CHAPTER SEVEN

MANAGEMENT OF THE ARBITRAL PROCESS

ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

The Arbitration Act 1996		*The Model Law*
	The arbitral proceedings	
33.	General duty of the tribunal.	Art 18
34.	Procedural and evidential matters.	Art 19,20,22,23,24
35.	Consolidation of proceedings and concurrent hearings.	
36.	Legal or other representation.	
37.	Power to appoint experts, legal advisers or assessors.	Art 26(1)
38.	General powers exercisable by the tribunal.	Art 17
39.	Power to make provisional awards.	
40.	General duty of parties.	
41.	Powers of tribunal in case of party's default.	Art 25

CONTENTS

CHAPTER SEVEN

Powers and Duties of the Tribunal

S33 Arbitration Act 1996 : General duty of the tribunal.

> *33(1) The tribunal shall-*
>
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*
>
> *33(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*

MODEL LAW : CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18 Model Law : Equal treatment of parties

> *The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*

Section33 provides the key general *(i.e. non-specific as contrasted with the specific duties set out in the contract)* duties of an arbitrator that in turn inform the grounds upon which the enforcement of an arbitral award may be resisted under **s68 Arbitration Act 1996** for procedural irregularity namely :-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);
(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
(d) failure by the tribunal to deal with all the issues that were put to it;
(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) uncertainty or ambiguity as to the effect of the award;
(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

DAC February 1996. : Clause 33 General Duty of the Tribunal

> *150. This is one of the central proposals in our Bill (grounded on Article 18 of the Model Law). It is a mandatory provision, since, as is explained below, we fail to see how a proceeding which departed from the stipulated duties could properly be described as an arbitration. We endeavour to set out, in the simplest, clearest terms we have been able to devise, how the tribunal should approach and deal with its task, which is to do full justice to the parties. In the following Clauses we set out in detail the powers available to the tribunal for this purpose.*
>
> *151. It has been suggested that the generality of Clause 33 may be problematic: that it may be an invitation to recalcitrant parties to launch challenges, or that vagueness will give rise to arguments. The advantage of arbitration is that it offers a dispute resolution system which can be tailored to the particular dispute to an extent which litigation finds it difficult to do. Thus depending on the nature of the dispute, there will be numerous ways in which the arbitration can be conducted. It. is quite impossible to list all the possible variants and to set out what may or may not be done. Indeed any attempt to do so would defeat one of the main purposes of the Bill, which is to encourage arbitral tribunals not slavishly to follow court or other set procedures. It follows that the only limits can be those set out in the present clause. It is to be hoped that the Courts will take a dim view of those who try to attack awards because of suggested breaches of this clause which have no real substance. At the same time, it can hardly be suggested that awards should not be open to attack when the tribunal has not acted in accordance with the principles stated.*

152. It has further been suggested that this part of the Bill will cause the demise of the amateur arbitrator. If by this is meant the demise of people who purport to act as arbitrators but who are either unable or unwilling (or both) to conduct the proceedings in accordance with what most would regard as self-evident rules of justice, then we indeed hope that this will be one of the results. But since these rules of justice are generally accepted in our democratic society, and are not merely theoretical considerations that concern lawyers alone, we can see no reason why the Bill should discourage anyone who is ready willing and able to apply them. Indeed we consider that the Bill will encourage and support all such people.

*153. Sometimes the parties to an arbitration employ lawyers who seek, in effect, to bully a non-legal arbitrator into taking a course of action which is against his better instincts, by seeking to blind him with legal `science' to get their way. Again, in some circles it is thought that somehow the procedures in an arbitration should be modelled on Court procedures, and that to adopt other methods would be **`misconduct'** (an expression that the Bill does not use) on the part of the arbitrator. This part of the Bill is designed to prevent such bullying and to explode the theory that an arbitration has always to follow Court procedures. If an arbitrator is satisfied that the way he wants to proceed fulfils his duty under this Clause and that the powers he wants to exercise are available to him under the following Clauses, then he should have the courage of his own convictions and proceed accordingly, unless the parties are agreed that he should adopt some other course.*

The relationship between Clauses 1(b), 33 and 34(1)

154. It has been suggested to us there could be a conflict between:

i. the mandatory duty cast on arbitrators by Clause 33 and

ii the principle of party autonomy in Clause 1(b) and the proviso in Clause 34(1)).

As we explain below, the DAC does not consider that there is any inconsistency between these two principles.

155. Under the principle of party autonomy, the parties are free to agree upon anything to do with the arbitration, subject only to such safeguards as are necessary in the public interest (Clause 1(b)). The mandatory provisions set out those matters which have effect notwithstanding any agreement to the contrary: see Clause 4. It seems to us that the public interest dictates that Clause 33 must be mandatory ie that the parties cannot effectively agree to dispense with the duty laid on arbitrators under Clause 33. In other words, they cannot effectively agree that the arbitrators can act unfairly, or that the arbitrators can be partial, or that the arbitrators can decide that the parties (or one of them) should not have a reasonable opportunity of putting his case or answering that of his opponent, or indeed that the arbitrators can adopt procedures that are unsuitable for the particular circumstances of the case or are unnecessarily slow or expensive, so that the means for resolving the matters to be determined is unfair. It is, of course, extremely unlikely in the nature of things that the parties would wish deliberately to make such bizarre agreements, but were this to happen, then it seems to us that such agreements should be ineffective for the purposes of this Bill, ie not binding on the parties or the tribunal.

156. However, a situation could well arise in practice in cases where the parties are agreed on a method of proceeding which they consider complies with the first of the general principles set out in Clause 1 (and which therefore the tribunal could adopt consistently with its duty under Clause 33) but the tribunal takes a different view, or where they are agreed in their opposition to a method of proceeding which the tribunal considers should be adopted in order to perform its Clause 33 duty.

157. In our view it is neither desirable nor practicable to stipulate that the tribunal can override the agreement of the parties. It is not desirable, because the type of arbitration we are discussing is a consensual process which depends on the agreement of the parties who are surely entitled (if they can agree) to have the final say on how they wish their dispute to be resolved. It is not practicable, since there is no way in which the parties can be forced to adopt a method of proceeding if they are agreed that this is not the way they wish to proceed. The latter is the case even if it could be established that their agreement was ineffective since it undermined or prevented performance of the duty made mandatory by Clause 33.

158. *A party would be unable to enforce an ineffective agreement against the other parties, nor would such an agreement bind the tribunal, but the problem under discussion only exists while the parties are in fact at one, whether or not their agreement is legally effective.*

159. *In circumstances such as these, the tribunal (assuming it has failed to persuade the parties to take a different course) has the choice of adopting the course preferred by the parties or of resigning. Indeed, resignation would be the only course if the parties were in agreement in rejecting the method preferred by the tribunal, and no other way of proceeding was agreed by them or considered suitable by the tribunal.*

160. *We have stipulated elsewhere in the Bill that the immunity we propose for arbitrators does not extend to any liability they may be under for resigning (Clause 29) though under Clause 25 they may seek relief in respect of such liability from the Court. The reason for the limitation on immunity is that cases may arise where the resignation of the arbitrator is wholly indefensible and has caused great delay and loss. In our view Clause 25 would suffice to protect arbitrators who resigned because they reasonably believed that the agreement of the parties prevented them from properly performing their Clause 33 duty. Furthermore, arbitrators could always stipulate for a right to resign in such circumstances as a term of their appointment.*

161. *If, on the other hand, the tribunal adopted a method of proceeding agreed by the parties, it seems to us that none of the parties could afterwards validly complain that the tribunal had failed in its Clause 33 duty, since the tribunal would only have done what the parties had asked it to do. Again, the fact that as between the parties such an agreement may have been ineffective as undermining or preventing performance of the Clause 33 duties seems to us to be wholly irrelevant.*

    It could of course be said that the tribunal had breached its Clause 33 duty, but this would have no practical consequences since the parties themselves would have brought about this state of affairs, and would therefore be unable to seek any relief in respect of it.

162. *Some people have expressed concern that there is a danger that lawyers will agree between themselves a method of proceeding which the tribunal consider to be unnecessarily long or expensive. However, if a tribunal considered, for example, that lawyers were trying either deliberately to `chum' the case for their own private advantage or were simply but misguidedly seeking to adopt unnecessary procedures etc, the obvious solution would be to ask them to confirm that their respective clients had been made aware of the views of the tribunal but were nevertheless in agreement that the course proposed by their lawyers should be adopted. At the end of the day, however, the fact remains that the only sanction the arbitrators have is to resign.*

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163. *In summary, therefore, we consider that the duty of the arbitrators under Clause 33 and the right of the parties to agree how the arbitration should be conducted do fit together. Under Clause 33 the tribunal have the specified duties. Under Clause 34 therefore, the tribunal must decide all procedural and evidential matters, subject to the right of the parties to agree any matter. If the parties reach an agreement on how to proceed which clashes with the duty of the tribunal or which the tribunal reasonably considers does so, then the arbitrators can either resign and have the protection of Clause 25, or can adopt what the parties want and will not afterwards be liable to the parties for doing so.*

Further points

164. *In this Clause we have provided that the tribunal shall give each party a "reasonable opportunity" of putting his case and dealing with that of his opponent. Article 18 of the Model Law uses the expression "full opportunity."*

> *165. We prefer the word "reasonable" because it removes any suggestion that a party is entitled to take as long as he likes, however objectively unreasonable this may be. We are sure that this was not intended by those who framed the Model Law, for it would entail that a party is entitled to an unreasonable time, which justice can hardly require. Indeed the contrary is the case, for an unreasonable time would ex hypothesi mean unnecessary delay & expense, things which produce injustice & which accordingly would offend the first principle of Clause 1, as well as Clauses 33 & 40.*

Belgravia v S & R Ltd [2001]. [1] S32 s33 AA 1996. Contractor under a JCT contract sought to borrow the management contractor's name to pursue a claim. Contractor declined to provide an indemnity so MC refused. Held : Contractor not a party to the arbitration agreement and would have to pursue remedy before the courts in the absence of a name borrowing arrangement.

Canadian Forest Navigation v Minerals Transportation [2001]. [2] S33 ; s68 AA 1996. Irregularity, if any had occurred, was not substantial or had serious consequences. Failed application.

Al Hadha Trading v Tradigrain [2002]. [3] Sections 33; 40; 41; 54; 57; 68; 70. Alleged breached the duty under s.40(1) to do everything necessary for the proper and expeditious conduct of an arbitration : tribunal invited to dismiss the claim under the powers given by s. 41(3). Claim 47 days late under the contract rules. GAFTA appeal board overturned the award and allowed the claim but provided no reasons. Held : Serious irregularity not to provide reasons – but no serious injustice since it was likely that reasons could be provided : Furthermore the challenge was 28 days late under s69.

Omnibridge v Clearsprings [2004]. [4] Sections 33 : 57 : 67 : 68 : 69 AA 1996. Dispute about bonuses under a management contract : Arbitrator held there was a right to bonuses – but that it was time limited : the latter point was not raised by either party to the arbitration : Held : Serious irregularity : however, other errors due to slips – which could have been corrected – right to challenge lost through waiver..

S34 Arbitration Act 1996. Procedural and evidential matters.

> *34(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.*
>
> *34(2) Procedural and evidential matters include-*
>
> *(a) when and where any part of the proceedings is to be held;*
>
> *(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;*
>
> *(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;*
>
> *(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;*
>
> *(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;*
>
> *(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;*
>
> *(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;*
>
> *(h) whether and to what extent there should be oral or written evidence or submissions.*
>
> *34(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).*

[1] ***Belgravia Property Co Ltd v. S & R (London) Ltd, Taylor Woodrow Management Ltd*** [2001] B.L.R. 424,: HHJ Humphrey Lloyd.
[2] ***Canadian Forest Navigation Co Ltd v. Minerals Transportation Ltd*** [2001] WL 1135100 (QBD (Comm Ct)) ; Mr Justice David Steel.
[3] ***Al Hadha Trading Co. v. Tradigrain S.A.*** [2002] 2 Lloyd's Rep. 512 : HHJ Havelock-Allan QC
[4] ***Omnibridge Consulting Ltd v. Clearsprings (Management) Ltd*** [2004] EWHC 2276 (Comm) : Mr Richard Siberry QC.

CHAPTER SEVEN

Article 19. Model Law : Determination of rules of procedure

19(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the Proceedings.

19(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20 Model Law : Place of arbitration

20(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

20(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 22. Model Law : Language

22(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

22(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Model Law : Statements of claim and defence

23(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

23(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Model Law : Hearings and written proceedings

24(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

24(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

24(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Clause 34 Procedural and evidential Matters. DAC 1996.

166. *We trust that the matters we have listed in this Clause (which are partly drawn from Articles 19, 20 22, 23 an 24 of the Model Law) are largely self-evident. We have produced a non-exhaustive check-list because we think it will be helpful both to arbitrating parties and to their arbitrators. We cannot emphasize too strongly that one of the strengths of the arbitral process is that it is able much more easily than any Court system to adapt its procedures to suit the particular case. Hence we have spelt this out as a duty under the preceding Clause. The list of powers helps the tribunal (and indeed the parties) to choose how best to proceed, untrammelled by technical or formalistic rules.*

167. *Some of those responding suggested that we should include a special code to deal with the arbitration of small claims. We have not adopted this suggestion for the very reason we have just stated. Any such code would have to have detailed rules, arbitrary monetary or other limits and other complicated provisions. In our view, proper adherence to the duties in Clause 33 will achieve the same result. A small claim will simply not need all the expensive procedural and other paraphernalia which might be required for the resolution of some huge and complicated international dispute.*

168. *Furthermore, we consider that associations and institutions concerned with specific areas of trade etc. can play a very significant part in formulating rules and procedures for arbitrating disputes concerning their members. Such bodies have the detailed knowledge and experience required to enable them properly to address this task, in relation both to small claims and otherwise. We feel strongly that it would be wrong for a Bill of the present kind to seek to lay down a rigid structure for any kind of case; and that different methods must be developed to suit different circumstances, by arbitral tribunals as well as those who have the necessary practical knowledge of those circumstances. Finally, of course, the Bill in no way impinges upon small claims procedures developed for use through the court system.*

169. *Sub-section (a). Whilst Article 20(1) of the Model law states that, in the absence of the agreement of the parties, "the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties", sub-section 34(2) (a) does not state that the tribunal should have the convenience of the parties in mind, given that this is a consideration that is really subsumed under the general duty of the Tribunal in Clause 33, and, further, because the DAC was of the view that like considerations apply to other parts of Clause 34, such as sub-section (b), even though the Model Law does not appear to reflect this. Unlike the Model Law, sub-section (a) also refers to "when", as well as "where".*

170. *Sub-section (f) makes it clear that arbitrators are not necessarily bound by the technical rules of evidence. In his 1993 Freshfields Lecture ((1994) Arbitration International Vol 10, p.l), Lord Steyn questioned why the technical rules of evidence should apply to arbitration, even if (as he doubted) there was authority for this. This provision clarifies the position. It is to be noted that Clause 34(2) (f) helps to put an end to any arguments that it is a question of law whether there is material to support a finding of fact.*

171. *Sub-section (g). Some anxiety was expressed at the power to act inquisitorially, to be found in sub-section (g), on grounds that arbitrators are unused to such powers and might, albeit in good faith, abuse them.*

172. *We do not share this view. Once again it seems to us that provided the tribunal in exercising its powers follows its simple duty as set out in Clause 33 (and sub-section (2) of this Clause tells the tribunal that this is what they must do) then in suitable cases an inquisitorial approach to all or some of the matters involved may well be the best way of proceeding. Clause 33, however, remains a control, such that, for example, if an arbitrator takes the initiative in procuring evidence, he must give all parties a reasonable opportunity of commenting on it.*

173. *A number of arbitrators who responded to our July 1995 draft suggested that the tribunal should be entitled to have the last word ie should be given the power to override the agreement of the parties to follow a different course. The interrelationship of the tribunal's duties and party autonomy has already been discussed above. As is clear from that discussion, we disagree with this view for the following reasons:*

   i. *To give the tribunal such a power would be contrary to Article 19 of the Model Law. It would also be contrary to the present position under English law.*

   ii. *To allow the tribunal to override the agreement of the parties would to our minds constitute an indefensible inroad into the principle of party autonomy, upon which the Bill is based.*

iii. It is difficult to see how such .a power could be backed by any effective sanction. If the parties agree not to adopt the course ordered by the tribunal, there is nothing the tribunal can do except resign.

iv. It seems to us that the problem is more apparent than real. In most cases the parties rely on the tribunal to decide how to conduct the case and do not sit down and agree between themselves how it is to be done. In order to reflect what actually happens in practice we have accordingly reversed the way many of the other Clauses begin and stated that it is for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. In our view, however, since arbitration is the parties' own chosen method of dispute resolution, we cannot see why they should be deprived of the right to decide what form the arbitration should take.

174. As we have made clear above, it is of course open to those who frame rules for arbitration which the parties incorporate into their agreement, to stipulate that the tribunal is to have the last word, and likewise arbitrators can stipulate this as a term of their agreement to act, though once again there would be no means, apart from persuasion or the threat of resignation, of enforcing such a stipulation if the parties later jointly took a different view.

175. It has been suggested that there could be a conflict between the proviso in Clause 34(1) and Clause 40. This is said to arise, for example, where the parties have agreed a procedural or evidential matter which they are entitled to do under Clause 34(1), but the tribunal are intent on taking a different course. Does the parties' agreement override their duty under Clause 40?

The DAC considers that no such conflict exists:

i. The parties are free to agree on all procedural and evidential matters, pursuant to Clause 34(1).

ii. However, any such agreement will only be effective, if it is consistent with Clause 33, being a mandatory provision.

iii. Any such agreement made pursuant to Clause 34(1), and consistent with Clause 33, will define the scope of Clause 40 - ie the parties will have agreed on how the arbitration is to be conducted, or, in the words of Clause 40, what is to constitute the "proper and expeditious conduct of the arbitral proceedings".

The determinations of the tribunal should follow that agreement (which would not be the case if such an agreement was inconsistent with Clause 33) and ex hypothesi the parties should be obliged to comply.

iv. If there are matters on which the parties have not agreed, then the tribunal will fill the gap under Clause 34(1) and Clause 40(1) will again operate without conflict.

176. It has also been suggested that the Bill should include a provision that the arbitrator should encourage the parties to use other forms of ADR when this was considered appropriate. This suggestion has not been adopted, since the Bill is concerned with arbitration where the parties have chosen this rather than any other form of dispute resolution.

Pirtek v Deanswood [2005]. [5] Sections 34; 49; 57; 66; 79 AA 1996. Interest : slip rule : time limits. No agreement to extend 56 day rule for amendment of award. Interest backdated to a period preceding claim. Award set aside.

S35 Arbitration Act 1996 : Consolidation of proceedings and concurrent hearings.

35(1) The parties are free to agree-
(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
(b) that concurrent hearings shall be held,
on such terms as may be agreed.

35(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

[5] ***Pirtek (UK) Ltd v. Deanswood Ltd, Gordon Harris*** [2005] EWHC 2301 (Comm) : Mr Justice Aikens

Clause 35 Consolidation of Proceedings and Concurrent Hearings. DAC 1996.

177. This Clause makes clear that the parties may agree to consolidate their arbitration with other arbitral proceedings or to hold concurrent hearings.

178. During the consultation exercises, the DAC received submissions calling for a provision that would empower either a tribunal or the Court (or indeed both) to order consolidation or concurrent hearings. These were considered extremely carefully by the committee.

179. The problem arises in cases where a number of parties are involved. For example, in a construction project a main contractor may make a number of sub-contracts each of which contains an arbitration clause. A dispute arises in which a claim is made against one sub-contractor who seeks to blame another. In Court, of course, there is power to order consolidation or concurrent hearings, as well as procedures for allowing additional parties to be joined. In arbitrations, however, this power does not exist. The reason it does not exist is that this form of dispute resolution depends on the agreement of the contracting parties that their disputes will be arbitrated by a private tribunal, not litigated in the public courts. It follows that unless the parties otherwise agree, only their own disputes arising out of their own agreement can be referred to that agreed tribunal.

180. In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the Court power to order consolidation or concurrent hearings. Indeed it would to our minds go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes. Further difficulties could well arise, such as the disclosure of documents from one arbitration to another. Accordingly we would be opposed to giving the tribunal or the Court this power. However, if the parties agree to invest the tribunal with such a power, then we would have no objection.

181. Having said this, the DAC appreciates the common sense behind the suggestion. We are persuaded, however, that the problem is best solved by obtaining the agreement of the parties. Thus those who are in charge of drafting standard forms of contract, or who offer terms for arbitration services which the parties can incorporate into their agreements, (especially those institutions and associations which are concerned with situations in which there are likely to be numerous contracts and sub-contracts) could include suitable clauses permitting the tribunal to consolidate or order concurrent hearings in appropriate cases.

For example, the London Maritime Arbitrators Association Rules have within them a provision along these lines. In order to encourage this, we have made clear in this Clause that with the agreement of the parties, there is nothing wrong with adopting such procedures.

182. It will be noted that whereas Clause 39 uses the expression "[tjhe parties are free to agree that the tribunal shall have power to order ... ", Clause 35 simple states that "1tlhe parties are free to agree... ". This difference is easily explained. In both cases the parties are free to endow the tribunal with the power in question. This is implicit in Clause 35(1) by virtue of Clause 35(2). Under Clause 35(1), the parties may agree between themselves to consolidate two arbitrations, or to have concurrent hearings, before a tribunal has been appointed. This could, of course, have a bearing on how the tribunal is to be appointed in such a situation. Indeed the parties may agree on institutional rules that provide for this. However, an equivalent arrangement is difficult to imagine in the context of Clause 39. Overall, the difference in wording is not intended to impede the parties' freedom to agree what they like, when they like, in either case.

S36 Arbitration Act 1996 : Legal or other representation.

36. Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

Clause 36 Legal or other Representation

183. It seems to us that this reflects a basic right, though of course the parties are free to dispense with it if they wish.

184. *In the draft produced in July we used the phrase "a lawyer or other person of his choice. " We have changed this, because we felt that it might give the impression that a party could stubbornly insist on a particular lawyer or other person, in circumstances where that individual could not attend for a long time, thus giving a recalcitrant party a good means of delaying the arbitral process. This should not happen. "A lawyer or other person chosen by him" does not give this impression: if a party's first choice is not available, his second choice will still be "a lawyer or other person chosen by him". The right to be represented exists but must not be abused. Furthermore the right must be read with the first principle of Clause 1, as well as Clauses 33 and 40. If this is done then we trust that attempts to abuse the right will fail.*

185. *It has been suggested to the DAC that there should be some provision requiring a party to give advance notice to all other parties if he intends to be represented at a hearing. Whilst in some ways an attractive proposal, this would be difficult to stipulate as a statutory provision, given that it may be impossible in some circumstances, or simply unnecessary in others. Further, different sanctions may be appropriate depending on the particular case. It is clearly desirable that, as a general rule, such notice be given. If it is not, one sanction may be for the tribunal to adjourn a hearing at the defaulting party's cost. In the end, however, this must be a matter for the tribunal's discretion in each particular case.*

186. *It has been suggested that this Clause provides an opportunity of extending by statute the privilege enjoyed by legal advisers to non-legal advisers or representatives. We have not adopted this suggestion. It seems to us that it would be necessary to define with great precision which non-legal advisers or representatives are to be included (eg what relationship they must have to the arbitration and its conduct), and the precise classes of privilege which should be extended to them. Further, any such provision would necessarily have an impact on the position beyond arbitration. In short, it seems to us that this question cannot be confined to arbitrations and raises matters of general principle far beyond those of our remit.*

S37 Arbitration Act 1996 : Power to appoint experts, legal advisers or assessors.

37(1) Unless otherwise agreed by the parties-

(a) the tribunal may-

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters,

and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

37(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

Article 26. Model Law : Expert appointed by arbitral tribunal

26(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

26(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses m order to testify on the points at issue.

Clause 37 Power to appoint experts, legal advisers or assessors

> *187. This to our minds would be a useful power in certain cases. We trust that the provisions we suggest are self-evident. Of course, the power can only be exercised if in the circumstances of the particular case its exercise falls within the scope of the duty of the tribunal set out in Clause 33.*
>
> *188. Sub-section (2) is made mandatory, to avoid the risk of the parties agreeing otherwise and thus disabling the tribunal from recovering from the parties expenses properly incurred.*

Elektrim v Vivendi [2007]. [6] S37 SCA 1981 : Injunction restraining arbitration. Party participated for 10 months in an on going arbitration in London – reserving its position on jurisdiction pending the outcome of an arbitration in Geneva. Application refused.

S38 Arbitration Act 1996 : General powers exercisable by the tribunal.

> *38(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.*
>
> *38(2) Unless otherwise agreed by the parties the tribunal has the following powers.*
>
> *38(3) The tribunal may order a claimant to provide security for the costs of the arbitration.*
> *This power shall not be exercised on the ground that the claimant is-*
> *(a) an individual ordinarily resident outside the United Kingdom, or*
> *(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.*
>
> *38(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings-*
> *(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or*
> *(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.*
>
> *38(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.*
>
> *38(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.*

Article 17. Model Law : Power of arbitral tribunal to order interim measures

> *Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.*

Article 41 SECURITY OF COSTS : DEPOSIT OF COSTS. UNCITRAL ARBITRATION RULES

> *1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).*
>
> *2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.*

[6] ***Elektrim SA v Vivendi Universal SA*** [2007] EWHC 571 (Comm) : Mr Justice Aikens.

3. *If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.*
4. *If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.*
5. *After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpected balance to the parties.*

See also Guideline 2, 2007 CIArb,, "*Guidelines for Arbitrators as to how to exercise the powers granted to them in terms of Section 38(4) of The Arbitration Act 1996*."

Clause 38 General Powers Exercisable by the Tribunal. DAC 1996.

189. *These provisions represent a significant re-drawing of the relationship between arbitration and the Court. Wherever a power could properly be exercised by a tribunal rather than the Court, provision has been made for this, thereby reducing the need to incur the expense and inconvenience of making applications to Court during arbitral proceedings.*
190. *The first of the powers in this Clause is one which enables the tribunal to order security for costs. The power presently given to the Court to order security for costs in arbitrations is removed in its entirety.*
191. *This is a major change from the present position where only the Court can order security for costs. The theory which lay behind the present law is that it is the duty of an arbitral tribunal to decide the substantive merits of the dispute referred to it and that it would not be performing this duty if it stayed or struck out the proceedings pending the provision of security: see for example,* ***Re Unione Stearinerie Lanza & Weiner*** *[1917] 2 KB 558.*
192. *We do not subscribe to this theory, which Parliament has already abandoned in the context of striking out a claim for want of prosecution. In our view, when the parties agree to arbitrate, they are agreeing that their dispute will be resolved by this means.*
    To our minds (in the absence of express stipulations to the contrary) this does not mean that the dispute is necessarily to be decided on its substantive merits. It is in truth an agreement that it will be resolved by the application of the agreed arbitral process. If one party then fails to comply with that process, then it seems to us that it is entirely within what the parties have agreed that the tribunal can resolve the dispute on this ground.
193. *Apart from this, the proposition that the Court should involve itself in such matters as deciding whether a claimant in an arbitration should provide security for costs has received universal condemnation in the context of international arbitrations. It is no exaggeration to say that the recent decision of the House of Lords in* ***S.A. Coppee Lavalin NV v Ken Ren Chemicals and Fertilisers*** *[1994] 2 WLR 631 was greeted with dismay by those in the international arbitration community who have at heart the desire to promote our country as a world centre for arbitration. We share those concerns.*
194. *It has been suggested to the DAC that the court should retain a power to order security for costs that may be incurred up to the appointment of the tribunal. We have not been persuaded, however, that this is really necessary.*
195. *It has been pointed out that in some cases an application for security before an arbitral tribunal might involve disclosing to that tribunal the fact that an offer of settlement had been or was about to be made. Under the court system, such disclosure can be made to a court other than that which will try the merits of the case.*
196. *We are not disturbed by this. It seems to us that a tribunal, properly performing its duty under Clause 33, could and should not be influenced by such matters, if the case proceeds to a hearing on the merits, nor do we accept that the disclosure of such information could somehow disqualify the tribunal from acting.*

197. *Clause 38(3) has been the subject of significant criticism since the Bill was introduced. In the light of this, we have concluded that it must be redrawn. Chapter 6, to which reference should be made, contains a full discussion of the problems with this provision as currently drafted, and our recommendations for its amendment.*

198. *Whilst the sanction in court for a failure to provide security for costs is normally a stay of the action, this is inappropriate in arbitration: if an arbitrator stayed proceedings, the arbitration would come to a halt without there necessarily being an award which could be challenged (eg if a party seeks to continue the proceedings). We have therefore included a specific sanction with respect to a failure to provide security for costs, which is to be found in Clause 41(6). This provision also follows the practice of the English Commercial Court, which changed from the old practice of ordering a stay of proceedings if security was not provided. The disadvantage of the latter course was that it left the proceedings dormant but alive, so that years later they could be revived by the provision of security.*

199. *Clause 38 provides the tribunal with other powers in relation to the arbitration proceedings. We trust that these are self-explanatory.*

The DAC Supplementary Report January 1997: Section 38(3) Security for Costs

28. *The power for arbitrators to order security for costs was included in the Bill for the reasons set out at Paragraphs 189 to 199 of our February 1996 Report. In the Bill as introduced, we included a provision that the arbitral tribunal should apply the same principles as the Court in exercising this power. This was an attempt to meet the concerns of those who considered that since under the existing law arbitrators had no power to order security (unless the parties had expressly agreed to confer such a power), there was a need to set out some principles to guide arbitrators. However, as we explained at Paragraphs 364 to 370 of Chapter 6, we concluded in the end that this was not a good idea and that it would be better to amend this part of the Bill, by deleting the references to Court principles and by making clear that the fact that a claimant or counter-claimant came from abroad was not a ground for ordering security.*
Our suggestions were adopted. We proposed a specific amendment, but Parliamentary Counsel improved upon it in particular by not using the word "only" since this might enable it to be argued that the fact that the claimant or counter-claimant came from abroad could be taken into account so long as there were other supporting factors as well. This, of course, was not our intention.

29. *It should also be noted that the Bill as introduced used the word "party" in relation to orders for security for costs. This did not matter so long as there was a reference to Court principles, but once this was deleted, it was necessary to change this to "claimant'; since it was not our intention to give arbitral tribunals the power to order respondents to provide security. Section 82 defines claimant as including counter-claimant.*

S39 Arbitration Act 1996 : Power to make provisional awards.

39(1) *The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.*

39(2) *This includes, for instance, making-*
- *(a) a provisional order for the payment of money or the disposition of property as between the parties, or*
- *(b) an order to make an interim payment on account of the costs of the arbitration.*

39(3) *Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.*

39(4) *Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.*

This does not affect its powers under section 47 (awards on different issues, &c.).

CHAPTER SEVEN

Clause 39 Power to make Provisional Awards. DAC 1996.

200. In the July 1995 draft Clauses, this power did not require the agreement of the parties. As the result of responses, we have concluded on further consideration that this is necessary.

*201. In **The Kostas Melas** [1981] 1 Lloyd's Rep. 18 at 26, Goff J, as he then was, made clear that it was no part of an arbitrator's function to make temporary or provisional financial arrangements between the parties. Furthermore, as can be demonstrated by the abundance of court cases dealing with this subject (in the context of applications for summary judgment, interim payments, Mareva injunctions and the like) enormous care has to be taken to avoid turning what can be a useful judicial tool into an instrument of injustice. We should add that we received responses from a number of practising arbitrators to the effect that they would be unhappy with such powers, and saw no need for them. We should note in passing that the July 1995 draft would arguably (and inadvertently) have allowed arbitrators to order ex parte Mareva or even Anton Piller relief. These draconian powers are best left to be applied by the Courts, and the provisions of the Bill with respect to such powers have been adjusted accordingly.*

202. There is a sharp distinction to be drawn between making provisional or temporary arrangements, which are subject to reversal when the underlying merits are finally decided by the tribunal; and dealing severally with different issues or questions at different times and in different awards, which we cover in Clause 47. It is for this reason that in this provision we draw attention to that Clause.

203. These considerations have led us firmly to conclude that it would only be desirable to give arbitral tribunals power to make such provisional orders where the parties have so agreed. Such agreements, of course, will have to be drafted with some care for the reasons we have stated. Subject to the safeguards of the parties' agreement and the arbitrators' duties (Clause 33), we envisage that this enlargement of the traditional jurisdiction of arbitrators could serve a very useful purpose, for example in trades and industries where cash flow is of particular importance.

Guideline 1, 2007 CIArb,, "*Guidelines for Arbitrators as to how to approach an application for Provisional Relief in terms of Section 39 of the Arbitration Act 1996*" provides a comparative law view of the provisional relief powers of arbitrators.

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.

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.

Article 25. Model Law. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) evidence, award on any party fails to appear at a hearing or to produce documentary the arbitral tribunal may continue the proceedings and make the evidence before it.

Clause 41 Powers of Tribunal in Case of Party's Default

206. The first part of this Clause sets out the present law (section 13A of the 1950 Act, which was inserted by section 102 of the Courts and Legal Services Act 1990) giving the arbitral tribunal power to strike out for want of prosecution.

207. The second part makes clear that in the circumstances stipulated, a tribunal may proceed ex parte, though we have forborne from using this expression (or indeed any other legal Latin words or phrases) in the Bill. The Clause has its roots in Article 25 of the Model Law.

208. It is a basic rule of justice that a court or tribunal should give all parties an opportunity to put their case and answer that of their opponents. That is why this appears in Clause 33 of the Bill. Equally, however, and for reasons already mentioned, that opportunity should, again for reasons of justice, be limited to a reasonable one. If for no good reason such an opportunity is not taken by a party then to our minds it is only fair to the other party that the tribunal should be able to proceed as we have set out in this Clause.

209. The last part of this Clause sets out a system of peremptory orders. It will be noted that a peremptory order must be "to the same effect" as the preceding order which was disobeyed (sub-section (5)). It could be quite unfair for an arbitrator to be able to make any type of peremptory order, on any matter, regardless of its connection with the default in question.

210. For the reasons mentioned earlier, sub-section (6) provides that where a party fails to comply with a peremptory order to provide security for costs, the tribunal may make an award dismissing the claim, thereby following the practice of the English Commercial Court, and avoiding the danger that the proceedings are halted indefinitely, without there being anything to challenge before the Court.

211. So far as failure to comply with other peremptory orders is concerned, we have provided a range of remedies. They do not include a power simply to make an award against the defaulting party. The reason for this is that (unlike a failure to comply with a peremptory order to provide security) it seems to us that this is too draconian a remedy, and that the alternatives we have provided very much better fit the justice of the matter.

The Boucraa (1994). [7] Inordinate delay : An arbitrator had power under section 13A of the Arbitration Act 1950, as inserted by section 102 of the Courts and Legal Services Act 1990, to dismiss a claim on the ground of inordinate and inexcusable delay occurring before the section came into force on January 1st 1992

[7] ***The Boucraa :*** (1994) 1 AC 486. Before Lords Templeman, Goff, Jauncey, Brown-Wilkinson and Mustill.

CHAPTER SEVEN

The House of Lords allowed an appeal by the charterers, Yamashita-Shinnihon SS Co Ltd. respondents in arbitration proceedings from the Court of Appeal (Sir Thomas Bingham, Master of the Rolls. Lords Justice Beldam and Kennedy) (Times April 16 1993: (1993) 3 WLR 266) who by a majority, Lord Justice Beldam dissenting. had dismissed the charterers' appeal from Mr Justice Saville.

The judge had allowed an appeal by the owners, L'Office Cherifien des Phosphates whose claim in the arbitration had been struck out by the arbitrator, Mr Michael Baker-Harber, for inordinate and in-excusable delay prior to January 1st 1992, in prosecuting the reference. The arbitrator, who held that the section applied retrospectively, did not find the owners guilty of delay after January 1st 1992. Mr Richard Aikens. QC and Mr Edmund Broadbent for the charterers; Mr Jonathan Gaisman and Mr Alistair Schaff for the owners.

Lord Mustill said that the shipowners' complaint was that the cargo holds of their vessel Boucraa had suffered corrosion damage while carrying sulphur for the charterers in 1964 due to excess moisture caused by watering of the Cargo at Vancouver. Points of claim and defence had been delivered in 1986 but nothing much further had happened until April 1991 when the owners' new solicitors had written to the arbitrator proposing a preliminary issue on the meaning of a clause in the charterparty. So far, the story would have caused regret but not undue surprise to anyone practising arbitration during the concluding decades of the twentieth century. What would, however have caused great remark was that on January 13, 1991 the charterers had applied to the arbitrator to dismiss the owners' claim for want of prosecution. Such an application, if made during the 1970s or 1980s, would have been rejected out of hand.

The grounds stated in the award were that the owners had been guilty of inordinate and inexcusable delay in advancing the arbitration, which had created a real risk of an unfair resolution of the dispute. If these had been proceedings in the High Court the arbitrator's decision to dismiss the claim would have been unassailable. The important question, however, was whether the arbitrator had been entitled to take into account any part of the delay that had preceded the coming into force of the new powers, for if he had not been, it was plain that the award could not be sustained.

Section l3A, as inserted, provided:

(1) Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to make an award dismissing any claim in a dispute referred to him if it appears to him ...

(a) that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim; and

(b) that the delay

(i) will give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or

(ii) has caused, or is likely to cause or to have caused serious prejudice to the respondent.

The arbitrator had taken the view that there was a short answer to the problem. He had said: "... as from January 1.1992. I am bound to read [The 1950 Act] as if section 13A was incorporated into it. That...is the clearest possible indication that the legislation has retrospective effect. It requires a tribunal …... to proceed on the basis that the power has been there since 1950."

His Lordship could not accept that. The legislative technique of adding a new section or sections to an existing statute was more common than in the past. The purpose seemed to be to make complex legislation more manageable, so that the reader need do no more than obtain a copy of the Act as amended. It did not it all follow that all part of the composite Act were to be treated as having come into force simultaneously with the original Act.

The real contest, on the present appeal, was not whether section l3A was retrospective in the ordinary sense but whether a provision that was undeniably prospective in the conferring of powers enabled those powers to be exercised by reference to acts or omissions that had taken place before the new section had come into force. It would be impossible to doubt that the court was required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute was not intended to have retrospective effect. The basis of the rule, however, was no more than simple fairness, which ought to be the basis of every legal rule. Precisely how the single question of fairness would be answered in respect of a particular statute would depend on the interaction of several factors capable of varying from case to case.

All had to be weighed together to provide a direct answer to the question whether the consequences of

reading the statute with the suggested degree of retrospectivity were so unfair that the words used by Parliament could not have been intended to mean what they might appear to say. Even if read in isolation, the words in Section 13A "there has been inordinate and inexcusable delay" would be sufficient, in the context of section l3A as a whole to demonstrate that the delay encompassed all the delay that had caused the substantial risk of unfairness.

If there were any doubt about that, the loud and prolonged chorus of complaints about the disconformity between practices in arbitration and in the High Court and the increasing impatience for something to be done about it, showed quite clearly that section 13A had been intended to bite in full from the outset.

His Lordship found the meaning of section 13A sufficiently clear to persuade him that in the interests of reform Parliament had been willing to tolerate the very qualified kind of hardship implied in giving the legislation a partially retrospective effect. He agreed with Lord Justice Beldam that the arbitrator had had the powers that he had purported to exercise.

Lord Templeman delivered an opinion agreeing with Lord Mustill and Lord Goff, Lord Jauncey and Lord Brown-Wilkinson agreed.

Korn-OG Foderst v Kaz Tejis Jaykant [1999][8] Application to strike out an arbitral application as frivolous or vexatious. Whether 1950 or 1996 Arbitration Act procedure applied. Attempt by other party to avoid the GAFTA appeals process time bar. Application approved.

Huyton v Jakil [1998].[9] CA on appeal from the order of Mr Justice Clarke QBD. Action challenging an arbitral award struck out at first instance for want of prosecution. S13A & s22 Arbitration Act 1950 – arbitrator's power to strike out / power of court to remit to arbitrator for further consideration. Strike out upheld.

Jubilee International v Farlin Timbers [2005]. [10] Strike out : arbitration pending. Vessel sank : Cargo owner subject to an arbitration clause – but instead sought a winding up petition and world wide freezing order. Petition stayed pending mediation – there were real issues to settle between the parties.

A v B [2006]. [11] Termination of family arbitral proceedings. Whether, given that the seat of the arbitration was indisputably Geneva, the court should decline to exercise the jurisdiction it has over the tribunal in respect of the claims against the arbitrator as an appropriate arbitrator under a void or rescinded arbitration agreement and as to the various personal claims for damages for breach of his various alleged duties to A.

Athletic Union Of Constantinople v National Basketball Association [2002]. [12] Strike out and set aside : CPR 52.9. CA on appeal from Commercial Court (Deputy Judge Mr Richard Field QC). Failed s67 set aside application and failed s69 application to appeal. Also refusal to appeal against s67 application. Held : only the judge can determine application to appeal – not the CA. There is no appeal to CA against a refusal to grant application to appeal.

China National Petroleum v Fenwick Elliott [2002]. [13] Strike out application : CPR Rule 24.2. Confidentiality : attempts to gain delivery up of documents and orders of non-disclosure. Parties involved in arbitration about responsibility for delays in contract dealing which had made an order for disclosure of documents. Held that documents being sought were privileged and orders refused.

Korea National Insurance Corp v Allianz Global [2007]. [14] Striking out : claim and defence : appeal. Unsuccessful appeal order striking out elements of claim and defence in respect of a prior arbitration. Held : No real prospect of success.

[8] ***Korn-OG Foderst off Orretningen Emmelev A/S v. Kaz Tejis Jaykant Establishments Pte Ltd***. 1999 WL 33210347 . Mr Justice Mance

[9] ***Huyton SA v Jakil SPA*** [1998] EWCA Civ 525. Roch LJ; Aldous LJ; Brooke LJ.

[10] ***Jubilee International Inc v. Farlin Timbers PTE Ltd*** [2005] EWHC 3331 (Ch) : Mr J Jarvis QC

[11] ***A v B [2006] EWHC 2006 (Comm)*** . Mr Justice Colman

[12] ***Athletic Union Of Constantinople v National Basketball Association [2002] EWCA Civ 830*** : Philliips MR Lord; Robert Walker LJ; Clarke LJ. 2002.05.28

[13] ***China National Petroleum Corp v Fenwick Elliott Techint Int. Construction Co [2002] EWHC 60 (Ch) :*** Vice-Chancellor 2002.01.31

[14] ***Korea National Insurance Corporation v Allianz Global Corporate & Speciality AG [2007] EWCA Civ 1066 :*** Buxton LJ; Jacob LJ ; Moore-Bick LJ. 30th October 2007.

Self assessment exercise No4

1 How, if at all, can the duties under s33 and under s41(4) Arbitration Act 1996 be reconciled ?

2 In what circumstances might a sole arbitrator continue proceedings in the absence of one of the parties and how might the arbitrator ensure that the duties imposed under s33 are fulfilled?

3 What procedures should an arbitrator follow if he discovers that a party intends to call a witness as to opinion without serving a report on the other party?

4 Outline the principles that an arbitrator should follow when awarding costs and explain when, if ever, the arbitrator may chose to apply other principles.

5 What costs are recoverable in the absence of agreement to the contrary and who determines the amount? What principles govern this issue?

6 In the absence of agreement to the contrary, can the arbitrator set a limit on recoverable costs?

7 What are the duties of the expert witness and the advocate and how can these roles be kept distinct and separate by the arbitrator?

8 What considerations should an arbitrator have in mind when dealing with an application for security of costs?

9 Outline the purpose of a Preliminary Meeting. What would you do if one party said that they did not consider it worth having a preliminary meeting?

10 In order to comply with s33(1) what rulings should the arbitrator make in respect of written statements of claim and defence?

11 In what circumstances, if any, should an arbitrator order further and better particulars of claim?

12 What criteria apply to rulings on the provision of oral and written evidence?

13 In what circumstances, if any, can a party be ordered to make full discovery in respect of private correspondence in an arbitration on commercial business?

Rights and Duties of the Parties

S40 Arbitration Act 1996 : General duty of parties.

40(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

40(2) This includes-

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

Clause 40 General Duty of the Parties. DAC 1996.

204. This is a mandatory provision, since it would seem that an ability to contract out of it would be a negation of the arbitral process.

205. We were asked what the sanction would be for non-compliance. The answer lies in other Clauses of the Bill. These not only give the tribunal powers in relation to recalcitrant parties (eg Clause 41), but stipulate time limits for taking certain steps (eg applications to the Court etc) and (in Clause 73) making clear that undue delay will result in the loss of rights.

Al Hadha Trading v Tradigrain [2002].[15] S40 s41 s33 s54 s57 s68 s70. Alleged breached the duty under s.40(1) to do everything necessary for the proper and expeditious conduct of an arbitration : tribunal invited to dismiss the claim under the powers given by s. 41(3). Claim 47 days late under the contract rules. GAFTA appeal board overturned the award and allowed the claim but provided no reasons. Held : Serious irregularity not to provide reasons – but no serious injustice since it was likely that reasons could be provided : Furthermore the challenge was 28 days late under s69.

Self assessment exercise

1. To what extent, if at all, can a party challenge an alleged excess of substantive jurisdiction by a tribunal after proceedings have commenced ?
2. To what extent, if at all can a party challenge a ruling by a Tribunal on its substantive jurisdiction by appeal or review ?
3. To what extent, if at all can a party challenge a ruling by a tribunal on its substantive jurisdiction by challenging an award ?
4. In an arbitration involving a small sum of money can the arbitrator make an order that there shall be no discovery of documents ?
5. An arbitrator appointed to two separate arbitrations between Andy and Bert and Andy and Charlie respectively wishes to make an order that the two hearings be held concurrently. In what circumstances, if any at all, can he make such an order ?
6. One party to an arbitration is represented by a solicitor, the other wishes to be represented by Counsel with a solicitor in attendance. Can the arbitrator rule that only solicitors will be allowed rights of audience ? If not, how else might the arbitrator ensure fairness between the parties ?
7. Can an arbitrator appoint a legal advisor for a poor, un-represented party ? and if so, can he make the other party pay for the services of the legal advisor ?
8. Can the arbitrator place a time limit on the time allowed for cross examination of witnesses ?
9. At the first day of a hearing counsel for one of the parties who is delayed by a lengthy court trial is unable to attend. Do you proceed with the hearing or order a recess until counsel becomes available ?
10. After a weekend break a witness contradicts statements he made the previous week, but the problem is not picked up on by counsel for the other side. What do you do next ?
11. Outline the relative advantages and disadvantages of Pleadings and Statements of Case.

FURTHER READING

[15] ***Al Hadha Trading Co. v. Tradigrain S.A.*** [2002] 2 Lloyd's Rep. 512 : HHJ Havelock-Allan QC QBD Mercantile 26th April 2002.