CHAPTER FOUR

COMMENCEMENT OF ARBITRAL PROCEEDINGS

ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

The Arbitration Act 1996 — *The Model Law*

Commencement of arbitral proceedings

12. Power of court to extend time for beginning arbitral proceedings, &c.
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CHAPTER FOUR

Statutory and contractual time bars for the submission of disputes to arbitration or litigation

It is common to insert a time bar in a contract in respect of legal claims, whether pursued by arbitration or litigation. Many International Conventions such as the Hague Visby Rules, which automatically form part of the statutory implied terms of the contract, include and thus incorporate time bars into contracts, even though the parties may not be aware of their existence.

Observance of and timely filing of a claim is a prerequisite to a claim. The general principles of prerequisites apply here, so that cases on claim notification and filing requirements under a contract are relevant. Indeed in a text on construction contracts the bulk of the content would relate to contractual mechanisms for applications for stage payments, extensions of time and variations, with a short reference at the end to the impact of statutory time bars. Most construction and import export standard form contracts will contain a time bar in the dispute resolution section. Statutes such as the Housing Grants Construction and Regeneration Act 1996 imply time bars and payment mechanisms into contract.

A time bar is arbitrary by nature and can give rise to a sense of unfulfilled justice, the common response to which is "*Its your own fault, you should have got your claim in on time.*" The courts were rather ambivalent to contractual time bars[1] at one stage where arbitration was involved and were prepared to recognize hardship and injustice. Judicial interference was not welcomed by the international community and addressing this problem was an important aspect of the work done by the DAC to revitalize arbitration in the UK.

The Arbitration Act 1996 took a much harder line towards respecting the initial choices of the parties and today there is more readiness to enforce contractual time bars. This development has gone hand in hand with the removal of the immunity of first solicitors and subsequently barristers, so that where a problem is caused by poor legal representation the lawyers concerned may now be held to account (or at least their insurance providers). This means that today the enforcement of a time bar may not entirely remove the opportunity of a litigant to recover his losses if the problem was caused by the legal team. This emphasizes the importance of the practitioner's "***Just In Time diaries***" to highlight relevant deadlines. A problem still occurs in respect of pro-se litigants who tend to have less awareness of relevant procedures and time provisions. Much of the recent judicial consideration of time bars has been in respect of such litigants and special circumstances for the extension of time. The pro-se litigant poses special problems both for arbitrators and for the judiciary. The enforcement of time bars now gives greater certainty to contracting parties.

The courts have some degree of discretion and may extend time both in respect of contractual and statutory time bars. The mirror arbitration provisions in this regard are set out in section 12 Arbitration Act 1996. Since the consequence of a time bar is that a claim ceases to be maintainable, this has an impact upon the jurisdiction of the arbitral tribunal. Thus this topic should be viewed in the context of relevant sections of the Arbitration Act 1996 that concern jurisdiction. It is important for arbitrators to be aware of the existence of and impact of time bars. It is even more important for lawyers involved in the litigation process both at arbitration and before the courts to be aware of and comply with time bar requirements.

Applications for extensions under the 1950 Act.

s27 Arbitration Act, 1950 Power of court to extend time for commencing arbitration proceedings.

Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper"

In ***The Agios Lazaros*** **[**1976],[2] the charterers chartered the Agios Lazaros from the owners under a Gencon

[1] Compare the attitude of the judiciary to statutory time bar, in respect of both contract and tort actions. These are currently governed by the Limitations Act 1980, key sections of which are set out and discussed below.

[2] ***The Agios Lazaros : Nea Agrex S.A. v Baltic Shipping Co Ltd*** [1976] 2 Lloyd's Rep 47 before Lords Denning, Goff & Shaw. ***The Augeliki.*** [1973] 2 Lloyd's Rep. 226, distinguished.

charter-party dated Jan. 5, 1972, for the carriage of a cargo of oranges from Preveza, Greece to Rotterdam and Hamburg. The charter provided (inter alia):

(23) if any dispute arises during the performance of this charter-party and cannot be solved amicably, [it) shall be referred to Arbitration in London..

(31) . .and also Paramount clause are deemed to be incorporated in this Charter Party.

On arrival in Rotterdam and Hamburg on Feb. 1 and 3, 1972, respectively, many of the oranges were found to be damaged. The charterers alleged that it was the fault of the owners, in that the ventilation channels had become blocked when the ship collided with another while leaving Preveza in Greece, and claimed damages. On May 31, 1972, the charterers' agents wrote to the owner's agents stating (inter alia) *"Please advise your proposals in order to settle this matter or name your arbitrators. Expecting your reply."*

Delays occurred and on Feb. 14, 1974, the owners were given 14 days in which to name their arbitrator. The owners contended that the claim for arbitration had become time barred in February, 1973, since the charter incorporated the Paramount clause which incorporated the provisions of the Hague Rules art III, r. 6 of which provided inter alia : *"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods ……"*

At first instance Donaldson J held that there was no time bar since the phrase "*and also Paramount clause"* in cl. 31 was ineffective because he could not say what paramount clause was to be incorporated and therefore none of the Hague Rules applied. On appeal by the owners and cross-appeal by the charterers, the Court of Appeal held, allowing both appeal and cross-appeal, that

(1) when the *"Paramount clause"* was incorporated without any words of qualification, it meant that all the Hague Rules were incorporated;

(2) there was incorporated into the charter the time bar clause (art. Ill, r. 6) under which the owners were discharged from all liability "unless suit is brought within one year after delivery of the goods . .;

(3) the letter dated May 31, 1972, could be construed as a request for the difference to be submitte4 to arbitration and this was sufficient to commence the arbitration;

(4) however if the letter was insufficient to commence the arbitration the charterers would be given an extension of time under S. 27 of the Arbitration Act, 1950.

Per Lord DENNING, MR., (at p. 50): *"What does " paramount clause" or "clause paramount" mean to shipping men? Primarily it applies to bills of lading. In that context its meaning is, I think, clear beyond question. It means a clause by which the Hague Rules are incorporated into the contract evidenced by the bill of lading and which overrides any express exemption or condition that is inconsistent with it. in this charter-party . . . [the clause paramount] brings the Hague Rules into the charter-party so as to render the voyage or voyages subject to the Hague Rules, so far as applicable thereto; and it makes those rules prevail over any of the exceptions in the charter-party."*

In ***The "Aspen Trader"*** **[**1981],[3] the principles which governed the exercise of the court's discretion under Section 27 were authoritatively laid down by Brandon LJ.

(1) The words "undue hardship" in S.27 are not to be construed too narrowly.

(2) "Undue hardship" means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are out of proportion to such fault.

(3) In deciding whether to extend time or not, the Court should look at all the relevant circumstances of the particular case.

(4) In particular, the following matters should be considered:
(a) the length of the delay; (b) the amount at stake; (c) whether the delay was due to the fault of the claimant or to circumstances outside his control; (d) if it was due to the fault of the claimant, the degree of such fault; (e) whether the claimant was misled by the other party; (f) whether the other party has been prejudiced by the delay, and, if so, the degree of such prejudice.

In ***The Balona*** [1992],[4] the ***a***pplicants failed to appoint and arbitrator within time allocated by a charterparty, due to the negligence of their solicitor, and applied for an extension of fine under s27 Arbitration Act 1950.

[3] ***The "Aspen Trader"*** **[**1981] 1 Lloyd's Rep. 273 at 279,

[4] ***The Balona : Unitramp : SA V Jenson & Nicholson (S) Pte Ltd*** [1992] 1 All ER 346.

The court concluded that the applicants were likely to suffer undue hardship if the extension was refused. The court concluded that when considering an application under s27 the existence of any potential claim by the applicant against his solicitor for negligence in failing to appoint an arbitrator within the time limited by the charterparty is relevant to the question whether the applicant would suffer *'undue hardship'* if an extension of time were not granted. However, because it is more difficult for such an applicant to pursue a secondary claim against his solicitor than his primary claim against the respondent (since the respondent would not participate, particularly in the way of discovery, in the secondary claim) the applicant may suffer undue hardship if the court were to refuse an extension of time in circumstances where the degree of fault on the part of the applicant is not grave and there is no allegation of any prejudice suffered by the respondent. Accordingly an extension was granted.

In ***Pheonix Shipping Ltd v General Feeds Inc*** [1997].,[5] an extension was granted by a "whisker". This was an appeal from the order of Moore-Bick J. granting to the Respondent Plaintiffs ("the plaintiffs") an extension of time in which to commence arbitration proceedings in respect of claims identified in that order pursuant to S.27 of the **Arbitration Act 1950**. The judge refused leave to appeal but, on 19th June 1996, Staughton LJ gave leave, observing that in his view the only arguable point was that the length of the extension of time ordered was outside any reasonable exercise of the judge's discretion.

The reasons for the delay. The affidavit of the plaintiffs' solicitor, Mr. Dearing, explains how the 12-month time bar applicable in this case was first overlooked. It appears that the system within his firm's office for logging time-bars and drawing their imminent expiration to the attention of partners and case-handlers broke down, though for no reason which can be satisfactorily explained. The time bar was notified to the person in the office who kept the log and, in the ordinary way, Mr. Dearing or the case-handler would have expected to receive a reminder on or about 15th October 1993. However, neither recalls receiving one. The time-bar passed and no one was aware of the fact. That being so, no one had occasion to re-visit the matter until some subsequent occurrence brought it again to their attention.

At that stage, it seems neither party was anxious to pursue the arbitration with alacrity. On the plaintiffs' side, 1994 passed with no more being done than the giving of "general consideration" to the claim. It was not until January 1995, i.e. 14 months from the expiry of the limitation period, that the matter came up for serious review. However, at that stage, Mr. Knight, a solicitor now assisting Mr. Dearing, was asked to look at the file for the first time in order to address two outstanding matters, namely how to respond to the owners' request for cooperation in resisting the claims being brought in Hong Kong and whether or not to speed up the arbitration against the sub-charterers and to pursue the claim for indemnity. He apparently examined the file but failed to observe that there was a time limit in the charterparty. He simply initiated a letter dated 10th February 1995 in which the defendants were informed that the plaintiffs would be serving a pleading in the sub-arbitration which included a new indemnity claim. This evoked a response in the form of the defendants' solicitors' letter of 6th April 1995 earlier quoted, in which they relied on clause 27 of the sub-charter.

For reasons which the judge regarded as "***not perhaps fully explained***" but which appear to have involved a further misunderstanding within the office, the plaintiffs' solicitors incurred a yet further period of 4 months delay before incorporating the new claim in a Reply and Defence Counterclaim served on 8th August 1995. On 21st August 1995 the defendants' solicitors sought an explanation as to the cause for the delay and the Section 27 application was finally issued on 3rd October 1995.

Conclusion of the court. I find no error for which the Judge can properly be criticised. I am inclined to agree with Mr. Milligan that, taken at first blush, and having regard solely to the delay involved, the plaintiffs were fortunate in the outcome of their application. Indeed, I note that, following judgment, in the exchanges concerning consequential orders and leave to appeal which appear in the transcript, the Judge observed to Mr. Persey that he had "won by a whisker". I would go so far as to say that the Judge's decision operated at the borders of the latitude to be afforded to an applicant guilty of delay in cases of this kind. However, in the final analysis, I consider that the Judge was right to attach great weight to the fact that, in expanding their

[5] ***Pheonix Shipping Ltd v General Feeds Inc [1997] EWCA Civ 1476*** : Potter LJ; Mummery LJ.

claims, the plaintiffs were seeking to rely on matters which had already been put in issue in the arbitration by the defendants and I do not think it right to interfere with the order which he made.

Crossing over from the 1950 to the 1996 Act.

The Catherine Helen [1996].[6] Charter-party (Voyage) - Limitation of time -Indemnity - Centrocon arbitration clause - Claims In respect of demurrage, additional berthing and shifting expenses referred to arbitration - Notification of potential indemnity claim -Whether claim for indemnity made within contractual limitation period - Extent of arbitrators' jurisdiction on appointment - Whether arbitrator had jurisdiction to determine Indemnity claim -Whether application for extension of time should be granted - Arbitration Act, 1996, s.12.

By a voyage charter-party on the Gencon form dated Bombay Oct.24, 1995 the owners chartered their vessel Catherine Helen to the charterers for the carriage of 12,500 tonnes (5 per cent. more or less in charterers' option) of bagged rice from the west coast of India to Dakar, Senegal. The charter contained inter alia an amended Centrocon arbitration clause (cI. 23) which provided: *Any claim must be made in writing and claimants' arbitrator appointed within one year of final discharging and where this provision is not complied with the claim shall be deemed waived and absolutely barred*. Further clause 9 of the charter required that master or agents to sign bills of lading at such rate of freight as presented without prejudice to the charter-party.

Shipment of 12,116.35 tonnes of rice by the charterers at Bombay was acknowledged by a bill of lading dated Dec. 7, 1995 in the Congenbill form and the cargo was discharged in Dakar between Mar.25 and Apr.13, 1996.

Disputes arose under the charter and on May 24, 1996 the owners appointed their arbitrator, the letter of appointment stating inter alia: *" ……. your appointment is in respect of all and any disputes and differences under the ... charterparty dated 24th October 1995."* The charterers appointed their arbitrator.

On June 19, 1996 the owners made a submission in writing in which they claimed (1) demurrage of U.S.$471,468.98 and (2) U.S.$18,260.39 for additional berthing and shifting expenses at Dakar. The parties exchanged submissions as to these claims and the arbitrators were asked to adjudicate on the documents alone.

However on Apr.17, 1996 a letter of guarantee had been issued by the owners' P. & I. club by the Credit Lyonnais Senegal to C.S.A.R. of Dakar, Senegal as subrogated insurers of cargo claims. These guarantees were issued shortly before and after completion of cargo discharge in Dakar. The owners had not known anything of these claims until informed by their P. & I. club on Oct.22, 1996.

On Oct. 22,1996 the owners wrote to the arbitral tribunal informing them of the potential cargo claim and that an indemnity might be sought.

The charterers, by fax of Oct.23, 1996 stated that the pleadings in the arbitration had been completed and that the owners' "claim" for an indemnity was not maintainable, they stressed the point that *"alleged security had already been provided by the insurers of the owners much before the commencement of the arbitration"*; and the owners' claim was not within the scope of the arbitration and could not be raised in any event at such a late stage.

The owners, by way of an originating summons, applied for a declaration that they had 'a claim in' writing against the charterers for an indemnity in respect of the owners' liability to the cargo-owners or cargo insurers of a cargo of rice and had appointed an arbitrator within a period of one year of final discharge as required by the amended Centrocon arbitration clause so that their claim was not time barred.

Alternatively the owners applied under **s12 Arbitration Act 1996** for an extension of time for commencing arbitration proceedings for such an indemnity against the charterers.

Section 12 provided inter alia:

(1) *Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred or the claimant's right be extinguished, unless the claimant takes within a time fixed by the agreement some step - (a) to begin arbitral proceed-..... the court may by order extend the time for taking that step.*

(3) *The court shall make an order only if satisfied (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and it would be just to extend time, or (b)*

[6] ***Cathiship S.A. v Allanasons Ltd (The "Catherine Helen")*** [1996] 2 Lloyd's Rep 511. before Mr. Geoffrey BRICE, Q.C. sitting as a Deputy Judge to the High Court.

that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question...

Held, by Q.B. (Com. Ct.) (Mr. GEOFFREY BRICE, Q.C.), that

(1) there appeared to be nothing ambiguous in the relevant words of the Centrocon clause and the Court was simply determining whether on the facts a sufficient claim was made (*see p.516, col. 2);*

(2) the Centrocon clause involved a party making a claim and appointing an arbitrator, both events to occur within the time stipulated by the clause *(see p.516, col. 2);*

(3) in the case of a subsisting claim for a monetary sum there should be no difficulty in one party making a clear and unequivocal claim in writing even if the precise sums were not known or ascertainable as at the date of the making of the claim; no particular form of words was required for making such a claim provided it was clear that a claim wag being made; and the same applied to contingent disputes *(see p.517, col. I);*

(4) the owners knew that a claim had been made against them by cargo owners because they had been required to put up security for a cargo claim one day before cargo discharge had been completed; although the claim appeared not to have been formulated in precise terms no party ordinarily put up security unless there was a claim however imprecise against him; the owners were or ought to have been aware that they might at some time have to claim an indemnity under the charter against the charterers; and given the 12 months allowed by clause 23 the owners had ample time to consider whether they could comply with the terms of clause. 23 during the contractual limitation period *(see p.517, cols. 1 and 2);*

(5) in such circumstances a shipowner could (a) make a claim in damages against the charterer for breach of contract and b) further claim a declaration that he was entitled to be indemnified by the charterer under the charter in respect of claims successfully made against him by cargo-owners such a claim to be quantified once the amount for which the shipowner was liable was known; no particular form of words was needed as long as it was clear to the charterer that a claim within the Centrocon clause was being made and not merely intimated as some vague future possibility; the purposes of the Centrocon clause as regards making a claim would thereby be met *(see p.517, col. 2; p.518, col. 1);*

(6) it would be a strange result if a valid "claim" could not be made within the contractual limitation period simply because the formal cause of action was not actually enforceable until after the expiry of that period *(see* p.518, col. 1);

(7) the statements made on behalf of the shipowners did not amount to a claim, but were an indication that a claim might be made at some time in the future; the bargain which the shipowners and charterers had entered into by virtue of the amended Centrocon clause necessitated the making of a claim within the 12 month period and if a claim was not so made then any claim made thereafter was time barred; the use of the word "claim" by the charterers in their fax of Oct.23, 1996 protesting their position could not convert what was not a claim into a claim and the whole purpose of that fax was to challenge what the owners were belatedly seeking to do in the then current arbitration *(see* p.518, col. 2);

(8) as to claims arising after the date of appointment: the owners' arbitrator was appointed by letter of May 24, 1996 and at that time there was no dispute relating to an indemnity between the owners and the charterers; an arbitrator had no jurisdiction over disputes which were not in existence when he was appointed to act; the appointment defined his jurisdiction at the same time as creating it and could not be taken to give him jurisdiction over something which did not at the time exist; the letter of appointment and the jurisdiction of the owners' arbitrator did not include the indemnity claim (*see* p.*519, col. I);*

(9) there was no clear appointment of either the owners' arbitrator or of the tribunal as regards the indemnity claim; it was open to the owners to make a claim and to appoint an arbitrator by April, 1997 and the proposed final award would not preclude them from doing so; the owners had not complied with the amended Centrocon clause in this respect either *(see p.519, col. 1);*

(10) as regards the owners' application to extend time the power of the Court under s.12 of the Arbitration Act 1996 to extend time was markedly more restricted than the power under its predecessor, s.27 of the Arbitration Act, 1950 *(see* p.520, col. 1);

(11) in a common commercial transaction such as a Gencon charter-party and operations under or in respect of it the parties would reasonably have in contemplation the type of events which experience has shown were prone if not certain to occur; one might be cargo claims against owners where owners wished to be indemnified under the ordinary principles of English law by the charterers; this must be taken to be within the reasonable contemplation of owners and charterers; similarly their reasonable contemplation would include the making of a claim and the appointment of an arbitrator under the Centrocon arbitration clause and the consequences which followed if the time limit was not observed ***(see** p.520, col. 2);*

(12) a Court was not justified in finding that the fact that a party made a mistake as to the operation of cI. 23 both in regard to making a claim and appointing an arbitrator, was something which was outside their reasonable contemplation when they concluded the charter; the clause was well established and quite straightforward in its operation and consequences; and to allow such matters absent some unforeseeable circumstance to fall within 5.1 2(3)(a) would not be to give effect to par. (a) nor the commercial purpose of the Centrocon arbitration clause *(see p.520, col. 2; p.521, col. I);*

(13) it was not possible or reasonable to find that the commencement of arbitration proceedings regarding an indemnity claim was outside the contemplation of the parties when the charter was included (see p.52 ~ col. 2);

(14) there was no reason why it would be just to extend time; there was no conduct on the part of the charterers which would make it unjust to hold the owners to the strict terms of clause 23; it was for the owners to comply in time with clause 23 and the charterers had made their objections on jurisdiction clear; no declaratory relief and no extension of time would be granted to the owners *(see* p.522, col. 2).

CHAPTER FOUR

Application for extension of time under the Arbitration Act 1996

S12 Arbitration Act 1996. Power of court to extend time for beginning arbitral proceedings

s12(1) Where an arbitration agreement to refer fixture disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,

the court may by order extend the time for taking that step.

12(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties) but only after a claim has arisen and after exhausting any available arbitral process for obtaining extension of time.

12(3) The court shall make an order only if satisfied

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

12(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.

12(5) An order under this section does not affect the operation of the Limitation Acts (see sl3)

Clause 12 Power of Court to extend Time for beginning Arbitral Proceedings etc.. DAC 1996.

62. We have proposed a number of changes to the existing law.

63. The major change concerns the test that the Court must apply before extending the time.

64. The power of the Court to extend a contractual time limit which would otherwise bar the claim first appeared in our law in Section 16(6) of the Arbitration Act 1934, which was re-enacted in Section 27 of the Arbitration Act 1950.

65. From paragraph 33 of the Report of the MacKinnon Committee presented to Parliament in March 1927 it can be seen that the reason for suggesting that the Court should have power to extend the time was that the vast majority of submissions to arbitration are contained in printed forms of contract, which cannot be carefully examined in the transaction of business and alteration of which it would be difficult for most people to secure. The Committee concluded that it might be sound policy to create a power to modify unconscionable provisions as regards common forms of submission in printed forms. It is also clear from Paragraph 34 of the Report that the Committee had in mind cases where the time limit was very short ie measured in days. The Committee suggested that the test should be whether the time limit created an `unreasonable hardship.'

66. As can be seen from the Notes on Clauses to the 1934 Act, it was later felt that since the justification for giving the power was presumably either ignorance of the existence of the provision in the contract, or the acceptance of the provision through undue pressure by the other party, which could be the case whether or not the contract was in a common form, the power should not be limited to such forms.

67. Section 27 of the 1950 Act, with its test of undue hardship, seems to many to have been interpreted by the Courts in a way hardly envisaged by those who suggested the power in the first place. Indeed that interpretation seems to have changed over the years: see the discussion in Mustill and Boyd "**Commercial Arbitration**", 2nd Ed., pp 201-215. Some responses indicated dissatisfaction with the way the Courts were using s27 to interfere with the bargain that the parties had made. The present legal position would seem to owe much to a time, now some 20 years ago, when the Courts were flirting with the idea that they enjoyed some general power of supervisory jurisdiction over arbitrations.

68. The justification for time limits is that they enable commercial concerns (and indeed others) to draw a line beneath transactions at a much earlier stage than ordinary limitation provisions would allow. It should be mentioned, however, that other responses suggested that the position presently reached by the Courts should be maintained.

69. The present Committee re-examined Section 27 in the light of the underlying philosophy of the Bill, namely that of party autonomy. This underlying philosophy seems to have been generally welcomed in this country and abroad and of course it fits with the general international understanding of arbitration. Party autonomy means, among other things, that any power given to the Court to override the bargain that the parties have made must be fully justified. The idea that the Court has some general supervisory jurisdiction over arbitrations has been abandoned.

70. It seemed to us in today's climate that there were three cases where the power could be justified in the context of agreed time limits to bring a claim. These are, firstly, where the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question and that it would be fair to extend the time, secondly, where the conduct of one party made it unjust to hold the other to the time limit, and thirdly, where the respective bargaining position of the parties was such that it would again be unfair to hold one of them to the time limit.

71. The third of these cases seems to us to reflect the thinking of the MacKinnon Committee, while the other two have developed through the Courts' interpretation of Section 27. However this third category is really an aspect of what nowadays would be called `consumer protection'. This part of the Bill is not concerned with consumer protection, for which provision is made elsewhere and in respect of which there is a growing body of European law.

72. In these circumstances it seemed to us to be appropriate to set out in this part of the Bill the first and second of the cases we have described. Apart from anything else, this will give the Courts the opportunity to reconsider how to proceed in the light of the philosophy underlying the Bill as a whole, namely that of party autonomy. As the MacKinnon Committee itself intimated, great care must be taken before interfering with the bargain that the parties have made.

73. It was suggested to the DAC that the principal matter to be taken into account by the court should be the length of the contractual period in question. The DAC is of the view that this is only one of several relevant matters, another factor being, for example, the contemplation of the parties. For this reason, the DAC concluded that a simple test of "*substantial injustice*", without more, would not suffice.

74. There are some other changes.

    i. Firstly, Clause 12(1)(b) contains a reference to other dispute resolution procedures. We understand that there is an increasing use of provisions which call for mediation and other alternative dispute resolution procedures to precede recourse to arbitration, so that we thought it proper to add this to the other step covered by the Clause, namely to begin arbitral proceedings. We do not intend to widen the scope of the Clause beyond this, so that unless the step in question is one of the two kinds described, the Clause will not operate. Thus this represents only a small but we think logical extension to the present law.

    ii. Secondly, it is made a pre-condition that the party concerned first exhausts any available arbitral process for obtaining an extension of time. In the view of the Committee it would be a rare case indeed where the Court extended the time in circumstances where there was such a process which had not resulted in an extension, for it would in the ordinary case be difficult if not impossible to persuade the Court that it would be just to extend the time or unjust not to do so, where by an arbitral process to which ex hypothesi the applying party had agreed, the opposite conclusion had been reached.

iii. Thirdly, we have made any appeal from a decision of the Court under this Clause subject to the leave of that Court. It seems to us that there should be this limitation, and that in the absence of some important question of principle, leave should not generally be granted. We take the same view in respect of the other cases in the Bill where we propose that an appeal requires the leave of the Court.

iv. Fourthly, whereas the existing statutory provision refers to terms of an agreement that provide that claims shall be "*barred*", this has been extended to read *"barred, or the claimant's right extinguished"*.

75. For obvious reasons, this Clause is mandatory.

Applications for extensions of time – the case law under s12 Arbitration Act 1996.

Vosnoc v Transglobal **[**1998].[7] Arbitration - Commencement - Limitation of time - Dispute under contract of affreightment - Letter of Sept.19, 1995 advising dispute being referred to arbitration - Arbitrator not appointed until Mar. 6, 1997 - Whether appointment out of time. Whether letter of Sept.19 commenced arbitration because it carried implication that recipient appoint his arbitrator - Whether application for extension of time to appoint arbitrator should be granted. Limitation Act, 1980, s.34(3) Limitation Act 1939, s27(3) Arbitration Act, 1996, s.12, 14.

The plaintiffs, Vosnoc entered into a contract of affreightment with the defendants Trans Global date Aug.23, 1994 for the shipment of pipes by four vessel from Port Kembla in New South Wales to Kuantan in Malaysia where they were to be coated and the shipped to Dampier or Pont Hedland in Western Australia where they were required for a pipeline. Claus 17.8 of the contract provided that disputes under the contract were to be referred to arbitration in London The charter incorporated the Hague Rules and art. III r. 6 provided that unless suit was brought within on year of delivery Trans Global would be discharge from all liability whatever in respect of the pipes.

The vessels discharged at various dates in 1994 in Western Australia and the pipes were inspected on discharge. Damage was noted. Between Sept.30, 1994 and Mar.23, 1995 there was correspondence between Vosnoc and Trans Global concerning the claims. On Sept. 16, 1995 Vosnoc sent a letter by fax to Trans Global asking for an extension of time to commence suit. There was no response. On Sept. 19,1995 Vosnoc sent a fax to Trans Global stating inter alia: "*During loading, stowage and the voyage an unloading of the pipes serious damage was caused to the pipes in consequence of which [Vosnoc] has suffered loss and damage ... Under the Contract of Affreightment, pursuant to clause 17.8.. . all disputes between our respective companies shall be referred to the Arbitration of three persons in London. By this letter the dispute between our respective companies is referred to the Arbitration of three Arbitrators in London pursuant to the provisions Clause 17.8..."*

On the same date, September 19th 1995, proceedings were commenced in South Korea and the damages Vosno sought to claim against Trans Global were the sums that Vosnoc had had to pay or were liable for in the South Korean proceedings. There was no response from Trans Global to Vosnoc's letter of September 19th nor was anything done at this stage by either side to appoint arbitrators. On March 6th 1997 Vosnoc advised Trans Global that they had appointed an arbitrator in respect of the relevant dispute. On Mar. II, Trans Global replied to the effect that the letter of Sept. 19, 1995 did not satisfy the requirements necessary to bring suit for the purpose of Art III, r. 6 of the Hague Rules.

The issue for decision was whether a notice requiring differences to be submitted to arbitration in accordance with an agreement satisfied s.34(3) of the Limitation Act, 1980 because it carried with it by implication a request that the recipient appoint his arbitrator. Section 34(3) of the 1980 Act and its predecessor s.27(3) of the Limitation Act, 1939 stated what was to be done to commence an arbitration and thereby stop limitation running in circumstances which the sections covered. Section 34(3) of the I980 Act was repealed with effect from Jan.31, 1997 and replaced by s14 of the Arbitration Act, 1996. Vosnoc also applied for an extension of time in which to appoint their arbitrator.

[7] ***Vosnoc Ltd v Transglobal Projects Ltd.*** [1998] 1 Lloyd's Rep 711. Before Judge Raymond Jack, Q.C

Held, by Judge Raymond Jack, that

(1) there was an important distinction between serving a notice which expressly required an act to be done and a notice which stated something from which that act should follow though it was not referred to; and if a statutory provision provided for a notice requiring something, it was ordinarily to be expected that the notice must do so expressly (see p.717, cols. I and 2);

(2) if all that was needed was a notice referring the matter to arbitration, it made pointless the spelling out in the statutes what was to be done in the situations which they covered; there was no distinction in this respect between the two statutory provisions and the position would be the same with the new s.14; it seemed particularly clear that it could not have been the intention that the carefully considered provisions of that section would be met by a notice simply referring the dispute to arbitration (see p.717, col. 2);

Provided the notice made plain that the arbitration was to commence at the date of the notice, it was plain that the respondent was required to do what the arbitration agreement provided, namely to appoint an arbitrator; English law had taken the policy decision that to stop time running the notice must take a step further than a requirement to arbitrate (see p.717, col. 2). [8]

It appeared that what Vosnoc were seeking to do was to protect their position without having to advance the reference once it was made; if Trans Global had acted on the letter and appointed an arbitrator they could if they had chosen to have forced the arbitration ahead unless Vosnoc had persuaded the arbitrators appointed to stay the proceedings for a period; the position would have been similar to that where a writ. had been served; there was no equivalent in arbitration proceedings to a protective writ which could "lie in a drawer" without being served (see p.718, col. I);

If the notice was required expressly to call for the appointment of an arbitrator by Trans Global, its omission to do so was not an irregularity (see p.718, cols. 1 and 2);

s.12(3) of the 1996 Act required the Count to be satisfied of two matters, one as to the circumstances being outside the contemplation of the panties when they agreed the time bar, one that an extension would be just (see p.718, col. 2);

The significant aspect of the letter of Sept. 19 was that contrary to its intention it did not succeed in bringing suit; it would be what might be called in argument "*a near miss";* and such an event would not have been in the reasonable contemplation of the panties in August, 1994 (see p.719, col. I);

In all the circumstances it would be just to grant Vosnoc an extension; such extension would be required as a result of the failure of Vosnoc to include in the letter of Sept. 19 an express requirement that Trans Global appoint an arbitrator; that was a mistake for which the explanation was more likely an ignorance of the requirements of English law on a point which was not determined by authority; Vosnoc's clear intention was to give notice of arbitration and Vosnoc's claim was substantial; an extension of time would be granted under 5. 12(3)(a) (see p.719, cols. I and 2);

Vosnoc's letter of September 19th 1995 was not in terms which were appropriate to commence suit for the purposes of art. III, r. 6 of the Hague Rules but there would be such an extension of time under 5. I 2(3)(a) of the Arbitration Act, 1996 for the commencement of arbitration as was needed (see p.720, cols. I and 2).

By their originating summons the plaintiff applicants Vosnoc Ltd. claim a declaration that certain disputes between themselves and the defendant respondents Trans Global Projects Ltd. were validly referred to arbitration on or before Sept. 19, 1995.

Harbour & General Works Ltd v Environment Agency (1999) QBD (Commercial Court), Colman J. The respondent was the employer and the applicant the contractor under a major construction contract under the ICE Conditions (6th Edition) as amended in 1993 ('the ICE Conditions'). On 6 April 1997 the applicant served a notice of dispute, and on 29 June 1997 the engineer gave his decision. The applicant indicated that this was unacceptable but did nothing to refer the decision to conciliation or arbitration until 23 September when it

[8] ***Nea Agrex SA. V. Baltic. Shipping Co. Ltd.,*** [1976] 2 Lloyd's Rep. 47 applied.

purported to serve a notice to refer the dispute to conciliation.

Under the ICE Conditions it had one month from the date of the engineer's decision to refer to conciliation (clause 66(5)) or there months to refer to arbitration (clause 66(6)). The respondent did not point this out, but simply reserved its right to dispute the validity of the notice. On 5 October the respondent pointed out the discrepancy in the dates and the consequent invalidity of the notice, and on 6 October, a week too late, the applicant issued a notice to refer the dispute to arbitration. The respondent denied the validity of this notice also, and the applicant issued these proceedings for an extension of time under s.12 of the 1996 Act, or in the alternative for a declaration that the issues in dispute were necessary issues to be considered in any arbitration on the final payment certificate, and that any arbitrator appointed to arbitrate a dispute on the final payment certificate would have jurisdiction to reopen these disputes.

HELD: dismissing the applications :-

(1) To the extent that the engineer's decision decided issues in the notice of dispute such decisions were final and binding unless referred to conciliation or arbitration within the respective time limits of one month or three months and amended or varied by the conciliator or arbitrator.

(2) The applicant had allowed the time limit for reference to an arbitrator to expire, and therefore required an extension of time under s.12 of the Act.

(3) The applicant had failed to bring itself within s.12(3)(a) of the Act. There was nothing outside the reasonable contemplation of the parties which had any material impact on the omission of the applicant to refer their disputes to arbitration within the contractual time-bar. [9]

(4) To the extent that the engineer's decision left issues of quantification undecided those issues, but no others, could be referred to arbitration.

(5) The applicant was not entitled to the declaration sought, since failure to refer to conciliation or arbitration within the necessary time limits meant that the engineer's decision could not be reopened.

Harbour & General Works Ltd v Environment Agency [1999]. [10] Under a contract to which the ICE Conditions 6th applied, a dispute arose between appellant and respondent as to the former's entitlement to claim additional costs in respect of the carrying out of flood defence works. The contract provided for any dispute to be settled, in the first instance, by the Engineer (as specified in the contract) with either party being entitled, at its election, to refer any decision of the Engineer to either conciliation or arbitration within certain defined periods from the receipt of the Engineer's written decision.

In April 1998 the claimant gave notice of a dispute in relation to additional costs which it claimed. The Engineer's decision was issued on 29 June 1998, although the details of the financial consequences of that decision were not provided until much later. The time period for the commencement of any arbitration was three months from the date of the Engineer's decision. Due to an administrative oversight the appellant did not refer the dispute to arbitration until 6 October 1998, by which time the time period for any reference to conciliation had long since expired. The respondent refused to accept the appellant's notice of reference.

The appellant contended that:

(1) the failure to commence the arbitration within three months of 29 June 1998 was a procedural mishap, such as justified an extension of time; alternatively.

(2) time had not begun to run until the Engineer gave the details of his decision.

HELD: dismissing the appeal

(1) The construction of s.12 of the Arbitration Act 1996 started from the assumption that when the parties agreed the time-bar, they were to be taken as having contemplated that any omission to comply with its provisions in not unusual circumstances would bar the claim unless the conduct of the other party made it unjust that such a result should follow. Narrowly over-looking a time-bar due to an administrative oversight was far from being so uncommon as to be treated as beyond the parties reasonable contemplation, so as to trigger the court's power under s12(3) of the Act. The aim of s12(3) was to prevent

[9] ***Vosnoc Ltd v Transglobal Projects Ltd*** (1998) 1 WLR 101; ***Cathiship SA v Allansons Ltd*** (1998)3 AEA 714 and ***Grimaldi Compagnia di Navagazione SpA v Skihyo Lines Ltd*** (1998) *3 AER 943* considered.

[10] ***Harbour & General Works Ltd v Environment Agency*** [1999] 2 All ER 686. CA Waller LJ; Tuckey LJ.

a court's interference with a contractual bargain unless the circumstances were such that, had they been drawn to the parties' attention on agreeing the provision, the parties would have contemplated that the time-bar might not apply. It was then for the court to decide whether justice required an extension to be given.

(2) It was clear from an examination of what was referred to the Engineer and the answers which he gave that the Engineer gave a decision which caused time to begin running on 29 June 1998.

Lafarge Redland Aggregates Ltd v Shephard Hill Civ Eng Ltd [2000].[11] Shephard Hill agreed to construct a by-pass for a local authority employer under the terms of a contract incorporating an amended form of I.C.E. Standard Form of Contract for Civil Engineering Works, **5th** edition. Clause 66 provided for decisions of the engineer to be referred to arbitration in the event of any dissatisfaction with those decisions.

Shephard Hill engaged Lafarge to lay asphalt surfacing under the terms of the F.C.E.C. Standard Form of Subcontract (aka the Blue form). Clause 18(1) of that subcontract provided for disputes to be referred to arbitration, and clause 18(2) entitled the contractor to serve a notice on the subcontractor requiring the subcontract dispute to be dealt with jointly with a dispute arising under the main contract which touched and concerned the subcontract dispute.

Disputes arose under both contracts and in February 1995 the subcontractor gave notice of arbitration under clause 18(1). Shephard Hill responded by serving a notice under clause 18(2), but did not ask the engineer for a decision under clause 66 of the main contract on the related main contract issue.

By February 1996 Shephard Hill had still not referred the matter to the engineer under clause 66 (on the grounds that it was attempting to negotiate a settlement of the dispute), and the subcontractor applied to the court for a declaration that the contractor had waived its right under clause 18(2) to require a tripartite arbitration. The High Court refused to give the declaration but this was reversed by the Court of Appeal, and Shephard appealed to the House of Lords.

Decision : Shephard Hill's appeal was refused. If a contractor required a sub-contract dispute to be dealt with jointly with a dispute with the employer under the main contract, it was an implied condition of the exercise of the power under clause 18(2) of the sub-contract, that the contractor took steps to initiate the clause 66 procedure under the main contract within a reasonable time. What amounts to a reasonable time is a question of fact in each case, but it is no answer to delay that the contractor had sought to defer invoking the clause 66 procedure owing to a wish to reach a settlement with the employer, since a contractor taking advantage of clause 18(2) is under an obligation to have regard to the interests of the sub-contractor by a timeous resort to the clause 66 procedure.

Orkney Islands Council [2001].[12] Jurisdiction : limitation : Court held whether limitation applied and whether there was a dispute were matters for the arbitrator not the court.

Gibson Joint Venture v Department of the Environment for Northern Ireland [2001] NIQB 48 Dispute regarding an ICC 5th edition contract. Failure to demonstrate that the conditions under s12(3)(a) or (b) had been satisfied – viz outside reasonable contemplation of the parties & unjust or conduct of a party made it unfair, application failed. Shiel J

Trafigura v Golden Stavraetos **[2003]:**[13] Whether there had been consent to an extension of time to apply under a HVR cargo claim.

Good Challenger v Metalexportimport S.A. **[2003].**[14] Pre-CPR application for enforcement of an enforcement order in respect of an arbitration award. Whilst the enforcement would in ordinary circumstances be time barred there had been acknowledgements which extended time. This dispute could not arise again under the CPR rules for enforcement and the one month time bar.

[11] ***Lafarge Redland Aggregates Ltd v Shephard Hill Civ Eng Ltd*** [2000] 1 WLR 1621 HL.
[12] ***Orkney Islands Council [2001] Scotcourts P59/501*** ; . Lord Johnson
[13] ***Trafigura Beheer BV v Golden Stavraetos Maritime Inc [2003] EWCA Civ 664.*** CA before VC; Clarke LJ; Kay LJ.
[14] ***Good Challenger Navegante S.A. v Metalexportimport S.A. [2003] EWCA Civ 1668*** CA before Mantell LJ; Clarke LJ; Mr Justice Rimer.

Macwilliam v Mediterranean Shipping Co **[2003].**[15] The business issue between the parties is whether the contract of carriage contained in or evidenced by the bill of lading prescribed a package limitation under the Hague Rules, the Hague-Visby Rules, or the US Carriage of Goods by Sea Act 1936 ("USCOGSA"). Held : A straight (named) bill of lading is a bill of lading within the HVR.

Van Oord & Harbour & General v Port of Mostyn Ltd **[2003].**[16] Van Ord and Harbour & General formed a joint venture to carry out works for the Port of Mostyn. A dispute arose which was referred to adjudication. Under the governing ICC contract, clauses 64-66 imposes a time bar of 3 months following an adjudication for the referral onwards of the dispute to arbitration, after which the decision becomes unchallengeable. The notice of referral had under the contract to be delivered to the JV's main address.

Mostyn served the notice one day in advance of the expiry date but sent it to the JV's Morcambe address, not to their Newbury address. The notice was forwarded to Newbury but arrived there after expiry of the 3 month period. Whilst it had never been confirmed that Newbury was the HQ and thus the relevant address for service of notice, the JV maintained that since the notice was not served, as required by the contract, to the Newbury address it was invalid and the adjudication decision could not therefore be challenged.

The court reviewed the history of relationships between the party. It was evident that over a prolonged period of time communications had been exchanged between Mostyn and the JV which involved both addresses. The court noted that the JV was fully aware of the notice and its contents prior to expiry and felt that the JV was, in the JV's own words, exercising "*commercial savvy*" to avoid the arbitration on technical grounds. [17] The court concluded that the notice was given in time, but further noted that even if out of time, the court was prepared to exercise its discretion to extend time. ***Harbour & General v Environment Agency*** considered.

Paul Paolino Montalto Monella v. Pizza Express Ltd [2003] EWHC 2966 (Ch). Application for extension of time to appoint rent review arbitrator. Held : Whilst law was previously more flexible – a year prior to this the court had ruled that time is of the essence. The cause of delay was inefficiency by solicitors – not a force majeure issue. Accordingly Sir Andrew Morritt VC refused the application for an extension.

Peacocks Ltd v Chapman Taylor **[2004].**[18] Defendant asserted claim sent to wrong address and eventually served outside the statutory limitation period. In the circumstances court held, exercising its discretion, that there had been effective service within time. Similar issues regarding effective service could apply to adjudication and arbitration - and similarly in respect of limitation periods.

Birse v McCormick **[2005].**[19] Failed Appeal : Action (arbitration) out of time : Applicant sought to establish that new causes of action arose subsequently, thus making the application within time. First instance judgement held that the causes of action accrued on and were accordingly now out of time by virtue of the Statute of Limitation.

Henry Boot v Alstom **[2005].**[20] When a cause of action arises in respect of claims for interim and final payment under construction contracts. Does time run from when an engineer makes a decision on an interim payment or when he should have made the decision? Or is the interim application subsumed into the final account. Engineer refused to take on board questions of limitation and certified payments for work done many years earlier. At first instance the judge arbitrator held that time ran from issue of certificate or failure to issue a certificate at the due time. Hence applications time barred. This was appealed here. Held : time runs from when the payment due by virtue of a certificate is not honoured. The interim applications could be held back to the final account. Hence, not time barred. (Note this contract was pre HGCRA payment scheme). Interest from time of due certification time barred.

15 ***JI Macwilliam Co Inc v Mediterranean Shipping Company S.A. [2003] EWCA Civ 556.*** CA before Peter Gibson LJ; Rix LJ; Jacob LJ.

16 ***Van Oord ACZ Ltd & Harbour & General v Port of Mostyn Ltd [2003] BM350030 TCC.*** HHJ Frances Kirkham. TCC.

17 ***Central Provident Fund Board v Ho Bock Lee*** *(1981) 17 BLR 28.* ***Eriksson v Whalley*** *[1971] 1 NSWLR 397* on methods of communication referred to.

18 ***Peacocks Ltd v Chapman Taylor [2004] EWHC 2898 (TCC) Lawtel AC0108593:*** Thornton QC HHJ Richard

19 ***Birse Construction Ltd v McCormick (UK) Ltd [2005] EWCA Civ 940 :*** CA before Clarke LJ; Carnwath LJ; Mr Justice Patten.

20 ***Henry Boot Construction Ltd. v Alstom Combined Cycles Ltd. [2005] EWCA Civ 814 :*** CA before VC; Dyson LJ; Thomas LJ.

Borgship Tankers v Product Transport Corp **[2005].**[21] Cargo claims under a charterparty subject to the HVR are subject to a 1 year time bar. Claimants sought damages for wasted bunkers. The event arose out of dirty holds that required cleaning. Held : This was not a cargo claim. No bar.

Gold Coast Ltd. v Naval Gijon SA **[2006].**[22] Tribunal admitted an award contained an error but held that since the 21 day period under s57 had passed it was an issue for the court to deal with. Successful application under s79 to apply retrospectively for extension of time, thereby enabling the tribunal to correct the error.

LJ Korbetis v Transgrain Shipping BV [2005] EWHC 1345 (QB) . Had an arbitrator been validly appointed? A fax accepting the nomination of an arbitrator was sent to the wrong fax address and was not received. This defect was discovered many months later and an attempt made to appoint the arbitrator by sending statement of claim direct to him. Postal rule applied to misdirected fax. No acceptance communicated. No appointment made. The arbitration became time barred and the subsequent appointment was too late. A s12 application for extension of time refused. Toulson HHJ

[21] ***Borgship Tankers Inc. v Product Transport Corporation Ltd. [2005] EWHC 273 (Comm) :*** Cresswell Mr Justice

[22] ***Gold Coast Ltd. v Naval Gijon SA [2006] EWHC 1044 (Comm)*** Mrs Justice Gloster,

CHAPTER FOUR

STATUTORY TIME BARS

S13 Arbitration Act 1996. Application of Limitation Acts.

13(1) The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.

13(2) The court may order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter-

(a) of an award which the court orders to be set aside or declares to be of no effect, or

(b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect,

the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.

13(3) In determining for the purposes of the Limitation Acts when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.

13(4) In this Part "the Limitation Acts" means-

(a) in England and Wales, the Limitation Act 1980, the Foreign Limitation Periods Act 1984 and any other enactment (whenever passed) relating to the limitation of actions;

(b) in Northern Ireland, the Limitation (Northern Ireland) Order 1989, the Foreign Limitation Periods (Northern Ireland) Order 1985 and any other enactment (whenever passed) relating to the limitation of actions.

This provision places arbitral proceedings and litigation on the same footing for the purposes of a statutory time bar. Thus a contract claim would have to be commenced within the statutory time limit in the appropriate forum, be it arbitration or the court. It would not be possible to gain further time by choosing arbitration in lieu of litigation.

Clauses 13& 14. Application of Limitation Acts and Commencement of Arbitral Proceedings. DAC 1996.

76. The first of these provisions is designed to restate the present law. The reference to the Foreign Limitation Periods Act 1984 avoids (subject to the provisions of that Act) the imposition of an English limitation period where an applicable foreign law imposes a different period. The second provision reflects to a degree Article 21 of the Model Law, but sets out the various cases, including one not presently covered by the law. It will be noted that we have used the word *"matter"* rather than the word "disputes." This is to reflect the fact that a dispute is not the same as a claim; cf Mustill and Boyd op.cit.at p29 and Commission for the ***New Towns v Crudens*** (1995) CILL 1035. The neutral word *"matter"* will cover both, so that an arbitration clause which refers to claims will be covered as well as one which refers to disputes.

77. Clause 13 is a mandatory provision.

Section 14(5) Commencement of Arbitral Proceedings. DAC 1997.

21. Parliamentary Counsel considered that it was not necessary to make the amendment suggested in Paragraph 359 of Chapter 6 and we accepted his advice.

THE LIMITATION ACT 1980

1 Time limits under Part 1 subject to extension or exclusion under Part II

(1) This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part.

(2) The ordinary time limits given in this Part of this Act are subject to extension or exclusion in accordance with the provisions of Part II of this Act.

2 Time limit for actions founded on tort

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

3 Time limit in case of successive conversions and extinction of title of owner of converted goods

(1) Where any cause of action in respect of the conversion of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion takes place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

4A. Time limit for actions for defamation or malicious falsehood

The time limit under section 2 of this Act shall not apply to an action for--

(a) libel or slander, or

(b) slander of title, slander of goods or other malicious falsehood, but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.

5 Time limit for actions founded on simple contract

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

7 Time limit for actions to enforce certain awards

An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

9 Time limit for actions for sums recoverable by statute

(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action to which section 10 of this Act applies.

10 Special time limit for claiming contribution

(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.

(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.

(3) *If the person in question is held liable in respect of that damage--*
(a) by a judgment given in any civil proceedings; or
(b) by an award made on any arbitration;
the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).
For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

(4) *If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.*

(5) *An action to recover contribution shall be one to which sections 28, 32 and 35 of this Act apply, but otherwise Parts II and III of this Act (except sections 34, 37 and 38) shall not apply for the purposes of this section.*

11 Special time limit for actions in respect of personal injuries

(1) *This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.*

(1A) *This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.*

(2) *None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.*

(3) *An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.*

(4) *Except where subsection (5) below applies, the period applicable is three years from--*
(a) the date on which the cause of action accrued; or
(b) the date of knowledge (if later) of the person injured.

(5) *If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from--*
(a) the date of death; or
(b) the date of the personal representative's knowledge; whichever is the later.

(6) *For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.*

(7) *If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.*

11A Actions in respect of defective products

(1) *This section shall apply to an action for damages by virtue of any provision of Part I of the Consumer Protection Act 1987.*

(2) *None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.*

(3) An action to which this section applies shall not be brought after the expiration of the period of ten years from the relevant time, within the meaning of section 4 of the said Act of 1987; and this subsection shall operate to extinguish a right of action and shall do so whether or not that right of action had accrued, or time under the following provisions of this Act had begun to run, at the end of the said period of ten years.

(4) Subject to subsection (5) below, an action to which this section applies in which the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person or loss of or damage to any property, shall not be brought after the expiration of the period of three years from whichever is the later of--

(a) the date on which the cause of action accrued; and

(b) the date of knowledge of the injured person or, in the case of loss of or damage to property, the date of knowledge of the plaintiff or (if earlier) of any person in whom his cause of action was previously vested.

(5) If in a case where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person the injured person died before the expiration of the period mentioned in subsection (4) above, that subsection shall have effect as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 as if for the reference to that period there were substituted a reference to the period of three years from whichever is the later of--

(a) the date of death; and

(b) the date of the personal representative's knowledge.

(6) For the purposes of this section "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(7) If there is more than one personal representative and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

(8) Expressions used in this section or section 14 of this Act and in Part 1 of the Consumer Protection Act 1987 have the same meanings in this section or that section as in that Part; and section 1(1) of that Act (Part I to be construed as enacted for the purpose of complying with the product liability Directive) shall apply for the purpose of construing this section and the following provisions of this Act so far as they relate to an action by virtue of any provision of that Part as it applies for the purpose of construing that Part.

14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either--

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both--

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are--

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire--

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

14B Overriding time limit for negligence actions not involving personal injuries

(1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission--

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that--

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred; before the end of the period of limitation prescribed by this section.

24 Time limit for actions to enforce judgments

(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

32 Postponement of limitation period in case of fraud, concealment or mistake

(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either--
(a) the action is based upon the fraud of the defendant; or
(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
(c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action--
(a) to recover, or recover the value of, any property; or
(b) to enforce any charge against, or set aside any transaction affecting, any property;
to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(4) A purchaser is an innocent third party for the purposes of this section--
(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and
(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

S14 Arbitration Act 1996. Commencement of arbitral proceedings.

14(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

14(2) If there is no such agreement the following provisions apply.

14(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

14(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

14(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

Article 21. Model Law. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Self Assessment Exercise No6

1. Andy, a car sales man, sells Bertie a car for £3,000, bought as seen. The car is stated to be in good roadworthy condition. The receipt contains a clause stating that all complaints must be referred to London Arbitration within 14 days of delivery. The car is delivered to Bertie's house while he is on holiday, as arranged at the date of sale. When Bertie returns from holiday he tests the car out and discovers it is a veritable death trap on wheels. He phones Andy's Car sales and informs Andy that he is referring the issue to arbitration. Andy tells him he is too late.

   Advise Bertie.

2. Noddy buys 100,000 tons of toys from big ears under a contract which states that any question as to the quality of the toys must be arbitrated. Noddy discovers that only 95,000 tons are delivered and files a claim in court for short delivery.

   Big Ears seeks your advice as to whether a stay of action is possible pending the outcome of arbitral proceedings.

3. Farouk, an Egyptian buyer of goods shipped from England seeks a stay of action for non-payment of goods by John an English seller, and insists on arbitrating the dispute in Egypt on the basis that defective goods were delivered.

   Discuss whether the English court can proceed.

4 Review critically the judgment of Colman J in ***Harbour and General Works Limited v Environment Agency*** [1999] 4 BLR 143 and compare the effects of s12 Arbitration Act 1966 with those of s27 Arbitration Act 1950.

   In addition consider the position had the arbitration provision invoked s46 Arbitration Act 1996 to require that "*the arbitrator act in a spirit of fair dealing between the parties.*" In particular, to what extent, if at all is the "*equity arbitration*" subject to the black letter law, namely s12 Arbitration Act 1996 ? That is to say could an ***ex aequo bono*** provision be used to circumvent jurisdictional time bars?

Cross reference s46 Arbitration Act 1996. Rules applicable to substance of dispute.

46(1) The arbitral tribunal shall decide -the dispute

- *a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or*
- *b) if the parties so agree, in accordance with such* other considerations as are agreed by them or determined by the tribunal.

Cross reference sl Arbitration Act 1996 General Principles.

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

- *(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.*
- *(b) The parties should be free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest.*
- *(c) In matters governed by this part the court should not intervene except as provided by this part.*