

# CHAPTER EIGHT

## THE POWERS OF THE COURT IN SUPPORT OF ARBITRAL PROCEEDINGS

### ARBITRATION ACT 1996

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## SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

### POWERS OF THE COURT TO SUPPORT ARBITRATION

#### INTRODUCTION

The powers of the arbitral tribunal outlined in Chapter 7 above would be to no avail without the support of the court to enforce the orders and directions of the tribunal, since the tribunal itself has no means of enforcement. The powers of the court outlined below are in addition to the traditional support lent to the tribunal by the court to enforce awards, needed to ensure that the arbitral proceedings are conducted in a robustly fair, effective and efficient manner.

#### **S42 Arbitration Act 1996. Enforcement of peremptory orders of tribunal.**

- 42(1) *Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.*
- 42(2) *An application for an order under this section may be made-*
- (a) *by the tribunal (upon notice to the parties),*
  - (b) *by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or*
  - (c) *where the parties have agreed that the powers of the court under this section shall be available.*
- 42(3) *The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.*
- 42(4) *No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.*
- 42(5) *The leave of the court is required for any appeal from a decision of the court under this section.*

#### **Clause 42 Enforcement of peremptory Orders of Tribunal. DAC 1996.**

212. *Although in Clause 41 we have provided the tribunal with powers in relation to peremptory orders, it seemed to us that the Court should have power to order compliance with such orders, though (unless both parties have agreed) these can only be invoked with the permission of the tribunal. In our view there may well be circumstances where in the interests of justice, the fact that the Court has sanctions which in the nature of things cannot be given to arbitrators (eg committal to prison for contempt) will assist the proper functioning of the arbitral process. This Clause is a good example of the support the Court can give to that process. Sub-section (3) requires that any other available recourse within the arbitral process be first exhausted.*

#### **Cross reference S41 Arbitration Act 1996 : Powers of tribunal in case of party's default.**

- 41(1) *The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.*
- 41(2) *Unless otherwise agreed by the parties, the following provisions apply.*
- 41(3) *If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay-*
- (a) *gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or*
  - (b) *has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim.*

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- 41(4) *If without showing sufficient cause a party-*
- (a) *fails to attend or be represented at an oral hearing of which due notice was given, or*
  - (b) *where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions,*
- the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.*
- 41(5) *If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.*
- 41(6) *If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.*
- 41(7) *If a party fails to comply with any other kind of peremptory order, then, without prejudice to s42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following-*
- (a) *direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;*
  - (b) *draw such adverse inferences from the act of non-compliance as the circumstances justify;*
  - (c) *proceed to an award on the basis of such materials as have been properly provided to it;*
  - (d) *make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.*

### THE ATTENDANCE OF WITNESSES AT ARBITRAL HEARINGS

#### **S43 Arbitration Act 1996. Securing the attendance of witnesses.**

- 43(1) *A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.*
- 43(2) *This may only be done with the permission of the tribunal or the agreement of the other parties.*
- 43(3) *The court procedures may only be used if-*
- (a) *the witness is in the United Kingdom, and*
  - (b) *the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.*
- 43(4) *A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.*

#### **Article 27. Model Law : Court assistance in taking evidence**

*The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.*

#### **Clause 43 Securing the attendance of witnesses. DAC 1996.**

213. *This Clause (which corresponds to Article 27 of the Model Law, and is derived from section 12(4) and (5) of the 1950 Act) is also designed to provide Court support for the arbitral process. It will be noted, in particular, that the agreement of the parties or the permission of the tribunal is required. The reason for this is to make sure that this procedure is not used to override any procedural method adopted by the tribunal, or agreed by the parties, for the arbitration. Thus, for example, if the tribunal has decided that there shall be no oral evidence, then (unless all parties agree otherwise) this procedure cannot be used to get round that decision.*

## SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

*South Tyneside v Wickes Building Supplies [2004]*.<sup>1</sup> S43 AA 1996 : Disclosure. Rent Arbitration : In effort to obtain evidence of a comparable rents B&Q (competitors of Wickes) were ordered to disclose the rent (subject to a confidentiality clause) they pay on a nearby property. B&Q successfully sought to have the order set aside. The arbitrators could access alternative information in order to establish a comparator..

*BNP Paribas v Deloitte & Touche [2003]*.<sup>2</sup> S43 AA 1996 : Evidence : witness summons s43 CPR Rule 34.4 Witness. Application to compel witnesses to give evidence at an arbitration and disclosure of documents. Application to issue to issue and serve the witness summons : Question : Can the court compel a third party who is not a party to an arbitration to disclose documents? Held : A fishing exercise – outside the scope of s43. Application refused.

*Assimina Maritime v Pakistan Shipping Corp [2004]*.<sup>3</sup> S43 AA 1996 : Evidence s44 Witnesses s43. Orders given in respect of a feasibility study carried out on behalf of the respondents to this application since the study could contain information relevant to the ship owner's claim.

*Tajik Aluminium Plant v Hydro Aluminium [2005]*.<sup>4</sup> S43 AA 1996 : witness summons. CA on appeal from Chancery (Mr Justice Mann) : Lower court set aside witness summons orders – confirmed on appeal. The documents that the appellant wanted disclosed were not described in a sufficiently narrow or specific manner to justify the order.

### POWERS OF THE COURT IN SUPPORT OF ARBITRAL PROCEEDINGS

*S44 Arbitration Act 1996. Court powers exercisable in support of arbitral proceedings.*

- 44(1) *Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*
- 44(2) *Those matters are-*
- (a) *the taking of the evidence of witnesses;*
  - (b) *the preservation of evidence;*
  - (c) *making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings-*
    - (i) *for the inspection, photographing, preservation, custody or detention of the property, or*
    - (ii) *ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;**and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;*
  - (d) *the sale of any goods the subject of the proceedings;*
  - (e) *the granting of an interim injunction or the appointment of a receiver.*
- 44(3) *If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.*
- 44(4) *If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.*
- 44(5) *In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.*
- 44(6) *If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.*

<sup>1</sup> *South Tyneside v Wickes Building Supplies Ltd. [2004] EWHC 2428 (Comm)*. Mr Justice Gross.

<sup>2</sup> *BNP Paribas v Deloitte & Touche LLP [2003] EWHC 2874 (Comm)*. Mr Justice Morison.

<sup>3</sup> *Assimina Maritime Ltd. v Pakistan Shipping Corporation [2004] EWHC 3005 (Comm)* : HHJ Colman.

<sup>4</sup> *Tajik Aluminium Plant (TadAZ) v Hydro Aluminium AS [2005] EWCA Civ 1218*: Rix LJ; Maurice Kay LJ; Moore-Bick LJ.

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44(7) *The leave of the court is required for any appeal from a decision of the court under this section.*

### Article 9. Model Law : Arbitration agreement and interim measures by court

*It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.*

### Clause 44 Court Powers exercisable in support of arbitral Proceedings. DAC 1996.

214. *This provision corresponds in part to Article 9 of the Model Law. As part of the redefinition of the relationship between arbitration and the Court, which was mentioned above, the powers we have given the Court are intended to be used when the tribunal cannot act or act effectively, as sub-section (5) makes clear. It is under this Clause that the Court has power to order Mareva or Anton Piller relief (ie urgent protective measures to preserve assets or evidence) so as to help the arbitral process to operate effectively. Equally, there may be instances where a party seeks an order that will have an effect on a third party, which only the Court could grant. For the same reason the Court is given the other powers listed.*
214. *This provision corresponds in part to Article 9 of the Model Law. As part of the redefinition of the relationship between arbitration and the Court, which was mentioned above, the powers we have given the Court are intended to be used when the tribunal cannot act or act effectively, as sub-section (5) makes clear. It is under this Clause that the Court has power to order Mareva or Anton Piller relief (ie urgent protective measures to preserve assets or evidence) so as to help the arbitral process to operate effectively. Equally, there may be instances where a party seeks an order that will have an effect on a third party, which only the Court could grant. For the same reason the Court is given the other powers listed.*
215. *In order to prevent any suggestion that the Court might be used to interfere with or usurp the arbitral process, or indeed any attempt to do so, we have stipulated that except in cases of urgency with regard to the preservation of assets or evidence, the Court can only act with the agreement of the parties or the permission of the tribunal. We have excepted cases of urgency, since these often arise before the tribunal has been properly constituted or when in the nature of things it cannot act quickly or effectively enough.*
216. *Furthermore, under sub-section (6) the Court, after making an order, can in effect hand over to the tribunal the task of deciding whether or not that order should cease to have effect. This is a novel provision, but follows from the philosophy behind these provisions: if a given power could possibly be exercised by a tribunal, then it should be, and parties should not be allowed to make unilateral applications to the Court. If, however, a given power could be exercised by the tribunal, but not as effectively, in circumstances where, for example, speed is necessary, then the Court should be able to step in.*

Contrast the powers of the ordinary arbitrator with that of the judge arbitrator.

*Hughes v Hannover [1997].*<sup>5</sup> Injunctive relief : Conflict of laws : US based reinsurance - arbitration clause - ex aequo bono - US. CA declined jurisdiction - no real connection with the UK.

*Lady Navigation v Lauritzencool [2005].*<sup>6</sup> Injunctive relief in support of arbitration. Court issued injunctive relief to the effect that vessels subject to charters which had given rise to a dispute should not be chartered out to third parties pending the outcome of the arbitration. Appeal asserting this amounted to specific performance and was not allowed dismissed.

*HM S.S. Foreign & Commonwealth Affairs v Percy Thomas [1998].*<sup>7</sup> Inordinate delay : Arbitration Act 1950. Contract performed 1986/87. Applications to appoint an arbitrator in April 1996 in respect of a defective roof. Notices of appointment issued in 1992 & 1993. Trial delayed pending supporting evidence. Court struck applications out for inordinate delay.

<sup>5</sup> *Hughes v Hannover Ruckversicherungs-Aktengesellschaft [1997] EWCA Civ 857; Roche LJ; Morritt LJ; Thorpe LJ.*

<sup>6</sup> *Lady Navigation Inc v Lauritzencool AB [2005] EWCA Civ 579; Judge LJ; Mance LJ; Thomas LJ*

<sup>7</sup> *HM S.S. Foreign and Commonwealth Affairs v Percy Thomas Partnership [1998] EWHC TCC 348 ; HHJ Bowsher QC*



## SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

*In Re Q's Estate* [1999].<sup>8</sup> S44 AA 1996. Mareva. Whether court had jurisdiction to grant a Mareva Injunction in favour of a successful party to an arbitration where jurisdiction stated to be exclusively within the power of the arbitrator. Held : Court has the power to grant a mareva in support of arbitral proceedings, but in the circumstances the injunction was discharged.

*Britten Norman v State Ownership Fund of Romania* [2000].<sup>9</sup> S44 AA 1996 Freezing Order. Payment of sums into an account as security in lieu of a freezing order.

*Green Flower Navigation v. Santierul Naval* [2002].<sup>10</sup> S44 AA 1996. Injunctive relief against action in Romania in favour of arbitration.

*Petroleum Investment Co v Kantupan* [2002].<sup>11</sup> S44 AA 1996. Quia timet injunction Refused : Situation not urgent – main sums not due until after arbitration had commenced.

*Commerce & Industry Ins. Co v Lloyds* [2002].<sup>12</sup> S44 AA 1996. Application to set aside an order made without notice by Langley J on 20th July requiring attendance before an examiner in order to give evidence on issues identified in the schedule to the order.

*Hiscox Underwriting v Dickson* [2004].<sup>13</sup> S44 : s48 AA 1996 Discoveries. Limited order made to enable applicant to prepare for the arbitration : arbitrator newly appointed and not yet in a position to make a discovery order.

*National Insurance & Guarantee Corp v M Young Legal Services* [2004].<sup>14</sup> S44 : s9 : AA 1996 interim injunction. Injunction for preservation of documents granted – even though action had not yet been stayed to but would ultimately be stayed to and referred to arbitration. Preservation aided the arbitration process rather than defeat it.

*Lauritzencool v Lady Navigation* [2004].<sup>15</sup> Injunction s44(2)(e) AA 1996. restraining owners from fixing vessels subject to a charterparty pending outcome of arbitration.

*Cetelem S.A v Roust Holdings Limited* [2005].<sup>16</sup> The court has restricted jurisdiction, under s.44(3) of the Arbitration Act 1996, to make an interim mandatory order only where necessary for the purpose of preserving evidence or assets, rather than at the discretion of the court. Preservation order : discretion. Jurisdiction of court : Freezing order : s44(3) : preservation order : court had jurisdiction - but the wide grounds beyond jurisdiction - judge not requested to make order on the restricted grounds but could and would have if asked. Accordingly, application for appeal granted, but appeal failed - no substantial injustice.

*Gus Consulting v Leboeuf* [2006].<sup>17</sup> Confidentiality – disclosure. Conflict of interests & legal representatives. Injunction sought under s44(2)(e) Arbitration Act 1996 to stop US law firm representing a party at an arbitration on grounds that the firm had represented the applicants at an earlier date. Court heard that the lawyers assigned to the case were new-migrants to the firm who undertook not to breach confidentiality rules. Court accepted the undertaking and refused injunction at 1st instance & on appeal. Adequate Chinese walls in place.

*Econet Wireless v Vee Networks* [2006].<sup>18</sup> S44 AA 1996 : Ex parte injunction in support of overseas arbitration lifted. Other party had no notice. Court provided with insufficient information at first instance. It is only in extra-ordinary situations that a court will injunct in respect of overseas arbitral proceedings. Nigeria was the appropriate forum of the arbitration.

<sup>8</sup> *In Re Q's Estate* [1999] 1 Lloyd's Rep. 931. Mr Justice Rix.

<sup>9</sup> *Britten Norman Ltd (In Liquidation) v State Ownership Fund of Romania* [2000] Lloyd's Rep. Bank. 315: Peter Leaver QC

<sup>10</sup> *Green Flower Navigation Malta Ltd, v. SC Santierul Naval SA Constanta* [2002] WL 1876042 : Miss Elizabeth Gloster QC

<sup>11</sup> *Petroleum Investment Co Ltd v. Kantupan Holdings Co Ltd* [2002] 1 All E.R. (Comm) 124 : Mr Justice Toulson

<sup>12</sup> *Commerce & Industry Ins. Co, Canada v Certain Underwriters of Lloyds* [2002] 2 All E.R. (Comm) 204 : Mr Justice Moore-Bick

<sup>13</sup> *Hiscox Underwriting Ltd v. Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm) : Mr Justice Cooke

<sup>14</sup> *National Insurance & Guarantee Corp Ltd v. M Young Legal Services Ltd* [2004] EWHC 2972 (QB) : Mr Justice David Clarke.

<sup>15</sup> *Lauritzencool Ab v Lady Navigation Inc* [2004] EWHC 2607 (Comm) ; Mr Justice Cooke

<sup>16</sup> *Cetelem S.A v Roust Holdings Limited* [2005] EWCA Civ 618. VC. Clarke LJ, Neuberger LJ

<sup>17</sup> *Gus Consulting GmbH v Leboeuf Lamb Greene & Macrae* [2006] EWCA Civ 683 : Brooke LJ Mummery LJ Scott Baker LJ

<sup>18</sup> *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm) : Mr Justice Morison

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*Vertex Data Science v Powergen [2006]*.<sup>19</sup> Injunctive relief. Arbitration clause withheld jurisdiction of arbitrators to grant injunctive relief. Could the court grant it in any case? In the circumstances a mandatory injunction forcing parties to work together was not workable. Relief denied. Potential of conflict between determinations of the court and the tribunal undermining value of award.

### ANTI-SUIT APPLICATIONS

*Starlight Shipping v Tai Ping [2007]*.<sup>20</sup> S44 AA 1996 : Anti-suit : s37 SCA. Pre-emptive anti-suit injunction application in support of arbitration. Granted.

*C v D [2007]*.<sup>21</sup> S44 AA 1996 : Anti-suit – extension. Anti suit injunction to prevent challenge to an award.

*Alfred C Toepfer v Societe Cargill [1997]*.<sup>22</sup> Anti suit : Reference to ECJ – re legality of injunction. Reference to ECJ to determine whether an anti-suit injunction can be issued where a defendant institutes litigation in an EC court contrary to an arbitration clause and in breach of contract.

*Donohue v Armco [2000]*.<sup>23</sup> Anti Suit Injunction. Appeal from a judgment of Aikens J. whereby he dismissed the Claimant's application for an anti-suit injunction to restrain the Defendants' from suing him in any forum other than England.

*Donohue v Armco [2001]*. *HL*.<sup>24</sup> Anti Suit injunction. Whether an injunction should have been granted to restrain the prosecution of proceedings in New York and, if so, in whose favour it should have been granted.

*Kallang v Axa [2006]*.<sup>25</sup> Anti-suit injunction. Failed application to lift an anti-suit injunction in respect of court proceedings in Dakar in favour of an LCIA arbitration.

*Albon v Naza (No 4) [2007]*.<sup>26</sup> Anti-suit injunction – renewal. Granted since respondent would not unconditionally accept that the question as to whether a signature had been forged was solely in the jurisdiction of the English Court - it would be oppressive and unconscionable to allow a duplication of proceedings.

### FREEZING ORDERS

*TTMI v ASM Shipping [2005]*.<sup>27</sup> Freezing order. Freezing order. Application to freeze funds from 1st award pending outcome of a counterclaim in a subsequent arbitration refused. Shipowners entitled to freight earned.

*Fiona Trust v Privalov [2007]*.<sup>28</sup> Freezing Order – Worldwide. Application for extension granted. .

*Banco Nacional v Empresa [2006]*.<sup>29</sup> Freezing orders. ICC arbitration award – enforced by Italian court. Domestic freezing order and worldwide freezing order made in UK. Paris court of appeal then annulled the arbitral award on the grounds that the arbitration should have been in Spain. Application to annul the freezing orders refused – a real risk of dissipation of funds.

*Swift-Fortune v Magnifica Marine [2007]*.<sup>30</sup> s44 Arbitration Act application for world-wide freezing order in support of arbitration.

<sup>19</sup> *Vertex Data Science Ltd v Powergen Retail Ltd [2006] EWHC 1340 (Comm)*: Mr Justice Tomlinson

<sup>20</sup> *Starlight Shipping Co v Tai Ping Insurance Co Ltd., Hubei Branch [2007] EWHC 1893 (Comm)*: Mr Justice Cooke

<sup>21</sup> *C v D [2007] EWHC 1541 (Comm)*: Mr Justice Cooke

<sup>22</sup> *Alfred C Toepfer International GmbH v Societe Cargill France [1997] EWCA Civ 2811*: Staughton LJ; Phillips LJ; Robert Walker LJ.

<sup>23</sup> *Donohue v Armco Inc. [2000] EWCA Civ 94*: Stuart-Smith LJ; Brooke LJ; Sedley LJ

<sup>24</sup> *Donohue v. Armco Inc [2001] UKHL 64*: Lords Bingham; Mackay; Nicholls; Hobhouse; Scott.

<sup>25</sup> *Kallang Shipping SA v Axa Assurances Senegal & Ors [2006] EWHC 2825 (Comm)*; Mrs Justice Gloster

<sup>26</sup> *Albon v Naza Motor Trading Sdn Bhd (No 4) [2007] EWHC 1879 (Ch)*: Mr Justice Lightman

<sup>27</sup> *TTMI Ltd of England v ASM Shipping Ltd of India [2005] EWHC 2666 (Comm)*: Mr Justice Clarke

<sup>28</sup> *Fiona Trust Holding Corp v Privalov [2007] EWHC 1217 (Comm)*: Mr Justice David Steel.

<sup>29</sup> *Banco Nacional De Comercio Exterior v Empresa De Telecomunicaciones De Cuba SA [2006] EWHC 19 (Comm)*: Mr Justice David Steel

<sup>30</sup> *Swift-Fortune Ltd v Magnifica Marine SA (Capaz Duckling) [2007] EWHC 1630 (Comm)*: Mr Justice David Steel



## SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

### DETERMINING PRELIMINARY POINTS OF LAW

#### *S45 Arbitration Act 1996. Determination of preliminary point of law.*

- 45(1) *Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.*
- An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.*
- 45(2) *An application under this section shall not be considered unless-*
- (a) it is made with the agreement 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, and*
    - (ii) that the application was made without delay.*
- 45(3) *The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.*
- 45(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.*
- 45(5) *Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.*
- 45(6) *The decision of the court on the question of law 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 is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.*

#### **Clause 45      Determination of Preliminary Point of Law. DAC 1996.**

217. *This Clause preserves what used to be the old Consultative Case procedure, though its availability is limited as we have set out, in order not to interfere with the arbitral process. The Clause is based on section 2 of the 1979 Act, with certain important changes.*
218. *It seems to us that with the limitations we have provided, this procedure can have its uses. For example, an important point of law may arise which is of great general interest and potentially the subject of a large number of arbitrations. This not infrequently happens when some major event occurs, as, for example, the closure of the Suez Canal or the United States embargo on the export of soya beans. It may well be considered by those concerned that in such special circumstances it would be cheaper and better for all to obtain a definitive answer from the Court at an early stage.*
219. *However, under sub-section (1), unless the parties agree, the Court must now be satisfied that determination of the given question of law will substantially affect the rights of one or more of the parties. This last point is a departure from the 1979 Act, section 1 of which makes this precondition in relation to an appeal in respect of questions of law arising out of the award, but section 2 of which does not impose it in relation to the determination of a preliminary point of law.*
220. *Further, unless the parties agree, the Court will now have to be satisfied of the matters set out in sub-section (2) before considering an application, so that the procedure can only be used (even with the permission of the tribunal) in cases where its adoption will produce a substantial saving in costs to the parties or one of them. The condition in section 2(2) of the 1979 Act, which requires that the question of law be one in respect of which leave to appeal would be likely to be given under section 1(3) (b) of that Act, is not repeated.*

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221. *It has been suggested to the DAC that the right to refer to the Court under this Clause be removed from all non-domestic arbitrations, unless the parties otherwise agree. For the reasons given above as to the value of this provision, and for the reasons given below with respect to preserving the right of appeal in Clause 69, we were not persuaded by this.*

### CASE STATED

There was a long tradition under English Law for a case to be stated on a preliminary point of law to the court and much could be written about the procedures under the 1950 and 1979 Arbitration Acts. To the extent that this procedure was emulated and has to date been retained in other jurisdictions, there is some value in reviewing material on this, but the old law is mainly of historic interest in the English Law context. The facility to be able to ask the court to determine a point of law in situations where the tribunal is not able to clarify the law is valuable. It ensures that the determinations of the tribunal are made within the law and thus ensures that the process does not waste either time or money. It provides the simple answer to critics of arbitration on the basis that arbitration stifles the development of the law. There is no need for it to do so in the rare situations where a case involves legal uncertainty. A few of the mile stone cases of the past include :-

*Century Insurance v Northern Ireland RTB [1942]*.<sup>31</sup> Insurance claim – employee smoked whilst delivering petrol – explosion : whether act in course of employment. Case stated by arbitral panel.

*Ronaasen v Arcos [1933] HL*.<sup>32</sup> Whether goods (staves) complied with the description or not and thus whether or not the buyer could reject. Held : Sufficient deviation from description to justify a finding of non-compliance.

*Davis Contractors v Fareham [1956] HL*.<sup>33</sup> Case stated : Arbitration : AA 1950. Did the unavailability of labour and material resulting in an overrun of 23 weeks in a construction contract strike at the heart of the contract, displacing it and making the employer liable on a quantum meruit basis for services? Held : No : Result : contract breached by late performance.

Whilst case stated references have resulted in significant developments in civil jurisprudence the procedure was frequently used as a mechanism for defeating arbitral provisions in contracts. The Arbitration Act 1996 now makes it clear that the procedure is limited to assisting rather than defeating the process.

*NIIB v Ellis [2003]*.<sup>34</sup> Appeal from a small claims arbitration by way of a case stated by Deputy District Judge Kearney under Article 30(4)(b) of the County Courts (Northern Ireland) Order 1980.

*Fuller v Happy Shopper [2001]*.<sup>35</sup> Case stated. Arbitration Act 1950 : Dispute about a lease and set off for non-repairs.

*Loudonhill v Mowlem (2001)*.<sup>36</sup> Case Stated. Interpretation of ICE Contract clause 15(6).

*Beegas v Decco [2003]*.<sup>37</sup> S45 AA 1996. Rent review terms unusual : Tribunal applied the standard but in the circumstances the wrong formula.

*Taylor Woodrow v Wimpey [2006]*.<sup>38</sup> S45 AA 1996 : Determination of question of law s45. Court, in support of arbitral proceedings, determined that the employer did not undertake the risk of structural problems in a bridge prior to architectural survey.

*SEB Trygg v Manches [2005]*.<sup>39</sup> s45 AA 1996 : Preliminary issues . 20 preliminary issues submitted to the

<sup>31</sup> *Century Insurance Co Ltd v Northern Ireland Road Transport Board [1942] UKHL 2*. Lord Chancellor ; Lords Wright; Romer; Porter 4<sup>th</sup> March 1942

<sup>32</sup> *Ronaasen & Son v Arcos Ltd [1933] UKHL 1* : Lords Buckmaster ; Blanesburgh Warring Atkin ; Macmillan.

<sup>33</sup> *Davis Contractors v Fareham Urban DC [1956] UKHL 3* : Viscount Simonds; Lords Morton; Reid; Radcliffe; Somervell.

<sup>34</sup> *NIIB Group Ltd v Ellis [2003] NIQB 65*. Weatherup HHJ

<sup>35</sup> *Fuller v Happy Shopper Markets Ltd [2001] EWHC Ch 702*; Mr Justice Lightman

<sup>36</sup> *Loudonhill Contracts Ltd v John Mowlem Construction Ltd (2001) 3 T.C.L.R. 23*; Lords Rodger; Cameron; Cowie.

<sup>37</sup> *Beegas Nominees Ltd v. Decco Ltd [2003] EWHC 1891 (Ch)* : Mr Justice Patten

<sup>38</sup> *Taylor Woodrow Holdings Ltd v George Wimpey Southern Counties Ltd Rev 1 [2006] EWHC 1693 (TCC)* . Mr Justice Jackson

<sup>39</sup> *SEB Trygg Holding Aktiebolag v Manches [2005] EWHC 35 (Comm)* : Mrs Justice Gloster

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court for determination.

*J I Macwilliam v Mediterranean Shipping [2002]*.<sup>40</sup> S45 AA 1996 : Reference s45 point of law. Rafaela : Whether or not a bill of lading was subject to the Hague Visby Rules. Does the HVR apply to a straight / named bill of lading ? Arbitrator and court at first instance held NO.

*XL Insurance v Owens Corning* [2001].<sup>41</sup> S45 s68 s69 AA 1996. Anti-suit injunction granted in favour of Arbitration under the 1996 Act – whilst substantive rights under New York Law – tribunal had jurisdiction over jurisdiction.

### FURTHER READING

### Self assessment exercise

<sup>40</sup> *J I Macwilliam Co Inc v Mediterranean Shipping Co Sa [2002] EWHC 593* : Mr Justice Langley

<sup>41</sup> *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530 : Toulson HHJ

## CHAPTER EIGHT

### Part 62 CIVIL PROCEDURE RULES. ARBITRATION CLAIMS

#### 62.1 Scope of this Part and interpretation

- (1) This Part contains rules about arbitration claims.
- (2) In this Part –
  - (a) ‘the 1950 Act’ means the Arbitration Act 1950<sup>(42)</sup>;
  - (b) means the Arbitration Act 1975<sup>(43)</sup>;
  - (c) ‘the 1979 Act’ means the Arbitration Act 1979<sup>(44)</sup>;
  - (d) ‘the 1996 Act’ means the Arbitration Act 1996<sup>(45)</sup>;
  - (e) references to –
    - (i) the 1996 Act; or
    - (ii) any particular section of that Actinclude references to that Act or to the particular section of that Act as applied with modifications by the ACAS Arbitration Scheme (England and Wales) Order 2001<sup>(46)</sup>; and
  - (f) ‘*arbitration claim form*’ means a claim form in the form set out in the practice direction.
- (3) Part 58 (Commercial Court) applies to arbitration claims in the Commercial Court, Part 59 (Mercantile Court) applies to arbitration claims in the Mercantile Court and Part 60 (Technology and Construction Court claims) applies to arbitration claims in the Technology and Construction Court, except where this Part provides otherwise.

#### I CLAIMS UNDER THE 1996 ACT

#### 62.2 Interpretation

- (1) In this Section of this Part ‘arbitration claim’ means –
  - (a) any application to the court under the 1996 Act;
  - (b) a claim to determine –
    - (i) whether there is a valid arbitration agreement;
    - (ii) whether an arbitration tribunal is properly constituted; orwhat matters have been submitted to arbitration in accordance with an arbitration agreement;
  - (c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
  - (d) any other application affecting –
    - (i) arbitration proceedings (whether started or not); or
    - (ii) an arbitration agreement.
- (2) This Section of this Part does not apply to an arbitration claim to which Sections II or III of this Part apply.

#### 62.3. Starting the Claim

- (1) Except where paragraph (2) applies an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure.
- (2) An application under section 9 of the 1996 Act to stay legal proceedings must be made by application notice to the court dealing with those proceedings.
- (3) The courts in which an arbitration claim may be started are set out in the practice direction.
- (4) Rule 30.5 applies with the modification that a judge of the Technology and Construction Court may transfer the claim to any other court or specialist list.

<sup>42</sup> 1950 c. 27

<sup>43</sup> 1975 c. 3; repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

<sup>44</sup> 1979 c. 42; repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

<sup>45</sup> 1996 c. 23.

<sup>46</sup> S.I. 2001/1185

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### 62.4 Arbitration claim form

- (1) An arbitration claim form must –
  - (a) include a concise statement of –
    - (i) the remedy claimed; and
    - (ii) any questions on which the claimant seeks the decision of the court
  - (b) give details of any arbitration award challenged by the claimant, identifying which part or parts of the award are challenged and specifying the grounds for the challenge;
  - (c) show that any statutory requirements have been met
  - (d) specify under which section of the 1996 Act the claim is made
  - (e) identify against which (if any) defendants a costs order is sought; and
  - (f) specify either –
    - (i) the persons on whom the arbitration claim form is to be served, stating their role in the arbitration and whether they are defendants; or
    - (ii) that the claim is made without notice under section 44(3) of the 1996 Act and the grounds relied on
- (2) Unless the court orders otherwise an arbitration claim form must be served on the defendant within 1 month from the date of issue and rules 7.5 and 7.6 are modified accordingly
- (3) Where the claimant applies for an order under section 12 of the 1996 Act (extension of time for beginning arbitral proceedings or other dispute resolution procedures), he may include in his arbitration claim form an alternative application for a declaration that such an order is not needed

### 62.5 Service out of the jurisdiction

- (1) The court may give permission to serve an arbitration claim form out of the jurisdiction if –
  - (a) the claimant seeks to –
    - (i) challenge; or
    - (ii) appeal on a question of law arising out of, an arbitration award made within the jurisdiction; (The place where an award is treated as made is determined by section 53 of the 1996 Act.)
  - (b) the claim is for an order under section 44 of the 1996 Act; or
  - (c) the claimant –
    - (i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and
    - (ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied.
- (2) An application for permission under paragraph (1) must be supported by written evidence –
  - (a) stating the grounds on which the application is made; and
  - (b) showing in what place or country the person to be served is, or probably may be found.
- (3) Rules 6.24 to 6.29 apply to the service of an arbitration claim form under paragraph (1).
- (4) An order giving permission to serve an arbitration claim form out of the jurisdiction must specify the period within which the defendant may file an acknowledgment of service.

### 6.2.6. Notice

- (1) Where an arbitration claim is made under section 24, 28 or 56 of the 1996 Act, each arbitrator must be a defendant.
- (2) Where notice must be given to an arbitrator or any other person it may be given by sending him a copy of –
  - (a) the arbitration claim form; and
  - (b) any written evidence in support.
- (3) Where the 1996 Act requires an application to the court to be made on notice to any other party to the arbitration, that notice must be given by making that party a defendant.

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### 62.7. Case management

- (1) Part 26 and any other rule that requires a party to file an allocation questionnaire does not apply.
- (2) Arbitration claims are allocated to the multi-track.
- (3) Part 29 does not apply.
- (4) The automatic directions set out in the practice direction apply unless the court orders otherwise.

### 62.8. Stay of legal proceedings

- (1) An application notice seeking a stay of legal proceedings under section 9 of the 1996 Act<sup>(47)</sup> must be served on all parties to those proceedings who have given an address for service.
- (2) A copy of an application notice under paragraph (1) must be served on any other party to the legal proceedings (whether or not he is within the jurisdiction) who has not given an address for service, at –
  - (a) his last known address; or
  - (b) a place where it is likely to come to his attention.
- (3) Where a question arises as to whether –
  - (a) an arbitration agreement has been concluded; or
  - (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement,the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision.

### 62.9. Variation of time

- (1) The court may vary the period of 28 days fixed by section 70(3) of the 1996 Act for –
  - (a) challenging the award under section 67 or 68 of the Act; and
  - (b) appealing against an award under section 69 of the Act.
- (2) An application for an order under paragraph (1) may be made without notice being served on any other party before the period of 28 days expires.
- (3) After the period of 28 days has expired –
  - (a) an application for an order extending time under paragraph (1) must –
    - (i) be made in the arbitration claim form; and
    - (ii) state the grounds on which the application is made;
  - (b) any defendant may file written evidence opposing the extension of time within 7 days after service of the arbitration claim form; and
  - (c) if the court extends the period of 28 days, each defendant's time for acknowledging service and serving evidence shall start to run as if the arbitration claim form had been served on the date when the court's order is served on that defendant.

### 62.10. Hearings

- (1) The court may order that an arbitration claim be heard either in public or in private.
- (2) Rule 39.2 does not apply.
- (3) Subject to any order made under paragraph (1) –
  - (a) the determination of –
    - (i) a preliminary point of law under section 45 of the 1996 Act; or
    - (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award,will be heard in public; and
  - (b) all other arbitration claims will be heard in private.
- (4) Paragraph (3)(a) does not apply to –
  - (a) The preliminary question of whether the court is satisfied of the matters set out in section 45(2)(b); or
  - (b) an application for permission to appeal under section 69(2)(b).

<sup>47</sup> 1996 c. 23



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## II OTHER ARBITRATION CLAIMS

### 62.11. Scope of this Section

- (1) This Section of this Part contains rules about arbitration claims to which the old law applies.
- (2) In this Section
  - (a) 'the old law' means the enactments specified in Schedules 3 and 4 of the 1996 Act as they were in force before their amendment or repeal by that Act; and
  - (b) 'arbitration claim' means any application to the court under the old law and includes an appeal (or application for permission to appeal) to the High Court under section 1(2) of the 1979 Act<sup>(48)</sup>.
- (3) This Section does not apply to –
  - (a) a claim to which Section III of this Part applies; or
  - (b) a claim on the award.

### 62.12. Applications to Judge

A claim –

- (a) seeking permission to appeal under section 1(2) of the 1979 Act;
  - (b) under section 1(5) of that Act (including any claim seeking permission); or
  - (c) under section 5 of that Act,
- must be made in the High Court and will be heard by a judge of the Commercial Court unless any such judge directs otherwise.

### 62.13. Starting the claim

- (1) Except where paragraph (2) applies an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure
- (2) Where an arbitration claim is to be made in existing proceedings –
  - (a) it must be made by way of application notice; and
  - (b) any reference in this Section of this Part to an arbitration claim form includes a reference to an application notice.
- (3) The arbitration claim form in an arbitration claim under section 1(5) of the 1979 Act (including any claim seeking permission) must be served on –
  - (a) the arbitrator or umpire; and
  - (b) any other party to the reference.

### 62.14. Claims in District Registries

If –

- (a) a claim is to be made under section 12(4) of the 1950 Act<sup>(49)</sup> for an order for the issue of a witness summons to compel the attendance of the witness before an arbitrator or umpire; and
  - (b) the attendance of the witness is required within the district of a District Registry,
- the claim may be started in that Registry.

### 62.15 Time limits and other special provisions about arbitration claims

- (1) An arbitration claim to
  - (a) remit an award under section 22 of the 1950 Act<sup>(50)</sup>;
  - (b) set aside an award under section 23(2) of that Act<sup>(51)</sup> or otherwise; or

<sup>48</sup> 1979 c. 42; repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

<sup>49</sup> 1950 c. 27; section 12(4) was repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

<sup>50</sup> 1950 c. 27; section 22 was repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

<sup>51</sup> 1950 c. 27; section 23(2) was repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

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- (c) direct an arbitrator or umpire to state the reasons for an award under section 1(5) of the 1979 Act,  
must be made, and the arbitration claim form served, within 21 days after the award has been made and published to the parties.
- (2) An arbitration claim to determine any question of law arising in the course of a reference under section 2(1) of the Arbitration Act 1979 must be made, and the arbitration claim form served, within 14 days after –
- (a) the arbitrator or umpire gave his consent in writing to the claim being made; or
- (b) the other parties so consented.
- (3) An appeal under section 1(2) of the 1979 Act must be filed, and the arbitration claim form served, within 21 days after the award has been made and published to the parties.
- (4) Where reasons material to an appeal under section 1(2) of the 1979 Act are given on a date subsequent to the publication of the award, the period of 21 days referred to in paragraph (3) will run from the date on which reasons are given.
- (5) In every arbitration claim to which this rule applies –
- (a) the arbitration claim form must state the grounds of the claim or appeal;
- (b) where the claim or appeal is based on written evidence, a copy of that evidence must be served with the arbitration claim form; and
- (c) where the claim or appeal is made with the consent of the arbitrator, the umpire or the other parties, a copy of every written consent must be served with the arbitration claim form.
- (6) In an appeal under section 1(2) of the 1979 Act –
- (a) a statement of the grounds for the appeal specifying the relevant parts of the award and reasons; and
- (b) where permission is required, any written evidence in support of the contention that the question of law concerns –
- (i) a term of a contract; or
- (ii) an event,  
which is not a 'one-off' term or event,  
must be filed and served with the arbitration claim form.
- (7) Any written evidence in reply to written evidence under paragraph (6)(b) must be filed and served on the claimant not less than 2 days before the hearing.
- (8) A party to a claim seeking permission to appeal under section 1(2) of the 1979 Act who wishes to contend that the award should be upheld for reasons not expressed or fully expressed in the award and reasons must file and serve on the claimant, a notice specifying the grounds of his contention not less than 2 days before the hearing.

### 62.16 Service out of the jurisdiction

- (1) Subject to paragraph (2) –
- (a) any arbitration claim form in an arbitration claim under the 1950 Act or the 1979 Act; or
- (b) any order made in such a claim,  
may be served out of the jurisdiction with the permission of the court if the arbitration to which the claim relates –
- (i) is governed by the law of England and Wales; or
- (ii) has been, is being, or will be, held within the jurisdiction.
- (2) An arbitration claim form seeking permission to enforce an award may be served out of the jurisdiction with the permission of the court whether or not the arbitration is governed by the law of England and Wales.
- (3) An application for permission to serve an arbitration claim form out of the jurisdiction must be supported by written evidence –
- (a) stating the grounds on which the application is made; and
- (b) showing in what place or country the person to be served is, or probably may be found.

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Rules 6.24 to 6.29 apply to the service of an arbitration claim form under paragraph (1).

- (4) Omitted
- (5) An order giving permission to serve an arbitration claim form out of the jurisdiction must specify the period within which the defendant may file an acknowledgment of service.

### III ENFORCEMENT

#### 62.17 Scope of this Section

This Section of this Part applies to all arbitration enforcement proceedings other than by a claim on the award.

#### 62.18 Enforcement of awards

- (1) An application for permission under –
  - (a) section 66 of the 1996 Act<sup>(52)</sup>;
  - (b) section 101 of the 1996 Act;
  - (c) section 26 of the 1950 Act<sup>(53)</sup>; or
  - (d) section 3(1)(a) of the 1975 Act<sup>(54)</sup>,to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.
- (2) The court may specify parties to the arbitration on whom the arbitration claim form must be served.
- (3) The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this Part.
- (4) With the permission of the court the arbitration claim form may be served out of the jurisdiction irrespective of where the award is, or is treated as, made.
- (5) Where the applicant applies to enforce an agreed award within the meaning of section 51(2) of the 1996 Act –
  - (a) the arbitration claim form must state that the award is an agreed award; and
  - (b) any order made by the court must also contain such a statement.
- (6) An application for permission must be supported by written evidence –
  - (a) exhibiting –
    - (i) where the application is made under section 66 of the 1996 Act or under section 26 of the 1950 Act, the arbitration agreement and the original award (or copies);
    - (ii) where the application is under section 101 of the 1996 Act, the documents required to be produced by section 102 of that Act; or
    - (iii) where the application is under section 3(1)(a) of the 1975 Act, the documents required to be produced by section 4 of that Act;
  - (b) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award; and
  - (c) stating either –
    - (i) that the award has not been complied with; or
    - (ii) the extent to which it has not been complied with at the date of the application.
- (7) An order giving permission must –
  - (a) be drawn up by the claimant; and
  - (b) be served on the defendant by –
    - (i) delivering a copy to him personally; or

<sup>52</sup> 1996 c. 23.

<sup>53</sup> 1950 c. 27; section 26 was repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2

<sup>54</sup> 1975 c. 3; repealed by the Arbitration Act 1996 (c. 23), section 107(2) and Schedule 4 but continues to apply to claims commenced before 31st January 1997 by virtue of the Arbitration Act 1996 (Commencement No. 1) Order 1996 (S.I. 1996/3146), article 4 and Schedule 2.

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- (ii) sending a copy to him at his usual or last known place of residence or business.
- (8) An order giving permission may be served out of the jurisdiction –
  - (a) without permission; and
  - (b) in accordance with rules 6.24 to 6.29 as if the order were an arbitration claim form.
- (9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set –
  - (a) the defendant may apply to set aside the order; and
  - (b) the award must not be enforced until after –
    - (i) the end of that period; or
    - (ii) any application made by the defendant within that period has been finally disposed of.
- (10) The order must contain a statement of –
  - (a) the right to make an application to set the order aside; and
  - (b) the restrictions on enforcement under rule 62.18(9)(b).
- (11) Where a body corporate is a party any reference in this rule to place of residence or business shall have effect as if the reference were to the registered or principal address of the body corporate.

### 62.19 Interest on awards

- (1) Where an applicant seeks to enforce an award of interest the whole or any part of which relates to a period after the date of the award, he must file a statement giving the following particulars–
  - (a) whether simple or compound interest was awarded;
  - (b) the date from which interest was awarded;
  - (c) where rests were provided for, specifying them;
  - (d) the rate of interest awarded; and
  - (e) a calculation showing –
    - (i) the total amount claimed up to the date of the statement; and
    - (ii) any sum which will become due on a daily basis.
- (2) A statement under paragraph (1) must be filed whenever the amount of interest has to be quantified for the purpose of –
  - (a) obtaining a judgment or order under section 66 of the 1996 Act (enforcement of the award); or
  - (b) enforcing such a judgment or order.

### 62.20 Registration in High Court of foreign awards

- (1) Where –
  - (a) an award is made in proceedings on an arbitration in any part of a United Kingdom Overseas Territory (within the meaning of rule 6.18(f)) or other territory to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933<sup>(55)</sup> ('the 1933 Act') extends;
  - (b) Part II of the Administration of Justice Act 1920<sup>(56)</sup> extended to that part immediately before Part I of the 1933 Act was extended to that part; and
  - (c) an award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place,rules 74.1 to 74.7 and 74.9 apply in relation to the award as they apply in relation to a judgment given by the court subject to the modifications in paragraph (2).
- (2) The modifications referred to in paragraph (1) are as follows –
  - (a) for references to the State of origin are substituted references to the place where the award was made; and
  - (b) the written evidence required by rule 74.4 must state (in addition to the matters required by that rule) that to the best of the information or belief of the maker of the statement the

<sup>55</sup> 1933 c. 13 (23 & 24 Geo. 5).

<sup>56</sup> 1920 c. 81 (10 & 11 Geo. 5); section 10 of Part II was substituted by the Civil Jurisdiction and Judgments Act 1982 (c. 27), section 35(2) and section 14 of Part II was amended by the Civil Jurisdiction and Judgments Act 1982 (c. 27), section 35(3).

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award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

### 62.21. Registration of awards under the Arbitration (International Investment Disputes) Act 1966

- (1) In this rule –
  - (a) ‘the 1966 Act’ means the Arbitration (International Investment Disputes) Act 1966<sup>(57)</sup>;
  - (b) ‘award’ means an award under the Convention;
  - (c) ‘the Convention’ means the Convention on the settlement of investment disputes between States and nationals of other States which was opened for signature in Washington on 18th March 1965<sup>(58)</sup>;
  - (d) ‘judgment creditor’ means the person seeking recognition or enforcement of an award; and
  - (e) ‘judgment debtor’ means the other party to the award.
- (2) Subject to the provisions of this rule, the following provisions of Part 74 apply with such modifications as may be necessary in relation to an award as they apply in relation to a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933<sup>(59)</sup> applies –
  - (a) rule 74.1;
  - (b) rule 74.3;
  - (c) rule 74.4(1), (2)(a) to (d), and (4);
  - (d) rule 74.6 (except paragraph (3)(c) to (e)); and
  - (e) rule 74.9(2).
- (3) An application to have an award registered in the High Court under section 1 of the 1966 Act<sup>(60)</sup> must be made in accordance with the Part 8 procedure.
- (4) The written evidence required by rule 74.4 in support of an application for registration must –
  - (a) exhibit the award certified under the Convention instead of the judgment (or a copy of it); and
  - (b) in addition to stating the matters referred to in rule 74.4(2)(a) to (d) state whether –
    - (i) at the date of the application the enforcement of the award has been stayed (provisionally or otherwise) under the Convention; and
    - (ii) any, and if so what, application has been made under the Convention, which, if granted, might result in a stay of the enforcement of the award.
- (5) Where, on granting permission to register an award or an application made by the judgment debtor after an award has been registered, the court considers –
  - (a) that the enforcement of the award has been stayed (whether provisionally or otherwise) under the Convention; or
  - (b) that an application has been made under the Convention which, if granted, might result in a stay of the enforcement of the award,

## PRACTICE DIRECTION – ARBITRATION

### SECTION I

- 1.1 This Section of this Practice Direction applies to arbitration claims to which Section I of Part 62 applies.
- 1.2 In this Section ‘the 1996 Act’ means the Arbitration Act 1996.
- 1.3 Where a rule provides for a document to be sent, it may be sent –
  - (1) by first class post
  - (2) through a document exchange; or
  - (3) by fax, electronic mail or other means of electronic communication

<sup>57</sup> 1966 c. 41

<sup>58</sup> The text of the Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966 (c. 41).

<sup>59</sup> 23 & 24 Geo 5 c.13

<sup>60</sup> 1966 c. 41; section 1 was amended by the Administration of Justice Act 1977 (c. 38), sections 4 and 32(4) and Schedule 5, Part I and by the Supreme Court Act 1981 (c. 54), section 152(1) and Schedule 5.

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### 62.3 – Starting the claim

- 2.1 An arbitration claim under the 1996 Act (other than under section 9) must be started in accordance with the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 by the issue of an arbitration claim form.
- 2.2 An arbitration claim form must be substantially in the form set out in Appendix A to this practice direction.
- 2.3. Subject to paragraph 2.1, an arbitration claim form –
  - (1) may be issued at the courts set out in column 1 of the table below and will be entered in the list set out against that court in column 2;
  - (2) relating to a landlord and tenant or partnership dispute must be issued in the Chancery Division of the High Court.

<i>Court</i>	<i>List</i>
Admiralty and Commercial Registry at the Royal Courts of Justice, London	Commercial list
Technology and Construction Court Registry, St. Dunstan's House, London	TCC list
District Registry of the High Court (where mercantile court established)	Mercantile list
District Registry of the High Court (where arbitration claim form marked 'Technology and Construction Court' in top right hand corner)	TCC list

- 2.3A An arbitration claim form must, in the case of an appeal, or application for permission to appeal, from a judge-arbitrator, be issued in the Civil Division of the Court of Appeal. The judge hearing the application may adjourn the matter for oral argument before two judges of that court.

### 62.4 – Arbitration claim form

#### *Service*

- 3.1 The court may exercise its powers under rule 6.8 to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration
- 3.2 Where the arbitration claim form is served by the claimant he must file a certificate of service within 7 days of service of the arbitration claim form. (Rule 6.10 specifies what a certificate of service must show).

### Acknowledgment of service or making representations by arbitrator or ACAS

- 4.1 Where –
  - (1) an arbitrator; or
  - (2) ACAS (in a claim under the 1996 Act as applied with modifications by the ACAS Arbitration Scheme (England and Wales) Order 2001)is sent a copy of an arbitration claim form (including an arbitration claim form sent under rule 62.6(2)), that arbitrator or ACAS (as the case may be) may –
  - (a) apply to be made a defendant; or
  - (b) make representations to the court under paragraph 4.3
- 4.2 An application under paragraph 4.1(2)(a) to be made a defendant –
  - (1) must be served on the claimant; but
  - (2) need not be served on any other party.
- 4.3 An arbitrator or ACAS may make representations by filing written evidence or in writing to the court.

### Supply of documents from court records

- 5.1 An arbitration claim form may only be inspected with the permission of the court.

### 62.7 – Case management

- 6.1 The following directions apply unless the court orders otherwise.
- 6.2 A defendant who wishes to rely on evidence before the court must file and serve his written evidence –
  - (1) within 21 days after the date by which he was required to acknowledge service; or,
  - (2) where a defendant is not required to file an acknowledgement of service, within 21 days after service of the arbitration claim form.



## **SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION**

- 6.3 A claimant who wishes to rely on evidence in reply to written evidence filed under paragraph 6.2 must file and serve his written evidence within 7 days after service of the defendant's evidence.
- 6.4 Agreed indexed and paginated bundles of all the evidence and other documents to be used at the hearing must be prepared by the claimant.
- 6.5 Not later than 5 days before the hearing date estimates for the length of the hearing must be filed together with a complete set of the documents to be used.
- 6.6 Not later than 2 days before the hearing date the claimant must file and serve –
- (1) a chronology of the relevant events cross-referenced to the bundle of documents;
  - (2) (where necessary) a list of the persons involved; and
  - (3) a skeleton argument which lists succinctly –
    - (a) the issues which arise for decision;
    - (b) the grounds of relief (or opposing relief) to be relied upon;
    - (c) the submissions of fact to be made with the references to the evidence; and
    - (d) the submissions of law with references to the relevant authorities.
- 6.7 Not later than the day before the hearing date the defendant must file and serve a skeleton argument which lists succinctly –
- (1) the issues which arise for decision;
  - (2) the grounds of relief (or opposing relief) to be relied upon;
  - (3) the submissions of fact to be made with the references to the evidence; and
  - (4) the submissions of law with references to the relevant authorities

### **Securing the attendance of witnesses**

- 7.1 A party to arbitral proceedings being conducted in England or Wales who wishes to rely on section 43 of the 1996 Act to secure the attendance of a witness must apply for a witness summons in accordance with Part 34
- 7.2 If the attendance of the witness is required within the district of a district registry, the application may be made at that registry
- 7.3 A witness summons will not be issued until the applicant files written evidence showing that the application is made with –
- (1) the permission of the tribunal; or
  - (2) the agreement of the other parties

### **Interim remedies**

- 8.1 An application for an interim remedy under section 44 of the 1996 Act must be made in an arbitration claim form.

### **Applications under sections 32 and 45 of the 1996 Act**

- 9.1 This paragraph applies to arbitration claims for the determination of –
- (1) a question as to the substantive jurisdiction of the arbitral tribunal under section 32 of the 1996 Act; and
  - (2) a preliminary point of law under section 45 of the 1996 Act.
- 9.2 Where an arbitration claim is made without the agreement in writing of all the other parties to the arbitral proceedings but with the permission of the arbitral tribunal, the written evidence or witness statements filed by the parties must set out any evidence relied on by the parties in support of their contention that the court should, or should not, consider the claim.
- 9.3 As soon as practicable after the written evidence is filed, the court will decide whether or not it should consider the claim and, unless the court otherwise directs, will so decide without a hearing.

### **Decisions without a hearing**

- 10.1 Having regard to the overriding objective the court may decide particular issues without a hearing. For example, as set out in paragraph 9.3, the question whether the court is satisfied as to the matters set out in section 32(2)(b) or section 45(2)(b) of the 1996 Act
- 10.2 The court will generally decide whether to extend the time limit under section 70(3) of the 1996 Act without a hearing. Where the court makes an order extending the time limit, the defendant must file

## CHAPTER EIGHT

his written evidence within 21 days from service of the order

### **62.9 – Variation of time**

- 11.1 An application for an order under rule 62.9(1) –
- (1) before the period of 28 days has expired, must be made in a Part 23 application notice; and
  - (2) after the period of 28 days has expired, must be set out in a separately identified part in the arbitration claim form.

### **Applications for permission to appeal**

- 12.1 Where a party seeks permission to appeal to the court on a question of law arising out of an arbitration award, the arbitration claim form must –
- (1) identify the question of law; and
  - (2) state the grounds on which the party alleges that permission should be given.
- 12.2 The written evidence in support of the application must set out any evidence relied on by the party for the purpose of satisfying the court –
- (1) of the matters referred to in section 69(3) of the 1996 Act; and
  - (2) that permission should be given.
- 12.3 The written evidence filed by the respondent to the application must –
- (1) state the grounds on which the respondent opposes the grant of permission;
  - (2) set out any evidence relied on by him relating to the matters mentioned in section 69(3) of the 1996 Act; and
  - (3) specify whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, state those reasons
- 12.4 The court will normally determine applications for permission to appeal without an oral hearing
- 12.5 Where the court refuses an application for permission to appeal without an oral hearing, it must provide brief reasons.
- 12.6 Where the court considers that an oral hearing is required, it may give such further directions as are necessary.

### **SECTION II**

- 13.1 This Section of this Practice Direction applies to arbitration claims to which Section II of Part 62 applies.

### **62.13 – Starting the claim**

- 14.1 An arbitration claim must be started in the Commercial Court and, where required to be heard by a judge, be heard by a judge of that court unless he otherwise directs.

### **SECTION III**

- 15.1 This Section of this Practice Direction applies to enforcement proceedings to which Section III of Part 62 applies.

### **62.21 – Registration of awards under the Arbitration (International Investment Disputes) Act 1966**

- 16.1 Awards ordered to be registered under the 1966 Act and particulars will be entered in the Register kept for that purpose at the Admiralty and Commercial Registry

### **FORMS**

#### **ARBITRATION**

- N8 Claim form (arbitration)  
N8A Notes for claimant  
N8B Notes for defendant  
N15 Acknowledgement of service (arbitration claim)