CHAPTER SIX

JURISDICTION OF THE TRIBUNAL

ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

The Arbitration Act 1996		*The Model Law*
	Jurisdiction of the arbitral tribunal	
30.	Competence of tribunal to rule on its own jurisdiction.	Art 16(1)
31.	Objection to substantive jurisdiction of tribunal.	Art 16(2),(3)
32.	Determination of preliminary point of jurisdiction.	

CONTENTS

JURISDICTION

Jurisdiction in arbitration and adjudication compared.

CRYSTALLISATION OF A DISPUTE & THE MEANING OF "A DISPUTE".

Open and closed adjudication and arbitration.

PRELIMINARY OBJECTION TO JURISDICTION BEFORE THE TRIBUNAL

Jurisdiction of the Court over Jurisdiction in Consumer Arbitration.

CHAPTER SIX

JURISDICTION

The source of jurisdiction of the arbitral tribunal flows from the agreement of the parties, not from statute. The Arbitration Act 1996 is silent on the right to refer a dispute to arbitration, though it has much to say about the arbitral process itself and the respective rights and duties of the parties to an arbitration agreement. The ability to refer a dispute to arbitration epitomizes the autonomy of parties to a dispute to determine the mechanism by which that dispute should be resolved.[1] Compare the jurisdiction of a construction adjudicator under **s108 Housing Grants Construction and Regeneration Act 1996,** which states that every relevant construction contract **"***shall (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication."* There is an artificial form of party autonomy here, in that whilst the parties have some limited influence over the shape of adjudication proceedings, providing they comply with the minimum requirements of the statute and the scheme, the agreement does not arise out of consensus, since the statute mandates an adjudication agreement.

The key to the significance of an arbitrator's jurisdiction lies in the enforceability of the award, which is governed by **s66 Arbitration Act 1996** for domestic awards and **sections 100-103** for international awards. The English Courts now adopt a hands off but supportive stance towards arbitration. Their approach to post award challenges to the process, in respect of jurisdiction, due process and appeal on a point of law, is equally robust. Similarly, the key to the validity of the adjudication process is based on its enforceability, which was soon confirmed after the HGCRA came into force in 1998 by ***Macob v Morrison*** [1999],[2] where it was held that a stay of enforcement proceedings in support of the decision of the adjudicator would not be granted. The party who had been awarded against on a preliminary claim sought to avoid payment pending arbitration and claimed procedural irregularity. The court held he should pay then seek to recover the monies by arbitration. In the absence of any irregularity in the adjudication process the only exception to enforceability is where issues of insolvency are raised. Thus, in ***Straume v Bradlor*** [1999][3] it was held that an applicant for adjudication had to apply for permission to the court to start adjudication proceedings if the other party was in administration within the meaning of the **Insolvency Act 1986**.

In both arbitration and adjudication a default award or decision is permitted where a party refuses to take part in proceedings.[4] There are great risks involved in non-participation since in the event that the tribunal is judged to have been seized of jurisdiction the refusing party will have forgone the opportunity to mount a defence and will lose by default. An assertion that the party was deprived of an opportunity to put his case is not tenable since there was an opportunity to do so, but the party chose not to avail himself of it.

In the event that a dispute arises as to what, if anything at all, has been referred to arbitration the question as to "***Whether or not the arbitrator has jurisdiction?"*** falls to be resolved. In essence it is a dispute about a dispute. Chapter Two above discussed arbitration agreements in detail and examined the importance of clarity and conciseness in the drafting of arbitration clauses to minimize the risk and expense involved in jurisdiction disputes. Here, the discussion is limited to examining what jurisdiction is and the respective powers of the court and the tribunal to settle jurisdiction disputes. At the outset two terms require defining, firstly, ***"What is a dispute?"*** since it is axiomatic that in the absence of a dispute there is nothing for the arbitrator to settle and thus to have jurisdiction over and secondly ***"What is involved in the concept of jurisdiction?"*** **S82 Arbitration Act 1996** briefly addresses both under the heading of **"Minor definitions."**

S82 Arbitration Act 1996 "Minor definitions

> *82(1) In this Part-*
>
> *"**dispute**" includes any difference;*
>
> *"**substantive jurisdiction**", in relation to an arbitral tribunal, refers to the matters specified in s30(1)(a)-(c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.*

1 S1 Arbitration Act 1996
2 ***Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] EWHC TCC 254***
3 ***Straume Ltd v Bradlor Dev. Ltd [1999] CILL 1520***
4 S41(4) Arbitration Act 1996

The matters referred to in s30(1)(a)-(c) are:-

> *(a) whether there is a valid arbitration agreement,*
> *(b) whether the tribunal is properly constituted, and*
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*

Prior to the Arbitration Act 1996 questions about the jurisdiction of an arbitrator were the exclusive reserve of the court. In addition, if it was determined that the parties were not in dispute over the matter referred to arbitration, the court retained jurisdiction over all other matters by virtue of s1 Arbitration Act 1950. The Model Law adopted the German concept of ***Kompetenze – Kompetenze***, that is to say the arbitrator is competent to rule upon his own competence (i.e. jurisdiction). Gradually thereafter a perception developed that the costs and delays inherent in applying to the courts for rulings on jurisdiction encouraged defendants to engage in filibustering techniques and attrition in order to wear their opponent down and that the London Arbitration centre was losing business to new arbitral centers operating under the Model Law regime. In order to address this, the Arbitration Act 1996 adopted the Model Law concept. The contrary argument that arbitrators would be inclined to find that they had jurisdiction, since it accorded with their vested interests by securing their employment, was outweighed by the need to promote efficiency and cost effectiveness.

Ironically, there was a strong perception that prior to the Act many judges had equally been unsympathetic to arbitration as something done by less qualified individuals than themselves and by leaning against arbitral jurisdiction they favoured and thus protected the status, position and work load of the judiciary to the detriment of party autonomy and the arbitral community. It is perhaps a mere coincidence that the changing legislative regime occurred at a time when the Government was seeking to promote alternatives to court settlement as a way of reducing work loads and financial pressures on the court system, albeit in the name of client care, wider service provision and autonomy.

Jurisdiction in arbitration and adjudication compared.

The contrast between arbitration and construction adjudication could not be greater. The construction adjudicator does not enjoy statutory jurisdiction over jurisdiction,[5] though it is possible for the parties to give the adjudicator jurisdiction in advance of,[6] or even during the course of the adjudication process.[7] Rather, jurisdiction is a matter to be dealt with by a judge during enforcement proceedings or at an earlier stage if a party seeks a declaration as to jurisdiction. All that is left for the adjudicator is to receive submissions on jurisdiction and to decide whether or not he believes that he has jurisdiction and thus whether or not it is in the best interests of the parties (*as opposed to the objecting party*) to continue with the process. If he determines that it is not in their best interests he has the option of asking the parties to expressly confirm jurisdiction of resigning or alternatively of resigning. Even where the parties give the adjudicator the power to determine his jurisdiction, the question still arises what the consequence of him getting it wrong is. The basic concept of adjudication is that the adjudicator's decisions are enforceable, even if wrong, on the basis of temporary finality.[8] The court will enforce the decision pending final determination by a subsequent court of tribunal. Does this apply to jurisdiction? One view is that it does.[9] Thus if the question related to scope of the agreement the decision may not be a problem. The other is that it does not. [10] Thus a decision that an activity was within the remit of the HGCRA if incorrect would not be enforceable. Thus both may be correct, depending upon what the question of jurisdiction turns.

5 ***Thomas-Fredric's (Construction) Ltd v Wilson [2003] EWCA Civ 1494***

6 i.e. in the construction contract.

7 ***Watson Builders Service v Millers [2001] Outer Ct of Session; Whiteways Contractors v Impresa Castelli [2001] 75 Con LRHT 00/199;*** **Nolan Davis Ltd v Steven P Catton (No1) [2000] EWHC 590 ;**

8 ***Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] EWHC TCC 254***

9 ***LPL Electrical Services Ltd v Kershaw Mechanical Services [2001] HT 00/427; Whiteways Contractors v Impresa Castelli [2001] 75 Con LRHT 00/199***

10 ***Bryen & Langley v Boston [2004] EWHC 2450***

S30 Arbitration Act 1996. Competence of tribunal to rule on its own jurisdiction.[11]

> *30(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-*
> *(a) whether there is a valid arbitration agreement,*
> *(b) whether the tribunal is properly constituted, and*
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*
>
> *30(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.*

Article 16. Model Law. Competence of arbitral tribunal to rule on its jurisdiction

> *16(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

Whilst the separability of the validity of the arbitration agreement from that of the contract is dealt with by **s7 Arbitration Act 1996** it is integrated into **Article 16 Model Law**. The effect is the same.

Clause 30 Competence of tribunal to rule on its own Jurisdiction. DAC. 1996.

> *137. This Clause states what is called the doctrine of "Kompetenz-Kompetenz". This is an internationally recognized doctrine, which is also recognized by our own law (eg **Christopher Brown v Genossenschaft Osterreichlischer Waldbesitzer** [1954] 1 QB 8), though this has not always been the case.*
>
> *138. The great advantage of this doctrine is that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal. Clearly the tribunal cannot be the final arbiter of a question of jurisdiction, for this would provide a classic case of pulling oneself up by one's own bootstraps, but to deprive a tribunal of a power (subject to Court review) to rule on jurisdiction would mean that a recalcitrant party could delay valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction.*
>
> *139. The Clause and the following Clause are based on Article 16 of the Model Law, but unlike that model we have not made this provision mandatory so that the parties, if they wish, can agree that the tribunal shall not have this power. We have also spelt out what we mean by `substantive jurisdiction.'*

The validity of the arbitration agreement. For public policy reasons the subject matter of a dispute that can be submitted to arbitration is restricted by law. What can be arbitrated varies from country to country. Criminal matters cannot be arbitrated since the state has a vested interest in its outcome. The scope of the criminal law differs from state to state. Certain civil arrangements are governed by state law, such as marriage and divorce, so that it is not possible under English Law to arbitrate a divorce or the division of matrimonial property. The basic rules regarding formation of an enforceable agreement apply equally to the valid formation of an arbitration agreement, namely offer, acceptance, consideration, privity, legal capacity and the incorporation of terms. **S6(2) Arbitration Act 1996** confirms that an arbitration agreement in other documents can be validly incorporated by reference.

The proper constitution of the tribunal. This is a question firstly as to whether the appointment rules set out in the contract,[12] and secondly as to whether or not the default rules in the constitution of the tribunal,[13] have been complied with.

The scope of the arbitration agreement. This concerns two separate concepts, firstly what is within the

[11] ***London Borough of Lewisham v. Shephard Hill Civil Engineering Ltd [2001] WL 825511 (QBD (TCC)) ; Azov Shipping Co. v. Baltic Shipping Co.*** *[1999] 2 Lloyd's Rep. 39*

[12] See Chapter 2 above.

[13] See Chapter 4 above.

scope of the agreement,[14] and secondly whether or not a dispute has crystallised that is capable of being referred to arbitration. It is this second issue that falls to be discussed here.

CRYSTALLISATION OF THE DISPUTE & THE MEANING OF "A DISPUTE".

Adjudicators, arbitrators and judges do not have free reign to consider any issue or area of law that they or a party appearing before them wishes, unless the issue or legal aspect is directly related to the dispute (*if any)* that has been validly referred to the tribunal. The danger is that the other party may be subject to a litigation ambush is that matters that they were not aware of are made the subject matter of litigation. This goes to the root of the concept of natural justice and the right to know the case against you and to be afforded the opportunity to prepare a defence in advance of the trial, be it in respect of an entire issue or a part of another issue that has been validly referred. It is an abuse of process to litigate where there is no dispute, since it results in wasted costs and time for the tribunal and the other party. Similarly, there are rules on the admissibility of late evidence and jurisdiction over the late submission of counter-claims and additional grounds.[15]

The principal question that falls to be answered here is "**What is a dispute?"** The leading case is ***The Halki,***[16] which involved an application for a stay to arbitration under **s9 Arbitration Act 1996** from an action for summary judgment of sums said to be due under a contract. The applicant for summary judgement asserted that there was no arguable defence to the claim, that the applicant had a right to be paid and hence there was no dispute. The Court of Appeal held that there was a dispute as to whether or not there was a right to payment, albeit that it was one that would not take long to answer assuming the issue was as cut and dried as the applicant asserted. That dispute could and should be decided by the tribunal. Accordingly the application for a stay was granted.

The question of whether or not dispute has crystallised take on even greater significance in relation to adjudication because of the tight time scales within which the process operates and the statutory framework which requires a notice and a referral document. It is essential here that a dispute has crystallised before the notice is issued. The difficult question to answer is at what stage does the talking end and a dispute begin, particularly where one of the parties does not respond to communications or engages in delaying tactics? Linked to this is the question whether or not a claim has been asserted that is capable of being responded to.

What then is a dispute, does it include a claim, and if so what amount to a claim in relation to a contract? Does it include claims made under and sanctioned by the contract or is it something more formal such as that recorded on a Statement of Claim/Claim Form? A civil dispute arises when one party asserts a legal entitlement (founded in tort or contract etc) to something, be it a right to damages/compensation, goods, services or the commencement of a process such as valuation or certification and the other party either denies that assertion or fails to respond within the requested time scale (if any), the contractually specified time or within a reasonable period of time for a considered response to be delivered, thereby demonstrating that preliminary discussions are at an end and a dispute has consequently crystallised. What is being asked for must be clear and specific or determinable by application of a formula.

Frequently the assertion is in the form of a demand for payment of a sum of money. The demand may be expressed as a claim for money but does not have to be headed "***Statement of Claim/Claim Form"*** etc (*unless the contract specifies a particular form*) provided the request for payment is clear and unambiguous. An inquiry is not a claim. In order to amount to a demand there is no requirement that it be a claim in court.

All disputes have two elements, namely entitlement and quantum though it should be noted that there may be no dispute about a particular element, as in either *"provided there is entitlement, we accept £5,000 is due"* or *"we accept that there is entitlement but only admit to £1,000"*. It is also possible to ask for a ruling on entitlement, leaving it to the parties to settle quantum on an amicable basis, a practice common in the US.

[14] See Chapter 2 above.

[15] See Chapter 7 below regarding the management powers and duties of the tribunal.

[16] ***The Halki*** [1997] 1 Lloyd's Law Reports, 49 (QBD) ; ***Halki Shipping Corporation v Sopex Oils Ltd [1997] EWCA Civ 3062.*** Note that **s82 Arbitration Act 1996** confirms that a dispute includes a difference. Cf ***F&G System v Fine Fare*** [1962] and affirming Savill J's ruling in ***Hayter v Helson*** [1990].

Not all claims are valid. The mere fact that a claim ultimately proves to have been invalid does not prevent a dispute arising, rather the dispute becomes one of entitlement, i.e. whether or not the claim is valid becomes the crux of what falls to be determined. Frequently the entitlement dispute will centre on whether or not a certificate or evaluation was accurate or alternatively whether the claimant was entitled to receive a certificate or evaluation. Depending on the outcome of that element of the dispute, the second element, namely quantum will or will not then fall to be determined, though if the question is whether a certificate or evaluation is due under the contract, then the contract procedure may require the certificator or evaluator to do that job so that the adjudicator has no more to do at that stage. It is now clear that an adjudicator has jurisdiction to open up and re-determine certifications and evaluations, but the adjudicator must be asked to do so by the claimant.

The factors that determine whether or not a claim is valid are many and varied :

- Was there a contract? If not there may be no claim or at best an accounting for undeserved benefit
- Entitlement may be subject to the fulfilment of contract procedures such as
- the occurrence of some event – often by an outsider, time or date requirement, time bar,
- a variation order,
- certification and passage of specified time post certification,
- application for payment etc in the manner specified by the contract including passage of time post application,
- failure to issue a withholding notice, passage of time if any post failure to issue, reckoned from due date of payment etc and
- proof that the sum claimed has been earned in accordance with contract specifications. This may not in fact be a distinct and separate issue from the above since the absence of a certificate may well indicate that no service or benefit has been rendered, or alternatively has become due under the contract.

The scope of the dispute thus referred is another matter. Much may depend on whether the dispute concerns an interim payment, a final payment or occurs at an even later stage. Whilst an arbitrator may seek to ensure that all disputes arising out of a contract are dealt with by the arbitrator and are within his jurisdiction, the jurisdiction of the construction adjudicator is limited by the terms of reference set out in the referral notice, to all matters relevant to that notice and no further in the absence of consent by both parties to broaden it out to include counter-claims on distinct and separate issues, though it is possible that a set off for outstanding prior sums owed by the claimant to the respondent may form part of the final accounting process in order to establish the sum due from one to another.

How workable is ***The Halki*** definition viz "*there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable.*"? There can be no dispute until the respondent has had sufficient opportunity to respond and either responds rejecting the claim, fails to pay on the due date for payment (if any), fails to issue a withholding notice where applicable under the contract mechanism, or fails to respond in a timely manner. The above interpretation makes no allowance for these factors.

In ***Beck Peppiatt Ltd. v Norwest Holst*** [2003]**,**[17] Mr Justice Forbes stated that *" for there to be a dispute for the purposes of exercising the statutory right of adjudication it must be clear that a point has emerged from the process of discussion or negotiation which has ended and that there is something which needs to be decided."* The value of this lies in that it goes to the root of whether or not there is sufficient time, within the construction adjudication process for the parties and the adjudicator to give due consideration to matters. It helps to eliminate the danger, inherent within the process, of ambush. However, in a simple dispute, by the time the respondent has submitted all his documentation, both parties may well have had sufficient time and similarly the adjudicator, and to stop the adjudication process on a technicality may serve very little purpose and merely force the parties to resubmit and go through the entire process. A judge requested to enforce a decision in such a situation may well be advised to consider whether or not justice is served by striking down an otherwise sound decision.

It is too simplistic to state that negotiations must always have come to an end, since the respondent may have tried to employ delaying tactics and half-heartedly engage in negotiations to buy time or wear the other

[17] ***Beck Peppiatt Ltd. v Norwest Holst Construction Ltd. [2003] EWHC 822 (TCC)***

party down by attrition. A negotiation in good faith or mediation clause cannot prevent a party referring a dispute to construction adjudication though a mediation clause as opposed to a good faith clause can give rise to a stay of arbitration or litigation. The fact that negotiations are underway demonstrates the existence of a dispute. A party can cut to the chase, bypass / truncate negotiations and call for an umpire. But preliminaries about a claim and reasonable time for consideration/evaluation of a claim must have passed.

In ***Edmund Nuttall v Carter*** [2002],[18] Seymour J stated that *"In my judgment a dispute is something different from a claim…While a dispute can be about a claim there is more to a dispute than simply a claim which has not been accepted….For there to be a dispute there must have been an opportunity for the protagonists each to consider the position of the other and to formulate arguments of a reasoned kind…"* This goes to the root of what is sufficient time to respond. It is a gloss – adding detail – useful where vast bundles of documentation are landed on an unsuspecting party or where no response can be delivered until an expert has had the opportunity to inspect works and do some valuation/accounting. On the other-hand, if the contract procedure lays down rules for response, such as issue of a withholding notice then it will not apply. Thus, the only *"opportunity"* will be that specified in the contract, not *"such reasonable opportunity"* as judged by a court.

As to the crystallisation of a dispute Seymour J observed *in* ***Durtnell v Kaduna*** [2003],[19] that *" …it is not easy to see how a dispute as to the entitlement to an extension of time could arise until …. The Architect had made his determination or the time permitted for so doing had expired….Until the Architect has made his assessment or failed to do so within the time permitted by the Standard Form, there is just nothing to argue about , no dispute"* This spells out the fact that entitlement is subject to the terms and procedures of the contract, something very relevant for instance to construction contracts but not applicable to a wide range of trade/maritime disputes.

In ***Amec Civil Engineering v Secretary of State for Transport*** [2004],[20] Mr Justice Jackson conducts an exhaustive review of the relevant cases and extracts seven proposition which are subsequently commented upon by Lord Justice Clarke in ***Collins Contractors v Baltic Quay.***[21]

53. *The remaining question which arises is whether there is a dispute which the parties have agreed to refer to arbitration. The clause is in wide terms. There is no doubt that if there is a dispute between the parties it is within the scope of the clause. In this regard we were referred to a considerable number of decisions on the existence or otherwise of a dispute in the course of oral argument yesterday. A number of different, and not entirely consistent, strands of thought can be discerned in them. There are, I think, a number of such strands.*

54. *In particular they include these:*

    (1) A dispute requires both a claim and a rejection ***Monmouthshire C.C v Costelloe & Kemple*** *[1977] 5 BLR 83.*

55. *(2) Such rejection is not necessary. As it was put by Templeman LJ in* ***Ellerine Brothers (Pty) Ltd v Klinger*** *at page 1381: "... it seems to me that ... if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say 'I don't agree'. If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."*

    That approach received support from the reasoning of the majority in ***The Halki.***

56. *(3) In* ***Fastrack Contractors Ltd v Morrison Construction Ltd & Anr*** *[2000] 1 BLR 168, HHJ Thornton QC sought to reconcile the above cases by deriving this principle at paragraph 27:*

    "A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

[18] ***Edmund Nuttall Ltd v R G Carter Ltd. [2002] EWHC 400 (TCC)***

[19] ***R. Durtnell & Sons Ltd. v Kaduna Ltd. [2003] EWHC 517 (TCC)***

[20] ***Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC) ;*** see subsequently ***Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291.***

[21] ***Collins (Contractors Ltd v Baltic Quay Management*** (1994) Ltd [2004] EWCA Civ 1757

57. *(4) In two cases, namely **Ken Griffin v John Tomlinson T/a K & D Contractors v Midas Homes Ltd** (unreported) 21st July 2000, and **Sindall Ltd v Solland & Ors** (unreported) 15th June 2001, HHJ Humphrey Lloyd QC introduced the notion that adjudication was intended to resolve what has not been settled by the normal process of discussion and agreement. In that regard he said in the **Ken Griffin** case that a dispute was not likely to be inferred. That approach was, at least to some extent, reflected in the decision of HHJ Seymour QC in **Edmund Nuttall Ltd v RG Carter Ltd** [2002] 1 BLR 312 and by Forbes J in **Beck Peppiatt v Norwest Holst** [2003] 1 BLR 316.*

58. *(5) There are cases in which a dispute has been held not to exist where one party has simply sought further information and not made a claim, or where the party has not given enough information to enable the other party to decide whether or not to admit the claim. Examples are **Cruden Construction Ltd v Commission for the New Towns** [1995] 2 Lloyd's Rep 387 per HHJ Gilliland QC and **Carillion Construction Ltd v Devonport Royal Dockyard** [2003] 1 BLR 79 per HHJ Peter Bowsher QC.*

59. *(6) In two cases, namely **Cowlin Construction Ltd v CFW Architects (A firm)** [2003] 1 BLR 241 and **Orange EBS Ltd v ABB Ltd** [2003] 1 BLR 323, HHJ Frances Kirkham, in careful judgments in which, as I read them, she referred to many if not at all the cases, recognised that they are not all entirely consistent and preferred the test in **The Halki** following the approach of Templeman LJ in **Ellerine v Klinger.***

60. *(7) After the conclusion of the argument, as promised by Miss Houghton, we were sent a copy of the decision of HHJ Moseley QC in **Lovell Projects Ltd v Legg and Carver** [2003] 1 BLR 452 which essentially followed **The Halki** in much the same way as HHJ Kirkham had done.*

61. *More importantly, we learned of a judgment of Jackson J delivered on 11th October 2004 in **AMEC Civil Engineering Ltd v The Secretary of State for Transport.** In the course of that judgment he considered many of the cases to which we have been referred, namely **Monmouthshire County Council v Costelloe, Tradax International v Cerrahogullari, Ellerine v Klinger, Cruden Construction Ltd v Commission for the New Towns, Halki, Fastrack Contractors Ltd v Morrison Construction Ltd, Sindall Ltd v Solland** and **Beck Peppiatt Ltd v Norwest Holst Construction Ltd.***

62 ***AMEC Civil Engineering Ltd v The Secretary Of State For Transport*** [2004] EWHC 2339 per Jackson J

"From this review of the authorities I derive the following seven propositions:

1. *The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*
2. *Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*
3. *The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.*
4. *The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.*
5. *The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.*
6. *If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.*

7. *If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."*

63. *For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.*

64. *It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J.*

Amec Civil Engineering Ltd v The Secretary Of State For Transport and **Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd** does little more than rehearse some of the central issues that had already been canvassed by previous cases in respect of what is a dispute. The seven points set out in ***Amec*** are broadly correct. The devil as always lies in the detail. The use of the word discussion (***Collins*** *64*) is unhelpful in that ***"to discuss"*** is not ***"to dispute"*** though note that it is used merely as indicative viz. ***"likely to be more consistent with."*** A heated discussion may possibly be synonymous with a dispute but a preliminary discussion certainly is not. "**C*rystallisation***" has become a useful term of art to indicate the stage when ***"discussions with dispute potential"*** break down and is to be preferred to the bland expression ***"absence of dispute"*** which could convey the impression that there is nothing to dispute.

Whilst some lists in judgements end up being treated as the definitive statement of the law, there is little specific or concrete enough about the meaning of a dispute in either dictum to usefully employ in an action, so future litigants are likely to resort to the detail of the plethora of dictum from which the reflections were drawn. The significance of ***Collins*** lies more in the question of forum than in respect of the existence of a dispute. The crucial distinction between ***Collins*** and ***Rupert Morgan v Jervis*** lies in the fact that the latter did not involve an arbitration clause. Even though in both cases there was no obvious defence to the claim, the claim was disputed in ***Collins***. In ***Rupert Morgan*** the contract permitted construction adjudication, in accordance with the HGCRA but the court had default jurisdiction since neither party had commenced adjudication and the employer did not dispute that the Interim Certificate had been issued by the Architect, thereby giving rise to a sum due under the contract. Hence, the court had jurisdiction to deliver a summary judgement on a ***"pay now, argue latter"*** basis.

In ***Collins***, a construction dispute should have been referred to arbitration pursuant to an arbitration agreement. The CA heard an appeal in respect of an application for stay of action. Neither party invoked construction adjudication. Collins asserted that there was no dispute. The court disagreed holding that the effect of ***Rupert Morgan*** was not to convert the claim into one for an undisputed sum of money due which would only be amenable to enforcement through the courts. A dispute existed which could only be settled, under the terms of the contract, by arbitration. Any other conclusion would result in rendering arbitral awards unenforceable, the exact opposite of the objective of the Arbitration Act 1996. The dispute was thus deferred to arbitration, albeit that the only obvious defence was a questionable reliance on a mere technicality, in that a claim had the "wrong" heading and was submitted outside a specified 14 day period. The court considered that it was not an insuperable task to overcome these defences and felt that this was a matter that could be quickly dealt with by an arbitrator, perhaps by issuing an interim award. Hence, there was no real danger of the claimant being kept out of funds for any undue period of time. The granting of a stay of action would not impede justice.

No doubt there will be further attempts to produce a definitive judicial definition of what is a dispute that might serve for all purposes, but I doubt that that it is possible to do so. Each case will fall on its special facts

and since new situations will always arise, so further glosses on the general rules can be anticipated. Furthermore, we can rely on the good offices of novel contract draftsmen, to provide the opportunity and need for further judicial elucidation. With a revised version of the HGCRA Adjudication process waiting in the wings, the scope for judicial activity extends even further over the horizon.

Open and closed adjudication and arbitration.

To what extent if at all is it possible for the referring party to case manage their disputes by closely prescribing in advance the remit of an arbitration or adjudication, to prevent the process from growing like ***Topsy*** into massive, uncontrollable proportions with consequent cost and time implications which could potentially deprive the parties of any realistic sense of proportionate justice? Beguiling as the prospect might at first blush appear, are their any hidden dangers to such an approach and in what circumstances, if any might such an approach work? There are two distinct aspects to this concept. The one involves the extent to which an applicant is able to prescribe the scope of a dispute, which is inextricably linked to the question of "***What is a dispute,***" the other, the role of the adjudicator/arbitrator/judge in case managing the proceedings.

The Submission Process : The drafting of the notice of intent to adjudicate and the referral rapidly developed into an art form almost immediately after the Housing Grants Construction and Regeneration Act 1996 came into force in 1998. It quickly became apparent that the referring party would pay a heavy price for getting the content of these documents wrong. Far from being an informal process to be operated by amateurs from within the industry, as initially envisaged by early proponents, it turned into a business for professionals. The lawyers and the courts made sure of this, quite correctly it might added in hindsight, since a great deal often rides on the outcome of adjudication.

Between them the notice of intention and the referral prescribe the scope of the dispute submitted to adjudication. To a greater or lesser extent, the same may be said of the referral document in arbitration and the statement of claim in litigation. Unlike the latter two, however, where there is both time and the facility to further develop and broaden out the scope of the dispute, adjudication presented a serious challenge in that there was a danger that because of the tight timescales within which the procedure operates, there was a serious potential of ambush. There are two distinct aspects to ambush, namely novelty and constriction. Both have been addressed by the courts.

The novelty aspect relates to whether or not it is possible to land a claim on an unsuspecting party about something they had no idea about, forcing them to attempt to respond in a very short period of time, whereas the claimant has had all the time in the world to dot the "i"s and cross all the "t"s in the referral documentation. In 1998 this was a highly contested issue, with many proclaiming that the adjudication process was inherently unfair. The reality has proved to be somewhat different. Whilst the key to the scope of the dispute before an adjudicator lies in the notice of intention, which prescribes the content of the referral document, forcing it to remain within the limits of the issues mentioned in the notice, albeit with far more detail, what can be validly submitted to adjudication has been drawn back to crystallisation. The court have insisted that a matter cannot be referred to adjudication unless it had matured into a dispute, that is to say that the claimant had put the matter to the other party, leaving sufficient time for response and no satisfactory response had been received. Hence, wherever a matter is validly referred to adjudication the respondent will have had sufficient advance warning and should have been fully aware that a referral was imminent. Furthermore, the scope of the dispute is limited to the issues that had been previously canvassed and no novel issues can be slipped in on the back of the crystallised matters.

The constriction aspect relates to what matters the respondent can raise in his defence. In line with the above, the courts will not allow a respondent to introduce novel disputes into the process by way of counter-claim. The test for novelty lies in whether or not the grounds of defence are based on matters which are integral to the dispute at hand. The potential for ambush lies in the extent, if at all, that it is possible for the claimant to couch his reference in limited terms which exclude any scope for the respondent to assert contrary rights.

By treating anything which is integral to the dispute within the scope of the reference limits the ability of the claimant to secure an unfair advantage. However, the claimant who submits a sloppily drafted reference can broaden out the scope of the dispute unnecessarily and do himself a major disservice, enabling the respondent to pursue counterclaims that would not otherwise be necessary. The tightly drafted reference is not necessarily

an unfair one. After all there is nothing preventing a respondent from initiating adjudication in respect of matters outside the scope of the current adjudication. Thus, to a limited extent, it may be possible to circumscribe the extent of the dispute in this way. Here are some of the things not to do and some of the things that it would be wise to do.

1) Make sure you ask for what you want. The response to the question of breach will be ***YES*** or ***NO.*** If you want payment ask for it. If a specific sum is asked for the adjudicator must reach exactly the same valuation in order to accede. Therefore, pitch the referral in the alternative, to include *"such other sum as the adjudicator deems due*." Do submit a concise documentation and where evidence is submitted, cross reference it clearly.
2) To require a decision as to how much is due under a contract will provide the scope for the respondent to set off sums against the works. Thus it is best, wherever possible, to require a decision as to how much is due under a progress claim, directly linked to an application for payment and terms if any of withholding notices, all tied up to the contractual payment mechanism.
3) Progress disputes are limited in scope. Final disputes and valuations are open ended. The adjudication process was intended to be incremental with the parties if needs be pursuing a series of adjudications during the course of a project rather than one massive dispute at the end.
4) Whilst a bit previous, make sure the initial contract is ***"shipshape and Bristol fashion".*** Adjudication is not the best place to attempt to remedy defects in the contract.
5) Do keep your paperwork in order. Poor administration on both sides is a major cause of extended disputation.
6) Don't introduce novel matters into an adjudication, have another go later. Do not let the other side introduce novel matters either.

PRELIMINARY OBJECTION TO JURISDICTION BEFORE THE TRIBUNAL

The jurisdiction of the tribunal will only become an issue if a party to arbitral proceedings makes it an issue. It is good practice for an arbitrator to set out and confirm the appointment procedure that was followed, the contract that gave rise to the appointment, the names of the parties, their representative and the date of acceptance in the pre-amble to an award, but otherwise jurisdiction may not be referred to at all if it has not been made an issue. Frequently an arbitration award will commence with a heading *"In the matter of an arbitration and In the matter of the Arbitration Act 1996"* which confirm the applicable procedural law but this do not address the jurisdiction of the arbitrator.

Objections to jurisdiction can be raised before the tribunal is appointed, after appointment but before the hearing commences, during the course of the proceedings or after an award has been made as an appeal against the award. We are not concerned here with the appeal process under s67 Arbitration Act 1996.[22] An objection voiced to the other party prior before a referral has taken place may result in the parties agreeing to litigate, but if the party insists on arbitration the mater will must first be dealt with by the arbitrator as discussed in s30 above. S31 provides the machinery to object, at whatever stage prior to the award.

S31 Arbitration Act 1996. Objection to substantive jurisdiction of tribunal.

31(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must, be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

31(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

31(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

[22] See Chapter 11 Challenging the Award.

31(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

31(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

The provisions of the Model Law contained in Article 16 are broadly similar.

Article 16. Model Law. Competence of arbitral tribunal to rule on its jurisdiction

16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitration A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

16(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Clause 31 Objection to Substantive Jurisdiction of Tribunal

140. In this Clause we set out how a challenge to the jurisdiction can be made, and the circumstances in which it must be made (following Article 16 of the Model Law). This reflects much of the Model Law but we have, for example, refrained from using expressions like `submission of the statement of defence' since this might give the impression, which we are anxious to dispel, that every arbitration requires some formal pleading or the like.

141. The Clause, in effect, sets out three ways in which the matter may proceed.

i. The first is that the tribunal may make an award on the question of jurisdiction. If it does so then that award may be challenged by a party under Clause 67.

ii. The second way is for the tribunal to deal with the question of jurisdiction in its award on the merits. Again on the jurisdiction aspect the award may be challenged under Clause 67.

We have provided these two methods because, depending on the circumstances, the one or the other may be the better course to take, bearing in mind the duty (in Clause 33) to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense.

iii. The third way of proceeding is for an application to be made to the Court before any award (pursuant to Clause 32). Again this third course is designed to achieve the same objective (albeit in limited circumstances). For example, cases arise where a party starts an arbitration but the other party, without taking part, raises an objection to the jurisdiction of the tribunal. In such circumstances, it might very well be cheaper and quicker for the party wishing to arbitrate to go directly to the Court to seek a favourable ruling on jurisdiction rather than seeking an award from the tribunal. Such an approach would be very much the exception, and, to this end, Clause 32 is narrowly drawn. In this connection it must be remembered that a party who chooses not to take any part in an arbitration cannot in justice be required to take any positive steps to challenge the jurisdiction, for to do otherwise would be to assume against that party (before the point has been decided) that the tribunal has jurisdiction. We return to this topic when considering Clause 72.

142. *Article 16(3) of the Model Law provides that the arbitral tribunal may rule on a plea as to jurisdiction either as a preliminary question or in an award on the merits. The DAC is of the view that it is unnecessary to introduce a new concept of a "preliminary ruling", which is somehow different from an award. Clause 31(4) therefore only refers to awards. This has the advantage that awards on jurisdiction will have the benefit of those provisions on awards generally (eg costs, lien, reasons, additional awards, etc), and, if appropriate, may be enforced in the same way as any other award.*

143. *A challenge to jurisdiction may well involve questions of fact as well as questions of law. Since the arbitral tribunal cannot rule finally on its own jurisdiction, it follows that both its findings of fact and its holdings of law may be challenged. The regime for challenging such awards is set out in Clause 67.*

144. *Clause 31(1) replaces the requirement set out in Article 16(2) of the Model Law (that a challenge to the overall jurisdiction of the tribunal must be raised no later than the submission of a statement of defence) with a requirement that such an objection be raised no later than the time a party takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. This allows for alternative procedures where there is no "statement of defence" as such.*

145. *Clause 31 is a mandatory provision. Under Clause 30, of course, the parties can agree that the tribunal shall not have power to rule on its own jurisdiction, but while this means (as sub-section (4) points out) that the tribunal cannot then make an award on jurisdiction, the compulsory nature of Clause 31 means that the objection must be raised as there stipulated. It seems to us that this is highly desirable by way of support for the object of arbitration as set out in Clause 1.*

146. *It has been suggested to the DAC that there should be a mechanism whereby an objecting party, or even a non-objecting party, could require the tribunal forthwith to make an award as to jurisdiction, rather than merely incorporating a ruling in an award on the merits. The DAC disagrees with this. Unless the parties agree otherwise, the choice as to which course to take will be left with the tribunal, who will decide what is to be done consistent with their duty under Clause 33 (see below). Indeed, in some cases it may be simply impracticable to rule on jurisdiction, before determining merits. If, however, the parties agree which course is to be taken, and if, of course, their agreement is effective (ie it does not require the tribunal to breach its mandatory duty under Clause 33) then the provision under discussion requires the tribunal to take the course chosen by the parties.*

The mere fact that a party had initially approved or taken part in the appointment is not a bar to an objection since otherwise this would prevent a party objecting to an arbitrator extending the scope of jurisdiction beyond that intended by that party.

Time is of the essence if a party seeks to raise an objection to jurisdiction, since otherwise cost, effort and time might be expended to no avail. There are two stages when an objection may be raised:-

1) **At the outset :** An objection must be raised at the outset before proceedings commence. If it is made subsequently, after a party has played a part in the proceedings it will be too late and the objection will not be considered.

2) **During proceedings :** If a dispute as to scope arises during the course of the proceedings the objection must be raised "*made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.*" What amounts to as soon as possible is a question of fact that may fall to be determined subsequently by a court.

The prescription as to a failure to comply with time requirements is provided by **s73 Arbitration Act 1996.**

73(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

73(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

Objection on ground of jurisdiction to enforcement action under s66 Arbitration Act. The significance of **s73** extends to a non-jurisdiction defence to enforcement mounted under **s66(3) Arbitration Act 1996.**

66(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

S72 Arbitration Act 1996. Saving for rights of person who takes no part in proceedings.

s72(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief.

S72 relates to applications under **s67 Arbitration Act 1996,** providing the ability to appeal an award provided the party takes no part whatsoever in the proceedings. There is no requirement here to have objected at any time. This protects the defendant to a default judgement who did not take part because they were not aware of the proceedings.

The appropriate time to deal with an objection : The arbitrator may deal with the matter in the award (*either as a final award or as a preliminary award*). If he does then any challenge to jurisdiction will fall to be determined by the s67 procedure. Alternatively, the matter may be dealt with as a preliminary matter, in which case a challenge may be mounted under the s32 procedure. Whether the matter is dealt with in the award or as a preliminary matter the parties may decide which course of action is to be taken, but if there is no agreement the tribunal has the power to decide which course of action to take. If the s32 procedure is adopted the tribunal can choose whether or not to proceed or stay proceedings pending the outcome of the s32 application, but must do so if the parties so require. Whether or not this happens will depend on how serious the tribunal considers the issue to be. It may well continue if it deems the challenge to be spurious and mounted merely to waste time. However, where the issue is a live one it may be wise to stay proceedings to avoid any waste of resources.

PRELIMINARY ROLE OF THE COURT IN DETERMINING JURISDICTION

S32 Arbitration Act 1996. Determination of preliminary point of jurisdiction.

> *32(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.*
>
> *A party may lose the right to object (see section 73).*
>
> *32(2) An application under this section shall not be considered unless-*
>
> *(a) it is made with the agreement in writing of all the other parties to the proceedings, or*
>
> *(b) it is made with the permission of the tribunal and the court is satisfied-*
>
> *(i) that the determination of the question is likely to produce substantial savings in costs,*
>
> *(ii) that the application was made without delay, and*
>
> *(iii) that there is good reason why the matter should be decided by the court.*
>
> *32(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.*
> *which for some other special reason should be considered by the Court of Appeal.*

Note the restrictions on applications to the court, namely that the parties agree in writing, or alternatively that the tribunal grants permission and the court is satisfied that it would save money and there is a good reason [*a likelihood of success perhaps – which would need to be established under the reasons provided pursuant to 32(3)*?] for the court to hear it, plus an addition requirement as to time, viz an absence of delay in making the application. These last three qualifications do not appear to apply where the parties agree in writing.

> *32(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.*
>
> *32(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.*
>
> *32(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.*
> *But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.*

Whilst an appeal against the court's determination on jurisdiction may be possible [s32(5)] it should be noted that by virtue of section 32(6) leave of the court making that determination is required. Furthermore, it is not possible to appeal any refusal of leave according to the Court of Appeal in ***Athletic Union of Constantinople v National Basketball Association* [2002]**.[23] The court has no jurisdiction to grant permission or to review the decision. Presumably this does not rule out judicial review by QBD, however unlikely that might be.

Clause 32 Determination of preliminary point of Jurisdiction DAC 1996.

> *147. In this Clause we have set out the procedure for the third of the possible ways of dealing with a challenge to the jurisdiction. As stated above, this Clause provides for exceptional cases only: it is not intended to detract from the basic rule as set out in Clause 30. Hence the restrictions in Clause 32(2), and the procedure in Clause 32(3). It will be noted that we have required either the agreement of the parties, or that the Court is satisfied that this is, in effect, the proper course to take. It is anticipated that the Courts will take care to prevent this exceptional provision from becoming the normal route for challenging jurisdiction. Since this Clause concerns a power exercisable by the Court in relation to the jurisdiction of the tribunal, it is in our view important enough to be made mandatory.*

[23] ***Athletic Union of Constantinople ("AEK") v National Basketball Association [2002] EWCA Civ 830*** : See also ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** *[2001] 1 QB 308.*

148. *Under this Clause the tribunal may continue the arbitral proceedings and make an award whilst the application to the Court is pending. Thus a recalcitrant party will not be able to mount spurious challenges as a means of delaying the arbitral process. Under sub section (5) of the preceding Clause the tribunal can, of course (and must if the parties agree) stay the arbitral proceedings whilst an application is made. Which course the tribunal takes (where it has power to choose) will of course depend once again on what it sees its Clause 33 duty to be.*

149. *The right of appeal from Court rulings is limited in the way set out in the Clause.*

Section 32, Section 45 and Section 69 DAC 1997

27. *The Bill used the words "unless the court certifies." These were changed by amendment to "which shall not be given unless the court considers." This amendment was made to make clear that where an appeal is desired from a decision of the Court, leave must be obtained from that Court itself, and will always be required. Leave may not be obtained from the Court of Appeal. As originally drafted, the incorrect impression was given that leave of the Court may not be necessary where that Court certified the issue as being one of general importance or one which for some other special reason should be considered by the Court of Appeal.*

Front Carriers v Atlantic & Orient Shipping [2007]. [24] S32 AA 1996 : Jurisdiction. Application for declaration that a contract – charterparty - containing an arbitration clause had been concluded for between the parties. Application granted. Clerical error in Charter Party naming company Lti instead of Ltd not significant. Court confirmed that there was a valid contract which in turn contained an arbitration clause.

Film Finance Inc v Royal Bank of Scotland [2007]. [25] S32 AA 1996 : Jurisdiction – s32 application. Scope of arbitration clause : Held : Arbitrator has jurisdiction over the dispute. Liberal approach to interpretation in favour of one stop arbitration appropriate. ***Fiona v Privalov*** noted..

Esso Exploration v Electricity Supply Board [2004]. [26] S32 AA 1996 : Jurisdiction s32. Arbitration to adjust the price of gas in a long term contract. Trigger for a notice is to demonstrate that the price is 85% or less below the market price., and that 90 days had passed since failure to negotiate a revised price. ESB complained that the comparator used by Esso was based on annual market price rather than on the market price of comparable long term contracts. Court agreed with ESB. No jurisdiction.

Belgravia Property Co v S & R Ltd. [2001].[27] S32, s33 AA 1996. Contractor under a JCT contract sought to borrow the management contractor's name to pursue a claim. Contractor declined to provide an indemnity so MC refused. Held : Contractor not a party to the arbitration agreement and would have to pursue remedy before the courts in the absence of a name borrowing arrangement..

[24] ***Front Carriers Ltd.v Atlantic and Orient Shipping Corp. [2007] EWHC 421 (Comm).*** Mr Justice Langley.
[25] ***Film Finance Inc v The Royal Bank of Scotland [2007] EWHC 195 (Comm) ;*** Mr. Justice Andrew Smith
[26] ***Esso Exploration & Production UK Ltd. v Electricity Supply Board [2004] EWHC 723 (Comm)*** . Mr Justice Moore-Bick
[27] ***Belgravia Property Co Ltd v. S & R (London) Ltd, Taylor Woodrow Management Ltd*** [2001] B.L.R. 424,: HHJ Humphrey Lloyd

SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

Jurisdiction of the Court over Jurisdiction in Consumer Arbitration.

PART II OTHER PROVISIONS RELATING TO ARBITRATION

Domestic arbitration agreements

S85 Arbitration Act 1996. Modification of Part I in relation to domestic arbitration agreement.

85(1) *In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.*

85(2) *For this purpose a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is-*

(a) *an individual who is a national of, or habitually resident in, a state other than the UK, or*

(b) *a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the UK,*

and under which the seat of the arbitration (if the seat has been designated or determined) is in the UK.

85(3) *In subsection (2) "arbitration agreement" and "seat of the arbitration" have the same meaning as in Part I (see sections 3, 5(1) and 6).*

Consumer arbitration receives distinct and separate treatment under the Arbitration Act 1996 because European Community Law has established a range of consumer rights provisions that include the right of a consumer to have any dispute settled by a court of law.

S 86 Arbitration Act 1996. Staying of legal proceedings.

86(1) *In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.*

86(2) *On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied-*

(a) *that the arbitration agreement is null and void, inoperative, or incapable of being performed, or*

(b) *that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.*

86(3) *The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.*

86(4) *For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced.*

S87 Arbitration Act 1996. Effectiveness of agreement to exclude court's jurisdiction.

87(1) *In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under-*

(a) *section 45 (determination of preliminary point of law), or*

(b) *section 69 (challenging the award: appeal on point of law),*

is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

87(2) *For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).*

87(3) *For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.*

There is no reference in this part to the application of **sections 30-32 and sections 67 & 68 Arbitration Act 1996,** which presumably therefore apply equally to domestic arbitration agreements.

Self assessment exercise

1. To what extent, if at all, is it justifiable to give the arbitrator the right to decide whether or not to determine jurisdiction during proceedings or subsequently during the award at the end of the arbitral proceedings where the parties are not able to agree on the matter?
2. To what extent, if at all, does the law now provide a clear and coherent guide to what is and what is not a dispute for the purposes of litigation, adjudication and arbitration?
3. If two contractual parties are unable to proceed with their project because there is a perception that they have a problem, but they are not sure what that problem is, why should the law prevent the parties from engaging an arbitrator to first determine what the problems and the issues are and to then go forward and determine the dispute, once clarified?
4. To what extent if at all, is it desirable or possible for a party to a dispute to prescribe the scope of the dispute that is to be ruled upon by the tribunal or court?