CHAPTER FIVE

THE ARBITRAL TRIBUNAL, CONSTITUTION, APPOINTMENT, REMUNERATION, REMOVAL AND IMMUNITY FROM LIABILITY

ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

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THE CONSTITUTION OF THE TRIBUNAL

The number of judges in a court is set by the legal system, traditionally a single member at first instance, three for an appeal before the Court of Appeal and three or even more in the highest courts of the land (currently the House of Lords in the United Kingdom, but soon to be re-titled the Supreme Court). The parties have no choice over the number of judges but can by contrast exercise choice of the number of arbitrators desired. The arbitral tribunal will be constituted by one or more odd numbers of members. Odd numbers are necessary to ensure a majority decision and prevent a tied vote. The alternative is the umpire system traditionally used by the maritime industry where any tie between the two man tribunal is settled by an umpire. Single member tribunals are more cost effective and the question of availability is less complex than with a three or five member tribunal easier to time manage. Multi-member panels allow for a greater range of expertise. All this is catered for by the Arbitration Act 1996 and by the Model Law though note the default number is a single arbitrator in the UK but three under the Model Law.

S15 Arbitration Act 1996. The arbitral tribunal.

> *15.(1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire.*
> *15(2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.*
> *15(3) If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.*

Article 10 Model Law. Number of arbitrators

> *10(1) The parties are free to determine the number of arbitrators.*
> *10(2) Failing such determination, the number of arbitrators shall be three.*

Clause 15 The Arbitral Tribunal DAC 1996.

> *78. Article 10(1) of the Model Law provides that the parties are free to determine the number of arbitrators. We have included a like provision.*
> *79. Article 10(2) of the Model Law stipulates that failing such determination, the number of arbitrators shall be three. This we have not adopted, preferring the existing English rule that in the absence of agreement the default number shall be one. The employment of three arbitrators is likely to be three times the cost of employing one, and it seems right that this extra burden should be available if the parties so choose, but not imposed on them. The provision for a sole arbitrator also accords both with common practice in this country, and the balance of responses the DAC received. The Model Law default does not, of course, cater for the situation where there are more than two parties to the arbitration.*

THE APPOINTMENT PROCESS

The major contrast between private dispute resolution is that the parties exercise a degree of choice over the selection of who they give jurisdiction to decide their dispute whereas there is little or no autonomy whatsoever over the judge that will preside over a case. By carefully choosing where to file an action a party may be able in specialist areas of practice to second guess which judge would most likely be appointed especially if the pool is small, but that is about the most a party can hope for in a civil action.

The question arises are to why the parties might wish to exercise such a choice. The answer lies partly in confidence in the standing of the decision maker and partly in the ability to specify someone with subject expertise. Judges should stand high in the order of those to be respected as experienced impartial decision makers but it is less likely that they will possess industry expertise, since most will have spent their working lives at the bar. By contrast, the arbitrator will most likely be first and foremost an industry specialise with

some standing in the arbitral community. The trade off thus is between industry standing and expertise against legal standing and expertise. Given that many disputes are more about decisions of fact than about law it is a worthwhile trade-off that can save a great deal of time, money and effort in putting the technical case to the decision maker. That said, it is not necessarily that straight forward ensuring that the appointed arbitrator has the necessary skill, expertise and standing to deal with the dispute and command the respect of the parties at a cost proportionate to the dispute at hand.

The first problem is that often the appointment mechanism will be put in place when a contract is made, long before any dispute has arisen and thus before the nature of the dispute is known, though this is not the case with an ad-hoc appointment after the event. However, the difficulty here is of a different dimension, namely of securing agreement to arbitrate, though if this is secured there is greater scope to select a specific individual as arbitrator providing the parties can agree to the appointment. Mutual distrust may make this impossible to secure. In both events it is more likely that rather than choosing a named individual, who may not be able and / or willing to accept the appointment when the time arises, a mechanism for appointment will be put in place.

Where the parties select individual arbitrators a variety of mechanisms may be adopted. The parties may agree in the contract to agree. If they cannot do so and the contract contains no fall back provision then the court will assist. If the arbitrator is named in a contract, assuming he is able and willing to accept the appointment that is the end of the matter. However, problems can arise if he does no or cannot accept, or as happens from time to time the arbitrator is incorrectly identified in the documents. Where the appointment fails, the parties can in the absence of alternative mechanisms ask the court to appoint an alternative. However, where the name is incorrect, the arbitration clause may be completely defective and unless the parties agree an alternative process, the only alternative is litigation.

Where a tribunal is involved there are a very wide range of alternative mechanisms that can be used. The principle mechanisms are contained in the sample clauses set out in Chapter Two above .

S16 Arbitration Act 1996. Procedure for appointment of arbitrators.

16(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

16(2) If or to the extent that there is no such agreement, the following provisions apply.

16(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

16(4) If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

16(5) If the tribunal is to consist of three arbitrators-

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

16(6) If the tribunal is to consist of two arbitrators and an umpire-

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

16(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure.

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Article 11. Model Law. Appointment of arbitrators

11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

11(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

11(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b)in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

Clause 16. Procedure for the Appointment of Arbitrators DAC 1996.

80. Again we have had the Model Law (Article 11) very much in mind in drafting these provisions, though we have attempted to cater for more cases and also for the fact that under our law, there can be either an umpire or a chairman. We should note that this has caused some confusion abroad, particularly in the United States, where what we would describe as a `chairman' is called an `umpire.' In Clauses 20 and 21 we set out the differences between these two which (in the absence of agreement between the parties) is the present position under English law.

81. The time limits we have imposed for appointments we consider to be fair and reasonable. They can be extended by the Court under Clause 79, but the power of the Court in this regard is limited as set out in that Clause. In the ordinary case we would not expect the Court to allow a departure from the Clause 16 time limits.

82. It might be noted that periods of 28 days, rather than 30 days (as in the Model Law) have been used throughout the Bill, in order to reduce the likelihood of a deadline expiring on a weekend.

Section 16(6)(b) and Section 21(4) DAC 1997.

22. The Bill used the word "any" after a negative which could thus be read as meaning "all." This was not intended. We suggested a form of wording in Paragraph 360 of Chapter 6 but were persuaded that a neater solution was to replace "any" with "a", and this was done.

S17 Arbitration Act 1996. Power in case of default to appoint sole arbitrator.

17(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

17(2) If the party in default does not within 7 clear days of that notice being given-

(a) make the required appointment, and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

17(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment.

17(4) The leave of the court is required for any appeal from a decision of the court under this section.

Clause 17 : Power in case of default to appoint sole arbitrator. DAC 1996

83. This Clause is intended to replace the present rules concerning the appointment of a sole arbitrator where the other party is in default (section 7(b) of the 1950 Act). It only applies to a two party case. We have stipulated that the party in default must not only appoint his arbitrator within the specified period but also inform the other party that he has done so. This in our view is a significant improvement on the present law, where the defaulting party was under no obligation to say that he had made an appointment. This was calculated to cause unnecessary delay, confusion and expense.

84. Some of those responding objected to this Clause. The DAC, however, remains of the view that this provision is an example of the Court supporting the arbitral process, and reducing the opportunities available for a recalcitrant party. The DAC is advised that section 7(b) of the 1950 Act is used a great deal, and that its very existence constitutes a deterrent to those contemplating dilatory tactics. The alternative would be to simply provide for recourse to Court. This would be overly burdensome in most cases, and is available, in any event, under the provisions of the Bill.

85. It has been suggested that the Bill should set out grounds upon which the Court should exercise its discretion in Clause 17(3). The DAC is of the view, however, that this is best left for the Courts to develop, given the specific circumstances of each case, and in the light of the overall philosophy of the Bill.

86. One respondent queried the use of the word "refuses" in Clause 17(1). The advantage of this is that if a party does actually refuse to appoint an arbitrator, rather than simply failing to do so, the non-defaulting party need not wait for the expiration of the relevant time period within which the defaulting party may make such an appointment, but could use the mechanism in Clause 17 straight away.

This is crucial in respect of the Limitations Act 1980. [1] The Model Law merely requires a request or notice of intent, as opposed to an order to commence.[2]

S18 Arbitration Act 1996. Failure of appointment procedure.

18.(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.
There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

18(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

18(3) Those powers are-
- *(a) to give directions as to the making of any necessary appointments;*
- *(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;*
- *(c) to revoke any appointments already made;*
- *(d) to make any necessary appointments itself.*

18(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

18(5) The leave of the court is required for any appeal from a decision of the court under this section.

[1] See ***Channel Tunnel Group v Balfour Beatty*** [1993] AC 334.

[2] See ***Surrendra v Government of Sri Lanka*** [1977] 1 Lloyd's Rep 653; ***The Aghios Lazaros*** [1976] 2 Lloyd's Rep 47; ***The Sargasso*** [1994] 1 Lloyd's Rep 162.

Article 11. Model Law. Appointment of arbitrators

> *11(4) where, under an appointment procedure agreed upon by the parties,*
> *(a) a party fails to act as required under such procedure, or*
> *(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or*
> *(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,*
> *any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

The important issue in all of this is that the law provides a robust mechanism in support of the arbitral process to ensure that the reluctant party to an arbitral provision does not use problems with the appointment mechanism to delay or disrupt the establishment of the tribunal or to deliberately frustrate appointment by refusing to play an active and timely part in the appointment as and when called upon to do so.

Clause 18 Failure of Appointment Procedure DAC 1996.

> *87. Again we have had the Model Law in mind when drafting this provision, The starting. point is any agreement the parties may have made to deal with a failure of the appointment procedure. In the absence of any such agreement, the Court is given the power to make appointments. This is a classic case of the Court supporting and helping to carry through the arbitration process.*
>
> *88. It will be noted that we have given the Court power to revoke any appointments already made. This is to cover the case where unless the Court took this step it might be suggested thereafter that the parties had not been fairly treated, since one had his own choice arbitrator while the other had an arbitrator imposed on him by the Court in circumstances that were no fault of his own. This situation in fact arose in France in the **Dutco Case**, where an award was invalidated for this reason.*
>
> *89. The Model Law stipulates that there shall be no appeal from a decision of the Court. We have not gone as far as this, since there may well be questions of important general principle which would benefit from authoritative appellate guidance.*

Atlanska Plovidba v Asturianas SA [2004]. [3] S18 AA 1996 : Appointment . The court is here concerned not with an excusive jurisdiction clause but with an international arbitration clause. If the defendant sought to pursue a claim that fell within the arbitration agreement in Spain, the court would be bound to grant a stay under the New York Convention. In these circumstances it would be contrary to the spirit of the Convention for this court to refuse to exercise its power to appoint an arbitrator..

Through Transport Mutual Insurance v New India Assurance [2005]. [4] S18 AA 1996 : Appointment application s18. Defendant was committed to litigation in Finland. The applicant sought assistance to appoint an arbitrator, reinforced by a CA finding that they had a right to arbitrate. Court acceded to the request to appoint. The objective of the applicant was to establish by arbitration that it was not liable to the defendant. If it did so it would use s66 to affirm that absence of liability. If that conflicted with any Finnish Court ruling then the courts would have to deal with that matter when the time arose. This was a distinct possibility given differences between English and Finnish Law. Moore-Bick Mr Justice

ASM Shipping v Harris [2007] . [5] S18 AA 1996 : Removal of arbitrator s28. Application for removal or arbitrators : s28 AA 1996.

[3] ***Atlanska Plovidba v Consignaciones Asturianas SA [2004] EWHC 1273 (Comm)*** : Mr Justice Moore-Bick
[4] ***Through Transport Mutual Insurance Assoc Ltd. v New India Assurance Co Ltd. [2005] EWHC 455 (Comm)*** Mr Justice Moore-Bick
[5] ***ASM Shipping Ltd. v Harris & Ors [2007] EWHC 1513 (Comm)*** : Mr Justice Andrew Smith

SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

S19 Arbitration Act 1996. Court to have regard to agreed qualifications.

> *19. In deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.*

Article 11. Model Law. Appointment of arbitrators

> *11(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.*

Clause 19 Court to have regard to Agreed Qualifications

> 90. This comes from Article 11(5) of the Model Law, which itself seeks to preserve as much of the parties' agreement as possible.

THE ARBITRAL TRIBUNAL AND AUTHORITY TO MAKE DECISIONS

S20 Arbitration Act 1996. Chairman.

> *20(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.*
>
> *20(2) If or to the extent that there is no such agreement, the following provisions apply.*
>
> *20(3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).*
>
> *20(4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3).*

To the extent that the chairman agrees with one of the wingmen on the tribunal, a majority will arise in any case. However, where there are three distinct and separate view, s20(4) might come into play.

Article 29. Model Law. Decision making by panel of arbitrators

> *In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.*

Note that the Model Law draws a distinction between substantive and procedural differences between the members of the tribunal.

S21 Arbitration Act 1996. Umpire.

> *21.(1) Where the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be, and in particular-*
>
> *(a) whether he is to attend the proceedings, and*
>
> *(b) when he is to replace the other arbitrators as the tribunal with power to make decisions, orders and awards.*

21(2) If or to the extent that there is no such agreement, the following provisions apply.

21(3) The umpire shall attend the proceedings and be supplied with the same documents and other materials as are supplied to the other arbitrators.

21(4) Decisions, orders and awards shall be made by the other arbitrators unless and until they cannot agree on a matter relating to the arbitration.

In that event they shall forthwith give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

21(5) If the arbitrators cannot agree but fail to give notice of that fact, or if any of them fails to join in the giving of notice, any party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court which may order that the umpire shall replace the other arbitrators as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

21(6) The leave of the court is required for any appeal from a decision of the court under this section.

Umpires are peculiar to English Law. The US does not use them. Note that contrary to standard practice, under s21(3) the umpire should attend from the commencement unless otherwise agreed, which in effect renders the option of an umpire rather than a chairman pointless.

Clauses 20 and 21 Chairman and Umpire. DAC 1996.

91. The parties are, of course, free to make what arrangements they like about the functions and powers of Chairmen or Umpires. We have set out what we believe to be the position under English law in the absence of any such agreement. As we understand the current position, in the absence of an agreement between the parties, an umpire can neither take part nor attend an arbitration until the arbitrators have disagreed.

92. A cause of delay and expense often exists under our umpire system where the umpire does not attend the proceedings and it is only at an advanced stage (when the arbitrators disagree) that he takes over, for much that has gone on may have to be repeated before him. Equally, the time and expense of an umpire may be wasted if he attends but the arbitrators are able to agree on everything. We have decided that it would be preferable to stipulate that (in the absence of agreement between the parties) the umpire should attend the proceedings (as opposed to taking part in the proceedings) and be supplied with the same documents and materials as the other arbitrators. We hope, however, that common sense will prevail and that the parties will make specific agreement over this question, tailored to the circumstances of the particular case.

93. Sub-section 21(4) caused some concern amongst a few respondents, but this sub-section simply reflects what is understood to be the current position.

94. We should record that we considered whether the peculiarly English concept of an umpire should be swept away in favour of the more generally used chaired tribunal. As we have pointed out above, in the United States what we would describe as a chairman is called an umpire. In the end we decided not to recommend this, and to continue to provide default provisions for those who wanted to continue to use this form of arbitral tribunal.

S22 Arbitration Act 1996. Decision making where no chairman or umpire.

22(1) Where the parties agree that there shall be two or more arbitrators with no chairman or umpire, the parties are free to agree how the tribunal is to make decisions, orders and awards.

22(2) If there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators.

Clause 22 Decision-making where no Chairman or Umpire DAC 1996.

95. We decided to include this situation for the sake of completeness, though the default provision can only work if there is unanimity or a majority. If there is neither, then it would appear that the arbitration agreement cannot operate, unless the parties can agree, or have agreed, what is to happen.

REVOCATION OF AUTHORITY OF AN ARBITRATOR

S23 Arbitration Act 1996. Revocation of arbitrator's authority.

23.(1) The parties are free to agree in what circumstances the authority of an arbitrator may be revoked.

23(2) If or to the extent that there is no such agreement the following provisions apply.

23(3) The authority of an arbitrator may not be revoked except-

(a) by the parties acting jointly,[1] or

(b) by an arbitral or other institution or person vested by the parties with powers in that regard.

23(4) Revocation of the authority of an arbitrator by the parties acting jointly must be agreed in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement.

23(5) Nothing in this section affects the power of the court-

(a) to revoke an appointment under section 18 (powers exercisable in case of failure of appointment procedure), or

(b) to remove an arbitrator on the grounds specified in section 24.

Article 14. Model Law. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Clause 23 Revocation of arbitrator's authority. DAC 1996.

96. Statutory provisions making it impossible unilaterally to revoke the authority of an arbitrator have existed since 1833. The present Clause is designed to reflect the current position, save that we have imposed a writing requirement and thought it helpful to make express reference to arbitral institutions etc.. These of course only have such powers as the parties have agreed they shall have, so that strictly this provision is not necessary, but we consider that an express reference makes for clarity.

97. Some of those responding suggested that the parties' right to agree to revoke an arbitral appointment should be limited (eg that Court approval should be required in every case). The DAC has not adopted these suggestions since any tribunal is properly regarded as the parties' tribunal and to do so would derogate from the principle of party autonomy.

98. It will be seen that various terms are used in the Bill with respect to the termination of an arbitral appointment, such as "removal" and "revocation of authority". Different terms have been adopted simply as a matter of correct English usage. The difference in terms is not intended to be of any legal significance.

99. Sub-section 23(4). Whilst any agreement as to an arbitration must be in writing, as defined earlier, the DAC is of the view that it is impracticable to impose a writing requirement on an agreement to terminate an arbitration. Parties may well simply walk away from proceedings, or allow the proceedings to lapse, and it could be extremely unfair if one party were allowed to rely upon an absence of writing at some future stage. Where a Claimant allows an arbitration to lapse, Clause 41(3) may be utilised.

CHAPTER FIVE

REMOVAL OF AN ARBITRATOR

The law has long since given the court the power and jurisdiction to remove arbitrators, so that this power pre-dates the Arbitration Act 1996.[6]

S24 Arbitration Act 1996. Power of court to remove arbitrator.

24.(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds-

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed-

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant.

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

24(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

24(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

24(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.[1]

24(6) The leave of the court is required for any appeal from a decision of the court under this section.

Article 12. Model Law. Grounds for challenge

12(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

12(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[6] See ***Pratt v Swanmore*** [1980] 2 Lloydis Rep 504; ***Model Engineering v Miskin*** [1981] 1 Lloyd's Rep 135 on removal of an arbitrator after commencement of proceedings. See also ***Morgan v Morgan*** (1832) 1 Dowl 611; ***Cook v Jean Velvaux*** [1985] 2 Lloyd's Rep 225 on removal on the grounds of the impartiality of the arbitrator.
See ***Blanchard v Sun Fire*** (1890) 6 TLR 365; **Re Steamship Catlina & MV Norma** [1938] 61 Lloyd's Rep 360; ***Watson v Prager*** [1991] 3 All.E.R. 487 on the grounds for impartiality.

Clause 24 Power of Court to Remove Arbitrator

100. We have set out the cases where the Court can remove an arbitrator.

101. The Model Law (Article 12) specifies justifiable doubts as to the independence (as well as impartiality) of an arbitrator as grounds for his removal. We have considered this carefully, but despite efforts to do so, no-one has persuaded us that, in consensual arbitrations, this is either required or desirable. It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.

*102. We can see no good reason for including 'non-partiality' lack of independence as a ground for removal and good reasons for not doing so. We do not follow what is meant to be covered by a lack of independence which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the `independence' of an arbitrator. For example, it is often the case that one member of a barristers' Chambers appears as counsel before an arbitrator who comes from the same Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law. Indeed the Chairman has so decided in a case in Chambers in the Commercial Court. We would also draw attention to the article "**Barristers' Independence and Disclosure**" by Kendall in (1992) 8 Arb. Int. 287. We would further note in passing that even the oath taken by those appointed to the International Court of Justice; and indeed to our own High Court, refers only to impartiality.*

103. Further, there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent.

104. We should emphasize that we intend to lose nothing of significance by omitting reference to independence. Lack of this quality may well give rise to justifiable doubts about impartiality, which is covered, but if it does not, then we cannot at present see anything of significance that we have omitted by not using this term.

105. We have included, as grounds for removal, the refusal or failure of an arbitrator properly to conduct the proceedings, as well as failing to use all reasonable dispatch in conducting the proceedings or making an award, where the result has caused or will cause substantial injustice to the applicant. We trust that the Courts will not allow the first of these matters to be abused by those intent on disrupting the arbitral process. To this end we have included a provision allowing the tribunal to continue while an application is made. There is also Clause 73 which effectively requires a party to `put up or shut up' if a challenge is to be made.

106. We have every confidence that the Courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted. Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by Clause 33, should on no view justify the removal of an arbitrator, even if the Court would not itself have adopted that procedure. In short, this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the Court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process.

107. We have also made the exhaustion of any arbitral process for challenging an arbitrator a pre-condition to the right to apply to the Court. Again it will be a very rare case indeed where the Court will remove an arbitrator notwithstanding that that process has reached a different conclusion.

108. If an arbitrator is removed by the Court, we have given the Court power to make orders in respect of his remuneration. We would expect this power to be exercised where the behaviour of the arbitrator is inexcusable to the extent that this should be marked by depriving him of all or some of his fees & expenses. This sub-section is also the subject of a supplementary recommendation in Chapter 6 below.

109. As a matter of justice, we have stipulated that an arbitrator is entitled to be heard on any application for his removal.

110. This is a mandatory provision. It seems to us that an agreement to contract out of the cases we specify would really be tantamount to an agreement to a dispute resolution procedure that is contrary to the basic principles set out in Clause 1.

Section 24(4) Power of Court to Remove Arbitrator DAC 1997

23. In Paragraph 361 of Chapter 6, we drew attention to the fact that the immunity of an arbitrator, under what is now Section 29, did not extend to protect an arbitrator from the consequences of resigning, though some protection is available under what is now Section 25(3). This we contrasted with what is now Section 24, since an arbitrator removed by the Court still enjoyed the Section 29 immunity. We thought that this was anomalous and that the Court should be given a discretionary power to make such order as it thought fit with regard to the immunity of an arbitrator it removed.

24. This suggestion was not adopted. After further consideration we concluded that the anomaly was more apparent than real and that the suggestion would undermine the reasons for providing arbitrators with the immunity expressed in Section 29. As will be seen from Paragraph 362 of Chapter 6, we were against adopting the same suggestion when the parties agreed to remove an arbitrator under what is now Section 23. What it seemed to us would be likely to happen if our original suggestion were adopted is that the parties, instead of privately agreeing to remove an arbitrator, would instead apply to the Court in the hope that the immunity would be wholly or partially removed. This seemed to us to be undesirable.

25. It should be remembered, of course, that while an arbitrator retains his immunity if removed by the Court, what is now Section 24(4) does give the Court the power to make orders about his fees and expenses, including those already paid.

The following two cases, at about the same time, may be useful in considering why the DAC decided to adopt the word *"impartial"* for the Arbitration Act 1996, in preference to the word *"independent"*. It is a good example of an ethical point which has practical implications and which the Court has considered with care.

Bremer v Soules & Scott [1985].[7] Disputes arose in connection with Bremer's sale of US soya bean meal to Soules. The parties opted for arbitration. The arbitrators published their award ordering Bremer to pay Soules $65,129 plus interest. Bremer gave notice of appeal to the GAFTA. A Board of Appeal was subsequently constituted, the members of which included a Mr Anthony Scott. However, Bremer objected to Mr Scott's appointment and applied to remove him on the ground that: *". . . he is not in a position to act judicially and without any bias, and that accordingly he is guilty of misconduct in the said appeal proceedings."*

Mr Scott was a director of European Grain & Shipping Ltd, a London company which was the wholly-owned subsidiary of Andre et Cie of Lausanne. Bremer alleged that Andre had previously been involved in the unfulfilled transaction as an intermediate trader. This transaction was the subject of the present disputes between Bremer and Soules. Thus, any decision in the Soules arbitration in favour of the Sellers would set a precedent favourable to Andre's chances in future arbitrations. Accordingly, there was a risk that Mr Scott would lean towards a finding of fact in the Soules arbitration (and those down the string) favourable to the respective buyers. Mustill J held that on the facts and evidence before him, Bremer had totally failed to prove their case. He dismissed the application. In the course of his judgment, Mustill J stated the principles for the removal of arbitrator for misconduct.

[7] ***Bremer GmbH v. ets Soules et Cie and Anthony G Scott*** [1985] 1 Lloyd's Rep 160.

Per Mustill J at p. 164: *"There are three material situations in which the High Court has power to remove an arbitrator for 'misconduct', under section 23 of the Arbitration Act 1950.*

(1) Where it is proved that the arbitrator suffers from what may be called 'actual bias'. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavourably towards him, for reasons peculiar to that party, or to a group of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.

(2) Where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is a manifest risk of partiality. This may be called a case of 'imputed bias'.

(3) Where the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect."

Tracomin v Gibbs Nathaniel & George Jacob Bridge **[**1985].[8] Tracomin entered into two contracts to buy peanuts from Gibbs, who would ship the goods in monthly instalments. When one shipment was never made, disputes having arisen, were referred to arbitration. Tracomin appointed their arbitrator. Gibbs also appointed theirs — one Mr George Jacob Bridge. Tracomin objected to Mr Bridge's appointment. They made efforts to persuade Gibbs to replace Mr Bridge with some other arbitrator, but in vain. Pursuant to section 23(1) of the Arbitration Act 1950, Tracomin applied for an order that Mr Bridge be removed, on the ground of imputed bias; that they had been involved with Mr Bridge on three separate arbitrations and that Mr Bridge had not been shown to have acted in an impartial manner.

Per Staughton J at p. 595: *"There are, in my judgment, three points of importance to the present case which emerge from the authorities. First, the test is objective, as to what a reasonable man would think; it is not an enquiry into what the party alleging bias thinks, or as to the actual views of the arbitrator who is challenged.*[9] *Secondly, the reasonable man forms his view 'with no inside knowledge' (per Lord Justice Cross in* ***Hannam's*** *case at p. 949). In its context, that statement was directed at inside knowledge of the character of the persons who were accused of bias: see the judgment of Mr Justice Mustill in* ***Bremer v Soules*** *[1985].*[10] *But the principle must, in my view, be wider than that, since the court looks at appearances, 'at the impression which would be given to other people'* .[11]

While I respectfully agree with Mr Justice Mustill that, in some circumstances, the Court may take into account an innocent explanation of facts which at first sight were suspicious, particularly when the challenge to an arbitrator is made before rather than after he has adjudicated, I do not think that this is always the case. Suppose that a reasonable man would have grounds for believing that the arbitrator was the majority shareholder in one of the parties; I do not see why it should not be established by evidence that the shareholder was not the arbitrator, but another person of the same name, or why the Court should not allow the reasonable man to revise his opinion with the benefit of that knowledge.

By contrast, if an arbitrator is proved to have conferred with one of the parties about the dispute in circumstances which appear improper, I do not think that the reasonable man's view should be revised by reference to subsequent evidence of what was in fact said. Given that there is a reasonable inference of impropriety in the first place, it would be wrong in my judgment that an application to remove the arbitrator should thereafter fail if the inference is displaced by inside knowledge which was not available to all at the time. Lord Hewart's famous observation is still the law.

I am conscious that there must be a dividing line between the two examples that I have given, and a test to determine on which side of that line a particular case lies. With the greatest respect to what may have been the view of Mr Justice Mustill, I cannot accept that the test is solely whether the application for relief is made

[8] ***Tracomin SA v. Gibbs Nathaniel (Canada) Ltd & George Jacob Bridge*** **[**1985] 1 Lloyd's Rep 586.

[9] ***Metropolitan Properties Co (FGC) Ltd v. Lannon***, [1969] 1 QB 577, ***Hannam v. Bradford Corporation***, [1970] 1 WLR 937, ***Hagop Ardahalian v. Unifert International SA,*** [1984] 2 Lloyd's Rep 84

[10] ***Bremer Handelsgesellschaft mbH v. Ets Soules et Cie,*** [1985] 1 Lloyd's Rep 160, at p. 168

[11] per Lord Denning, MR, in the **Metropolitan Properties** case at p. 599

before or after the arbitrator has adjudicated.

But wherever else the test is to be found, it need not be determined on this motion: I am convinced that in the present case, so far as it concerns the conduct of Mr Bridge in court during the ***SOS*** case,[12] the view of the reasonable man ought not to be revised in the light of subsequent evidence which was not available to an observer at any time. It will be noted that, in considering another of Tracomin's complaints (the writing of Mr Bridge's letter to Maitre Wanner) I have paid heed to Mr Bridge's evidence that he did not know that the letter was going to be used as evidence in Switzerland. But I express no view as to whether it is right to take that evidence into account.

Before leaving that point, I would accept that the reasonable man must have some knowledge of the trade. Mr Justice Mustill held that he must be put in the position of the complainant, having ascribed to him all the complainant's knowledge and experience of the trade, and the manner in which disputes are habitually resolved, I would be prepared if necessary to go further, and attribute to him all that is common knowledge in the trade even if not known to the complainant. But there is no reason to suppose that the point is of any importance in the present case.

Thirdly, there is some difference of view in the cases as to the precise degree of probability needed to found a charge of imputed bias. In the ***Metropolitan Properties*** case Lord Denning, MR (at p. 599) favoured real likelihood of bias, Lord Justice Danckwerts (at p. 602) reasonable doubt as to the chairman's impartiality. Lord Justice Edmund Davies (at p. 606) rejected real likelihood, and adopted, as a less stringent test, reasonable suspicion of bias. In ***Hannam's*** *case* Lord Justice Sachs (at pp. 941-942) preferred real danger to real likelihood. In ***Ardahalian's*** case (at p. 89) the Court of Appeal accepted real likelihood; but I do not think that there was any contest as to the standard of probability in that case. Indeed, Lord Justice Ackner referred to the case of ***R v. Liverpool City Justices ex parte Topping***,[13] where he himself had adopted reasonable suspicion as a test.

In many, if not most cases, it will make no difference which test is applied. That is so in the present case, and I am content to adopt real likelihood, which appears to lay the heaviest burden on the person alleging bias. But I do not, with great respect, share the view of Lord Justice Cross (in ***Hannam's*** case) and Lord Justice Ackner (in the ***Liverpool City Justices*** case) that there is little if any difference between the two tests. If it had been necessary to decide the point, I would have followed what was said by Lord Justice Edmund-Davies in the ***Metropolitan Properties*** case (1969) 1 QB, at p. 606:

'With profound respect to those who have propounded the "real likelihood" test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by Reg. v. Barnsley Licensing Justices itself, as Devlin LJ made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body.'

In my judgment a reasonable man, acquainted with the practice at FOSFA, would conclude that there was a real likelihood of bias on the part of Mr Bridge from the appearance of his conduct during the hearing of the 505 case in this court. That impression would not be dispelled, but rather slightly fortified, by the letter to Maitre Wanner, the reference to taking instructions from his principals, and the two occasions on which application was made to remove him. But it is on the appearance of Mr Bridge's conduct during the SOS case in this Court that my conclusion is founded. Accordingly, I am prepared to make the order sought." [The parties later came to terms. No order was made because Mr Bridge agreed to resign.]

Danae Air Transport v Air Canada [1999]. [14] S22 / 24 AA 1950 : Slip rule. CA on appeal from Commercial Court (Mr Justice Longmore) : Held : where the arbitrator's had made an arithmetical error in the course of a costs award, the court could remit the award back to the tribunal for correction.

[12] ***Tracomin SA v. Sudan Oil Seeds Co Ltd*** [1983] 2 Lloyd's Rep 384 (Mr Bridge was said to have sat beside Counsel for SOS in that case and to have been advising Counsel with visible enthusiasm.).

[13] ***R v. Liverpool City Justices ex parte Topping***, [1983] 1 WLR 119,

[14] ***Danae Air Transport Societie Anonyme v Air Canada [1999] EWCA Civ 2011.*** Kennedy LJ; Ward LJ; Tuckey LJ. 29th July 1999.

Good Challenger v Metalexportimport [2003]. [15] S23 AA 1950 : Enforcement. Ex parte enforcement judgment entered on the 25th January 1993. Application here for final enforcement. Defendant sought set aside – limitation. Court ordered enforcement. During the interim period the claimants had continuously been engaged in enforcement proceedings outside the UK. No want of prosecution.

Ahmed v L.B. Southwark [1997].[16] S23 AA 1950 : Removal of arbitrator. Appeal against refusal to dismiss arbitrator. Appeal terms altered to assert that the tribunal extended its jurisdiction. Appeal granted. Grounds were arguable – giving rise to the need for a hearing.

AT&T v Saudi Cable Co [2000]. [17] S23 AA 1950 apparent bias ; Removal of arbitrator : Independence of arbitration : Unsuccessful appeal against refusal of application for removal pursuant to s23 Arbitration Act 1950. CA on appeal from Commercial Court (*Mr Justice Longmore*) : Arbitrator failed to directly disclose that he was a non-executive director of an organisation and held 400+ shares in a portfolio. This was an appeal against a refusal to remove under the Arbitration Act 1950 – though the same principles would apply to the 1996 Act. Could found no evidence of actual bias or misconduct – it was all an unfortunate error. If disclosed at the outset there may have been a challenge to his appointment – but the court in the exercise of its discretion would not remove at this late stage.

Havant .C. v South Coast Shipping Co [1998].[18] S23 AA 1950 Challenge : Set aside. Unsuccessful challenge to a judgment refusing to set aside an award under s23 Arbitration Act 1950.

Guaranteed Ashphalt v Taylor Woodrow [1998]. [19] S23 AA 1996 : Application for removal for misconduct. Acrimonious arbitration – with much bad feeling on both sides – arbitrator remained professional at all times. Application groundless and refused. *"This application was made 1 year after publication of Award no 1. The order was issued over 15 months before. No complaint had been made previously that the Order was one the arbitrator had no power to make. It is doomed to fail. Although the Order could be described as procedural mishap, it is not misconduct. It was made at the express request of one party without the other objecting. The arbitrator can hardly be faulted for making the Order. It is open to G to apply to the arbitrator to lift the stay, even if the sums provided for in the Order are not paid. If the arbitrator declines to do so, G could, if it wished make another misconduct application. I refuse the application for leave to amend."*

Argonaut Insurance v Republic Insurance [2003].[20] S24 AA 1996 Removal. Arbitrator had been involved in previous litigation as a witness of fact. Did not disentitle him from hearing the current dispute – when none of the issues from the prior disputes were at point, Held : No. Removal refused.

Norbrook Laboratories v Tank [2006].[21] S24 AA 1996: Removal s24: s69 irregularity. Private communications. Natural Justice : The role of the arbitrator in gathering evidence : Undisclosed contact by arbitrator with witnesses not allowed. Arbitrator removed under s24.

Kalmneft v Glencore [2001].[22] S24 s33 s67 s68 s70 s73 AA 1996. S67 / 68 applications out of time : Challenge to jurisdiction too late. Regarding s24 only past not future actions relevant – so allegations of misconduct must be run under s68. Main complaint was that more time should have been spent on certain issues. All challenges failed.

Runman Faruqi v Commonwealth [2002].[23] S24 s67, 68, 69 AA 1996. Removal – forfeiture of confidence : There were no compelling reasons in the circumstances for the court to interfere with the running of the tribunal – though it has jurisdiction to do so where appropriate.

15 ***Good Challenger Navegante S.A. v Metalexportimport S.A. [2003] EWHC 10 (Comm)*** Deputy Judge Mr Michael Crane QC, 10th January 2003.

16 ***Ahmed v London Borough Of Southwark [1997] EWCA Civ 2323.*** Morritt LJ; Phillips LJ. 2nd September 1997.

17 ***AT&T Corporation & Anor v Saudi Cable Company [2000] EWCA Civ 154.*** Woolf LJ MR; Potter LJ; May LJ. 15th May 2000.

18 ***Havant Borough Council v South Coast Shipping Co Ltd [1998] EWCA Civ 1205.*** Simon Brown LJ : Buxton LJ. 14th July 1998.

19 ***Guaranteed Ashphalt (London) Ltd (In Receivership) v. Taylor Woodrow Construction Ltd [1998] EWHC TCC 317.*** HHJ Thornton QC. 5th June 1998.

20 ***Argonaut Insurance Co. v. Republic Insurance Co*** [2003] EWHC 547 (Comm) : Mr Justice David Steel. 7th March 2003.

21 ***Norbrook Laboratories Ltd v Tank [2006] EWHC 1055 (Comm)*** : Mr Justice Colman. 12th May 2006.

22 ***Kalmneft v Glencore International AG [2001] EWHC QB 461*** : Mr Justice Colman. 27th July 2001.

23 ***Runman Faruqi v. Commonwealth Secretariat [2002] WL 498805 :*** Mr M Brindle QC 26th March 2002

Home of Homes v L.B. Hammersmith & Fulham [2003].[24] S24, s68 AA 1996. S24 removal for conduct during arbitral hearings refused. A challenge to competence where arbitrator initially capped costs but withdrew cap following further argumentation was rejected – did not indicate incompetence – simply part of the process.

RESIGNATION OF AN ARBITRATOR

An arbitrator may choose to resign because the parties have made it clear that they no longer have confidence in him or alternatively that he feels he cannot work with the parties impartially, perhaps because he has formed an adverse view of a party; because he determines that he is no longer feels that he has the requisite competences required to conduct the arbitration, and feels out of his depth, or for personal reasons such as ill health or overriding family/social commitments.

S25 Arbitration Act 1996. Resignation of arbitrator.

25(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards-
(a) his entitlement (if any) to fees or expenses, and
(b) any liability thereby incurred by him.

25(2) If or to the extent that there is no such agreement the following provisions apply.

25(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court-
(a) to grant him relief from any liability thereby incurred by him, and
(b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

25(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

25(5) The leave of the court is required for any appeal from a decision of the court under this section.

Cross reference s64 Arbitration Act 1996. Recoverable fees and expenses of arbitrators.

64(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

64(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)-
(a) determine the matter, or
(b) order that it be determined by such means and upon such terms as the court may specify.

64(3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

64(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

Clause 25 Resignation of Arbitrator : DAC 1996.

111. In theory it could be said that an arbitrator cannot unilaterally resign if this conflicts with the express or implied terms of his engagement. However, as a matter of practical politics an arbitrator who refuses to go on cannot be made to do so, though of course he may incur a liability for breach of his agreement to act.

112. In this Clause we have given an arbitrator who resigns the right to go to the Court to seek relief from any liability incurred through resigning and to make orders relating to his remuneration and expenses, unless the consequences of resignation have been agreed with the parties (eg by virtue of having adopted institutional rules).

[24] ***Home of Homes Ltd v. L.B. Hammersmith & Fulham, Mr Alan Turner*** [2003] EWHC 807 (TCC). Mr Justice Forbes . 10th April 2003

113. *We have chosen the words of sub-section (1) with care so that the agreement referred to is confined to an agreement as to the consequences of resignation. A simple agreement not to resign (or only to resign in certain circumstances) with no agreement as to what will happen if this promise is broken is not within the sub-section. This has to be so since otherwise (by virtue of sub-section (2)), sub-sections (3) and (4) would never or hardly ever operate, for the arbitrator will not be under any liability or at risk as to his fees or expenses unless he is in breach by resigning.*

114. *In the July draft we suggested a provision which would have entitled the Court to grant relief in all circumstances including those where the arbitrator had made an agreement as to the consequences of his resignation. However, as the result of a response that we received we have concluded that where the parties have agreed with an arbitrator on the consequences it would be wrong to give the Court a power to adjust the position.*

115. *The reason we propose this is that circumstances may well arise in which it would be just to grant such relief to a resigning arbitrator. For example, the arbitrator may (reasonably) not be prepared to adopt a procedure agreed by the parties (ie under Clause 34) during the course of an arbitration, taking the view that his duty under Clause 33 conflicts with their suggestions (the relationship between the duty of arbitrators in Clause 33 and the freedom of the parties in Clause 34, is discussed in more detail below). Again, an arbitration may drag on for far longer than could reasonably have been expected when the appointment was accepted, resulting in an unfair burden on the arbitrator. In circumstances where the Court was persuaded that it was reasonable for the arbitrator to resign, it seems only right that the Court should be able to grant appropriate relief.*

Section 25(2) Resignation of Arbitrator DAC 1997.

26. *At Paragraph 363 of Chapter 6 we noted that the words "in writing" appeared, though by virtue of Section 5(1) this was unnecessary. These words were duly removed by amendment.*

DEATH OF AN ARBITRATOR

The simple point to be made here is that the authority of an arbitrator cannot be inherited on death or otherwise delegated to another. Given that the rights and liabilities of the parties can survive their demise means that it is hardly surprising that the default position is that the death of the party who appoints an arbitrator has no impact whatsoever on the on-going authority of the tribunal, though it may well cause evidential difficulties if that person has yet to give evidence, but that is another matter altogether.

S26 Arbitration Act 1996. Death of arbitrator or person appointing him.

26(1) *The authority of an arbitrator is personal and ceases on his death.*

26(2) *Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority.*

Clause 26 Death of Arbitrator or Person appointing him

116. *This Clause complements Clause 8 and is included for the same reason. Clause 26(1) is mandatory - it is difficult to see how parties could agree otherwise.*

FILLING A VACANCY FOLLOWING RESIGNATION OR DEATH

Given the high average age of arbitrators, often valued as a mark of respect for wisdom, knowledge and expertise, it is hardly surprising that from time to time arbitrators are forced to retire by circumstances. Where the parties have used an appointing body, it is most likely that that body's rules will provide for succession in the event that a vacancy occurs.

Where a single arbitrator departs there is little option but to abandon what has gone before and start over afresh. However, where one of three departs it may be possible for the two remaining arbitrators to fill in the gaps in knowledge for an incoming arbitrator. If there is consensus between the remaining two this is highly

likely but not if differences have already arisen between them on important issues.

S27 Arbitration Act 1996. Filling of vacancy, &c.

27(1) Where an arbitrator ceases to hold office, the parties are free to agree-
(a) whether and if so how the vacancy is to be filled,
(b) whether and if so to what extent the previous proceedings should stand, and
(c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

27(2) If or to the extent that there is no such agreement, the following provisions apply.

27(3) The provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.

27(4) The tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.
This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office.

27(5) His ceasing to hold office does not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a chairman or umpire.

Article 15. Model Law. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Clause 27 Filling of Vacancy etc.. DAC 1996.

*117. This Clause reflects Article 15 of the Model Law, but also deals with certain other important ancillary matters. It should be noted that we do not propose to re-enact the power given to the Court under Section 25 of the Arbitration Act 1950 to fill a vacancy created by its removal of an arbitrator. It seems to us that (in the absence of agreement between the parties) it is preferable for the original appointment procedure to be used, for otherwise (as in the **Dutco case** mentioned above) it might be argued that the parties were not being treated equally.*

118. We have given the tribunal the right (when reconstituted) to determine to what extent the previous proceedings should stand, though we have also made clear that this does not affect any right a party may have to challenge what has happened.

119. Further, we have provided in Clause 27(5) that the fact of an arbitrator ceasing to hold office will not affect any appointment made by him (whether alone or jointly) of another arbitrator, unless the parties have otherwise agreed pursuant to Clause 27(1)(c).

LIABILITY FOR ARBITRATOR'S FEES

Joint and several liability of parties to arbitrators for fees and expenses.

28(1) *The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.*

28(2) *Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.*[1]

28(3) *If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of such amount (if any) as is shown to be excessive, but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment.*

28(4) *The above provisions have effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).*

28(5) *Nothing in this section affects any liability of a party to any other party to pay all or any of the costs of the arbitration (see sections 59 to 65) or any contractual right of an arbitrator to payment of his fees and expenses.*

28(6) *In this section references to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.*

Clause 28 Joint and Several Liability of Parties to Arbitrators for Fees and Expenses. DAC 1996.

120. *Arbitration proceedings necessarily involve the incurring of expenditure. The arbitrators have to be paid, and the parties incur expense in presenting their cases to the tribunal. The issue of costs involves at least three quite discrete elements:*

- *i. As a matter of general contract law, arbitrators, experts, institutions and any other payees whatsoever are entitled to be paid what has been agreed with them by any of the parties. Therefore, for example, if a party appoints an arbitrator for an agreed fee, as a matter of general contract law (rather than anything in this Bill), that arbitrator is entitled to that fee.*
- *ii. It is generally accepted that all parties are jointly and severally liable for the fees of an arbitrator. This is an issue as to the entitlement of arbitrators, and as such is quite distinct from the third element.*
- *iii. As in court litigation, when one party is successful, that party should normally recover at least a proportion of his costs. This issue, being where the burden of costs should lie, is an issue as between the parties.*

121. *The Bill contains provisions as to costs and fees in two separate parts: the joint and several liability owed by the parties to the arbitrators (the second element) is addressed in this clause, whilst the third element (ie the responsibility for costs as between the parties) is addressed in Clauses 59-65. The first element, being a matter of general contract law, is not specifically addressed by either set of provisions, but is preserved in both. It is extremely important to distinguish between these provisions.*

122. *Clause 28 is concerned with the rights of the arbitrators in respect of fees and expenses. As sub-section (5) makes clear, and as explained above, this provision is not concerned with which of the parties should (as between themselves) bear these costs as the result of the arbitration, which is dealt with later in the Bill, nor with any contractual right an arbitrator may have in respect of fees and expenses.*

123. *As we understand the present law, the parties are jointly and severally liable to the arbitrator for his fees and expenses. The present position seems to be that if these are agreed by one party, the other party becomes liable, even if he played no part in making that agreement; and circumstances may arise in which that party is unable to obtain a reduction of the amount by taxation. It seems to us that whilst arbitrators should be protected by this joint and several liability of the parties, a potentially unfair result must be avoided: a party who never agreed to the appointment by another party of an exceptionally expensive arbitrator should not be held jointly and severally liable for that arbitrator's exceptional fees. To this end, we have stipulated, in Clause 28(1), that a party's joint and several liability to an arbitrator only extends to "reasonable fees". Of course, if a party has agreed an exceptional fee with an arbitrator, that party may still be pursued by that arbitrator, under general contract law, which is preserved in Clause 28(5).*

124. *We have proposed a mechanism to allow a party to go to the Court if any question arises as to the reasonableness of the arbitrator's charges. The Court is empowered to adjust fees and expenses even after they have been paid, since circumstances may well arise in which a question about the level of fees and expenses only arises after payment has been made. For example, a large advance payment may be made at a time when it is considered that the arbitration will take a long time, but this does not turn out to be the case. However, the Court must be satisfied that it is reasonable in the circumstances to order repayment. Thus an applicant who delays in making an application is likely to receive short shrift from the Court, nor is the Court likely to order repayment where the arbitrator has in good faith acted in such a way that it would be unjust to order repayment. It seems to,--- that it is necessary to set out expressly in the Bill that the power of the Court extends to dealing with fees and expenses already paid, since otherwise there could be an argument that this power is confined to fees and expenses yet to be paid.*

125. *These provisions are extended by sub-section (6) to include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators. An arbitrator may cease to act through the operation of Clauses 23 to 26, or if an umpire takes over following a disagreement.*

126. *The liability in Clause 28(1) is to "the parties". It seems to us to follow that a person who has not participated at all, and in respect of whom it is determined that the arbitral tribunal has no jurisdiction, would not be a "party" for the purposes of this clause (cf Clause 72). More difficult questions may well arise in respect of persons who have participated, for there the doctrine of Kompetenz-Kompetenz (Clauses 30 and 31) may have to be weighed against the proposition that a party can hardly be under any liability in respect of the fees and expenses of the tribunal which he has successfully established should not have been acting at all on the merits of the dispute.*

127. *It is to be noted that arbitrators' fees and expenses include, by virtue of Clause 37(2), the fees and expenses of tribunal appointed experts etc.*

128. *It seems that the present joint and several liability of the parties to an arbitrator for his fees may rest on some implied contract said to exist between them. Be this as it may, such an implied contract (in so far as it related to fees and expenses) would not survive by virtue of Clause 81 of this Bill, because this only saves rules of law which are consistent with Part I. Any implied contract imposing a liability for more than reasonable fees and expenses would clearly be inconsistent with Clause 28(1). Furthermore, since Clause 28(1) gives a statutory right there remains no good reason for any implied contractual right. As stated above, any specific contract would, however, of course be preserved by Clause 28(5).*

129. *Contrary to some suggestions made to us, it seems to us that rights of contribution between the parties in relation to their statutory liability under Clause 28(1) can best be left to the ordinary rules which relate to joint and several liability generally.*

130. *Clause 28 is made mandatory, since otherwise the parties could by agreement between themselves deprive the arbitrators of what seems to us to be a very necessary protection.*

United Tyre Co v Born [2004]: [25] S28 AA 1996 : Joint & Several Liability – s28(3) Arbitrators fees. Applicant request taxation pursuant to s28(3) or arbitrator's fees 15 months after the award, having immediately after the award made a compromise offer with an indication that if not accepted he would apply for taxation. Preliminary issue : Did this delay disentitle the applicant. Judge held no. Appeal : Held : Whilst the objective of arbitration was a rapid settlement, the defendant had suffered no disadvantage and knew that the application was waiting in the wings. No reason to refuse the application.

Agrimex v Tradigrain [2003].[26] s28(2),(3) AA 1996 : Costs : Arbitrator's fees Adjustment of fees. Application s28(2) & (3) for adjustment of arbitrator's fees : court concurred and ordered that the sum offered in settlement become the due amount. *"the size of the team employed and the time spent was wholly excessive and disproportionate to the issues involved."* Re a Gafta appeal board. Recovery of winning party's costs before a GAFTA appeal tribunal from the losing party. *"In my judgment, the size of the team employed and the time spent was wholly excessive and disproportionate to the issues involved. The Claimants had been prepared to pay, prior to the hearing, the sum of £6,500; that was in my view a generous amount in all the circumstances, but I will not go below it. I summarily assess the costs at £6,500."*

FURTHER READING

Self assessment exercise

1. Under an ad hoc arbitration which is not subject to institutional rules or any prescribed rules established on appointment, what can an arbitrator do if his appointment is challenged ?
2. Identify relevant sections of the Arbitration Act which set out the general duties of the tribunal and comment on the ability of a party to challenge the appropriateness of an arbitrator to fulfill these duties at the outset of an arbitration.
3. Discuss the scope for a party to challenge the validity of appointment of an arbitrator? What other alternatives are available to a party who does not accept the appointment of an arbitrator?
4. To what extent, if at all, does the Arbitration Act 1996 allow for party autonomy in the appointment process and should the law place any limits upon it ?
5. What can the parties do if an arbitrator resigns in the middle of an expensive trial?

[25] ***United Tyre Company Ltd v Born [2004] EWCA Civ 1236.*** Mance LJ; Munby LJ
[26] ***Agrimex Ltd. v Tradigrain SA [2003] EWHC 1656 (Comm).*** Mr Justice Thomas

CHAPTER FIVE

ARBITRATOR / ADJUDICATOR IMMUNITY.[27]

In the United Kingdom the arbitrator enjoys a wide degree of protection against undue pressure, including any attempt by a party to the arbitration to blackmail / cajole / coerce / influence or otherwise threaten the arbitrator, which might adversely impact upon the arbitrator's ability to reach an impartial decision.[28] This protection is embodied in **s29 Arbitration Act 1996**, which states as follows :-

> *29(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator **unless the act or omission is shown to have been in bad faith**.*
>
> *29(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.*
>
> *29(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).*

Likewise, the construction adjudicator is also protected by virtue of 108(4) Housing Grants, Construction and Regeneration Act 1996, which requires a relevant construction contract to incorporate adjudicator immunity. S108(4) provides that "*The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator **unless the act or omission is in bad faith**, and that any employee or agent of the adjudicator is similarly protected from liability.*"

If this were not the case, an arbitrator might consciously, or unconsciously, tip-toe around a belligerent litigant during the course of proceedings, be it during case management, during the hearing or in the body of an award, to ward off potential litigation. This would be contrary to the duty to act impartially at all times. It would impede the arbitrator's ability to act in a robust manner as and when required.

Bad faith is the only limitation to this immunity. What then amounts to bad faith? In what circumstances might the immunity be overridden and where that occurs, what is the consequence, first in terms of the enforceability of an award and secondly what are the consequences for the arbitrator? Does the arbitrator forfeit his entitlement to his fees and expenses? Could an arbitrator acting in bad faith be held accountable for any of the consequences of so acting, and if so how extensive would that liability be? Would it extend to the costs of the parties thrown away in the action or perhaps go even further to cover economic loss due to the failure to bring about closure? Apart from removal, what other consequences might flow from an arbitrator being removed on the grounds of bad faith? Recent judgements concerning construction adjudication, both in the UK and in Australia, throw some more light upon these questions.

Clause 29 Immunity of Arbitrators. DAC 1996.

> *131. Although the general view seems to be that arbitrators have some immunity under the present law, this is not entirely free from doubt. We were firmly of the view that arbitrators should have a degree of immunity, and most (though not all) the responses we received expressed the same view.*
>
> *132. The reasons for providing immunity are the same as those that apply to Judges in our Courts. Arbitration and litigation share this in common, that both provide a means of dispute resolution which depends upon a binding decision by an impartial third party. It is generally considered that an immunity is necessary to enable that third party properly to perform an impartial decision making function. Furthermore, we feel strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined. The prospect of a losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of that party is one that we would view with dismay. The Bill provides in our view adequate safeguards to deal with cases where the arbitral process has gone wrong.*
>
> *133. This is a mandatory provision. Given the need and reason for immunity, it seems to us to follow that as a matter of public policy, this should be so.*

[27] See ***Sutcliffe v Thakarah*** [1974] 1 All E.R. 859; ***Arenson v Cacson*** [1975] 3 All E.R. 901. See ***Finnegan v Allen*** [1943] 1 All ER 493 [1943] KB 425 on the immunity of expert valuers. An arbitrator may be given the power to act as a valuer. See however **Sirros v Moore** *[1974] 3 All ER 776, [1975] QB 118* which affirms that the immunity derives at the outset by appointment as an arbitrator.

[28] ***Garnett v Farrand*** (1827) 6 B&C 611 [1824-34] All ER 244; ***Taafe v Downes*** (1813) 3 Moo PCC 36

134. The immunity does not, of course, extend to cases where it is shown that the arbitrator has acted in bad faith. Our law is well acquainted with this expression and although we considered other terms, we concluded that there were unlikely to be any difficulties in practice in using this test: see, for example, ***Melton Medes Ltd v Securities and Investment Board*** *[1995] 3 All ER.*

135. Sub-section 29(3). There was a concern that if a provision such as this was not included, Clause 25, when read together with Clause 29, could be said to preclude a claim against an arbitrator for resigning in breach of contract and similarly a defence (based on resignation) to a claim by an arbitrator for his fees, unless "bad faith" is proved.

136. Since the publication of the final draft of the Bill, we have concluded that the Court should be given power to remove or modify the immunity as it sees fit when it removes an arbitrator. We consider this further in Chapter 6 below.

Setting aside an award and removal of an arbitrator for serious irregularity : This is not the time or place for an extended discussion on the grounds for setting aside an award for serious irregularity or the grounds for the removal of an arbitrator, or to conduct a review of case law in that regard, but a brief reminder of the statutory regime sets the scene for consideration as to what additional recourse might be had against the arbitrator. The text of **S24 : Arbitration Act 1996, Power of court to remove arbitrator**. is set out above.

S64 Arbitration Act 1996. Recoverable fees and expenses of arbitrators.

64(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

64(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)-

(a) determine the matter, or

(b) order that it be determined by such means and upon such terms as the court may specify.

64(3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

64(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

Challenging the award: serious irregularity.

68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;
(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

68(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-
(a) remit the award to the tribunal, in whole or in part, for reconsideration,
(b) set the award aside in whole or in part, or
(c) declare the award to be of no effect, in whole or in part.
The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

68(4) The leave of the court is required for any appeal from a decision of the court under this section.

The case law to date.

Wicketts v Brine Builders & Siederer* [2001].**[29] This case concerned an application for an order under s24(1) Arbitration Act 1996*** for the removal of Mr. Siederer as arbitrator and the grounds set out in ss4(1)(d) namely *'That he has refused or failed (i) properly to conduct the proceedings, or (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.'*

The court took notice of the overriding principles set out under s1 Arbitration Act 1996, namely that *'The provisions of this Part [which is Part 1 of the 1996 Act] are founded on the following principles and shall be construed accordingly...'* with specific reference to subsection (a) namely *'The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal, without unnecessary delay be expense .. ' a*nd of the arbitrator's duties set out in s33(1) Arbitration Act 1996, to the effect that *'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'*

The complaint related to an application to the tribunal for security of costs and peremptory orders. The applicants complained that they had suffered delay and incurred additional costs arising in connection with the failure of the arbitrator to adopt suitable procedures and asserted that the arbitrator failed to understand and apply properly his powers in relations to sections 38(3) and 40 of the Arbitration Act.

Wicketts had accused the arbitrator of spinning out the proceedings and allowing the respondent to conduct his case in such a way, such that costs were through the roof and rising and made it clear that he considered the arbitrator was negligent and incompetent, and that he might well take action against him or make complaint against him.

The arbitrator observed that Wicketts was not so clever having gone through three sets of solicitors. Wicketts responded that that was because they had all advised him that the arbitrator was mis-conducting the proceedings. The arbitrator took all this as a threat and advised the other party that this amounted to grounds to overturn any award he might produce on the grounds that it was procured by undue pressure / influence. The parties then unsuccessfully attempted a compromise settlement.

[29] ***Wicketts v Brine Builders & Siederer* [2001] App.L.R. 06/08.**

The following day Brine asked for an adjournment on health grounds. Wicketts objected. The arbitrator initially ignored the application for adjournment and tried to get the parties to deal with the terms of an amended agreement. They refused and insisted on moving to the central issue once submission of evidence was complete.

The arbitrator wrote the next day and directed the parties that should they broker a settlement a draft should be sent to him for approval, instructions on any payment provisions that might go in the settlement including apportionment of the costs of the arbitration and detail arrangements for payment of the arbitrator and directed that no payment could be made until his (the arbitrator's) fees had first been paid. The arbitrator subsequently itemized his bill to date, plus VAT totaling in excess of £20K.

Following a renewed application for security of costs, the arbitrator wrote stating that because of the failure of the parties to fully comply with requests for interim payments of his fees on account, which could indicate that the parties were experiencing financial difficulties and stated that he was minded to direct that both parties provide reciprocal security for the costs of the other party, on the basis of joint and several liability. He subsequently wrote suggesting each party could deposit £13K as an indication of good faith. Brine indicated that they would send a cheque, post dated for 7 days and conditional on the Wicketts doing the same. Wicketts declined.

The arbitrator then informed the parties that he would issue peremptory orders for both parties to provide £30K security of legal costs and an additional £26K security to cover the arbitration fees.

Pending the hearing of an application for removal, pursuant to s24(3) Arbitration Act 1996 the arbitrator decided to plough on, and attempted to set up a hearing. This led to an application for a restraining injunction. At the hearing the arbitrator agreed to an adjournment. After the application for removal, the arbitrator had ordered that a supplemental witness statement be received as evidence despite the absence of any opportunity for Wicketts to challenge the evidence. The arbitrator also permitted Brine to quantify a previously un-quantified counterclaim.

Having noted that the first order was not requested by either of the parties and thus none of the arbitrator's business, His honour Judge Seymour concluded that the second order had no legal foundation. The arbitrator had no perception of his proper functions and duties and was duly removed. This was all without considering events subsequent to issue of the orders. The court capped his fees at £10K.

One might think that in the circumstances the arbitrator was lucky to get what he did. The value of the claim was only £60K. The parties must have run up massive legal expenses. The entire affair had been extremely protracted and at the end of it all they still had no resolution. Nonetheless, the arbitrator received some remuneration (*albeit that the costs of the removal hearing would make a big dent in that sum*) but the parties were left with no recovery for the costs and consequences of the arbitrator's incompetence and inability to manage the arbitration. This is hardly surprising since compensation had not been asked for, no doubt because in the light of the "*section 29 Arbitration Act immunity*" provision, it was felt that such an application would not be appropriate. Furthermore, it is no doubt for this very reason that there is virtually no case law on the broader implications of breach of the "***good faith***" exception to immunity to date.

Rankilor & Perco v Igoe [2006].[30] This case concerned two enforcement actions (1) for monies due pursuant to an adjudicator's decision and (2) payment by the losing applicant for an equal share of the adjudicator's fee. Perco had been retained to carry out boring works. The boring machine failed to bore out one area and took additional time to bore out another. The contract was terminated and traditional excavation methods adopted using an alternative contractor. Due to insufficient data on ground conditions, the contractor had undertaken to carry out the work within 10 days on the basis of normal ground conditions, excluding liability for delay or inability to bore if he encountered unexpected ground conditions.

The client's view was that he had tendered out for boring through clay. The ground was clay and thus there was nothing unexpected about the ground conditions. The problem was due either to worn out boring machinery or inexperienced operators. The contractor's case was that the ground conditions were not

[30] ***Rankilor (1) & Perco Engineering Service Ltd (2) v Igoe (M) Ltd*** [2006] Adj.L.R. 01/27

normal and prevented the machine functioning or functioning properly. Paperwork established that the boring machine was only 18 months old.

The adjudicator found that the ground conditions were unexpected. This decision was reinforced by his conclusion about why the boring equipment did not perform effectively, which he reached by relying on his own geological expertise. This view differed from that of the claimant and the defendant. The defendant asserted that he has been deprived of an opportunity to address this latter issue which was not canvassed in the adjudication.

The court found that the claimant in the adjudication (here the defendant) had failed to prove his case viz. normal conditions. Whilst the contractor's theory as to the cause of the loss differed from that of both the client's expert and also the adjudicator's alternative explanation (adduced from technical reports of both parties), the adjudicator was entitled to conclude that the conditions were unexpected.

The adjudicator did not have to share all provisional views with the parties. The parties between them had raised all the technical data relied upon by the adjudicator. The defendant had chosen to rely on a bold assertion that the ground conditions were normal, without adducing any proof. He had failed to prove that the machine was defective or adduce evidence of incompetence. He did not adduce any evidence as to why the machine was ineffective. That was his choice. He was not obliged to do so, but a failure to do so meant that the adjudicator was left to reach his own preliminary conclusions. These conclusions were not at odds with the evidence. Accordingly there was no breach of the rules of natural justice. Both of the adjudicator's decisions were accordingly enforced.

What is of interest to us here is the penultimate paragraph of His Honour Judge Gilliland's judgment :-.

33 *Perco is in my judgment entitled to enforce Dr. Rankilor's decision and it must also follow that Dr. Rankilor is entitled to recover the half share of his fee from Igoe. In the circumstances, I do not need to consider Dr. Rankilor's claim that even if his decision had been vitiated by a breach of the rules of natural justice, he would still have been entitled to recover his fee under the terms of the adjudication contract which had been entered into. It is,* ***I must say, a surprising submission that if an adjudicator's decision has been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, that the adjudicator should nevertheless be entitled to claim payment for producing what was in fact a worthless decision*** *without even any temporary binding legal effect. I prefer however to leave that question for determination in a case where it is necessary to do so. The present is not such a case.*

Whilst the problem under discussion is thus alluded to, no further enlightenment on what the answer might be is provided by the judgment. It is nonetheless a clear invitation for a future frustrated party to an ineffective arbitration or adjudication to seek to recover costs thrown away and to withhold fees.

Paul Boardwell v k3D Property Partnership Ltd [2006].[31] The court found that the adjudicator had failed to consider a substantial part of the defence submission on the grounds that it concerned a counterclaim beyond his jurisdiction. The adjudicator should in fact have dealt with the information to the extent that it also amounted to a defence, whilst excluding the counterclaim element, which in any case was un-quantified at that time and incapable to resulting in an award. The adjudication decision included a statement to the effect that whilst only a limited number of matters were addressed by the decision all other matters had been considered. The court held that the catch all phrase *"all other matters had been considered"* was insufficient to establish that this was in fact the case.

His Honour Judge Raynor noted that the adjudicator intended to pursue an action for outstanding fees and remarked in an aside that the "***Rankilor***" effect might come into play, with clear reference to paragraph 33 set out above, in that the adjudicator would be pursuing payment for a service that had in the event no value to the defaulting parties. It is not known where events went thereafter.

[31] ***Paul Boardwell v k3D Property Partnership Ltd*** [2006] Adj.C.S. 04/21. Paul Newman's commentary on this case, where an application for summary enforcement was refused, is set out above.

Timwin v Facade [2005].[32] A contractor (T) / subcontractor (F) construction variations payment dispute was submitted to adjudication. Timwin's response to a payment application was to assert that the variation payments were for works under the contract, that there had already been an overpayment due to duress and asserted a damages claim for delay. Façade's submission to the adjudication sought to demonstrate that clause 7 of the contract (which required written, valued instructions for all variations, in the absence of which the variation would be at the subcontractor's risk) had been waived in that there had been written instructions about many of the variations and promises to pay. Timwin sought to rebut these assertions.

The adjudicator went about the issue a different way. McDougall J found that he had ignored the submissions of both parties and instead found for Façade on the basis that any work done which the contractor had not demonstrated to be within the scope of the works was a variation for which payment was due. This was not an argument explored by the parties in their submissions or responses.

The issue before the court was *"whether the adjudicator, in the way that he dealt with the defence to the payment claim based on the assertion that the variations "**are amounts that should have been carried out pursuant to the contract**", attempted in good faith to exercise the powers given to him by the Act."*

In ***Brodyn v Davenport*** [33] Hodgson JA having canvassed the concept of good faith within the context of ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147, concluded that the payment legislation mandated *"a bona fide attempt by the adjudicator to exercise the relevant power …* " accorded to him by that legislation. He concluded that where an adjudicator does not fulfill the statutory requirements the decision will be deemed invalid. Whilst ***Brodyn*** established that judicial review is not the appropriate mechanism for challenging payment adjudication procedures in New South Wales it nonetheless made it clear that there are mechanisms to set aside an invalid decision and render it unenforceable. The following extract from McDougall's judgment in ***Timwin*** develops the concept of good faith further :-

38 *There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in **Brodyn.** Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in **Roberts v Hopwood** [1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

39 *That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see **Zhang v Canterbury City Council** (2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

40 *As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in **The Queen v Hunt; ex parte Sean Investments Proprietary Limited** (1979) 180 CLR 322 (Mason J) and in **Evans v Marmont** (1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq).*

[32] ***Timwin Construction P/L v Facade Innovations P/ L*** [2005] NSWSC 548. 1st June 2005. Whilst an appeal appeared to be pending against McDougall J's judgement, there is no report of progress to date. However in the interim period, the ***Timwin*** test has been applied on a number of occasions. See ***Fifty Property Investments P/L v Barry J O'Mara*** *[2006] NSWSC 428;* ***Springs Golf Club P/L v Profile Golf P/L*** *[2006] NSWSC 344;* ***Pacific General Securities Ltd v Soliman & Sons P/L*** *[2006] NSWSC 13;* ***De Martin & Gasparini P/L v State Concrete P/L*** *[2006] NSWSC 31;* ***Tolfab v Tie*** *[2005] NSWSC 326;* ***Glen Eight v Home Building*** *[2005] NSWSC 907;* ***Reiby Street Apartments v Winterton Constructions*** *[2006] NSWSC 375;* ***Lanskey v Noxequin*** *[2005] NSWSC 963;* ***Shellbridge P/L v Rider Hunt Sydney P/L*** *[2005] NSWSC 1152;* ***Holmwood Holdings P/L v Halkat Electrical Contractors P/L*** *[2005] NSWSC 1129;* ***Energy Australia v Downer Construction (Australia) P.L*** *[2006] NSWSC 52.*
At an interlocutory appeal ***Facade Innovations P/L v Timwin Constructions P/L*** *[2005] NSWCA 197* the court of appeal ordered that Order 3 made by McDougall J on 1 June 2005 in proceedings 55035/05 for payment out to Timwin of money paid into court be stayed until the judgment entered in favour of Facade in 11729/05 had been set aside. Nothing in the interim judgment however detracts from the validity of the ***Timwin*** test.

[33] ***Brodyn v Davenport*** *[2004] Adj.L.R. 11/03*

41 *In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.*

42 *It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.*

43 *I therefore conclude that the adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was.*

His Honour continued

49 *I am conscious that the question of (in effect) attempting in good faith to exercise the power given by the Act has not been the subject of prior judicial exposition. However, the relevant question is one that was argued for the direct benefit of Façade and not merely as a service to the industry. In those circumstances, I see no reason why the usual order for costs should not be made.*

50 *Façade also asked that I make an order referring the matter back to the adjudicator to be dealt with according to law. I do not propose to do so, in circumstances where the time for the making of a determination has long since expired and where Façade's rights are preserved under s 26 of the Act. In that context, and unless it is not crystal clear, I should say that the view to which I have come has nothing to do with the merits of the case, and does not prevent the present or any other adjudicator from determining a further adjudication application, based on the same payment claim, according to law.*

Whilst it is to be noted that ***Timwin*** does not and could not have dealt with the liability of the adjudicator for costs thrown away, what it does do is to throw some light upon what "***good faith***" involves. The implication is that it is not restricted to "***bad faith***" but embraces a failure to fulfill or comply with the statutory duties that one has voluntarily undertaken by accepting a public or private appointment. Australia has taken the lead on the development of jurisprudence in relation to good faith generally. Thus ***Zhang v Canterbury City Council,*** noted in ***Brodyn*** above, concerned the duties of a planning tribunal which pursued its own policy agenda against prostitution, un-related to the criteria for planning permission. Whereas "***misconduct***" by an arbitrator provides grounds for setting an award aside and for the removal of an arbitrator, the court both at first instance and on appeal in ***Sea Containers v ICT*** [34] went one step further and adopted a robust view to the misconduct of arbitrators who were more concerned with securing their fees than the business at hand and deprived them of the very fees they had been so anxious to ring-fence. Even so the arbitrators escaped any further liability for the legal costs incurred by the parties.

Traditionally the status of good faith agreements has been considered to be extra-legal, equating such commitments as promises to do something ***in good faith,*** the absence of which has no legal repercussions, since there is no intention to be legally bound by the promise. There is however a leap of logic in such a conclusion. Whilst it would be a contradiction in terms to force parties to agree and thus comply with an agreement to agree, as per ***May v Butcher*** [35] and ***Walford v Miles,***[36] it does not follow that the parties intended the undertaking to be optional. After all, it is possible to measure the extent to which the parties have or have not complied with the undertaking. This has been acknowledged already to the limited extent that the courts are prepared to stay court action pending participation in settlement negotiations, whether the parties have contractually committed themselves to do so, or indeed where the court considers that it would be beneficial for the parties to do so. It is not uncommon in US jurisdictions for the court to require a mediator to submit a report to the court, detailing the extent of participation in the mediation process of both

[34] ***Sea Containers v ICT*** *[2002] NSWSC 77 : NSWCA 84*
[35] ***May v Butcher*** *[1929] ADR.L.R. 02/22*
[36] ***Walford v Miles*** *[1992] 2 AC 128*

parties, recording both attendance and the level of co-operation, noting any refusal to put forward a case or to otherwise actively engage in the process. Such conduct, it is submitted, amounts to a failure to do that which one has undertaken to do and would fit within the ***Timwin*** definition of an absence of "***good faith***".

Immunity is important to guard against behaviour that might prejudice the ability of an adjudicator to act impartially. Nonetheless, Parliament has made it clear by inclusion of the absence of "***good faith***" exceptions that there is no intention to extend the blanket immunity enjoyed by the judiciary to arbitration or construction adjudication. Despite stout resistance from the professions, long standing immunities based on public policy are gradually being stripped away. The mere objection that it is difficult to strike the right balance between competing public and private interests is no longer sufficient justification for not providing a remedy for the consequences of professional incompetence, as demonstrated by ***Hall v Simons***,[37] so that today even lawyers can be held liable for incompetence in the presentation of a case.

The mere existence of professional accountability of the professional to a governing body is small comfort to those who have costs thrown away by incompetence. To place the risk of professional incompetence on the parties to carefully choose who they appoint is not realistic, since they have little scope to assess the risk beyond relying on the reputation of the professional body, which also enjoys immunity. Clearly, it would be unsatisfactory to expose an arbitrator to legal suit at the whim of any and every unsuccessful party. If such litigation were to amount to a retrial, that would be tantamount to by-passing the appeal process and afford the litigant another bite of the cherry. That cannot be the way forward. However, it is only through an action for professional incompetence that the parties can avail themselves of the protection provided by professional indemnity cover.[38] Thus it is inevitable that the courts will in due course have to develop a jurisprudence of accountability for arbitrators, adjudicators and mediators. Perhaps ***Timwin*** points the way, to higher premiums and consequently higher arbitration fees, if naught else.

Self assessment exercise

Given that the Arbitration Act 1996 accords immunity to an arbitrator in order to protect against duress and undue influence, to what extent, if at all, do you consider that the courts should take a proactive role in developing the arbitrator's liability for the consequences of acting in bad faith?

If the courts should do so, for what consequences should the arbitrator be held to account and what consequences, if any should not give rise to liability?

FURTHER READING

[37] ***Arthur J.S Hall and Co. v Simons*** *[2000] UKHL 38*

[38] ***Ryman v Ontario Association of Architects*** *[1998] Canada Ontario Court, General Division, per Southey, Chilcott & Pardu JJ. 16th March* where the court held that professional indemnity cover extended to liability for losses arising from incompetence of an arbitrator.