimant will then have an opportunity to give his defence to that.

The directions may be given 'by consent', that is to say that the parties agree to the arrangements. In the absence of agreement, the arbitrator will decide what is to be done. He will be flexible, but his order does bind the parties to do what he requires and sanctions are available if they fail to do so.

There really is no scope for a would-be Perry Mason in an arbitration, nor in a civil court for that matter. Every step is designed so that the parties know what is claimed against them, what is agreed and what is denied. Once the claim is made, and served on the other party, it cannot be changed without the arbitrator's permission, and he will hear the views of both sides before giving that permission. Not only is that necessary fairness to the parties, but also it helps to avoid time wasting and delay. Perhaps more important, when the parties see their differences clearly set out, they may find it easier to agree to some settlement, which will save them the expense of continuing to the hearing.

Formal pleadings will involve a claim, the defence and any counterclaim, a reply to the defence and a defence to the counterclaim and sometimes a final reply. Their function is to set out the issues which are to be tried. Often they give the parties an opportunity to see the matter more clearly, as a result of which some or all of the issues may be settled, a good arbitrator will always be glad to find himself redundant as the result of a settlement, even if his fees are thereby rather less. Then there will be the process of discovery and inspection, whereby each side tells the other what documents he has which relate in any way to the dispute. When disclosed, those documents must be shown to the other side, unless they are privileged, such as letters between the party and his solicitor in contemplation of the proceedings. Sometimes that stage may be unnecessary; sometimes it may be limited in some way.

When all the interlocutory exchanges are over, there sometimes, but not always, may be another meeting to prepare for the hearing. The arbitrator needs to know how long each side will need for presenting its arguments and examining its witnesses. Everyone needs to agree on when the hearing is to be and on the venue. The arbitrator may weigh up the relationship between the parties. If it is generally amicable, he may suggest an information venue, perhaps his own office or somewhere near the site in dispute. If relations are strained, he will suggest more formal impressive surroundings. There is a lot to be said for a table, at least a metre wide, to separate the two sides!

There may be, in exceptional cases, other things to do before the hearing, such as obtaining depositions from witnesses overseas. A technical dispute will often require an inspection by the arbitrator, or he may decide that operational tests are to be conducted, under his control and in the presence of both parties. Again, if anything needs to be done which requires the assistance of an order of the court, application may be made under the 1979 Act.

I refer again to the advantages of an 'administered arbitration' and, particularly, to the role of the registrar and his staff. Such administered arbitrations are handled by the London Court of International Arbitration, by the Court of Arbitration of the ICC in Paris and by other bodies of the kind. The case will be decided at the hearing. Nevertheless, there is a great deal to be done in the interlocutory stages, and, particularly when the parties are not legally represented, they may find themselves arguing with the arbitrator about what can or cannot be done. Clearly, that is much easier when the parties deal not with the arbitrator, but with the registrar, because it is not the registrar who will have to decide on the case itself. In addition, the cost of administrative work is somewhat cheaper if the registrar and his team look after it. Also, most formal arbitration rules clarify a number of points on the arbitrator's powers, and that can lead to major simplification -- worth bearing in mind.

The Institution of Civil Engineers has devised and published its own rules of procedure. They include some interesting ideas, one of which is the examination of experts, one by the other, without lawyers, arbitration is much used in building and civil engineering and many building professionals become concerned with it. I do not propose, however, to concern myself with that aspect in this article.

CHAPTER ONE

The hearing :

In the ordinary way, then, we now come to the hearing itself. Each party presents his case and examines his witnesses before the arbitrator. Not every arbitrator takes evidence on oath. It is probably best, except in the simplest of cases, that he should, not because people tell lies, but because like an examination paper, the oath has the advantage of concentrating the mind on the matter in hand. The general rules of evidence apply, although they can be dispensed with, but time can be saved, for example, if documents are agreed, rather than read aloud. Often, where the matter has a technical content, the arbitrator can understand what a witness is saying, even though the lawyers may be having difficulty. He can save time by asking his own questions, but he must be careful not to introduce new arguments by doing so. There will be times when progress can be made by permitting leading questions; that is, questions which contain the information sought. It is important not to introduce, by leading, matters which are actually disputed, particularly if one of the parties is not represented by a lawyer, and thus may not know when to make an objection. It is not always obvious what is a leading question and what is not. However, little harm results from leading something already written in a statement.

During the hearing, the arbitrator takes notes of what is said. Some like to use a portable tape recorder as well, but only to help in the reading of those notes. If the parties require transcripts to be made, then a professional court shorthand writer is engaged. After all the evidence has been given, each party summarises his case and makes any points of law arising from it. Costs may be argued then or later. The arbitrator then closes the hearing. Within a reasonable time after the hearing -- a week or so, longer in complex cases -- the arbitrator prepares his award.

The award :

In the past, a good award simply said what was the result -- who should pay and how much. Reasons were not given or, if they were, were given as part of a separate, informal document, not part of the award. That was to avoid, by a technicality, any scope for setting aside an award 'for an error of law on its face'. Clearly, the less said, the less chance of setting aside. Nowadays, things have changed. Under the 1996 Act, the appeal procedure first introduced in 1979 is developed. Effectively, if the parties have not agreed to dispense with reasons, even nominally separate reasons become part of the award and will be considered by the court when any application is made for leave to appeal. The reasons may not be all that detailed. They need only be sufficient to explain why the arbitrator had decided as he has. In many cases, like those of quality arbitrations, where the arbitrator takes a look and says 'That isn't coffee' or whatever, reasons are unnecessary and will not be given. For most cases in the construction industry, however, one can expect the arbitrator to give his reasons in some detail, if only to satisfy the parties that they have been heard and understood.

It is the right of an arbitrator to write his award and to leave it on the mantle piece until someone pays for it. Usually, he will advise the parties (some only advise the successful party) of the arbitrator's fees, and often the parties will pay jointly. In major cases, it is likely that some arrangement will have been made to meet the arbitrator's fees as the case progresses. Of course, the payments will have to be adjusted afterwards, according to any order for costs, but the arbitrator os not concerned about that, because the parties are both jointly and severally liable to him for his own costs. There are circumstances in which the court may order him to deliver his award, but conditions may be attached to that. Again, when the arbitration is an *'administered'* arbitration, the registrar will deal with the issue of the award once the arbitrator has prepared it.

An award almost always states who is to pay, what amount and to whom. That will include any damages, the balance of any account between the parties, the parties' legal costs (if any are to be awarded) and the arbitrator's own fees and expenses. It should also say when that sum is to be paid. There is an exception to that, in that the parties' costs may be 'to be taxed if not agreed', in which case it is for the parties or their lawyers to argue out the costs between them or, failing that, for the costs to be 'taxed', that is to say assumed as to what has been properly incurred in the conduct of the case, by the arbitrator or by a taxing master in the High Court. In either case, further delay and expense will result. Even if the award is to be the subject of an appeal, it becomes payable when it is issued. If the terms are not met, then the award may be entered as a judgement for execution, just as any judgement of the court. That means that the whole apparatus of the State is available to

enforce the award, and similar facilities exist for foreign arbitrators or foreign parties. There is scope for declaratory awards which declare findings of fact or law, but they are not often sought.

What are the advantages of arbitration?

Arbitration has some advantages over court proceedings. Perhaps the most obvious example is in an international dispute, where one party does not wish to submit his arguments to the jurisdiction of a foreign court. The reason may be political, or a party may be a government agency in a country where the judiciary is not independent of government. In one such case, one party was British and the other was an agency of an Eastern Bloc government. The tribunal sat in Switzerland under a Swiss chairman. It was a proceeding under the rules of the International Chamber of Commerce Court of Arbitration. Moreover, as I said to begin with, The New York Convention ensures that awards are enforceable in most jurisdictions.

Another important reason, in domestic and foreign disputes, is that the proceedings are private. The outcome is private, any evidence remains confidential to the parties and the arbitrator, and thus arbitration is particularly useful where the parties do not want others to know their business. Conversely, the findings of one arbitration will not bind the courts or another arbitrator considering another case on similar facts; so arbitration may not be a good way of dealing with a 'test' case, although it could be a useful guide to what might happen in other, similar, cases.

The main practical advantage of arbitration, however, is that it can be conducted more or less to suit the parties involved. The hearing can be wherever suits everyone. There need not be a formal hearing if the parties and the arbitrator think that written submissions will do. The arbitrator can go to the site, if the dispute is about something fixed. Expert witnesses may not be needed.

Parties need not be represented by lawyers; they may appear themselves or they may be represented by lay advocates, a practice which is increasing in the area of building cases. A lay advocate is someone, not a lawyer but usually with some other expertise, who can present a case and question witnesses. Generally, though, I think anyone entering a modern arbitration should do so with legal advice.

If a substantial sum is involved, it is probably as well to engage the services of counsel. There is more to the conduct of a complex case than knowledge of the law, and few lay men have that combination of tactical experience and a touch of showmanship which may be required to present a case at its best. Counsel's role is more than a little like that of an orchestral conductor -- superficially easy, but all we see is the performance and not the legally skilled preparation and arrangement. Nevertheless, there are cases, usually straightforward, matters of fact, which parties may present themselves, and there are others which can be conducted perfectly well by experienced solicitors or lay advocates.

There are other ways in which an arbitration can be simplified. The arbitrator is said to be 'master of his own procedure', and he can cut across many of the usual formalities of court procedure, provided that he does so without restricting the parties' right to a fair hearing. If the parties make full use of this versatility of procedure, arbitration can be swift, effective and economical.

At a time when the courts are very busy, it often will be possible to have a matter settled by arbitration very much more quickly than could be done in the courts. That can be a major advantage, although it may not appeal to a party whose chances of success are not great. It is important that anyone concerned with appointing an arbitrator makes sure that his appointee is reasonably available.

Finally, there is one point which must be emphasised. Although the arbitrator has a great deal of freedom as to procedure, he must make his decision according to law. That means that he cannot just split the difference. It also means that he must listen to both sides and confine himself to considering what they put before him. Although he has been chosen for his general competence, if he proposes to use some special knowledge, he must let the parties know, so they cannot comment on it.

It is sometimes said that an arbitrator will produce a fair result, even if it is not strictly in accordance with law. I am afraid that is not true. If it were, then we would be living under two separate systems of law, with all the uncertainty that would result. Moreover, the courts would not be available to enforce the awards of such arbitrations, which would be of little value. There is an exception to that.

CHAPTER ONE

There are arbitration clauses which provide specifically that the arbitrator or arbitrators shall act as *amiable compositeur(s)* or that the award shall be made *ex aequo et bono*. They are more commonly used outside the Common Law jurisdictions. In rough terms, they do allow the arbitrator to achieve a fair result, not disregarding the law, but rather disregarding any palpably unjust effect of legal technicality. Proceedings under these terms will be directed towards the intentions of the parties, to the consequences of their conduct and to a fair result if external circumstances have intervened to cause the difficulties which led to the dispute. In many ways, the concepts adopted, when arbitrators act as *amiable compositeurs*, can be compared with the concepts of equity, linked with the so-called law merchant, the private international law of traders' custom and practice, which is itself undefined in any strict legal sense.

In asking a tribunal to act in this capacity, the parties are effectively throwing themselves on the mercy of the tribunal in the hope that the tribunal will resolve matters to give a reasonably fair result. Even if it is not law, that result will be enforceable as the product of the parties' agreement. The procedure is rare and, in England, almost unknown. Indeed, one may argue that the fusion of equity and law, in the English system, means that any decision, made in accordance with English Law, should be both just and equitable.

Arbitration will not be the answer to every problem. Consideration should be given to the appointment of conciliators or investigating experts when there is some prospect of success in a less formal approach. Nevertheless, in engineering, submission to arbitration is very much a matter of trial by one's peers and has become an established and settled way of dealing with many kinds of disputes. It is to be hoped that is to the advantage of all.

ADR : A User's Introduction to Some Available Methods

This is an outline of the principal methods available for the resolution of private disputes, and the resolution of some classes of disputes, which may have a public element. There are learned arguments about what is meant by Alternative Dispute Resolution, ADR. The logical meaning is simple. Alternative Dispute Resolution, in a legal context, embraces all means of resolution that are available as alternative to proceedings in court.

In general, any persons who have a dispute of any substance have a right to seek to have that dispute heard and determined by an appropriate court. In most countries, the court has an inherent jurisdiction to hear private disputes and it will hear them whether or not the defendant or responding party has agreed to that jurisdiction. That, then, is the essential difference between litigation and all forms of ADR. At one point or another, ADR methods are voluntary and depend upon the consent of the parties in the dispute.

There is one cautionary note to include here - there are countries who have enacted legislation to make one or more methods of ADR obligatory. The United Kingdom, for example, has introduced a right to what is called 'adjudication' for parties to construction contracts. The essential principle remains. The law provides, however, for every construction contract to be deemed to have an agreement to adjudication in it. Other countries have provided for mediation to be ordered by a judge, or to be a necessary step on the way to litigation. However, it is still true to say that consent is the underlying principle, even if the consent itself is not fully free.

Similarly, some States of the United States of America have legislated, and some Courts have provided as a part of Court procedure, for mediation to be required as a condition of proceeding with an action. This also contravenes the principle of consent, and that in turn affects the way in which parties view the process - and may even affect the outcome, for essentially psychological reasons, which we cannot discuss here.

So, as this note is essentially an overview for the possible user, let me first set out the processes that are available and from which a choice can be made. Mine is not an exclusive list and there are variants to almost every approach, so the reader is urged, indeed strongly urged, to seek legal advice before embarking on any of the courses open. The choices I propose to review, as alternatives to litigation are these: 1). Do Nothing : 2) Negotiate directly; 3) Find an Expert; 4) Find a Mediator : 5) Find an Adjudicator : 6) Find an Arbitrator. Each of these approaches has its merits, and I propose to look at them from a user's point of view.

1 Do Nothing

Disputes can often involve an expense of time and spirit, as well as money, and the outcome is rarely certain. Involvement in a dispute can distract attention from other, more important matters in business and personal life. It is surprising how often people, having found themselves faced with an insult or injury - real or

perceived - decide, after careful thought, to let the matter go and to chalk it up to experience. Doing nothing is a very practical option and anyone with a grievance should consider the benefits of inactivity first and foremost. Talking it through with a friend or professional may help to get things into perspective, but be warned that it is often too easy for other people to urge you to action - they will not have the burden of it.

In certain circumstances, and on taking advice, it may be as well to write to the other party saying something like "I propose to do nothing about this, but I reserve my rights" or something of the kind. There is often a great pleasure in taking the moral high ground, especially if you do not lose much by doing so.

2 Negotiate Directly

There is almost never harm in writing or telephoning the other party and saying "Let's talk about this over . . . . *a game of golf, lunch, dinner, a walk by the sea, any of those things.*" It is sometimes said that to make the first move displays weakness, but that is nonsense - you may be negotiating from strength or weakness, and a willingness to discuss a solution is a sign of moral strength, not weakness. It also puts you in the position of gaining a *tempo*. If you initiate the negotiation, the other party may expect you to make the first proposal, which puts you in a leading position. No third party is involved. Whether you offer to play host (and that itself gives an advantage) or 'go Dutch' is a matter of judgement. A variant on direct negotiation would be negotiation through friends or through your respective solicitors - but think what would happen if you agreed to negotiate through a mutual friend - you would have created a form of mediation without knowing it.

3 Find an Expert

The two of you, parties in dispute, can agree to find an expert who will know about the matters that concern you, and may look into your differences and form his or her expert opinion.
Now, and this is very important, you can use that expert in two very different ways. You can agree merely to obtain that expert opinion, and then use it to guide your own negotiations. Alternatively, you can agree to abide by that decision - to be bound by it.

If you agree to be bound, then you will have contracted to accept the expert's opinion and to act on it. If you then fail to comply with your bargain, it can be enforced by a Court. Moreover, expert determination, as it is called, is generally not open to appeal or correction in the court, except, in the event of egregious misbehaviour by the expert.

Examples where expertise has been used in this way include such questions as the opinion of Counsel as to the proper interpretation of a Contract, the opinion of an engineer as to the probable cause of a failure of a machine, and the opinion of a stockbroker as to the valuation of shares.

Some times the distinction between an expert and an arbitrator or adjudicator may be blurred, and experienced experts will encourage the parties to make their purpose clear. Certain forms of contract, such as those of the IChemE in UK, have provision for an expert to determine all disputed matters or disputed matters of particular kinds. The parties choose how to limit the range of subjects for the expert to resolve.

Specialist institutions, including NADR, will often suggest the names of persons having experience of expert determination. Although the only obvious requirements are competence and, of course, the trust of both parties, there are legal considerations, such as the need for fairness, that favour the use of an expert who has made such determinations before.

4 Find a Mediator

Mediation requires only that the two of you in dispute should agree to have someone mediate between you. However, in recent years, a mediation industry has come into existence and is growing, with many organisations (of which NADR is but one) providing training and accreditation and developing sets of more or less formal rules. The principle is simple, the mediator uses his or her skills to enable the parties to negotiate towards an agreement of their own.

There are choices: the mediator may simply chair a discussion between the parties, taking a more or less active role as they, the parties, wish; in a commonly seen variant, sessions chaired by the mediator, the so-called plenary sessions, alternate with private discussions or caucus sessions, in which the mediator sits with one or other party and carries the thoughts of one to the other (sometimes characterised as "shuttle diplomacy"). The mediator also hears things from a party which help with understanding the position, but may not be repeated

to the other party. Confidentiality is very important.

There are other choices: The mediation may be intended simply as a means to a deal (so-called "interests" mediation) or it may be to help the parties achieve a fair result (so-called "rights" mediation). The parties may choose to use a mediator solely as a passive messenger, or they may ask the mediator to bring his own knowledge into play. They are more likely to ask for that knowledge where the issues are of fact and the mediation is about rights, or intended to predict what may happen in Court.

It is as well for there to be a clear understanding about which of those choices is preferred by the parties, because different ADR organisations have different approaches. Some favour a deal at any price, some favour a fair outcome. It is sometimes said that an agreed deal must be fair, but that ignores the weight of bargaining power which one or other party has. "A man, convinced against his will, is of the same opinion still."

One advantage claimed for mediation is that it opens the way to lateral thinking, and to the settlement of disputes by the use of creative alternatives for example, leaving things as they are in the disputed contract and entering into some other deal which suits both parties - perhaps on another project. It is sometimes forgotten that, even with arbitration and litigation, two parties may always agree to an alternative deal, limited only, as in mediation, by their ability to imagine.

5 Find an Adjudicator

Strictly speaking an Adjudicator is anyone who makes a decision in a more or less judicial manner. However, the contract forms used by the World Bank have provided for a Board of Adjudicators in major contracts, and the UK construction industry, through the Housing Grants, Construction and Regeneration Act 1996, has a statutory right of adjudication implied in every contract (there are exceptions, and there is now jurisprudence as to what is a construction contract for the purpose of the Act).

An Adjudicator has wide ranging powers, but has an obligation to make a decision within 28 days from receiving a claim, commonly called a 'referral' (he or she is a kind of referee). The referring party may agree to extend the time, but the essential purpose of Adjudication is to keep the cash flow going without stopping the construction. As it happens, the Arbitration Act 1996 was intended for the same purpose, but the drafters made a mistake, by making s.39 optional, but that is another matter.

Adjudicators are available from a wide range of appointing bodies (NADR is one, of course). Many are competent construction professionals, but there are lawyers available too. Agreement as to the Adjudicator is very desirable, but not necessary, because the Act deems there to have been an agreement in the contract (whether there was or not), and the Secretary of State has prescribed a default Adjudication Scheme.

Many of the plethora of appointing bodies have their own rules for Adjudication and it would be invidious, in the note, to discuss any one in particular. The essential features of Adjudication are that it has to be done briskly and that the decision of the Adjudicator must be complied with straightaway, even though it is a provisional decision, made subject to the final decision of a Court or Arbitrator. There are dangers about that, one or other party may become insolvent in the interim. The Courts have considered this question when deciding whether or not to enforce Adjudicators decisions.

6 Find an Arbitrator

Arbitration is, even now, the principal alternative to litigation. In Arbitration, the parties choose someone to hear their respective cases and make a binding decision. There is legislation in most countries to regulate and supervise the process, but essentially, the principle is the same. Arbitration usually results from an arbitration clause in a contract, or in the standard membership terms of a club, such as a commodity association. The arbitration agreement is in existence before the dispute.

It is perfectly possible, however, to make an agreement to arbitrate after the dispute has arisen. From time to time, parties may compromise an action brought in the Court, by referring it to arbitration.

The Arbitrator (or arbitral tribunal - larger international cases often have three arbitrators - one appointed by each party and the third agreed in some way) will act judicially, and give directions as to what the parties should do. There is great flexibility of procedure, the arbitrator may leave everything to the parties, or may take his or her own initiative in ascertaining the facts or the law.

Arbitration is a serious business, although, in the right hands it can be fair, efficient and quick. However,

because it is final and binding (subject to limited scope for appeal), no-one should venture into it with out advice from a lawyer with specialist experience of arbitration.

In England and Wales, an arbitrator can order an interim payment, but only if the parties have agreed (this is the effect of s.39 of the Arbitration Act 1996). So useful is this provision that a number of sets of arbitration rules provide for it (for example CIMAR - the Construction Industry Model Arbitration Rules).

Arbitration is particularly useful in international trade. That is because the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognised in almost every trading nation, provides for enforcement of Awards all over the world, while Court judgements do not always work so freely in foreign lands.

Arbitrators can be found in the lists of most of the major technical institutions, and bodies such as the Law Society, the Chartered Institute of Arbitrators or, of course NADR, as well as in arbitral organisations such as the ICC in Paris, the LCIA in London or their equivalents around the world. Most arbitral institutions provide full administrative services also, with clerks or counsel handling the file.

Conclusion

This has been a brief overview of the main ADR processes. Although the processes all stem from the principle of voluntary agreement, there is real variety and each method is worthy of a book of its own.

I have set out to show that variety in outline - anyone who needs to have recourse to some form of dispute resolution should seek the advice of an experienced practitioner as, although the principles may be clear and the processes inherently simple, there are pitfalls.

ADR has come to stay, however. No businessman or professional should ignore the implications, and in England and Wales (and in many other jurisdictions world-wide) no contentious lawyer should even consider going to a Court in the present legal climate without first looking carefully, and being seen to have looked carefully, at the alternatives.

Self Assessment Exercise No 1

1. Why arbitrate in lieu of litigation?
2. Why litigate rather than negotiate?
3. Why have recourse to legal principles and law? What is wrong with common sense & fairness?
4. What is wrong (if anything) with using an expert instead or an arbitrator? And what, if any, is the difference between experts and arbitrators?

ADDITIONAL READING

ADR Matrix. Spurin.C.H.. 2002.

CHAPTER ONE

Sources of Arbitration Law in England and Wales.

There is not, and never has been a single source of arbitration law in England and Wales. As with most areas of law, the law is to be found in the Statutes, statutory instruments and rules of the Supreme Court of England and Wales, the common law [9] and since 1972, where relevant, in the law of the European Union. The law of arbitration is also be affected by the European Convention on Human Rights, as implemented in England and Wales by the Human Rights Act.

The Arbitration Act 1996 is the principal source of legislation, but arbitration provisions are contained in a wide variety of other Acts of Parliament. International Conventions gain the force of law in England and Wales by virtue of Act of Parliament. Legislation apart, the common law remains a major source of arbitration law, both as a primary source and as a secondary source as an interpreter of statute.

Whilst they are not laws, the rules of arbitral bodies and associations have a considerable impact on the conduct of arbitral proceedings and the terms of standard form contracts that provide for arbitration may also affect the conduct of arbitrations resulting from disputes in relation to the contract governed by the arbitration agreement. However, the substantive law of England and Wales governs the application of the rules of arbitral bodies and associations in England and Wales and may affirm or negate terms of the contract that purport to prescribe the conduct of an arbitral proceeding in England and Wales.

Whilst the decisions of foreign domestic courts and public and private international courts and arbitral bodies are not binding on the courts of England and Wales they may well have a persuasive authority, especially in areas not covered by express statutory or judicial authority.

Background to The Arbitration Act 1996.

The Arbitration Act 1996 is the result of work conducted by the Departmental Advisory Committee on Arbitration Law (The DAC) set up by the Department of Trade and Industry. The DAC initially delivered a report in 1978 in advance of the 1979 Act. Apart from the 1996 DAC Report and Supplement which are essential reading, [10]

Prior to 1950 arbitration law in England and Wales was essentially founded in the Common Law.[11] Three Arbitration Acts passed respectively in 1950, 1975 and 1979 provided for the application of International Conventions in England and Wales, in particular the 1975 Act provided for the 1958 New York Convention and made provisions in respect of certain issues not covered by the common law. The 1979 Act removed some of the courts powers but provided new but limited powers for the court which subsequently proved to be controversial and the provisions came in for significant criticism.

Whilst London was considered to be a major international centre for arbitration concern was expressed that London's standing as the centre for international dispute resolution might be lost for a number of reasons. The Model Law had been adopted by a number of countries and was proving to be very popular. The English courts had sought to assert their supremacy over arbitral proceedings. The courts placed a premium on the supervisory role of the English courts over arbitral proceedings. The courts were not at that time prepared to have their jurisdiction ousted in favour of arbitration. A succession of judgements resulted in an overweening, interfering judicial climate which made arbitration in England less attractive.

One of the prime reasons for choosing arbitrations is that the parties wish to keep their dispute out of the courts. Reasons for choosing arbitration include the ability to choose the decision maker, the considerable length of time involved in litigation, the high costs of litigation as opposed to the choice of simple, inexpensive and speedy procedures available under the arbitration process and the loss of confidentiality in litigation. Recourse to the courts in respect of arbitral proceedings tends to negate these advantages. Some recourse to the courts is of course useful or even essential especially in respect of enforcement of awards. The courts can

[9] e.g. ***Chandris v Isbrandtsen-Moller*** *[1951] : 1 KB 240,* arbitrators can award interest : ***Wealands v CIC Contractors Ltd*** *[1999] CILL 1569* Liability under the Civil Liability (Contribution) Act 1978 could be awarded by an arbitrator.

[10] R.Merkin provides detailed accounts of the Committee's work in both Arbitration Law and the Arbitration Act Annotated Guide by LLP. The history is also outlined in The Arbitration Act 1996 Harris, Planterose and Tecks and in Russell on Arbitration.

[11] The 1950 Act was predated by the Arbitration Act 1698, the Arbitration Act 1889 and the Arbitration Act 1934. Whilst dealing with aspects of legal procedures, none of these Acts really amounted to a law of arbitration.

play a useful role in respect of preliminary matters such as discoveries, the availability of witnesses, in providing interim measures to prevent the migration of monies and in respect of injunctions pending the hearing. Again, third party involvement can present difficulties for arbitration which only the courts can resolve. The courts have a complementary role to play in arbitration which cannot be denied but excess recourse to the courts was damaging English arbitration.

Apart from judicial intervention, English arbitration suffered from self inflicted problems. Many arbitrators adopted proceedings which mirrored those in the courts, which pre Woolf were not very efficient. The degree of informality that parties to arbitral proceedings tend to welcome was often lost. In fact, the situation got so bad that the waiting lists for hearings were as bad as if not worse than those for the courts. Costs had escalated to a point where arbitration in England was as expensive as litigation and frequently more expensive. Standard form Arbitration agreements had become very complicated and prescriptive as to the conduct of arbitration proceedings. Arbitration in England had lost its way.

There was a growing tendency for contracts to stipulate foreign arbitration and a new trend of choosing foreign law threatened English Law's primary role in the governance of international trade in particular as following their adoption in 1985, the United Nations Commission on International Trade (UNCITRAL) Rules and the Model Law, started to receive international acclaim. The work of UNCITRAL and the resultant Model Law was itself an international response to criticism of the way international arbitration was being conducted. The Model Law chose not to replace the New York Convention but rather to reinforce it. The Model Law has proved to be an international success story. Even Scotland adopted the Model Law following the Dervaird Committee Report of May 1989. The DAC was set up to address these problems and provide recommendations for reform.

The DAC delivered its first report in June 1989 under the Chairmanship of Mustill LJ. The DAC rejected mere incorporation of the Model Law for a number of reasons set out at 1:13 Arbitration Law and p2 of Merkin's Commentary which also sets out what Mustill considered to be the strengths of English Arbitration Law. Namely a single system for domestic and international arbitration, established principles of English Common Law, a highly developed arbitration system and no demand for total replacement as opposed to reform of certain restrictive elements. [12]

The Report was eventually followed by a draft bill in February 1994. The government accepted the report's recommendation that new legislation was required and that a new bill should be drafted but progress then ground to a standstill. Private bodies took up the challenge and raised funds to push the development work forward. A.Marriott, a solicitor, was commissioned to produce a private model bill. Steyn LJ succeeded Mustill at the DAC in April 1992. Steyn took over the work of drafting a model bill and incorporated it into the February 1994 report. The DAC sought the views of the industry on the draft bill.

An interim report followed in April 1995 and a new draft bill in July 1995. In February 1996 the DAC produced the last major Report under Saville LJ., who had succeeded Steyn as Chairman, with a new draft bill. Bingham MR but lately Lord Chief Justice, facilitated the process providing the means for Saville and Tony Landau of the Bar to get the new draft completed. The bill was amended by the Lords and following its passage onto the statute books as the Arbitration Act 1996 the DAC produced a final supplementary report in February 1997. The DAC Report and Supplement will provide invaluable guidance as to the aims and objectives of the various provisions for a long time to come, since it is likely to take many years before the courts get around to providing judicial consideration of all the sections of the Act.

Whilst the Act is in many ways modelled on The Model Law, it nonetheless differs in a number of respects, giving the Act a distinctly English character. Most notably, the Act provides a single regime for domestic and international arbitrations whereas the Model law does not apply to domestic arbitrations. Where Parliament departs from the Model Law the DAC Report provides an in-depth explanation of why this has occurred. The Act contains both additions to, and omissions from, the model law. [13]

[12] Merkin, Arbitration Law 1.14, the Mustill Committee options for reform are set out.

[13] Merkin lists the differences at 1.22 of Arbitration Law and at p7 Commentary. Merkin sets out the general principles of the Act in paras 1,23 though to 1.37.

CHAPTER ONE

The pre-amble to the Act states :-*"An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes."* However, despite this, the act is not a complete restatement or codification of the Law of Arbitration. This was a deliberate decision. See Para 9 DAC Feb 1996. Most notably, the Act does not deal with confidentiality issues. The DAC considered confidentiality in detail but chose to leave this area to the courts, leaving already established common law principles intact. Whilst acknowledging that there are grey areas in respect of confidentiality the DAC preferred to leave future considerations of these matters to be left for the judiciary to address.

As we will see, whilst the Act provides a number of mandatory provisions, it leaves a large number of issues for the parties to settle between themselves, merely providing a default provision in respect of issues that the parties fail to address themselves, or where the parties cannot reach agreement. The Act severely limits the powers of the court to interfere in the arbitral process, provides the arbitrator with a number of powers hitherto exercised by the courts and provides the courts with powers to assist the arbitral process.

The 1950, 1975 and 1979 Acts are substantially repealed by the Arbitration Act 1996, but provisions in respect of the International Conventions are re-enacted making reference to the relevant sections of the old Acts unnecessary, though the ability to trace the origins of the relevant sections is still required since cases which referred to those sections still contain good law. Indeed this makes it of even more important to be aware of which provisions have been removed and therefore which pre-1996 cases are no longer relevant.

OTHER SOURCES OF LAW RELEVANT TO ARBITRATION

Apart from The Arbitration Act 1996 one needs to be aware of the provisions contained in :-

- The Civil Jurisdiction Act 1982 implementing the Brussels Convention 1968 in respect of the EC and the Lugano Convention in respect of EFTA ;
- EC Regulation 44/2001
- The Consumer Arbitration Agreements Act 1988 as amended by the EC Consumer Directive and the Arbitration Act 1996;
- The 1996 Statutory Instrument No 3146 (C.96) Arbitration Act 1996 (Commencement No 1) Order 1996;
- Statutory Instrument No3219 (L.18) Rules of the Supreme Court (Amendment) 1996, Order 73,
- The Employment Act 1998
- The 1999 County Court Rules.
- The 1998 Civil Procedure Rules.
- The Housing Grants Construction and Regeneration Act. 1996
- The Rome Convention – Contracts Applicable Act 1991.
- The 1958 New York Convention on Enforcement of Arbitral Awards.
- The UNCITRAL Model Law.

ADDITIONAL READING

First Report of the Departmental Advisory Committee on Arbitration Law 1989 . Mustill LJ

Interim Report of the Departmental Advisory Committee on Arbitration Law 1995 . Steyn LJ

Final Report of the Departmental Advisory Committee on Arbitration Law 1996 . Saville LJ., (DAC)

The Departmental Advisory Committee Reports on Arbitration Law February 1996

Chapter 1 INTRODUCTION (DAC 1996)

1. *In its Report of June 1989, the Departmental Advisory Committee on Arbitration Law (the DAC), under the chairmanship of Lord Justice Mustill (now Lord Mustill) recommended against England, Wales and Northern Ireland adopting the UNCITRAL Model Law on International Commercial Arbitration. Instead, the DAC recommended that there should be a new and improved Arbitration Act for England, Wales and Northern Ireland, with the following features (Paragraph 108):*

   *"**(1) It should comprise a statement in statutory form of the more important principles of the English law of arbitration, statutory and (to the extent practicable) common law.***

   (2) It should be limited to those principles whose existence and effect are uncontroversial.

   (3) It should be set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman.

   (4) It should in general apply to domestic and international arbitrations alike, although there may have to be exceptions to take account of treaty obligations.

   (5) It should not be limited to the subject-matter of the Model Law.

   (6) It should embody such of our proposals for legislation as have by then been enacted. see paragraph 100 [of the 1989 Report].

   ***(7) Consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.**"*

2. *In an Interim Report in April 1995, the DAC stated as follows: "**The original interpretation of [paragraph 108 of the 1989 Report] led to the draft Bill which was circulated in February 1994. Although undoubtedly a highly skilful piece of worn it now appears that this draft Bill did not carry into effect what most users in fact wanted. In the light of the responses, the view of the DA C is that a new Bill should still be grounded on the objectives set out in [paragraph 108 of the 1989 Report], but that reinterpreted, what is called for is much more along the lines of a restatement of the law, in clear and `user friendly' language, following, as far as possible, the structure and spirit of the Model Law, rather than simply a classic exercise in consolidation.**"*

3. *The DAC's proposals in the Interim Report led to a new draft Bill which was circulated for public consultation in July 1995. This draft was very much the product of a fresh start. Indeed, it will be noted that whereas the February 1994 draft had the following long-title: "**To consolidate, with amendments, the Arbitration Act 1950, the Arbitration Act 1975, the Arbitration Act 1979 and related enactments**"*

   *this was altered for the July 1995 draft, and now begins: "**An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement...**"*

4. *The DAC remained of the view, for the reasons given in the Mustill Report, that the solution was not the wholesale adoption of the Model Law. However, at every stage in preparing a new draft Bill, very close regard was paid to the Model Law, and it will be seen that both the structure and the content of the July draft Bill, and the final draft, owe much to this model.*

5. *The task of the Committee has been made far easier by the extraordinary quantity and quality of responses we received both to the draft Bill published in February 1994 and to the draft Bill which was published in July 1995. A large number of people put substantial time and effort into responding to both drafts and putting forward suggestions, and we are very grateful to all of them. Indeed, both these consultation exercises have proved invaluable: the former showed that a new approach was required, while the latter showed that our April 1995 proposals seemed to be on the right track. Both sets of responses also contained carefully considered suggestions, many of which have been incorporated in the Bill. It should be emphasized that those suggestions which have not been adopted were only put on one side after lengthy consideration.*

CHAPTER ONE

6. *Among those who responded were a large number of institutions who offer arbitration services (such as the ICC) or who provide rules and administration for arbitrations concerning their members (such as the commodity associations). Both domestically and internationally institutions such as these play a very significant role in the field of arbitration. It seemed to us that the Bill should specifically recognize this, and that it should safeguard their spheres of operation. Consequently, there are many references to such institutions in the Bill, and, indeed, Clause 74 gives them what we believe to be a necessary degree of immunity from suit.*

7. *Given the extremely favourable response, the July 1995 draft was taken forward, with certain modifications, to form the basis of the final draft, which is explained in this Report.*

8. *As well as containing a guide to the provisions of the final draft, this Report also contains supplementary recommendations (in Chapter 6) on certain matters that have come to light since publication of the final draft, and since its second reading in the House of Lords.*

Chapter 7 CONCLUSIONS (DAC 1996)

394. *The Arbitration Bill and this Report are the result of a long and wide-ranging process of consultation with interested parties, probably the most comprehensive for any Bill of this kind. Our recommendations are based on the many responses that we have received as well as our own researches and discussions. In a number of cases, of course, we have had to make decisions on matters where more than one point of view has been expressed. What we should emphasize, however, is that all were agreed that it is high time we had new legislation, to the extent that many people have stated to us that for this reason they were not disposed to delay progress by stubbornly insisting on their point of view on particular points; and have demonstrated that this is the case by being ready and willing to reach compromise solutions. We are convinced (as all are) that further delay will do grave and probably irretrievable damage to the cause of arbitration in this country, thus damaging our valuable international reputation as well as the promotion here of this form of dispute resolution.*

395. *We have attempted to produce a draft which can be read, understood and applied by everyone, not just lawyers learned in this branch of our law. Thus our aim has been to make the text `user-friendly' and the rules it contains clear and readily comprehensible, so that arbitration is available to all who wish to use it. This has not been an easy task, since in the nature of things this form of dispute resolution raises highly complex and sophisticated matters. We have attempted it, however, in the hope that our efforts will not only encourage and promote arbitration, but also help to achieve what we believe to be the true object of this form of dispute resolution, namely (in the words of Clause 1 of the Bill itself) to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.*

Departmental Advisory Committee Reports on Arbitration Law January 1997

Chapter 1 INTRODUCTION (DAC 1997)

1. *In our Report of February 1996 we discussed the provisions of the Arbitration Bill as introduced in the House of Lords in December 1995. In Chapter 6 of that Report we set out some recommendations for changes to some of the provisions of the Bill, having considered the speeches made in the House of Lords on the Second Reading and some comments and suggestions from others; and having also carried out our own reexamination of the Bill. This Report discusses the changes that were made to the Bill during its passage through Parliament and thus the differences between that Bill and the Arbitration Act 1996, which received the Royal Assent on 17 June 1996.*

   All these changes were recommended by the Committee, though some differ from or are in addition to the suggestions originally made in Chapter 6. Not all the changes suggested in Chapter 6 were adopted, but again this met with the approval of the Committee, after yet further reflection and consideration of comments and suggestions made to us.

2. *Certain decisions were also taken by the DAC after the Act received Royal Assent, with respect to the commencement of its provisions. These are also discussed with respect to the particular sections affected, and in the context of the transitional provisions.*

3. *This Supplementary Report is to be read in conjunction with our Report of February 1996. The numbering of Sections corresponds to the Act in its final form. As several Sections were added to the Bill during its passage through Parliament, some of the references are slightly different from those in Chapter 6 of our February 1996 Report.*

4. *The new Order 73 of the Rules of the Supreme Court, together with the new Allocation Order (which stipulates the Courts to which arbitration applications may be made) have been included in Appendix A to this Report, together with a short commentary. The new Order 73 has been completely recast in order to reflect the changes brought about by the Act and to simplify the procedure for Court applications concerning arbitration. Although drafted in consultation with some members of the DAC, the new rules were not within the latter's remit, and are therefore included here simply for ease of reference.*

5. *By the Arbitration Act (Commencement No. l) Order 1996 (S.I. 1996 no. 3146 (C96)), the Act (with the qualifications set out in that Order) comes into force on 31st January 1997. This Order also contains transitional provisions. The Order is reproduced in Appendix B, together with a short commentary.*

CHAPTER ONE

THE ARBITRATION ACT 1996

Overriding Objectives, General Principles and The Arbitration Act 1996[14]

Arbitration Act 1996
1996 Chapter 23

An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes. [17th June 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT
Introductory

General principles.

1. *The provisions of this Part are founded on the following principles, and shall be construed accordingly-*
   - *(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
   - *(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;*
   - *(c) in matters governed by this Part the court should not intervene except as provided by this Part.*

Section l Arbitration Act 1996 commences with a statement of general principles which it asserts Part 1 of the Act is founded on. The Act goes even further, in that guidance is given to the courts to interpret the provisions of Part 1 in the light of the principles.

In essence the three principles the section introduces are

a) fair resolution, impartiality and avoidance of delay and expense
b) party autonomy and
c) the liberation of tribunals from judicial interference.

Why does the Act start out with a statement of general principles and how useful is the requirement to apply Part 1 in the light of the principles set out in the section?

The Act was introduced, as discussed above in the introduction, to remedy a number of perceived defects in the law governing arbitration in the UK. The introduction of the UNCITRAL MODEL LAW and ARBITRATION RULES and their adoption by a number of countries challenged London's premier position as principle provider of arbitration facilities to the international trading community.

The Model Law now provides other jurisdictions with a credible and potentially universal alternative to the well established arbitral system offered in the UK. Defects which it was perceived had crept into the UK system meant that any country operating the Model Law might be seen as offering a service which would be as good as or even better than that available in the UK. The legislators wished therefore to remedy these perceived defects and bring the law governing arbitration in the UK into line with the Model Law. See Para 1 DAC. and Para 18 well established arbitral system offered in the UK. Defects which it was perceived had crept into the UK system meant that any country operating the Model Law might be seen as offering a service which would be as good as or even better than that available in the UK. The legislators wished therefore to remedy these perceived defects and bring the law governing arbitration in the UK into line with the Model Law. See Para 1 DAC. And Para 18. Thus the Arbitration Act 1996 accords which much of what is contained in the Model Law. S1(c) Arbitration Act 1996 reflects Article 5 Model Law and s1(b)

[14] Note that mimicking the Arbitration Act 1996 the Civil Procedure Rules commence with a similar statement, this time labelled ***overriding objectives***.

Article 5. Model Law : Extent of court intervention

> *In matters governed by this Law, no court shall intervene except where so provided in this Law.*

Article 19. Model Law. Determination of rules of procedure

> *19(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the Proceedings.*
>
> *19(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

If the Arbitration Act 1996 aims at providing an improved regime for governing arbitration one needs first to examine what arbitration is about in order to consider whether or not the principles reflect what is needed to provide a good regime.

Arbitration is the principle form of Alternative Dispute Resolution available in the UK. The purpose of arbitration is to provide a system of third party dispute settlement. Since the courts already provide such a service, the question has to arise, *"Why does industry wish to have an alternative to the courts?"*

FOR :	**V**	**AGAINST :**
Court services are public, formal, imposing, costly, time consuming and take control away from the parties.		The courts are perceived as providing justice, which embraces notions of fairness and impartiality, have considerable enforcement power and provide a method of establishing new law which arbitration can never seek to achieve since it lacks the authority of the state.

In as much as arbitration seeks to provide an alternative to the courts, establishing general principles that will ensure the objective of arbitration, to avoid the disadvantages of litigation, helps to ensure a clear distinction between judicial and arbitral provision. Nonetheless, arbitration is essentially a judicial function in that the tribunal decides questions of law and fact and imposes a decision on the parties.

Arbitration is distinct from other forms of Alternative Dispute Resolution such as mediation where the parties make the decision themselves and expert adjudication and evaluation where the opinion of the decision maker is final, binding and does not seek to canvass the submissions of the parties. As an essentially judicial function arbitration must demonstrate that it is impartial, free from bias and that justice is not only done but seen to be done. However, it is less clear that the decision making process needs to be fair in the sense that it balances the interests of each party. Arbitral awards may favour one party completely to the exclusion of the other. Arbitration can produce winners and losers and so fairness in the arbitral context relates only to the process not to the outcome. Fairness can be demonstrated in terms of equal opportunity between the parties to present their case without exerting undue pressure on one party to the detriment of the other.

The perception that arbitration in the UK prior to the introduction of the 1996 Act may have fallen short of these objectives were partly correct and party exaggerated. To the extent that they are were well founded the establishment of general principles is welcomed. To the extent that the perceptions were exaggerated, the need for the principles is not proven, in that arbitration has historically been subject to judicial control to ensure fairness. Nonetheless, the reaffirmation of such principles does no harm in terms of international confidence in the arbitral system in the UK.

The drift away from arbitration in the UK had more to do with a world wide drift away from arbitration than from defects specific to the UK. The Model Law was introduced to tackle the same problems internationally as the Arbitration Act addresses in the UK. Arbitration as a process had suffered from lawyers and others who embraced legal training and had become far too legalistic and in particular mimicked the court process to reinforce principles of fairness justice and impartiality. If an arbitrator and the parties followed the courts no one could question the efficacy of the procedure. Arbitration gained a reputation for being as slow, expensive

and procedure ridden as the courts, depriving the process of its principal advantages over litigation. The international and domestic streamlining of the process seeking to ensure less court interference, greater speed and lower expense is therefore welcome and embodying these as general principles is a valuable concept.

The second aspect of the section is that it states that Part 1 be construed in accordance with these principles. How well this requirement for statutory interpretation will work is hard to tell. The efficacy of this approach will only become clear as time goes by and the courts get to consider the concept and apply it. In one respect the statement that Part 1 embraces these principles is evident in for instance section 33(1) and (2) which impose duties on the tribunal which mirror section l(a)(b) & (c) which touches on the question as to whether or not Part 1 is indeed founded on the principles established in section l.[15]

On the other hand, section l provides a guideline as to how an arbitrator will exercise powers as for instance s34(3) where the tribunal may fix time within which directions must be complied with, and may if it thinks fit extend time. Clearly in exercising such powers the tribunal must do so on the basis of fairness and impartiality, ensuring speed and avoiding undue expense. There is therefore a role to play for the interpretation requirement both for the arbitrator and for the courts in examining whether or not section 1 has been complied with.

How much of Part 1 is based on the principles of section l? The provisions that relate to s1(a) (b) and (c) are by enlarge distinct and separate and therefore (a), (b) and (c) need to be analysed separately.

s1(a) to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

As discussed above the principle provision here is **s33(1) and (2) Arbitration Act 1996**.

> *s33(1) the tribunal shall*
>
> *a) act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent and*
>
> *b) adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined.*
>
> *s33(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings in its decision in matters of procedure and evidence and in the exercise of all other powers conferred on it.*

Paras 150 - 153 DAC discuss s33 and the relationship between s33 and s34 are discussed at 154 - 165 with specific discussion of s34 at 166-176. The DAC spells out the interplay between party autonomy and the duties under sI(a) and places responsibility on the parties for delay and excessive expense.

The powers of the tribunal exercisable in relation to procedures are set out in s34. It is clear that they are aimed at giving the tribunal the power to speed up the process and to avoid expense - but only time will tell how much arbitrators embrace and make use of these powers. However the opportunity now exists for them to do so - and there will therefore be less excuse for arbitrators to seek a safety net for themselves by mimicking the courts.

There are also a wide number of provisions to expedite proceedings which the tribunal can avail itself of but **sl(b)** party autonomy provisions make the exercise of these default powers by the tribunal subject to the rights of the parties to otherwise agree. Therefore provided the arbitrator takes the initiative the process can be speedy and inexpensive - but the parties have the right to spin the process out and run up large expenses.

However, where only one party does this the tribunal has the power to shift the costs of unnecessary delay onto that party ensuring fairness so that a powerful, rich party cannot frighten a less wealthy opponent into making a settlement just in case he or she has to shoulder excessive costs if they should lose.

Whilst Part 1 provides rules in relation to jurisdiction and powers of the courts there is a major shift, at least initially to the tribunal in terms of power and autonomy, with the courts being given a clear role in support of the arbitral process and supervision being kept to a minimum. None the less the courts do have the power to intervene if the tribunal falls short in its duties of fairness and impartiality. However, even here, there is a duty on the parties to raise the issue promptly otherwise the right to object may be lost.

[15] S1 is referred to in ***China Petroleum Technology & Dev Corp v L.G. Caltex Gas Co Ltd. [2000] WL 33148669:*** and ***Nagusina Naviera v. Allied Maritime Inc [2002] C.L.C. 385***

In conclusion therefore, whilst it is inevitable that the Act has provisions which have little to do with the general principles, nonetheless, where applicable these principles are complied with in Part 1 of the Arbitration Act 1996.

Does s1 provide that the only grounds for arbitral challenge are set out in Part 1 Act?

Prior to the 1996 Act it was not unknown for the courts to take action to restrain arbitral tribunals as demonstrated by Hobhouse J in ***Compagnie Europeene de Cereals v Tradax*** [1986]. [16] Whether or not this jurisdiction to grant injunctions survived the 1996 Act was examined in ***Vale Do Rio. v. Shanghai Bao Steel*** [2000],[17] where Mr Justice Thomas stated : -

" ….. The court is given guidance as to the circumstance in which it should intervene in relation to arbitration by the terms of s 1 in Pt 1 of the 1996 Act. This provides:

> *"The provisions of this Part are founded on the following principles, and shall be construed accordingly ... (c) in matters governed by this Part the court should not intervene except as provided by this Part.'*

It is clear from the DAC Report that this principle was included because of international criticism that the courts of England and Wales intervened more than it was thought they should in the arbitral process, and this was a discouragement to the selection of London as a forum for arbitration.

The provisions of Pt 1 of the 1996 Act regulate all matters not only after constitution of the tribunal by the appointment of an arbitrator but prior to that; see for example s 9, s 12 and s 44(5) which all relate to powers that can be exercised prior to the appointment of the arbitral tribunal.

In my view therefore the present application for the determination of whether there is an arbitral agreement is a matter regulated by Pt 1 of the 1996 Act and in accordance with s 1(c), the court must approach the application on the basis it should not intervene except in the circumstances specified in that part of the 1966 Act.

I accept the owners' submission that the use of the word "should' as opposed to the word "shall' shows that an absolute prohibition on intervention by the court in circumstances other than those specified in Pt 1 was not intended. *That submissions seems to me to have force as the view is expressed in the DAC Report that a mandatory prohibition of intervention in terms similar to art 5 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (21 June 1985) (the Model Law) was inapposite. However, it is clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Pt 1 of the 1996 Act."*

Whilst merely obiter since the matter was within Part 1 in ***Vale do Rio***, the above extract was relied upon by Mr Justice Andrew Smith in ***China Petroleum v Caltex Gas [2000].***[18] The applicants initially sought to restrain an arbitral tribunal on the grounds of double jeopardy in that the question of jurisdiction had already been settled elsewhere, thus establishing grounds for issue estoppel, but this fell away since under Part 1 of the Act the tribunal has jurisdiction to rule on its own jurisdiction. The question then centered around a prospective quantum hearing. This was not a challenge to an award but rather an application for interim relief pending the determination of a challenge to the award before another court, to avoid incurring unnecessary costs. There is nothing in Part 1 of the Arbitration Act 1996 which specifically or implicitly envisages the grant of an injunction in circumstances comparable to those that arose in this case. Does therefore the court have jurisdiction to make such a grant? Whilst Steyn J. in ***Bill Biakh v. Hyundai*** [1988],[19] commented upon the general reluctance of the courts to interfere with or exercise a supervisory jurisdiction over arbitral tribunal ***Vale de Rio*** nonetheless provides support for the existence of the court's jurisdiction in such matters. In the event the court declined to make the grant, holding that the application had been made too late, was supported by insufficient information and was not appropriate in the circumstances .

[16] ***Compagnie Europeene de Cereals S.A. v. Tradax Export S.A.*** [1986] 2 Lloyd's Rep. 301, at 304. *""It is well established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, is confined to injunctions granted for the enforcement or protection of some legal or equitable right and this rules applies to applications for injunctions to restrain arbitration proceedings as it does to other injunctions."*

[17] ***Vale Do Rio Doce Navegacao S.A. v. Shanghai Bao Steel Ocean Shipping Co. Ltd***. [2000] 2 All. E.R. (Comm.) 70, para 48 et seq.

[18] ***China Petroleum Technology & Dev Corp v L.G. Caltex Gas Co Ltd. [2000] WL 33148669***

[19] ***Bill Biakh v. Hyundai Corporation*** [1988] 1 Lloyd's Rep. 187,

CHAPTER ONE

The Departmental Advisory Committee Reports on Arbitration Law February 1996

9. *The title to this Part is Arbitration Pursuant to an Arbitration Agreement- It is in this Part that we have attempted to restate within a logical structure the basic principles of our law of arbitration, as it relates to arbitration under an agreement to adopt this form of dispute resolution. The Bill does not purport to provide an exhaustive code on the subject of arbitration. It would simply not be practicable to attempt to codify the huge body of case law that has built up over the centuries, and there would be a risk of fossilizing the common law (which has the great advantage of being able to adapt to changing circumstances) had we attempted to do so. Rather, we have sought to include what we consider to be the more important common law principles, whilst preserving all others, in so far as they are consistent with the provisions of the Bill (see Clause 81).*

10. *A small number of key areas, however, have not been included, precisely because they are unsettled, and because they are better left to the common law to evolve. One such example concerns privacy and confidentiality in arbitrations, which deserves special mention here.*

11. *Privacy and confidentiality have long been assumed as general principles in English commercial arbitration, subject to important exceptions. It is only recently that the English courts have been required to examine both the legal basis for such principles and the breadth of certain of these exceptions, without seriously questioning the existence of the general principles themselves (see eg **The Eastern Saga** [1988] 2 Lloyd's Rep 373, 379 (Leggatt LJ; **Dolling-Baker v Merrett** [1990] 1 WLR 1205, 1213 (Parker LJ); **Hassneh v Mew** [1993] 2 Lloyd's Rep 243 (Colman J); **Hyundai Engineering v Active** (unreported, 9 March 1994, Phillips J); **Ins Company v Lloyd's Syndicate** [1995] 2 Lloyd's Rep. 272 (Colman J); **London & Leeds Estates Limited v Parisbas Limited (no 2)** (1995) E.G. 134 (Mance J)).*

12. *In practice, there is also no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitration (eg see survey of users amongst the "**Fortune 500**" US corporations conducted for the LCIA by the London Business School in 1992). Indeed, as Sir Patrick Neill QC stated in his 1995 "Bernstein" Lecture, it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy.*

13. *Last year's decision of the High Court of Australia in **Esso BHP v Plowman** (see [1995] 11 Arbitration International 234) reinforced many people's interest in seeking to codify the relevant English legal principles in the draft Arbitration Bill. The implied term as the contractual basis for such principles was not in doubt under English law, and the English Courts were upholding these principles in strong and unequivocal terms. However, the Australian decision was to the effect that, as a matter of Australian law, this contractual approach was unsustainable as regards confidentiality. This has troubled users of commercial arbitration far outside Australia. The first response has been for arbitral institutions to amend their arbitration rules to provide expressly for confidentiality and privacy. The new WIPO Rules have sought to achieve this and we understand that both the ICC and the LCIA are currently amending their respective rules to similar effect.*

14. *In England, the second response was to consider placing these general principles on a firm statutory basis in the Arbitration Bill. This task was initially undertaken by the DAC mid-1995, and perhaps surprisingly, it soon proved controversial and difficult.*

15. *Whilst none could reasonably dispute the desirability of placing these general principles beyond all doubt on a firm statutory basis, applicable to all English arbitrations within the scope of the Bill (irrespective of the substantive law applicable to the arbitration agreement), grave difficulties arose over the myriad exceptions to these principles - which are necessarily required for such a statutory provision. There is of course no statutory guidance to confidentiality in the UNCITRAL Model Law whatever; and indeed, in a different context, Lord Mustill has recently warned against an attempt to give in the abstract an accurate exposition of confidentiality at large (see **In re D (Adoption Reports: Confidentiality)** [1995] 3 WLR 483, 496D: "To give an accurate exposition of confidentiality at large would require a much more wide-ranging survey of the law and practice than has been necessary for a decision on the narrow issue raised by the appeal and cannot in my opinion safely be attempted in the abstract")*

16. *For English arbitration, the exceptions to confidentiality are manifestly legion and unsettled in part; and equally, there are important exceptions to privacy (eg in **The Lena Goldfields Case** (1930), the arbitration tribunal in London opened the hearing to the press (but not the public) in order to defend the proceedings against malicious charges made by one of the parties, the USSR). As to the former, the award may become public in legal proceedings under the Arbitration Acts 1950-1979 or abroad under the 1958 New York Convention; the conduct of the arbitration may also become public if subjected to judicial scrutiny within or without England; and most importantly, several non-parties have legitimate interests in being informed as to the content of a pending arbitration, even short of an award: eg parent company, insurer, P+I Club, guarantor, partner, beneficiary, licensor and licensee, debenture-holder, creditors' committee etc., and of course even the arbitral institution itself (such as the ICC Court members approving the draft award). Whilst non-parties to the arbitration agreement and proceedings, none of these are officious strangers to the arbitration. Further, any provisions as to privacy and confidentiality would have to deal with the duty of a company to make disclosure of, eg, arbitration proceedings and actual or potential awards which have an effect on the company's financial position. The further Australian decision in **Commonwealth of Australia v Cockatoo Dockyard Pty Ltd** (1995) 36 NSWLR 662 suggests that the public interest may also demand transparency as an exception to confidentiality: "Can it be seriously suggested that [the parties I private agreement can, endorsed by a procedural direction of an arbitrator, exclude from the public domain matters of legitimate concern ... " per Kirby J. This decision raises fresh complications, particularly for statutory corporations. We are of the view that it would be extremely harmful to English arbitration if any statutory statement of general principles in this area impeded the commercial good-sense of current practices in English arbitration.*

17. *Given these exceptions and qualifications, the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue. Far from solving a difficulty, the DAC was firmly of the view that it would create new ones. Indeed, even if acceptable statutory guidelines could be formulated, there would remain the difficulty of fixing and enforcing sanctions for non-compliance. The position is not wholly satisfactory. However, none doubt at English law the existence of the general principles of confidentiality and privacy (though there is not unanimity as to their desirability). Where desirable, institutional rules can stipulate for these general principles, even where the arbitration agreement is not governed by English law. As to English law itself, whilst the breadth and existence of certain exceptions remains disputed, these can be resolved by the English courts on a pragmatic case-by-case basis. In due course, if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill. For these reasons, the DAC is of the view that no attempt should be made to codify English law on the privacy and confidentiality of English arbitration in the Bill. We would, however, draw attention to our supplementary recommendations on this topic in Chapter 6 below.*

Clause 1 General Principles

18. *The DAC was persuaded by the significant number of submissions which called for an introductory clause setting out basic principles. This Clause sets out three general principles. The first of these reflects what we believe to be the object of arbitration. We have not sought to define arbitration, since this poses difficulties that we discussed in our April 1995 Interim Report, and in the end we were not persuaded that an attempted definition would serve any useful purpose. We do, however, see value in setting out the object of arbitration. Fairness, impartiality and the avoidance of unnecessary delay or expense are all aspects of justice ie all requirements of a dispute resolution system based on obtaining a binding decision from a third party on the matters at issue. To our minds it is useful to stipulate that all the provisions of the Bill must be read with this object of arbitration in mind.*

19. *The second principle is that of party autonomy. This reflects the basis of the Model Law and indeed much of our own present law. An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen means. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted. In some cases, of course, the public interest will make inroads on complete party autonomy, in much the same way as there are limitations on freedom of contract. Some matters are simply not susceptible of this form of dispute resolution (eg certain cases concerning status or many family matters) while other considerations (such as consumer protection) may require the imposition of different rights and obligations. Again, as appears from the mandatory provisions of the Bill, there are some rules that cannot be overridden by parties who have agreed to use arbitration. In general the mandatory provisions are there in order to support and assist the arbitral process and the stated object of arbitration.*

20. *So far as the 3rd principle is concerned this reflects Article 5 of the Model Law. This Article provides as follows: "In matters governed by this Law, no court shall intervene except where so provided in this Law."*

21. *As was pointed out in the Mustill Report (pp50-52) there would be difficulties in importing this Article as it stands. However, there is no doubt that our law has been subject to international criticism that the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.*

22. *Nowadays the Courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the Courts from awards brought into effect by the Arbitration Act 1979, & changing attitudes generally, have meant that the Courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modem approach & it seems to us that it should be enshrined as a principle in the Bill.*

ADDITIONAL READING

Mutual Cover TPI Ltd v Mutual TVT Ltd [1998] MOCK 1. Miller. Francis E. 1996
The Proper Conduct of the Arbitration. Toby Landau.Toby. 1997.
In Search of Justice. Spurin.C.H. 2005.
Committing to arbitration procedure. Miller. Francis E
Arbitration, The pros and cons of Arbitration and ADR. Connerty, Anthony.
Failsafe Adjudication. Spurin.C.H. 2006

Scope of the Arbitration Act 1996

S2 Arbitration Act 1996. Scope of application of provisions.

2(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

2(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined
- *(a) sections 9 to I 1 (stay of legal proceedings, &c.), and*
- *(b) section 66 (enforcement of arbitral awards).*

2(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined
- *(a) section 43 (securing the attendance of witnesses), and*
- *(b) section 44 (court powers exercisable in support of arbitral proceedings);*

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

2(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where
- *(a) no seat of the arbitration has been designated or determined, and*
- *(b) by reason of a connection with England and Wales or, Northern Ireland the court is satisfied that it is appropriate to do so.*

2(5) Section 7 (separability of arbitration agreement) and section 8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.

Confidentiality was considered in **CWS v Birse [1997].**[20] This involved two consecutive construction arbitrations regarding main & sub contracts in JCT form. A tribunal placed fault with the employer who went into liquidation before honoring the award. In the normal course of events the benefits of the arbitral award would, subject to deductions, have passed to the sub-contractor. Could the sub-contractor enforce that award against the contractor or was the award confidential to the parties? The court held at first instance that it could and this was upheld by the Court of Appeal.

Article 1. Model Law : Scope of application♦

*1(1) This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.*♦

1(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

♦ *The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.*

[20] ***CWS Engineering Group v Birse Construction Ltd [1997] EWCA Civ 2062***

♦ *Article headings are for reference purposes only and are not to be used for purposes of interpretation*

CHAPTER ONE

The Departmental Advisory Committee Reports on Arbitration Law February 1996

Clause 2 Scope of Application of Provisions

23. *International arbitrations can give rise to complex problems in the conflict of laws. A possible solution to some of these problems would have been to provide that all arbitrations conducted in England and Wales or in Northern Ireland should be subject to the provisions of the Bill, regardless of the parties' express or implied choice of some other system of law.*

    We have not adopted this solution, which appears to us contrary to the basic principle that the parties should be free to agree how their disputes should be resolved. There appear to us to be no reasons of public policy to prevent the parties conducting an arbitration here under an agreement governed by foreign law or in accordance with a foreign procedural law. Clause 4(5) also follows the same basic principle. Of course, cases may well arise where considerations of our own concepts of public policy would lead to the refusal of the Court here to enforce an arbitration award. This, however, is covered by Clause 66(3).

24. *The rules of the conflict of laws as they apply to arbitration are complex, and to some extent still in a state of development by the courts. It therefore seems to us inappropriate to attempt to codify the relevant principles, beyond the simple statements set out in clause 2(1). Thus, as clause 2(2) provides, matters referable to the arbitration agreement are governed by the law of England and Wales or of Northern Ireland, as the case may be, where that is the law applicable to the arbitration agreement, and matters of procedure are governed by that law where the seat of the arbitration is in England and Wales or in Northern Ireland**: "seat"** is defined in Clause 3. Beyond that we have not attempted to state the relevant rules of the conflict of laws, nor to embark on the issues of characterisation by which they are invoked.*

25. *Sub-section (3) concerns the powers of the court to support the arbitration by staying proceedings brought in breach of an agreement to arbitrate, by compelling the attendance of witnesses, by granting those forms of interim relief which are set out in Clause 44, and by enforcing the award at common law by summary procedure. Such powers should obviously be available regardless of whether the seat of the arbitration is in England and Wales or in Northern Ireland, and regardless of what law is applicable to the arbitration agreement or the arbitral proceedings. Since we have used the expression "whatever the law applicable.... ", it follows that Clause 2(3) is in no way restricted by Clause 2(1). It will be noted that in extending the power of the court to grant interim relief in support of arbitrations to arbitrations having a foreign seat we have given effect to our recommendation that section 25 of the Civil Jurisdiction and Judgments Act 1982 should be extended to arbitration proceedings. It should be appreciated that Rules of Court will have to be amended to give proper effect to the extension of the Court's jurisdiction in Clause 2(3) (ie so as to allow service out of the jurisdiction in cases where it is necessary). Sub-section (4) enables the court to refuse to exercise its power in such cases, where the fact that the arbitration has a foreign seat makes it inappropriate to exercise that power.*

Clause 2 Scope of Application : Supplementary Comment.

357. *A number of foreign readers have expressed the view that Clause 2(2)(a) does not sufficiently make clear that the applicable law referred to is the law applicable to the arbitration agreement, rather than the law applicable to the substantive agreement (which would have far reaching and wholly unintended consequences). For the sake of clarity, we would suggest an amendment along the following lines:*

    "... where the applicable law to that agreement is the law of England and Wales or Northern Ireland; and... "

Further amendments were introduced by the **Departmental Advisory Committee Reports on Arbitration Law January 1997.** The following discussion is recorded in the report in respect of Section 2, Scope of Application

Departmental Advisory Committee Reports on Arbitration Law January 1997.

6. Clause 2 of the Bill as introduced in the House of Lords in December 1995, read as follows:

"2(1) The provisions of this Part apply where the law of England and Wales or Northern Ireland is applicable, or the powers of the court are exercisable, in accordance with the rules of the conflict of laws.

(2) They apply, in particular

(a) to matters relating to or governed by the arbitration agreement, where the applicable law is the law of England and Wales or Northern Ireland; and

to matters governed by the law applicable to the arbitral proceedings, where the seat of the arbitration is in England and Wales or Northern Ireland.

(3) The following provisions apply whatever the law applicable to the arbitration agreement or the arbitral proceedings

(a) sections 9 to 11 (stay of legal proceedings);

section 43 (securing the attendance of witnesses) and section 44 (court powers exercisable in support of arbitral proceedings); and

(c) section 66 (enforcement of arbitral awards).

(4) The court may refuse to exercise any power conferred by this Part if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to exercise that power."

7. *This provision was explained at paragraphs 23 to 25 of our Report of February 1996. The intention was to set out a clear statement identifying the scope of application of the Act, without attempting to codify any rules of the conflict of laws. The basic elements of this clause, as originally drafted, may be summarised as follows:*

i. Clause 2(1) simply provided that the Act applies wherever English law is found to be applicable to an arbitration, or where the powers of the English Court are exercisable in relation to an arbitration. Whether or not English law is applicable, and whether or not the powers of the English Court are exercisable, are both matters to be determined by reference to appropriate rules of the conflict of laws, which are to be found elsewhere.

ii. Clause 2(2), as originally drafted, further refined this basic principle by recognising that different elements in an arbitration may well be governed by different laws. The law governing the merits of the dispute (e.g. a choice of law clause in a contract) may not necessarily govern the arbitration clause itself, as the latter constitutes a separate agreement. Similarly, the law governing the procedure of the arbitration may well be a different law from that governing the merits of the dispute. Consequently, if the arbitration agreement was governed by English law, those provisions in the Act which concern arbitration agreements would apply (clause 2(2)(a)). Similarly, if the seat of the arbitration was in England and Wales or Northern Ireland, those parts of the Act which concern the arbitral procedure (as distinct from matters of substance) would apply (clause 2(2)(b)).

This further refinement was necessary in order to avoid the danger that all the provisions of Part I of the Act would be imported if English law is found to govern one particular aspect of an arbitration. For example, an arbitration may have a French seat, with French law governing the procedure, but English law governing the arbitration agreement. In such a situation, only those provisions of the Act which concern arbitration agreements should apply. It would be quite wrong to apply provisions of the Act which concern arbitral procedure, as this would be governed by French law. Indeed, if this were not the case, a choice of English law to govern an arbitration agreement would entitle a party to invoke the jurisdiction of the English Court wherever the seat of the arbitration might be, thereby endowing the English Court with an unacceptable extra-territorial jurisdiction.

iii. The remaining parts of the original Clause 2 made specific provision for the New York Convention (Clause 2(3)(a) and (b) - stays of legal proceedings and the enforcement of awards) and enacted Section 25 of the Civil Jurisdiction and Judgments Act 1982 (Clause 2(3)(b) - powers in support of foreign arbitrations).

8. *In Chapter 6 of our February 1996 Report, at paragraph 357, we recommended that the original clause 2(2)(a) be slightly amended in order to make clear that the applicable law referred to there was the law applicable to the arbitration agreement, rather than the law applicable to the substantive agreement.*

9. *Following the introduction of the Bill into Parliament, we had the benefit of further detailed discussions with a number of leading arbitration experts from abroad, and took the opportunity of reconsidering this provision. It is fair to say that whilst there was unanimous support for the inclusion of such a provision identifying the scope of the Act, there was considerable disquiet as to the clause as drafted. It was felt that the provision was sound in principle, but unworkable in practice, for the following reasons:*

   i. *The clause was complicated and extremely difficult to understand. To this end, it appeared to defeat its own object.*

   ii. *In order to apply clause 2(2), it was necessary to be able to identify all those provisions of the Act which concerned the arbitration agreement, as distinct from all those that concerned the arbitral procedure.*

   As explained above, if for example English law governed the arbitration agreement, but not the arbitral procedure, by virtue of clause 2(2) only those provisions in the Act which concerned the arbitration agreement (as opposed to the arbitral procedure) would apply. The provisions of the Act had therefore to be individually characterised and separated in this way.

   However, the original clause made no attempt to characterise each provision of the Act, precisely because this had proved an extremely difficult and complex exercise. Many provisions concern both arbitration agreements and arbitral procedure, and there appeared to be a divergence of view with respect to many others.

   iii. *There was a feeling amongst certain foreign experts that the original clause gave the wrong impression, in that it appeared to endow the English Court with inappropriate extra-territorial powers, when this was clearly not intended.*

10. *In the light of these difficulties, the DAC decided to recommend recasting the whole provision in a different form that would be far easier to understand and that would be entirely workable in practice. The policy behind the Section, however, was not materially altered. The final Section 2 provides a clear and simple scheme, which was welcomed by all those who had originally expressed concerns.*

11. *Section 2(1) states the basic rule: Part I of the Act applies to arbitrations which have their seat in England and Wales or Northern Ireland. The concept of a "seat" was referred to in our February 1996 Report, and is defined in Section 3 of the Act. The seat of an arbitration refers to its legal place, as opposed to its geographical location. It is, of course, perfectly possible to conduct an arbitration with an English seat at any convenient location, whether in England or abroad.*

12. *If the seat of an arbitration is in England and Wales or Northern Ireland, the arbitration will be governed by this Act. If, however, a foreign law has been chosen to govern any particular aspect of the arbitration, such as the arbitral procedure or the arbitration agreement, or is otherwise applicable to any such aspect, this is catered for by Section 4(5). Therefore, reference may be made to this Act in the first instance, and then back to another law with respect to a specific issue. Whilst a process of characterisation may still have to be done, the combination of Section 2 and Section 4(5) avoids the dangers that:*

   a choice of English law with respect to one part of an arbitration will import other parts of the Act that concern other aspects of the arbitration;

   a choice of England as the seat of the arbitration will necessarily entail the imposition of every provision of the Act.

13. *Sections 2(2) to (5) set out a series of deviations from the basic rule in Section 2(1).*

14. *Section 2(2) caters for the New York Convention. Under the terms of this Convention, the English Courts are obliged to recognise and enforce foreign arbitration agreements and foreign arbitral awards. Sections 9 to 11 (stays of legal proceedings etc) and Section 66 (enforcement) could not, therefore, be restricted to arbitrations with a seat in England and Wales or Northern Ireland. These particular Sections therefore apply even if the seat of an arbitration is abroad. Equally, these Sections will apply if no seat has been designated or determined.*

15. *Section 2(3) extends the power of the Court to grant interim relief in support of arbitrations with a foreign seat, thereby giving effect to Section 25 of the Civil Jurisdiction and Judgments Act 1982, as was intended by the original clause 2(3)(b). The power of the Court to exercise these powers is restricted in the last part of this Section to appropriate cases. There may well be situations in which it would be quite wrong for an English Court to make an interim order in support of a foreign arbitration, where this would result in a possible conflict with another jurisdiction.*

16. *Section 2(4) deals with those cases where a seat has still to be designated or determined, but where recourse to the Court is necessary in the meantime. For example, an arbitration agreement may provide that the tribunal, once constituted, will designate the seat of the arbitration. The agreement may also provide that any arbitration must be commenced within a specified time period. If that time period is exceeded, could a party make an application to the English Court pursuant to Section 12 of the Act for an Order extending time for the commencement of proceedings (eg in order that a seat may be designated)? See eg* ***International Tank & Pipe SAX. v Kuwait Aviation Fuelling Co. B.S.C****. [1975] Q.B. 224 (C.A.). Clearly this would not be possible under Section 2(1), as long as the arbitration was without an English or Northern Irish seat. It was our view, however, that the English Court should be able to exercise supportive powers if there is a sufficient connection with England and Wales or Northern Ireland such that this is appropriate (ie the requirement in Section 2(4)(b)), and if there will be no clash with a foreign jurisdiction. For example, there will be cases where it is extremely likely that once a seat is designated, that seat will be England & Wales or Northern Ireland.*

17. *Section 2(4) therefore gives the English Court powers where that Court is satisfied, as a matter of English law, that the arbitration in question does not have a seat elsewhere. As long as there is no seat elsewhere, there could be no possible conflict with any other . jurisdiction.*

18. *Both Sections 2(3) and 2(4) are based on a very clear policy: the English Court should have effective powers to support an actual or anticipated arbitration that does not fall within Section 2(1). However, such powers should not be used where any other foreign Court is already, or is likely to be, seized of the matter, or where the exercise of such powers would produce a clash with any other more appropriate forum.*

19. *Section 2(5) provides that Section 7 (separability) and Section 8 (death of a party) apply whenever the law applicable to an arbitration agreement is English law, even if the seat of the arbitration is abroad. Without this provision, reference would have to be made to the old English common law with respect to separability and the effect of death in every arbitration where the arbitration agreement is governed by English law, but the seat is not in England and Wales or Northern Ireland, such as to be within Section 2(1). This would be an absurd result.*

Braes of Doune Wind Farm v Alfred McAlpine [2008]. [21] S2 AA 1996 Seat of tribunal : s69 Challenge. Place of arbitration Glasgow : Arbitration Act 1996 and CIMAR Rules governed the process : Where was the seat? Held : England and Wales. Liquidated damages clause under a Silver Book ICE contract held to be an unenforceable penalty by the arbitrator. Held : Not obviously wrong – and in the circumstances whilst a strange result – not wrong either – application to appeal refused.

[21] ***Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC):*** Mr Justice Akenhead. 13th March 2008.

CHAPTER ONE

The Seat of the Arbitration under the Arbitration Act 1996

S3 Arbitration Act 1996. The seat of the arbitration.

> *3. In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated*
> *(a) by the parties to the arbitration agreement, or*
> *(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or*
> *(c) by the arbitral tribunal if so authorised by the parties,*
> *or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.*

The conflicts of laws of the state where the seat of the arbitration is located will govern that aspect of the arbitration process. Likewise the law of the state where the seat of the arbitration is located will govern the procedural rules applicable to the application for any form of assistance from the courts in that state.

> ***Clause 3 The seat of the arbitration.***
>
> *26. The definition of "seat of the arbitration" is required by Clause 2, and as part of the definition of "domestic arbitration" in Clause 85. The concept of the "seat" as the juridical seat of the arbitration is known to English law but may be unfamiliar to some users of arbitration. Usually it will be the place where the arbitration is actually conducted: but this is not necessarily so, particularly if different parts of the proceedings are held in different countries*
>
> *27. In accordance with the principle of party autonomy, Clause 3 provides that the seat may be designated by the parties themselves or in some other manner authorised by them. Failing that it must be determined objectively having regard to the parties' agreement and all other relevant circumstances. English law does not at present recognise the concept of an arbitration which has no seat, and we do not recommend that it should do so. The powers of the court where the seat is in England and Wales or in Northern Ireland are limited to those necessary to carry into effect the principles enshrined in clause 1. Where the seat is elsewhere, the court's powers are further limited by Clause 2(4). The process of consultation identified no need for an arbitration which was "delocalised" to a greater extent than this.*

The catch all provision at the end of Section 3, namely *"all the relevant circumstances"* fell for consideration in ***Dubai Islamic Bank v Paymentech*** [2001],[22] The question was "*How should the court apply s3 AA 1996 when determining what is the juridical seat of the arbitration, if neither the parties to the arbitration agreement nor any arbitral or other institutions have designated the seat of the arbitration?"* Mr Justice Aikens inquired as to whether there is a particular point in time during the arbitral process at which the court should consider all the relevant circumstances in order to determine the juridical seat of the arbitration. If the seat of the arbitration is England, how should the court approach an application for an extension of time in which to make an application for permission to appeal an arbitration award, under s80(5)?

The implications of the Brussels Convention, the Lugano Convention and the council regulation replacing them under Community Law, in respect of jurisdiction was examined in ***Speed Investments v Formula One Holdings*** [2004]. [23] The Court noted that Council Regulation 44/01 and the Lugano Convention 1988. Art. 16 of the Convention was, for practical purposes, in the same terms as Art. 22 of the Regulation and held that accordingly the English court had exclusive jurisdiction in the instant case.

[22] ***Dubai Islamic Bank PJSC Applicant v Paymentech Merchant Services Inc. [2001] 1 All E.R. (Comm) 514***

[23] **Speed Investments Ltd v. Formula One Holdings Ltd** [2004] EWCA Civ 1512 : Westlaw. Carnwath LJ ; Neuberger LJ ; Sir William Aldous

Compulsory Provisions that cannot be contracted out of

S4 Arbitration Act 1996. Mandatory and non-mandatory provisions.

> *4.(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.*
>
> *4(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.*
>
> *4(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.*
>
> *4(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.*
>
> *4(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.*
>
> *For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.*

Since the Arbitration Act 1996 only applies where an arbitration agreement is in writing, pursuant to **s5 Arbitration Act 1996,**[24] neither the general parts of the Act nor the mandatory provisions apply to an arbitration pursuant to an oral agreement. In such cases the common law applies.

The Departmental Advisory Committee Reports on Arbitration Law February 1996

> ***Clause 4 Mandatory and Non-mandatory Provisions.***
>
> *28. This provision is designed to make clear that the Bill has certain provisions that cannot be overridden by the parties; and for ease of reference these are listed in Schedule 1 to the Bill. The Clause also makes clear that the other provisions of this Part can be changed or substituted by the parties, and exist as 'fall-back' rules that will apply if the parties do not make any such change or substitution, or do not provide for the particular matter in question. In this way, in the absence of any other contrary agreement, gaps in an arbitration agreement will be filled.*
>
> *29. Sub-section (5). Although we believe that the choice of a foreign law would anyway have the effect set out in this provision, it seemed for the sake of clarity to be useful to state this expressly, so as to remind all concerned that a choice of a foreign law does amount to an agreement of the parties to which due regard should be paid.*
>
> *30. It should be made clear that the phrase "mandatory" is not used in either of the two senses that it is used, for example, in Articles 3 and 7 of the Rome Convention (see Goode Commercial Law, 2nd Ed, at 1118): the mandatory provisions of Part 1 of the Bill are only mandatory in so far as the provisions of Part 1 apply (ie by virtue of Clause 2). The mandatory provisions would have no application if Part 1 does not apply.*

[24] **Section 5 : Arbitration Act 1996 : Agreements to be in writing.** Whilst this section appears under the introductory heading in the Arbitration Act 1996, it is dealt with in this text in Chapter 2 as the starting point for examination of the arbitration agreement. Cf **Article 7(2) Model Law** : "*The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*

General principles.

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly-

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

The sections where the Act provides that the court's may intervene are listed in Schedule 1.

SCHEDULE 1 MANDATORY PROVISIONS OF PART I

sections 9 to 11	*(stay of legal proceedings);*
section 12	*(power of court to extend agreed time limits);*
section 13	*(application of Limitation Acts);*
section 24	*(power of court to remove arbitrator);*
section 26(1)	*(effect of death of arbitrator);*
section 28	*(liability of parties for fees and expenses of arbitrators);*
section 29	*(immunity of arbitrator);*
section 31	*(objection to substantive jurisdiction of tribunal);*
section 32	*(determination of preliminary point of jurisdiction);*
section 33	*(general duty of tribunal);*
section 37(2)	*(items to be treated as expenses of arbitrators);*
section 40	*(general duty of parties);*
section 43	*(securing the attendance of witnesses);*
section 56	*(power to withhold award in case of non-payment);*
section 60	*(effectiveness of agreement for payment of costs in any event);*
section 66	*(enforcement of award);*
sections 67 and 68	*(challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections;*
section 72	*(saving for rights of person who takes no part in proceedings);*
section 73	*(loss of right to object);*
section 74	*(immunity of arbitral institutions, &c.);*
section 75	*(charge to secure payment of solicitors' costs).*

Note that this does not provide a mutually exclusive list of the circumstances where a court might act in support of arbitration. It is a mutually exclusive list of the circumstances where a court can intervene in arbitration governed by Part 1. Whilst similar the two concepts are distinct and separate.

ADDITIONAL READING

Public International Law

International Dispute settlement. Merrills. J.G. 2nd ed. Grotius Cambridge. ISBN 0 521 46315 7.

Arbitration

An Introduction to International Commercial Arbitration. Hartwell.G.M.B. CIArb :
Arbitration Practice, Bernstein S&M Ch 1;
Arbitration Law, Merkin.R. LLP Ch 1.
Arbitration Act 1996 An Annotated Guide LLP Pt 1 :
Arbitration Principles and Practice Parris.J : Granada Ch1 :
Russell on Arbitration Sweet & Maxwell Ch 1 :
The Arbitration Act 1996 A Commentary Harris, Planterose & Tecks, Blackwell Science Pt 1.
Arbitration Practice Stephenson,D.A. Blackwell Science, Ch 1.
International Commercial Arbitration. Redfern & Hunter. 2nd ed.
Freshfield Guide to Arbitration, Kluwer;
Arbitration, a Practical Guide, Ginnings, Gower Press:
Domke on Commercial Arbitration Domke. Ch 1 & 2.

Overviews of Arbitration

Introduction to dispute resolution and arbitration. Aeberli.. P. Kings College 2000.
Arbitration Innovations, Dispute Review Boards and Adjudication, (The Evolving Concept of Dispute Attrition) : Faulkner R. Spurin.C.H. ABA. 2002
Arbitration. Lovells web site.
After the 1996 Act : Arbitration in Practice. Cornes.D. Winward Fearon web site.
Primer on International Arbitration. Hill. R. 1995.

Self Assessment Exercise No 2

1. Identify the sources of arbitration law relevant to arbitration practice in England & Wales
2. Identify the sources of arbitration law relevant to international arbitration practice
3. Explain the inter-relationship between The Arbitration Act 1996 and the UNCITRAL Model Law.
4. Explain why the Arbitration Act 1996 was introduced and what it seeks to achieve.
5. Consider the benefits, if any, in setting out general principles to guide the application of Part 1 Arbitration Act 1996 and overriding principles in respect of the Civil Procedure Rules 1998.
6. What is the seat of a tribunal ?
7. Why is the question of the seat of a tribunal important and what benefits arise out of its treatment by the Arbitration Act 1996 ?
8. Consider why the Arbitration Act 1996 establishes mandatory provisions and explain how the remaining provisions operate in the absence of a mandate and the rationale for their existence.