CHAPTER TWO

THE ARBITRATION AGREEMENT

ARBITRATION ACT 1996
PART I
ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

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CHAPTER TWO

The Arbitration Act 1996 and the agreement to arbitrate.

Part I of the Arbitration Act 1996 deals with Arbitration pursuant to an arbitration agreement.

Private or Civil Law. Arbitration agreements, as will be seen in further detail below, arise in two distinct ways under civil law,[1] either 1) before and in anticipation of or 2) after the event, giving rise to the dispute.

1. Arbitration clauses in contracts. And ***Scott v Avery*** (1856) 5 HL Cas 881 Clauses viz *"Where by this clause any dispute or difference is to be referred to arbitration the making of an award shall be a condition precedent to any right of action by either party against the other."*

An agreement to arbitrate "*clause compromissoire*" may be incorporated into a contract or licence defining the relationships between the two parties and therefore arises before the dispute. There is no particular prescribed form for an arbitration agreement. All that is required is an agreement to refer "***a dispute***"[2] for resolution by someone apart from a court, the outcome of which will bind the parties.[3] The arbitration agreement in such cases is collateral to the main contract. If no dispute arises, clearly there is nothing to settle and so no arbitration takes place. International trade, maritime disputes, insurance disputes, construction disputes and labour disputes are the most common instances of this type of arbitration.

In the US a number of Fortune 500 Companies have signed up with arbitration houses and mediation providers stating that they will either mediate or arbitrate or med/arb any dispute that arises between themselves and any other organisation that has signed up to the same ADR Charter. Thus there is an enforceable agreement to mediate or arbitrate disputes with fellow signatories of the Charter even if there is no arbitration clause in the actual contract which is subject to the dispute.

Is consensus –(consent) – a reality or fiction ? Arbitration agreements tend to be part of standard form contracts and represent the standard terms by which one of the parties habitually conducts his business. Where the parties are commercial undertakings there is quite likely to be a large degree of consensus as to the choice of mode of dispute settlement. However, where one party is an individual or a smaller enterprise, there is little in the way of genuine agreement. The choice of arbitration is dictated by the dominant party.

Where the dominant party is a commercial undertaking and the other party is a consumer European Community law provides an absolute right for the consumer to litigate even if there is an arbitration clause in sales or service contract. The consumer can waive the right and proceed to arbitration, so there is no duty to litigate, merely an inalienable choice to litigate at the behest of the consumer. Care must be taken however regarding standard form contracts especially where a contract contains a range of choices on the method of dispute resolution and requires the parties to delete one or more of the methods thereby making the final choice by way of elimination. Problems can arise if the parties do not delete any of the clauses.

Concensus is likewise rather artificial in respect of inherited arbitration agreements. Conveyances and negotiable instruments result in a third party inheriting a prior agreement. The classic illustration of this is the bill of lading which contains either an arbitration clause or a choice of law and jurisdiction clause. The seller is duty bound to secure a contract of carriage for the goods. Statute in the UK and many other jurisdictions then gives the endorsee rights of suit or makes the endorsee a statutory party to the contract of carriage on the terms of the bill of lading. The endorsee may thus unwittingly become a party to an arbitration agreement.

Another device which can impose an arbitration agreement on an unwitting party is the cross reference term. Thus, many bills of lading purport to incorporate all terms and conditions and other clauses of a charterparty. Whilst the UK courts are very restrictive in their approach to this issue, courts in other jurisdictions are not. Where the device works the endorseee of a bill of lading or purchaser of land etc may find that he is committed to arbitrating disputes that arise in respect of the bill or conveyance by virtue of an arbitration clause in a referred document. Again he has little choice in the matter.

[1] This chapter is only concerned with private or civil law.

[2] See Chapter 6 below regarding jurisdiction and the meaning of a dispute and see in particular ***The Halki*** [1999].

[3] ***David Wilson Homes v Survey Services*** [2001] : Compare ***Aig Europe v QBE International Insurance*** [*[2001] Lloyd's Rep 1* where the tribunal was required to create a process for the determination of the dispute –i.e. a form of conciliation.

2. Independent agreements to arbitrate.

Alternatively, once a dispute has arisen the parties may chose to settle the dispute by way of arbitration – what is known as a "*submission or comprimis*" to arbitration. Even where a contract did not contain an agreement to submit the dispute to arbitration the parties may well agree to submit the dispute to arbitration. However, such agreements have a wider remit than the collateral arbitration contract and can involve disputes on a far wider range of tortious issues. Medical claims, insurance claims and personal injuries claims are commonly arbitrated.

There are occasions when the parties can be ordered by a court or by statute to arbitrate a dispute and in such instances one cannot truly say that the parties have agreed to arbitrate the dispute. They have no choice in the matters. Court ordered arbitration is common both in the US and in China. A milder version of this is where a court has the power or duty to recommend arbitration. In such situations, even though the court has a strong coercive power the parties nonetheless do agree to arbitrate since they have the option of insisting on continuing with litigation,, though often there is a cost penalty in so doing.

What can be arbitrated ?

The scope of the arbitrator's powers are initially prescribed by the agreement, in particular regarding what matters are subject to the arbitration. If the arbitrator goes beyond the power granted in the agreement without the prior or subsequent agreement of the parties then the arbitrator will be deemed to have acted ***ultra vires*** his powers and any award made on that issue will be unenforceable in the courts. The arbitrator can rule on the scope of his power and on the validity of the arbitration agreement and the validity of the underlying contract – s7 Arbitration Act.

That apart, there are limits to the range of dispute that can be lawfully be submitted to arbitration. In particular, matters in which the State has a direct interest such disputes about criminality cannot be submitted to arbitration. However, a claim for compensation arising out of a criminal act may well be arbitrated as for instance in respect of a claim for trespass to the person or property, since these would be civil actions.

The subject matter of a dispute must be legal. Public policy prevents the legal enforcement of an arbitration award if the activity involved in the dispute is illegal. A drug dealer in illicit narcotics can no less sue a supplier or client for non payment etc in the courts or enforce the deal through arbitration.

Again, divorce cannot be arbitrated, though the division of property might well be provided third parties are not involved. In England and Wales only the courts can grant a divorce.

Similarly, wills and succession issues do not lend themselves to arbitration, though certain matters involving trusts might well be arbitrated. Again, the beneficiaries of a will can agree to a different method of sharing out the estate and could enlist the help of a third party in reaching a settlement. However, participation could not be forced on an unwilling beneficiary. A will can only be contested in court.

Arbitration of issues involving minors and the insane may well be arbitrable but enforcement will be subject to the same constraints as placed on the courts in respect of enforcement of claims against minors and the insane.

Public International Law. Public International Law disputes are commonly settled in The International Court of Justice at the Hague. This is the successor to the Permanent Court of Arbitration. Public International Bodies which are signatories to the UN Convention thus consent to arbitrate their disputes on a wide range of issues most notably on all issues covered by The United Nations Convention on Law of the sea UNCLOS III of 1982. This course does not seek to deal with Public International Law.

CHAPTER TWO

FORM OF THE AGREEMENT

S5 Arbitration Act 1996. Agreements to be in writing.

> *5(1) The provisions of this part (Part I) apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly.*

This reflects Article 7 Model law. Whilst the agreement must be in writing it does not have to be signed by the parties. Since Part I deals with enforcing arbitration agreement, the effect of this is that an arbitration agreement which is not written or recorded as prescribed below will not be subject to the provisions of the Act. The arbitration agreement would, under s81 Arbitration Act 1996, be subject to the common law alone. Note that likewise the New York Convention and the Model Law do not apply to oral arbitration agreements and New York Convention enforceability of awards would be denied. See s4(1) Arbitration Act 1996 on Mandatory Provisions applying to arbitrations irrespective of choice of law clauses and s4(2) Arbitration Act 1996 implied provisions, unless the parties otherwise agree, which includes the choice of foreign law.

> *5(2) There is an agreement in writing*
> *(a) if the agreement is made in writing (whether or not it is signed by the parties),*
> *(b) if the agreement is made by exchange of communications in writing, or*
> *(c) if the agreement is evidenced in writing.*

Thus it is possible to enforce an oral arbitration agreement in certain circumstances.

> *5(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*

Parties could for instance refer in an oral agreement to the terms of a previous contract which contained an arbitration clause by for instance saying that the next agreement would be on the same basis as the prior agreement. The sole problem here is one of the burden of proof and establishing that the arbitration agreement was one of the provisions of the contract. The problem is no different from that regarding proving any other term of the agreement, which is not to say that it is necessarily straightforward. Thus in ***NBS v Tameside*** [2001] [4] the arbitrator and the court, under a section 68 reference, reached different conclusions as to which of several written contracts had in fact been referred to by the parties, though in both instances this nonetheless led to arbitration. The result was that the matter was referred back to the arbitrator following determination of this preliminary issue as to which contract governed the relationship by the court, for determination of the main dispute.

This is all well and good where such matters are dealt with as preliminary issues, but the danger is that if a tribunal goes ahead and determines the issues on the terms of the wrong contract, the award is susceptible to a Section 69 challenge and may be struck down. Whilst under sections 67-69 the court can remit a matter back to the tribunal, where one or both of the parties has lost confidence in the tribunal this is unlikely to occur.

> *5(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.*

Note that since permission is required then it would pay to specifically ask. Note that agreement can be implied in certain circumstances, so that having a recording device clearly on display might be sufficient. A statement that "this meeting is being recorded" would be even better and would be absolutely essential in

[4] ***National Boat Shows Ltd, British Marine Industries Federation v Tameside Marine [2001] WL 1560826***

respect of telecommunications to ensure knowledge. Leaving recorded messages on an ansa-phone would almost certainly imply consent.

> *5(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.*

This reinforces the need to rebut all statements of claim that one does not agree with.

> *5(6) References in this Part (Part I) to anything being written or in writing include its being recorded by any means.*

Clause 5. Agreements to be in writing. DAC 1996.

(a) Arbitration Agreements.

31. Article 7 of the Model Law requires the arbitration agreement to be in writing. We have not followed the precise wording of this Article, for the reasons given in the Mustill Report (p52), though we have incorporated much of that Article in the Bill.

32. The requirement for the arbitration agreement to be in writing is the position at present under Section 32 of the Arbitration Act 1950 and Section 7 of the Arbitration Act 1975. If an arbitration agreement is not in writing then it is not completely ineffective, since the common law recognizes such agreements and is saved by Clause 81(2) (a).

33. We remain of the view expressed in the Consultative Paper issued with the draft Clauses published in July 1995, that there should be a requirement for writing. An arbitration agreement has the important effect of contracting out of the right to go to the court ie it deprives the parties of that basic right. To our minds an agreement of such importance should be in some written form. Furthermore the need for such form should help to reduce disputes as to whether or not an arbitration agreement was made and as to its terms.

*34. We have, however, provided a very wide meaning to the words "in writing." Indeed this meaning is wider than that found in the Model Law, but in our view, is consonant with Article 11.2 of the English text of the New York Convention. The non-exhaustive definition in the English text ("shall include") may differ in this respect from the French and Spanish texts, but the English text is equally authentic under Article XVI of the New York Convention itself, and also accords with the Russian authentic text (" KMqaeT"); see also the 1989 Report of the Swiss Institute of Comparative Law on Jurisdictional Problems in International Commercial Arbitration (by Adam Samuel), at pages 81 to 85. It seems to us that English Law as it stands more than justifies this wide meaning; see, for example, **Zambia Steel v James Clark** [1986] 2 Lloyd's Rep. 225. In view of rapidly evolving methods of recording we have made clear that "writing" includes recording by any means.*

(b) Other agreements.

35. These we have also made subject to a `writing' requirement. Had we not done so, we could envisage disputes over whether, for example, something the parties had agreed to during the conduct of the arbitration amounted to a variation of the arbitration agreement and required writing, or could be characterized as something else. By introducing some formality with respect to all agreements, the possibility of subsequent disputes (eg at the enforcement stage) is greatly diminished. Indeed it seemed to us that with the extremely broad definition we have given to writing, the advantages of requiring some record of what was agreed with regard to any aspect of an arbitration outweighed the disadvantages of requiring a specific form for an effective agreement.

(c) Further points

36. Sub-section 5(3). This is designed to cover, amongst other things, extremely common situations such as salvage operations, where parties make an oral agreement which incorporates by reference the terms of a written form of agreement (eg Lloyd's Open Form), which contains an arbitration clause. Whilst greatly extending the definition of "writing", the D AC is of the view that given the frequency and importance of such activity, it was essential that it be provided for in the Bill. The reference could be to a written agreement containing an arbitration clause, or to a set of written arbitration rules, or to an individual written arbitration agreement. This provision would also cover agreement by conduct. For example, party A may agree to buy from party B a quantity of goods on certain terms and conditions (which include an arbitration clause) which are set out in writing and sent to party B, with a request that he sign and return the order form. If, which is by no means uncommon, party B fails to sign the order form, or send any document in response to the order, but manufactures and delivers the goods in accordance with the contract to party A, who pays for them in accordance with the contract, this could constitute an agreement "otherwise than in writing by reference to terms which are in writing.. ", and could therefore include an effective arbitration agreement. The provision therefore seeks to meet the criticisms that have been made of Article 7(2) of the Model Law in this regard (see eg the Sixth Goff Lecture, delivered by Neil Kaplan QC in Hong Kong in November 1995, (1996) 12Arb. Int. 35). A written agreement made by reference to separate written terms would, of course, be caught by Clause 5(2).

37. Sub-section 5(4). There has been some concern that a writing requirement with respect to every agreement might unduly constrain the parties' freedom and flexibility with respect to, for example, minor matters of procedure during a hearing. This sub-section seeks to avoid this. An agreement will be evidenced in writing if recorded by, amongst others, a third party with the authority of the parties to the agreement. Given that this third party could of course be the tribunal, the parties are free during a hearing to make whatever arrangements or changes to the agreed procedure they wish, as long as these are recorded by the tribunal The DAC is of the view that this presents no serious hindrance to the parties' flexibility, and has the merit of reducing the risk of disputes later on as to what exactly was agreed. Clearly, this sub, section also has a wider effect, allowing for the recording of an oral agreement at any stage.

38. Sub-section 5(5). This provision is based on Article 7(2) of the Model Law, but with certain important changes. The DAC has been careful to emphasize that for there to be an effective arbitration agreement for the purposes of this Part, it is not enough for one party to allege in a written submission that there is an arbitration agreement, in circumstances where the other party simply fails to respond at all. If this were enough, an unfair obligation would be placed on any party (including a stranger to the proceedings in question) to take the active step of serving a written submission in order to deny this allegation. Therefore, in order to satisfy this sub-section, there must be a failure to deny an allegation by a party who has submitted a response submission.

39. It has been suggested that the term "written submissions" is too narrow, and that this should be replaced by "documents". The DAC does not agree with this, given that this would include the most informal of letters. It may well be unjust, for example, for one party to be able to point to one sentence in one letter in a long exchange with another party, in which there is an allegation that there exists an arbitration clause, and where this has not been denied.

40. Reference should also be made to sub-section 23(4). Whilst any agreement as to an arbitration must be in writing, the DAC is of the view that it is impracticable to impose a writing requirement on an agreement to terminate an arbitration. Parties may well simply walk away from proceedings, or allow the proceedings to lapse, and it could be extremely unfair if one party were allowed to rely upon an absence of writing at some future stage. Where a Claimant allows an arbitration to lapse, Clause 41(3) may be utilised.

In the light of the s5 writing requirements it may appear odd that a s23 agreement to suspend arbitrations proceedings does not have to be in writing. However, the parties would be well advised to reduce such an agreement to writing as protection against second thoughts and denial of the revocation by one of the parties who might then pursue a default judgement.

National Boat Shows v Tameside Marine [2001].[5] S5, S67 s68 AA 1996. Terms and conditions for space at a boat show and dispute resolution process set out in prospectus – so arbitrator could not reference back to prior contracts for guidance. Matter remitted back to arbitrator.

Construction Adjudication

Contrast the approach adopted by the Housing Grants Construction and Regeneration Act 1996. Here by virtue of section 108 HGCRA 1996 either party to a relevant construction contract has the right to refer a dispute to adjudication. If the contract does not contain adjudication provisions the Scheme for Construction Contracts applies and provides the contractual rules for the adjudication process. However, a relevant contract has to be in writing by virtue of s107 HGCRA 1996. This provision has spawned extensive case law as to what amounts to writing and how much must be written. There are calls to abolish the provision.

THE DEFINITION OF AN ARBITRATION AGREEMENT

Section 6 Arbitration Act 1996. Definition of an arbitration agreement.

> *6(1) In this Part (Part I) an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).*

In ***David Wilson Homes Ltd v Survey Services Ltd*** [2001],[6] the Court of Appeal had to determine whether or not the following dispute resolution clause, "*Any dispute to be referred to a QC*" was an arbitration clause. The court held that it was obvious that the choice of a QC demonstrated that the parties intended that they wanted the individual to determine the dispute and not merely act as an expert to provide a non-binding opinion. Accordingly it was in effect an arbitration clause.

Article 2(a) & (e) Model law.

> *2(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution.*
> *2(e) where a provision of this Law (the Model Law) refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.*

Article 7 Model Law – Definition and form of arbitration agreement.

> *7(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
> *7(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*

The importance of ensuring that any international arbitration agreement is in writing arises out of the fact that enforcement under the auspices of the New York Convention will not apply unless it is.

[5] ***National Boat Shows Ltd, British Marine Industries Federation v Tameside Marine*** [2001] WL 1560826: Michael Kershaw QC. 2001.08.01 Commercial Court

[6] ***David Wilson Homes Ltd v Survey Services Ltd [2001] EWCA Civ 34***

Article II New York Convention on the Recognition and Enforcement of Arbitral Awards 1958.

> *II(1) Each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences ,which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
>
> *II(2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

S 6 Arbitration Act 1996

> *6(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.*

Whilst Art 7(2) Model Law and s6(2) both appear to accept the concept of cross reference to arbitration clauses in other contracts or documents there is both times a caveat that the reference must be such as to make the arbitration clause part of the agreement or contract. The autonomy of the arbitration clause from a contract is made clear in s7 below. This maintains a long line of cases ranging from ***The Portsmouth*** [1912][7] through to ***The Mahkutai*** [1996][8] regarding bill of lading and charterparty arbitration and jurisdiction clauses where the clause must not only be cross referenced but repeated in full in the second contract.

Statutory arbitrations – implied term that there is a written arbitration agreement.

s95(1)(a) & (b) Arbitration Act 1996 apply part I to statutory arbitrations as if there had been an agreement to arbitrate.

Clause 6 : Definition of Arbitration Agreement. DAC 1996.

> *41. The first sub-section reflects Article 7(1) of the Model Law and provides a more informative definition than that in Section 32 of the 1950 Act. We have used the word "disputes" but this is defined in Clause 82 as including "differences" since there is some authority for the proposition that the latter term is wider than the former; see* ***Sykes v Fine Fare Ltd*** *[1967] 1 Lloyd's Rep. 53.*
>
> *42. The second sub-section reflects Article 7(2) of the Model Law. In English law there is at present some conflicting authority on the question as to what is required for the effective incorporation of an arbitration clause by reference. Some of those responding to the July 1995 draft Clauses made critical comments of the views of Sir John Megaw in* ***Aughton v M F Kent Services*** *[1991] 57 BLR 1 (a construction contract case) and suggested that we should take the opportunity of making clear that the law was as stated in the charter party cases and as summarized by Ralph Gibson LJ in* ***Aughton.*** *(Similar disquiet has been expressed about decisions following* ***Aughton,*** *such as* ***Ben Barrett v Henry Boot Management Ltd*** *[1995] Constr. Ind. Law Letter 1026). It seemed to us, however, that although we are of the view that the approach of Ralph Gibson LJ should prevail in all cases, this was really a matter for the Court to decide. The wording we have used certainly leaves room for the adoption of the charter party rules in all cases, since it refers to references to a document containing an arbitration clause as well as a reference to the arbitration clause itself. Thus the wording is not confined to cases where there is specific reference to the arbitration clause, which Sir John Megaw (but not Ralph Gibson LJ) considered was a requirement for effective incorporation by reference.*

FURTHER READING

Handbook of Arbitration Practice. Bernstein 3rd Ed, sweet & Maxwell
Domke Commercial Arbitration. Chapters 5, 6, 7, 8, 9 & 12.

[7] ***The Portsmouth*** [1912] AC 1
[8] ***The Mahkutai*** [1996] Lloyd's Rep

Key Cases :

AIG Europe v QBE *[2001].*[9] *The appointment of one or more arbitrators t*o propose resolution terms is not arbitration but conciliation.

Baltic U.A.V. AG v Fortuna *[1999].*[10] Notice provisions.

Hayter v Nelson *[1990].*[11] Meaning of a dispute – meaning of difference considered.

Seabridge Shipping v Orssleff *[1999].*[12] Notice provision – see Chapter 5 below.

The Annafield *[1971].*[13] "On the same terms" "Disputes arising under this contract". Clear incorporation.

The Halki *[1998].*[14] Principal authority of the meaning of what is a dispute – and relied upon as an authority in most of the adjudication cases where the meaning of a dispute is discussed. Stay of Action : Application to defer to Arbitration under s9 Arbitration Act 1996. CA

Trygg Hansa v Equitas *[1998].*[15] "Follow the terms" not clear enough.

Vosnoc v Transglobal *[1998].*[16] Notice provisions – see Chapter 5 below.

9 ***AIG Europe v QBE International Insurance Ltd*** *[2001] Lloyd's Rep 1.* Mr Justice Moore-Bick. 3rd May 2001

10 ***Baltic Universal Alliance Versicherungs AG v Fortuna Co Ltd*** *[1999] 1 Lloyd's Re; 497.*

11 ***Hayter v Nelson*** *[1990] 2 Lloyd's Rep 265.*

12 ***Seabridge Shipping v Orssleff*** *[1999] 2 Lloyd's Rep 685.*

13 ***The Annafield*** *[1971] P68*

14 ***The Halki Shipping Corp v Sopex Oils Ltd*** *[1998] 2 All E R 23.* . Hirst LJ, Henry LJ, Swinton Thomas LJ. 19th December 1997.; *Regarding the m*eaning of a dispute – See Chapter 6 below.

15 ***Trygg Hansa Insurance Co Ltd v Equitas*** *[1998] 2 Lloyd's Rep 439.*

16 ***Vosnoc Ltd v Transglobal Projects Ltd*** *[1998] 1 WLR 101.*

CHAPTER TWO

SEPARABILITY OF ARBITRATION AGREEMENT

Section 7 Arbitration Act 1996. Separability of arbitration agreement.

> 7 *Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*

This ensures that the arbitrator has the power to rule on the validity of the underlying contract in a dispute and that the proceedings are not taken over by the court to rule on the validity of the contract. s82(1) states that a "dispute" includes any difference. Cross reference s30(1)(a) & (c)

However, the common law cases still apply where the parties otherwise agree. The problem is then to ascertain whether or not the arbitration clause covers disputes on the contract only or includes disputes as to the validity of the contract. Consequently the wording chosen may affect the scope of the arbitration clause.

Harbour Assurance v Kansa G.I. [1993],[17] distinguished between clauses which referred to "*all disputes*" and to "*all disputes arising out of or in connection with the contract*" which enable the arbitrator to rule on his jurisdiction, from clauses which referred to *"all disputes arising under this contract"*, which would not empower the arbitrator to rule on his jurisdiction. An alternative view, though there are problems regarding the collateral contract thesis of the separability of the arbitration clause is that since a condition precedent to the arbitration is the existence of the contract if the contract is invalid then so is the arbitration clause contained within it. Whichever version is correct the result is that the court would have jurisdiction to settle this preliminary point.

Article 16 UNCITRAL Model Law.

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

Clause 7 : Separability of Arbitration Agreement. DAC 1996.

> 43. *This Clause sets out the principle of separability which is already part of English law (see **Harbour Assurance v Kansa** [1993] QB 701), which is also to be found in Article 16 (1) of the Model Law, and which is regarded internationally as highly desirable. However, it seems to us that the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction, so that, unlike the Model Law, we have dealt with the latter elsewhere in the Bill (Clause 30).*
>
> 44. *In the draft Clauses published in July 1995 we inserted a provision to make clear that the doctrine of separability did not affect the question whether an assignment of rights under the substantive agreement carried with it the right or obligation to submit to arbitration in accordance with the arbitration agreement. This is now omitted as being unnecessary, since we have re-drafted sub-section (1) in order to follow the relevant part of Article 16 of the Model Law more closely, and to make clear that the doctrine of separability is confined to the effect of invalidity etc of the main contract on the arbitration agreement, rather than being, as it was in the July 1995 draft, a free-standing principle. Similarly, in being so restricted, this Clause is not intended to have any impact on the incorporation of an arbitration clause from one document or contract into another (which is addressed in Clause 6(2)).*

[17] ***Harbour Assurance v Kansa G.I.*** [1993] 1 Lloyd's Rep 455

45. A number of those responding to our drafts expressed the wish for the Bill to lay down rules relating to assignment, eg that the assignment of rights under the substantive agreement should be subject to any right or obligation to submit to arbitration in accordance with the arbitration agreement unless either of these agreements provided otherwise. Indeed we included such a provision in the illustrative draft published in April 1995. However, on further consideration, we concluded that it would not be appropriate to seek to lay down any such rules.

46. There were two principal reasons for reaching this view.

i. In the first place, under English law the assignability of a contractual right is governed by the proper law of that right, while the effectiveness of the assignment is governed by the proper law of the assignment. However, where the law governing the substantive agreement (or the arbitration agreement) is not English law, different rules may well apply and there is an added problem in that those rules (under the foreign law in question) may be categorized as either substantive or procedural in nature. The Bill would therefore have to address such problems whilst simultaneously not interfering with substantive rights and obligations. We were not persuaded that it would be either practicable or of any real use to attempt to devise general rules which would deal satisfactorily with this matter.

ii. In the second place, English law distinguishes between legal and equitable assignments, so that any rules we devised would have to take this into account. In our view, an attempt to devise rules relating to assignments where no foreign law elements are involved is more the subject of reform of the law of assignment generally than of a Bill relating exclusively to arbitration.

47. Finally, it should be noted that the substantive agreement of which the arbitration agreement forms part need not itself be in writing for the Bill to apply, provided of course that the arbitration agreement itself is in writing. This should be clarified as we suggest in our supplementary recommendations in Chapter 6 below.

Section 7 : Separability of Arbitration Agreement. DAC 1967.

20. As we said in Chapter 6, we suggested that the words "(whether or not in writing) " be inserted after the words "another agreement " in view of the definition of "agreement" in what is now Section 5, in order to preclude any argument that Section 7 only applies where the other agreement is in writing. This amendment was duly made.

Contractual arbitration clauses and the Doctrine of Separability.[18]

Vicount Simon LC ruled in ***Heyman v Darwins*** [1942],[19] that an arbitration clause in a contract relied on the validity of the contract itself for its enforceability. This was not the case however where the arbitration agreement was in a self standing document. Thus the location of the arbitration clause could be crucial to the validity of the process. In ***Harbour v Kansa*** [1992], [20] Steyn J in the High Court concluded a series of judicial developments which led to the Court of Appeal ruling which adopted Steyn's reasoning and completely overturned the rule in ***Heyman v Darwins***. On the basis:-

1 Post dispute arbitration agreements may clearly be framed so as to cover the validity of the contract itself.
2 Businessmen expect all aspects of the dispute including validity to be arbitrable.
3 Outside England & Wales the validity of the contract is arbitrable and work would go elsewhere.
4 The mere allegation that a contract does not exist would enable a party to evade his responsibilities.

Steyn J could not follow his own rule, being bound by previous cases, but on appeal to the CA his formula was adopted and the rule in ***Taylor v Barnett*** [1953] ,[21] was reversed. ***Harbour v Kansa*** is now enacted as **s7 Arbitration Act 1996**, following Art 16(1) Model law. An arbitration clause under section 7 even survives illegality in the original contract.

The agreement would not be separable if the contract otherwise agrees, for instance by stating that *"disputes arising out of this contract, provided it is valid, will be settled by arbitration."* This would leave the validity issue

[18] See further Arbitration Law 4.34. Merkin.
[19] ***Heyman v Darwins*** [1942] AC 356
[20] ***Harbour v Kansa*** [1992] 1 Lloyd's Rep 81,
[21] ***Taylor v Barnett*** [1953] 1 Lloyd's Rep 181,

for the courts to settle as a prerequisite to arbitration. Arguably therefore an agreement to settle disputes arising under an agreement would likewise make the agreement a prerequisite and thus prevent the tribunal determining its own jurisdiction on the basis of validity of the agreement. Separability is linked directly to the new power to determine jurisdiction now embodied in s30.

Section 30 Arbitration Act 1996. Competence of tribunal to rule on its own jurisdiction.

s30(1) Unless otherwise agreed by the parties, the tribunal may rule on its own substantive jurisdiction, that is, as to :-

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

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

s2 Arbitration Act 1996. Scope of application of provisions.

s2(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

*s2(5) Section 7 (separability of arbitration agreement) and section * (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.*

The courts may well have to rule initially on whether or not there is a valid arbitration agreement and decide on whether or not to allow a stay of action if an action is commenced in the court.

Even though section 7 gives the arbitrator the power, unless otherwise agreed, to decide on the validity of the contract and hence the arbitrator's jurisdiction, none the less it is essential that the scope of the arbitration clause embraces validity. Thus an arbitration clause in respect of the settlement of a specific aspect of a contract would not embrace validity issues. Section 72 still empowers the court's to review the decision of the arbitrator as to jurisdiction provided the party objecting does not participate in the arbitration.

Frequently, even if the contract itself appears to limit the scope of the arbitrator's jurisdiction and thus excludes jurisdiction, the clause may incorporate institutional rules which provide for jurisdiction over validity. If an arbitrator made an award which effectively attempted to enforce an illegal contract then the courts could later refuse to enforce the award. Public policy does not therefore dictate that the arbitrator should not be able to deal with such a matter.

Can an arbitrator rule on a claim that a contract be avoided for misrepresentation, duress, undue influence or fraud since it likewise goes to jurisdiction in that the main contract may be avoided either ab initio or from the time of avoidance ? Yes. This was confirmed in ***The Tradesman*** [1961].[22] **s2(1) Misrepresentation Act 1967** treats the contract as alive but awards damages in lieu of rescission. Dicta to the contrary are no longer significant since s7 makes it clear all void contracts remain arbitrable. However, if the scope of a contract is limited to disputes arising under a contract then if the arbitrator rules that a contract has been avoided he only has the power to rescind the contract. He does not have the Misrepresentation Act power to award damages in lieu of rescission. The wording used is crucial. ***Ashville v Elmer*** [1988],[23] held that unlike the term "arising under", the words "arising out of", "in respect of" and ""in connection with" would enable the arbitrator to award damages in lieu of rescission.

If a contract has missing ingredients is there an agreement? In an executory contract it is likely as in ***May & Butcher v R*** [1934],[24] that there is no contract at all if the price, date of performance or some other essential detail is missing. This again could go to jurisdiction. However, where a contract is executed there is a

[22] ***The Tradesman*** [1961] 2 Lloyd's Rep 183.
[23] ***Ashville v Elmer*** [1988] 2 All ER 577
[24] ***May & Butcher v R*** [1934] 2 KB 17

stronger likelihood that the contract will be found to exist and the court or arbitrator can determine the price as in ***Foley v Classique Coaches*** [1934],[25] or the quantity as in ***Sykes v Fine Fare*** [1967].[26] Rectification may not be part of an arbitrator's jurisdiction in disputes "arising under the contract" for it is a dispute as to the existence or form of the contract. [27]

s7 Arbitration Act confirms that a ***Scott v Avery*** Clause making court proceedings conditional on an award will be applied even where the dispute centres around whether or not the contract has been avoided by fundamental breach. This was at one time disputed. All forms of words cover this situation including the "arising under" formulation.

Crestar v Carr [1987],[28] established that the discharge of a contract by performance does not terminate the arbitration agreement. It is assumed that the ruling in ***Hirji Mulji v Cheong Yue SS Co*** [1926],[29] to the effect that a frustrated contract destroys an arbitration clause is no longer good law under s7 Arbitration Act 1996. Whilst s6(1) Arbitration Act 1996 clearly covers tort actions as well as contract claims the scope of an arbitration clause will not prevent a tort claim before the courts in respect of common law bailment claims and other tort claims arising independently from the contract. [30]

FURTHER READING

Arbitration Law. R.Merkin LLP Chapter 4
Russell on Arbitration. Sweet & Maxwell. Chapter 2.
Arbitration Practice. D.Stephenson Chapter 2. & p122 & p124
Domke on Commercial Arbitration Chapter 5, 7, 8 & Challenging the agreement 19.
Agreements to Arbitrate. Aeberlie. Peter. Kings College 2000.
Arbitration Clauses & Selecting Arbitrators. Doke.
Arbitration Clauses – enforceability. Salezo Simon.

25 ***Foley v Classique Coaches*** [1934] 2 KB 1
26 ***Sykes v Fine Fare*** [1967] 1 Lloyd's Rep 53.
27 ***Fillite v Aqua Lift*** [1977] 1 Lloyd's Rep 630 & ***The Marques de Bolarque*** [1970] 1 Lloyd's Rep 235.
28 ***Crestar v Carr*** [1987] 2 FTLR
29 ***Hirji Mulji v Cheong Yue SS Co*** [1926] AC 497
30 ***The Paola D'Alesio*** [1994] 2 Lloyd's Rep 366.

Self Assessment Exercise No3

1 What is the difference between Private or Civil Law and Public Law ?

2 What is a ***Scott v Avery*** clause ?

3 Do the parties to arbitration agreements always consent to submit disputes to arbitration?

4 Examine the scope of an arbitrator's powers as set out in the arbitration agreement.

5 What issues can be the subject matter of an arbitration, and which issues cannot?

6 What elements are required to establish a valid binding arbitration agreement? Define an arbitration agreement and identify the legal provisions that govern the form and requirements of a valid agreement.

7 What other things which whilst not prescribed by law may be usefully incorporated into an arbitration agreement ?

8 Explain the concept of the separability of the arbitration agreement.

9 What is the effect of death of a party on the enforceability of an arbitration agreement.

10 Distinguish between common law arbitrations and arbitrations governed by the Arbitration Act 1996.

11 What form must an agreement to suspend an arbitration take ?

12 What is a statutory arbitration and how, if at all, does it differ from an arbitration brought about by a clause compromissoire or a compromis ?

13 What is the Permanent Court of Arbitration ? Where is it and what does it do ?

14 What is the significance of **The Mahkutai** [1996] ?

15 What is the significance of ***Harbour Assurance v Kansa*** 1993 ?

16 What is the significance of s82(1) Arbitration Act 1996 ?

17 In what way, if any at all, does the Model Law differ from the Arbitration Act 1996 in respect of the definition and requirements for a legally enforceable and valid arbitration agreement ?

18 In what way, if any at all, does The New York Convention differ from the Arbitration Act 1996 in respect of the definition and requirements for a legally enforceable and valid arbitration agreement and what effect does a failure to conform have on proceedings ?

Forms of agreement.

Section 6 Arbitration Act 1996 does not differentiate between agreements to arbitrate in respect of future or existing disputes. However, whilst the general scheme of things is the same for both types of agreement there are some differences in treatment by the law. Merkin identifies several distinctions.[31]

1 Regarding future disputes, contractual time bars for the commencement of proceedings may be extended under s12 Arbitration Act 1996. The section does not apply to agreements to submit to arbitration in respect of existing disputes.

2 As far as domestic arbitrations in England and Wales are concerned,[32] s87 Arbitration Act provides that agreements to dispense with reasons under s45 and s69 of the act will only be effective if made after commencement of the proceedings. s87 therefore refers to agreements to vary the arbitration agreement, and must be made in writing under s5 & 6.

Under section 45(1) a party to arbitral proceedings may apply to the court to settle a question of law affecting that party's rights. *However,*

s45(1)…… An agreement to dispense with reasons for a tribunal award excludes this jurisdiction. Thus such a provision cannot be part of the original agreement to arbitrate.

Similarly, under s69(1) a party may appeal an award on a point of law but :-

s69(1) … An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the courts jurisdiction under this section.

At present the agreements outlined above to exclude review by the courts under s45 and s69 do not apply to non-domestic arbitrations so the exclusions could be contained in the original agreement to arbitrate. However, since these provisions may be unlawful under Art 6 TEU s88 gives the Secretary of State the power to amend s87. Whether the amendment if and when introduced will remove the restriction or apply the restriction to non-domestic arbitrations as well only time will tell.

3 There is no express distinction between the way a court may exercise its power under s24(1)(a) to remove an arbitrator for impartiality but it is possible that the grounds for removal will be harder to establish for existing disputes arbitrations than for contractual arbitration clauses arbitrations.

4 Consumer arbitration agreements are subject to the UTCCR 1994 (as subsequently amended) and so it is likely that a contractual provision for the settlement of future disputes will not be enforceable whereas an agreement to arbitrate an existing consumer dispute will be.

FURTHER READING

Arbitration Law. R.Merkin. LLP Chapters 1, 3 & 4.

Domke on Commercial Arbitration Chapter 5.

Handbook of Arbitration Practice, Bernstein p25.

Provisions of the Arbitration Act 1996 that impact in one way or another upon the arbitration agreement :-

Section 12. Power of court to extend time for beginning arbitral proceedings[33]

Section 24. Power of court to remove arbitrator.

Section 45. Determination of preliminary point of law. Exclusion of jurisdiction agreement.

Section 69(1) & (2). Appeal on a point of Law. Exclusion of jurisdiction agreement.

Section 87. Effectiveness of agreements to exclude court's jurisdiction.

Section 89. Consumer Agreements & UTCCR 1994.

[31] Arbitration Law at 3.1

[32] ie by virtue of s85 Arbitration Act 1996, an arbitration where both parties are either UK citizens or legal personalities or are habitually resident in the UK and where the seat of the arbitration is in the UK at the time that the agreement is made.

[33] See further Chapter 3 below.

CHAPTER TWO

The Arbitration Agreement for Future Disputes

Whilst the heading refers to future disputes, remember that there can be no arbitration unless there is something to dispute so that by the time the submission to arbitration is made there must be a dispute. By virtue of s82(1) a dispute includes a difference. ***Woolfe v Collis*** {1948}[34] established that a clause covering "all claims" includes tort claims. This is fortunate since it is now clear that a tort action will not be struck down on the basis of procedural impropriety where a contract is involved. ***Henderson v Merritt.***

R.Merkin submits, on the authority of ***River Thames Ins v Al Ahleia Ins*** [1973][35] that a reference to mediation or conciliation can prevent a dispute, difference or claim arising as and until a mediation or conciliation has taken place and failed to solve the problem. If the correct wording can be found to make this work then in the absence of a dispute, references to adjudication under the Housing Grants Act, submissions to arbitration and applications to the courts would be prevented pending the outcome of the mediation or conciliation process. However, whilst a standard med/arb clause provides an enforceable condition precedent to arbitration the fact that a dispute exists would mean that a reference to adjudication under the Housing Grants Act would be enforceable using a standard med/arb or arbitration clause. ***Channel Tunnel Group v Balfour Beatty*** [1993].[36] The Arbitrator has the jurisdiction now to determine whether or not a dispute exists and therefore whether or not he has jurisdiction. ***Halki v Sopex Oils*** [1998].[37] Even if there is no defence to a claim there is nonetheless a dispute about which the arbitrator can make an enforceable award. Even if the defence fails to appear the arbitrator can make an award though it is unwise to rush to make an award without giving the defendant a chance to appear. If the defendant declines to appear then it is only right and proper for the arbitrator to make an award in the defendant's absence providing there is sufficient evidence to establish a prima facie case for the claim.

An agreement to arbitrate future disputes includes an option by either party to submit to arbitration. Where an option is provided for, both parties must be given the option for it to be valid. ***The Stena Pacifica*** [1990].[38] Under the Housing Grants Act any party to a construction contract may refer any interim dispute to adjudication. However, an arbitration agreement may permit individual grievances within the course of a project to be submitted sequentially to arbitration or may require the submission of all disputes at the same time at the conclusion of the contract. ***Compagnie Graniere v Fritz Kopp*** [1980].[39]

Agreements to submit future disputes to arbitration tend to be more general in their terms of reference than agreements in relation to existing disputes. None the less, as will be seen in more detail later, in relation to the subject matter of the agreement the scope of the agreement does not normally include disputes that arise after the submission. ***Manser v Heaver*** (1832).[40] An award on an issue that subsequently arises may be struck down and severed from the award on the original submission.

Where the terms of reference are general and a subsequent loss flows from a ruling about the subject matter of the original reference then the tribunal may have jurisdiction to rule on that matter as occurred in ***The Maria Lemos*** [1986].[41] A ruling that a vessel had incurred demurrage at the port of loading led to lay days on discharge being exhausted rendering the vessel in demurrage on discharge as well as on loading. The arbitrator enforced both portions of the demurrage to the shipowner. The court upheld both parts of the award. The parties of course can agree to refer additional subsequent matters to the arbitrator. The rather odd result is that the second submission may lead to an ad hoc arbitration if the parties fail to ensure the reference is made subject to the same terms of reference as the original submission.

Apart from the requirement of a written agreement what words in an agreement are sufficient to constitute an agreement to submit future disputes to arbitration? R.Merkin at 4.13 Arbitration Law demonstrates that the English courts require the merest reference to arbitration to uphold an agreement.

34 ***Woolfe v Collis*** {1948} 1 KB 11
35 ***River Thames Ins v Al Ahleia Ins*** [1973] 1 Lloyd's Rep 2
36 ***Channel Tunnel Group v Balfour Beatty*** [1993] 1 All ER 664.
37 ***Halki v Sopex Oils*** [1998] 2 All ER 23.
38 ***The Stena Pacifica*** [1990] 2 Lloyd's Rep 234.
39 ***Compagnie Graniere v Fritz Kopp*** [1980] 1 Lloyd's Rep 463.
40 ***Manser v Heaver*** (1832) 3 B&Ad 295.
41 ***The Maria Lemos*** [1986] 1 Lloyd's Rep 45.

Russell by contrast asserts that the terms must be clear and certain – p27. This is certainly true of the US courts as demonstrated by Domke. Apart from ***Finnegan v Sheffield CC*** [1988][42] where parties were required to negotiate on the issue, and ***Lovelock v Exportles*** [1968][43] where disputes and claims were required to be submitted to arbitration in England but any other dispute was to be referred to arbitration in Russia (too ambiguous) both of which were struck down, it is clear that the insertion of the word arbitration is practically sufficient in itself to ensure a valid arbitration agreement in England.

Anthony Walton – (editor of Russell 20th ed) refers to the problem of certainty in the preface to the 3rdof Gill, *"arbitration in truth afford(s) the parties a choice of law and a choice of the judges that they do want and, more importantly an opportunity to reject the law which, and to reject the particular judge whom, they do not want. The opportunity is there. That is undoubted. But like any other opportunity it has to be grasped. What is more, it has to be grasped in time. A single wrong step and all advantage may be thrown aside. An ill thought out arbitration clause in a contract can have serious consequences in that the real advantages that could have been obtained have not been obtained, the wishes of at least on party have been thwarted and the opportunity has not been grasped. How is this to be avoided ? In one way only. Every party to a contract must take thought as to what he wishes to happen if there is a dispute and if he desires arbitration, provide exactly for the kind of arbitration that he wants so that he can get the things he himself regards as advantageous. In short, he must at an early stage take effective steps t make a real choice."*

Examples of poor but nonetheless effective arbitration clauses

"arbitration to be settled in London" ***Tritonia SS v south Nelson Forest*** [1966].[44]

"Arbitration in London – English law to apply" ***The Petr Schmidt*** [1995].[45]

"3rd county .. in accordance with the rules of procedure of the ICAA (no such body existed) ***Lucky Goldstar*** [1994].[46]

"Suitable arbitration claues" heading but blank not filled in. ***Hobbs Padgett v Kirkland*** [1969].[47]

"Arbitration, if any, by ICC rules in London" ***Mangistaumunaigaz v United World Trading*** [1995].[48]

"*Arbitration in the usual manner"* ***Bright v Gibson*** (1916) 32 TLR 533.

"adjudication under ICC Rules - Courts of England shall have exclusive jurisdiction" ***Paul Smith v I.H.Inc*** [1991].[49]

As a matter of good practice Russell provides a list of issues that a good arbitration clause should cover or the party should consider when drafting such a clause:

1 A clear reference to arbitration.
2 Designation of the seat.
3 Choice of proper law.
4 Whether law of the agreement follows the proper law.
5 Choice of procedural law.
6 Who appoints the tribunal.
7 Types of people required to arbitrate.
8 The size of the panel.
9 Procedural rules if any.
10 Language.
11 Privacy and confidentiality.
12 Exclusion of applications to court.

Whilst many agreements to arbitrate future disputes will not cover all these issues it should be remembered that the less that is covered the more likely it is that the assistance of a court may be required to provide the detail. Thus in ***Tritonia v South Nelson Forest*** [1966], a reference to the court was necessary to confirm that there was in fact an arbitration agreement on the basis of the mere words ""*arbitration to be settled in London*".

[42] ***Finnegan v Sheffield CC*** [1988] 43 BLR 124
[43] ***Lovelock v Exportles*** [1968] 1 Lloyd's Rep 163
[44] ***Tritonia SS v south Nelson Forest*** [1966] 1 Lloyd's Rep 114
[45] ***The Petr Schmidt*** [1995] 1 Lloyd's Rep 202
[46] ***Lucky Goldstar v Ng Moo Kee*** [1994] ADRLJ 49
[47] ***Hobbs Padgett v Kirkland*** [1969] 2 Lloyd's Rep 547
[48] ***Mangistaumunaigaz v United World Trading*** [1995] 1 Lloyd's Rep 617.
[49] ***Paul Smith v I.H.Inc*** [1991] 2 Lloyd's Rep 127

Scope of arbitration agreement : Subject matter referred to arbitration.

The parties may not wish to refer all aspects of a contract or of a dispute that has already arisen to arbitration. They may wish to avail themselves of the court's services regarding specific elements, or, they may wish certain factors not to be considered by the arbitrator (though this may cause difficulties if the issue is directly related to the issue that can be arbitrated and especially if settlement of disputes in respect of these factors is a prerequisite to settling the dispute at hand). In particular they may wish to ensure that disputes arising after the submission are or are not covered by that particular arbitration. Thus they may require an inclusive, a sequential provision or an individualised provision.

Examples of common phrases on scope of agreement. See 4.33 Arbitration Law R.Merkin.

"all claims", "all disputes", "all differences" ***Re Hohenzollern Aktien & City of London CC*** (1886). [50] ***Astro Vencedor v Mabanaft*** [1971][51] including tort claims.

"any dispute arising out of or in connection with this contract, including its existence, validity or termination." LCIA

"any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or validity thereof" UNCITRAL

"any dispute arising out of, or in connection with, this contract". LMAA

"any dispute arising out of or under this contract" GAFTA

"all disputes arising in connection with the present contract" ICC

"all disputes from time to time arising out of this contract" Centrocon & FOSFA

"any dispute arising under this contract"

"any dispute concerning the application of this contract" ***Fletamentos v Effjohn No2*** [1996].[52]

Evans J in ***Overseas Union v AA Mutual*** [1988],[53] echoing ***Ashville Investments v Elmer contractors*** [1988],[54] makes it clear that the intentions of the parties are paramount. The court will consider all the relevant facts before deciding what the scope of the arbitrator's authority is, so reliance on precedent even from the highest court is no guarantee as to the outcome of a dispute as to the scope of the arbitrator's powers.

Drafting the arbitration clause

Where arbitration has been chosen as the dispute resolution mechanism, the next decision to be taken by a contract negotiator is whether to propose an ad hoc or institutional system.

In the absence of special factors, institutional arbitration: should be favoured. The most common special factors are where parties are considering a new arbitration agreement for a dispute which has already arisen, or where one of the parties (often a state) is unwilling to submit to institutional arbitration, in which cases ad hoc arbitration under the UNCITRAL Arbitration Rules is recommended.

Where institutional arbitration is contemplated the choice of institution depends on the many and varied Circumstances that may arise in each individual negotiation, such as:

- the nationalities of the parties;
- the nature o: the transaction;
- likely problems in enforceability;
- special regional or political factors.

Non-specialists should not tinker with the model clause recommended by the institution concerned. For example, the deceptively simple language of the ICC model clause (*'all disputes arcing in connection with the present contract'*) covers issues of formation, termination and quasi-contractual tort claims. Attempts at

[50] ***Re Hohenzollern Aktien & City of London CC*** (1886) 54 LT 596.
[51] ***Astro Vencedor v Mabanaft*** [1971] 2 All ER 1301
[52] ***Fletamentos v Effjohn No2*** [1996] 2 Lloyd's Rep 304
[53] ***Overseas Union v AA Mutual*** [1988] 1 FTLR 421
[54] ***Ashville Investments v Elmer contractors*** [1988] 2 All ER 577,

refinement - for example, 'issues regarding the interpretation and performance of this contract' run the risk of being interpreted as restrictive and may lead to disputes over the jurisdiction of the arbitral tribunal.

A general purpose model clause

Our recommendation is therefore either to adopt the institution's own model clause intact or to use the following general purpose model clause for institutional arbitration:

'Any dispute, controversy, or claim arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be finally resolved by arbitration under the Rules of [name of institution in force at [the date hereof/the date of the request u for arbitration], which Rules are deemed to be incorporated by reference into this clause.

- *The tribunal shall consist of [a sole/three] arbitrator[s].*
- *The place of arbitration shall be [city].*
- *The language of the arbitration shall be [language].'*

Checklist for drafting arbitration clauses

Reference to an experienced and reputable institution by means of the simple model clause proposed above should be sufficient to create a workable arbitral mechanism.

But the draftsman should not be satisfied with that. A process which only just works may be inefficient and frustrating. To eliminate potential pitfalls, the draftsman should also seek to satisfy himself on the following points:

Capacity of the parties to agree to arbitration

This is a matter for the law of the party whose capacity is in question. May a state or a state entity or a partnership or a private property owner enter into an agreement to arbitrate? In some cases, such questions are sufficiently important for a formal legal opinion to be required, or for a specific contractual warranty to be given.

Authority to agree to arbitration

The authority of representatives is generally a matter of the law of the person or corporate entity being represented In some legal systems, questions of authorisation are governed by the law of the country in which acts of representation are carried out. The powers of independent agents or brokers should be examined particular care. A recurrent problem arises in connection with arbitration clauses in corporate by-laws. Under some national laws they are binding only if shareholders expressly accept them at the time of acquiring shares.

Applicable substantive law

The 'proper law' of the contract, whether it is contractually stipulated by the parties or chosen afterwards by an arbitral. Tribunal, also generally determines the validity, scope and effects of the arbitration clause. The parties should therefore consider whether the arbitration clause meets the requirements of' the applicable substantive law. If necessary (although this is rare) a different law may be chosen to govern the arbitration clause.

Procedural law

The modern consensus is that arbitrations should be conducted in accordance with the mandatory rules of the law of the place of arbitration.. This need not be spelled out in tire arbitration clause. Occasionally it may be acceptable to stipulate that the procedural law shall be that of the place of arbitration (including non-mandatory rubs). Such a provision should, however, not be accepted without the benefit of expert advice. Provisions to the effect that the arbitration should be conducted in accordance with the law of a country other than the place of arbitration are potentially dangerous (because they increase the risk of post-arbitration litigation in national courts) and should usually be avoided.

Arbitrability of anticipated disputes under the law applicable to the arbitration clause or under that of the likely place of enforcement

If the dispute is not arbitrable, any award is likely to be unenforceable. The most frequent problems arise in relation; to disputes that involve competition, bankruptcy and intellectual property law, as well as employment and distribution agreements. For example, a contract draftsman in Europe should know that although an arbitral tribunal may initially decide issues of European competition law, the final authority is necessarily the European Court of Justice.

Exclusion of appeals on the merits

The ICC and LCIA Rules contain identical provisions to the effect that, by agreeing to arbitration there-under, the parties waive all recourse or rights of appeal insofar as such waiver is legally permissible. Parties who want finality must ensure that the rules to which they refer (or their arbitration. clauses) contain a similar provision.

This crucial feature must, however be examined in light of the legal position at the place of arbitration. The provision in the ICC and LCIA Rules has been held to be effective as a matter of English law to exclude appeals on the merits. In Switzerland, on the other hand, it is generally accepted that the recently enacted possibility of total exclusion of any recourse to the Swiss courts (including challenges on the grounds of excess of authority or Violation of the right to be heard) requires an express provision in the arbitration clause. (Since the general rule in Switzerland is that awards may not be challenged on the merits, the desirability of such a total exclusion is questionable.

Standard arbitration clauses.

There are a wide variety of arbitration agreements ranging from pre-dispute contract clauses and conditions which may be institutional or ad hoc, with or without a set of rules, through to post dispute agreements which again may be institutional or ad hoc which in turn may or may not incorporate a set of rules.

- Ad hoc arbitration.
- Institutional Arbitration.
- Drafting the arbitration clause.
- Model Clause for ad hoc arbitration.
- Arbitration agreement before dispute has arisen – model clause
- Arbitration agreement in conditions of contract – model clause
- Selection of institutional clauses
- Arbitration agreement after dispute has arisen
- Ad hoc arbitration agreement – model clause
- Ad hoc arbitration agreement – short form

Ad hoc arbitration

In principle, agreements for ad hoc arbitration are intended to be self-executing, through voluntary implementation by the parties backed by the support of the national legal system, in the place of arbitration. An advantage of ad hoc arbitration is that the procedure may be shaped to meet the wishes of the parties and the facts of the particular dispute. Parties need not, for example, be bound by preconceived time limits set by arbitral institutions for various steps in the arbitration.

It is, however, expensive and time-consuming to draft special rules for an ad hoc arbitration. In addition, it is easy for non-specialists to make costly mistakes. Time and money can be saved by adopting, or adapting rules of procedure which have been specially formulated for ad hoc arbitrations. The best known are the UNCITRAL Arbitration Rules, which were developed in 1976 by the United Nations Commission for International Trade

Parties who wish to avoid involving an arbitral institution will do well to specify the UNCITRAL Arbitration Rules. It is not advisable, however, to try to adopt or adapt institutional rules (such as those of the ICC) for use in ad hoc arbitration. Such rules make constant reference to the role played by the institution concerned and will not work properly or effectively without it.

A fully ad hoc mechanism should normally be chosen only after a dispute has arisen and where both parties have a common interest in designing a tailor-made mechanism to resolve it. The principal disadvantage of an ad hoc arbitration is that its effectiveness depends upon the voluntary co-operation of the parties and their lawyers in formulating and complying with procedural rules often at a time when they are already in dispute. Unless the parties have adopted the UNCITRAL Arbitration Rules, or otherwise made an appropriate express provision in the arbitration clause, they may yet have to make a number of potentially time-consuming applications to a national court to appoint arbitrators, rule on challenges fix arbitrators' fees and the like. This is precisely what they wished to avoid when they chose arbitration in the first place.

Furthermore, it is not difficult to delay an ad-hoc arbitration by raising questions of jurisdiction or procedure. If one of the parties is recalcitrant at the outset of the proceedings, there will be no arbitral tribunal in existence available to deal with the situation.

Even when an arbitral tribunal is established and a set of rules has been adopted, ad hoc arbitrations will not proceed as smoothly as institutional arbitrations if one of the parties fails or refuses to play its part in the proceedings. This is why an institutional arbitration clause is generally preferable, negotiated when the transaction is entered into and before disputes have arisen.

Institutional arbitration

Institutional arbitration is sometimes described as 'administered or supervised' arbitration, although the degree of administration or supervision varies greatly from one institution to the next. This type of arbitration has many advantages. The rules of prominent and well- established arbitral institutions such as the ICC, the LCIA and the AAA have benefited from the trial-and-error of practice. They have undergone periodic revision in consultation with experienced practitioners to take account of new developments in the law and practice of international arbitration; and they are widely available in booklet form, as well as in many manuals for international practice.

Most arbitral institutions provide trained staff to administer the arbitration and to advise users. They ensure that the arbitral tribunal is appointed; that the basis of remuneration of the arbitrators is established; that advance payments are made in respect of the fees and expenses o the arbitrators; that time limits are kept, or at least extended in an orderly fashion; and, generally, that the arbitration remains on track. If there is no institution, the arbitration must be administered by the arbitral tribunal itself, or by a secretary or registrar.

Sample Standard Form Arbitration Clauses.

As noted above, there is a wide range of model arbitration clauses in common use. In addition, many arbitral bodies and many regular contractors all operate their own clauses, tailored to their specific requirements of the needs of the relevant trade. Some examples are set out below, but are far from exhaustive.

MODEL CLAUSE FOR AD HOC ARBITRATION

1. *Any dispute, difference, controversy or claim arising out of or in connection with this agreement shall be referred to and determined by arbitration in …. [place].*

2. *The arbitral tribunal [hereinafter referred to as 'the tribunal'] shall be composed of three arbitrators appointed as follows*
   - *(i) each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator who shall act as president of the tribunal;*
   - *(ii) if either party fails to appoint an arbitrator within 30 days of receiving notice of the appointment of an arbitrator by the other party, such arbitrator shall at the request of that party be appointed by … [the appointing authority];*
   - *(iii) if the two arbitrators to be appointed by the parties fail to agree upon the third arbitrator within 30 days of the appointment of the second arbitrator, the third arbitrator shall be appointed by the … [appointing authority] at the written request of either party;*
   - *(iv) should a vacancy arise because any arbitrator dies, resigns, refuses to act, or becomes incapable of performing his functions, the vacancy shall be filled by the method by which that arbitrator was originally appointed. When a vacancy is filled the newly established tribunal shall exercise its discretion to determine whether any hearings shall be repeated.*

3. *As soon as practicable after the appointment of the arbitrator to be appointed by him, and in any event no later than 30 days after the tribunal has been constituted, the claimant shall deliver to the respondent (with copies to each arbitrator) a statement of case, containing particulars of his claims and written submissions in support therefore, together with any documents relied on.*

4. *Within 30 days of the receipt of the claimant's statement of case, the respondent shall deliver to the claimant [with copies to each arbitrator] a statement of case in answer, together with any counterclaim and any documents relied upon.*

5. *Within 30 days of the receipt by the claimant of any statement of counterclaim by the respondent, the claimant may deliver to the respondent [with copies to each arbitrator] a reply to counterclaim together with any additional documents relied upon.*

6. *A soon as practicable after its constitution, the tribunal shall convene a meeting with the parties or their representatives to determine the procedure to be followed in the arbitration.*

7. *The procedure shall be as agreed by the parties or, in default of agreement, as determined by the tribunal. However, the following procedural matters shall in any event be taken as agreed:*
   - *(i) The language of the arbitration shall be ….. [language];*
   - *(ii) the tribunal may in its discretion hold a hearing and make an award I relation to any preliminary issue at the request of either party and shall do so at the joint request of both parties;*
   - *(iii) the tribunal shall hold a hearing, or hearings, relating to substantive issues unless the parties agree otherwise in writing;*
   - *(iv) the tribunal shall issue its final award within 60 days of the last hearing of the substantive issues in dispute between the parties.*

8. *In the event of default by either party in respect of any procedural order made by the tribunal, the tribunal shall have power to proceed with the arbitration and to make its award.*

9. *If an arbitrator appointed by one of the parties fails or refuses to participate in the arbitration at any time after the hearings on the substance of the dispute have started, the remaining two arbitrators may continue the arbitration and make an award without a vacancy being deemed to arise if, in their discretion, they determine that the failure or refusal of the other arbitrator to participate is without reasonable excuse.*

10. *Any award or procedural decision of the tribunal shall if necessary be made by a majority and, in the event that no majority may be formed, the presiding arbitrator shall proceed as if he were a sole arbitrator.*

ARBITRATION AGREEMENTS BEFORE A DISPUTE HAS ARISEN

General arbitration clause-short form

In the event of any dispute or difference arising between the parties to this agreement from or in connection with this agreement or its performance, construction or interpretation, such dispute shall be referred to arbitration by a single arbitrator in accordance with the provisions of the Arbitration Act 1996, or any amendments thereto, whose decision in relation to any such dispute or difference shall be final and binding on all the parties hereto.

A longer form of general arbitration clause

Any dispute or difference arising out of or in connection with this contract shall be determined by the arbitration of: :

A single arbitrator who failing agreement shall be appointed by the President or a Vice-President for the time being of the [Chartered Institute of arbitrators]

OR

One arbitrator to be appointed by each party together (if they disagree) with an umpire who failing agreement between such arbitrators shall be appointed by the President or a Vice-President for the time being of the [Chartered Institute of Arbitrators] on the application of either party or either arbitrator.

OR

One arbitrator to be appointed by each party together with a third arbitrator (the chairman) who shall be appointed by such, arbitrators or (if they cannot agree upon the appointment) by the President or a Vice-President for the time being of the [Chartered Institute of Arbitrators]. If on any matter in dispute the three arbitrators are not unanimous, the decision shall be given by the majority. If there is no majority the decision shall be given by the chairman.

SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

A typical but basic Stylised Ad hoc Arbitration Agreement.

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION BETWEEN

XXXXXXXXX

CLAIMANT

AND

YYYYYYYYY

RESPONDENT

ARBITRATION AGREEMENT

We the undersigned HEREBY AGREE to refer to arbitration a dispute that has arisen from (a contract between us dated ------) or (describe incident giving rise to tort claim) and we HEREBY APPOINT ZZZZZZZ of (address) to be Arbitrator in the reference.

Signed on behalf of the Claimant by : ……

Dated this …….. day of ……

Signed on behalf of the Respondent by :

Dated this ……. Day of ……

Optional clauses that may be added to the short or general clause set out above

The powers of the tribunal to the wishes of the parties

In the conduct of any arbitration under this arbitration agreement, the arbitrator' [shall have]' [shall not have] the following powers …….

The role of the court

In respect of any arbitration arising under this agreement the role of the court [shall not extend to the exercise of any of the following powers] …….. [shall be enlarged as follows] ……..

Time limit

Any claim for damages for breach of this agreement shall be made in writing and shall he served upon the party whom the claim is made not than X months from the date of the breach and in default any such claim shall be deemed to have been abandoned and shall be absolutely barred.

Place and law of the arbitration

The arbitration shall be held in . . …. and the dispute shall be decided in accordance with [English] law.

Incorporating institutional rules

The arbitration shall be conducted in accordance with the
(Rules of the Chartered Institute of Arbitrators)
(Rules of the London Court of International Arbitration)
(Rules of the London Maritime Arbitrators' Association) (London Bar Arbitration Scheme)
(Rules of [Conciliation and]" Arbitration of the International Chamber of Commerce)

Care must be taken here, since some rules are self standing whereas others will require the involvement of the incorporated administrative body which may require consent and the payment of fees.

CHAPTER TWO

Institutional Clauses

Chartered Institute of Arbitrators clause

Any dispute arising out of or in connection with this contract shall be referred to and finally resolved by arbitration under the Rules of the Chartered Institute of Arbitrators, which Rules are deemed to be incorporated by reference into this clause.

American Arbitration Association

"Any controversy or claim arising out of or relating to this contract shall be determined by arbitration under the International Arbitration Rules of the American Arbitration Association."

The parties may wish to consider adding:

(a) *The number of arbitrators shall be ... [one or three];*
(b) *The place of arbitration shall be ... (city and / or country);*
(c) *The language of the arbitration shall be ..."*

Euro-Arab Chambers of Commerce

"Any dispute arising out of or in connection wit: this contract shall be finally settled in accordance with the arbitration provisions in the Rules of conciliation, arbitration and expertise of the Euro-Arab Chambers of Commerce, by one or more arbitrator(s) appointed in accordance with the said Rules."

It is suggested that if this clause is used, it should be amended to indicate which Board of Arbitration (i.e. which particular Euro-Arab Chamber of Commerce) shall have jurisdiction over the dispute A positive choice of one or three arbitrators is advised. The phrase "controversy or claim" may usefully be inserted after 'dispute'.

Hong Kong International Arbitration Centre-

(a) *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITIRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.*
(b) *The appointing authority shall be the Hong Kong International Arbitration Centre [HKIAC].*
(c) *The place of arbitration shall be in Hong Kong at the Hong along International Arbitration Centre.*
(d) *There shall be only one arbitrator (amend if three required)*
(e) *Any such arbitration shall be administered by HKIAC in accordance with the HKIAC Procedures for Arbitration in force at the date of this contract including such additions to the UNCITRAL Arbitration Rules as are therein contained. (delete if administration not required)*

The "*Procedures for Arbitrations"* referred to in paragraph (e) relate solely to the administrative function of the HKIAC itself, and not to the way in which arbitrators conduct proceedings. If this paragraph (e) is left out, an ad hoc arbitration would be created, with the HKIAC acting solely as appointing authority. In fact, most of the arbitrations dealt with by the HKIAC in 1992 were ad hoc arbitrations not administered by the Centre. However, the importance of the appointing authority function, and of the ability to make facilities available, should not be underestimated.

It is recommended that the applicable substantive law should also be stated expressly, and that the same consideration be given to varying the UNCITRAL majority decision rule, as in the case of the clause suggested in the text under the UNCITRAL model clause below.

Stockholm Chamber of Commerce Arbitration Institute

"Any dispute, controversy or claim- arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Arbitration Institute of the Stockholm Chamber of Commerce."
The parties are advised to make the following adds to the clause, as required:
The Arbitral Tribunal shall be composed of arbitrators (a sole arbitrator).
The place of the Arbitration shall be ……..
The language(s) to be used in the arbitral proceedings shall be ……..,

It would be rare for an arbitration under these Rules to take place outside Sweden. The reason for choosing the Stockholm Institute has generally been thought to be the geopolitical situation of Sweden in the arbitration context. A provision identifying the applicable substantive law is advised.

UNCITRAL

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity therefore, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.
Parties may wish to consider adding:

(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town or county);
(d) The language(s) to be used in the arbitral proceedings shall be ...".

If the parties wish the appointing authority to be the ICC, the appropriate wording (which is recommended by the ICC to deal with the special features of the ICC's internal structure) should, instead of sub-clause (a) above, be as follows: *'The appointing authority shall be the ICC acting in accordance with the rules adopted by the ICC for this purpose."*

Consideration may be given to varying the UNCITRAL Rules (which absolutely require majority awards) by providing as follows: *"When three arbitrators have been appointed, the award is given by a majority decision. If there is no majority, the award shall be made by the Chairman of the arbitral tribunal alone."*

It should be noted that parties who like the UNCITRAL Arbitration Rules but are ill at ease with the notion of ad hoc arbitration may refer to an institution as an administering rather than merely as an appointing authority. The ICC does not wish to act in such a role, but other institutions will do so. The LCIA has made it clear that it is willing to administer arbitrations under the UNCITRAL Rules, and has published explanations of how it acts in such circumstances.

The LCIA suggests that for those purposes the following be included in addition to clause (a) above: *"Any such arbitration shall be administered by the London Court of International Arbitration ('LCIA') in accordance with the UNCITRAL Arbitration Rules in force at the date of this contract. Unless the arbitral tribunal directs otherwise all commun1caboils between the parties and the arbitral tribunal (except at hearings and meetings) shall be made through the LCIA. Any such communications shall be deemed received by the addressee when received by the LCIA. When passed on by the LCIA to any party such notices or communications will be sent to the address of that party specified in the Notice of Arbitration or such other address as may have been notified in writing by that party to the LCIA."*

London Court of International Arbitration (LCIA)

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause."

Parties are also reminded that difficulties and expense may be avoided if they expressly specify the law governing their contract. The parties may if they wish to specify the number of arbitrators, and the place and language of the arbitration. The following provisions may be suitable

- *"The governing law of this contract shall be the substantive law of ...*
- *The tribunal shall consist of... (a sole or three) arbitrator(s). (In the case of a three member tribunal, the following words maybe added ... two of them shall be nominated by the respective parties).*
- *The place of arbitration shall be:. (city).*
- *The language of the arbitration shall be ..."*

As with the ICC Standard Clause, the phrase "*controversy or claim*" may be added after "*dispute*".

International Centre for Settlement of Investment Disputes (ICSID)

"The parties hereto consent to submit to the International Centre for Settlement of Investment Disputes any dispute relating to or arising out of this agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and National of other States."

The ICSID mechanism (omitted here) is complex and ICSID has issued a special publication with additions and refinements. Jurisdiction disputes are common with ICSID references and so no one should adopt an ICSID arbitration clause without first taking specialist advice.

Inter-American Commercial Arbitration Commission: (IACAC)

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Procedures of the Inter-American Commercial Arbitration Commission in effect on the date of this Agreement. The arbitral tribunal shall decide as ***amiable compositeur*** *or* ***ex aequo et bono****."*

Parties may wish to consider adding:

(a) the number of arbitrators shall be ... (one or three):

(b) the place of arbitration shall be. (town .. or country);

(c) the languages) to be used in the arbitral proceedings shall be

Given the particular structure of IACAC, it appears to be especially important to stipulate the place of arbitration. It is also suggested, as a general rule:

- eliminating the second sentence of the IACAC model clause;
- specifying the applicable substantive law;
- considering a variation of the requirement of a majority award (see UNCITRAL model clause above).

International Chamber of Commerce (ICC)

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the international Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

Parties are reminded that it may be desirable for them to stipulate in the arbitration clause itself the law governing the contract, the number of arbitrators and the place and language of the arbitration. The parties' free choice of the law governing the contract and of the place and language of the arbitration is not limited by the ICC Rules of Arbitration.

Attention is called to the fact that time laws of certain countries require that parties to contracts expressly accept arbitration clauses, sometimes in a precise and particular manner.

It is recommended that whenever the ICC model clause is used, it should be amended as follows:

(1) The words *"Conciliation and"* should be removed because they are misleading. If conciliation is desired it should he set out in a separate clause, perhaps as a required step prior to arbitration. But where it is not desired, there should be no confusion as to a party's right to initiate arbitration without any prior attempts at formal conciliation.

(2) The words *"one or more arbitrators"* should, if possible, be reduced to a positive choice, of "a sole arbitrator" or "three arbitrators".

To ensure the that the clause is as widely drawn as possible, the phrase "*controversies or claims*" (used in the UNCITRAL model clause) may be added after *"disputes*", so as to neutralise any argument as to arbitral jurisdiction over undisputed claims and collateral issues, such as fraud.

Vienna Federal Economic Chamber Arbitral Centre

"All disputes arising in connection wi0i the present contract: shall be finally settled under the Rules of Arbitration and Conciliation of the Arbitral Centre of the Federal Economic Chamber, Vienna, by one or more arbitrators appointed in accordance with the Rules."

This clause tracks exactly the ICC Standard Clause. It should therefore be complemented and amended in the same way as the ICC clause, with the special observation that the rules of this Centre would not normally be adopted unless the parties intend that the arbitration will take place in Vienna.

The submission agreement for Existing Disputes. [55]

An agreement to submit a present or existing dispute to arbitration is in many ways more straightforward than a pre-dispute agreement. The courts under s12 Arbitration Act only have power over pre-dispute agreements in terms of time bars. The parties to a present dispute agreement can agree to exclude judicial review and thus make the decision final, binding and un-impeacheable with certain exceptions based on public policy. To be governed by the Arbitration Act 1996 the agreement must be in writing as must agreements to vary the agreement. The agreement can be very specific as to scope since the nature or the dispute is already known. It is possible to name the arbitrator.

As to the applicable law of a submission agreement and questions of legality see ***The Amazonia*** [1990].[56] The seat of the arbitration was England and the applicable Law was English. Thus the agreement to arbitrate was enforceable, thought there were doubts as to its enforceability and legality under foreign law. Since the foreign law did not apply the courts were not governed by it. This would typically arise under a Hamburg dispute where whilst English law is stated to apply in the agreement, Hamburg signatory states might claim jurisdiction. Nonetheless English Law permits the arbitration to proceed. Clearly no enforcement might be possible in the Hamburg Signatory State.

If the arbitrator considers matters beyond the scope of the submission the parties have the right to object and prevent matters going further as soon as they becomes aware of the issue, but if they fail to object within a reasonable time then the award can become binding and they are estopped from objecting. Likewise, a party can object to an arbitration taking place on the basis that the agreement was due to a mutual mistake but will be estopped from raising mistake after the arbitration has commenced and he has taken an active part in proceedings. ***Jones v Balfour*** [1994].[57]

6(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

Whilst s6(2) Arbitration Act 1996 facilitates the incorporation of arbitration clauses from other contracts there can still be problems of privity in respect of third parties. Where A makes a contract with B subject to arbitration and the outcome of that contract affects a contract made with C by either A or B it is a question of fact whether or not that second contract is subject to arbitration as well. Clear words can make the second contract subject to arbitration as well but it will not automatically be subject to arbitration. ***The World Umpire*** [1990].[58] There was an agreement that funds payable, if any depending on the outcome of an arbitration should under A & B's relationship would be available as a set off to C in relationship to his dealings with B. It was held that B & C's relationship was not subject to arbitration.

Similarly in ***The Almare Prima*** [1989][59] a dispute arose between consignees of cargo who collected the goods without presentation of bill of lading. Clearly any action had to be in tort prior to 1992 on the basis of the old Bill of Lading act 1855. The dispute was referred to arbitration and both parties took part. This was clearly an ad hoc reference not dependent on the arbitration clause in the bill of lading. The act of reference conferred jurisdiction on the arbitrator. It was too late to object after commencement and participation.

FURTHER READING

Arbitration Law. R.Merkin. LLP Chapter 3

Domke on Commerical Arbitration Chapter 5, 9 & Challenging the agreement 19

[55] Chapter 3 Arbitration Law Merkin
[56] ***The Amazonia*** [1990] 1 Lloyd's Rep 236.
[57] ***Jones v Balfour*** [1994] ADRLJ 133.
[58] ***The World Umpire*** [1990] 1 Lloyd's Rep 374.
[59] ***The Almare Prima*** [1989] 2 Lloyd's Rep 376

Parties to agreement. Capacity. [60]

Companies : A company is bound by an arbitration agreement even where the main contract is ultra vires – s35 Companies Act 1985 as amended by Companies Act 1989 s108.

Minors and the mentally insane : The same rules apply as at common law regarding the enforceability and avoidability of the main contract and the arbitration agreement stands or falls with the main agreement. ***Slade v Metrodent*** [1953].[61] Payment for necessaries etc are enforceable and thus subject to arbitration. However, the same rules regarding ratification apply.

The validity of an arbitration agreement remains unaffected as far as other parties are concerned where one of a number of participants just happens to be a minor. ***Gill v Russell*** (1672),[62] ***Wrightson v Bywater*** (1838).[63]

Consumers as parties. [64] Central problem relates to the fact that legislation had to be amended to allow consumers to opt out of arbitration before the process commences – to accommodate EC Law.

Agreement and the Impact of Death. [65]

Section 8 Arbitration Act 1996. Whether agreement discharged by death of a party.

> *8(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal respresentatives of that party.*
> *8(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.*

Clause 8 : Whether Agreement discharged by Death of a Party. DAC 1996.

> 48. This Clause sets out the present statutory position. The common law was that an arbitration agreement was discharged by the death of a party. That rule was altered by the Arbitration Act 1934 as re-enacted by Section 2 of the Arbitration Act 1950. We have avoided using the technical expression `right of action' which is to be found in Section 2(3) of the 1950 Act and which could perhaps give rise to problems for the reasons given in the consultative paper published with the draft Clauses in July 1995. In line with party autonomy, we have provided that the parties can agree that death shall have the effect of discharging the arbitration agreement.
>
> 49. This Clause deals only with the arbitration agreement. The effect of the death of a party on the appointment of an arbitrator (also to be found in Section 2 of the 1950 Act) is now dealt with in that part of the Bill concerned with the arbitral tribunal (see Clause 26(2)).

The ability of the parties to agree in advance that death will terminate an arbitration agreement is new – but is unlikely to be called on very often given the general content and scope of arbitration agreements. Life insurance is however a potential candidate – though in fact underwriters are frequent users of arbitration in any case.

Note that the usual rules of law extinguishing personal performance contracts will still apply. Thus the only action permitted would be for payment, delivery of goods or for damages.

Note also that care would have to be taken in terms of commencing an action in arbitration or indeed before the courts against a deceased, from a time aspect, since if the estate has completed administration and the funds distributed then there will be nothing left for the personal representatives to pay with, and indeed once wound up they will cease to be personal representatives. An action cannot be taken against

[60] Arbitration Law. R.Merkin.2.15 See ***Bremer Vulkan Schiffbau und Maschinenfabrique v South India SS Co*** [1981] 1 All ER 289 at 324.
[61] ***Slade v Metrodent*** [1953] 2 QB 112.
[62] ***Gill v Russell*** (1672) 1 Freem KB 139 ;
[63] ***Wrightson v Bywater*** (1838) 3 M & W 199.
[64] Arbitration Law. R.Merkin. 1.41, 1.43, 21.90 A13 & 42
[65] Arbitration Law. R.Merkin. 2.25, 21.9, A1,2, A13,8

beneficiaries once they have received their bequests.

A personal representative may submit a dispute to arbitration even in the absence of an arbitration agreement. Thus a tort action for compensation in respect of an accident causing the death itself could be subject to arbitration at the personal representatives behest.

1st Schedule Protocol on Arbitration Clauses 1923 Art 2 a will can set out arbitration procedure.

Freedom to agree how a dispute is to be resolved. [66]

s1 Arbitration Act 1996 General Principles.

> *s1 The provisions of this Part are founded on the following principles, and shall be construed accordingly.*
> *(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.*
> *(b) The parties should be free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest.*
> *(c) In matters governed by this part the court should not intervene except as provided by this part.*

The question that arises however relates to "*Who is a party with the freedom to agree?*"

Persons claiming under or through a party to proceedings. [67] see co-defendants and counterclaims.

s82(2) Arbitration Act 1996. **Minor Definitions**

> *"References in this Part to a party to an arbitration agreement include any person claiming under or though a party to the agreement."*

a) Underwriters in subrogation are a party using the assured's name.
b) An assignee acts in his own name.
c) An assignee in law acts in his own name.
d) Mortgagees claim in their own right.
e) Very occasionally a subsidiary company may act in its own name in an arbitration where the agreement was made by the parent company, provided the veil of incorporation is lifted. ***Grupo Torras v Al Sabah*** [1995].[68]
f) A guarantor acts on his own behalf.

Persons within the Arbitration Act 1996. [69]

The common law and statutory provisions on legal personality apply as do the rules on Sovereign Immunity. Otherwise any legal personality can be a party to an arbitration.

Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd **[2006]**.[70] Due to Part VII FSA 2000 mergers the names of parties to an arbitration were not accurately stated. Parties had issued a deed acknowledging submission to an arbitration to settle what was due under reinsurance contracts. Held : There was no need to institute fresh arbitrations for every name change. Arbitrator had jurisdiction to determine accounts between the parties.

Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd. [2000].[71] Personality : Brokers purported to conclude a contract of affreightment with the ship owners on behalf of Bao Steel. Two voyages followed. Bao disavowed themselves of the contract. Vale wished to arbitrate claims against Bao and the brokers as co-defendants and unsuccessfully applied for a high court declaration that Bao were parties to the arbitration. Under Lugano claim had to be litigated in Norway.

[66] Arbitration Law. R.Merkin. 21.2, A13(1)
[67] Arbitration Law. R.Merkin. 1.37
[68] ***Grupo Torras v Al Sabah*** [1995] 1 Lloyd's Rep 364.
[69] Arbitration Law. R.Merkin. 1.36
[70] ***Harper Versicherungs AG v Indemnity Marine Assurance Company Ltd [2006] EWHC 1500 (Comm)***
[71] ***Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd. [2000] EWHC 205 (Comm)***

Caltex Gas Co Ltd v National Petroleum Corporation [2001].[72] Caltex commenced an arbitration against the respondents. The arbitrator found on basis of ad hoc appointments that they were not parties to arbitration agreements. The high court found that the arbitration settled the question of liability and that no appeal lay against it. Caltex successfully appealed the refusal to allow an appeal on the jurisdiction award. Trial to follow.

Pirie v Shore Potters Society [2003].[73] Parties to an arbitration clause : Members of a society agreed to arbitrate differences. The applicant had been expelled. In consequence he was no longer a member and not entitled to arbitration.

Respondents outside jurisdiction. [74]
Order 73 rule 8 Rules of the Supreme Court 1997. Service abroad from the court must be made in accordance with Order 11 rules.

Respondents in the European Community or in the European Free Trade Association [75]
See also detail in lectures on EU Law, Conflicts and Codes

Third Parties. [76]
In examining who is a party to an arbitration agreement the basic rules of privity apply. There may be direct agreement between the parties, an agent can bind a principal to an arbitration agreement,[77] an arbitration agreement may have pre-existed in dealings between others and subsequent agreements adopt the same provisions,[78], an assignment of a contract may include an arbitration agreement and finally anyone joining in with existing contractors may find themselves joining an enterprise subject to an arbitration requirement, as is common in construction and carriage contracts, or find that the benefit (or burden) of arbitration is extended to third parties. This has now been further facilitated by the Contract (Third Parties) Act 1999. Do note however that the Act does not apply to contracts for the carriage of goods by sea, leaving the Carriage of Goods by Sea Act 1992 intact. Otherwise under ***The Eurymedon*** it is really another example of agency – compare ***Scrutton v Midland Silicones*** and ***The New York Star.*** A third party can by agreement be allowed to join an arbitration.[79]

Northern Health Authority v Derek Crouch Construction [1984][80] and ***Beaufort v Gilbert-Ash*** [1998][81] discuss the situation where general relations in a project are said to be subject to arbitration for all concerned parties and a subcontractor who is not privy to the agreement is in dispute with the developer rather than the main contractor. The court in ***NHA v DCC*** sent a claim back to arbitration. Note however, that a cause of action must be established otherwise there would be nothing to arbitrate, so that in the absence of privity as to the relationship or the arbitral agreement there would be no point in sending the dispute to arbitration – apart from the fact that the arbitrator as opposed to the court could find there is no case to answer. On the other hand a bailment or tort claim could usefully proceed.

String contracts – third and multiple parties.[82]
Most supply contracts involve chains from manufacturer to wholesaler to retailer to purchaser with allied carriage and or other service arrangements. Whilst there is the ability to consolidate actions in the court under RSC Order 16 it is not possible for an arbitrator to order such consolidation. ***The Eastern Saga*** [1984][83] regarding s12 Arbitration Act 1950 and now s38 Arbitration Act 1996. Even in court consolidation may be refused if each claim is subject to confidentiality.[84]

[72] ***Caltex Gas Co Ltd v National Petroleum Corporation [2001] EWCA Civ 788.***
[73] ***Pirie v Shore Potters Society [2003] ScA136/93.***
[74] Arbitration Law. R.Merkin. 1.31, 1.32.1
[75] Arbitration Law. R.Merkin. 1.33-35
[76] Arbitration Law. R.Merkin. 15.1
[77] ***Fagan v Harrison*** (1849) 8 CB 383,
[78] ***The Scaplake*** [1978] 2 Lloyd's Rep 380, re guarantors.
[79] ***The Almare Prima*** [1989] 2 Lloyd's Rep 376; ***The World Umpire*** [1990] 1 Lloyd's Rep 374.
[80] ***Northern Health Authority v Derek Crouch Construction*** [1984] 2 All ER 174
[81] ***Beaufort v Gilbert-Ash*** [1998] 2 All ER 778
[82] Arbitration Law. R.Merkin 15.2.
[83] ***The Eastern Saga*** [1984] 3 All ER 835
[84] ***Abu Dhabi Gas v Eastern Bechel*** [1982] 2 Lloyd's Rep 425; ***The Vimeira*** [1984] 2 Lloyd's Rep 66.

S35 Arbitration Act 1996 Consolidation of proceedings and concurrent hearings.

s35(1) The parties are free to agree
a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
b) that concurrent proceedings shall be held
on such terms as may be agreed.
s35(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order the consolidation of proceedings or concurrent hearings.

The result is that third parties can be invited, with the agreement of the original parties to join proceedings. They cannot be forced to join an arbitration ***Taunton-Collins v Cromie***.[85] The problem with concurrent proceedings however is that in order for a consolidation to take place each of the proceedings need to be subject to arbitration as opposed to court proceedings. Furthermore, the same arbitrator needs to be dealing with all of the various proceedings and to be subject to the same institutional rules and organisations. Even when all of these occur, the arbitrator has no right to order consolidation. The parties have to choose to do so.[86] Of course, even if there are court proceedings pending or arbitrations with another arbitrator, subject perhaps to different rules and a different institution, it is possible for the other parties not to proceed with these proceedings and make a series of new arbitration agreements on the same terms and basis as the arbitration they wish to consolidate with and to appoint the same arbitrator.

The converse however is also true. Whilst the courts have the power under RSC 14 to consolidate actions they can no longer refuse a stay of action, to prevent a dispute going to arbitration, simple in order to consolidate it with a court action. This was previously possible for consumer actions but s9 Arbitration Act 1996 removes the distinction between commercial and consumer disputes.

The findings and award are personal to the parties and confidential ***Mitchell v East Anglia RHB*** [1971],[87] and cannot be used in evidence by other parties in other actions – even where there is a string contract covering the same ground so there is the possibility of different parties winning or loosing on very similar cases subject to arbitration. If it is the same parties before the same arbitrator then prior findings and awards bind the subsequent arbitrations. This is necessary since a chain of arbitrations on the same subject matter but separate issues is quite common.[88] Arbitration submissions etc may be used in court in subsequent hearings if the same parties are involved under RSC Order 24 Rule 7 – ***Dolling-Baker v Merrett*** [1991].[89] See also ***Hassneh v Mew*** [1993][90] where disclosure must be reasonable – ***Ali SS v Shipward Trogir*** [1998][91] and necessary in the interests of justice, ***L&LE v Paribas No2*** [1995]. [92] The parties of course can consent to submission of any evidence used in an arbitration. This is most likely to happen if the award is subject to challenge since both parties will wish to put their case fully before the court.

Findings of fact in an award are personal to the case and are both confidential and not to be regarded as evidence for subsequent cases where different parties are involved.[93] If the parties are the same in both the arbitration and the court case then ***The Sargasso*** **[**1994][94] confirms that they can be used. Exceptionally, evidence given in previous arbitrations can be produced in court if justice requires, in particular where it would appear that the evidence of an expert witness has been inconsistent. [95] Note that it is not possible

[85] ***Taunton-Collins v Cromie*** [ ] 1 All ER 332..
[86] ***Green Star SS v London Assurance*** [1929] 31 Lloyd's Rep 4; ***The Pine Hill*** [1958] 2 Lloyd's Rep 146.
[87] ***Mitchell v East Anglia RHB*** [1971] CLY 375
[88] ***Land Securities v Westminster CC*** [1992] 44 EG 153.
[89] ***Dolling-Baker v Merrett*** [1991] 2 All ER 891.
[90] ***Hassneh v Mew*** [1993] 2 Lloyd's Rep 243
[91] ***Ali SS v Shipward Trogir*** [1998] 2 All ER 136
[92] ***L&LE v Paribas No2*** [1995] 2 EG 134.
[93] ***Thorpe v Eyre*** (1834) 1 Ad & El 926 : ***Buccleugh v Metropolitan Board of Works*** (18720 LR 5 HL : ***Gueret v Audouy*** (1893) 62 LJQB 633.
[94] ***The Sargasso*** **[**1994] 1 Lloyd's Rep 412 c
[95] see ***L&LE v Paribas No2*** [1995] 2 EG 134.

normally to challenge an arbitrator's findings of fact as demonstrated by The ***Santa Clara*** [1994].[96]

Chain contracts and chain arbitration agreements.

Chain contracts can provide through standard form terms that all disputes must be settled between the first seller and the final buyer, with all parties in between settling on the basis of the arbitral award. Eg GAFTA Rules 5. Or alternatively parties may agree e.g. subcontractors – to settle in writing on the same basis as the main contract - FOSFA Rule 6 : CALR Rule 8 : SALR Rule 403 : JCT binds sub-contractors to the same terms as the main contractor and developer. ***Gleeson v Wyatt*** [1995].[97] GAFTA is limited to quality issues on like terms,[98] – not statutory breaches.[99]

Recent third party arbitration cases.

Catlin Estates Ltd v Carter Jonas [2005].[100] Had property been sold to Mr Catlin by CEL and if so did the builder owe a tortious duty of care for defective premises arising out of breach of contract ? Held : CEL still owner.

Nisshin Shipping Co. Ltd v Cleaves & Co Ltd [2003].[101] Jurisdiction : Third Party Rights : Held under s1(1)(b) Contract 3rd Parties Rights Act 1999 - charterparty purported to confer a benefit on brokers : that being so, any dispute arising out of that agreement was subject to the general arbitration provision in the contract.

Arbitration by order of court.

There are two situations where the court will order arbitration in England and Wales

1 Where an application is made by one party to an arbitration for a stay of action (***section 7 Arbitration Act 1996***) in the court to stop judicial proceedings pending an arbitration award.

2 Statutory arbitrations covered by various Acts of Parliament that provide for arbitration.

By contrast, in the United States court ordered arbitration is very common. Many States have introduced legislation whereby the courts can order parties to disputes to mediate or arbitrate a dispute and will only hear a case after ADR has taken place. The parties do not always have to have made a prior arbitration or mediation agreement for the court to give the order. If the court believes that it is more appropriate it may make the order. In the US this device has been introduced to clear the court lists and to ensure that there is more if not sufficient time to get through all the cases that need judicial involvement. [102]

Statutory arbitration. [103] There is no need at this stage to deal with the details regarding which areas are covered by statutory arbitrations. The main point to be noted is that under **s95 Arbitration Act 1996** Part I of the Act now applies to statutory arbitrations.

[96] ***Santa Clara*** [1994] 1 Lloyds Rep.
[97] ***Gleeson v Wyatt*** [1995] 11 Construction Law Journal 59.
[98] ***Burkett v Eastcheap*** [1962] 1 Lloyd's Rep 267
[99] ***Eastern Counties v Cunningham*** [1962] 1 Lloyd's Rep 261.
[100] ***Catlin Estates Ltd v Carter Jonas [2005] EWHC 2315 (TCC)***
[101] ***Nisshin Shipping Co. Ltd v Cleaves & Co Ltd [2003] EWHC 2602***
[102] See Domke Chapter 4 on Statutory Arbitration and the Uniform Arbitration Act, Federal Arbitration Law and the US Arbitration Act and Chapter 18 on Court Directives.
[103] Arbitration Law. R.Merkin. 1.43-48 and see Chapter 13 below.

PART II OTHER PROVISIONS RELATING TO ARBITRATION

Domestic arbitration agreements

Modification of Part I in relation to domestic arbitration agreement.

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

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

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

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

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

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

Staying of legal proceedings.

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

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

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

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

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

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

Effectiveness of agreement to exclude court's jurisdiction.

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

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

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

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

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

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

Power to repeal or amend sections 85 to 87.

88(1) *The Secretary of State may by order repeal or amend the provisions of sections 85 to 87.*

88(2) *An order under this section may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate.*

88(3) *An order under this section shall be made by statutory instrument and no such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.*

Consumer agreements (89-91 Arbitration Act 1996)

s89 Consumer arbitration agreements

Application of unfair terms regulations to consumer arbitration agreements.

89(1) *The following sections extend the application of the Unfair Terms in Consumer Contracts Regulations 1994 in relation to a term which constitutes an arbitration agreement.*
For this purpose "arbitration agreement" means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual).

89(2) *In those sections "the Regulations" means those regulations and includes any regulations amending or replacing those regulations.*

89(3) *Those sections apply whatever the law applicable to the arbitration agreement.*

Regulations apply where consumer is a legal person.

90. *The Regulations apply where the consumer is a legal person as they apply where the consumer is a natural on.*

Arbitration agreement unfair where modest amount sought.

91(1) *A term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.*

91(2) *Orders under this section may make different provision for different cases and for different purposes.*

91(3) *The power to make orders under this section is exercisable-*
(a) for England and Wales, by the Secretary of State with the concurrence of the Lord Chancellor,
(b) for Scotland, by the Secretary of State with the concurrence of the Lord Advocate, and
(c) for Northern Ireland, by the Department of Economic Development for Northern Ireland with the concurrence of the Lord Chancellor.

91(4) *Any such order for England and Wales or Scotland shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.*

91(5) *Any such order for Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 and shall be subject to negative resolution, within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954*

Self Assessment Exercise No4

1. What form, if any, should an arbitration clause conform to in order to be effective? What, if any, are the essential ingredients of an arbitration agreement?
2. What, restrictions, if any, apply to parties indirectly involved in arbitration in participating in that arbitration and pursing a remedy?
3. What is the concept of consolidation about and does it apply to arbitration?
4. What restrictions, if any, apply to a claimant seeking to arbitrate claims against third parties?
5. Does arbitration survive the death of a party?
6. Can arbitration pierce the corporate veil?
7. What impact does mental incapacity of a party have on the arbitral process?
8. Explain what "Scope of the reference to arbitration" is about and its importance.
9. How relevant is the concept of "agreement to arbitrate" to statutory arbitration?
10. What restrictions, if any, apply to agreements to arbitrate consumer disputes?
11. Janet sold Harry 20,000 packets of aspirins at a bargain discount price, all disputes subject to arbitration. It would appear that Janet may not have had a valid licence to deal in pharmaceuticals. Harry, discovering the potential problem with the licence cancelled the contract. Janet informed Harry that she was referring the dispute to arbitration.

    Harry seeks your advice as to whether or not he can simply walk away from the affair, ignore any information about arbitrating and forget about the whole thing.
12. Charlie and Dave are in the course of arbitrating a dispute about a kitchen extension built by Charlie for Dave. The building was 6 months late being completed and Dave is claiming compensation for late completion. The arbitration is subject to LCIA rules and the LCIA appeals procedure. Charlie who was only 17 and took over the work from his father who was also a builder but who had died just before work was due to commence applies to the court for a ruling as to whether or not he was bound by the terms of the contract since he was a minor at the time.

    Advise Dave who wants the arbitrator to get on with the matter and does not want the court to interfere.
13. George and Harry agree, subject to arbitration, to engage in a joint venture. They quarrel about what is required under the contract and ask Iris, an arbitrator, to decide whose opinion as to the reciprocal rights and duties of the contract is correct.

    Advise Iris as to whether or not there is a dispute amenable to arbitration.