CHAPTER NINE

THE ARBITRAL AWARD

ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

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THE ARBITRAL AWARD

RULES APPLICABLE TO SUBSTANCE OF DISPUTE.

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.

46(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

46(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Article 28 Model Law. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo quo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Clause 46 Rules applicable to Substance of Dispute DAC 1996.

*222. This Clause reflects much, though not all, of Article 28 of the Model Law. We have not, for example, directed the tribunal to "**take into account the usages of the trade applicable to the transaction**." If the applicable law allows this to be done, then the provision is not necessary; while if it does not, then it could be said that such a direction overrides that law, which to our minds would be incorrect.*

*223. Sub-section (1)(b) recognizes that the parties may agree that their dispute is not to be decided in accordance with a recognized system of law but under what in this country are often called "**equity clauses**", or arbitration "**ex aequo et bono**", or "**amiable composition**" ie general considerations of justice and fairness etc.. It will be noted that we have avoided using this description in the Bill, just as we have avoided using the Latin and French expressions found in the Model Law. There appears to be no good reason to prevent parties from agreeing to equity clauses. However, it is to be noted that in agreeing that a dispute shall be resolved in this way, the parties are in effect excluding any right to appeal to the Court (there being no "**question of law**" to appeal).*

224. Sub-section (2) does, in effect, adopt the rule found in Article 28 of the Model Law, thereby avoiding the problems of renvoi.

225. Sub-section (3) caters for the situation where there is no choice or agreement. This again is the language of the Model Law. In such circumstances the tribunal must decide what conflicts of law rules are applicable, and use those rules in order to determine the applicable law. It cannot simply make up rules for this purpose. It has been suggested to the DAC that more guidance be given as to the choice of a proper law, but it appears to us that flexibility is desirable, that it is not our remit to lay down principles in this highly complex area, and that to do so would necessitate a departure from the Model Law wording.

Section 46(1)(b) "Equity Clauses" DAC 1997

> *30. Whilst the provisions of Part I of the Act apply to arbitrations commenced after the Act comes into force, regardless of when the arbitration agreement was made (by virtue of Section 84), strong representations were made to the DAC that Section 46(1)(b) should be commenced differently - in such a way as to preserve the existing law on the validity of "**equity clauses**" with respect to arbitration agreements that already exist and were made before the Act comes into force. Many existing contracts contain standard clauses which read as if they are "**equity clauses**", but which have been interpreted differently by the Courts. This is the case, for example, with so-called "**honourable engagement**" clauses in reinsurance treaties. It was thought that if Section 46(1)(b) were to apply to existing arbitration agreements, this would entail a retrospective substantive change in the meaning and effect of existing contracts, different from that which the contracting parties would have contemplated at the time of contracting. The DAC agreed with this view, and recommended that Section 46(1)(b) should not apply to arbitration agreements that were made before the Act comes into force. Existing case law on the interpretation and effect of "**equity clauses**" will therefore continue to apply to such agreements. Transitional provisions have been put in place accordingly (see Appendix B).*

This is neither the time nor the place to enter into an analysis of the complexities of the conflicts of law. Nonetheless, a few key points are worth recalling.

First, it is most unlikely that most domestic contracts will make any reference whatsoever to the substantive law governing a dispute. Rather the contract will set out the contractual regime governing an dispute that might arise out of the contract. Whilst S46 makes it clear that in such an event the conflicts of laws will apply, happily in such circumstances conflicts of laws will direct the parties to their own domestic law.

Where international contracts are concerned, any choice of law will be assumed to be a substantive law choice not a procedural choice, so that for the sake of clarity is advisable in a contract to deal with both choice of law and jurisdiction. Where jurisdiction is chosen that jurisdiction's procedural law will apply by default.

AWARDS ON DIFFERENT ISSUES (Partial awards)

S47 Arbitration Act 1996 : Awards on different issues, &c.

> *47(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.*
>
> *47(2) The tribunal may, in particular, make an award relating-*
>
> *(a) to an issue affecting the whole claim, or*
>
> *(b) to a part only of the claims or cross-claims submitted to it for decision.*
>
> *47(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.*

Clause 47 Awards on Different Issues etc. DAC 1996.

> *226. We regard this as a very important provision. Some disputes are very complex, raising a large number of complicated issues which, if they are all addressed and dealt with at one hearing, would necessarily take a very long time and be very expensive. Disputes concerning large scale construction contracts are a good example, though there are many other cases.*
>
> *227. In recent years both the Commercial Court and the Official Referees Court in England (which deal with large cases) have adopted a different approach. The Judge plays much more of a managerial role, suggesting and indeed directing ways in which time and money can be saved. One of the ways is to select issues for early determination, not necessarily on the basis that they will be legally determinative of the entire litigation, but where they may well be commercially determinative, in the sense that a decision is likely to help the parties to resolve their other differences themselves without the need to spend time and money on using lawyers to fight them out. This has a further advantage. Cases fought to the bitter end often result in a permanent loss of goodwill between the warring factions, thus impeding or preventing future profitable relationships between them. The result is often in truth a loss to all the parties, whether or not they were the `winners' in the litigation.*

228. *In Court therefore, the old idea that a party is entitled to a full trial of everything at once has now largely disappeared: see, for example, the decision of the House of Lords in* ***Ashmore v Corporation of Lloyd's*** *[1992] 2 Lloyd's Rep 1. Furthermore, this method of approach is reflected in the views expressed by Lord Woolf in his current consideration of how to improve our system of civil justice. The same reasoning, of course, applies to arbitrations.*

229. *As we have said earlier, arbitration enjoys an advantage over litigation, since the arbitral tribunal is appointed to deal with the particular dispute that has arisen, and is thus in a better position to tailor the procedure to suit the particular circumstances of that dispute. Furthermore, an arbitral tribunal is often able, for the same reason, to move much quicker than the Court.*

230. *For these reasons, we have tried to make clear in this Clause that the tribunal is empowered to proceed in this way. This is am aspect of the duty cast upon the tribunal to adopt procedures suitable to the circumstances of the particular case, which is set out in Clause 33(1)(a). We would encourage arbitrators to adopt this approach in any case where it appears that time and money will be saved by doing so, and where such an approach would mot be at the expense of any of the other requirements of justice.*

231. *In this connection we would draw attention to the decision of Goff J (mow Lord Goff) in The* ***Kostas Melas*** *op. cit. As we observed when considering Clause 39, the function of arbitrators is mot to make temporary financial adjustments between the parties pending the resolution of the dispute, unless this is what they have agreed the arbitrators cam do. As this case shows, there is a clear distinction between such arrangements and the right to make a permanent binding decision after considering the arguments, even though the later resolution of other issues (if this becomes necessary) may overall produce a different result.*

232. *We should emphasize that in this Clause we are mot intending to give arbitral tribunals greater or different powers from those they presently have, but to emphasize how their powers should, in suitable cases, be exercised.*

233. *It might also be noted that we have been careful to avoid use of the term "**interim award**", which has become a confusing term, and in its most common use, arguably a misnomer.*

Apart from the powers of the tribunal in the management of proceedings, to issue preliminary orders and directions, it makes a great deal of sense in most situations for the tribunal to have the power to issue interim awards, particularly in respect of jurisdictional matters.

In addition, there are occasions when the tribunal may find it beneficial to deal with issues not only in a sequential manner but also in stages, where perhaps each stage involves distinct and separate hearings. In such situations it may be useful for the tribunal to decide each of these issues as it proceeds, particularly where the issues impact upon subsequent issues yet to be heard. In addition, once certain issues are determined the parties may well be put in a position where a settlement of outstanding issues can then be brokered. If the tribunal also makes awards on costs in relation to each sequential award, this greatly facilitates settlement.

S47(1) makes this the default position, so that if the parties want the award to deal with everything at one point in time only they should expressly state that that is the case.

Royal & Sunalliance v BAE Systems [2008]. [1] **S47 & s69 AA 1998 – Leave to appeal.** Reinsurance : LCIA arbitral award. Is leave required to appeal on a point of law regarding contract construction & interpretation. Held : No.

Sea Trade v Hellenic Mutual [2006]. [2] **s47 AA 1996 : s57 AA 1996 : Costs.** Reservation to subsequent award. Where a tribunal reserves costs to a subsequent award it deals with the matter (s47) so that the provisions of s57 do not come into play.

1 *Royal & Sunalliance Insurance Plc v BAE Systems (Operations) Ltd [2008] EWHC 743 (Comm)*
2 *Sea Trade Maritime Corp v Hellenic Mutual War Risks Assoc (Bermuda) Ltd. [2006] EWHC 578 (Comm)*

REMEDIES

S48 Arbitration Act 1996. Remedies.

48(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

48(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

48(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.

48(4) The tribunal may order the payment of a sum of money, in any currency.

48(5) The tribunal has the same powers as the court-

(a) to order a party to do or refrain from doing anything;

(b) to order specific performance of a contract (other than a contract relating to land);

(c) to order the rectification, setting aside or cancellation of a deed or other document.

Clause 48 Remedies

234. We trust that the matters addressed in this Clause are self-evident. We have excluded specific performance of land contracts, so as not to change the law in this regard, but clarified the power of arbitrators to award injunctive relief. Given that the parties are free to agree on the remedies that a tribunal may order, there is nothing to restrict such remedies to those available at Court.

Kastner v Jason [2004].[3] **s48 AA 1996 :** Fraud & deceit arbitration. A Beth Din issued a freezing order on property, the principal asset of the respondent. The respondent agreed to abide by the order and a caution was placed on the Land Registry. The respondent sold the property and left the country. The purchaser's solicitor failed to take note of the caution. The issue turned on whether Jewish Law created an interest in personam or in rem. At first instance, Mr Justice Lightman held that the freezing order of a tribunal should not be enforced against the purchaser and a notice in the land registry of the order be removed enabling the buyer to register title. The CA, dismissing the appeal, having considered heard evidence of Jewish Law, confirmed that the interest is in rem. Thus there was no legal interest in the property to support a caution.

S49 Arbitration Act 1996. Interest.

49(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.

49(2) Unless otherwise agreed by the parties the following provisions apply.

49(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case-

(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

49(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

49(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

49(6) The above provisions do not affect any other power of the tribunal to award interest.

[3] ***Kastner v Jason [2004] EWHC 592 (Ch)*** Before Mr Justice Lightman. 23rd March 2004.. ***Kastner v Jason [2004] EWCA Civ 1599.*** Before LCJ; Clarke LJ; Rix LJ. 2nd December 2004.

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Clause 49 Interest

> *235. The responses we received demonstrated to us that there was a general desire to give arbitral tribunals a general power to award compound interest.*
>
> *236. There is no doubt that the absence of such a power adds to the delays (and thus the expense) of arbitrations and causes injustice, for it is often in a party's interest to delay the proceedings and the honouring of am award, since the interest eventually payable is less than can be made by holding on to funds which should be paid over to the other party, who of course is losing out by a like amount.*
>
> *237. Some of those responding were fearful that arbitrators would abuse this power, and may, for example, award compound interest on a punitive rather than compensatory basis. We do not share those fears. To our minds any competent arbitrator seeking to fulfil the duties laid on him by the Bill will have no more difficulty in making decisions about compound interest than he will in deciding in any other context what fairness and justice require. Anyone who has such difficulties demonstrates, in our view, that he is really not fit to act as an arbitrator. In such a case, the award and the arbitrator will be susceptible of challenge.*
>
> *238. Clause 84 and 111 allow for transitional measures. In the context of this Clause, we understand that these may prove necessary in relation to the enforcement of awards through the county courts, who we are told are not presently equipped to calculate compound interest payable from the date of the award.*

The default powers of the tribunal under s49 are extremely wide ranging. Interest often takes on a very important dimension in commercial dispute resolution, particularly where the sums involved are large and the time between breach and hearing are extensive. For this very reason, it common for most commercial contracts to make specific provision for the recovery of interest, which will then restrict the freedom of the tribunal, which will have to work within the contractual regimes.

Man v Freightliner [2005]. [4] **S49(3) AA 1996 :** Whether compound interest is punitive or normal for a tribunal in such circumstances..

THE DUE TIME FOR THE ISSUE OF AN AWARD

S50 Arbitration Act 1996 Extension of time for making the award[5]

> *50(1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time.*
>
> *50(2) An application for an order under this section may be made-*
> *(a) by the tribunal (upon notice to the parties), or*
> *(b) by any party to the proceedings (upon notice to the tribunal and the other parties),*
> *but only after exhausting any available arbitral process for obtaining an extension of time.*

See also RSC Order 73 Rule 10(1)

> *50(3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done.*
>
> *50(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 or under the agreement or by a previous order) has expired.*
>
> *50(5) The leave of the court is required for any appeal from a decision of the court under this section.*

Cross reference s5(1) agreement, agreed; s6 arbitration agreement, s82(1) available arbitral process; s105 the court; s76(6) notice(or other document); s88(2) & s106(4) party; s80 upon notice (to the parties or the tribunal); Schedule 2 para 5 on powers of judge-arbitrator.

[4] ***Man Nutzfahrzeuge Ag v Freightliner Ltd. [2005] EWHC 2347 (Comm)*** Moore-Bick LJ. 28th October 2005.

[5] NB this is not a mandatory provision. See further16.25 Merkin.

Clause 50 Extension of Time for making Award DAC 1996.

> 239. *This Clause re-enacts the existing law, though with two qualifications:*
> *i. arbitral procedures for obtaining an extension must be exhausted before recourse to the Court; and*
> *ii the Court must be satisfied that substantial injustice would be done if the time were not extended.*
> *It seems to us that these qualifications are needed so as to ensure that the Court's power is supportive rather than disruptive of the arbitral process. For the same reason, it seems to us that it would be a rare case indeed where the Court extended the time notwithstanding that this had not been done through an available arbitral process.*

It is unlikely, apart from ACAS Employment Arbitrations where the award should be made the same day, that there will be an immediate award at the end of the final day of the hearings. Undue haste is not good. A general advice is that, having written an award, an arbitrator should consider putting it in a draw for a day or so, and then give it a thorough reading, making any necessary amendments which the scrutiny brings to light, before finally issuing the award. Of course, there may under **s47 Arbitration Act 1996** be partial awards issued during the currency of the hearings.

The question therefore arises as to how quickly the arbitrator must issue the award. At one time Statute provided a time limit within which to make an award. Today there is no specific statutory time limit though the general requirements regarding speed and efficiency apply. Thus under **s1(a) Arbitration Act 1996** the tribunal must avoid unnecessary delay. This is reiterated in **s33(1(b)** to ensure a fair means to resolve the matters falling to be determined. If a party can show the court that the delay in issuing an award has or will cause substantial injustice **s24(1)(d) Arbitration Act** provides the court with the power to remove the arbitrator. The arbitrator must first receive notice of such an application which would probably spur him into action and if there is an application he can appear to explain why it has taken so long – or even to show that an unreasonable time has not yet passed. What is an unreasonable time is as ever a question of fact for the court to determine in all the circumstances of the case. [6]

Where an award has been struck down by the court following an application by a party, and the court remits the case back to the tribunal to make a fresh award the arbitrator must make that award within 3 months, **s71(3) Arbitration Act 1996**, subject to the right to apply under **s79 Arbitration Act 1996** for an extension if the time scale is too short. This section covers all issues regarding time whether by agreement of the parties or by order of the court with the exception of s12 time bars and limitations.

> *71(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.*

S79 Arbitration Act 1996. Power of court to extend time limits relating to arbitral proceedings.

> *79(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.*

This section does not apply to a time limit to which section 12 applies (power of court to extend time for beginning arbitral proceedings, &c.).

[6] ***Bradley v Telefusion*** *[1981] 259 EG 337;* ***Art & Sound v West End Litho*** *[1992] 1 EG 110;* ***Pembroke St George v Cromwell*** *[1991] EG 43.*

79(2) An application for an order may be made-
(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or
(b) by the arbitral tribunal (upon notice to the parties).

79(3) The court shall not exercise its power to extend a time limit unless it is satisfied-
(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and
(b) that a substantial injustice would otherwise be done.

79(4) The court's power under this section may be exercised whether or not the time has already expired.

79(5) An order under this section may be made on such terms as the court thinks fit.

79(6) The leave of the court is required for any appeal from a decision of the court under this section.

That apart, many institutional rules provide time limits for making an award. ICC Rules, Art 18 prescribes 6 months : The LMAA Art 18 prescribes 6 weeks. Such agreements are governed by **s78(1) Arbitration Act 1996** which states that the parties are free to agree on methods for reckoning time limits. On this issue the question may arise as to whether or not an extension can be obtained from the court and this is what **s50 Arbitration Act 1996** provides for. Of course, the parties can agree an extension. [7]

Where there is a delay in issuing a preliminary award and the parties continue with the reference there is an implication that the parties have consented to an extension. [8]

The arbitrator or the institution may be given the power under the contract to extend time though since statute no longer prescribes a time these are less common today.[9] Several applications are permitted under such a power. [10]

SETTLEMENT AGREEMENTS

Agreed awards. S51 Arbitration Act 1996. Settlements

51(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.

51(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

51(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.

51(4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.

51(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.

Article 30. Model Law. Settlement

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

7 ***Greig v Talbot*** (1823) 2 B&C 179.
8 ***R v Hill*** (1819) 7 Price 636.
9 ***The Halcynon The Great*** [1984] 1 Lloyd's Rep 283 and ICC Rules, .Art 18(3).
10 ***Payne v Deakle*** (1809) 1 Taunt 509.

Clause 51 Settlement. DAC 1996.

241. *Concern has been expressed that this provision (taken from Article 30 of the Model Law) might be used by the parties either to obtain an award in respect of matters which are simply not arbitrable (eg matters which under our law cannot be settled by agreement between the parties), or to mislead third parties (eg the tax authorities). It was suggested that any agreed award should have to state on its face that it is such.*

242. *Dealing first with deception, in our view there is no material difference between Clause 51 and our present law: cf p.59 of the Mustill Report. As that Report observes, Article 30 and our present law recognize the right of the tribunal to refuse to make an award on agreed terms if it contains an objectionable feature, eg is structured to mislead third parties. Clause 51 preserves that right. Thus unless the tribunal is itself prepared to be a party to an attempted deception, we consider the risk that misleading awards will be made to be very small. If the tribunal is prepared to conspire with the parties, then nothing we could put in Clause 51 is likely to deter it. Furthermore, the whole of Clause 51 is based upon the assumption that there is a dispute between the parties which has been referred to arbitration and then settled. Nothing in the Clause would assist parties to mislead others where there was no genuine dispute or genuine reference or genuine settlement. The Clause would simply not apply to such a situation.*

240. *This Clause reflects Article 30 of the Model Law. It enables an agreed settlement of the dispute to be given the status of an arbitral award, which could then be enforced as such.*

243. *So far as arbitrability is concerned, this is a question that goes beyond agreed awards. We discuss this question when considering Clause 66 (see also the supplementary recommendations in Chapter 6 below).*

244. *We are not persuaded that we should require that any agreed award should state that it is such. Both under this Clause and Clause 52 the parties are free to agree on the form the award should take. In our view this is not only the position under the Model Law but also the position under our present law. A requirement that an agreed award should state that it is such would have to be made a mandatory provision to be effective. We are not aware of any problems arising under our present law and are reluctant to impose this formal requirement. Moreover, it would of course be open to the tribunal to record the agreement in the award if they thought it was appropriate to do so.*

However, at the enforcement stage we agree that the Court should be informed if the award is an agreed award, if this is not apparent from the award itself. We return to this point when considering Clause 66 below (see also Chapter 6).

SELF ASSESSMENT

1. Where the parties request that a tribunal reduce a settlement agreement to an award, should the tribunal simply acquiesce to that request without more? If not, what might the tribunal do instead? And in what circumstance should it do so?
2. Is a tribunal definitively seized of the power to determine matters in the same way as a court, or, in the event of a settlement agreement, does there cease to be an outstanding dispute to be settled, which automatically terminates the jurisdiction of the tribunal?
3. What if anything, might the parties do, if having settled a dispute, the tribunal goes ahead and determines the matter in any case? Would such an award be enforceable?

CHAPTER NINE

PROVISIONAL AWARDS

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.).

Note that the powers under s39 are quite distinct and separate from those under s47 with regard to interim final awards.

S39 essentially gives the tribunal the powers to order interim measures. Such orders may be of great assistance to a party with cash flow problems, but a tribunal would have to bear in mind that if the final decision went in a different direction to the order, that the paying party would then wish to recover that money and might be very aggrieved if it were no longer possible to do so because the receiving party had intentionally or otherwise have dissipated funds.

Interim payments can act as a disincentive to settlement but equally lessen the impact of attrition. A tribunal may be more inclined towards ordering interim payments, where it is clear that there will be an award in a parties favour, but where the central issue is quantum. The interim payment is likely to be pitched clearly well within the boundaries of where the award will ultimately fall.

Form of award (Sections 52, 53, 54 Arbitration Act 1996) Art 31 Model Law

The award informs the parties of the tribunal's decision enabling them to comply with the decision or to seek enforcement though the courts. The award must be final in that there is no longer scope for the arbitrator to change his mind on the issue.[11] Once a final award is issued the arbitrator becomes functi officio – which is to say that he ceases to have jurisdiction and cannot amend the award,[12] though see below s57 Arbitration Act 1996 and Article 33 on correction of errors... Each issue can be decided with finality even though it is only an interim award and the "final" award is yet to come. Thus final has two separate meanings.

Form of the award.

There is no standardised form for the award in Law in England and Wales. It could even be oral at one time,[13] but this is now over-ruled by **s52(3) Arbitration Act 1996** unless the parties agree to an oral award. Under RSC Ord 73 Rule 31(6(a)(i) court enforcement required written submission so the court could require the award to be subsequently reduced to writing by the arbitrator(s). Update to CPR.

Recitals are no longer absolutely necessary. They are none the less desirable and set the scene for the award, providing a valuable record of all the events leading up to the award and can be usefully cross referenced in the award itself, in particular in relation to events and correspondence taken into consideration by the award. ***Harlow v Read***[14] established that a mere error on the case of the record in the recitals does not invalidate an award. If the information is relied on in the award it must however be correct. [15]

Whilst not strictly necessary to set out the matters considered in relation to the dispute in the award,[16] it helps to make it clear that the duty under **s68(2)(d) Arbitration Act 1996** to cover all issues is fulfilled and it makes it more difficult to fall into the trap of straying beyond the scope of and jurisdiction of the submission as governed by **s67 Arbitration Act 1996**.

In order to be valid the award must be communicated to the parties.[17] **s55(1) & (2) Arbitration Act 1996**.

Some arbitral institutions prescribe the form of the award.

With the exception of agreed awards or where the parties have agreed to waive reasons, it must be a reasoned award, following the Model Law. The US does not require reasons – though a failure to provide reasons could lead to a court setting an award aside because the facts of the case do not support the decision. Basic reasons are likely to become the norm even in the USA in the future.

s52 Arbitration Act 1996. Form of award.

> 52(1) The parties are free to agree on the form of an award.
> 52(2) If or to the extent that there is no such agreement, the following provisions apply.
> 52(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.
> 52(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.
> 52(5) The award shall state the seat of the arbitration and the date when the award is made.

It is common to issue the award in writing and it will usually be signed by the arbitrator and attested by signature by a witness. **s52(3) Arbitration Act 1996** requires the award to be signed. Where there is more than one arbitrator theoretically the award should be signed and witnessed by all the arbitrators in the presence of each other according to ***Wade v Dowling***.[18] Otherwise the court could send it back to them to complete the

[11] ***Thompson v Miller*** (1867) 15 WR 353
[12] ***Ward v Dean*** (1832) 3 B&Ad 234
[13] ***Roberts v Watkins*** (1863) 32 LJCP 291
[14] ***Harlow v Read*** (1845) 14 LJCP 239
[15] ***Price v Popkin*** (1839) 8 LJQB 198.
[16] ***Smith v Hartley*** (1851) 20 LJCP 169.
[17] ***Thompson v Miller*** (1867) 15 WR 353.
[18] ***Wade v Dowling*** (1854) 4 E&B 44

formalities.[19] ***Bank Mellat v GAA Development,***[20] indicates that this will no longer be enforced and is not required by statute. Dissenting arbitrators do not have to sign unless the parties otherwise require. If it otherwise requires the arbitrator will be in breach if he refuses to sign,[21] contrary to **s68(2)(h) Arbitration Act 1996** but the award itself will not be invalidated by his refusal to sign. Note that he could sign and at the same time record the fact that he has dissented. However, the production of a dissenting judgement could provide the basis for an appeal or at least fuel a parties dissatisfaction with the arbitral process and thus may not be an example of best or preferred practice.

Bay Hotel Resort v Cavalier Construction [2001]. [22] Where a reasoned award was required could an award be set aside for insufficient reasons pursuant to s52(4) Arbitration Act 1996 ? Award subject to the AAA arbitral rules – so test of sufficient reasons to be based on AAA rules – not what would be sufficient under English Law. In the circumstances there were sufficient reasons. However, an award regarding joinder of a third party set aside – outside remit of the tribunal.

Clause 52 Form of Award DAC 1996

245. This Clause follows closely Article 31 of the Model Law. There are, however, two matters worthy of particular note.

246. In the first place, as in the Model Law, we have required the tribunal to give reasons, unless the award is an agreed award or the parties have agreed that reasons need not be given.

247. To our minds, it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making that decision. This was also the view of the majority of those who commented on this.

248. It was suggested that having to give reasons would be likely to add to the cost of arbitrations and encourage applications for leave to appeal to the Court.

249. We do not agree. The need for reasons is that which we have explained above and has nothing to do with the question whether or not a Court should hear an appeal from an award. Further, we have introduced stricter conditions for the bringing of appeals in any event. As to cost, it is always open to the parties to agree to dispense with reasons if they wish to do so, though in the case of domestic arbitrations this can only be done after the dispute has arisen: see Clauses 69(1) and 87.

250. The second noteworthy point is that we have used the word "seat" instead of the Model Law phrase `place of arbitration." We consider that the Model Law uses this phrase to mean the seat (there being no obvious legal reason to stipulate the geographical place where the award was made), and since we have used this word earlier in the Bill (see Clauses 2 and 3) it would in our view only cause confusion not to use it here. Of course the seat is only of importance in international arbitrations or where the question arises as to the enforcement of an award abroad. Therefore, in a purely domestic arbitration, if an arbitrator were to fail to state the "seat", or to state this incorrectly, it is extremely unlikely that the award could be challenged under Clause 68 (2) (h), given that such a failure would be unlikely to result in "substantial injustice".

251. Sub-section (3) provides that the award shall be in writing and signed by all the arbitrators or, alternatively, by all those assenting to the award. An earlier draft of this sub-section had only stipulated that all arbitrators assenting to an award sign it. It was pointed out to the DAC, however, that (for whatever reason) some dissenting arbitrators may not wish to be identified as such, and that the provision should therefore be amended to provide for this.

252. It has been suggested to the DAC that there should be a provision allowing for somebody to sign on behalf of an arbitrator. This could invoke complicated principles of agency, and, overall, is better left to be resolved in each particular case.

[19] ***Anning v Hartley*** (1858) 27 LJ Ex 145.

[20] ***Bank Mellat v GAA Development & Construction Co*** [1988] 2 Lloyd's Rep 44

[21] ***Cargill v S.I.D.Moluracion*** [1998] 1 Lloyd's Rep 489

[22] ***Bay Hotel Resort Ltd & Zurich Indemnity Co Canada v. Cavalier Construction Co. Ltd. [2001] UKPC 34 :*** Privy Council before Lords Nicholls; Cooke ; Clyde; Hutton; Millett . 16th July 2007

THE REASONED ARBITRAL AWARD

S52 Arbitration Act 1996. Reasoned awards & form of award.

> 52(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

Article 31. Model Law : Reasoned awards : Form and contents of award

> *(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.*

In England and Wales the default position today, by virtue of section 52(4) Arbitration Act 1996, is that unless the parties otherwise agree, an arbitrator shall provide the parties with a written, signed, reasoned award. This accords with the general principle set out in Article 31(2) Model Law. Traditionally arbitrators have not been required to provide reasons. Indeed, even today the default position in the US, both at federal and state level, is that an award contain no reasons unless otherwise required by the parties. The reason for this is that whilst an absence of reasons renders an award virtually impervious to challenge, there are times when the parties to a dispute might value the finality that that imperviousness provides. It ensures that the affairs of the parties are kept out of the public domain, guaranteeing confidentiality and privacy, though admittedly at a price, in that the parties have to accept the risk of arbitral incompetence in the decision making process. Furthermore, it purports to enable the parties to draw a line under the affair as soon as the award is issued, though that may not be the case where in default of compliance the other party has to resort to the courts for enforcement. Even here however, that which is placed within the public arena will be far more restricted than in the case of a reasoned award.

The question that falls to be answered here is, "***What in the context of arbitration, constitutes a reasoned award, i.e. do the reasons have to be fulsome?***" [23] First let us examine the general concept of the existence or otherwise of a duty to provide reasons, the rationale underpinning such a duty.

People instinctively require those in positions of authority to explain and justify decisions that impact upon them. Understanding is a significant element of acceptance and compliance, the willingness to do both being reinforced by justification, the absence of which in ***Lymington v Macnamara***[24] was fatal to the refusal.

At a very early age infants learn the dreaded ***"WHY?"*** word. Most busy parents will at one stage or another have tried to resort to the time saving ***"BECAUSE I SAY SO?"*** response, the subtext of which is that authority provides its own justification. It rarely works and will in time lead to unwelcome challenges to that authority. Hard gained authority, carelessly squandered has then to be earned all over again. Parental declarations along the lines of "***I DON'T HAVE TO JUSTIFY MYSELF TO YOU***", ***"I HAVEN'T GOT TIME FOR THIS"***, ***"YOU MUST LEARN TO DO AS YOU ARE TOLD"*** and ***"YOU DON'T HAVE ANY RESPECT"***, as responses to the sulking ***"WON'T"*** and "***ITS NOT FAIR"*** achieve little apart from postponing the time when an explanation has to be provided in order to restore peace and harmony.

Even though the infant may have no right to that which he or she wants to have or do, or alternatively does not want to do, nonetheless the child holds the moral high ground in that a sense of injustice (*even if there is in fact no injustice*) is inherent in a failure to provide a rational justification. The parent is however caught between a cleft stick, for once given, the reason may itself provide ammunition for a challenge or objection. It needs therefore to be met with a good explanation, a self justifying reason that puts the demand, order or declaration beyond challenge, otherwise further detail will be called for.

"***What situations call for a reasoned decision?"*** and ***"What amounts to sufficient reasons?"*** The court in ***Lymington v Macnamara*** was able to require a reasoned decision because in the circumstances of the case there were contractual pre-requisites *(grounds)* to the exercise of the decision making power. This was however

[23] A further question relates to what the consequence of failing to provide a reasoned award is. Does it render the award unenforceable? This second question is addressed in the next chapter.

[24] ***Lymington Marina Ltd v Macnamara*** [2006] EWHC 704 (Ch), at paras 96 & 9

was a civil law action concerning a contractual dispute and hence not subject to public law and judicial review, the principal area under consideration here.

The provenance of the decision making power and the existence and extent of prerequisites to the exercise of that power are key to the existence of a duty to provide reasons. Whilst arbitrary power is anathema to the instinctive human desire for reasoned decisions this is not to say that arbitrary power cannot be and is never lawful. There are many examples of statute granting arbitrary powers of decision making on public and quasi-public bodies. At common law, the exercise of authority in a wide range of social relationships is recognised but largely unregulated. Thus there is no legal duty on a parent or guardian to justify everyday decisions to those under their charge. Furthermore, consent to authority within groups is common. Depending upon the nature of the social / commercial contract, such power may be arbitrary or subject to conditions, whether oral or written, express or implied.

The need or otherwise to provide reasons will accordingly depend upon circumstances, which are infinitely variable, making it difficult to set down intelligible rules and workable criteria suitable for all occasions. This dilemma is as true, if not more so, for judicial or quasi-judicial decision makers as it is for anyone else in a position of authority. Two categories of decision maker are examined here, viz courts and arbitral tribunals.[25]

PART I : JUDGES AND REASONS

Lymington Marina Ltd v Macnamara

[The] ***Duty to give reasons*** *: The point raised in the proceedings is whether LML is obliged to give reasons for its decision. There is no express obligation to do so ….. But as Millett J observed in* ***Price v Bouch*** *a failure to provide proper reasons …..…. may lead to the inference that no such reasons exist.*

Conclusion : *There is no duty as such to give reasons for refusing consent but the absence of good reasons which conform to the grounds for refusal ……. may be taken as indicating that no proper reasons exist.*

Patten J. Chancery Division. 4th April 2006.

The judge will be called upon to determine whether or not a party to litigation was entitled to reasons as a prerequisite to the performance of reciprocal duties or submission to authority and if so whether or not the reasons provided were adequate. In addition a judge may also be called upon to provide adequate reasons for his decisions. On times the judge stands in the same position as the harassed parent, with a massive case load to get through. A reasoned decision takes a lot of time to construct and commit to paper, a luxury not always available to a judge delivering a series of ex tempore judgments in quick succession.

The pressures inherent in that task and the compromises that may arise are set out vividly by Lord Craighead in the 2005 Annual Lecture to the Judicial Studies Board, entitled "***Writing Decisions***", regarding his time on the bench of the Criminal Appeal Court in Scotland, where there were often in excess of 75 cases per week on the list. His Lordship then provides some sound advice on how to compose a judgment.[26] Central to this is the importance of thinking about and satisfying the needs of one's audience. In addition to the parties, he identified appellate bodies, judicial colleagues, the legal profession, academics and those in society that will look to the judgement for advice on how they should act in similar situations, as an extended audience who need also to be taken into consideration when drafting a judgement.

Whilst first impressions often turn out to be correct, this is not always the case, hence the danger implicit in arbitrary decision making. There is little doubt that the quality of decision making is improved where the decision and the reasons underpinning it are reduced to writing. So doing concentrates the mind of the decision maker. That said, it would be wrong to conclude that all judicial and quasi-judicial decision makers are under a legal duty to provide reasoned judgements at all times and in all circumstances. This is most certainly not the case, though with the advent of the Human Rights Act 1998 and in particular the requirements of a fair trial set out in Article VI, the exceptions to the duty to provide reasons have been greatly reduced. Nonetheless, exceptions do exist and the extent of the duty will vary between different courts, disciplinary bodies and public and private tribunals.

[25] Tribunals and construction adjudicators and reasons are analysed in the ADR News "Reasons Series" by the author.

[26] www.jsboard.co.uk/downloads/annuallecture_2005_proof_220305.pdf

Where there is a duty to provide reasons, the next question to be addressed is *"What amounts to adequate reasons?"* An mere appearance of reasons will not do, as noted by Mr Justice Hedley in ***RE F (children),*** where he remarked that *"…… this judgment is so lacking in reasoning and substance that it presents at least an appearance not to have engaged fully with the important issues that were being ventilated before the learned judge and that it is wholly deficient in explanations as to how or why he has arrived at the conclusions that he has."*[27] This is not to say however, that every case calls for the judge to deliver a judgment on par with Tolstoy's ***War and Peace.*** Adequate and sufficient reasons may on times be quite short and concise. In ***Bessant v South Cone Inc*** the Court of Appeal observed that *"The appellate court should not treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed. The duty to give reasons must not be turned into an intolerable burden:"* [28] The conclusion therefore is that what is required should be in some way proportionate to the circumstances.

At the very least a judgment should not be arbitrary, and constitute a figure plucked out of the air for no good reason. This is what appears, from the text of the ex tempore judgment of His Honour Judge Howarth, to have occurred in ***Fielden v Cunliffe.***[29] The case concerned a disputed will. Despite the fact that a couple had married late in life and had only been married for a year before the husband died and the fact that she was the successor in title to real estate valued in excess of £200K, the court awarded the widow £800K out of a £1.4M estate, the rest going to the deceased's extended family. The question here was how did the court arrive at that figure? Whilst the applicable law was referenced, there was no indication that it was taken into account. The Court of Appeal was not inspired by the reasoning of the court, as set out in the extract below

*"65. … I must find an appropriate sum of capital which should be awarded to Monica (Mrs Cunliffe), and doing the best that I can and how much is always one of the most difficult questions a Judge ever has to answer or a barrister to advise upon. Counsel will know that very often within a set of barristers chambers, people will go into each other's rooms and say "**We have a claim under the Inheritance Act. These are the facts. How much?**" and you will get from members of chambers differing answers over sometimes a quite broad spectrum. For better or worse the case has ended up before me and no doubt one party will say it is better for them and another party will say it is worse for them, and perhaps they might both say it is worse for them, and if that is so, that would be a very good indication that I have got it about right. (emphasis added).*

66. The figure I have in mind is £800,000, and that is the amount of the order."

Commenting upon this extract Lord Justice Wall stated *" …. it has to be said that the judgment, taken as a whole, is both discursive and unfocused. Moreover, from a forensic standpoint, its principal deficiency … is that it lacks any kind of judicial analysis. The consequence, in my judgment, is that the judge simply fails to explain how he reached his figure of £800,000. ….. In my judgment, the proper exercise of a judicial discretion requires the judge to explain how he has exercised it. This is the well-known "**balancing exercise**". The judge has not only to identify the factors he has taken into account, but to explain why he has given more weight to some rather than to others. Either a failure to undertake this exercise, or for it to be impossible to discern from the terms of the judgment that it has been undertaken, **vitiates** the judicial conclusion, which remains unexplained." (emphasis added).*

The Court of Appeal reduced the sum to £600K. Given that the widow's litigation costs were paid out of the estate, one might pause to wonder whether at the end of the day the other testators ended up any better off than they were prior to the challenge, but that is a completely different matter.

Remedies

Assuming both a duty and a failure to provide adequate reasons, the next issue is *"What should be done about the omission?"* Three possibilities exist. The first is to do nothing. Thus in ***Marshall v Northamptonshire C.C.,*** Mr Justice Sedley noted that insufficient reasons alone is not enough to challenge a decision. The applicant must also demonstrate that that the absence of reasons resulted in an error or law.[30] Thus some form of prejudice to the legal interests of the applicant must exist that requires remedial action.[31] The second is that the decision

[27] ***RE F (children), [2006] EWCA Civ 792*** at para 16

[28] ***Bessant & ors v South Cone Inc*** [2002] EWCA Civ 763: at para 29. See also the Overriding Principles of the Civil Procedure Rules.

[29] ***Fielden v Cunliffe [2005] EWCA Civ 1508*** *para 22 et seq*

[30] ***Marshall, R (on the application of) v Northamptonshire County Council [1998] EWHC Admin 400***

[31] ***McLoughlin v Jones [2006] EWCA Civ 1167*** at paras 72-74. per Arden LJ; *"There were four errors in the judge's detailed reasons; however, in*

may be reversed, ending the matter or it may be quashed raising the possibility of a new trial before a new tribunal. Finally, the matter may be remitted to the prior tribunal with a request for further information and elucidation, which assumes that the judge had or may have had reasons.[32] The circumstances in which each of these options is appropriate requires further consideration.

The duty of a court to provide reasons

That it is common for the courts of England and Wales to provide reasoned judgments is not in doubt. Rather the question here is whether there is a duty to provide a reasoned decision and if so, the scope and extent of that duty. The Common Law is a construct of the doctrine of binding precedent. It would not exist but for the delivery and dissemination of reasoned decisions. However, the mere fact that courts do on occasions provide reasoned decisions does not establish a general rule that they should do so.[33] Where a decision of the court does not add to the body of the law, as in the majority of cases where the decision turns on the facts as determined by the court rather than on a novel point of law, there is no need from this perspective for a reasoned judgment. If a judge has nothing to say of great import to the wider world the incentive to deliver an extended judgment is greatly reduced. It is hardly surprising that the higher the court, the more likely it is that it will deliver a fully reasoned decision, though only a fraction of such decisions have in the past been published, since on occasions the higher court merely confirms the decision of the lower court and involves no new statement of legal principle.[34]

Whilst the expectation of a reasoned judgment is longstanding[35] it would appear that the duty of a professional judge in England & Wales (*by implication the duty does not extend to 'non-professionals' though beyond lay magistrates, what is deemed to be a non-professional is less clear*) to deliver one is of relatively recent standing.[36] Thus in ***Flannery v Halifax*** Lord Justice Henry declared *"That today's professional judge owes a general duty to give reasons is clear, although there are some exceptions. It does not always or even usually apply in the magistrates court, nor in some areas where the court's decision is more often than not a summary exercise of discretion - in particular orders for costs."* [37]

The issue was of importance to the Court of Appeal because it impacted upon the ability of the court to fulfil its appellate function. In the absence of a reasoned decision the court has no way of evaluating whether or not the lower court correctly determined the facts and then applied those facts to the law to reach its decision. In such a situation the court might either have to retry the case itself, ask the trial judge for further information or send the case back for a new trial, all of which are expensive and time consuming options.[38] It is thus in the interests of the Court of Appeal to encourage trial judges to provide reasoned judgments, particularly where the trial judge has to choose between conflicting evidence. The same principle would apply to both evidence of fact and expert evidence.

my judgment, her overriding reason for rejecting the claim remains….. It is necessary, in my judgment, to look at the imperfections in the judgment as a whole, cumulatively. Even so, they are not in my judgment to shake the foundations on which the judgment was based. Namely, the absence of credibility and the absence of contemporaneous complaint. …. those findings of primary fact on credibility are matters with which this court cannot interfere."

32 ***Saxena v Rushforth [2002] EWCA Civ 1129*** *"What I propose to do is to request Jacob J to give reasons for his decision. For me to refuse permission on the basis now available ….. would, in my judgment, be unsatisfactory, having regard to my difficulty in considering why Jacob J made the order he did and what follows from it. I accede to the applicant's request that reasons be sought."*

33 ***Soulemezis v Dudley Holdings*** (1987) NSWLR 247 at 273: per Mahoney JA *"The court's order is a public act. The judgment given for it is a professional document, directed to the parties and to their professional advisers. It may, in a particular instance, delineate, develop or even decorate the law but that is peripheral and not essential to its nature."* Referenced in ***English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605*** *at para 15.*

34 Whilst the internet and sites such as BAILEE have greatly increased the number of reported decisions, even now, many reports are not published.

35 In "***Of Judges & Arbitrators*** (2001) 67 Arbitration, 2001. 254 et seq, **"** Sir Anthony Evans observes that as early as the 17th century Francis Bacon in his "***Essays"*** saw that a principal part of judicial office is the "*wise use and application of law."* Hence the judge is required to *"get the answer right."* The only way to know whether or not a judge did in fact so do is by reference to a reasoned decision.

36 Compare ***Lewis v Wilson & Horner Ltd*** [2000] 3 NZLR 546 at 565, per Elias CJ. *"there is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions"*. Referred to in ***English v Emery Reimbold*** [2002] EWCA Civ 605 at para 15

37 ***Flannery v Halifax Estate Agencies Ltd [1999] EWCA Civ 811,*** further citing ***R v Knightsbridge Crown Court ex parte International Sporting Club*** **[**1982] QB 304 and ***R v Harrow Crown Court ex p. Dave*** [1994] 1 AER 315.

38 In ***Willett (Now Whitling) v Marks & Spencer [2002] EWCA Civ 1427, t***he CA having concluded that because the CA simply did not know how the judge arrived at a vital conclusion (*viz how an accident had occurred and injury sustained*) a retrial was necessary. However, given the expense involved and the fact that this litigation had already been running for 10 years the court urged the parties to explore ADR in lieu of a retrial.

Flannery v Halifax was a dispute involving conflicting expert evidence. The claimants bought a house relying on a valuation report produced by Mr Haining an employee of Halifax. They did work to the property then put it on the market. Another valuer of Halifax found that the property had structural damage. The claimants sought to recover their losses from the Halifax. At the trial the Halifax relied upon expert evidence by Haining that the property had no structural damage. The claimants relied upon expert evidence confirming what the Halifax's second surveyor had determined. The trial judge stated that he preferred Haining's evidence and found for the Halifax. The claimants appealed on the grounds that the judge provided no explanation as to why he preferred Haining's evidence. The Court of Appeal upheld the appeal, stating *"…. in our judgment* ***this*** *judge was under a duty to give reasons and did not do so. Without such reasons, his judgment is not transparent, and we cannot know whether the judge had adequate or inadequate reasons for the conclusion he reached."* Commenting generally on the duty to give reasons Lord Justice Henry said :-

"(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in ***Ex parte Dave****) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence, but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same; the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. ***Transparency*** *should be the watchword."*

The Court of Appeal revisited the duty to give reasons in ***English v Emery Reimbold & Strick.***[39] Here, the court dealt with three separate cases (English, Withers and Verrechia) in a combined judgement. In ***English*** the critical issue was whether a disabling dislocation of a section of the claimant's spine was attributable to an injury for which the defendants were responsible or resulted from a congenital condition. On this issue, expert evidence was of critical importance. In ***Withers*** the central issue was also one of causation – whether a hydraulic system for milking cows supplied by the defendants had suffered from design defects which had been responsible for an outbreak of mastitis in the claimant's herd. Again expert evidence was of critical importance. In each case the Judge found for the defendants, findings that were open to the Judge on the evidence. In each case the claimant contended that, because the Judge had failed to explain why he had reached his decision, he had not received a fair trial and was entitled to a retrial. In ***Verrechia*** the claimant appealed a costs judgement on the ground that the judge was wrong in principle and failed to give any reasons.

Regarding the duty to give reasons the court concluded that *"There is a general recognition in the common law jurisdictions that it is* ***desirable*** *for Judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement … "* but then observed that *" …. justice will not be done if it is not apparent to the parties why one has won and the other has lost."*

[39] ***English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605***

Whilst the court in ***Flannery*** stated that "***the trial judge***" was under a common law duty to give reasons, this fell short of stating that all judges are under such a duty. It is not clear from ***English v Emery*** that the position is any clearer as to whether there is now a blanket duty to do so or whether the duty only applies in certain types of situation. If that is the case when does it apply and when is it not applicable? The court examines the impact that Article 6 of the Human Rights Act 1998 has had on the duty to provide reasons. Thus contrary to the view in ***Flannery*** magistrate are now subject to the duty. ***Flannery*** also considered that where a judgment is based on a summary exercise of discretion, as where a court awards costs, reasons are not required. However, contrary to the House of Lords emphatic ruling in ***The Antaios***,[40] the Court of Appeal noted that the Commercial Court is also now required to give at least limited reasons when refusing permission to appeal against an arbitration award under s69 Arbitration Act 1996.[41] Logic dictates that this should apply to all appeal consent or refusal determinations. Both parties are entitled to know why.

Adequacy and the scope of the duty.

English v Emery examines the scope and extent of the duty to provide reasons established by the Strasbourg litigation. The court's starting point was ***Ruiz Torija v. Spain***[42] where the court stated that *"…. Art 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfill the obligation to state reasons, deriving from Art 6 of the convention, can only be determined in the light of the circumstances of the case."*

The Court of Appeal concluded that Article 6 is concerned with the fairness of the procedures adopted by courts when determining substantive issues. Thus it does no extend to procedural matters and is not concerned with the merits of a case. It is concerned with whether or not a relevant matter has been taken into account[43] but is not concerned with whether or not the court then reached the right decision in the light of that matter. To the extent that a decision could not have been reached if a matter had been considered, a breach of the duty would be evident, but not otherwise. Thus it may be implicit in a decision that a matter has been taken into account, even if not expressly stated.[44] The overall conclusion is that substantive decisions must in future be supported by reasons that demonstrate expressly or implicitly that all relevant matters have been considered. Since the pre-Civil Procedure Rules 1998 cost regime automatically followed the rule that ***"Costs follow the event"*** nothing more was required. This is no longer the case since s44 of the Civil Procedure Rules allows exceptions. Today a costs judgment should provide a clear, albeit succinct, reference to the relevant matters that have been taken into account when allocating costs.[45]

English v Emery[46] also considered the scope and extent of the duty under common law, by reference to the dicta of Griffiths L.J. *in* ***Egil Trust v Pigott-Brown***,[47] in which he stated that

"When dealing with an application in chambers to strike out for want of prosecution a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and,

40 ***The Antaios*** [1985] AC 191; see also ***Mousaka Inc v Golden Seagull Maritime In [2001]*** *1 All ER 726*

41 ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405.

42 ***Ruiz Torija v. Spain*** (1994) 19 EHRR 553 at paragraph 29 confirmed by ***Garcia Ruiz v Spain*** (2001) 31 EHRR 589.

43 ***Helle v Finland*** (1997) 26 EHRR 159 at para 60 *"…..the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court."*

44 ***X v Federal Republic of Germany*** [1981] 25 DR 240; *Webb v UK* [1997] 24 EHRR CD 73

45 ***The Mayor and Burgess of the London Borough of Brent v Aniedobe*** (unreported) 23 November 1999, per Swinton Thomas LJ, *"…this Court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the County Court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."*

46 At para 17.

47 ***Eagil Trust Co. Ltd. v Pigott-Brown*** [1985] 3 All ER 119, at 122. see also Sachs L.J. in ***Knight v Clifton*** [1971] Ch 700, 721

if need be, the Court of Appeal, the basis on which he has acted. … "

Lord Phillips MR stated on behalf of the court that in their judgement the observations of Griffiths L.J. apply to judgments of all descriptions. Having noted that

"… the judgment must enable the appellate court to understand why the Judge reached his decision" he explained however that *"This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision."*

Adequate Reasons, Convention Rights and Proportionality

It would appear that where Convention Rights are at stake, it is very important for a trial judge to provide a clear explanation of how he has exercised his discretion. *Thus in* ***Gallagher v Castle Vale Action Trust Ltd***[48] which involved an appeal against eviction for anti-social behaviour the C.A. determined that the trial judge had failed to set out why he had exercised his discretion in the way he did and had not taken a less drastic option. Whilst accepting that there was sufficient evidence to support the judge's decision the C.A. re-exercised the discretion and suspended the order for two years subject to good behaviour, because of the importance of demonstrating that Convention rights had been taken into account. The court had to demonstrate that it had acted proportionately. In this case it had failed to do so.

Lord Phillips, MR. also addressed the question of reasons when proportionality is in issue in ***Coates v South Bucks DC.***[49] He noted that

"Members of this court have expressed different views as to the manner in which a judge should explain in his reasons a decision that turns essentially on a test of proportionality. Sedley LJ has, on a number of occasions, emphasised the need not merely to identify the relevant factors that weigh in each direction but to explain clearly why it is or is not proportionate to interfere with a Convention right in order to address a pressing social need ….. He returned to this theme when giving permission to appeal in ***Davis v Tonbridge & Malling BC***.[50] *On the substantive appeal Auld LJ suggested that Sedley LJ had been over-exacting. He said this of the judge's task at para 51*:

> ***"At the end of the day, having set out all the competing factors, he had to make his own judgment, which, though characterised by section 187B as an exercise of discretion, is as much a matter of feel as anything else. It is not an exercise that is susceptible to fine intellectual analysis or description at the point of decision. The problematic business of weighing competing interests of so different a character … is to be structured and articulated in the judgment as a whole. It is from that exercise … that … "the appropriate conclusion should emerge".***

In my judgment there is one cardinal rule. The judge's reasons should make clear to the parties why he has reached his decision. Where he has had to balance competing factors it will usually be possible to explain why he has concluded that some have outweighed others. Even where the competition is so unequal that the factors speak for themselves it is desirable to say so. "

Later in the same judgment Lord Justice Neuberger stated

"*I accept that it may have been better if he had then explained in a little more detail his thought processes as to why the balance ultimately fell in favour of the shorter period of suspension, but there is a limit as to how far a Judge can take an explanation of his thought processes in relation to such a balancing exercise. Sometimes, there is a decisive factor, in which case he can say so. Sometimes, there are exceptional factors which can be said to take the case out of the ordinary, and therefore to justify a particular course; in that case, he can also say so. However, on many occasions, having set out the various competing factors, there is little more that a Judge can say than that he is of the view that the factors pointing one way are stronger than the factors pointing the other."*

[48] ***Gallagher v Castle Vale Action Trust Ltd*** [2001] EWCA Civ 944
[49] ***Coates v South Bucks DC [2004] EWCA Civ 1378*** at para 6
[50] ***Davis v Tonbridge & Malling BC*** [2004] EWCA Civ 194.

CHAPTER NINE

Reasons for choosing between conflicting evidence.

Moving from the general to the specifics of each case, the Court of Appeal makes it clear that when preferring one piece of evidence over another, the court is required not merely to state that fact but to in addition provide some indication of why that is the case, whether it be by reference to the standing or expertise of an expert witness, the scope of expertise demonstrated on the day or alternatively defects in the competing evidence. In each of the three cases in ***English v Emery*** the Court of Appeal was able to determine, by closer inspection of the evidence, why the judges reached their conclusions, but clearer first instance judgements would have rendered that task unnecessary.[51]

The appropriate judicial approach to conflicting expert evidence was set out by Lord Justice Bingham LJ in ***Eckersley v Binnie***[52] "*In resolving conflicts of expert evidence, the judge remains the judge: he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity….*" However, it is not then enough to reach a conclusion. How that conclusion is reached must be set out. A failure to do so was fatal to the judgment of His Honour Judge Steel when he concluded that a surgeon was negligent during the course of an operation when he entered via the abdominal wall to treat a suspected hernia from below. The claimant asserted that he should have made his incision of the outer layers of the stomach above the site of the suspected hernia, thereby weakening the abdominal wall rendering her more susceptible to further hernias by entering from below. In consequence she asserted that she suffered from a hernia two years later. The experts disagreed as to whether or not this assertion was correct, the defence asserting that she was susceptible to hernias because of other underlying conditions. It was not apparent why the court had upheld the claimant's version of what was an appropriate operational procedure and the consequences of deviating from it.[53] Even with the evidence in front of them the Court of Appeal could not determine the matter because both parties challenged the judgment, the claimant seeking greater compensation and the surgeon challenging liability, thereby necessitating a retrial.

As to a conflict between expert evidence and evidence of fact Mr Justice Lightman stated in ***Cooper Payen v Southampton Container Terminal.***[54] that "*Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain. But if his evidence is on an issue of fact on which direct evidence is given, for example the speed at which a vehicle was travelling at a particular time, the situation is somewhat different. If the evidence of a witness of fact on the issue is credible, the judge may be faced with what, if they stood alone, may be the compelling evidence of two witnesses in favour of two opposing and conflicting conclusions. There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact. The judge must consider whether he can reconcile the evidence of the expert witness with that of the witness of fact. If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept. The circumstances may be such as to require the judge to reach only one conclusion.*" The Court of Appeal here overturned the first instance judgement because the finding of fact did not accord with what was possible in the light of the evidence of the single joint expert.

In ***Armstrong v First York*** [55] the dilemma facing the trial judge was that he found the evidence of the claimants that they had suffered whip lash injuries convincing, but against this was an expert report stating that such injuries were not possible where the impact to a vehicle was insufficient to do any more than rock the car on its springs. Whilst the witnesses could not prove their injuries (*that being the nature of neck and back pain, which is not susceptible to absolute proof)* their complaints were evidenced by prompt documented visits to a hospital and later to their GP's. The judge concluded on a balance of probability that the claimant's version was correct, rejecting a counter allegation of fraud. The insurance company appealed asserting that the judge had to show

[51] ***Eckersley v Binnie*** (1988) 18 Con L.R. 1 at 77-8 per Bingham LJ, *'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal'.*

[52] infra at 77-78: see also ***Penney, Palmer & Cannon-v East Kent Health Authority*** [2000] Lloyd's Rep Med 41

[53] ***Glicksman v Redbridge NHS Trust [2001] EWCA Civ 1097***

[54] ***Cooper Payen Ltd v Southampton Container Terminal Ltd*** [2003] EWCA.Civ 1223 at para 67

[55] ***Armstrong v First York [2005] EWCA Civ 277***

that the expert report was wrong in order to reject it. The Court of Appeal disagreed. The judge's reason for rejecting the report, namely that he was convinced of the veracity of the witness of facts statements was sufficient. The CA reiterated the observation of Lord Justice Stuart Smith in ***Liddell v Middleton***[56] that *"We do not have trial by expert in this country; we have trial by judge."*

The same problem can occur in relation to conclusions as to credibility. In ***Hartley v Hartley*** the court had to determine whether personal loans had been made by one brother to another, or whether the loans related to companies run by each of them.[57] Over 45 minutes the court heard evidence and promptly delivered an ex tempore judgement. The Court of Appeal stated that "*It is an understandable wish of any judge, who has formed a clear view of the outcome in a relatively straightforward dispute, to give judgment immediately in order to avoid the parties having to come back on another day. But this should not be at the expense of a proper examination of the issues, and of the central factors bearing on their resolution. The judgment in the present case was regrettably short on such examination, a matter which has both led to this appeal and made it difficult to resolve."* The judge had concluded that he found the evidence of one brother more credible than that of the other, particularly since there was evidence that the other brother had on another occasion engaged in questionable accounting activities. Nonetheless there was evidence in support of his account, which the court discounted. The Court of Appeal was in the fortunate position of have transcripts of the evidence heard by the trial judge. Within this they found sufficient evidence to support the trial judge's conclusion. If he had pointed to that evidence in his judgment, there would have been no grounds for an appeal.

In ***London Borough of Merton v Williams***,[58] again the court at first instance had failed to provide reasons, but there was no dispute as to the evidence. The appellant had not even made an appearance in court. Whilst the failure was to be regretted, Lord Justice Mance noted that *" … a court may confirm a decision otherwise vitiated by procedural irregularity if it can properly be said that the decision would inevitably have been the same even if the matter had been dealt with properly"*[59] the view clearly being that nothing would be served by a re-trial.

In ***Baird v Thurrock Borough Council***[60] the Court of Appeal directly address the question as to whether or not the judgment of the trial judge met the test of adequacy. The court concluded that it did not. The claimant, an agency employee, was injured whilst loading a wheelie bin on to the defendant's rubbish cart. According to the claimant he was hit by the right hand bin as it automatically descended. The other employees gave testimony to the effect that after the incident the right hand bin remained in an upright position attached to the vehicle. Everyone agreed that the left hand bin lay on its side in the road. The judge accepted that the other employees had given honest accounts of the event, but concluded that the claimant's version was correct. Subsequent tests of the vehicle had demonstrated that whilst on most occasions where an operator manually operated the raising mechanism the bin would remain in the upward position after being emptied and would not return to the ground until the operator pressed the downward button, there were times when the bin would be automatically returned to the ground. The judge concluded that this is what had occurred, catching the claimant by surprise and causing his injury. The problem for the Court of Appeal was that this did not tally with the evidence of the other employees (*which the Judge had found credible*) that the bin remained in an upright position, the implication here being that the injury was caused by the left hand bin and was 100% the fault of the claimant who should not have stood underneath a raised bin. The defendant's complaint here was that they were at a loss to understand why they had lost the case.

Lord Justice Gage concluded that the judge had failed to provide any rational explanation as to why he preferred the evidence of the claimant over that of the other two employees and ordered a retrial. Lord Justice Ward highlighted the following exchange between Shapiro, council for the defendant, and the trial judge :-

56 ***Liddell v Middleton*** [1996] PIQR P36

57 ***Hartley v Hartley [2003] EWCA Civ 1688***

58 ***London Borough of Merton v Williams [2002] EWCA Civ 980*** **:** see further ***Barty-King v. Ministry of Defence*** [1979] 2 AER 80; ***Hussain Ali v. Somirun Ness v London Borough of Newham*** [2001] EWCA Civ 73.

59 ***R v City of Westminster, ex p. Ermakov*** (1995) 28 HLR 819, at pp. 833-4. Hutchison LJ endorsed a previous statement by Schiemann LJ *"that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same".*

60 ***Baird v Thurrock Borough Council [2005] EWCA Civ 1499***

Shapiro : *"The grounds on which I ask that [permission to appeal] is that the judgment does not, I submit, address the issue of how the bin...*

HHJ Yelton: *"No. What I said was -- and I am always very careful in these judgments -- I followed the advice of the Court of Appeal, which is that a judgment should be as short as possible. I said that I preferred the Claimant's evidence on all material matters. That is a finding of fact. That is what County Court Judges are here for. I shall refuse permission to appeal. I think this is a wholly unappealable case."*

and then observed that :-

"*Short judgments are, of course, all fine and well and to be encouraged but only if they are careful judgments. Second, judges do not have to deal with each and every point in issue but where the dispute is as fundamental to the case as this one then it does deserve mention and an explanation being given for the apparent inconsistency between his appearing to believe the two ladies yet also finding that they could not have been correct in saying that the right-hand bin was still up in the air. If the judge had not so intemperately interrupted counsel, he would have heard Mr Shapiro's point, he would have had a chance to consider the suggested omission and expanded his reasoning to cover it if he thought fit. …. "*

Reasons and procedural determinations.

The prior rule that reasons were not required by a court when determining procedural matters has clearly been undermined by the advent of the Human Rights Act 1998, at least where the decision impacts upon a party's legal interests, as for instance where costs or consent to appeal are concerned. The absence of adverse effects could therefore explain the following Court of Appeal judgments, though the procedural versus substantive law divide is posited as another explanation for the exceptions to the duty to provide reasons embodied in the following judgments.

In ***Slot v Isaac***[61] the applicants unsuccessfully challenged an order of directions. Instead of requesting an oral hearing before the judge who refused their application they attempted to get a High Court judge to deal with the matter. It came before Judge Jack who refused the application on the simple grounds that he had no jurisdiction. They then challenged this decision for absence of reasons. The Court of Appeal concluded that since rejection is in essence an administrative act, in that the court had no jurisdiction, there was no necessity for any kind of reasoned judgment. Similarly in ***David Robert Persson v Matra Marconi Space UK Ltd***[62] the Court of appeal held that where a party is out of time to appeal there is no requirement for a court to provide a reasoned judgement when rejecting a late application to appeal.

Finally, in ***Sumners Ltd v L.B. Hammersmith & Fulham***[63] the Court of Appeal held that where a party did not object to a brief judgement on entitlement on the grounds of absence of reasons but instead went on to address quantum, it would be inferred that they had waived that objection and accordingly lost the right to appeal on those grounds.

Two Caveats.

Firstly, it should not be assumed, without more, that no reasons existed, or that the judge's unspoken reasons were not good in law, simply because no reasons were provided. Quite the opposite, there is a presumption that the judge had good reasons and made the right decision, but merely failed to enunciate them clearly, believing that he had done so, or that the facts spoke for themselves and that the outcome was self evident. However, where the known facts point in the opposite direction to that adopted by the judge, it is possible for adverse assumptions to be drawn. If there is a way to test such assumptions by for instance re-examining transcripts, or inviting the judge to elucidate, this should be done. If that is not possible a retrial will be required. The presumption is a politically useful device that avoids any implication of bad faith on behalf of the trial judge and maintains public confidence in the judiciary.

Secondly, reasons do not have to be proportionate to the size or significance of a claim.[64] The issues surrounding a large but straightforward claim may be dealt with very briefly yet adequately. A small but complex dispute may be far more demanding. Paraphrasing Mozart, adequate reasons require *"as many words*

[61] ***Slot v Isaac [2002] EWCA Civ 481 ;*** but compare ***Jolly v Jay*** [2002] EWCA Civ 277 at [19].

[62] ***David Robert Persson v Matra Marconi Space UK Ltd [1996] EWCA Civ 921***

[63] ***Sumners Ltd v London Borough Of Hammersmith & Fulham [2002] EWCA Civ 703***

[64] See however fn 24 supra regarding proportionality and Convention Rights, which may be an exception to the general rule.

as required" to clearly explain the judge's reasoning and to set out why the decision was reached, *"no more and no less."* The size of a judgment alone provides no indication of the coverage given to the reasons. It is standard practice for a judge to set out the background to a dispute.[65] The facts may be extensive. By setting them out in a comprehensive manner, the judge helps to ensure that he has shown that he was aware of all the issues. The same applies where the judge sets out the relevant law and principles. The key area of the judgement for present purposes however remains that where the judge sets out his reasons for decisions of both fact and law. The reasons may be fragmentary, occurring incrementally during the course of a judgment, or alternatively they may be brought together in a single place. Awareness of the issues as demonstrated by setting out the facts will not be enough. The reasons need to show that the facts have been taken into account and the relevant law applied.

In conclusion, whilst the requirement for judges to provide reasoned judgements is not absolute, in recent times considerable progress has been made towards satisfying a general expectation that such reasons be provided. The losing litigant may or may not be persuaded by such reasons. Many outcomes are based on the drawing of fine distinctions; the capacity of the individual to convince himself of facts and of supposed entitlements is infinite. Independent, objective finality is the goal. A court cannot expect to satisfy all comers at all times but its decision making process can and should wherever possible be transparent.

PART II : ARBITRATORS AND REASONS

The duty of a private arbitral tribunal to provide reasons

In England and Wales the question regarding whether or not there is a duty to provide reasons, whilst pertinent to judges, does not apply to arbitrators. As noted at the start of this examination of reasoned decision, the default position today, by virtue of section 52(4) Arbitration Act 1996, is that unless the parties otherwise agree,[66] an arbitrator subject to the Arbitration Act 1996 regime shall provide the parties with a written, signed, reasoned award. Whilst therefore reasons will be required in England & Wales even if the contract is silent upon the matter, it is a common practice for arbitration service providers to require members to provide reasons, a failure to de so being subject to disciplinary procedures as a question of professional misconduct.

In ***Armstrong v CIArb*** [1997] [67] an arbitrator issued an award in respect of alleged liability for subsidence. A complaint was made that insufficient reasons were provided. The arbitrator was asked to expand. He essentially refused asserting the reasons in the award were sufficient and self explanatory. The CIArb, Professional Conduct Committee concluded that the reasons were inadequate but did not question the actual award. Following this the Panel Management Group determined that any subsequent award would first be vetted by the PMC before being released to ensure adequate reasons were provided. Armstrong felt slighted by all this resulting in this action. The court agreed with the CIArb that the reasons were inadequate and did not address the issue at hand.

In as much as reasons, once provided, shine a light on the decision making process and render an award susceptible to review under s68 or appeal under s69 on a point of law, where the parties determine in advance that finality and/ or privacy are higher priorities than "*the correct decision, for the right reasons"* the parties may well provide that no reasons be provided as part of the award, though it is possible for the arbitrator to provide private reasons subject to privilege that are not admissible in court.[68] This ensures that the arbitrator provides a

[65] See fn 2 supra, per Lord Craighead.

[66] ***Osei Sankofa & Chartlon Athletic Football Co Ltd v Football Association Ltd (2007) EWHC 78 (Comm).*** Mr Justice Simon held here that by the agreement of the parties the decisions of an FA Disciplinary Commission were final and thus did not require reasons, but went on to note that whilst ***Wednesbury*** unreasonableness was nonetheless a ground for challenge, the decision in question was not self evidently unreasonable. Furthermore, on the balance of convenience - viz the need of sport to produce rapid, determinative decisions, the application for relief failed.

[67] ***Armstrong, R v Chartered Institute Of Arbitrators [1997] EWHC Admin 561*** per Mr Justice Owen.

[68] ***Transmountana v Atlantic Shipping*** [1978]. *"The function of a reasoned award is not simply to identify and determine a point which the arbitrators ultimately considered to be decisive. It is to enable the parties and the court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive paoint and (b) to understand the facts, and so consider the position with respect to appeal, on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each, including those which the arbitrators may not themselves have thought to be determinative. Further, it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made containing assertions of fact or law; the arbitrators' finding and brief reasoning upon them are what matters. ……. Not only do reasons concentrate the*

fully considered, rather than arbitrary decision and provides the parties with a reference point for future conduct, but may result in marginally higher arbitrator fees than might otherwise have been the case, to cover the additional cost of producing the private award.

The consequences of failure to provide reasons.

The question whether or not an award could be set aside for insufficiency of reasons was addressed by the Privy Council in ***Bay Hotel v Cavlier*** [2001].[69] In the circumstances, the court did not have to decide on this matter since it found that the relevant standard was set out in the governing rules of the American Arbitration Association, as understood in US Law and the decisions were adequate by those standards. However, a separate award against a third party was set aside for lack of jurisdiction.

Mr Justice Colman observed in ***Margulead v Exide*** [2004] that a deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68(2)(d) of 1996 Act unless it amounts to a *"failure by the tribunal to deal with all the issues that were put to it."* Thus the poor quality of reasons was insufficient in ***Action Navigation*** [70] to justify striking down an award. This however does not mean that no consequences flow from such failure as s70(4) below demonstrates. In addition, an award that is uncertain or ambiguous as to its effect can by virtue of Section 68(2)(f) amount to a serious irregularity.

S70(4) Arbitration Act 1996. Supplementary Provisions

> *70(4) If on an application or appeal it appears to the court that the award –*
> *(a) does not contain the tribunal's reasons, or*
> *(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,*
> *the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.*
>
> *70(5) Where the court makes an order under subsection 4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.*

What constitutes adequate or sufficient reasons for the purposes of arbitration.

The reason for requiring reasons provides some guidance as to what amounts to adequate or sufficient or sufficient reasons, though as Lord Donaldson MR, points out in ***UCATT v Grime*** **(**1991)[71] whilst the arbitrator must **"***tell the parties in broad terms why they lose or, as the case may be, win ... In every case, the adequacy of the reasons must depend on the nature of proceedings, the character of the decision making body and the issues raised before it, particularly if they include issues of fact."*

Section 46 Arbitration Act 1996 requires that the arbitrator decide the matter referred in accordance with the law. Accordingly the reasons should clearly demonstrate that the law has been correctly applied, since otherwise the award will be amenable to a section 69 challenge on a point of law.[72] Thus in the ***BBC v CAC*** [2003] [73] the criteria used by the CAC to determine whether or not BBC wild life camera men were professionals not entitled to union recognition, or were workers entitled to recognition, was incorrect. The decision was remitted to a new panel to re-determine the issue, applying the correct criteria. Care needs to be taken in determining what the relevant criteria are, whether set out in a contract or governing legislation. In ***Burford v Forte*** [2003][74] an appeal was mounted on the grounds that there had been a failure to comply with the mechanism for determining a dispute as set out in an arbitration clause. However, in the circumstances the court held that the arbitration terms were for establishing rent, and thus not relevant to the current action, which was concerned with non-payment.

mind, but on the whole they tend to satisfy the parties more than silence."

69 ***Bay Hotel v. Cavalier Construction Co. Ltd. [2001] UKPC 34*** per Lords Nicholls of Birkenhead; Cooke of Thorndon; Clyde; Hutton; Millett

70 ***Action Navigation Inc v Bottiglieri Navigation Spa [2005] EWHC 177 (Comm)*** per Mr Justice Aikens.

71 ***UCATT v Grime*** (1991) ICR 542.

72 ***The Niedersachsen*** [1986]. A reasoned award is one *"which states the reasons for the award in sufficient detail for the court to consider any question of law arising therefrom."*

73 ***British Broadcasting Corporation, R v Central Arbitration Committee [2003] EWHC 1375 (Admin)*** per Mr Justice Moses.

74 ***Burford UK Properties Ltd v Forte Hotels (UK) Ltd [2003] EWCA Civ 1800*** per Auld LJ; Chadwick LJ; Arden LJ.

The reasons should demonstrate that the award does not determine matters outside the jurisdiction of the tribunal, since a failure to do so could pave the way to a jurisdictional challenge under section 67 either by way of defence to a section 66 enforcement action or as an application for a declaration that the award be of no effect under section 67(1)(b). Furthermore, the reasons should demonstrate that all issues referred to the arbitrator have been dealt with and that the tribunal has taken into account all relevant information put to it, since otherwise a section 68 challenge on the grounds of a serious irregularity. [75]

The latter has provided fertile grounds for challenges where the reasons provided do not cross reference all the issues or all the evidence provided by one of the parties and set out why the tribunal did not adopt that reasoning. A failure to reference aspects of argumentation leads inexorably to an assertion that the issue or the evidence was not considered or even that the decision was based on information not put to the parties and no opportunity had been provided for that information, including expertise of the arbitrator to challenge that information. Much of the discussion regarding sufficiency of reasons relates to minor or tangential information, and whether or not any irregularity, where established, has caused or will cause substantial injustice. The question then is how much attention, if any at all, should be paid to such matters by the tribunal when delivering its award.[76] The principles here mirror those that apply to judges.[77]

In ***Ipco v Nigerian National Petroleum*** [2005],[78] enforcement of a New York award was resisted inter alia on the grounds of inadequate reasons. Gross J. stated :-" *… As it seemed to me, the nub of this complaint was twofold. First, that the Tribunal in respect of the many individual but substantial items with which it dealt comprising the variations, while summarising the rival arguments, gave very little by way of reasons for preferring IPCO's case to that of NNPC. Secondly, that the Tribunal did not address how each of the variations had an impact on the overall time for completion of the project. Such criticisms require close scrutiny. All too easily, they can be exploited in an attempt to re-open the Tribunal's findings of fact. No arbitration Tribunal should be criticised for succinctness; nor is any Tribunal required to set out every point raised before it, still less at length. …. Had this matter stood alone, I am inclined to think that I would have been largely unsympathetic. ….."*

Subsequently, Mr Justice Tomlinson[79] expressed an equally unsympathetic view of this objection, when faced with applications for partial enforcement of elements of the award not affected by a pending, though late and very protracted challenge to the award, in the Nigerian court. The key factor, that the variations were ordered by the respondent, justified a short but robust rejection by the tribunal of the assertions of the defendants. Detailed analysis was not accordingly required and the court anticipated that such complaints would be given short shrift by the Nigerian court.

Ambiguity, Uncertainty and Reasons

An arbitral award should be certain and free from ambiguity. Under previously the common law[80] and now under Section 68(2)(f) an ambiguous award may be rendered unenforceable in whole or in part.[81] Thus in as much as the reasons are ambiguous leading to uncertainty, the reasons could be deemed to be inadequate. However, this goes more to the clarity than the extent of the reasons. From this perspective, ambiguity may best be avoided by brevity, in that the more that is written, the greater is the scope for contradiction. Furthermore, ambiguity may arise out of a failure to specify, though the provision of the requisite specifics might not illuminate why a decision has been reached. On the other-hand, the section of an award containing a direction, which taken out of context might be ambiguous, may in fact be clarified by reference to the reasons for that decision. Applicants should where applicable first seek rectification under section

[75] ***Universal Petroleum v Handels und Transportgesellschaft*** [1987]. CA. *"An arbitrator should remember to deal in his reasoned awards with all issues which may be described as having "conclusive" nature, in the sense that he should give reasons for his decisions on all issues which lead to conclusions on liability or other major matters in dispute on which leave to appeal may subsequently be sought. Such issues should not be difficult to identify."*

[76] See ***Bankers Trust Co v Government of Moscow*** 2003] EWHC 572 (Comm).

[77] See ***English v Emery supra***

[78] ***Ipco (Nigeria) Ltd v Nigerian National Petroleum Corp*** [2005] EWHC 726 (COM) paras 49 & 50

[79] ***IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation [2008] EWHC 797 (Comm)***

[80] ***Duke of Beaufort v Welsh*** (1839) 10 Ad & el 527; ***Re an Arbitration between Marshall & Dresser*** (1843) 3 QB 878; ***Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd*** [1958] 1 Lloyd's Rep 250; ***River Plate Products Netherlands BV v Etablissement Coargrain*** [1982] 1 Lloyd's Rep 628.

[81] ***Miller v De Burgh*** (1850) 4 Ex 809.

57(3)(a) Arbitration Act 1996 before mounting a section 68 challenge.[82] Where an ambiguity is not amenable to rectification a section 57 reference would not be required.[83]

The Standard Required of Arbitrators

In as much as often arbitrators and lay tribunal members are not lawyers, the court does not impose such high standards on tribunals when expressing awards as they might for trained lawyers**.** Thus in ***General Feeds v Slobodna*** **[**1999], it was stated that the court *" … is not entitled to expect from trade arbitrators the accuracy of wording or cogency of expression that is required of a judgement."*[84] That said, reasons, where required should be adequate. The situations where the courts now require reasons appears to be expanding. Thus, in ***Halifax v Equitable Life*** [2007],[85] by analogy with section 70(4) Arbitration Act 1996 Mr Justice Cresswell held that the court can require an expert determinator / umpire to provide adequate reasons for a decision to determine an appeal against the validity of the umpire's decision.

The following extract from the judgment of Megaw J, in ***re Poyser & Mills' Arbitration*** [1964],[86] in the context of a statutory arbitration under the Agricultural Holdings Act throws some light on the need for reasons and what amounts to adequate and sufficient reasons. *"So far as paragraph 3 is concerned, there being seven items in the notice to remedy, the arbitrator has not said which of those items he found to be good, and which he found to be bad. He has not dealt with them individually; he has merely said that he "**found as a fact that there was sufficient work required in the notice which ought to have been done and was not done on the relevant date to justify the notice to quit.**" I am bound to say this, and again I do not think it was disputed by Mr. Langdon-Davies, that a reason which is as jejune as that reason is not satisfactory, but in my view it goes further than that.*

The whole purpose of section 12 Tribunals & Inquiries Act, 1958, was to enable persons whose property, or whose interests, were being affected by some administrative decision or some statutory arbitration to know, if the decision was against them, what the reasons for it were. Up to then, people's property and other interests might be gravely affected by a decision of some official. The decision might be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made. The purpose of section 12 was to remedy that, and to remedy it in relation to arbitrations under this Act. Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. ***The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.*** *In my view, it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take. If those reasons do not fairly comply with that which Parliament intended, then that is an error on the face of the award. It is a material error of form. Here, having regard to paragraph 3, this award, including the reasons, does not comply with the proper form, and that is, in my view, an error of law on the face of the award and is properly so to be described rather than as technical misconduct. No one here suggests for a moment actual misconduct on the part of the arbitrator, but it may well be that what has gone wrong here is something which is capable properly of being described as both misconduct and error of law on the face of the award. If so, the fact that it is the latter brings it within the jurisdiction of this court. I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think* ***there must be something substantially wrong or inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked****. In my view, in the present case paragraph 3 gives insufficient and incomplete information as to the grounds of the decision; and, accordingly, I hold that there is an error of law on the face of the award, that the motion succeeds and the award must be set aside."*

Lord Justice Donaldson had this to say in ***Bremer v Westzucker (No2)*** [1981],[87] about reasoned arbitral awards, in the context of the Arbitration Act 1979 :- *"At the end of the hearing* [the trade arbitrators] *will be in a position to give a decision and the reasons for that decision. They should do so at the earliest possible moment. The parties will have made their submissions as to what actually happened and what is the result in terms of their respective rights and liabilities. All this will be fresh in the arbitrators' minds and there will be no need for further written submissions by the*

[82] ***Torch Offshore LLC v Cable Shipping Inc.*** [2004] EWHC 787 (Comm)
[83] ***Gbangbola v Smith & Sherriff Ltd*** [1998] 3 All.E.R. 730.
[84] ***General Feeds Inc Panama v Slobodna*** [1999] :
[85] ***Halifax Life Ltd v The Equitable Life Assurance Society [2007] EWHC 503 (Comm)***
[86] ***In re Poyser & Mill's Arbitration.*** [1964] 2 Q.B. 467,
[87] ***Bremer Handelsgesellschaft mbH v Westzucker GmbH (No2)*** [1981] 2 Lloyds's Rep 130 at 132-

parties. ***No particular form of award is required****. Certainly no one wants a formal 'Special Case'.* ***All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.*** *This is all that is meant by a 'reasoned award'.*

For example, it may be convenient to begin by explaining briefly how the arbitration came about -- 'X sold to Y 200 tons of soyabean meal on the terms of GAFTA Contract 100 at US.$Z per ton c.i.f. Bremen. X claimed damages for non-delivery and we were appointed arbitrators'. *The award could then briefly tell the factual story as the arbitrators saw it. Much would be common ground and would need no elaboration. But when the award comes to matters in controversy, it would be helpful if the arbitrators not only gave their view of what occurred, but also made it clear that they have considered any alternative version and have rejected it, e.g.,* 'The shippers claimed that they shipped 100 tons at the end of June. We are not satisfied that this is so', *or as the case may be,* 'We are satisfied that this was not the case'. *The arbitrators should end with their conclusion as to the resulting rights and liabilities of the parties. There is nothing about this which is remotely technical, difficult or time consuming.*

It is sometimes said that this involves arbitrators in delivering judgments and that this is something which requires legal skills. This is something of a half truth. Much of the art of giving a judgment lies in telling a story logically, coherently and accurately. This is something which requires skill, but it is not a legal skill and it is not necessarily advanced by legal training. It is certainly a judicial skill, but arbitrators for this purpose are Judges and will have no difficulty in acquiring it. ***Where a 1979 Act award differs from a judgment is in the fact that the arbitrators will not be expected to analyse the law and the authorities.*** *It will be quite sufficient that they should explain how they reached their conclusion, e.g., 'We regarded the conduct of the buyers, as we have described it, as constituting a repudiation of their obligations under the contract and the subsequent conduct of the sellers, also as described, as amounting to an acceptance of that repudiatory conduct putting an end to the contract'****. It can be left to others to argue that this is wrong in law and to a professional Judge, if leave to appeal is given, to analyse the authorities.*** *This is not to say that where arbitrators are content to set out their reasoning on questions of law in the same way as Judges, this will be unwelcome to the Courts. Far from it. The point which I am seeking to make is that* ***a reasoned award,*** *in accordance with the 1979 Act,* ***is wholly different from an award in the form of a special case.*** *It is not technical, it is not difficult to draw and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing. That is the time when it is easiest to produce an award with all the issues in mind. … "*

The question as to adequate reasons arose again in ***Hayn Roman v Cominter*** [1982] .[88] This is what Goff J had to say about the matter : - *"Now it appears that the Committee of Appeal have affirmed the decision on damages of the arbitrators but they themselves have said nothing about damages in their reasons. I can therefore only infer that they have upheld the award of the arbitrators on the same basis as the arbitrators. The arbitrators awarded that: ". . . the Buyers pay to the Sellers $61,740.00 in compensation for the difference between the original contract price and that obtained on resale. " That resale appears to be one made consequent on the negotiations between the original shippers and the sellers as at Jan. 3, 1980. Now in these circumstances it seems to me that the Committee of Appeal should give their reasons why they reached this decision, to ascertain whether they did apply the appropriate principles of law as to the measure of damages, because if the position is that the market difference as at mid-December was at the level which the buyers have suggested then it would appear prima facie that the measure of damages, assuming that the buyers are in breach of contract in this case, was far less than the sum of $61,000 which has been awarded against them by the Committee of Appeal.*

In those circumstances, as the Committee of Appeal had this point specifically raised before them by the buyers and had to consider it, and as they have not dealt with it at all in their reasons and we simply do not know the basis upon which they reached their decision and ***as on the face of the documents it appears that they may have applied the wrong test, the matter must go back to them to give their reasons*** *for deciding that the sum to be awarded against the sellers by way of damages was the same sum as that awarded by the arbitrators.*

So I conclude that on all these three points the matter should go back to the Committee of Appeal. I reach this conclusion with much regret in view of the passage of time that has elapsed. But my attention has been drawn to the recent judgment of Lord Justice Donaldson in ***Bremer v Westzucker****, in which the learned Lord Justice did refer in the course of his judgment to the reasons which should be given by arbitrators. I think it is clear from that account given by Lord Justice Donaldson that* ***it is incumbent upon arbitrators, in giving their reasons, to explain on what basis they have***

[88] ***Hayn Roman & Co S.A. v Cominter (UK) Ltd*** [1982] 2 Lloyd's Rep 458 at 464 .

***rejected contentions that have been advanced before them. They are not being asked to go into great detail; they are simply being asked to deal with submissions which have been advanced before them because this is just the kind of matter which the parties**, if their contentions are rejected, **may wish to pursue on appeal**. Anyway, as a matter of commonsense, **they are entitled to know why their contentions have been rejected**. Each of the three points on which I have decided that the matter should go back to the Committee of Appeal for further reasons are points on which contentions were advanced by the buyers but the award, with all respect to the Committee of Appeal, does not have sufficient detail in it to explain why the contentions were rejected. I therefore order that the award be remitted to the arbitrators for those three matters to be clarified."*

Lord Justice Kerr delivered an extended judgement on the role of the arbitrator when delivering decisions in ***Universal Petroleum v Handels*** [1987]. [89] Again it was in the context of the Arbitration Act 1979 and some of his comments have been addressed by the Arbitration Act 1996 regime. Nonetheless, there is much of value to take note of in this judgement. His Lordship noted as follows :- *" … in most arbitrations arising from contractual disputes, like the present, the arbitrator's conclusion on these matters will be his point of departure for the resolution of the dispute and be embodied in one or more primary findings. Albeit that they involve conclusions of law, these findings cannot then be treated differently from other primary findings. They cannot be challenged unless either (i) the necessary foundation for a challenge to them has been laid, or (ii) the remainder of the award contains material which enables their correctness in law to be challenged, or (iii) there are gaps, inconsistencies or ambiguities in the arbitrator's reasons which cast sufficient doubt upon the correctness in law of these findings, and upon the consequent correctness of the award, to justify an order for more detailed reasons under sub-s. 5(b).*

In the present case none of these applies. There is admittedly nothing in the award which casts any doubt on par. 1 so as to satisfy (ii) or (iii). As regards (i), since there was evidently argument about the contractual documents and terms, the arbitrator should have been asked specifically to give reasons for his conclusions in that regard, possibly by including a summary of the evidence on which he might base his conclusions about the terms of the contract. That would have laid the necessary foundation under (i) above for a question of law arising out of the award whether the findings or conclusions of law in par. 1 were sufficiently clearly erroneous to justify leave to appeal. But since this did not happen, it is now impossible to question the finality of his award on this issue. … We would therefore allow the appeal and set aside the order for the "schedule of further reasons" on these grounds. ….

*It must always be remembered that the question whether or not to make an order for further reasons under sub-s. (5)(b) is only one issue in the context of the overriding question whether leave to appeal should be granted at all. It is wholly subsidiary to that main question, and this must constantly be borne in mind. The relevant tests for deciding whether or not to grant leave to appeal have of course been laid down authoritatively in **The Nema** and **The Antaios**. But the underlying statutory test must not be forgotten. This is that leave to appeal may only be granted when the answer to the relevant question or questions of law "could substantially affect the rights of one or more of the parties"; see sub-s. (4). Thus if there are several grounds for concluding that a claim succeeds or fails, there must be no remission under sub-s. 5(b) for more detailed reasons in support of the arbitrator's conclusion on one of these grounds if the existence of the other grounds would or should still lead to a refusal of leave to appeal. The reason is that an answer from the arbitrator which is favourable to an applicant for remission under sub-s. (5)(b) on that one ground could not "substantially affect the rights of the parties" if the existence of the other grounds would still lead to a refusal of leave to appeal on the basis of **The Nema** and **The Antaios** decisions.*

*That this must be borne in mind by everyone concerned is clear as a matter of common sense to avoid unnecessary proceedings, delay and costs, and also as a matter of authority. The first stage at which this point must be borne in mind is at the arbitration itself. A reasoned award is usually requested in order to lay the foundation for a possible application for leave to appeal. **An arbitrator should** therefore remember to **deal in his reasoned awards with all issues which may be described as having a "conclusive" nature, in the sense that he should give reasons for his decisions on all issues which lead to conclusions on liability or other major matters in dispute on which leave to appeal may subsequently be sought.** Such issues should not be difficult to identify, and the arbitrator should if necessary be reminded about them. But all that an arbitrator has to bear in mind in that connection is effectively summarized in the judgment of Sir John Donaldson, M.R., in **Bremer. v. Westzucker** ….*

[89] ***Universal Petroleum Co Ltd v Handels und Transportgessellschaft mbH** [1987] 1 Lloyds Rep 517 at 527*

The award in the present case did not follow this pattern. Both Counsel indicated, and we agree, that in that respect it is unsatisfactory. ***The arbitrator*** *seized upon only one basis for his conclusion that there had been no wrongful repudiation of the contract by the sellers. He* ***said nothing about the sellers' "additional reasons" for concluding that the presence of the additional decimals in the Saybolt certificate could not in any event have led to this consequence.*** *We will not burden this judgment with an enumeration, let alone analysis, of these "additional reasons". But* ***they had evidently been fully argued in the arbitration, and on that basis they deserved consideration and reasoned conclusions in a reasoned award.***

But since the arbitrator did not deal with them, what should have happened on the buyers' application for leave to appeal, and their intertwined application for remission for further reasons under sub-s. (5)(b)? Mr. Schaff submitted that in considering the latter application the Judge should have had full regard to the question whether the arbitrator's answers upon a remission aimed at par. 1 of his award were in any event likely "substantially (to) affect the rights of the parties", in the sense that they might lead to the grant of leave to appeal within the guidelines of ***The Nema*** *and* ***The Antaios.*** *He therefore submitted that before deciding to order further reasons under sub-s. (5)(b), the Judge shall have given full consideration to the sellers' "additional reasons" for seeking to uphold the award in their favour.*

Leaving aside the main point, that a remission aimed at par. 1 was in any event erroneous, we have no doubt that this submission is correct in principle. The prospect of granting or refusing leave to appeal against an award under sub-s. (4) in the light of the guidelines in ***The Nema*** *and* ***The Antaios*** *is clearly relevant to the decision whether to grant or refuse an application for further reasons on a particular question or questions of law under sub-s. (5)(b);* [90] *…..*

In the present case the Judge did not consider the general "appealability" of the award against the background of the sellers' additional reasons. But as Mr. Schaff readily admitted, he had not argued these points fully in the context of his opposition to the buyers' application to remit. That, no doubt, is why the Judge said no more on this aspect than the following: "I will assume that in an ordinary case, such, for instance, as one in which reasons omit express reference to one or two links in a logical chain of argument leading to a conclusion, an order would not normally be made unless leave would be ultimately likely to be granted,[91] *although the matter must always, it seems, remain ultimately one of discretion. In the present case, however, it is, in my view, impossible to gauge the strength of the applicant's arguments without further reasons, which, so far as the applicants are asking for them, should in principle ask for specific findings (1) as to the identity of the contractual document or documents and (2) as to the relevant terms of the contract and the source of those terms with reasons for those findings. ... I will now stand over for further argument or submissions the terms of the schedule which will be attached to the order."*

In these circumstances Mr. Schaff's argument in this Court, that the Judge failed to have proper regard to the general appealability of the award, is hardly fair to the Judge. But it must always be borne in mind that applications of this kind inevitably have to be dealt with in the Commercial Court in a very different atmosphere and more hurriedly than their subsequent analysis and review on rare occasions in this Court. However, since both Counsel said that this second aspect also raised issues of principle about the practice concerning applications for leave to appeal under s. 1 of the 1979 Act, we will briefly state our views about them in general terms, but bearing in mind that the exercise of this jurisdiction under the 1979 Act is a matter for the Judges of the Commercial Court.

(1) The jurisdiction to order further or more detailed reasons under sub-s. (5)(b) should be exercised as sparingly as possible. Such orders involve a process of "to-ing and fro-ing" between the Court and the arbitrator, with consequential costs and delays before it is even known whether leave to appeal against the award will ultimately be granted. The effect of such orders is therefore greatly to postpone the effective finality of what was intended to be a final award. Any excessive or unnecessary resort to such orders runs counter to the purpose and policy of the 1979 Act, as explained - in particular - in ***The Nema*** *and* ***The Antaios*** *and is liable to bring the Act into disrepute.*

(2) As already explained, the need to resort to such orders should be sought to be avoided by arbitrators stating their reasoned conclusions on all important issues which have been raised in the arbitration, even though several reasons may lead to the same result.

(3) Where a party applies for an order under sub-s. (5)(b), the decision whether or not to grant the application should never be taken without giving the fullest consideration possible at that stage to the question whether leave to appeal is likely

[90] see the decision of Mr. Justice Staughton in ***Warde v Feedex*** *[1984] l Lloyd's Rep. 310 at p. 313 &* the reference to that decision with apparent approval, which we share, in ***The Niedersachsen****, [1986] 1 Lloyd's Rep. 393 at p. 395 per Sir John Donaldson, M.R.*

[91] *(see Mr. Justice Staughton's judgment in* ***Warde v. Feedex***

to be granted by reference to the text of sub-s. (4) and ***The Nema*** *and* ***The Antaios*** *decisions.* ***Such orders should therefore never be made simply on a basis of "Let us wait and see what the arbitrator will say", but only if there appears to be a real prospect of leave to appeal being properly granted.***

(4) The reasoning of the judgment of Lord Justice Robert Goff in ***The Barenbels****, precluding the use of evidence extrinsic to the award on applications for leave to appeal, cannot be circumvented by applications under sub-s (5)(b) and is therefore equally applicable to such applications. There is no relevant distinction between evidence given on affidavit or otherwise and information given to the Court by Counsel. In the same way as applications for leave to appeal, applications for further reasons under sub-s. (5)(b) must therefore be decided exclusively on the basis of the contents of the award.*

(5) Despite the advice to arbitrators under (2) above, there will inevitably remain some cases where, as here, the respondents to applications for leave to appeal and/or for further reasons under sub-s. 5(b) will wish to resist such applications by seeking to rely on matters which were raised in the arbitration but were not dealt with in the arbitrator's reasoned award. Should they then be able to inform the Court about those matters, whether by affidavit or through Counsel? On the present appeal both Counsel were in agreement that respondents should be entitled to do so. Although we heard no argument on the point, our present view is that this must be right. In such cases extrinsic evidence is not being used for the purpose of seeking to obtain the reversal of an award by raising questions of law which do not arise out of the award. It is used in order to inform the Court about matters with which the arbitrator has ex hypothesi failed to deal, which - in the view of the respondents - should lead the Court to refuse leave to appeal, and/or to remit under sub-s. (5)(b), on the ground that leave to appeal and/or remission could in any event not lead to a different outcome from the arbitrator's conclusion, and could therefore not substantially affect the rights of the parties. As at present advised it therefore seems to us that the reasoning and decision in ***The Barenbels*** *do not apply to respondents who oppose applications for leave to appeal and/or to remit by seeking to uphold the award. As both Counsel agreed, any other conclusion could lead to great injustice.*

Finally we would add, …. that we sincerely hope that the course of events in the present case was indeed exceptional, because it appears to us to have been in the highest degree unsatisfactory. We have already said that ***the full "schedule of further reasons" reads like a cross-examination of the arbitrator. If it stood, there would then have to be further argument, on the basis of the arbitrator's first and second sets of reasons, whether leave to appeal should be granted.*** *Such a course may of course be unavoidable in occasional complex cases. But* ***how can anything of the kind be justifiable in a case like the present?*** *Using the terminology of Lord Diplock in* ***The Antaios*** *case at pp. 241 and 206C, this dispute arose out of a "one-off" contractual situation and a "one-off" event.* ***What*** *therefore* ***fell to be considered on an application for leave to appeal was – "Whether the arbitrator was in the judge's view so obviously wrong as to preclude the possibility that he might be right . . . Unless the answer he would give to . . . (this) question is "Yes" he should refuse leave to appeal."***

In the present case the contractual cargo certificate showed the maximum density to be correct to the required three decimal points and the RVP to be correct to the required two decimal points. However it was put, the buyers' case rested solely on the presence of one additional decimal figure which appeared in the certificate in each case. We were told that it was not disputed on the side of the buyers that an analysis of the cargo to that degree of precision could not establish whether the cargo was in fact outside the specification. It was also undisputed that the alleged discrepancy was commercially insignificant. Against this background the arbitrator's ultimate conclusion was that the buyers had not established that by tendering this certificate the sellers had wrongfully repudiated the contract. ***How then could it be said that this conclusion was so obviously wrong that there was no possibility that it was right? Why was it ever thought appropriate to launch an application for leave to appeal in this case? & why was it not rejected out of hand?"***

Mance J. returned to the issue of adequate reasons in ***Transcatalana v Incobrasa*** [1995],[92] in the following terms :- *"…. Mr. Justice Colman said in respect of an award issued by the Board of Appeal of GAFTA in* ***Cefetra v Toepfer.*** [93] *"I am bound to say that the reasoning in par. 4.5 of the award is obscure, to say the least. In my judgment, it falls short of the clarity of exposition which parties to a London arbitration are entitled to expect for the purposes of a reasoned award under the Arbitration Act, 1979. Until the hearing of this appeal neither party had applied for the board to give further reasons for their award. As a result of discussion at the end of this hearing Mr. Hancock….. sought to apply*

[92] ***Transcatalana De Commercio S.A. v Incobrasa Industrial E Commercial Brazileira SA*** [1995] 1 Lloyd's Rep 215 at 217

[93] ***Cefetra B.V. v. Alfred C. Toepfer International G.m.b.H.,*** *[1994] 1 Lloyd's Rep. 93 at p. 100*

out of time for the award to be remitted for further reasons. . . . This application is dismissed." … The present award is imbalanced between recitation on the one hand and findings and reasoning on the other. It sets out at great length messages exchanged between the various parties (many of them containing assertions of fact raised as the dispute evolved) as well as the parties' respective submissions to the board on numerous issues of fact and law. But its reasoning and finding on liability are limited to one issue and are of the utmost brevity.

More particularly, the award extends over some 41 pages, …. "The Facts" extend over 18 pages consisting mainly of verbatim recitation of messages passing between the parties. The sections on submissions comprise of 15 pages recounting arguments and submissions on facts. By contrast ***the essential findings and reasoning on liability extend to 12 lines.*** *The equivalent reasons in* ***Cefetra*** *were, it appears,* ***only five lines long****.*

This approach to the preparation of reasoned awards almost inevitably leads to uncertainty and argument about what, if anything, the arbitrators have accepted by way of evidence or decided on important issues of fact or law. ***The function of a reasoned award is not simply to identify and determine a point which the arbitrators ultimately considered to be decisive. It is to enable the parties and the Court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive point and (b) to understand the facts, and so consider the position with respect to appeal, on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each, including those which the arbitrators may not themselves have thought to be determinative.*** *Further,* ***it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made containing assertions of fact or law; the arbitrators' findings and brief reasoning upon them are what matters.*** *On the function and contents of a reasoned award generally, arbitrators will find helpful guidance in both existing case-law*[94] *and Mustill & Boyd on Commercial Arbitration (2nd ed.) pp. 377- 378."*

Scope of the Duty

The duty to provide reasons where invoked only applies to awards and not to interim orders since they concern the administration of procedure. [95] Whilst an award may subsequently relate the history of interim orders issued during the arbitration proceedings, it is too late at this stage to provide reasons and a failure to do so cannot undo the lawfulness of such orders.[96] Where decisions of fact are central to the application of relevant law, the facts should be clearly set out. As noted in ***Customs & Excise v Civil Service Motor Association [1997].*** [97] Hobhouse LJ. Stated that *" ……... It is … necessary to emphasise the comment that must be made concerning the Statement of Decision of the Tribunal in this case. It runs to 21 pages yet it does not contain any clear findings of fact on the critical issues. It has only been possible to discover the facts summarised in the judgment of Mummery LJ with the assistance of counsel and an examination of the documents apparently referred to in the Statement. The Tribunal rehearses and comments on the oral evidence which they heard, it may be thought at excessive length. But what they do not then do is to make any clear findings of fact upon that evidence.*

It is the duty of a fact finding tribunal to clearly set out the relevant facts and make findings upon the disputed questions of fact. This is necessary for two main reasons. First the parties are entitled to know why they have won or lost. Secondly, where there is a right of appeal, particularly where it is on a point of law only (as is the case from the Value Added Tax and Duties Tribunal), it is essential to the exercise of the right of appeal and its determination that the facts shall have been found by the tribunal from which the appeal is brought.

In the present case it was central to the determination of the appeal to be clear what the service was which CSMA rendered to Frizells in return for which Frizells paid CSMA the commission upon which it was said that VAT was chargeable. Once this had been ascertained, the legal question of applying the legislation to the relevant facts became relatively straightforward as appears from the Judgment of Mummery LJ.

It must be stressed that in every case the Tribunal should distinguish between the recitation of evidence and the finding of facts and be sure to make clear and adequate findings of fact. This it did not do in the present case. "

[94] ***Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H.,*** *[1981] 1 Lloyd's Rep. 130 at p. 133 and* ***Universal Petroleum Co. Ltd. v. Handels- und Transportgesellschaft G.m.b.H.,*** *[1987] 1 Lloyd's Rep. 517 at pp. 526-527*

[95] ***Three Valeys Water Committee v Binnie & Partners*** *[1990] 52 BLR 42.*

[96] ***Exmar BV v National Iranian Trader Co****. [1992] 1 Lloyd's Rep 169.*

[97] ***Customs & Excise v Civil Service Motor Association [1997] EWCA Civ 2809 :***

CHAPTER NINE

DOMESTIC ARBITRATION AND REASONS IN AUSTRALIA

Introduction. Whether or not the enforceability of a domestic arbitral award might be impugned by a failure to provide adequate reasons came before the high court (2006) [98] and subsequently before the court of appeal (2007) [99] in Victoria in the case of ***BHP Billiton v Oil Basins.*** The central issues were 1) whether inadequate reasons constituted an error of law on the face of the record and 2) whether inadequate reasons might have a substantial impact on the rights of a party and amount to technical misconduct, leading in turn to whether 3) the court should set aside an award on the grounds of inadequate reasons. The case is all the more remarkable since two of the arbitrators were retired senior judges, one from the High Court Victoria, the other from the Federal court. The court's affirmative answer to all three questions has led to criticism in some quarters that this undermines the arbitral process, particularly since this was not a case where no reasons at all were provided. The central issue in future cases may turn on what amounts to "*adequate reasons"* and whether or not the reasons provided are to the satisfaction of the court.

The Facts : Oil Basins are the successors in title to the contractual consultancy rights of Dr Weeks, an eminent geologist, whose expertise led to the opening up of valuable oil fields. The crux of the matter turned on whether an "***overriding royalty***" agreement with a return of 2 ½ % of gross turnover continued in operation after the fields had been opened up to competition by the government and new licensing arrangements were introduced which saw Billiton co-operating with other extractors, or was limited to the original extraction program. Clearly a lot of money was at stake, so inevitably the decision of the tribunal tasked with adjudicating on this dispute would have a substantial impact of the rights of the respective parties. The meaning of *"**overriding royalty**"* was stated under the contract to be subject to the law of New York. The tribunal received expert opinion on interpretation of the phrase from a wide range of sources. The challenges concerned the way that the tribunal dealt with this interpretation and its preference for one interpretation (*area based*) which favoured Oil Basins by a majority of two to one and the exclusion an alternative *(property based)* which would have favoured Billliton. Critically, the tribunal failed to set out why the alternative interpretation was rejected. The problem was exacerbated by the fact that the accepted opinion as to the legal interpretation of the phrase under US Law contained contradictions. The reasons simply referred to and adopted that opinion without indicating which elements of the opinion were being endorsed and which elements were rejected.

Governing Law : Whilst the focus of the examination was inevitably the provisions of the governing legislation namely the **Commercial Arbitration Act 1984** *(Vic),* with specific reference to sections 29, 38, 42 and 43**,** the court examined English jurisprudence prior to the Arbitration Act 1996 and the authorities regarding the powers of the court to set aside an award for misconduct in Western Australia.

Reasons : There being no agreement to the contrary, the arbitrators were required under s. 29(1)(c) of the Act to provide reasons. The scope of this duty was examined in the light of Nettle JA's judgement in ***Hunter v T.A.C.*[100]**, viz :- "*When a judge decides an application … the judge is under a duty to provide reasons for his or her decision. Furthermore, while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the*

[98] ***BHP Billiton Ltd v Oil Basins Ltd [2006] VSC 402*** per Hargrave J. 1st November 2006.
[99] ***Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255*** per Buchanan, Nettle; Dodds-Streeton JJA. 16th November 2007.
[100] ***Hunter v Transport Accident Commission*** [2005] VSCA 1, at [23].

argument or the resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law."

As to whether this "***general duty***" extended to arbitrators, Hargrave J at first instance cited the following extract from the judgment of Byrne J in ***Peter Schwarz v Moreton*** [101] *: -*

*"It is the duty of an Arbitrator to consider and deal with all matters the subject of the reference. Commonly, the arbitrating parties will present contentions of fact and law in support of their own case in opposition to that of the opponent. Often there will be multiple contentions put forward, sometimes in the alternative to those which have preceded them. The Arbitrators must have regard to them all. When it comes to preparing the award pursuant to s. 29(1), and to 'a statement of reasons for making the award', the obligation is not identical. The statutory requirement that the reasons be '**reasons for making the award'**, means that the Arbitrators are not required to provide reasons which did not lead to the determination of the disputes referred to arbitration. Accordingly, it is not necessary for them to deal with an alternative basis of claim or defence when the primary claim or defence has been accepted.*

The requirement for reasons in s. 29 means that the Arbitrators must set out the facts which they have found and the legal principles which they have relied upon as the foundation for the award and that this should be in terms sufficient for the parties to understand why they have won and lost and for them to decide whether to make and for the Court to determine an application for leave to appeal or enforcement.

I have mentioned the purposes which the statement of reasons is to serve. The statement of reasons, at a minimum, must be sufficient to achieve these purposes. I say 'at a minimum', because I am concerned with the point at which the Court will take an active interest in the insufficiency of reasons; the prudent Arbitrator will not be tempted to stray close to this cliff edge. The question may arise whether a particular contention must be dealt with in the statement of reasons. Judges, mindful of their own judgment-writing experience, have been careful not to impose upon Arbitrators a burden greater than their own. And so, there is no need to deal with contentions which are frivolous, irrelevant or even peripheral to the matters in issue.

*This has led the Court to stipulate that Arbitrators must deal with every 'submission worthy of serious consideration'. In **Fletcher Construction Australia Ltd v Lines MacFarlane and Marshall Pty Ltd** the Court of Appeal in this State said that a reasoned judgment of a court must "**deal with the central contentions advanced by the parties**". However the test is expressed, the minimum requirement is not that the Arbitrators deal with every contention. Precisely where the line is to be drawn in a given case will depend upon the circumstances, including the relevance of the contention to the Arbitrators' conclusions. The decision to deal in the reasons with a particular rejected submission may also depend upon an assessment of its weight, particularly in a case where the arbitrating parties are not legally represented. Putting it bluntly, some points are so obviously bad that no good purpose is served by dealing with them in any detail. I need hardly add that the prudent Arbitrator will prefer to err on the side of comprehensiveness in order that the award should be of benefit to the parties.*

*A further matter bearing upon the application of this principle is that the Arbitrators will commonly not have had the benefit of legal training. Accordingly, Smart J in a much quoted passage has said this: **"Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the court should not construe his reasons in an overly critical way.**"*

In what are often called trade arbitrations, the parties and the Arbitrators are all engaged in a particular trade. In such an arbitration the reasons may be expressed in the jargon of the trade or they may ignore matters which will be well known to the participants. Such an award which may appear deficient to an outsider, may nonetheless satisfy the fundamental purpose of the statement of reasons. It cannot be the case that an award should be drafted only with an eye to informing an appeal court which may be unfamiliar with the trade and its practices."

Standard Required : Adequacy : The court canvassed whether or not a different test as to adequacy applied to legal trained as opposed to lay arbitrators, but concluded the same test applied to all, but it was noted that where legal qualified arbitrators are appointed there is an expectation that the standard will be high and goes a long way to explaining why such individuals are appointed, particularly to complex cases which demand erudite exposition.

[101] ***Peter Schwartz (Overseas) P/L v Morton [2003] VSC 144***

Error of Law & Inadequate Reasons : S38 Commercial Arbitration Act 1984 provides for an appeal on the grounds of a manifest error of law on the face of the record. That a failure to give adequate reasons constituted an error or law was not contested, [102] the central issue being whether or not the error was manifest. Hargrave J noted that "***Manifest***" in this context means an error of law which is "***evident and obvious rather than merely arguable***." [103] In determining this question the court should limit itself to the documentation relied upon by the tribunal when making the award. [104]

Misconduct : Section 42 of the *Commercial Arbitration Act 1984* (Vic) provides that, where there has been misconduct by an arbitrator, the Court may set the arbitrator's award aside either wholly or in part. "***Misconduct***" involves "*corruption, fraud, partiality, bias and a breach of the rules of natural justice*" according to s4(1) of the Act. However, relying on ***Williams v Wallis & Cox*** [105] the court concluded that impropriety is not a prerequisite to the setting aside of an award. The court concluded that "*A failure by an arbitrator to deal with a substantial and serious submission, or to consider evidence which is vital to the determination of the issues raised for decision, will constitute technical misconduct within the meaning of ss.42 and 44 of the Commercial Arbitration Act 1984.*" The Court of Appeal agreed with Hargrave's judgement.

49 The appellant contends that .. to criticise the majority arbitrators' reasons portrays a misunderstanding of the arbitral function. Counsel … argued that it was unnecessary for the reasons to be anything like as rigorous or complete as those demanded by the judge. … the dual requirements that arbitrators provide a statement of their reasons for making the award & do so 'as soon as reasonably practicable' fundamentally distinguished this arbitration from a curial proceeding,[106] & implied that it was enough that the arbitrators set out the factors that supported the meaning of the expression which they preferred, had regard to contextual matters, contrasted the context of the private mineral holdings in the US with the context of the Royalty Agreement, including the statutory regime prevailing at the time the agreement was entered into, & found on the evidence before them that 'overriding royalty' does not & never has had one fixed meaning.

*50 We do not accept those submissions either. As already noted, the requirement to give reasons arose out of s29(1)(c) CAA 1984. The extent of that requirement is informed by the purposes of the Act. As Giles J observed in **R P Robson Constructions v D & M Williams**, [107] the Act fundamentally altered the approach to the provision of reasons in commercial arbitration, by taking away the jurisdiction to set aside an award on the ground of error on the face of the award and replacing it with a right to seek leave to appeal on any question of law arising out of the award which the court considered could substantially affect the rights of one or more of the parties. In order to enable the court to see whether there has been an error of law, s 29 provides that the award must be in writing and that the arbitrator must include a statement of reasons. And **in order to be utile, the requirement is for reasons sufficient to indicate to the parties why the arbitrator has reached the conclusion to which he or she has come. To that extent, the requirement is no different to that which applies to a judge.** Of course it is understood that arbitrators may not always be skilful in the expression of their reasons. Consequently, it is accepted that a court should not construe an arbitrator's reasons in an overly critical way. But it is necessary that an arbitrator deal with issues raised and indicate the evidence upon which he or she has come to his or her conclusion. Accordingly, if a party has relied on evidence or material which the arbitrator has rejected, it is ordinarily necessary for the arbitrator to assign reasons for its rejection."*

Whilst findings of fact are not open to review, this does not mean that the tribunal should not set out the evidence relied on to make those findings. S29 CAA 1984, s52(4) AA 1996 and Art 31 Model Law are all to similar effect. As Sir Harry Gibbs explained : "*The arbitrator is required to explain in the reasons which form part*

[102] ***Re Poyser and Mills' Arbitration*** [1964] 2 QB 467, 478.

[103] ***Leung v Hungry Jacks Pty Ltd*** [1999] VSC 477, [15] (Hedigan J) ; ***Promenade Investments Pty Ltd v New South Wales*** (1992) 26 NSWLR 203.

[104] ***Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd.*** [2003] VSC 275, [31]-[43]. Per Dodds-Streeton J.

[105] ***Williams v Wallis & Cox*** [1914] 2 KB 478. per Lush J : "*Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it, would have been seen by him to be vital, that is, within the meaning of the expression, 'misconduct' in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside.*"

[106] In ***Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd*** (1991) 22 NSWLR 653 Rogers CJ observed (at 661) that '*[t]he heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues'.*

[107] (1990) 6 Building and Construction Law 219, 221-2.

of the award why he or she reached the decision which the award embodies. To do that it is necessary to state the relevant facts and to explain why each issue of fact was resolved in the way in which the arbitrator resolved it. It is further necessary to state what conclusion the arbitrator reached on each question of law or of mixed law and fact and how that conclusion was reached..." [108] Later the court noted at para [57] that *"in complex commercial arbitrations, it may appear that the determination of the dispute demands reasons considerably more rigorous and illuminating than the mere ipse dixit of a 'look-sniff'* [109] *trade referee."*

Set Aside : The respondents asserted on appeal that even if there was an error of law, it was not such as to justify setting the award aside. The court disagreed noting the dicta of Kirby P [110] in ***Warley Pty Ltd v Adco Constructions Pty Ltd***: "*A failure to give **'reasons'** as the Act envisages would amount to an error of law. It would be such as to attract the operation of s 38 of the Act...*" Set aside supports the ethos and objectives of the Act and adds an element of compulsion to the duty to provide reasons. [111] The court also considered whether or not set aside was now considered to be appropriate under English Law. The following is informative :-

66 *Counsel .. referred to two recent English decisions, **ABB AG v Hochtief Airport GmmbH*** [112] *and **Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No 2)*** [113] *as support for the view that an award should not be set aside for manifest error of law on the face of the award unless the error amounts to a '**serious irregularity'** and that an insufficiency of reasons ought not be regarded as a serious irregularity for that purpose.*

67 *.. in our view those authorities do not assist …. Each is based on s 68 Arbitration Act 1996 (Eng) (which significantly restricts the circumstances in which a court is to set aside an arbitral award for error to '**serious irregularity'** as defined). There is no such restriction on the power of the court to set aside an award for error of law pursuant to s38 CAA 1984 (Vic). A second difference between the Arbitration Act 1996 (Eng) and the CAA 1984 (Vic) is that s 70(4) of the former confers on the court an express power to order further reasons and thus by necessary implication excludes from the power to set aside an award for substantial injustice those cases in which the subject defect is constituted solely of a deficiency in reasons.*[114] *Thirdly, and more generally, as was noted by Lord Steyn in **Lesotho Development v Impregilo SpA***[115] *the 1996 English Act has: "given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities...have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature*." [116]

Conclusions : This award was flawed in a way that could not survive the surgical deconstruction it was subjected to by the court and which is not uncommon these days. In consequence, nowadays the arbitrator is required by the courts to adhere to very high analytical standards, particularly in complex, high stake disputes. The tribunal needs to beware of the dreaded though beguiling "*leap in logic*" and particular to be alert to the potential of leaps in logic within expert opinion and contradictions within the projected thesis. A failure to do so can lead to the undoing of an award. Remission of the award in this instance was pre-empted by the intervening demise of a tribunal member. Accordingly the outcome would probably have been the same in England & Wales, though of course for very different reasons. Nonetheless, remission in such a case invites the tribunal to contrive to support a decision they might not have made if the leap in logic had been spotted in time, which is to some extent worrying and unsatisfactory.

[108] "*The John Keays Memorial Lecture: Reasons for Arbitral Awards*" (1988) 7 *The Arbitrator* 95, 102: see also ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247 per McHugh JA's

[109] ***Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping*** [1981] AC 909, 919.

[110] As his Honour then was.

[111] ***Promenade Investments Pty Ltd v State of New South Wales*** (1992) 26 NSWLR 203, 225 (Sheller JA). : ***Friend and Brooker Pty Ltd v Council of the Shire of Eurobodalla*** NSW CA, Kirby P, Clarke and Sheller JJA, 9 November 1993), 9. See also, ***Energy Brix Australia Corporation Pty Ltd v National Logistics Coordinators (Morwell) Pty Ltd*** [2002] VSCA 113; (2002) 5 VR 353, 368; ***Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd*** [2003] VSC 275 (Unreported, Victorian Supreme Court, Dodds-Streeton J, 28 July 2003) [31]-[49] and the cases there cited; ***Gunns Forest Products Ltd v North Insurances Pty Ltd*** (2006) 14 ANZ Ins Cas 61-691.

[112] [2006] 1 All ER (Comm) 529, [2006] 1 Lloyd's Rep 1.

[113] [2005] EWHC 1370 (TCC).

[114] See ***Fidelity Management SA v Myriad International Holdings BV*** [2005] 2 Lloyd's R 508.

[115] [2005] UKHL 43; [2006] 1 AC 221, 230 [17].

[116] Citing Lord Mustill and Stewart Boyd QC (*Commercial Arbitration*: 2001 Companion Volume to the Second Edition, preface).

CHAPTER NINE

CONCLUSIONS

The quest for knowledge and understanding is the hallmark of humanity, epitomised by exploration and science. Not everything in existence is knowable and amenable to explanation, least of all by science, but the boundaries are remorselessly pushed further back by the progress of mankind and the passage of time. Perhaps some things are destined to remain hidden forever, but that at least should not be the case in respect of societal dealings.

Whilst what has been is a closed book, when dispute arises the best one can hope for is a considered view as to what in fact took place. The same is true of the mindset of concerned individuals at the time of the event. Memory is unreliable and is wont to be reshaped by convenience. Determinations of fact, as and when required are in reality nothing more than opinions of what is most likely to have occurred, formed in the light of available knowledge. Justice and due process demand that effort is expended to ensure that at the relevant time the opinion maker has as much knowledge available as possible, though the proportionate quantum of expenditure due to any particular issue is a matter amenable to law. What is available, however, may depend as much on chance and circumstance as on available resources. The subsequent appearance of fresh evidence may provide grounds for a later appeal and perhaps a retrial but that is another matter.

The opinion thus formed should not be perverse or demonstrate that relevant factors have not been taken into account. Thus by application of the ***Wesdnesbury Rules*** [117] a decision that no reasonable decision maker might have reached on the known facts may be struck down. An explanation of why certain evidence has been rejected may on times be called for but that requirement is not universal. Equally the criminal judge has the facility to declare a verdict perverse and in appropriate circumstances to order a retrial. However, there is no general requirement to provide reasons for determinations of fact. The jury returns a simple verdict of ***"Guilty"*** or ***"Not Guilty"*** without further adornment. That is as must be, since to do otherwise would open up the verdict to further questioning and cast doubt upon its finality. A time comes when one must, having done one's best, draw a line and put matters to rest. This applies equally to decisions of fact as to decisions of law. If needs be the legislature can always change the law for the future, but since a judge is required to make a decision, for the immediate case at least, the law must be established. However, none of this applies to procedure, which should at all times demonstrate transparency. Review unlike appeal should not be precluded on the grounds of expediency alone.

Whilst there now appears to be a general consensus that it is desirable, in the interests of fairness and justice that judicial and quasi-judicial decision makers provide reasons, ensuring that the decision making process is open and transparent, the legal requirement to do so is still not of universal application. There are a wide range of exceptions to the general rule, in an area of the law which is highly complex, having developed on an ad-hoc basis over an extended period of time, with reference to special circumstances. Furthermore, even where the duty exists, the scope and extent of that duty is extremely variable.

It is remarkable that it is only now in the late 20th and early 21st century that such a self evidently basic, fundamental aspect of justice is starting to be addressed in any sort of comprehensive manner. Even this small progress has been hard fought to achieve. Deference to authority is important for an orderly society, but it is essential that that authority is held to account. Justice demands that when legal interests are at stake, the parties have a right to know why they have won or lost and that they have done so in accordance with the law, both in terms of practice and procedure and in terms of substantive law. However the discipline demanded of decision makers to explain their actions represents an often unwelcome constraint on their exercise of power. In the interests of convenience administrators and politicians will inevitably strain to extend the boundaries of arbitrary power, and the courts strive to contain, all the while maintaining a balance in the public interest. The law in this area is never likely to be simple and straightforward.

It is submitted that the Rule of Law should apply to all, including the judiciary and those who perform quasi-judicial functions. The exercise of arbitrary authority should be the sole preserve of the dictator and have no part to play in a democratic society …. unless of course its me calling the shots! What? You don't think so? Why ever not? *Quod erat demonstrandum!*

[117] ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223 per Lord Greene.

ESSENTIALS OF AN ENFORCEABLE AWARD.

According to Bernstein.[118] :

- The award must be certain.
- The award must be cogent.
- The award must be final on the issue covered by the award (for interim awards)
- A final award must be complete.
- There must be no internal inconsistency – especially between recitals and award on issues referred to in the award.
- The award must be enforceable.
- Unless otherwise required, reasons must be given for all issues decided which require them.

THE PLACE OF THE AWARD

s53 Arbitration Act 1996. Place where award treated as made.

> 53. Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.

The seat must be stated according to **s53(5) Arbitration Act 1996** as must the date. Unless otherwise agreed, **s53** provides that even when the award is signed elsewhere, then as far as the English Courts are concerned there is an assumption that it was signed at the seat of the arbitration solving problems previously encountered under ***Hiscox v Outhwaite.***[119]

Whilst this solves curial problems in the UK note that there may still be a need under the New York Convention to ensure that the award is made in a country which is a recognised signatory to the Convention thus guaranteeing enforcement. Whilst it will be deemed to be made in England if that is where the seat is as far as the UK courts are concerned a foreign court might rule otherwise since it would be governed by its own practice rules and not the Arbitration Act 1996.

Clause 53 Place Where Award is Treated as Made

> 253. This Clause is designed to avoid disputes over where an award is made and (i*n cases where Part I of the Bill applies to the arbitration in question*) it reverses the decision (*although not the result*) of the House of Lords in ***Hiscox v Outhwaite*** [1992] 1 AC 562.

THE DATE OF THE AWARD

s54 Arbitration Act 1996. Date of award.

> *54(1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.*
>
> *54(2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.*

The date is important in terms of interest and limitation and appeal etc and is governed, in the absence of agreement to the contrary by **s54(1) Arbitration Act 1996**.[120]

Clause 54 Date of Award

> *254. We trust this provision is self-explanatory.*

[118] Handbook of Arbitration Practice p227 et seq. See also Mustill & Boyd p384.

[119] ***Hiscox v Outhwaite*** [1992] 1 AC 562.

[120] Note : Where s57 provisions are engaged, time runs for s70 from time of confirmation of the award under s57, not from date or initial award. ***McLean Homes South East Limited v. Blackdale Limited [2001] WL 1560746 (QBD (TCC))***

CHAPTER NINE

Article 31. Model Law. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

NOTIFICATION OF THE AWARD

S55 Arbitration Act 1996 Notification of award.

55(1) The parties are free to agree on the requirements as to notification of the award to the parties.

55(2) If there is no such agreement, the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.

55(3) Nothing in this section affects section 56 (power to withhold award in case of non-payment).

Clause 55 Notification of Award

255. This provision we also trust is self-explanatory. The obligation on the tribunal to notify the parties by service on them of copies of the award is important, given that certain time limits in the Bill for, eg challenging the award, run from the date of the award (which, under Clause 54, in the absence of any other agreement, is the date upon which it is signed). Time periods, of course, can be extended: see Clause 79. We have required the award to be notified to the "parties" so as to prevent one party from obtaining the award and sitting on it without informing the other party until the expiry of time limits for appeal etc, which we are aware has happened in practice.

256. Clause 55(3) provides that nothing in this section affects the power to withhold an award in the case of non-payment. However, it should be noted that the duty to notify all parties would of course revive once the tribunal's "lien" has been satisfied.

GETTING THE FEEES IN : THE ARBITRATOR'S LIEN

S 56 Arbitration Act 1996 : Power to withhold award in case of non-payment.[121]

56(1) The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

56(2) If the tribunal refuses on that ground to deliver an award, a party to the arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court, which may order that-

(a) the tribunal shall deliver the award on the payment into court by the applicant of the fees and expenses demanded, or such lesser amount as the court may specify,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as the court may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

56(3) For this purpose the amount of fees and expenses properly payable is the amount the applicant is liable to pay under section 28 or any agreement relating to the payment of the arbitrators.

56(4) No application to the court may be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded.

56(5) References in this section to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.

56(6) The above provisions of this section also apply in relation to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the tribunal's award.

As they so apply, the references to the fees and expenses of the arbitrators shall be construed as including the fees and expenses of that institution or person.

56(7) The leave of the court is required for any appeal from a decision of the court under this section.

56(8) Nothing in this section shall be construed as excluding an application under section 28 where payment has been made to the arbitrators in order to obtain the award.

Clause 56 Power to withhold Award in case of non-payment

257. These provisions enable a party to seek the assistance of the Court if he considers that the arbitrators are asking too much for the release of their award, though it is important to note from sub-section (4) that there is no recourse if there is already arbitral machinery for an appeal or review of the fees or expenses demanded.

258. Sub-section (8) makes clear that this Clause does not affect the right to challenge fees and expenses under Clause 28 ie that paying them to get the award does not lose this right. The reason for this provision is that it may be important for a party to obtain the award quickly, rather than going to the Court for an order about fees and expenses before getting the award.

259. Unlike section 19 of the 1950 Act, this provision gives the Court a discretion to specify that a lesser amount than that claimed by the arbitrators be paid into Court, in order to have the award released. If this were not so, an arbitrator could demand an extortionate amount, in effect preventing a party from taking advantage of the mechanism provided for here.

260. For obvious reasons, this provision is mandatory.

Whilst not directly concerned with whether or not a construction adjudicator can exercise a lien over a decision, the effect of ***Ritchie Brothers Ltd v. David Philp Ltd*** [2005], which held that in the absence of an agreed extension of time, an adjudicator's decision must be delivered to the parties within 28 days, would appear to make it impracticable to withhold a decision pending payment in respect of HGCRA adjudication. [122]

[121] Regarding what are appropriate rates for arbitral services and allied recoverable costs see Chapter 10 below.

[122] ***Ritchie Brothers Ltd v. David Philp Ltd [2005] ScotCS CSIH_32.***

CHAPTER NINE

CORRECTING SLIPS AND ERRORS.

S57 Arbitration Act 1996 : Correction of award or additional award.

57(1) *The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.*

57(2) *If or to the extent there is no such agreement, the following provisions apply.*

57(3) *The tribunal may on its own initiative or on the application of a party-*

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

57(4) *Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.*

57(5) *Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.*

57(6) *Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.*

57(7) *Any correction of an award shall form part of the award.*

Article 33 Model Law. Correction and interpretation of award; additional award

(1) *Within 31 days of receipt of the award, unless another period of time has been agreed upon by the parties:*

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors m computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) *The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.*

(3) *Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.*

(4) *The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.*

(5) *The provisions of art 31 shall apply to a correction or interpretation of the award or to an additional award.*

Clause 57 Correction of Award or Additional Award DAC 1996

261. *This Clause reflects Article 33 of the Model Law. In our view this is a useful provision, since it enables the arbitral process to correct itself, rather than requiring applications to the Court. In order to avoid delay, we have stipulated time limits for seeking corrections etc..*

Section 57 Correction of Award or Additional Award DAC 1997.

31. *A minor drafting change was made to Section 57(3)(b).*

Gold Coast v Naval Gijon SA [2006]. [123] S57 : AA 1996 : Extension of time to correct error s79 & s57. 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.

Dolan v Northern Ireland Housing Executive (2000). [124]. S57 AA 1996 : Slip Rule : Challenge s69 & 68 serious irregularity .

Gannet Shipping v Eastrade [2001].: [125] S057 AA 1996 : Slip rule : s67 / 68 challenges. Correction of error : did the tribunal have jurisdiction to correct an error – and if so was there a serious irregularity. Challenges failed.

THE EFFECT OF AN AWARD

S58 Arbitration Act 1996. Effect of award.

58(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

58(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Clause 58 Effect of Award

262. This provision in effect simply restates the existing law.

263. It has been suggested that what is described as the other side of sub-section (1) should be spelt out in the Bill ie that whatever the parties may or may not agree, the award is of no substantive or evidential effect against any one who is neither a party nor claiming through or under a party.

264. Such a provision would, of course, have to be mandatory. It would have to confine itself to cases exclusively concerned with the laws of this country, for otherwise it could impinge on other applicable laws which have a different rule. Even where the situation was wholly domestic, it would also have to deal with all those cases (eg insurers) who are not parties to the arbitration but whose rights and obligations may well be affected by awards (agreed or otherwise) in one way or another. In our view it would be very difficult to construct an acceptable provision and we are not persuaded that it is needed.

Sun Life v Lincoln [2004]. [126] S58 AA 1996 : Confidentiality : 1st & 2nd arbitration. Applicability of the findings of an arbitration between A & B to a subsequent arbitration between B &C where disclosure of the first award was not objected to. Held : Not applicable or binding.

Associated Electric v European Reinsuranc [2003].[127] S58 AA 1996 : Confidentiality Privacy – injunction. Applicants on appeal wish to produce a prior award (Bermuda Law incorporating Model law and New York Convention) subject to a confidentiality agreement as evidence to establish an issue estoppel. Scope of rules of privacy and whether an award could be used as evidence in a subsequent award. In the circumstances a prior injunction that had been revoked by the CA continued to be lifted. Appeal refused.

[123] ***Gold Coast Ltd. v Naval Gijon SA [2006] EWHC 1044 (Comm)*** Mrs Justice Gloster, 2006.05.15

[124] ***William John Dolan t/a WJ Dolan Construction v Northern Ireland Housing Executive (2000) 2044*** court.nsi.gov.uk. Gillen J. 20th January 2000. Northern Ireland

[125] ***Gannet Shipping Ltd v Eastrade Commodities Inc [2001] EWHC 483 (Comm)*** Mr Justice Langley. 6th December 2001

[126] ***Sun Life Assurance Company of Canada v The Lincoln National Life Insurance Co [2004] EWCA Civ 1660:*** Mance LJ; Longmore LJ; Jacob LJ. 10th December 2004.

[127] ***Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Co Zurich [2003] UKPC 11.*** Privy Council before Lords Bingham; Hoffmann; Hobhouse; Millett; Sir Christopher Staughton. 29th January 2003.

Reading Materials on The Award.

Bernstein. Handbook of Arbitration Practice 3rd ed. S&M & CIArb. Part II 25.
Russell on Arbitration. S&M. 21st Ed. Chapter 6.
Mustill & Boyd. Butterworths 2nd Ed. Part VI Chapters 25. 26 & 27.
Domke on Commercial Arbitration. Part X. Chapter 28, 29, 30 & 31.
Merkin. Arbitration Law. Lloyds. Part IV Chapters 16, 17 & 18.
Harris, Planterose & Tecks. Arbitration Act 1996 A Commentary. Blackwell – see sections.
Merkin. Arbitration Act 1996 an Annotated guide. Lloyds. See sections.

Self assessment exercise

1. Consider to what extent, it is either possible or desirable, under English Law to institute equitable arbitral proceedings.
2. Consider what amounts to adequate and sufficient reasons to satisfy the requirement of s52 Arbitration Act 1996 and outline the consequences of a failure to comply with that requirement.
3. Consider whether the statutory regime governing the correction of errors (slips) by the arbitrator is sufficiently robust as to ensure that undue pressure is not put on an arbitrator to change his mind.