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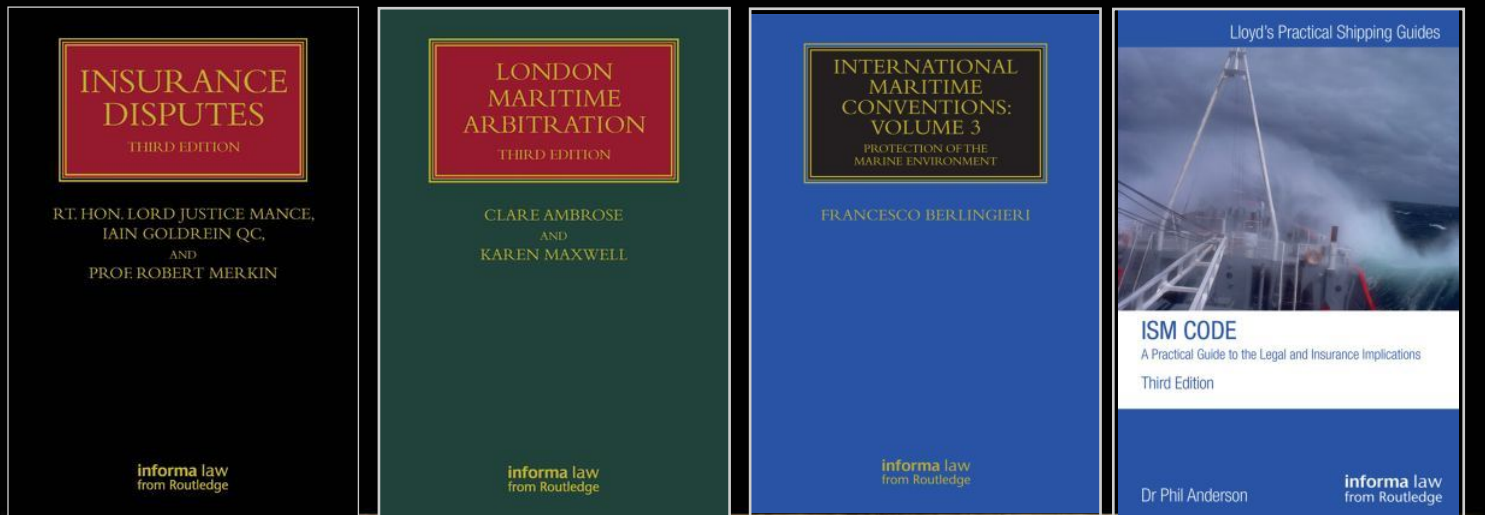
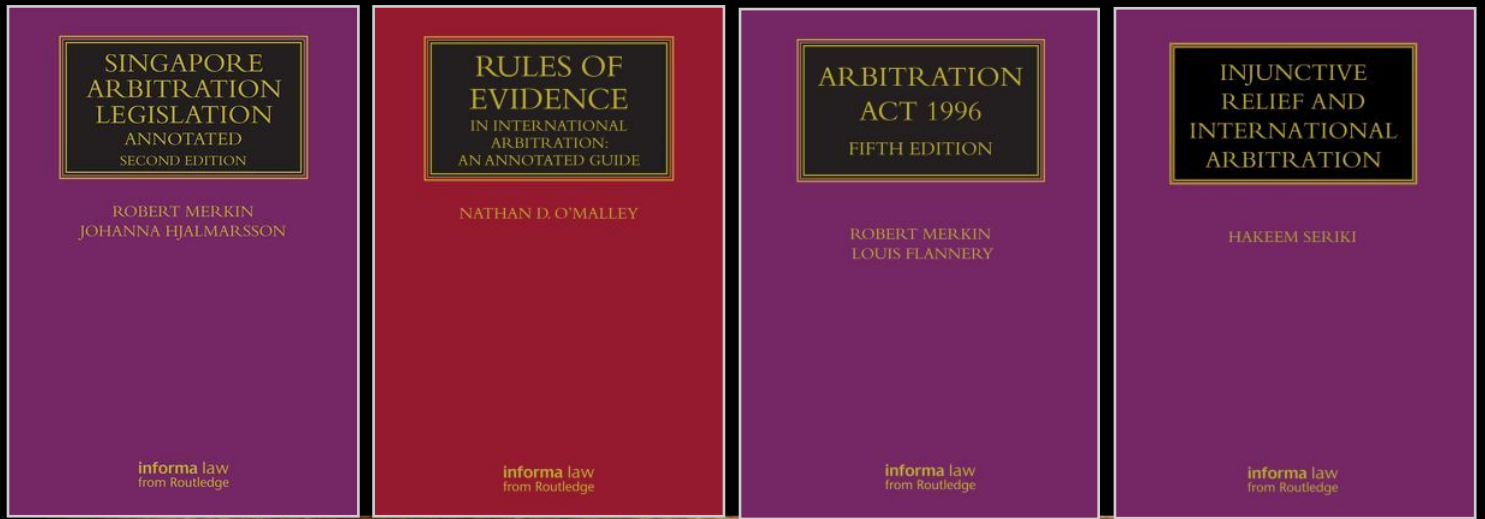
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TABLE OF CONTENTS

Introduction	Page 4
Chapter 1. Arbitral Tribunal taken from <i>Singapore Arbitration Legislation, Annotated</i>	Page 6
Chapter 2. Party-Appointed Experts taken from <i>Rules of Evidence in International Arbitration, An Annotated Guide</i>	Page 16
Chapter 3. Other Provisions Relating to Arbitration taken from <i>Arbitration Act 1996, Fifth Edition</i>	Page 41
Chapter 4. Injunctions and the Arbitration Act 1996 taken from <i>Injunctive Relief and International Arbitration</i>	Page 52
Chapter 5. Loss, Causation and Burden of Proof taken from <i>Insurance Disputes, 3rd Edition</i>	Page 88
Chapter 6. Mediation and Arbitration taken from <i>London Maritime Arbitration, 3rd Edition</i>	Page 106

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Introduction

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Legal systems across the globe provide resolutions for a variety of disputes that have arisen between disagreeing parties. There are many processes and techniques employed and anything which minimises cost and damage to the relationship between parties is considered advantageous.

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CHAPTER 1 - ARBITRAL TRIBUNAL

The Singapore International Arbitration Centre is a focal point for international arbitration in the region. This chapter helpfully summarises and analyses key rules, regulations and practices of the SIAC.

Professor Robert Merkin is the Lloyd's Professor of Commercial Law at Exeter University, Honorary Professor of Law at the University of Auckland, visiting Professor at the Universities of Hong Kong and Queensland, and consultant to DLA Phillips Fox, New Zealand, a member of the DLA Piper Group.

Johanna Hjalmarsson is an Informa Law Research Fellow in Maritime and Commercial Law at the University of Southampton.

CHAPTER 2 - PART-APPOINTED EXPERTS

This chapter discusses the use of expert witnesses in international arbitration. It covers identifying appropriate experts and how to best utilise their evidence.


A frequent contributor to academic journals and lecturer on the topic of international arbitration, **Nathan O'Malley** holds an LL.M. in international trade and business law from Erasmus University of Rotterdam, a J.D. from the University of the Pacific, McGeorge School of Law and is currently Senior Counsel with the Los Angeles firm of Gibbs, Giden, Locher, Turner & Senet.

CHAPTER 3 - OTHER PROVISIONS RELATING TO ARBITRATION

In this chapter additional provisions to the Arbitration Act 1996 are set out clearly and distinctly. Topics such as domestic arbitration agreements and statutory arbitrations are examined in relation to the Act, so that the reader is fully prepared for any such provision.

Professor Robert Merkin is the Lloyd's Professor of Commercial Law at Exeter University,





Honorary Professor of Law at the University of Auckland, visiting Professor at the Universities of Hong Kong and Queensland, and consultant to DLA Phillips Fox, New Zealand, a member of the DLA Piper Group.

Louis Flannery is a Chartered Arbitrator, and is partner and head of the International Arbitration Group at Stephenson Harwood. He specialises in arbitration and litigation with a particular emphasis on fraud and/or conflict law issues.

CHAPTER 4 - INJUNCTIONS AND THE ARBITRATION ACT 1996

There are limited circumstances under the Arbitration Act 1996 in which an English court can intervene by means of an injunction. This chapter looks at clauses 44 and 72 of that Act and examines when injunctive relief can and should be sought.

Dr Hakeem Seriki is a senior lecturer in commercial law at the University of East Anglia. He is a consultant to the International Arbitration Group at Steptoe & Johnson and has written extensively on arbitration matters.

CHAPTER 5 - LOSS, CAUSATION AND BURDEN OF PROOF

This chapter explains when, how and to what loss must occur to be claimable under an insurance contract. The reader is then shown where the burden of proof lies in both general claims and when there are exceptions under the contract.

Christopher Butcher QC is recognised as one of the country's leading commercial silks, and has considerable experience in insurance and reinsurance litigation. He is Recorder of the Crown Court and sits as a Deputy High Court Judge in the Commercial Court and Administrative Court.

CHAPTER 6 - MEDIATION AND ARBITRATION

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This chapter provides a brief introduction to mediation in relation to resolving disputes that would otherwise be determined in London arbitration and is based on the law and LMAA terms in force on 1 June 2009.

Clare Ambrose is a barrister and arbitrator at 20 Essex Street. **Karen Maxwell** was the Head of Arbitration with the Practical Law Company and is now a barrister at Stone Chambers. **Angharad Parry** is a barrister at 20 Essex Street. Consultant Editor **Bruce Harris** is a Chartered Arbitrator.

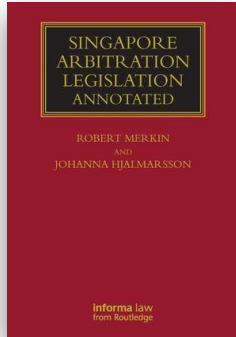
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CHAPTER

1

Arbitral Tribunal

Chapter 1:: Arbitral Tribunal



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Number of arbitrators

- 12.—(1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, there shall be a single arbitrator.

NOTES

The default position under s. 12 in the absence of agreement is that there is to be a sole arbitrator.¹ The suggestion that there should be a sole arbitrator even where the parties had agreed on a larger tribunal, unless the agreement for three arbitrators was made after the dispute had arisen: the suggestion, designed to ensure that the tribunal was not unnecessarily large, was ultimately rejected on grounds of party autonomy.¹

1. Cf. AA 1996 (Eng), s. 15.

Appointment of arbitrators

- 13.—(1) Unless otherwise agreed by the parties, no person shall be precluded by reason of his nationality from acting as an arbitrator.
- (2) The parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
- (3) Where the parties fail to agree on a procedure for appointing the arbitrator or arbitrators:
 - (a) in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the parties shall by agreement appoint the third arbitrator; or
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, the arbitrator shall be appointed, upon the request of a party, by the appointing authority.
- (4) Where subsection (3)(a) applies:
 - (a) if a party fails to appoint an arbitrator within 30 days of receipt of a first request to do so from the other party; or
 - (b) if the 2 parties fail to agree on the appointment of the third arbitrator within 30 days of the receipt of the first request by either party to do so, the appointment shall be made, upon the request of a party, by the appointing authority.
- (5) If, under an appointment procedure agreed upon by the parties:

- (a) a party fails to act as required under such procedure;
- (b) the parties are unable to reach an agreement expected of them under such procedure; or
- (c) a third party, including an arbitral institution, fails to perform any function entrusted to it under such procedure,

any party may apply to the appointing authority to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

(6) Where a party makes a request or makes an application to the appointing authority under subsection (3), (4) or (5), the appointing authority shall, in appointing an arbitrator, have regard to the following:

- (a) the nature of the subject-matter of the arbitration;
- (b) the availability of any arbitrator;
- (c) the identities of the parties to the arbitration;
- (d) any suggestion made by any of the parties regarding the appointment of any arbitrator;
- (e) any qualifications required of the arbitrator by the arbitration agreement; and
- (f) such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(7) No appointment by the appointing authority shall be challenged except in accordance with this Act.


(8) For the purposes of this Act, the appointing authority shall be the Chairman of the Singapore International Arbitration Centre.

(9) The Chief Justice may, if he thinks fit, by notification published in the Gazette, appoint any other person to exercise the powers of the appointing authority under this section.

1. LRRD No. 3/2001, paras 2.6.4–2.6.5.

NOTES

Section 13 is fashioned on Model Law, art. 11 as modified by IAA, s. 9A. Section 13(1)–(4) more or less re-enact Model Law, art. 11(1)–(3) and IAA, s. 9A, by providing that: no person is to be precluded from acting as an arbitrator by reason of nationality (unless the parties have agreed otherwise, e.g., for reasons of impartiality); the parties may agree on an



appointment procedure; and if they fail to do so the default position is that for a three-person tribunal each party is to appoint an arbitrator and they are then to agree on a third, and if there is to be a sole arbitrator then they are required to agree on his identity. In the event that the parties fail to agree on a sole arbitrator an appointment is to be made by the appointing authority (not the court, but the Chairman of SIAC—see s. 13(8)–(9)).¹ In the event that there are to be three arbitrators and one party fails to appoint his arbitrator, or the parties cannot agree on the third arbitrator, then the appointment is to be made by the Chairman of SIAC. In all other cases, if there is a failure of the appointment procedure, the appointment is to be made as a matter of last resort by the Chairman of SIAC (s. 13(6), adopting Model Law, art. 11(4)). It was commented in the Notes to Model Law, art. 11, that the English rule, which was shared by earlier Singapore legislation, that if one party fails to appoint his arbitrator then the other can treat his appointee as the sole arbitrator, has been rejected, on the ground that it threatens to compromise the independence and impartiality of the tribunal.²

In making an appointment, the Chairman of SIAC must have regard to the criteria listed in s. 13(6): (a) the nature of the subject-matter of the arbitration; (b) the availability of any arbitrator; (c) the identities of the parties to the arbitration; (d) any suggestion made by any of the parties regarding the appointment of any arbitrator; (e) any qualifications required of the arbitrator by the arbitration agreement; and (f) such considerations as are likely to secure the appointment of an independent and impartial arbitrator. By contrast, under Model Law, art. 11(5), the Chairman of SIAC is to have regard only to agreed qualifications, independence and impartiality. Where the Chairman of SIAC has made an appointment, the only permissible challenge is on the ground of lack of independence, impartiality or agreed qualifications under AA, ss. 14 and 15: by contrast, under Model Law, art. 11(5), there is no possible appeal at all.

1. See LRRD No. 3/2001, para. 2.6.7.

2. LRRD No. 3/2001, paras 2.6.2–2.6.3.

Grounds for challenge

14.—(1) Where any person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence.

(2) An arbitrator shall, from the time of his appointment and throughout the arbitration proceedings, without delay disclose any such circumstance as is referred to in subsection (1) to the parties unless they have already been so informed by him.

(3) Subject to subsection (4), an arbitrator may be challenged only if:

(a) circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party who has appointed or participated in the appointment of any arbitrator may challenge such arbitrator only if he becomes aware of any of the grounds of challenge set out in subsection (3) as may be applicable to the arbitrator after the arbitrator has been appointed.

NOTES

Section 14 reproduces verbatim, but with a slightly different structure, Model Law, art. 12: see the Notes to that provision. Attention is drawn to the phrase "impartiality or independence" and to the fact that AA 1996 (Eng) is concerned only with impartiality rather than independence. These concepts are quite different, the latter reflecting the fact that many commercial markets are quite small and that finding an independent arbitrator may be difficult, hence the only need being impartiality. That reasoning has been specifically rejected in Singapore.¹

1. LRRD No. 3/2001, paras 2.7.2.

Challenge procedure

15.—(1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

(2) If the parties have not agreed on a procedure for challenge, a party who intends to challenge an arbitrator shall:

(a) within 15 days after becoming aware of the constitution of the arbitral tribunal; or

(b) after becoming aware of any circumstance referred to in section 14(3), send a written statement of the grounds for the challenge to the arbitral tribunal.

(3) The arbitral tribunal shall, unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, decide on the challenge.

(4) If a challenge before the arbitral tribunal is unsuccessful, the aggrieved party may, within 30 days after receiving notice of the decision rejecting the challenge, apply to the Court to decide on the challenge and the Court may make such order as it thinks fit.

(5) No appeal shall lie against the decision of the Court under subsection (4).

(6) While an application to the Court under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and make an award.

NOTES

Section 15 reproduces verbatim, but with a slightly different structure, Model Law, art. 13: see the Notes to that provision. An application to the judge under s. 15(4) must be made by originating summons: RC, Ord. 69, r. 2(1).

Failure or impossibility to act

16.—(1) A party may request the Court to remove an arbitrator:

(a) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his capacity to do so; or

(b) who has refused or failed

(i) to properly conduct the proceedings; or

(ii) to use all reasonable despatch in conducting the proceedings or making an award, and where substantial injustice has been or will be caused to that party.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the Court shall not exercise its power of removal unless it is satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) While an application to the Court under this section is pending, the arbitral tribunal, including the arbitrator concerned may continue the arbitration proceedings and make an award.


(4) Where the Court removes an arbitrator, the Court may make such order as it thinks fit with respect to his entitlement, if any, to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the Court before it makes any order under this section.

(6) No appeal shall lie against the decision of the Court made under subsection (4).

NOTES

Section 16 is modelled upon AA 1996 (Eng), s. 24 and Model Law, art. 14. The grounds for removal under s. 16 are incapacity and failure to conduct the proceedings properly or with reasonable despatch. “Reasonable despatch” is a matter of degree to be determined according to the particular facts of the case and the contentious nature of the dispute.¹ Mere procedural error does not suffice, and what is required is that the arbitrator’s conduct



undermines the arbitration.² As is the case under the Model Law, a different regime exists for problems arising from lack of independence, lack of impartiality or lack of agreed qualifications: that is set out in AA, ss. 14 and 15, namely the Model Law challenge procedure whereby a complaint is to be made initially to the arbitrators themselves before the court can become involved. For the meanings of delay and incapacity, see the Notes to Model Law, art. 14.

Section 16(2) places a restriction on the right of a party to apply to the court under s. 16(1) where there is an arbitration body empowered to remove an arbitrator: the procedure involving recourse to that body has to be exhausted before an application may be made. However, as was pointed out by the DAC in its drafting of the AA 1996 (Eng), "it is likely to be a very rare case indeed where the court will remove an arbitrator notwithstanding that that process has reached a different conclusion".³

Section 16(3) allows the arbitration to continue even though there is a pending application for removal. In the event that the application is dismissed, the arbitration will not have been delayed: the existence of this provision removes the ability of a party to seek removal for purely tactical reasons, thereby delaying the arbitration.

Section 16(4) provides that the question of fees and expenses is a general one, relevant to all cases of removal, and adopts the rule that the court may make an order in respect of this matter. Removal by the court does not, therefore, operate as an automatic disentitlement to fees. Doubtless, in taking into account its discretion under s. 16(4), the contract and the reason for removal will be crucial to the court.⁴ There is no appeal against any decision under this subsection: s. 16(6).

Section 16(5), in the interests of justice, entitles an arbitrator to be heard by the court in an application against him for his removal. An application to the judge under this section must be made by originating summons: RC, Ord. 69, r. 2(1).

1. *Anwar Siraj v. Ting Kang Chung* [2003] 2 SLR 287.

2. LRRD No. 3/2001, para. 2.8.3. The case for misconduct was not made out in *Tan Tong Meng (Pte) Ltd v. Artic Builders & Co (Pte) Ltd* (PC) [1986] 1 SLR 7, where the arbitrator had misinterpreted the rules on showing the parties his notes, but had acted even-handedly.

3. Echoed by LRRD No. 3/2001, para. 2.8.4

4. See *Wicketts and Sterndale v. Brine Builders* [2001] CILL 1805 and the Notes to Model Law, art. 14.

Arbitrator ceasing to hold office

17.—(1) The authority of an arbitrator shall cease upon his death.

(2) An arbitrator shall cease to hold office if:

(a) he withdraws from office under section 15(3);

(b) an order is made under section 15(4) for the termination of his mandate or his removal;

(c) he is removed by the Court under section 16 or by an institution referred to in section 16(2); or

(d) the parties agree on the termination of his mandate.

(3) The withdrawal of an arbitrator or the termination of an arbitrator's mandate by the parties shall not imply acceptance of the validity of any ground referred to in section 14(3) or 16(1).

NOTES

Section 17 is also based on Model Law, art. 14. It provides that an arbitrator ceases to hold office: on death (AA, s. 17(1)); by withdrawal from office under the challenge procedure in AA, s. 15 in respect of independence, impartiality or qualifications (AA, ss. 15(3) and 17(2)(a)); by reason of his removal from office under a court order following the challenge procedure (AA, ss. 15(4) and 17(2)(b)); or following the agreement of the parties (AA, s. 17(2)(d)). There is no provision for unilateral resignation, on the basis that if an arbitrator really wishes to leave then he should be able to reach agreement with the parties failing which he can be removed.¹

Section 17(2), echoing Model Law, art. 14(2), safeguards the arbitrator by providing that the withdrawal of an arbitrator or the termination of his mandate by the parties does not imply acceptance of any allegation of lack of independence, impartiality or qualifications, inability to act or failure to conduct the proceedings properly or with reasonable despatch.

1. LRRD No. 3/2001, paras 2.8.7–2.8.8.

Appointment of substitute arbitrator

18.—(1) Where an arbitrator ceases to hold office, the parties are free to agree:

(a) whether and if so how the vacancy is to be filled;

(b) whether and if so to what extent the previous proceedings should stand; and

(c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

(2) If or to the extent that there is no such agreement, the following subsections shall apply.

(3) Section 13 (appointment of arbitrators) shall apply in relation to the filling of the vacancy as in relation to an original appointment.

(4) The arbitral tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.

(5) The reconstitution of the arbitral tribunal shall not affect any right of a party to challenge the previous proceedings on any ground which had arisen before the arbitrator ceased to hold office.

(6) The ceasing to hold office by the arbitrator shall not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a presiding arbitrator.

NOTES

Section 18 closely follows AA 1996 (Eng), s. 27, which is itself based on Model Law, art. 15. It was decided to adopt the English model on the ground that the provisions of the Model Law were “an uneasy mixture of rules”.¹ In the case of a casual vacancy or judicial removal of an arbitrator, s. 18(1) states that the parties are free to set out a procedure for replacement, or to agree on nonreplacement, whether the proceedings are to stand and what the effect is of his removal of any appointment made by him. It is relatively unusual for arbitration clauses to deal with the appointment of replacement arbitrators, and in *Federal Insurance Co v. Transamerica Occidental Life Insurance Co Ltd*² Rix J held that wherever possible it was necessary to extend the agreement between the parties for the appointment of the first arbitrators to the appointment of replacement arbitrators, even if that meant some manipulation of the wording of the arbitration clause. In the absence of express agreement, s. 18(2) introduces fallback provisions.

Section 18(3) refers back to AA, s. 13 for the appointment of replacement arbitrators and for the default procedure in the event that no appointment is made. The original procedures apply even where an arbitrator has been removed by the court under AA, s. 17. In *Federal Insurance Co v. Transamerica Occidental Life Insurance Co Ltd* Rix J construed s. 18(3) as requiring the court to look at the agreement between the parties for the appointment of the original arbitrators, and that it was legitimate to import whatever aspects of the default provisions in the equivalent of AA 1996 (Eng) to AA, s. 13 as were necessary to render the arbitration clause applicable to the appointment of a replacement. It was there decided that a clause which required each party to make an appointment within 30 days of the other requesting arbitration could be given effect by importing AA, s. 13(3)(a)—a request for an appointment to be made—as the trigger for the running of the 30-day appointment period for a replacement.

Section 18(4) is a logical statement of the position where the tribunal has been reconstituted. The purpose of s. 18(5) is to preserve the right of a party to challenge those aspects of the arbitration which the newly constituted panel has allowed to stand. Accordingly, the fact that the arbitrators have been replaced does not prevent the applicant from challenging the final award.

Section 18(6) is a saving provision, protecting the validity of the appointment of any arbitrator or umpire made by the arbitrator in question prior to his ceasing to hold office.

1. LRRD No. 3/2001, para. 2.9.

2. [1999] 2 Lloyd's Rep 286.

Decision by panel of arbitrators

19.—(1) In arbitration proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by all or a majority of all its members.

(2) Any question of procedure may be decided by a presiding arbitrator if so authorised by the parties or all members of the arbitral tribunal.

NOTES

Section 19 reproduces Model Law, art. 29: see the Notes to that provision.

Liability of arbitrator

20.—An arbitrator shall not be liable for:

- (a) negligence in respect of anything done or omitted to be done in the capacity of the arbitrator; or
- (b) any mistake of law, fact or procedure made in the course of arbitration proceedings or in the making of an arbitral award.

NOTES

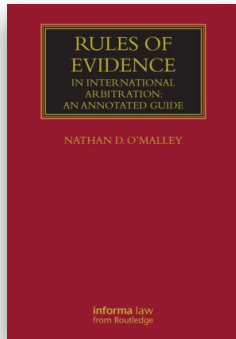
Section 20 is identical to IAA, s. 25: see the Notes to that section.

CHAPTER

2

Party-Appointed Experts

Chapter 2:: Party-Appointed Experts



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INTRODUCTION

5.01 There are essentially two modes of presenting expert testimony in an international arbitration. The first is through introduction by a party of an expert's testimony in support of their case. Such witnesses are often referred to as the "party-appointed" expert, a designation indicating that the expert is instructed and compensated by a party for his or her work. This approach is to be distinguished from the second mode of introducing expert testimony, which is the tribunal-appointed expert. As the phrase suggests, the tribunal-appointed expert is retained to work on behalf of the tribunal, and does not accept direct compensation for his work from either party, and is instructed by the tribunal. While chapter 6 will deal extensively with the use of tribunal-appointed experts, the following chapter is devoted to considering article 5 of the IBA Rules, which covers party-appointed expert witnesses.

5.02 The expert's opinion is generally given in regard to factual or other issues which present particularly difficult questions for a tribunal. Thus the role of the party-appointed expert in international arbitration is to contribute to establishing, through his or her specialist testimony, certain conclusions regarding particular aspects of a case. Often summarised as "technical issues", the questions submitted to an expert for consideration may in fact cover a wide variety of subject matter. In this respect, it is important to note that article 5 of the IBA Rules does not impose any limitations on which issues a party may submit expert testimony on, as that is a matter left largely to the determination of a party. However, as is discussed in the comments to article 5.1, the tribunal is equally free to ignore an expert's report if it is immaterial to the final award.

5.03 In the modern practice of international arbitration, the use of party-appointed experts has eclipsed the practice of leaving such appointments to the discretion of the tribunal, to become the most common mode of introducing expert testimony. This may be the case for any number of reasons, but it would seem there are grounds for both the parties and arbitrators to prefer party-appointed experts. For the parties, this may be the case because they have greater control over the matters that will be put to the expert for his or her opinion, which arguably pares down the potential for irrelevant testimony. For the tribunal, this approach may be preferred because it relieves the arbitrators of the logistical and procedural responsibility of appointing an expert.

5.04 However, despite this, there are counter arguments against the use of the party-appointed expert. In particular, some regret the development of the "battle



of the experts”, which is a reference to where two opposing experts testify in favour of contradictory positions, often employing hopelessly technical jargon that is seemingly irreconcilable. In such a case a tribunal may feel at a loss to determine which expert is correct. While such a possibility is accepted, as will be discussed in the comments below to article 5.4, techniques have developed for controlling such scenarios.

PARTY-APPOINTED EXPERT'S TESTIMONY IN INTERNATIONAL ARBITRATION GENERALLY

Article 5.1 2010 IBA Rules: party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

General discussion

5.05 The language in article 5.1, which includes the statement that “a party may rely on a Party-Appointed Expert as a means of evidence”, confirms the widely accepted view in international arbitration that the use of such experts by parties to support their case is acceptable. While for common law lawyers an affirmation of this principle may seem unexceptional, since party-appointed expert testimony is widely used in such jurisdictions, those of the civil law tradition may not as readily accept such a proposition. It is reported that the use of a party-appointed expert remains controversial in some civil law jurisdictions.¹ Thus article 5.1 serves as an important reminder that such testimony is generally admissible in international arbitration.

5.06 It should be further noted, however, that the general admissibility of such evidence does not affect the tribunal’s right to weigh and assign the value it regards to be appropriate to expert testimony.² The weighing of the evidence is a matter left to the discretion of the tribunal, as is stated in article 9.1 of the IBA Rules. In this respect, arbitrators may adopt the findings of one party-appointed expert as opposed to another as they see fit.³ It has been further considered that it is not inappropriate for the tribunal to adopt an expert’s choice of terms and expressions in the final award, if the tribunal is persuaded that such terminology is

useful to their determinations.⁴

1. See: generally the following discussion of party-appointed experts in Denmark: Jacob C. Jørgensen, "Expert Witness in Danish Arbitration", *ASA Bulletin*, vol. 26, No. 3, p. 479 (2008).

2. One commentator provided the following consideration of general approach to weighing evidence provided by party-appointed experts: "[T]he opinion of party-appointed experts is not merely argument but has its own weight depending on the competence and credibility of the expert. The position of these experts, thus, can be situated somewhere between that of a witness of fact and that of the parties' counsel." Michael E. Schneider, "Technical Experts in International Arbitration" *ASA Bulletin*, vol. 11, No. 3, p. 446 (1993).

3. This has been affirmed in a decision of an *ad hoc* annulment committee. In this instance, where the tribunal appeared to endorse one party-appointed expert's view over another, the *ad hoc* committee noted that to assign such weight did not constitute a departure from a fundamental rule of procedure: "In the view of the *ad hoc* committee, a Tribunal may rely in this connection on expert and other testimony with which it agrees and may disregard other testimony. That is one of its principal tasks...It is generally accepted that a Tribunal has in these matters substantial discretion and does not need to explain expert views. To further clarify its position, the *ad hoc* Committee also accepts that where a Tribunal agrees with one of the parties or with experts, it is not improper or unexpected for it to adopt the language used by them in the pleadings or in written testimony." *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Request for Annulment, p. 62 (20 August 2007).


4. *Ibid.*

Identifying the expert

5.07 Under article 5.1 the parties are required to identify any expert on whose testimony they intend to rely within the time frames set by the tribunal. In practice, such identification will often occur when the expert submits the first report in the case in accordance with the filing schedule set by the tribunal. However, under article 5.1 a tribunal is permitted to exclude testimony from an expert that is not identified in accordance with the established time frame.⁵ This may be particularly the case where a party reveals an expert witness within a short time prior to the hearing. In such circumstances, a tribunal may, after considering the merits of the proposed testimony, rightly determine that to admit the testimony of an expert, only recently proffered, would cause the adverse party to suffer unfair surprise.

The expert report

5.08 Article 5.1 states that experts retained by parties are expected to provide a written report. It is clear that the IBA Rules do not contemplate testimony from an



expert that is only provided orally. For many reasons this approach is advisable. Most importantly, as the expert report will often be quite complex and cover issues of a highly technical nature, both the tribunal and the opposing party should be provided with the report in advance in order to consider its contents fully and prepare challenges to the conclusions presented therein.

5.09 Similar to articles 3.1 and 4.1 of the IBA Rules in regard to documentary evidence and fact witnesses, the timing for the submission of the expert's report is usually identified in the schedule set by the tribunal. The customary timing for the submission of an initial expert report intended to support a case-in-chief or defence-in-chief is with the filing of the statement of claim or defence, as is the case with the filing of documentary evidence and fact witness testimony.⁶ However, a tribunal may exercise its discretion to admit expert reports filed after the deadline where it considers it appropriate to do so,⁷ and equally, it may reject an expert report that is belatedly filed if the circumstances would warrant it.⁸

5. This rule implicitly covers the duty to identify a fact witness who may provide expert testimony as well. See: the following description of an ICDR case, where a tribunal disregarded the expert report of a witness who had not previously been identified as an expert by the party presenting his testimony. Having already imposed a deadline for the submission of expert testimony, the tribunal refused to permit the expert analysis of the witness who had been presented as a fact witness. "[T]he Arbitrator issued Procedural Order No. 2, ruling that paragraphs 5 to the end of the witness statement of [the witness] constituted expert testimony submitted after the due date of the submission of expert reports, and would not be considered by the arbitrator." ICDR Case No. 15054T, Final Award, p. 3 (2008) (unpublished).

6. As an example, see: the procedural direction given in the following case in regard to the filing of the statement of claim and defence: "the Parties shall indicate in their written submissions to the Arbitral Tribunal the nature of evidence relied upon (exhibit(s), witness testimony, expert opinion, specifically designated documents to be produced by the other party, etc) by providing, with reasonable specificity, references to the exhibits and witness statements submitted in support of their allegations." ICC Case No. 13046, ICC *Bulletin*, 2010 *Special Supplement: Decisions on ICC Arbitration Procedure*, p. 94. See also: the following excerpt from the procedural history in *Duke Energy v Ecuador*, "On 2 September 2005, the Claimants submitted their Memorial in Chief accompanied by supporting documents as well as (...) the expert reports of [the five experts]". Dietmar W. Prager and Ana Frischtak, " *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador* , ICSID Case No. ARB/04/19, 18 August 2008", *A Contribution by the ITA Board of Reporters*, para. 81. See also: Schneider's confirmation of this principle, "The opinions of party-appointed experts often are expressed in writing and produced with the pleadings." Schneider, *supra* n. 2, p. 447.

7. See: the affirmation of this principle by an *ad hoc* committee in regard to an ICSID tribunal's power to admit late evidence: "The Committee has no doubt that under these provisions, a tribunal has the power to accept the filing by a party of an expert report after the deadline fixed for such filing, if the tribunal considers that there are good reasons for so doing." *Enron Creditors Recovery Corp and Others v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of

the Argentine Republic, para. 188 (2010).

8. See: the rule adopted by the tribunal in ICC Case No. 12761: "The technical opinion of the individuals who have not been identified as experts by the parties in their respective evidential proposal writs, or whose Expert Report has not been presented on the abovementioned date, will not be admissible." ICC Case No. 12761, *ICC Bulletin, 2010 Special Supplement: Decisions on ICC Arbitration Procedure*, p. 74.


THE CONTENTS OF THE EXPERT REPORT

Article 5.2 2010 IBA Rules: The Expert Report shall contain:

- (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her back-ground, qualifications, training and experience;**
- (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;**
- (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;**
- (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;**
- (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;**
- (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;**
- (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report; (h) the signature of the Party-Appointed Expert and its date and place; and**
- (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.**

General discussion

5.10 Article 5.2 of the IBA Rules sets forth the general criteria to which an expert




report should conform. These criteria may be followed as a means of ensuring that the information necessary for the tribunal to assess the validity and weight of the expert's conclusions is included in the report, and to afford the adverse side, including its own experts, the fair opportunity to respond. In regard to the latter point, there is also a case to be made that the efficiency of the proceedings is enhanced when the parties adhere to the format set forth in article 5.2. This is so, because across-examination of party-appointed experts may be conducted with greater efficiency if background information is included with the report in advance of the hearing as such disclosure may limit the need for foundational questions.

5.11 While some of the subparagraphs of article 5.2 are included for reasons that are self-evident, such as a requirement that the expert provide his or her full name under subparagraph (a), other requirements have from time to time given rise to controversy. Issues that have led to debate include, the duty incumbent on the expert to describe their instructions in subparagraph (b), the statement of independence set forth in subparagraph (c) (and the duty to disclose relevant relationships under 5.2(a)) as well as the duty to disclose the documents relied on in subparagraph (e). In regard to the subparagraph (b) and the requirement to disclose instructions, the question of whether the communications between a retained expert and legal counsel are covered by privilege may arise. Further, the required statement of independence set forth in subparagraph (c) may also be controversial insofar as it is often debated whether a party-appointed expert may be considered independent and, if so, to what extent does a perceived or real lack of independence impact upon the admissibility and weight to be given to a report. These and other issues are discussed more fully below.

The independence of a party-appointed expert

5.12 In regard to the independence of party-appointed experts, it is instructive to compare the requirements set forth in article 6 of the IBA Rules concerning tribunal-appointed experts and those pertaining to the party-appointed expert in article 5. Whereas article 6.1 presupposes that the tribunal-appointed expert will be independent, no such prerequisite is noted in article 5.1. Instead, in article 5.2 a party-appointed expert is required to provide a "statement of independence from the Parties, their legal advisers and the Arbitral Tribunal" and to disclose details of relationships with any of the parties or legal advisers as per 5.2(a). This statement is to be included in the report itself, indicating that a determination that the party-appointed expert is sufficiently independent is not a prerequisite for admitting the report into the record. Here too a contrast can be made to article 6.2,



where the tribunal-appointed expert is required to disclose any details affecting his or her independence prior to being appointed, and before any testimony is to be admitted.⁹


5.13 The divergent approach to independence found in articles 5 and 6 may be explained on the basis of the different roles performed by the two categories of expert. For the tribunal-appointed expert, a lack of independence may be grounds for terminating his or her appointment because independence is central to such expert's obligation to observe neutrality in the performance of his or her duties on behalf of the tribunal.¹⁰ Clearly, where the tribunal-appointed expert has a connection to a party or its advisers, which is of such degree as to prima facie cast doubt on his or her impartiality, justifiable doubts may arise as to whether the expert is capable of acting for the tribunal. Where such doubts exist, due process will require the tribunal to appoint a different expert. **5.14** Concerning the party-appointed expert, it is clear from the outset of the appointment that this expert is acting at the instruction of a party.¹¹ Therefore, it would appear inconsistent for a tribunal to consider the "independence" of an expert who is paid and instructed by a party, in a manner similar to a tribunal-appointed expert.¹² The more workable interpretation of article 5.2(c) (and the disclosure

9. Speaking in regard to art. 5 generally, Jones notes the following: "Article 5 now requires the party-appointed expert's report to contain a statement of independence from the parties, from their legal advisors and from the arbitral tribunal. This requirement is not as robust as that for tribunal-appointed experts who must provide a statement of independence before appointment, thereby ensuring the expert's mind is focused upon his or her paramount duty to the tribunal before he or she has a chance to identify with the case of either party." Doug Jones, "Party Appointed Experts: Can They be Usefully Independent?", *Transnational Dispute Management*, vol. 8, No. 1, p. 7 (February 2011).

10. See: generally, the comments to art. 6.2. See also: noting that under English procedural law experts owe a duty of independence to the court, which is defined as meaning that the expert witness would provide the same opinion if given the same instructions by another party, Gaffney and O'Leary make the following observation: "The authors suggest that this principle does not find expression in the IBA Rules, at least insofar as party-appointed experts are concerned...The position is arguably different in the case of tribunal-appointed experts." John Gaffney, Gillian O'Leary, "Tilting at Windmills? The Quest for Independence of Party Appointed Expert Witnesses in International Arbitration", *Asian Dispute Review*, July 2011.

11. Tribunals have in the past pre-supposed that a party-appointed expert was acting "for" a side, going so far as to consider the expert as part of a party's team. See: the following position adopted by an ad hoc tribunal constituted in Dubai, UAE: "At the opening of his examination, each expert must state the extent to which he confirms as expert witness the explanations which, as a member of a Party's team, he has given to the Arbitral Tribunal during May 1991 Hearing." "Documents 15-30", *ASA Bulletin*, vol. 11, No. 3, p. 465 (1993).

12. See: the following comments of Harris regarding art. 5.2(c) and 5.2(a): "In opting to focus more



strongly on the independence of the expert than his or her impartiality, the IBA subcommittee has preferred the (possible) outward manifestation of the partiality over tests which focus on the arguably more relevant but less tangible state of mind of the expert. Whilst that is legitimate per se, and is indeed the route taken by some notable institutional rules and arbitration laws, the disclosure of connection in this way is a rather blunt instrument, as it is the quality of those connections which is really of more importance. Indeed there is an inherent tension between the concept of independence and a relationship of retainer, such as the relationship between a party and the expert it appoints and pays." Christopher Harris, "Expert Evidence: The 2010 Revisions to the IBA Rules on the Taking of Evidence in International Arbitration", *International Arbitration Law Review*, vol. 13, No. 5, p. 212 (2010). The view that there is a different intent as to independence with respect to tribunal-appointed experts as compared to party-appointed experts, may not be shared by all, as is evident in an article by Sachs and Schmidt-Ahrendts, "By aligning the requirements for a party-appointed and tribunal-appointed experts, the 2010 IBA Rules stress that both type of experts, at least in principle, are subject to the same standards of quality, accuracy and independence.", and further, "...art. 5.2(a) and (c) highlights the fact that the party-appointed expert has to be impartial and independent." Dr Klaus Sachs, Dr Nils Schmidt-Ahrendts, "Expert


requirements of 5.2(a)), would be to view these conditions as relevant to a tribunal's weighing of the probative value of the expert report, and not as a matter of admissibility. Indeed this is an approach commonly adopted in international arbitration, as the comments of one well-experienced tribunal chairman, who possesses a civil law background, indicates:

"...when counsel in an arbitration starts to question the independence of experts, I always say there are no independent experts from the moment they are paid by the parties. That's an objective point. From the moment you are paid by a party, objectively you are not independent. The problem is the reliability of your report."¹³

5.15 This view captures the approach widely adopted in modern practice. In international arbitration, a tribunal may admit and give weight to testimony provided by experts who have a commercial relationship with a party, including one of employment¹⁴ or, previous and on-going consultancy.¹⁵ This principle also holds

Evidence Under the 2010 IBA Rules", *International Arbitration Law Review*, vol. 13, No. 5, pp. 217–218 (2010).

13. NAI Case No. 3702, Comment of 18 May 2011 [Hearing Transcript] (unreported). See also: Harris' general agreement with this approach although he acknowledges that the wording of art. 5.2(c) may support the view that the disclosure statement regarding independence could give rise to challenges on the question of admissibility: "One particular concern is whether the new disclosure requirements will lead to challenges being made to experts appointed by the other party (...). Whilst the better view is that the purpose of disclosure of such relationships is to enable the tribunal to take these matters into account for the purpose of determining the weight to give to an expert's evidence, the disclosure requirements give credence to the suggestion that such matters may properly form the




basis for a challenge.” Harris, *supra* n. 12, p. 213. On this point one may have further reference to the Chartered Institute of Arbitrators approach to the question: “An expert’s opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party.” Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (“CI Arb Protocol”), art. 4.1. Conspicuously absent from the requirement is that the witness is “independent”. Nevertheless, the CI Arb Protocol does contain a disclosure requirement similar to art. 5.2(c) as well as an express statement in art. 4.2 that the mere fact that an expert is paid for his or her analysis does not “vitiates an expert’s impartiality”. One may consider that the Protocol’s view is that impartiality and not independence is the issue which the tribunal should be most concerned. By analogy, one may further consider that the disclosure statement in art. 5.2(c) should be viewed as ultimately establishing the impartiality of an expert, or lack thereof.

14. See: the view of a panel of the Iran–US Claims Tribunal which rejected the challenge by the respondent to the claimant’s expert arguing that the report was per se unreliable because the expert was an employee of the claimant: “Mr. Thorne is a leading officer of the Claimant company and the President of SISA. In that last capacity he was ultimately responsible for the maintenance of the rigs. Although the Tribunal in principle does not accept NIOC’s objection to Claimant’s experts as unreliable because of their alleged master–servant relationship with Claimant, Mr. Thorne’s close affiliation to Claimant and SISA could quite naturally have caused a certain subjectivity (which must be distinguished from bad faith) to taint his assessment.” *Sedco Inc v Iranian National Oil Co and the Islamic Republic of Iran*, Award No. 309-129-3, para. 75 (7 July 1987). Although noticeably reserved in its comments, the following Danish Building and Construction Arbitration Board tribunal provides an interesting consideration of this issue: “The disputed exhibits contain among other things descriptions of observations made by the employees of the contractor in connection with the repair, as well as descriptions of the measures taken in the remedying of the works. Those of the contractor’s employees who participated in remedying the defects can in any event be cross-examined about these issues. Even though the reports contain assessments as to the underlying causes of the defects, the claimant should not be prevented from submitting the reports, in a situation where a joint expert survey is no longer possible and where the arbitrators have technical insight. This said, we have not decided on the evidential value of the exhibits.” Jørgensen, *supra* n. 1, p. 482.

15. In an LCIA arbitration the tribunal received an expert report from an accounting expert who disclosed that he had previously provided services on behalf of a shareholder to one of the parties. These services had impacted upon an agreement that was relevant to the proceedings. The tribunal, considering the nature of the work the expert had performed, noted the following: “[The Expert] explained his view,

true in regard to connections between an expert and an adverse party¹⁶ and to some extent, connections between a party-appointed expert and the arbitral tribunal.¹⁷ Reviewing courts in some jurisdictions have gone so far as to affirmatively state that the mere existence of a relationship between the expert and the party presenting his or her testimony does not constitute grounds for excluding the expert’s evidence.¹⁸

¹⁶this background knowledge had not been of relevance to the instruction to carry out the production




of [his] expert report and subsequent addenda and that the work has not prevented [him] in any way from forming an independent view on the matters set forth' in that report and addenda. The tribunal concludes that [the expert's] independence has not been impaired by virtue of that connection." LCIA Case No. 81079, Final Award, para. 138 (2009) (unpublished).

16. In *Jan de Nul v Egypt*, an ICSID tribunal was requested by the claimants to strike from the record a report submitted by an expert for respondent, because the expert had previously been a member of the board of directors for one of the claimants, and was not impartial. Here the tribunal noted as follows: "Whereas the Tribunal is mindful of the Claimants' allegations and of their significance, it believes that they are not of such nature as to make the report co-authored by Mr. Taillé inadmissible at this stage. The Tribunal first notes that Mr. Taillé is just one of two co-authors of the report and that no objection was presented against his co-author Mr. Brossard. The Tribunal further takes into account that the Claimants will have an opportunity to cross-examine Mr. Taillé at the hearing. On the basis of such oral testimony, the parties may then comment on the value of Mr. Taillé's evidence and the Tribunal will be in a better position to assess such value and to decide what weight to give to Mr. Taillé's evidence, if any. This ruling is made without prejudice to any later determination on the evidentiary weight or relevance." *Jan de Nul & Dredging International v the Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Final Award, para. 28 (2006). The tribunal's emphasis on the ability of a party to cross-examine the expert in question, is consistent with the overall principle that any ties between an expert and a party do not automatically disqualify the expert from rendering testimony, but rather go to the weight to be assigned his or her report. See also: *Helnan v Egypt* where an ICSID tribunal noted an allegation that an expert was or had been an employee of the party which proffered his testimony, but refused to exclude the report: "On 27 September 2007, Claimant requested the Tribunal to strike Mr Mounir Doss's [Respondent's expert witness] expert witness statement from the record and preclude him from testifying. Claimant claimed that Mr Mounir Doss was a former employee of Helnan who was working for the Respondent's legal team making him unqualified to testify as an independent expert witness. On 28 September 2007, the Centre, on behalf of the Tribunal, requested Respondent to provide its comments in regard to Claimant's request relative to its expert witness. On 2 October 2007, the Centre communicated the Respondent's reply. Respondent stated that Mr Mounir Doss had left Helnan employment under favourable circumstances and contested the allegation that he now worked for Respondent. On 3 October 2007, the Tribunal stated that it would accept Mr Mounir Doss' witness statement while taking into consideration the Parties' observations." Dietmar W. Prager and Joanna E. Davidson, " *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No. ARB/05/09, 7 June 2008", *A Contribution by the ITA Board of Reporters*, paras 39–42.

17. In *World Duty Free v Kenya*, the tribunal admitted into the procedure an expert opinion by Lord Mustill on English law, even though the expert shared chambers with a member of the tribunal. While accepting Lord Mustill's statement on the law, the tribunal noted that it would not accept any representations by Lord Mustill concerning the facts or legal outcome of the case based on the facts. *World Duty Free Co Ltd v Republic of Kenya*, ICSID Case No. ARB/00/7, Final Award, paras 50 and 163 (2006). Because connections between a party and an arbitrator are fertile ground for challenges of bias brought against the arbitrator, or a final award, a cautious approach to the contacts between a party-expert and an arbitrator is warranted.

18. See: for example, the view of the English courts: "On the question of independence, Mr. Brazier had no connection with Mr. Black prior to his retainer for the purposes of the arbitration, but in any event there is no rule of law that an expert witness may not be connected with a party. I have no doubt that a court or arbitral tribunal has jurisdiction to refuse to hear an expert witness on grounds of lack of independence, but it is essentially a procedural matter. For example, in small claims it is



not uncommon for a party to use an in-house expert so as to save costs. The evidence of such a witness may carry less value in the eyes of the tribunal, but that is a matter for the tribunal.” *Brandeis Brokers Ltd v Black*, 2001 WL 513189 (QB 2001) p. 14. See further, the view of the US courts whereby a US district court noted that failure to disclose an underlying business relationship between a party-appointed expert and the party that proffered his testimony was not a reason to set aside a final award. *Trevino Hernandez, S de RL de CV v Smart & Final Inc*, Lexis 60755 (SD Cal. 2010).

Therefore, a party-appointed expert’s relationship with the appointing party should generally not be a basis for barring such a report from the record.


5.16 Further to the above, it appears uncontroversial in international arbitration that an expert’s relationship with a party or its legal advisers may be considered as a factor in assessing the weight that should be given his or her conclusions. This does not mean, however, that such ties, or a lack of them, will be determinative of whether the expert has shown independence in performing his or her work. A tribunal may be far more interested in the professionalism with which the expert conducted the analysis¹⁹, and the consistency in his or her testimony, when determining whether an expert is truly independent.²⁰ Thus the statement required by article 5.2(c) and 5.2(a), may be only one of several factors considered by the tribunal when appraising the independence and impartiality with which experts approached their mission.²¹

Factual assumptions and documents relied upon

5.17 Essential for the critical evaluation of an expert’s testimony is a full description of the factual basis upon which his or her conclusions are based. ²² Typically, an

19. In ICC Case No. 7365, the tribunal seated in Zurich, Switzerland, reviewed the method applied by the party-appointed expert to determine that requisite thoroughness and professionalism had been demonstrated, permitting the tribunal to regard the report as “evidence” of certain conclusions. “Although the [experts] acted as party-appointed experts, their professional competence and the approach justify to accept the [expert’s] reports not merely as argument, but as evidence, subject to the Tribunal’s assessment of the credibility of the experts’ opinion with respect to the various factual elements.” ICC Case No. 7365, Final Award, para. 14.5 (1997) (unpublished).

20. See: the following considerations of a Society of Maritime Arbitrator’s tribunal: “Mr. Sykes’ testimony and preferred method for calculating fair market rates differed from that used by Seacor’s other experts. Indeed, there were instances where Mr. Sykes both contradicted himself and brought his claimed “independent” and “expert” status into question. Rather than rely upon his own expertise and independent research to form his opinion, Mr. Sykes used operational data supplied to him by Seacor and then modified his calculations based upon opinions offered by Seacor’s other experts.” *Seacor Offshore Inc Ltd v US Bancorp Leasing*, Decision as to Motion to Dismiss, Final Award




SMAAS, WL 34461643 (2002). See also: the considerations of the tribunal in ICC Case No. 12706, seated in Singapore, in which the technical testimony of an employee for the claimant was given dispositive weight. "CW4, who is the technical services manager of the Claimants, is in my view, a credible and reliable witness who gave straightforward answers to questions asked of her during cross-examination." ICC Case No. 12706, Partial Award, para. 10.32 (2005) (unpublished).

21. Kantor provides a useful consideration of the independence criterion as it relates to expert witnesses. He identifies that the following duties are inherent to the notion of "independence" as it exists under the IBA Rules, "(1) a duty to disclose material relationships with respect to the parties, their affiliates, counsel or the dispute, including compensation arrangements; (2) a duty to provide 'full information' even if adverse: to include in any written and oral evidence all material information, whether supportive or adverse to the professional analyses and conclusions found in that expert's evidence; and (3) a duty to assess reasonableness (4) a duty to use diligence to assess, to the extent the expert has the professional background to do so, the reasonableness of assumptions provided by counsel or a party on which that expert relies in the expert evidence." "A Code of Conduct for Party-Appointed Experts in International Arbitration—Can One be Found?", *Arbitration International*, vol. 26, No. 3, p. 374 (2010).

22. Consider, the following determination of an ICDR tribunal to reject an attack on the sufficiency of a party-appointed expert's report, based upon the description of the information considered by the expert: "Respondents' broadly assert that the 'documentation remains insufficient' to justify the claims made in this arbitration. This is apparently a criticism of [the expert] ... [the expert] and his staff spent many hours investigating, analyzing and documenting the payment of [the project] expenses. They then incorporated their findings in a comprehensive report supported by detailed schedules. Backing up the text and schedules are literally boxes of documentation gathered from third parties. Respondent's vague claim that all of this is somehow inadequate is rejected." ICDR Case No. 50168, Final Award, p. 18 (2006) (unpublished).

expert will have reviewed considerable documentation over the course of reaching his or her conclusions. It is a customary rule in international arbitration that relevant information should be produced with the report, if relied upon by the expert to reach his or her conclusions, as is reflected by articles 5.2(d) and 5.2(e). Such evidence should be disclosed even where the expert has considered documents which are publicly available, or, at the very least a party should provide details allowing the adverse party and the tribunal to locate the publicly available information.²³ While a tribunal may admit a report that does not append relevant documents to it,²⁴ failure by a party to produce the relevant documents after being ordered to do so, may be cause to disregard the expert report, as was the situation in the Iran–US Claims Tribunal case, *Fredrica Riahi v Iran*: "The Tribunal cannot give credence to a party's valuation report premised on evidence that that party refused to produce. This is especially true where, as here, the Tribunal specifically ordered the production of that very evidence."²⁵ All may not follow this approach; nevertheless, a failure to produce underlying documentation could have a potentially negative effect upon the weight assigned to the report.²⁶



5.18 There are few objections that are open to the party seeking to resist production of the documents that its own expert has relied on. In the past, some have resorted to raising claims of burden where the information is arguably voluminous. Tribunals have generally rejected such objections, reasoning that a party's right to examine the evidence used by an expert to arrive at his conclusions outweighs the burden imposed in producing it.²⁷ This view accords with basic notions of procedural fairness which require that the adverse party should at all times be adequately allowed to challenge an expert's conclusions if they are potentially material.

23. In the *Methanex v US* case, the UNCITRAL tribunal was confronted with a refusal by the claimant to produce documents relied upon by the proffered expert. Arguing that the information which had been relied upon was voluminous and public information, with the exception of one internal survey, the claimant sought to be excused from this provision of the IBA Rules. The tribunal responded as follows: "Whilst the Tribunal accepts the reluctance of Methanex at this stage of the proceedings not to burden the Tribunal unnecessarily 'with voluminous and often highly technical scientific papers and reports on which [Methanex's] expert reports rely...', that consideration does not apply to the USA currently studying Methanex's Expert Reports. Accordingly, as regards the USA, Methanex's Expert Reports must comply fully with the requirements of the IBA Rules and the Tribunal's orders; (A) As regards the 'public information', the identification of this information should be provided by Methanex to the USA and its designated experts, as requested by the USA; and (B) As regards the 'survey', access to this documentation should be provided to the USA and its designated expert witnesses, as requested by the USA." *Methanex Corp v United States of America*, NAFTA/UNCITRAL, Order of 10 October 2003, p. 1.

24. As was noted by the tribunal in ICC Case No. 11258, when faced with a request to strike witness statements from the record for failure to include documents cited to by the witnesses: "...it is not for a tribunal to determine on the content of declarations made by third parties to the arbitration, namely witnesses." ICC Case No. 11258, Final Award, para. 120 (2004) (unpublished).

25. *Frederica Lincoln Riahi v The Government of the Islamic Republic of Iran*, Interlocutory Award No. ITL 80-485-1, para. 517 (10 June 1992).

26. See: the decisions in the Iran-US Claims Tribunal case *INA Corp v Iran*: "INA argues that the Tribunal has been furnished with insufficient information as to the basis of the Amin valuation, the principles on which it was undertaken and the documents and data on which it was based, for it to be accorded any evidential value. The Tribunal's Order of 21 January 1983 required production *inter alia* of the material which had been made available to Amin & Co but no such material was filed and the Respondent contended at the hearing that it was too voluminous to be conveniently assembled. The tribunal decided to admit the Amin Report as evidence but to take account of the lack of supporting documentation in assessing the evidential weight to be accorded to it." *INA Corp v Islamic Republic of Iran*, Award No. 184-161-1, para. 6 (13 August 1985).

27. *Ibid.* See: ICC Case No. 11258 where the respondent resisted the request for the production of documents relied upon by its expert witness claiming that they would be burdensome to produce. The tribunal responded by rejecting such an argument and ordering production. ICC Case No. 11258,

Disclosure of an expert's instructions

5.19 Generally, the inclusion of an expert's instructions in a report is helpful for the tribunal and the adverse party to have a sense of the scope of the expert's analysis. In this regard, article 5.2(b) calls on the expert to include a "description" of the instructions provided to him or her. Thus this reference to instructions should be seen as a general requirement to provide an overview of the scope of the instructions under which the expert prepared his or her report — a line by line recitation of the instructions is not generally required.


5.20 In some circumstances however, it may be appropriate under article 5.2(b) for an expert to reveal their instructions in greater detail. In this respect the *Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* ("CI Arb Protocol") is helpful.²⁸ Article 5 of the CI Arb Protocol states that while instructions and terms of appointment shall not be regarded as "privileged", a tribunal should not, unless there is good cause, allow or require those instructions, or appointment documents to be disclosed or further permit the questioning of the expert witness on this issue.²⁹ Moreover, article 5(2) of the CI Arb Protocol also makes clear that drafts, working papers or other documentation created by an expert for the arbitration should be regarded as privileged. In order to reconcile article 5 of the CI Arb Protocol with article 5.2(b) of the IBA Rules, one could take the approach that a description of an expert's mandate is appropriate for inclusion with his or her report, but further questioning or investigation of that point should not be allowed unless a bona fi de issue has been raised as to the suitability of the expert's instructions. In this way a balance between allowing the consideration of the expert's instructions, while preventing irrelevant and unnecessary questioning to occur, can be achieved. It should also be noted that where privilege questions are considered, a tribunal must take account of the mandatory ethical or legal impediments which a party may be required to adhere to under IBA Rules article 9.2(b).

Affirmation of an expert's genuine belief in the opinions expressed

5.21 The 1999 version of the IBA Rules required the party-appointed expert to affirm the truth of the report. This approach has been modified in the 2010 version

supra n. 24, Procedural Order No. 4, p. 5 (2003) (unpublished). Discussed further in the comments to art. 9.2(c).

28. Chartered Institute of Arbitrators, *supra* n. 13 . While a number of points in this chapter are taken



from the CIArb Protocol, the reader is advised that this document, taken as a whole, may not be considered as indicative of international arbitration practice. See for instance, the view of Kantor, who notes the criticism the CIArb Protocol has received for, “following too closely the practice of English Courts”, Mark Kantor, *supra* n. 21, p. 332. However, the CIArb Protocol does contain some helpful suggestions, even if to adopt the entire document may not be consistent with general arbitral practice.

29. While not concerning “instructions” per se, in ICC Case No. 11258 a tribunal of well-experienced arbitrators of mixed civil and common law backgrounds declined to order the production of an expert’s notes that had been made during an interview with the instructing party’s representatives. ICC Case No. 11258, *supra* n. 24, para. 116.

of the rules to reflect the fact that an expert’s role is to provide a genuine analysis, and not to attest to the truth of certain facts. In this context it may be considered that one should not be held to guarantee the correctness of the facts underlying an analysis. Rather, it is for the expert to provide a reasoned view that applies, in good faith, his expertise to the question at hand. Thus the correction to the affirmation set forth in the 2010 version of article 5.2(g), which now requires the expert to assert his or her genuine belief in the opinions expressed in the expert report, was welcomed as a more accurate condition reflecting the role of an expert.³⁰ This change should not, however, be seen to lower, or call into question the duty incumbent on experts to provide accurate descriptions of the facts they are informed of, and have relied upon, and to answer questions concerning their report with truthfulness. The duty to act with honesty in the presentation of their findings remains binding upon experts under the IBA Rules.³¹

5.22 The utility of oaths, or formal affirmations in international arbitration, has been questioned by some.³² Nevertheless, a general consensus on this issue has not yet been achieved as there are notable examples of tribunals requiring a experts to affirm the genuineness of their testimony, or otherwise provide the expert report under oath.³³ This may be influenced largely by the legal culture of the parties or the members of the tribunal, or the requirements of the *lex arbitri* and procedural rules,

30. Harris notes that, “whilst witnesses of fact give evidence of fact from their own knowledge, and therefore an affirmation of truth of that evidence is appropriate, for expert witnesses what is important is the opinions they state represent their genuine professional views and have not been unduly influenced by the party instructing them.” Harris, *supra* n. 12, p. 213. However, it should be noted that some tribunals did follow the previous formula as found in the 1999 version of the IBA Rules. See: for example the Nobel Ventures v Romania Procedural Order No. 2, referred to in the final award: “Unless otherwise agreed by the Parties: Examination of witnesses and experts presented by Claimant. For each: a) Affirmation of witness or expert to tell the truth.” Dietmar W. Prager, “*Noble Ventures Inc v Romania*”, ICSID Case No. ARB/01/11, 12 October 2005”, *A Contribution by the ITA*

Board of Reporters .

31. In the *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* case before the English courts, it was considered whether a witness who had acted as a quasi-expert, had deliberately misled the arbitral tribunal constituted under the ICC Rules who had also applied the IBA Rules to the proceedings. The specific issue was whether in his written report, and in his presentation at the hearing, the expert had made misleading statements, improperly enhancing the probative value of certain test results that were favourable to his findings, and also, had concealed the existence of test results demonstrating inconsistent conclusions. It was demonstrated before the court that the expert was aware of the inconsistencies in his statements at the time of making them. Upon reviewing the written analysis which the expert had provided, as well as the power-point presentation which had been made to the tribunal, the court found that indeed the expert had misled the arbitrators concerning these facts underlying his analysis: "This was serious deception of the tribunal by the head of the Research and Development Department of GTT who had been deputed to present GTR's technical case to the tribunal. That is fraud by GTT as a party to the arbitration for the purposes of section 68(2)(g) of the Arbitration Act." *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm), para. 291. While in this instance the expert was affiliated closely with a party, it is submitted that a similar result could occur where an outside expert colludes with a party to misrepresent aspects of the technical analysis presented to the tribunal. Thus the IBA Rules should be read as consistent with the universal requirement that experts testify with honesty regarding their findings and the basis for their conclusions.

32. Kantor reports the following in regard to oaths administered to experts: "Many international arbitrators do not in any event consider the administration of an oath to be part of international arbitration." Kantor, *supra* n. 21, p. 327.

33. See: the procedural instruction in ICC Case No. 12761. "The Expert Report will be sworn on oath and shall: (a) state the name and address of the expert, their relationship with the Parties and a curriculum vitae which evidences their technical knowledge; (b) be signed by the expert, indicating the place and date of the signature." ICC Case No, 12761, *supra* n. 8, p. 74. See also: the admonition by the chairman of the tribunal in ICC Case No. 14069, provided in accordance with Swiss law. "You will be heard today as an expert witness before a private arbitral tribunal ... it is my duty to draw your attention to the fact

but it would seem that where an affirmation is required, the formula set forth in article 5.2(g) is to be generally preferred in respect of expert witnesses unless mandatory law would require another formulation.³⁴ Additionally, there is a discernable practice in international arbitration in favour of requiring experts to affirm a duty to assist the tribunal in establishing the facts of the case. An example may be drawn from an LCIA arbitration, where the following description of an expert's statement on this point was included: "[The Expert] made a declaration in his Expert Report, and again before the Tribunal, in which he recognized that his duty to the Tribunal overrides his obligation to the party who engaged him".³⁵ It seems clear that this practice is heavily influenced by common-law procedure, but the use of such statements in international arbitration seems to have gained acceptance amongst some civil law arbitrators as well.³⁶ Although such

affirmations may be applied congruently with the IBA Rules, it should be noted that art. 5.2 does not impose this requirement.

REBUTTAL EXPERT REPORTS

Article 5.3 2010 IBA Rules: **If Experts Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties re-vised or additional Experts Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.**

General discussion


5.23 Article 5.3 addresses the submission of expert reports after the initial filing of a report in support of the case-in-chief or defence-in-chief. As in the case with rebuttal documentary evidence and fact witness statements, such latter submissions will often be restricted to reports that fit the category of rebuttal or reply evidence. This is made evident by the wording of article 5.3 requiring such reports to "respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions". 5.24 The rule set forth in article 5.3 generally affirms the tribunal's right to require parties to submit responsive expert reports that are narrowly tailored

that false testimony is a criminal offence under Swiss law, and I would like you to confirm to the audience that you will tell the truth?" ICC Case No. 14069, Transcript, pp. 469–470 (2009) (unpublished).

34. See: the comments to art. 8.4 for a further discussion of the use of oaths and affirmations in oral hearings.

35. LCIA Case No. 81079, *supra* n. 15, para. 138. 36. See: the following admonition of the chairman of an NAI tribunal: "I also insist to say that you are here to assist not the parties but the Arbitral Tribunal to reach a solution to the issues in dispute." NAI Case No. 3702, *supra* n. 13, p. 374, ln.1–12.

to issues and properly considered points of rebuttal.³⁷ In some instances, a tribunal may be inclined to accept an expert's statement to the extent the report is



responsive to a previous statement, but otherwise reject those aspects that are not.³⁸ Naturally, a party should be afforded the opportunity to respond to material points raised by the adverse side, thus a tribunal will often consider that fairness will require it to permit expert testimony to be revised, and resubmitted if needed to address a technical point that has been raised.³⁹ For a further consideration of rebuttal evidence, the reader is directed to the comments to article 3.11.

ORDERING PARTY-APPOINTED EXPERTS TO MEET AND CONFER

Article 5.4 2010 IBA Rules: **The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.**

37. See: generally the comments to art. 3.11 as to what is considered “rebuttal” evidence in international arbitration. As a general example of the exercise of this procedural discretion, see the following procedural determination of the tribunal in an NAFTA/UNCITRAL arbitration: “By July 5, 2007, the Claimants file their Rebuttal Memorial on Jurisdiction with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Respondent’s Reply memorial or regarding new evidence.” *Consolidated Cases Concerning the Border Closing Due to BSE Concerns* (Canadian Cattlemen for Fair Trade v United States of America), Award on Jurisdiction, UNCITRAL/NAFTA, para. 14. (2008).

38. The past practice of international tribunals has often been to evaluate the nature of the evidence that was submitted to determine that it meets the standard of “rebuttal evidence”. It follows that where particular evidence does not meet that standard it should be excluded, and conversely, where it does it should be admitted. See: the following ruling of the Iran–US Tribunal: “It is evident that all of the material contained in these items was available to Iran and could have been submitted to the Tribunal with Iran’s earlier filings. As such, the Tribunal finds that these items do not constitute proper items of rebuttal, which the Tribunal has described as “material submitted in response to specific evidence previously filed. The Tribunal concludes that all exhibits submitted...are inadmissible.” *Eastman Kodak Co v the Government of Iran*, Award No. 514-227-3, para. 6 (1 July 1991). See also: the ruling of the Iran–US Claims Tribunal in *Teichman Inc v Hamdan Glass Co*, “On examination, much of what it contains does not appear to fall within the definition of “rebuttal” as being material page submitted in response to specific evidence previously filed. It consists largely of new material, presented in support of Hamadan’s defence and counterclaims, and seemingly unrelated to any of the documents filed in evidence by Teichmann. The admission of such a document so close to the hearing date would effectively deprive the opposing party of an opportunity to examine and rebut a large body of new material. The Tribunal, therefore, decides not to admit this document in evidence.” *Henry F. Teichman Inc v Hamdan Glass Co*, Award No. 264-264-1,

para. 23 (12 November 1986) .

39. See the following affirmation of this principle by a CAS tribunal applying Swiss law: "Under the *Swiss Private International Law Act* , the right to be heard in adversarial proceedings specifically guarantees each party's right to participate in the evidentiary proceedings, to rebut allegations made by the opposite party, to examine and criticize evidence adduced by the opposite party and to bring its own evidence in rebuttal before an award is rendered to its detriment." *S. v Fédération Internationale de Natation (FINA)* , Award of 19 October 2000 – CAS 2000/A/274 in Matthieu Reeb (ed), *Recueil des sentences du TAS / Digest of CAS Awards II 1998–2000* , p. 400.

General discussion

5.25 As noted at the outset of this chapter the utilisation of party-appointed expertise creates the propensity towards the so-called "battle of the experts". It has been rightly noted that this outcome does not serve the search for truth very well, as a tribunal's understanding of the technical nature of a case is generally not helped by the submission of conflicting expert reports on matters of a technical nature.⁴⁰ In such situations the tribunal may be simply at a loss to determine which technical expert report is to be afforded greater weight.

5.26 To deal with such situations, various procedural tools have been developed for wading through the technical mire that may exist where there are multiple, conflicting, party-appointed expert conclusions. One such procedural tool is restated in article 5.4 where it is noted that a tribunal may require the experts to meet and confer in regard to their respective reports. This simple but useful procedural mechanism permits arbitrators to narrow the issues by directing the experts to determine in a joint report where the differences between their respective positions lie, as well as points of common ground.⁴¹ It is the rare situation that two experts are utterly unable to find any points of agreement between their respective analyses.

5.27 Article 5.4 may be used in combination with other procedural approaches to further disentangle the experts in an arbitration. One common approach is to require the party-appointed experts to appear during the hearing to testify jointly.⁴² Under article 8.3(f) a tribunal may determine that following the issuance of an article 5.4 joint report, the experts should appear together for further questioning concerning their respective views at the hearing. Many have found it useful to observe and question experts at the same time in the environment of an oral hearing.⁴³

5.28 Another combination of procedural methods is for a tribunal to require the experts to meet and confer as a precursor to the appointment of an expert by the tribunal. Tribunals have found in the past that by requiring the experts work

towards narrowing the issues between them, allows for the tribunal-appointed expert to deal discreetly with only the most relevant points in contention. From a cost as well as procedural economy stand-point, employing such a method in advance of the appointment of a tribunal-appointed expert has obvious merit.

40. "Indeed, one of the criticisms of this system is that the result is a battle of experts of doubtful neutrality, or even of declared partiality, the prize going to the more articulate and convincing one, not necessarily to the one telling the truth, the whole truth and nothing but the truth." Giovanni De Berti, "Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?" *Austrian Yearbook on International Arbitration*, vol. 2011, p. 54 (2011).

41. See: the decision in *SD Myers v Canada*, whereby the tribunal ordered the following procedure, appointing an expert to analyse the dispute between two party-appointed experts: "As soon as practicable thereafter, and in consultation with the Disputing Parties, the Tribunal will decide whether a Tribunal expert should be appointed pursuant to art. 27(1) of the UNCITRAL Rules to assist in the determination of issues that are outstanding as between the Disputing Parties' expert witnesses; and, if so, the Terms of reference of any such Tribunal expert." *SD Myers v Government of Canada*, NAFTA/UNCITRAL, Procedural Order No. 17, p. 3 (26 February 2001).

42. See: the discussion of witness conferencing in the comments to art. 8.3.

43. See: Wolfgang Peter, "Witness 'Conferencing'", *Arbitration International*, vol. 18, No. 1, p. 47, for a general discussion of witness conferencing in international arbitration. See also: the comments of the chairman of an ICDR tribunal in response to a question from an expert as to why she would be heard together with the adverse party's expert: "Well, we were informed in advance of what your position would be. It is my wish to have both witnesses declaring at the same time to see how one reacts to the questions of the other." ICDR Case No. 50T180, Transcript of 2 October 2002, p. 83, ln. 11-13 (unpublished).

5.29 The general duty on behalf of the parties to cooperate in the taking of evidence applies equally to the party-appointed expert appointed under article 5.4.⁴⁴ The tribunal is free to take into consideration any lack of cooperation by a party, or its expert, in this exercise. As noted in other chapters, the failure by a party to fully cooperate in the taking of evidence may result in the drawing of an adverse inference, or have negative repercussions in the awarding of costs.

SUMMONING A PARTY-APPOINTED EXPERT TO AN EVIDENTIARY HEARING

Article 5.5 2010 IBA Rules: **If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral**

Tribunal decides otherwise.

Article 5.6 2010 IBA Rules: **If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.**

General discussion

5.30 Article 5.5 adopts a position which mirrors that of article 4.7 pertaining to fact witnesses, providing that the failure of a witness to attend a hearing is generally regarded as grounds for disregarding that expert's report. In addition, article 5.6 also reflects the general position taken on fact witnesses by noting that a decision to not call a witness is not to be interpreted as an acceptance of that expert's testimony. While much of the rationale behind these rules is discussed in chapter 4 in the comments to the corresponding portions concerning fact witnesses, the comments below consider some particular issues as they relate to party-appointed expert witnesses.

Failure by an expert to attend a hearing


5.31 While it may be true that cost and scheduling are factors that may create difficulties in presenting an expert witness at a hearing, it is generally considered that such difficulties should be regarded as risks borne by the party proffering the expert's testimony in support of their case. The position adopted in international arbitration was summarised by the ICSID tribunal in *Aguas del Tunari SA v Republic of Bolivia* in response to a complaint by the claimant that it would incur considerable expense should it be forced to present its experts for examination at the hearing:

"The Tribunal observed that it is, in its view, customary in international arbitration that such witnesses, whether they are experts in law or witnesses of fact, be made available for examination if so requested."⁴⁵

44. See: generally the comments to art. 9.7.

45. *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, paras. 40, 41 (2005).

5.32 This customary rule accords with norms of procedural fairness, as there is little doubt that a party has a right to challenge evidence proffered against it. As



this principle translates to expert evidence, it naturally implies that a tribunal should afford a party a procedurally fair opportunity to challenge an expert on his or her report.⁴⁶ It follows therefore that where an expert who has proffered a statement in the arbitration does not appear at the hearing to answer questions concerning the statement the consequence should be that the statement is excluded from the proceedings.

5.33 The above notwithstanding, there are known instances where tribunals have not enforced this rule against experts, despite otherwise applying it to fact witnesses.⁴⁷ The reasons for this deviation from the standard rule may vary, but one possible explanation may be that a tribunal will often determine the weight to be assigned to an expert report based on whether the expert's conclusions are derived from logical methodology, and are rendered in consideration of all of the relevant facts.⁴⁸ These issues may, in some circumstances, be sufficiently challengeable in writing by rebuttal experts and to this extent the need for an in-person hearing is somewhat mitigated. This may not be so in the case of fact witnesses. A fact witness' credibility will often turn on whether they appear, under the pressure of cross-examination, to be believable regarding what he or she claims to have seen. The most widely accepted means of testing the memory of a fact witness is in-person cross-examination. Thus, where an expert is not testifying from memory, but a fact witness is, an in-person cross-examination is difficult to dispense with in the case of a fact witness.

5.34 The above notwithstanding, it is far from clear that this distinction would be largely accepted in international arbitration. Rather, it seems that tribunals in many instances are perfectly willing to enforce the rule set forth in article 5.5 where an expert, without good cause, fails to appear at a hearing.⁴⁹

Determining not to call or cross-examine an expert witness

5.35 Article 5.6 adopts a rule generally accepted in regard to fact witnesses and applies it to expert testimony, which is to say that the failure to call an expert witness

46. See: the determination of an UNCITRAL tribunal that a proper opportunity to cross-examine an expert was required in order to safe-guard an equal opportunity to present one's case. "In response to the Claimant's request dated August 20, 2002 for clarification of the Tribunal's Order No. Q 13, the Tribunal advised the parties that Order No. Q 13 does not change the Tribunal's prior orders directing that each party has half of the allocated hearing time. The Tribunal advised that it may deviate from this principle, if appropriate, to safeguard each party's being given an equal opportunity to present its case in an appropriate manner. This shall apply in particular in respect to the cross-examination of

the parties' experts..." *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Final Award, para. 80 (2003).

47. See: the rule adopted in the following award: "In case a witness whose presence at the hearing was requested does not show up, his or her written statement shall be disregarded. This rule will not apply to expert reports." *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, as reported in David D. Caron, Lee M. Caplan, Matti Pellonpää, *The UNCITRAL Arbitration Rules*, pp. 649–650 (2006).


48. Where a report provided a full analysis of the facts used to arrive at the conclusions set forth, it was noted in *ADC et al. v the Republic of Hungary* that: "The Tribunal would like to point out here that the LECG reports are, in the Tribunal's view, an example as to how damages calculations should be presented in international arbitration; they reflect a high degree of professionalism, clarity, integrity and independence by financial expert witnesses." *ADC Affiliate Ltd and ADC & ADMC Management Ltd v The Republic of Hungary*, ICSID Case No. ARB/03/16, Final Award, para. 516 (2006).

49. See: the discussion of *Vivendi et al. v Argentina* in the comments to art. 4.5.

to a hearing should not be deemed an acceptance of that expert's conclusions. This rule is not controversial in international arbitration, but the corollary point that a failure to challenge a witness, or an expert, may be taken note of by the tribunal when weighing the unchallenged report, is often missed. Consider the following statement by an UNCITRAL tribunal seated in Miami, Florida, where this rule was articulated:

"While (the respondent) has not agreed that the witness statements it did not specifically challenge in cross-examination are to be considered true and accurate, it did not take advantage of the opportunity to test the veracity of the witnesses and only sought to challenge their evidence indirectly and (the claimant) has been very emphatic throughout that it considered unchallenged witness statements to be admitted as truthful and undisputed. Further, (the respondent) did not lead specific, detailed contrary evidence. In these circumstances, direct, probative witness statements will normally be accepted by the Tribunal unless there is a valid basis for discounting them. With respect to witness evidence central or critical to a claim, there is generally considered to be an onus on a party to challenge the witness in cross-examination, particularly if the party is challenging that witness's credibility. This is particularly so when the witness is available and is cross-examined on other issues."⁵⁰

5.36 When applied to expert reports this rule means that a tribunal is free to accept the unchallenged conclusions included in the report where it deems it appropriate to do so. This being said, a tribunal should consider the entire context of the expert report before accepting its conclusions to determine whether it is complete, logical and consistent with the evidence on record and circumstances of the case.⁵¹



50. As reported in Poupak Anjomshoaa and John Bellhouse, "The Implications of a Failure to Cross-Examine in International Arbitration", 23-6 *Mealey's Int'l Arb Rep* 19 (2008).

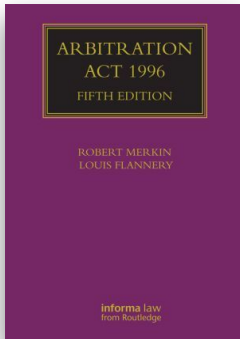
51. In this regard, a tribunal may consider the standard often applied to tribunal-appointed experts, which may be also applied to a party-appointed expert's report. "It is certain that the opinion of the expert does not bind the Commission which must decide according to its own conviction. But taking account of the facts and evaluation techniques, there is no reason for the court not adopting as its own the conclusion of the expert, unless his argumentation is in contradiction with the facts of record, with the legal provisions of the rules or logic." *Durward V. Sandifer, Evidence Before International Tribunals*, Procedural Aspects of International Law Series, vol. 13, p. 327 (1975). Citing to the *Héritiers de SAR Mgr le Duc de Guise* decision. See also: this principle as articulated by an ICSID tribunal: "In accordance with the parties' shared understanding, as expressed in the letters referred to above, the Tribunal will consider the written statements of those witnesses and experts who have not been called to testify at the hearing as part of the evidentiary record and evaluate those statements in light of the record as well as the oral testimony of the witnesses and experts called to testify at the hearing." Dietmar W. Prager and Ana Frischtak, " *Duke Energy International Peru Investments No. 1 Ltd v Republic of Peru* , ICSID Case No. ARB/03/28, 18 August 2008", *A Contribution by the ITA Board of Reporters* , para. 29.

CHAPTER

3

Other Provisions Relating to Arbitration

Chapter 3:: Other Provisions Relating to Arbitration



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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.

(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 United Kingdom, 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.

and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

(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).

NOTES

Sections 85 to 87 of the Act have not been brought into force, and it is unlikely that they will ever be. Conversely, it is highly unlikely that the sections will ever be formally repealed. Although several foreign jurisdictions retain the distinction between domestic and non-domestic arbitrations (including Canada, New Zealand and Australia), such as existed in English law prior to the coming into force of the Act, English law has effectively abolished the distinction by holding back these three sections from the statute as enacted.

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.

(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.

(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.

(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 concerned.

NOTES

This section (along with sections 85 and 87) has not been brought into force, and, although scheduled for repeal, it is likely to remain included in the statute but ignored for all purposes: see the Notes to section 85.

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.

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


(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.

NOTES

This section (along with sections 85 and 86) has not been brought into force; see the Notes to section 85.

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.

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

(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.

NOTES

No order has been made under this section. Perhaps the Secretary of State should do so, and put these sections out of their misery.

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).

(2) In those sections ‘the Regulations’ mean those regulations and include any regulations amending or replacing those regulations.

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

NOTES

Sections 89 to 91 lay down a scheme for the regulation of consumer arbitration agreements, replacing the Consumer Arbitration Agreements Act 1988. The 1988 Act invalidated an arbitration agreement to which a consumer was a party and which fell within county court limits, provided that the agreement had been entered into prior to the dispute arising. The 1988 Act was all but rendered redundant with effect from 1 July 1995 by the Unfair Terms in Consumer Contracts Regulations 1994,¹ reenacted with minor amendments by the Unfair Terms in Consumer Contracts Regulations 1999,² and was duly repealed by the Arbitration Act 1996. The Regulations implement the EC’s Unfair Terms in Consumer Contracts Directive 1993.³ The 1999 Regulations apply to any contract between a consumer (i.e. a natural person making a contract for purposes outside his business) and a commercial concern (i.e. a person who supplies goods or services, for purposes relating to his business, and including a profession, government



department or local authority). Under the Regulations, a term in a contract with a consumer⁴ is unfair, and is rendered unenforceable, if three conditions are met:⁵

(a) the term has not been individually negotiated: this refers to a term that has been drafted in advance, and the consumer has not been able to influence its substance;

(b) the term is contrary to the requirement of good faith, a concept that is not defined by the 1999 Regulations, although there had been a detailed definition in the 1994 Regulations; and

(c) the term causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

It is apparent that the Regulations apply to all manner of contract terms, most importantly, exclusion clauses. However, the Regulations are not so limited, and the Schedule to the Regulations sets out an illustrative list of potentially unfair terms. Item (q) in the schedule refers to any term that excludes or hinders the consumer's right to legal redress, in particular by the imposition of an obligation to go to arbitration. It is thought to be relatively unlikely that the presumption of unfairness can be rebutted in relation to arbitration clauses in consumer contracts, and, accordingly, the effect of the Regulations was to supersede the 1988 Act by providing more extensive protection to consumers.

The purpose of section 89 is to apply the 1999 Regulations to consumer arbitration agreements, and to repeal the 1988 Act so that consumer arbitration agreements are governed by a single set of rules. Section 89 is a curious provision, in that the Regulations, independently of it, apply to consumer arbitration agreements, and the main effect of section 89 is to declare the existing state of the law. However, section 89 does have some independent purpose, in that it confirms that the Regulations apply to arbitration clauses and, in some respects, extends the ambit of the Regulations. No distinction is drawn between pre- and post-dispute arbitration clauses, and any clause, whenever agreed to, is within the Regulations, provided that it is drafted in advance by the supplier. It is, however, far more likely that an arbitration agreement freely entered into by a consumer after a dispute has arisen will be regarded as fair. Fairness is to be determined at the time the agreement was made, and not in relation to what has happened subsequently, so the fact that the consumer has participated in the arbitration does not remove his right to allege that the clause was unfair by challenging the award.⁶ A consumer who is sophisticated or who has had the benefit of legal advice when entering into the arbitration agreement is unlikely to benefit from the Regulations.⁷

It is the duty of a court, on an application for the enforcement of an arbitration award, to determine of its own volition whether the arbitration agreement was valid under the 1999 Regulations. Accordingly,

1. SI 1994 No 3159.

2. SI 1999 No 2083.

3. 93/13/EC.

4. See *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC).

5. See *Zealand v Laing Homes Ltd* [1999] CILL 1510, decided under the 1994 Regulations. Contrast *Mylcris Builders Ltd v Buck* [2008] EWHC 2172 (TCC).

6. Case C-168/05 *Claro v Centro Movil Milenium SA*, 2006.

7. *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC).

even if there has not been a challenge to the clause in the arbitration proceedings, the enforcing court is required to consider the matter, but subject to the consideration that the award has not become binding by the expiry of the period of time set out for the award to be challenged.⁸

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 person.

NOTES

This section operates to extend the Unfair Terms in Consumer Contracts Regulations 1999 to arbitration agreements between a commercial supplier and a consumer who is a company or partnership: this goes further than the Regulations themselves, which are confined to consumers who are natural persons. A company that obtains goods or services other than for the purposes of its business is, therefore, protected by the Regulations.

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.

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

(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, and

(c) for Northern Ireland, by the Department of Economic Development for Northern Ireland with the concurrence of the Lord Chancellor.

(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.

(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) Order 1954.

NOTES

The effect of section 91 is to authorise the making of an order that fixes a financial limit for a financial remedy, so that an arbitration clause which relates to a lesser sum is automatically unfair. The power was exercised by the Unfair Arbitration Agreements (Specified Amount) Order 1999, fixing the sum at £5,000, exclusive of interest. If the sum sought is greater than £5,000, the consumer necessarily retains the right to rely directly upon the Unfair Terms in Consumer Contracts Regulations 1999, and so the mere fact that a dispute involving a large sum is outside section 89 does not mean that the arbitration clause in it is automatically valid, as it still has to pass the tests in the Regulations themselves.

8. Case C-408/08, *Asturcom Telecomunicaciones SL v Nogueira* [2009] EUECJ.

Exclusion of Part I in relation to small claims arbitration in the county court

92. Nothing in Part I of this Act applies to arbitration under section 64 of the County Courts Act 1984.

NOTES


This section was originally designed to make it clear that the Act did not apply to county court arbitrations. Such arbitrations were governed by the special rules laid down in the County Courts Act 1984. The concept of introducing separate legislation for the resolution of consumer disputes was considered but rejected by the DAC. The CPR replaced county court arbitrations with the small claims track for such claims. Section 92 no longer has any effect, although it has not yet been repealed.

Appointment of Judges as Arbitrators

Appointment of judges as arbitrators

93.–(1) A judge of the Commercial Court or an official referee may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement.

(2) A judge of the Commercial Court shall not do so unless the Lord Chief



Justice has informed him that, having regard to the state of business in the High Court and the Crown Court, he can be made available.

(3) An official referee shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of official referees' business, he can be made available.

(4) The fees payable for the services of a judge of the Commercial Court or official referee as arbitrator or umpire shall be taken in the High Court.

(5) In this section—

'arbitration agreement' has the same meaning as in Part I; and 'official referee' means a person nominated under section 68(1)(a) of the Senior Courts Act 1981 to deal with official referees' business.

(6) The provisions of Part I of this Act apply to arbitration before a person appointed under this section with the modifications specified in Schedule 2.

NOTES

This section permits a judge to act as an arbitrator. The Act applies to a judge–arbitrator subject to the modifications listed in Schedule 2 to the Act. The section re-enacts section 4 of the Administration of Justice Act 1970. The DAC Report, para 341 and 343, stated a desire to extend the section to all judges, and not just the two classes presently referred to, but agreement with the relevant departments could not be reached in time to permit this extension to be included.¹ The report highlighted a particular problem in disputes involving patents, where commonly the only acceptable arbitrators are judges.


1. DAC Supplementary Report, para 55.

Section 93(2)–(3) makes it clear that the parties do not have the right to appoint a judge, and that any appointment is subject to availability. The modifications to the Act, listed in Schedule 2, re-enact the Administration of Justice Act 1970, Schedule 3. The purpose is to disapply those provisions of the Act that are not required by judges in the light of their existing powers. It should be noted that, although the phrase 'official referee' has not actually been repealed by statute, the office does not formally exist as such, and business previously referred to as 'official referees' business' has been dealt with by the TCC since 1998. Those judges formerly dubbed 'official referees' are now judges of the TCC.

Statutory Arbitrations

Application of Part I to statutory arbitrations

94.–(1) The provisions of Part I apply to every arbitration under an enactment (a 'statutory arbitration'), whether the enactment was passed or made before or after



the commencement of this Act subject to the adaptations and exclusions specified in sections 95 to 98.

(2) The provisions of Part I do not apply to a statutory arbitration if or to the extent that their application—

(a) is inconsistent with the provisions of the enactment concerned, with any rules or procedure authorised or recognised by it, or

(b) is excluded by any other enactment.

(3) In this section and the following provisions of this Part ‘enactment’—

(a) in England and Wales, includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978;

(b) in Northern Ireland, means a statutory provision within the meaning of section 1(f) of the Interpretation Act (Northern Ireland) 1954.

NOTES

Statutory arbitrations exist by virtue of various enactments which provide that disputes under them shall be referred to arbitration. Statutory undertakings sometimes provide for disputes to be referred to arbitration (e.g. under the Water Act 1991). Other examples include the Agricultural Tenancies Act 1995, which provides inter alia that disputes between landlord and tenant under a farming business tenancy should be resolved by arbitration. The effect of this provision is to put statutory arbitrations on an equal footing with private consensual arbitrations, so far as possible (see sections 95 to 97).

General adaptation of provisions in relation to statutory arbitrations

95.—(1) The provisions of Part I apply to a statutory arbitration—

(a) as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement, and

(b) as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made were parties to that agreement.

(2) Every statutory arbitration shall be taken to have its seat in England and Wales or, as the case may be, in Northern Ireland.

NOTES

This provision is self-explanatory.

Specific adaptations of provisions in relation to statutory arbitrations

96.–(1) The following provisions of Part I apply to a statutory arbitration with the following adaptations.

(2) In section 30(1) (competence of tribunal to rule on its own jurisdiction), the reference to paragraph (a) to whether there is a valid arbitration agreement shall be construed as a reference to whether the enactment applies to the dispute or difference in question.

(3) Section 35 (consolidation of proceedings and concurrent hearings) applies only so as to authorise the consolidation of proceedings, or concurrent hearings in proceedings, under the same enactment.

(4) Section 46 (rules applicable to substance of dispute) applies with the omission of subsection (1)(b) (determination in accordance with considerations agreed by parties).

NOTES

Again, this provision is self-explanatory, as it makes necessary changes to the provisions concerning jurisdiction, consolidation and applicable law insofar as a statutory arbitration is concerned.


Provisions excluded from applying to statutory arbitrations

97. The following provisions of Part I do not apply in relation to a statutory arbitration—

- (a) section 8 (whether agreement discharged by death of a party);
- (b) section 12 (power of court to extend agreed time limits);
- (c) sections 9(5), 10(2) and 71(4) (restrictions on effect of provision that award condition precedent to right to bring legal proceedings).

NOTES

The modification to section 8 is necessary, as there is no ‘agreement’ as such in a statutory arbitration. The time limit provision in section 12 is also redundant, as the legislation itself will



have the necessary time limits built in.

Power to make further provisions by regulations

98.—(1) The Secretary of State may make provision by regulations for adapting or excluding any provision of Part I in relation to statutory arbitration in general or statutory arbitrations of any particular description.

(2) The power is exercisable whether the enactment concerned is passed or made before or after the commencement of this Act.

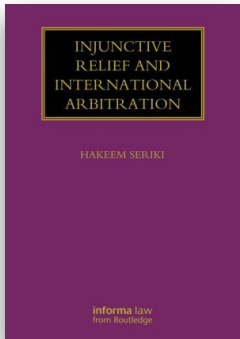
(3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

NOTES

No regulations have been made under this section.

Injunctions and the Arbitration Act 1996

Chapter 4:: Injunctions and the Arbitration Act 1996



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Introduction	6.01	CPR PD 6B, para 3.1(6)	6.51
Section 44: an overview	6.02	CPR PD 6B, para 3.1(3)	6.52
Urgency	6.12	Relationship between section 37 of SCA & section 44 of the Act	6.54
The purpose of section 44(3)	6.14	Extending the power of the court ...	6.58
Section 44 & freezing injunctions ..	6.23	Anti-suit injunctions & section 44 ...	6.59
Section 44 & ICSID arbitrations	6.31	Injunctive relief and section 72	6.60
Appeals & injunctions	6.37	Taking part in proceedings	6.70
Certainty & injunctive relief	6.40	Stay of proceedings & section 72 .	6.79
Section 44 & third parties	6.44		


INTRODUCTION

6.01 In Chapter 2, section 37 of the SCA was discussed. It will be recalled that both interim and final court injunctions can be granted under section 37 of the SCA. Under the Act, there are very limited circumstances where an English court can intervene by way of an injunction. The power to grant injunctive relief under the Act is conferred by both sections 44 and 72 of the Act. This chapter considers:

- (a) section 44 of the Act;
- (b) section 44 and freezing orders;
- (c) section 44 and ICSID arbitration;
- (d) section 44 and third parties;
- (e) the relationship between section 37 of the SCA and section 44 of the Act;
- (f) anti-suit injunctions and section 44; and
- (g) section 72 of the Act.

SECTION 44: AN OVERVIEW

6.02 Section 44 of the Act lists the powers exercisable by the courts. These powers can only be exercised by the courts where the arbitrators do not possess the necessary powers or are unable to act.¹ Where such powers have been expressly conferred on the arbitrators by the parties or the arbitrators have default powers under sections 38(3) to (6) of the Act, then the courts cannot act.



6.03 It is clear from section 2(3) of the Act that the powers conferred on the courts under section 44 can be exercised even where the seat of the arbitration is outside England and Wales.² Where the seat of the arbitration is not England and Wales, section 44 must only be exercised if it is appropriate to do so. The section may be exercised where the arbitration has no connection with England but there is a need to protect or preserve evidence in this jurisdiction.³ There is a distinction between a court exercising its jurisdiction under section 44 of the Act pursuant to an English arbitration clause and its jurisdiction under the same in relation to a foreign-seated arbitration clause.⁴ Where the seat is a foreign seat, the natural court to grant any interim relief is the court of the seat of the arbitration, especially where the curial law of the arbitration is that of the seat.⁵ The English courts will not grant an interim injunction to support what is simply a domestic arbitration in another jurisdiction.

6.04 In *U&M Mining Zambia Ltd v Konkola Copper Mines PLC*,⁶ Blair J considered whether or not the English courts had exclusive jurisdiction to grant interim measures in support of a London-seated arbitration pending the constitution of the arbitral tribunal. In that case, the agreement was governed by Zambian law, but the seat of arbitration was London and the agreement also provided that the Zambian court was to have exclusive jurisdiction. Konkola sought and obtained an ex-parte interim mandatory injunction from the High Court of Zambia ordering U&M to vacate the mine immediately. The judge held that the English courts did not have exclusive jurisdiction to grant interim measures in support of a London-seated arbitration.⁷ It is perfectly acceptable that a party may exceptionally be entitled to seek interim relief from a court other than that of the seat of the arbitration where such application can sensibly be made in that court and it is not a disguised attempt to “outflank” the arbitration agreement.⁸

6.05 While the English courts can have exclusive supervisory powers in a London-seated arbitration over issues relating to existence or scope of the tribunal’s jurisdiction or as to the validity of an existing interim or final award, this is not the case in relation to interim relief. In *Konkola*, the judge felt that Zambia was the appropriate forum to grant such an order, given that the dispute was between two Zambian companies and the copper mine that was the subject matter of the dispute was in Zambia.

6.06 Where the seat of the arbitration is not England and Wales and the respondent has very little connection with this jurisdiction, the applicant must demonstrate that there are

1. See sections 44(3) to 44(5).

2. An applicant can seek permission to serve an arbitration claim form seeking relief under section 44 of the Act outside the jurisdiction pursuant to CPR 62.5(1)(b). See *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd's Rep. 684, *Western Bulk Shipowning III AS v Carbofer Maritime Trading APS* [2012] EWHC 1224 (Comm) at para 107.
3. See *Copsa Enterprises Ltd v Technomarine SPA* [1998] unreported.
4. See *Econet Wireless Ltd v Vee Networks Ltd and Others*, [2006] EWHC 1568 (Comm), [2006] 2 Lloyd's Rep. 428 at para 17.
5. See *Econet Wireless Ltd v Vee Networks*. In this case, the seat of the arbitration was Nigeria, and the substantive law of the shareholders' agreement in dispute was Nigerian law.
6. [2013] EWHC 260 (Comm), [2013] 2 Lloyd's Rep. 218.
7. In this case, there were arguments as to whether or not the seat of the arbitration was London. The agreement provided that the "place of arbitration shall be England." Konkola argued that the place could either mean the seat or physical location. Consequently, the juridical seat of the arbitration was Zambia. U&M on the other hand, maintained that the seat of the arbitration was London. Blair J held that "place" of arbitration, as stipulated in the agreement, was to be treated as the seat of the arbitration unless there was clear evidence to the contrary. In this case, there was no such evidence.
8. *Ibid.* at para 63.

good reasons as to why the English courts should grant an interim injunction pursuant to section 44 of the Act. An applicant must demonstrate an overriding reason for intervention by the courts, such as the need to prevent fraud.⁹ The courts will not assist an applicant to obtain a commercial term that it could not previously obtain by agreement with the other party.

6.07 The court can intervene under section 44 in the same way as if the proceedings were brought in litigation proceedings.¹⁰ The powers under section 44 will only be exercised in favour of a foreign-seated arbitration if the foreign seat has similar procedural laws with England and for the purpose for which they are designed. In *Commerce and Industry Insurance Co. of Canada v Lloyd's Underwriters*,¹¹ Moore-Bick J rejected an attempt to use section 44 to obtain an order for a US-style deposition, which was tantamount to a fishing expedition so as to determine what evidence might be in existence.

6.08 In order for the court's jurisdiction to be invoked under section 44, there must be no agreement to the contrary. Where there is a contrary agreement, the parties will not be able to invoke the court's power under this section. A good example is where the parties have agreed to a condition precedent before the court's jurisdiction can be invoked. This was the position in *B v S*,¹² where the parties had agreed to a *Scott v Avery*¹³ clause in their contract; B then applied for a worldwide freezing order in the English courts, which was granted on an interim basis. The injunction was subsequently discharged on the basis that the *Scott v*

Avery clause prevented a party from commencing court proceedings before an award was rendered. It is also the case that such clauses will oust the jurisdiction of the courts until an award is rendered, even if the court proceedings in question are ancillary in nature. This is a logical approach to adopt given that parties can contract out of section 44 of the Act, as it is not a mandatory section. The court will be doing no more than giving effect to the agreement of the parties.

6.09 Where there is no contrary agreement between the parties, and in non-urgent cases, the application must be made with the permission of the tribunal or the written agreement of the other parties to the arbitration agreement.¹⁴ Despite these restrictions, the English courts have granted interim injunctions without reference to section 44. This was the position in cases such as *XL Insurance Ltd v Owens Corning*,¹⁵ *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski)*¹⁶ and *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co. Ltd*.¹⁷

6.10 Where the courts have the relevant jurisdiction to grant an interim injunction pursuant to section 44 of the Act, this does not negate the court's wider powers under section 37 of the SCA.¹⁸ Where the court's jurisdiction under section 44 of the Act is invoked because the tribunal is not yet constituted, an applicant is required to give an undertaking to have a tribunal constituted as soon as possible.¹⁹

9. See *Mobil Cerro Negro Limited v Petroleos de Venezuela S.A.* [2008] EWHC 532 (Comm), [2008] 1 Lloyd's Rep. 684.

10. See CPR 25.1.

11. [2002] 1 Lloyd's Rep. 219. Moore-Bick J noted that: "The procedure adopted under the curial law differs in this respect from that which applies under our law in a way which, on this ground alone, makes it inappropriate in my view to make the order now being sought."

12. [2011] EWHC 691 (Comm), [2011] 2 Lloyd's Rep. 18.

13. (1856) 5 H.L. Cas.811 (HL). These clauses, in general, tend to prevent either party from commencing any court proceedings until an arbitral award has been rendered.

14. See section 44(4) of the Act.

15. [2000] 2 Lloyd's Rep 500. An interim injunction to enforce an arbitration clause was granted, but the constraints of section 44 were not discussed.

16. [2002] 1 Lloyd's Rep. 106. An interim injunction was granted to enforce an arbitration clause without reference to section 44.

17. [2004] 1 Lloyd's Rep. 206.

18. See *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494.

19. See *Econet Wireless Ltd v Vee Networks Ltd and Others*, at para 14 and *Western Bulk Shipowning III* [2012] EWHC 1224 (Comm) at para 109.

6.11 The need for one party to seek, and the court to grant an injunctive relief under section 44 of the Act may arise in the following ways:

(a) An applicant may seek an injunction under section 44 of the Act where the tribunal is not yet constituted and/or does not have the necessary power to act, but it seeks to restrain the breach of contract by the respondent. This relief may, for example, be an order that certain information and/or documents are disclosed, or prohibiting the respondent from entering into certain arrangements and/or agreements.

(b) Given that under section 2(3) of the Act, an English court has jurisdiction to grant interim relief under section 44, even if the seat of the arbitration is not England and Wales, an applicant may seek a worldwide freezing order where it feels that there is a risk that the respondent may dissipate its assets.

(c) An applicant may seek interim relief under section 44 of the Act for a freezing order in support of an investment treaty claim under the auspices of the International Centre for the Settlement of Investment Disputes (“ICSID”). This is particularly so where it has already secured interim protective measures in another jurisdiction, but still wishes to further protect its position in England and Wales so as to ensure that any favourable award can be satisfied.


(d) Where the parties have not agreed that they can appeal any award to an appeal tribunal, an applicant may wish to protect its contractual position not to have the award appealed by seeking an injunction under section 44 of the Act.

(e) A party may seek an interim injunctive relief under section 44 where it suspects that a third party is acting in collusion with the other party to the arbitral proceedings to derail and/or circumvent arbitral proceedings that are already on foot. In these circumstances, the third party might be seen as a “necessary and proper party” to the arbitral proceedings.

(f) An applicant may seek an interim injunction under section 44 of the Act where the parties have expressly conferred such powers on the courts in their agreement and it alleges that the other party seeks to wrongfully terminate the agreement between them, thereby causing it irretrievable and unquantifiable loss.

URGENCY

6.12 In order to invoke the jurisdiction of the English courts under section 44(3),



the case must be one of urgency. The section is directed at situations where the court already has jurisdiction, and not at circumstances concerning the variation or continuation of orders already made. Consequently, where the court is fixed with jurisdiction and seised of the matter, the court will have jurisdiction to vary, continue or discharge any injunction already granted.²⁰ Where the applicant's argument of urgency is based on the fact that there is a "risk of dissipation" of assets by the respondent, and the court holds that there is no such risk, the requirement of urgency under section 44(3) will not be satisfied.²¹ Where the court has been misled as to the urgency of the application during an ex-parte hearing, any injunction granted will be subsequently discharged.

6.13 It is not the case that an application for relief under section 44 of the Act is not urgent if there is no immediate risk of dissipation. The requirement for urgency must be kept distinct.²² This is because an applicant may only need to seek an order preserving assets under section 44(3), but may not necessarily need the wider protection provided by a worldwide freezing order.

20. See *Congentra AG v Sixteen Thirteen Marine SA*, [2008] EWHC 1615 (Comm), [2008] 2. Lloyd's Rep. 602.


21. See *Mobil Cerro Negro Limited v Petroleos de Venezuela S.A.* [2008] EWHC 532 (Comm), [2008] 1 Lloyd's Rep. 684.

22. See *Belair LLC v Basel LLC*, [2009] EWHC 725 (Comm).

THE PURPOSE OF SECTION 44(3)

6.14 A court can intervene (on a discretionary basis) by virtue of section 44(3) to make an order to preserve evidence or property in the case of an emergency. The court's powers under section 44(3) are not independent of the power to grant relief under section 44(2)(e). The courts can only grant an injunction to preserve assets and evidence under section 44. The aim of section 44(3) is for the court to interfere as little as possible with the arbitral process, and should only act in urgent cases so as to protect evidence or assets.²³ In the process of exercising its discretionary powers, the court's order may incidentally involve the preliminary or even final determination of an issue that the parties have agreed to submit to arbitration. However, this should not prevent the court from making an order in such circumstances.²⁴

6.15 The court's power under section 44 is not ousted simply by the fact that the parties have elected to submit their dispute to the exclusive jurisdiction of the arbitrators.²⁵ A distinction must be drawn between substantive and procedural



matters, and section 44 is a procedural matter. However, given that section 44 states that “unless otherwise agreed by the parties,” a court will not be able to exercise the power under section 44 where the parties have contracted out of the powers listed in the section.

6.16 In deciding whether or not to exercise its jurisdiction, the court must adopt the same test it would adopt in ordinary legal proceedings rather than the lesser test of just holding the “status quo,” pending any determination by the arbitral tribunal. In *Permasteelisa Japan KK v Bouyguesstroi*,²⁶ Ramsey J expressed the view that the test in ordinary legal proceedings must be adopted so as to avoid any uncertainty.²⁷ In addition, the court ought not to take into account the prospect of success in obtaining relief from the tribunal, nor the tribunal’s approach.²⁸

23. This is clear from para 215 of DAC Report, which states that: “In order to prevent any suggestion that the Court might be used to interfere with or usurp the arbitral process, or indeed any attempt to do so, we have stipulated that except in cases of urgency with regard to the preservation of assets or evidence, the Court can only act with the agreement of the parties or the permission of the tribunal. We have excepted cases of urgency, since these often arise before the tribunal has been properly constituted or when in the nature of things it cannot act quickly or effectively enough.”

24. See *Cetelem SA v Roust Holdings Limited* [2004] EWHC 3175 (QB) at para 48.


25. See *Re Q’s Estate* [1999] 1 Lloyd’s Rep. 931. The defendant in the case argued that since the parties had agreed that their dispute should be exclusively settled by arbitration, the parties had, in effect, demonstrated their intention to exclude any ancillary proceedings, as well as substantive proceedings from the jurisdiction of the courts. This argument was rejected by Rix J, and he held that the use of the word “exclusive” did not introduce the exceptional situation so as to bar ancillary proceedings before the court. If the parties wanted to exclude the supportive powers of the court under section 44 of the Act, this should have been done by more specific wording. Consequently, the court did not lack jurisdiction to make the order that was sought. See page 938.

26. [2007] EWHC 3508 (QB).

27. See paras 46 and 47.

28. See also *National Insurance and Guarantee Corporation Ltd v M Young Legal Services* [2004] EWHC 2972 QB, [2005] 2 Lloyd’s Rep 46, where Clarke J granted an interim injunction against underwriting agents, ordering them to produce documents, even though the rights of the parties under the relevant agreement had not been resolved. The judge was prepared to do so, even though no arbitration had been commenced. The insurer had commenced court proceedings, to which the defendants had indicated that they would seek a stay of proceedings.

6.17 In relation to scenario (a) above,²⁹ an applicant may seek an interim injunction not only for the preservation of evidence and assets, but also to stop the respondent from frustrating arbitral proceedings. An injunction can be sought



under section 44(2)(e) to preserve evidence or assets. This then raises the question: what is the exact relationship between sections 44(2)(e) and 44(3)? In *Hiscox Underwriting Limited v Dixon Manchester & Co. Limited*,³⁰ an insurer sought an interim injunction pending the arbitration requiring the underwriting agency to allow inspection of its books and records so as to allow the insurer to ascertain the identities of policyholders, as the insurer believed that new customers were being diverted to rival insurers by the agency. At first instance, Cooke J held that he had jurisdiction to grant the relief sought on the basis that section 44(3) was not limited to the purposes listed in that section.³¹ The scope of section 44(3) was further considered in *Cetelem SA v Roust Holdings Limited*,³² where the claimant took the view that the respondent was seeking to frustrate a proposed share sale and sought an interim order from the court under section 44(3) of the Act. The effect of the order sought was to restrain the defendant from dealing with various assets and shareholdings, and required it to lodge a share transfer approval request with the Central Bank of Russia in order for the contractual deadline to be met. At first instance, Beatson J held that section 44(3) was not limited to matters set out in that section, but could be read together with section 44(2)(e) so that an injunction could be granted in any case of urgency, and section 44(3) could be used in advance of an arbitration having been commenced.³³

6.18 In essence, the earlier view was that section 44(3) incorporated section 44(2)(e), and in a case of urgency the court could grant an interim injunction for any reason. On appeal, while the Court of Appeal³⁴ agreed that the judge was correct in granting the relief, it however disagreed with the reasoning of the first-instance judge. The Court of Appeal did so on the basis that the philosophy of the Act was to reduce judicial intervention.³⁵ Accordingly, in *Cetelem*, the court had jurisdiction to grant the injunction sought under section 44(3), even though it did not have the wider discretion that it had been held to have in *Hiscox*. Consequently, the reasoning in *Hiscox* was expressly overruled, and the analysis of Beatson J at first instance in *Cetelem* was rejected.³⁶

29. See para 6.11.


30. [2004] EWHC 479, [2004] 2 Lloyd's Rep. 438.

31. In essence: "... for the purpose of preserving evidence or assets and the court had the power to grant an interim injunction in the case of urgency even though the purpose of the injunction was not merely to preserve evidence or assets but rather to restrain a breach of contract." See para 38.

32. [2004] EWHC 3175 (QB).

33. At para 31.

34. [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494.



35. Clarke LJ noted that: “. . . in all the circumstances, it is in my judgment appropriate to construe the subsection consistently with the intention identified in para 215 of the DAC Report. That report makes it clear that it was intended to interfere as little as possible with the arbitral process and to limit the power of the court in urgent cases to the making of orders which it thinks are necessary for the preservation of evidence or assets.” At para 46.

36. Clarke LJ noted that: “It follows that I would hold that in the instant case there was only power under section 44(3) to make an order if the judge thought that it was necessary for the preservation of evidence or assets. Since the question whether the order made in this case was necessary for those purposes (as opposed to a wider purpose) was not considered by the court, I would hold that it must be taken to have been made on a wider basis and that the court had no jurisdiction to make it on that basis. On that footing, I would hold that this court has jurisdiction to entertain an appeal from the order notwithstanding that the judge refused leave to appeal and would grant leave to appeal. However, for the reasons given below, I would dismiss the appeal.” At para 47.

6.19 It is clear that the purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before the arbitration is on foot so as to reduce the risk of non-cooperation by one party and any attempt to frustrate the arbitral process. However, where the court is called upon to exercise its powers, it must take great care not to usurp the arbitral process and ensure, by obtaining appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or tribunal.

6.20 Although the Court of Appeal adopted a narrow interpretation of section 44(3) in *Cetelem*, the section is, however, not restricted to orders for the preservation of evidence or assets, and the court “may make such orders as it thinks necessary for the purpose of preserving evidence or assets.”³⁷ It is now clear that “assets” are not limited to tangible assets, but also include, for example, perishable assets, shares and contractual rights.

6.21 The courts have the jurisdiction to grant an injunction to prevent a respondent from approving and issuing shares pursuant to a shareholders’ agreement. In order for the court to exercise its jurisdiction, it must be persuaded that the applicant’s rights will not be adequately protected. Where the respondent has given an undertaking, the court will not be minded to grant an injunction if the undertaking is deemed to be sufficient. That was the approach adopted by Gloster J in *Telenor East Holding II AS v Altimo Holdings & Investments Ltd*,³⁸ where there was an application to restrain one of the respondents from issuing shares in the company pursuant to a shareholders’ agreement. The judge took the view that on the strength of the undertakings offered by two of the respondents, the applicant’s rights were adequately protected pending the outcome of the arbitration.³⁹ The courts also have jurisdiction to grant an injunction to restrain an allegedly wrongful call of a performance bond before the appointment of an

arbitral tribunal.⁴⁰

6.22 An English court will only act under section 44 of the Act if it is clear that it has jurisdiction to do so. Where the tribunal has refused to grant an interim relief sought on two separate occasions, the court needs to be clear as to why the tribunal refused to act. If the tribunal's decision is ambiguous as to the basis for refusing to grant an interim relief, the matter will be sent back to the tribunal for clarification.⁴¹ This is important because if the reason for refusing the application for interim relief was because of lack of jurisdiction, then the application could be heard by the court because the tribunal was unable to act. However, if the reason was that it was not the appropriate situation for the tribunal to exercise its power, then the court would not be able to act. This was the situation in *Barnwell Enterprises Ltd v ECP Africa FII Investments LLC*,⁴² where Hamblen J considered an application concerning whether or not to continue an interim injunction previously granted.⁴³ The applicant had failed on two occasions to persuade the tribunal to grant an interim relief restraining ECP from exercising certain rights under a share pledge agreement. Hamblen J held that the proper course was to send the matter back to the tribunal, and it was up to it to reconsider its position on the matter. However, he was prepared to grant a short interim relief pending the matter's remittal based on the principles of *American Cyanamid Co. v Ethicon Ltd (No 1)*.⁴⁴

37. See para 49.

38. [2011] EWHC 735 (Comm), [2011] Arb. L.R. 9.

39. See also *SabMiller Africa B.V, Tanzania Breweries Limited v East African Breweries Limited* [2009] EWHC 2140 (Comm), [2010] 1 Lloyd's Rep. 392, where an injunction was granted to restrain the respondent from entering into arrangements with a competitor.

40. See *Permasteelisa Japan KK v Bouyguesstroi* [2007] EWHC 3508.

41. *Barnwell Enterprises Ltd v ECP Africa FII Investments LLC* [2013] EWHC 2517 (Comm).

42. [2013] EWHC 2517 (Comm), [2014] 1 Lloyd's Rep. 171.

43. The parties were involved in LCIA proceedings about a debt of about \$22 million, which ECP alleged it was owed by Barnwell. ECP threatened to exercise its rights under a Share Pledge Agreement, which would have meant that ECP would have had to ultimately sell Barnwell to realise the debt. Barnwell sought a restraining order from the tribunal on two separate occasions to restrain ECP from exercising that right. These attempts failed, but Barnwell successfully obtained identical relief from a Mauritian court and subsequently from the English courts.

44. [1975] A.C.396.

SECTION 44 AND FREEZING INJUNCTIONS

6.23 In relation to scenario (b) above,⁴⁵ an English court has jurisdiction to grant a freezing injunction in support of arbitral proceedings in London, as well as a foreign-seated arbitration.⁴⁶ A freezing injunction will not be granted where the assets in question are of no real monetary value.⁴⁷ A freezing injunction may be sought pending the completion of judicial proceedings so as to ensure that the applicant has sufficient assets to enforce against. Alternatively, an injunction may be sought after the award has been rendered. The courts may also grant an order compelling a defendant to provide disclosure verified by an affidavit of all its assets worldwide.⁴⁸ Worldwide freezing injunctions are made only sparingly, usually in cases where there is compelling evidence of serious international fraud.⁴⁹ The principles applicable to the granting of freezing injunctions are applicable to foreign arbitrations.⁵⁰ The rationale for a freezing injunction is that a judgment or award will remain unsatisfied or difficult to enforce by virtue of dissipation or disposal of assets. It is the case that an applicant for a freezing injunction does not need to link its claim for a freezing injunction to assets already held by the courts or otherwise in this jurisdiction.⁵¹

6.24 A court must be satisfied that there is a “real risk” that the respondent will dissipate its assets with a “very real risk” that the award may go unsatisfied.⁵² A mere allegation of fraud or dishonesty is not sufficient reason for granting or maintaining a freezing injunction.⁵³ The court will scrutinise with care whether what is alleged to have been the dishonesty really justifies the inference that unless an injunction is granted, that party will dissipate the assets.⁵⁴ In deciding whether or not to exercise its jurisdiction, the court must examine very carefully the particular facts upon which it is being asked to exercise its jurisdiction or discretion. Whether an order can or should be made will ultimately depend on the facts of the case. A court will be more inclined to grant and/or continue a freezing order in a group-of-companies situation, where it is easy to make one of the companies judgment-proof by moving assets around the group of companies. Likewise, a freezing order will be granted against a company that is a guarantor to one of the companies within the group of companies, especially where the company it is guaranteeing has no material or fixed assets apart from certain inter-group receivables.⁵⁵ Likewise, where the assets that are the subject matter of the dispute are the only source by which any award can be satisfied, then there will be a risk of dissipation especially where the respondent is in a position to dispose or deal with the assets in such a way as to render the arbitral proceedings futile.

45. See para 6.11.

46. See section 2(3) of the Act.

47. See *Camdex International Ltd v Bank of Zambia* [1998] QB 22. The right to draw down on a credit facility is not regarded as an asset of value. See also *JSC BTA Bank v Ablyazov* [2012] EWHC 1819 (Comm).

48. This order cannot be sought under section 44, but under section 37 of the SCA.

49. *Mobil Cerro Negro Limited v Petroleos de Venezuela S.A.* [2008] EWHC 532 (Comm), [2008] 1 Lloyd's Rep. 684.

50. *Ibid.* Where the defendant is not within jurisdiction of the English courts, a leave to serve out of jurisdiction under CPR 62.5 will need to be obtained. The applicant must demonstrate a good arguable case, but need not show that it is bound to succeed. See *Congentra AG v Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep. 602. A freezing injunction cannot be granted against a sovereign State pursuant to the State Immunity Act 1978, unless the State waives its immunity or concludes a commercial contract and/or agreement. The underlying claim to which the freezing injunction relates must have crystallised or must have been threatened. A mere anticipation of future breach will not suffice. See *R Q's Estate* [1999] 1 All E.R. (Comm) 499. See also *Dadourian Group Int Inc v Simms*, [2006] EWCA Civ 399, [2006] 2 Lloyd's Rep. 354, for the Court of Appeal's guidelines, which govern an application for the enforcement of a worldwide freezing order.

51. *Ibid.* at para 95.

52. *Tsavliris Salvage (International limited) v The Grain Board of Iraq* [2008] EWHC 612. (Comm), [2008] 2 Lloyd's Rep. 90. See also *TTMI v ASM Shipping* [2005] EWHC 2666 (Comm), [2006] 1 Lloyd's Rep. 401 at paras 24–27 and *AH Baldwin and Sons Ltd v Sheik Saud Bin Mohammed Bin Ali-Al Thani* [2012] EWHC 3156 (QB).


53. *Congentra AG v Sixteen Thirteen Marine SA*, [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep. 602.

54. As per *Gibson LJ in Thane Investments v Tomlinson* [2003] EWCA Civ 1272.

55. See *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK*, [2011] EWHC 3143 (Comm), [2012] 2 All E.R. (Comm) 513.

6.25 Where the defendant has failed to make adequate disclosure about its assets to the court when ordered to do so, the court may draw an adverse inference about the risk of dissipation. This was the position in *PJSC v Vseukrainskyi Aktsionernyi Bank v Sergey Maksimov*,⁵⁶ where Blair J took the view that there was a risk of dissipation by one of the defendants because of lack of disclosure of its assets. Consequently, where England is the seat of the arbitration, the English courts will stop a defendant from dissipating its assets so as to avoid enforcement of any resulting award.

6.26 In *Mobil Cerro Negro Limited v Petroleos de Venezuela S.A. ("PDV")*, Mobil sought a worldwide freezing order to the value of US\$12 billion in support of its claim against PDV. Mobil had commenced ICSID proceedings, and, at the time, the initial order was granted, promising to commence other proceedings under the



auspices of the ICC. In deciding whether or not to continue the initial order or discharge it, Walker J adopted the following test. First, the applicant must have a sufficiently arguable case. Second, there must be a good arguable case that the respondent will dissipate its assets. Third, the applicant must satisfy the requirement of urgency under section 44(3) of the Act. The judge dismissed the application on the basis that there was no likelihood that the assets would be dissipated, nor was the case one of urgency. Given that there was no exceptional feature of fraud, nor did PDV have or control any assets in England, it was not an appropriate case in which the courts should exercise its jurisdiction under section 44.

6.27 Where there is cogent evidence of fraud, the English courts will be minded to grant a freezing injunction, even where the respondent is not a company incorporated in or with significant presence in England. This was the situation in *Mediterranean Shipping Co. v OMG International Ltd*,⁵⁷ where Walker J held that, given the evidence that the respondent and other parties were involved in fraud against other shipowners, and it was masterminded in London, it was appropriate to grant a freezing injunction.


6.28 An applicant seeking a freezing injunction ought to do so promptly, as delay is one of the factors to be considered in whether or not to grant the injunction sought. However, the fact that an applicant does not bring its application promptly does not necessarily mean that there is no “real risk” of dissipation. In *Antonio Gramsci Shipping Corporation v Recoletos Limited*,⁵⁸ Cooke J considered the impact of delay, and noted that delay in bringing an application did not mean there was no risk of dissipation. However, if the court is satisfied on other evidence that there is a “real risk” of dissipation, the court ought to grant the order, despite the delay, even if only limited assets are frozen.⁵⁹ Where the delay is inexcusable, the courts may draw an adverse inference. This was the position in *Enercon GmbH, Wobben Properties GmbH v Enercon (India) Limited*,⁶⁰ where Eder J refused the injunction sought on the basis that the applicant waited for almost two and a half years before seeking a freezing injunction.

56. [2013] EWHC 3203 (Comm).

57. [2008] EWHC 2150 (Comm).

58. [2011] EWHC 2242 (Comm).

59. See *Madoff Securities International Limited v Stephen Raven* [2011] EWHC 3102 (Comm), [2012] I.L.Pr. 15 at para 156.



6.29 However, the court will assist a party to enforce an award by granting an order under section 37(i) of the SCA, that a defendant, through a proper officer of the company, provide disclosure verified by an affidavit of its assets outside, as well as inside, the jurisdiction. This is particularly the case where the award in question has been converted into a judgment by the English court.⁶¹ The court has a free-standing power under section 37 of the SCA to order disclosure after a judgment so as to render that judgment effective so as to facilitate enforcement.

6.30 Given that an arbitral award gives a party a contractual right to be paid the sums awarded, the court will grant an order of disclosure if that would materially assist the applicant in enforcing the award. This was the position in *Cruz City 1 Mauritius Holdings Ltd v Unitech Limited*,⁶² where Field J was prepared to grant an order under section 37 of the SCA that the defendants disclose their assets worldwide so as to assist the claimant in enforcing two awards rendered in a London-seated arbitration.

SECTION 44 AND ICSID ARBITRATIONS

6.31 An applicant may seek an injunction in relation to foreign arbitral proceedings commenced under the auspices of the International Centre for the Settlement of Investment Disputes ("ICSID"). These are normally claims commenced by a foreign investor against a host State in circumstances where the investor feels that its investment has not been protected and/or has been expropriated contrary to the relevant protections under the relevant bilateral investment treaty ("BIT"). The issue, then, is whether or not an English court can grant a freezing injunction under section 44 in support of a foreign arbitration conducted under the auspices of ICSID. This is scenario (c) above.⁶³ It is now the case that section 44 of the Act cannot be the basis of an interim injunction in relation to ICSID claims.⁶⁴

6.32 Prior to the enactment of section 25 of the Civil Jurisdiction Act 1982 ("CJA"), the English courts did not have jurisdiction to grant interim relief by way of a *mareva* injunction against a foreign defendant other than in support of a cause of action, in respect of which the defendant was amenable to the jurisdiction.⁶⁵ The main purpose of section 25 of the CJA was to give English courts the jurisdiction to grant provisional and protective measures where the court of another Member State under the Brussels Convention⁶⁶ had jurisdiction over the substantive matter. Second, it was to enable subordinate legislation to be enacted to reverse the effect of *The Siskina* so as to allow the English courts to grant interim relief where proceedings were pending in foreign, non-EU cases.

60. [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep. 519.

61. See the *Naftilos* [1995] 1 WLR 299.

62. [2013] EWHC 1323 (Comm).

63. See Para 6.11.

64. See *ETI Euro Telecom International v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 2 Lloyd's Rep. 421.

65. *The Siskina* [1979] AC 210.

66. This is now Brussels Regulation No 44/2001.

6.33 Section 25(3)(c) of the CJA provided that the power to grant interim relief could be extended to arbitration by an order in Council. However, Schedule 3 of the Arbitration Act 1996 repealed section 25(3)(c) of the CJA so as to remove arbitration proceedings from the description of the proceedings to which the power to extend section 25(1) could be applied by order in Council. The reason for this repeal is because the Act contains the necessary provisions for the courts to grant interim relief in support of arbitration pursuant to section 44 of the Act. The Civil Jurisdiction and Judgments Act (Interim Relief) Order of 1997 provides that section 25 of the CJA applies wherever the proceedings are commenced, and it seems that the defendant's domicile is no longer material. The "proceedings" referred to in sections 25(3)(a) and (b) of the CJA were not intended to refer, and did not refer, to arbitration proceedings, since these were specifically dealt with in section 25(3)(c). Consequently, it has been held that arbitral proceedings are not proceedings for the purpose of the Interim Relief Order of 1997.⁶⁷

6.34 Although there is power under section 3(1) of the Arbitration (International Investment Disputes) Act 1996 (as amended by section 107(1) and Schedule 3 of the Act), for the Lord Chancellor to apply section 44 of the Act to cover ICSID arbitrations, this has not been done.⁶⁸ Consequently, section 25(3) of the CJA and the Interim Relief Order 1997 do not encompass ICSID arbitration.

6.35 In *ETI Euro Telecom International v Republic of Bolivia*,⁶⁹ an interim order was sought pursuant to section 44 of the Act and section 25 of the CJA as a basis for freezing assets in a London bank account belonging to the second respondent after successfully obtaining an attachment order in New York. These applications were in aid of ICSID proceedings commenced by ETI for alleged breaches of the Netherlands-Bolivia BIT. While section 25 of the CJA permits an English court to grant ancillary relief in support of foreign proceedings, however, it cannot be used in support of foreign proceedings that are not "substantive" in nature. Where the foreign proceedings are proceedings in aid of arbitration, then section 25 of the

CJA cannot be invoked.⁷⁰

6.36 The foreign proceedings referred to in section 25 of the CJA and 1997 Order are referring to “substantive proceedings.”⁷¹ In *Refco Inc v Eastern Trading Co.*,⁷² the Court of Appeal noted that in deciding whether or not to grant interim relief, the court had to consider whether or not it would grant the relief sought had the substantive proceedings been conducted in England. Second, whether the fact that those substantive proceedings were abroad made it inexpedient for the purposes of section 25(2) to grant the relief.

67. See *ETI Euro Telecom International v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 2 Lloyd’s Rep. 421. Para 92.

68. See also *Republic of Ecuador v Occidental Exploration and production Company* [2005] EWCA Civ 1116, [2006] QB 432 at para 38. See also *ETI Euro Telecom*.

69. [2008] EWCA Civ 880, [2008] 2 Lloyd’s Rep. 421.

70. Collins LJ noted that: “ In my judgment, this ground of appeal fails because on any view the English proceedings are not in aid of, or related to, any substantive proceedings in New York, however liberally those expressions are interpreted. As I have said, the complaint in the SDNY describes the proceedings as an ‘an action for an order of attachment in aid of arbitration’ and founds jurisdiction and venue on the fact that property belonging to Entel and/or Bolivia was situate in New York. The SDNY attachment proceedings constitute interim relief to protect assets pending the outcome of the ICSID arbitration. The New York proceedings are directed solely at assets in New York, and proceedings in England directed at assets in England cannot be ancillary to the New York attachment.” At para 78.


71. *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818 at 825–831, *Refco Inc v Eastern Trading Co.* [1999] 1 Lloyd’s Rep. 159 at 170–172, 174–175; *Motorola Credit Corp v Uzan* (No 2) [2003] EWCA Civ 752, [2004] 1 WLR 113.

72. [1999] 1 Lloyd’s Rep 159.

APPEALS AND INJUNCTIONS

6.37 Under certain arbitral procedures, a party may be allowed to appeal to an arbitral appeal body. This, in essence, is a contractual agreement between the parties as to whether or not an appeal is allowed to an appeal body under the institutional rules governing the arbitration. This raises the issue of whether or not a court can grant an injunction to restrain such appeal.⁷³

6.38 This is scenario (d) above.⁷⁴ In essence, the question is whether an anti-appeal injunction can be granted under section 44 of the Act. Of course, any relief under this section can only be interim in nature. This was the issue that Teare J had to decide in *Sheffield United Football Club Ltd v West Ham United*



*Football Club Plc.*⁷⁵ The case concerned an injunction by Sheffield United to stop West Ham from appealing or challenging an award rendered by an arbitral tribunal in England at the Court of Arbitration for Sport in Switzerland. Although Teare J noted that the ordinary requirements of section 37 of the SCA 1981 and the special requirements under section 44 of the Act had to be satisfied in order for the relief to be granted, this view must be treated with some caution, given the comments of Cooke J in *Starlight Shipping Company v Tai Ping Insurance Company Limited*⁷⁶ that the sections gave independent rights of relief. While Cooke J's approach in *Starlight* was endorsed by *Rix LJ in AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC*,⁷⁷ the Supreme Court took a different view.⁷⁸

6.39 Once an applicant satisfies the requirements of sections 44(3) and (5), the English courts have the jurisdiction to grant an anti-appeal injunction.⁷⁹ It has been considered that where a declarative award by the arbitrators is subject to appeal before the appeal tribunal, the arbitrators will not be able to act effectively, as such declaration would not preclude the other party from appealing to the appeal tribunal.⁸⁰ An anti-appeal injunction will be granted even where the seat of the appeal is not England or Wales. What matters is that the seat of the initial arbitration proceedings is England. While the appeal tribunal will have the power to decide its own jurisdiction, this does not affect the supervisory powers of the English court.⁸¹

73. This raises section 30 issues, which are discussed in Chapter 7.

74. See para 6.11.

75. [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep. 167.

76. [2007] EWHC 1893, [2008] 1 All E.R. (Comm) 593. The relationship between sections 37 of the SCA and section 44 of the Act is discussed later in this chapter.

77. [2011] EWCA Civ 647.

78. At para 48.

79. See *Sheffield United Football Club Ltd v West Ham United Football Club Plc* at paras 33 and 36.

80. Teare J held that: "If the tribunal were requested to rule on allegations of breach and decided that West Ham's conduct in seeking to appeal to CAS was a breach of the arbitration agreement it seems likely that West Ham would seek to appeal to CAS. While a decision by the tribunal would resolve the question as a matter of law, the probabilities are that West Ham would not so regard it and would seek to appeal to CAS. Sheffield United would in turn be likely to issue proceedings in this court seeking an order restraining West Ham from appealing to CAS. Thus the parties would return to the position in which they presently find themselves. In these unusual circumstances I consider that it can properly and fairly be said that the tribunal is unable to act effectively." At para 35.


81. See para 27.

CERTAINTY AND INJUNCTIVE RELIEF

6.40 In order to ensure certainty, and given that any order made by the courts may have to be enforced according to its terms, a distinction has been drawn between orders that require the respondent to carry on an activity for a period of time and those that are required to achieve a specific result.⁸² An applicant may seek an interim injunction to stop the other party from terminating an agreement, as well as stopping that party from taking any steps from hindering the applicant from performing its obligations under the agreement. This is scenario (f) above.⁸³

6.41 An English court will refuse to grant an interim injunction where the terms of the contract are not sufficiently defined so as to indicate what is precisely required of the respondent. Intolerable burden will not be placed on the respondent simply to expect it to make arrangements work in circumstances where it would be unclear as to what exactly it has to comply with so as to avoid any sanctions from the courts. This was the position in *Vertex Data Science Limited v Powergen Retail Limited*,⁸⁴ where Vertex sought an interim injunction so as to prevent Powergen from terminating the Master Service Agreement between the parties and preventing Vertex from performing its obligations under the same. Tomlinson J refused to grant the injunction on the basis that the injunction would lack certainty, place intolerable burden on Powergen and compel the parties to work together.⁸⁵ However, in *Ericsson AB v EADS Defence and Security Systems Ltd*,⁸⁶ Akenhead J noted that the reasoning of Tomlinson J in *Vertex* must not be seen as setting out a general principle on what a court ought to do between two commercial parties in terms of injunctions when one party is trying to terminate the contract. That said, a party's contractual right under a contract to terminate that contract is not dependent on the dispute between the parties being referred to adjudication. In other words, it is not a breach of contract for a party to terminate that contract while the dispute as to termination is referred to adjudication, unless there is clear wording to that effect in the contract.⁸⁷

6.42 In *Ericsson*, Ericsson sought an injunction to prevent EADS from terminating the agreement, at least before the adjudication was completed. The judge refused to grant the injunction sought on the basis that the effect of the injunction to restrain termination would be to require two parties who had fallen out with each other to continue to work together. Consequently, on the balance of convenience, justice did not require that he should prevent EADS from terminating the contract.⁸⁸ Indeed, the courts should not take on the responsibility of determining whether a commercial party is doing the "sensible thing."⁸⁹



6.43 This approach can be contrasted with that of the Court of Appeal in *LauritzenCool AB v Lady Navigation Inc*,⁹⁰ where the shipowner wanted to withdraw chartered vessels from a pool-chartering agreement and sought an order to restrict the use of the vessels in a manner inconsistent with the agreement. The Court of Appeal held that such an order did not amount to an order of specific performance of a contract for personal services, despite accepting that the practical effect of the order would be to force one party to adhere to the pool-chartering agreement until the dispute was resolved.

82. See *Co-Operative Insurance Society Limited v Argyll Stores (Holdings) Ltd* [1996] 3 W.L.R. 27.

83. See para 6.11.

84. [2006] EWHC 1340 (Comm), [2006] 2 Lloyd's Rep. 591.

85. See para 46.

86. [2009] EWHC 2598 (TCC) [2010] B.L.R 131.

87. See *Ericsson AB* at para 42.

88. See para 47.


89. See para 44.

90. [2005] EWCA Civ 579, [2006] 1 All E.R. 866.

SECTION 44 AND THIRD PARTIES

6.44 Given that arbitration is a consensual process based on party autonomy, this raises the issue of whether or not an injunction can be granted against a party that is not a party to the arbitration agreement. It is clear that where a contract containing an arbitration clause has been assigned to a third party, such party will be bound by the arbitration agreement. This is particularly the case in insurance contracts, where the insurer has a right of subrogation. The duty to arbitrate is an inseparable component of the claim transferred to the insurer as part of the subrogated right. In *Jay Bola*,⁹¹ the Court of Appeal noted that earlier authorities confirmed that any rights acquired by an insurance company were subject to the arbitration clause and could not assert its claim inconsistently with the terms of the contract.⁹² However, where no rights have been assigned or where a party is not a party to the arbitration agreement, what, then, is the position? This is scenario (e) above.⁹³ Ordinarily, one may take the view that such applications should not be entertained by the English courts.

6.45 In order for an English court to grant an injunction against a non-party to an arbitration agreement that is out of jurisdiction, one of the "gateways" under the



CPR rules must be satisfied.⁹⁴ It has been suggested that the English courts lack jurisdiction to grant an injunction against a third party where such a party is not a party to the arbitration agreement, especially in the non-insurance context, and CPR 62.5 does not apply, as it only applies to parties to the arbitration agreement. This was the view expressed by Teare J in *Tedcom Finance Limited v Vetabet Holdings Limited*.⁹⁵ Cooke J had expressed a similar view in *Starlight*, when he considered an application for an anti-suit injunction from owners of a vessel and the managers restraining the defendants from taking further steps in litigation proceedings commenced in China. The managers were not a party to the arbitration agreement. Cooke J followed the decision of Thomas J in *Vale do Rio*,⁹⁶ and noted that CPR 62.5(c) could only be invoked if the remedy or question affects arbitration, or an arbitration agreement.⁹⁷ Consequently, there must be an arbitration agreement in place or both parties must be a party to the arbitration agreement.⁹⁸

91. [1997] 2 Lloyd's Rep 279.

92. In *The Leage* [1984] 2 Lloyd's 259, the assignee took the assigned right with both the benefit and burden of the arbitration clause. In the *Padre Island (No 1)* [1984] 2 Lloyd's 408, Leggatt J held that the transferee under the Third Parties (Rights Against Insurers) Act 1930 of an insolvent assured's rights against his insurer was bound by the arbitration clause. In the *Jordan Nicolov* [1982] Lloyd's 11, Hobhouse J noted that: "Where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary include as stated in s.136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the arbitration clause in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate. Accordingly, it is clear both from the statute and from a consideration of the position of the assignee that the assignee has the benefit of the arbitration clause as well as of other provisions of the contract."

93. See para 6.11.

94. See CPR 62.5(1) and CPR PD6B. The relevant gateways for non-parties are discussed later in this chapter, and in Chapter 4 for parties.


95. See Teare J, at first instance, in *Tedcom Finance Limited v Vetabet Holdings Limited* 2010, unreported.

96. A decision that is now in considerable doubt, given the comments of *Rix LJ in AES-UST*.

97. See paras 38–42.

98. This approach must be doubted, given the decisions of the Court of Appeal in *AES-UST and Tedcom*.

6.46 However, the view expressed at first instance by Teare J in *Tedcom* was rejected by the Court of Appeal,⁹⁹ where Longmore LJ held that it was arguable



that there was jurisdiction to grant the relief sought under CPR 62.5.¹⁰⁰ It was also noted that it was arguable that permission to serve out of jurisdiction could be granted under Practice Direction 6B para 3.1(3)¹⁰¹ as a “necessary and proper party.”

6.47 In *Niagara Maritime SA v Tianjin Iron & Steel Group Co. Ltd.*,¹⁰² Hamblen J granted an interim anti-suit injunction against a cargo receiver and its insurer from pursuing a salvage claim in the Chinese Court, as the applicant had demonstrated that there was a high degree of probability that there was an English arbitration agreement and there was no strong reason as to why the injunction should not be granted. However, it should be pointed out that this is an insurance-related case, and granting an injunction against an insurer simply confirms earlier authorities discussed above.¹⁰³

6.48 In any event, it seems that the emerging approach is that the English courts are willing to grant injunctive relief against a third party if that party is seen as acting in collusion with the other party to the arbitration agreement. This was the position in *BNP Paribas S.A. v Open Joint Stock Company Russian Machines and Joint Stock Asset Management Company Ingosstrakh-investments*,¹⁰⁴ where Russian Machines guaranteed certain liabilities of one of its subsidiaries in relation to a loan granted by BNP to that subsidiary. The guarantee was governed by English law, and contained a London-seated arbitration clause. A dispute arose under the Loan Agreement, and the bank sought to enforce the Agreement. Ingosstrakh, which was not a party to the Loan Agreement, but a shareholder in Russian Machines, commenced court proceedings in Russia on the basis that the guarantee was void because it had not been approved in accordance with Russian law.

6.49 CPR 62.5(1)(b) provides that the court may give permission if the claim is for an order under section 44 of the Act. Since section 44(3) of the Act encompasses a contractual right to have disputes referred to arbitration, then CPR 62.5(1)(b) is satisfied, especially where the applicant can make good the underlying allegation. In *Russian Machines*, Blair J¹⁰⁵ simply relied on the comments of Longmore LJ in *Tedcom* to find the necessary jurisdiction under CPR 62.5(1)(b). A similar scenario arose in *PJSC v Vseukrainskyi Aktsionernyi Bank v Sergey Maksimov*,¹⁰⁶ where Blair J considered an application to discharge a worldwide freezing injunction against a Cyprus company that was not a party to the arbitration agreement. The company sought to argue that the English courts lacked jurisdiction, as it was not a party to the arbitration agreement and it relied on the decision of Thomas J in *Vale Do Rio*. Blair J was quick to reject this argument, and reaffirmed the view that in the appropriate case, the English courts have the power to order service out of jurisdiction under CPR 62.5(1)(b) where the defendant is not a party to the arbitration agreement. This is particularly the case where it can be demonstrated

that the defendant company is owned and controlled by a party to the arbitration agreement.

99. [2011] EWCA Civ 191, [2011] Arb. L.R. 8. The Court of Appeal distinguished *Vale Do Rio* on the basis that *Vale Do Rio* did not consider the then equivalent of CPR62.5 (1)(b), but only part (c).

100. [2011] EWCA Civ 191. See para 18.

101. *Ibid.* at para 19.

102. [2011] EWHC 3035 (Comm), [2011] Arb. L.R. 54.

103. See *Jay Bola, The Leage and The Jordan Nicolor*.

104. [2011] EWHC 308 (Comm).

105. See para 45 of *Russian Machines*.

106. [2013] EWHC 3203.

6.50 In relation to CPR 62.5(1)(c), the court may give permission to serve an arbitration claim form out of jurisdiction if the claimant seeks or requires a question to be decided by the court affecting a London-seated arbitration. It may be recalled that in *Vale do Rio*, Thomas J held that an order against a third party under the predecessor provision could not be made. However, in *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC*,¹⁰⁷ Rix LJ disagreed with Thomas J's approach in *Vale do Rio* in relation to CPR 62.5(1)(c), but the Court of Appeal in *AES-UST* did not consider the position in relation to third parties. In *Russian Machines*, no determinative ruling was given on CPR 62.5(1)(c), given that the court had jurisdiction under CPR 62.5(1)(b). However, given the analysis and comments¹⁰⁸ of Rix LJ in *AES-UST*, the courts may have jurisdiction against a third party under CPR 62.5(1)(c).

CPR PD 6B, PARA 3.1(6)

6.51 This gateway applies where the claim is made "in respect of a contract" made or broken in England or governed by English law. This gateway applies to third-party contractual claims governed by English law to which only one of the intended parties to the litigation is a party.¹⁰⁹ It is, however, doubtful that there is jurisdiction under this gateway where the basis of the applicant's claim is not contractual, but unconscionable conduct.¹¹⁰

CPR PD 6B, PARA 3.1(3)

6.52 Under this gateway, the court may give permission for a claim form to be served on a third party who is a “necessary and proper party” to a claim against a defendant in respect of which a claim form has been or will be served.¹¹¹ Where a third party is deemed as colluding with a party to an arbitration agreement so as to frustrate the arbitral proceedings, the third party will be seen as a “necessary and proper party.” This is particularly the case where a non-party to the arbitration agreement and the defendant in the arbitral proceedings are under common control. The courts may infer that the non-party is not acting alone and is trying to frustrate the arbitration proceedings, especially where court proceedings are commenced shortly after the arbitration proceedings.¹¹² The Court of Appeal, in *Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas*,¹¹³ confirmed the reasoning of Blair J at first instance that a non-party to an arbitration agreement can be a “necessary or proper party” to a claim.

107. [2011] EWCA Civ 647.

108. See paras 114–120.

109. See *Greene Wood and MacClean LLP v Templeton Insurance Ltd* [2009] 1WLR 2013 at paras 17–20.

110. See para 58 of *Russian Machines*, where Blair J held that: “The claimant’s argument under this ground relates to its more general submission that its claim against the second (as well as the first) defendant can be framed in contractual terms. Since (as I shall explain) I have decided the case on the basis of the unconscionable conduct analysis, rather than the contractual analysis, I do not uphold the claimant’s claim to jurisdiction on this ground.”

111. See *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 All E.R. (Comm) 319.

112. See *Russian Machines*, at first instance, at paras 50–52. A similar view was adopted by the Court of Appeal on Ingosstrakh’s appeal at para 57. Blair J, in his judgment, noted that: “In addition, there is evidence from the record that the first defendant has supported the second defendant’s case in the Russian proceedings. What is unconscionable cannot and should not be defined exhaustively (*Glencore International AG v Exeter Shipping Ltd* [2002] 2 All E.R. (Comm) 1 at [42], Rix LJ), but where companies are in the same ownership and control, it is arguably unconscionable for them to work together to the extent of one bringing court proceedings with a view to impeding the outcome of an arbitration to which the other is a party. Where England is the seat, this may justify the court intervening by way of injunction against both companies, albeit only one is a party to the arbitration agreement, because the conduct of the other party is bound up with the arbitration agreement. Against the nonparty also, the court’s jurisdiction ultimately rests upon the consensual submission of the dispute to arbitration. On the submissions I have heard, and the material I have seen, I accept the claimant’s contention that there is sufficient material to justify drawing the inference that the Russian proceedings are brought with a view to impeding the outcome of the arbitration. There is authority that the claim should be made out to a ‘high degree of probability’ where an interim injunction has the effect of finally disposing of all or part of a claim (e.g. *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] 2 Lloyd’s Rep. 411 at [36]), Teare J, (reversed on other grounds: [2010] EWCA Civ 66). Although at present, I am considering the matter in the context of a challenge


to jurisdiction, where it is sufficient to say that the good arguable case threshold is satisfied, I have kept in mind that this higher standard may be applicable on an interim application.” At para 92.

113. [2012] EWCA Civ 644.

6.53 It is now clear that there is jurisdiction to grant an interim injunction under section 44 of the Act against a third party outside the jurisdiction if the CPR 62.5(1)(b) or CPR PD 6B, para 3.1(3) is satisfied. From a tactical point of view, the latter might be more efficient for an applicant, as all it has to do is persuade the court that the non-party is simply trying to frustrate the arbitral proceedings and acting in collusion with the defendant in the arbitration. That said, the courts will not grant an injunction against a non-party (who has not agreed to litigate or arbitrate in England and has not submitted to the jurisdiction) where that party is not seeking the determination of any issue in the arbitration, but simply seeking the determination of the validity of the contract it had entered into by commencing court proceedings in another jurisdiction. This was the position in *Star Reefers Pool Inc v JFC Group Ltd*,¹¹⁴ where the Court of Appeal overturned the first instance decision of Teare J to grant an injunction on the basis that the conduct of JFC was vexatious because it had commenced proceedings first in Russia to seek the determination of the validity of the guarantee contracts it had entered into. Star Reefers subsequently commenced arbitral proceedings under two charterparties it had entered into with companies nominated by JFC, but JFC was not a party to the charterparties. The Court of Appeal held that the anti-suit injunction should not have been granted by the first instance judge, and it was “a touch of egoistic paternalism in an English court injuncting continuation of the foreign proceedings in such a case.”¹¹⁵

RELATIONSHIP BETWEEN SECTION 37 OF SCA AND SECTION 44 OF THE ACT

6.54 Given that applications for interim injunctions are made pursuant to section 37 of the SCA and/or section 44 of the Act, it is important to examine the relationship between the two sections. It may be recalled that this issue was considered by Aikens J in *Elektrim S.A. v Vivendi Universal S.A.*,¹¹⁶ and the judge simply noted that the scope of the court to intervene by injunction before an award was made by the tribunal was limited to sections 44(2) (e) and 72 of the Act.¹¹⁷ Nevertheless, the tension between the two sections was aptly illustrated in *Sabmiller Africa B.V. Tanzania Breweries Limited v East African Breweries Limited* (“EABL”).¹¹⁸ In that case, various disputes arose between the parties, mainly because EABL asserted that Sabmiller had unilaterally instituted price changes and



failed to use best endeavours to promote EABL's brands. Consequently, EABL entered into another agreement with a competitor of Sabmiller. Sabmiller's response was to seek a temporary injunction under section 44 of the Act to stop the new agreement being put into effect.¹¹⁹ 6.55 At first instance, Clarke J applied the general principles of temporary injunctive relief under section 37, namely: was there a serious issue to be tried? If so, would damages be an adequate remedy, and, if not, where did the balance of convenience lie? The judge felt that as the tests under section 37 for interim relief were satisfied, he deemed it appropriate to grant an injunction restraining EABL from putting into effect the new agreement but not an injunction ordering EABL to continue with the performance of its agreements with Sabmiller. In Sabmiller, the approach of the English courts in relation to a section 44 application was that the tests in both sections 37 of the SCA and 44 of the Act ought to be satisfied. Clearly, that was the approach adopted by Clarke J in Sabmiller, which was never disapproved by the Court of Appeal.

114. [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep. 376.

115. See para 39. See also *Vitol Bahrain EC v Nasdec General Trading LLC* [2013] EWHC 3359 (Comm).

116. [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep. 8.

117. See paras 67–73.

118. [2009] EWHC 2140 (Comm), [2010] 1 Lloyd's Rep. 392.

119. The arbitration clauses provided that a breach of the agreement entitled either party "to apply to any court of competent jurisdiction for an appropriate interdict or injunction," and either party could seek "an urgent order for specific performance or interim or final injunctive relief or any other relief of a similar nature from any court having jurisdiction on a without notice basis or otherwise."

6.56 It was argued in the Court of Appeal, in *AES-UST*, that the two sections must be considered together on the basis that if section 44 was not available to a party, then section 37 should not be used in order to exceed the powers allowed under section 44 of the Act. In essence, where section 44 is not available, section 37 ought not to be regarded as available in principle as well. Rix LJ dismissed this argument on the basis that each section must be considered on its own terms, but one may influence the application of the other. In so doing, he relied on and cited with approval the comments¹²⁰ of Cooke J in *Starlight Shipping Company v Tai Ping Insurance Company Limited*,¹²¹ where the judge held that the two sections gave independent rights of relief and each must be considered in its own right, although one may influence the application of the other.


6.57 However, in *AES-UST*, Lord Mance in the Supreme Court¹²² took a different view to that of Cooke J in *Starlight*, and offered a “better view” that the provisions of section 44(e) of the Act were not intended to either exclude the court’s general power to act under section 37 of the SCA in circumstances where section 44 could not be invoked, or to duplicate the general power of the court contained in section 37 of the SCA. Consequently, where an injunction (interim or final) is sought to restrain foreign proceedings where arbitral proceedings are not on foot, the court’s jurisdiction to act is based on its inherent jurisdiction under section 37 of the SCA, and not section 44 of the Act. This is because such injunction relates to a negative promise contained in the arbitration agreement not to bring foreign proceedings, and not for the purposes of, and in relation to, arbitral proceedings.¹²³ Given Lord Mance’s approval of Colman J’s reasoning in *Sokana Industries*, the inference to be drawn from the comments of Lord Mance is that the two sections are to be used in different situations. Section 37 of the SCA should be used to enforce the arbitration agreement, and section 44 for injunctions relating to the arbitration proceedings.

120. In *Starlight*, Cooke J noted that: “While the ability or otherwise of the arbitrators to deal with the dispute and to make a final order is a relevant consideration in the context of the discretion under s 37, it does not appear to me to govern the position under s 37 in the way that it operates under s 44. In circumstances where the cargo owners and the insurers both maintain that the arbitration clause is ineffective in the bill of lading, so far as they are concerned, and the insurers have commenced proceedings in China on the substantive claim under the bill, it does not lie in their mouths to contend that the court should refuse to exercise its s 37 jurisdiction in favour of allowing the arbitrators to do so. The likelihood must be that, if the arbitrators did make an award against the cargo owners and the insurers, an objection would then be taken to the arbitrators’ jurisdiction and an application would then be made to this court under s 67 of the 1996 Act.” At para 29.

121. [2007] EWHC 1893, [2008] 1 All E.R. (Comm) 593.

122. [2013] UKSC 35.

123. Lord Mance noted that: “The better view, in my opinion, is that the reference in section 44(2) (e) to the granting of an interim injunction was not intended either to exclude the Court’s general power to act under section 37 of the 1981 Act in circumstances outside the scope of section 44 of the 1996 Act or to duplicate part of the general power contained in section 37 of the 1981 Act. Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement – whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed – the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not ‘for the purposes of and in relation to arbitral proceedings’, but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed. Colman J in *Sokana Industries Inc v Freyre & Co. Inc* [1994] 2 Lloyd’s Rep. 57 was correct on this point when he held that the court’s power to ‘make orders for the purpose of and in relation to a reference’ in



section 12(6) of the Arbitration Act 1950 did not include the granting of relief consisting of either a final or an interim injunction to restrain an alleged breach of a London Chamber of Commerce arbitration agreement consisting in the commencement of proceedings in Florida.” Lord Mance also approved the decision of Colman J in *Sokana Industries*. See para 48.

EXTENDING THE POWER OF THE COURT

6.58 As discussed above, there are restrictions on the court’s powers under section 44. In *SabMiller*,¹²⁴ the Court of Appeal had to consider two questions. First, whether the parties had, by their agreement, extended the power of the court under section 44 of the Act. Second, whether such extension was allowed. The Court of Appeal held that the agreement did not extend the court’s powers, hence it was unnecessary to deal with the second question. On the first question, the Court of Appeal held that the judge had acted under section 44 of the Act, and the clauses in the arbitration agreement did no more than preserve the court’s powers under section 44. Where parties want injunctive relief to be granted pursuant to the powers under section 37 of the SCA, then clear wording to that effect will be needed.


ANTI-SUIT INJUNCTIONS AND SECTION 44

6.59 It used to be the case that anti-suit injunctions were normally granted under section 37 of the SCA. It has been assumed by the English courts that section 44 applies to anti-suit injunctions, and such assumptions were made in *Starlight*, *Niagara Maritime*, *Tedcom* and *AES-UST*. This assumption has never been fully tested, although Blair J, in *Russian Machines*, felt it was a correct assumption to make.¹²⁵ In the event that this assumption is correct, only interim anti-suit injunctions can be granted under section 44 of the Act. This could raise a potential problem where the effect of the interim injunction would, in effect, be permanent, extinguishing the ability of the respondent to take any further action elsewhere. In any event, and more importantly, it would now seem that the assumptions made in the cases above are wrong, given Lord Mance’s comments in *AES-UST* that section 44 relates to injunctions relating to the arbitration proceedings themselves.

124. [2010] EWCA Civ 1564, [2010] 2 Lloyd’s Rep. 422.

125. See para 38.

INJUNCTIVE RELIEF AND SECTION 72



6.60 Where a claimant has commenced arbitration proceedings but the respondent has refused to have anything to do with them, the respondent is free to seek injunctive or declaratory relief from the court under section 72 of the Act in the form of an order that the arbitrators do not possess the relevant jurisdiction. The purpose of section 72 is to protect a party who refuses to participate in arbitral proceedings on the basis that the arbitrator lacks jurisdiction over it. A declaration may also be sought under section 72 of the Act where a party denying the existence of an arbitration agreement fails to commence court proceedings and does not wish to do so.

6.61 Mann J noted in *Law Debenture Corporation plc v Elektrim Finance BV and Others*¹²⁶ that where a party could bring itself within the wording of section 72 of the Act, it was entitled to invite the court to consider the jurisdictional point under that section. A party that takes no part in arbitral proceedings may seek a declaration or an interim or final injunction.¹²⁷ A party can question whether there is a valid arbitration agreement, whether the tribunal is properly constituted or that matters have been submitted to arbitration in accordance with the arbitration agreement.¹²⁸ The court's power under section 72 can only be exercised where the seat of the arbitration is in England,¹²⁹ because the section falls within part 1 of the Act, which only applies where the seat of the arbitration is in England and Wales, or Northern Ireland.¹³⁰

6.62 In *Fiona Trust and Holding Corporation v Privalov*,¹³¹ the Court of Appeal emphasised that the arbitrators should first consider whether or not they have jurisdiction to determine the dispute, and the courts should be "very cautious about utilizing section 72 of the Act."¹³² Consequently, if there is a valid arbitration agreement, section 72 cannot be invoked.

6.63 Section 72 of the Act does not provide for any formal time limit within which an application must be brought. However, it must be brought in good time, because the court has discretion as to whether or not to entertain the application.¹³³ Although there are time limits¹³⁴ within the Act, they do not apply to section 72 of the Act, because those time limits apply to a party that takes part in the proceedings.

6.64 The court's power in relation to section 72 of the Act is discretionary, and an application under the same may be refused if it is not made promptly. In *Zaporozhye Production Aluminium Plant Open Shareholder Society v Ashley Limited*, Tomlinson J refused to grant an interim injunction under section 72 because the application was brought at very short notice, with the arbitral proceedings due to commence the next day.

6.65 Under section 72(2) of the Act, a party may challenge the award itself on the

grounds of lack of substantive jurisdiction under section 67 of the Act or serious irregularity under section 68 of the Act.¹³⁵ There is no need for the party to exhaust any internal appeal process. However, it must be the case that the applicant will still be bound by the time limit upon which a challenge must be brought under section 70(3) of the Act.

126. [2005] EWHC 1412 (Ch), [2005] 2 Lloyd's Rep 755.

127. See *Zaporozhye Production Aluminium Plan Open Shareholders Society v Ashly Limited* [2002] EWHC 1410 (Comm).

128. See section 72(1).

129. In *Arab National Bank v EL Sharib Saoud Bin Masoud Bin Haza'a El-Abdali* [2004] EWHC 2381 (Comm) [2005] 1 Lloyd's Rep 54.

130. See section 2(1) of the Act.

131. [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep. 267.

132. At para 34.

133. *British Telecommunications PLC v SAE Group Inc* [2009] EWHC 252 (TCC).

134. See section 73 of the Act.

135. See section 72(2).

6.66 The English courts will not entertain an application for a declaration under section 72 where an applicant accepts that there is a binding arbitration agreement.¹³⁶ It has been held that section 72 cannot be invoked to seek a declaration as to whether or not there is a binding arbitration agreement.¹³⁷ The earlier approach adopted by the English courts was that a party wishing to enforce its contractual right to arbitrate must appoint an arbitrator and if necessary, deploy the relevant default procedures to complete the appointment process.¹³⁸ Once the tribunal has been appointed, it can rule on its own jurisdiction under section 30 of the Act, and any award on jurisdiction can be challenged under section 67 of the Act.

6.67 In *Vale do Rio*, Thomas J saw no reason why an application for a declaration should be entertained prior to the constitution of the tribunal. However, Thomas J's view in *Vale do Rio* has been doubted by the Court of Appeal in *AES-UST*. While not specifically overruling *Vale do Rio*, Rix LJ noted that there were situations where a declaratory relief in favour of a party seeking to establish the validity of an arbitration agreement may be justified.¹³⁹

6.68 The English courts have jurisdiction to grant an injunctive or declaratory

relief under section 72 of the Act. In *J T Mackley Co. Ltd v Gosport Marina Ltd*,¹⁴⁰ Richard Seymour QC granted a declarative relief as the arbitrators and the other party refused to agree to refer the matter to the court for a preliminary ruling on jurisdiction under section 32 of the Act.¹⁴¹

6.69 Section 72 of the Act can be invoked even after the publication of an award, especially where the award was procured by fraudulent means. This was the position in *Arab National Bank v EL Sharib Saoud Bin Masoud Bin Haza'a El-Abdali*,¹⁴² where the claimant (Arab National Bank) sought a declarative relief under section 72 of the Act, to the effect that the purported arbitral award made in favour of the defendant was not binding on the bank. Given that the arbitrator, rather than the successful party, was seeking to enforce the purported award and the circumstances by which the award was rendered, Morison J was satisfied that the award was obtained by fraud, and there was no arbitration agreement in force between the parties.¹⁴³

136. *ABB Lummus Group Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep. 24.

137. See *Vale Do Rio Doce Navegacao SA v Shanghi Bao Steel Ocean Shipping Company Limited and Sea Partners* [2000] 2 Lloyd's Rep. 1 and *ABB Lummus Global Limited v Keppel Fels Limited* [1999] 2 Lloyd's Rep. 24. The decision in *Vale do Rio* must now be treated with some caution.

138. See, for example, section 18 of the Act.

139. See Chapter 8 in general.


140. (2002) EWHC 1315 [TCC], [2002] B.L.R. 367.

141. In *British Telecommunications plc v SAE Group Inc*, [2009] EWHC 252 (TCC), there were various applications for declarative reliefs under part 8 of the CPR rules, sections 32 and 72 of the Act. The court held that it possessed jurisdiction to deal with the application under each provision. See also *Nakanishi Kikai Kogyosho Ltd v Intermerc Transport GMBH* [2009] EWHC 994 (Comm) and *Secretary of State for Transport v Stagecoach Southern Western Trains Ltd* [2009] EWHC 2431 (Comm), [2010] 1 Lloyd's Rep. 175.

142. [2004] EWHC 2381 (Comm), [2005] 1 Lloyd's Rep 54.

143. At para 21.


6.70 Section 72 preserves the common law entitlement to seek a declaration that an arbitral tribunal lacks jurisdiction but limits the right to circumstances where the applicant has taken no part in the arbitration proceedings. A distinction has been drawn between submission and/or correspondence that a tribunal should not be acting and an attempt to argue the case on jurisdictional grounds so that the tribunal can consider it.



6.71 A preliminary objection to the commencement of arbitral proceedings will not constitute participation. In *Caporo Group Ltd v Fagor Arrasate Sociedad Cooperativa*,¹⁴⁴ Clarke J held that objecting to the jurisdiction of the arbitrators would not amount to submission to the jurisdiction of the tribunal and would not affect the applicant's right under section 72 of the Act. A similar approach was adopted by Mann J in *Law Debenture*, where the judge took the view that the applicant did no more than contest the appointment of the arbitrator with the relevant arbitral institution. Where a party vigorously protests that the tribunal has no jurisdiction on several occasions by correspondence, that will not amount to taking part in the proceeding.¹⁴⁵ This is particularly the case where the party protesting does not recognise the jurisdiction of the tribunal in the correspondence, or invite the same to consider or determine jurisdictional issues. An invitation by a party to the tribunal to decline jurisdiction cannot be interpreted as invoking the tribunal's jurisdiction. Such invitation is the party's right of assertion of lack of jurisdiction, and not a participation in the proceedings.

6.72 In *Bernuth Lines Ltd v High Seas Shipping Ltd*,¹⁴⁶ Clarke J considered an application under section 68 of the Act to set aside an award on the basis that the notice of arbitration had not been effectively served. Despite concluding that the notice had been effectively served, he nevertheless considered (obiter) the position had he reached the opposite conclusion that notice had not been effectively served. He considered the relationship between sections 72(1) and 72(2) of the Act. In relation to the former, it is directed at applications at an interlocutory stage, where the court may declare that an applicant is not bound by the arbitration agreement so as to restrain the respondent from further continuance of the arbitration. Curiously, Clarke J took the view that he would not have refused to set aside the award on the ground that section 72(1) of the Act did not permit it, and that section 67 of the Act had not been invoked, and would have been prepared to give the applicant permission to amend and set aside the award under section 67 of the Act.¹⁴⁷ The judge's view was influenced by the fact that the application was brought within the 28-day time limit and that the respondent would not have suffered any prejudice if permission was given to the applicant to amend its application notice so as to make its application under section 67 of the Act, because High Seas would have made exactly the same arguments under sections 67 and 72(2)(a), save for the argument about substantial injustice.¹⁴⁸ This is a curious decision. Where the application is brought within the 28-day time limit, it might be the case that the respondent suffers no prejudice. However, what if the application is brought outside the allowed time limit?

6.73 It is argued that the drafters of the Act did not intend that a party who has taken part in proceedings should be able to invoke section 72(2). Section 72(2) is



reserved for parties that have not taken part in the proceedings otherwise a party can easily side-step section 70(3). Furthermore, paragraphs 295–298 of the DAC Report support this argument. In particular, paragraph 298 makes clear that the provisions of paragraph 297 cannot be applied to a party who plays no part at all in the arbitral proceedings. In *London Steam Ship Owners Mutual Insurance Association Ltd v Spain*,¹⁴⁹ Walker J considered the relationship between sections 72(1) and 72(2) of the Act. He took a slightly different approach to Clarke J in *High Seas*. Walker J considered that section 72 should be construed with a degree of generosity, and there was no reason to confine section 72(1) to pre-award situations. Given that the remedies contemplated by section 72(1) are discretionary in nature, the courts will consider all relevant circumstances before deciding the appropriateness of any remedy to be granted.¹⁵⁰ In relation to section 72(2), Walker J took the view that given section 70(3) was not referred to under section 72(2), the inference must be that the time limit under section 70(3) would apply.¹⁵¹

144. [2005] ADRLJ 254.

145. See *Sovarex SA v Romero Alvarez S.A.* [2011] EWHC 1661 (Comm), [2012] 1 A11 E.R. (Comm) 207 where Alvarez wrote to the tribunal on at least four occasions as to why the tribunal had no jurisdiction.

146. [2006] 1 Lloyd's Rep. 537.

147. See para 59.

148. See para 59.


149. [2013] EWHC 2840 (Comm), [2014] 1 A11 E.R. (Comm) 300.

150. See para 83.

151. See para 84.

6.74 In addition, a closer reading of section 72(2) further supports the author's arguments. The section provides that "He also has the same rights as a party to the arbitral proceedings to challenge . . ." The right of a party that participates is subject to section 70(3) of the Act. Consequently, it is argued that a party seeking to invoke section 72(2) of the Act must be subject to the time limit prescribed in section 70(3). This approach also sits comfortably with the issue of finality of arbitral awards. A successful party ought to know the time frame within which an award can be challenged so that it can take the necessary steps to seek enforcement of the same.

6.75 Where a party subsequently "participates" in the merits of the case after an



initial ruling on jurisdiction by the arbitrators, then the right under section 72 will be lost. This was the position in *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH*,¹⁵² where the applicant refused to participate in the jurisdictional hearing and sought judicial relief in the Russian courts. After the award on jurisdiction, the applicant made submissions on the merits of the case, and on two occasions urged the tribunal to dismiss the claim with costs. At first instance, Teare J held that the applicant had participated in the proceedings, hence the right under section 72 was lost. Upon appeal, the Court of Appeal¹⁵³ concurred with the first instance ruling and refused the relief sought on the basis that the applicant had participated in the substantive proceedings. The Court of Appeal noted that it was not always easy to distinguish between a letter that did no more than inform the arbitral tribunal as a matter of courtesy that the respondent did not accept its jurisdiction and a submission that the tribunal had no jurisdiction.¹⁵⁴

6.76 A party is under a contractual obligation to participate in arbitral proceedings if there is a valid arbitration agreement to which it is a party. Consequently, where a court decides that there is a binding arbitration agreement and an application under section 72 is dismissed, the applicant is under a contractual obligation to participate in the arbitration following its unsuccessful challenge. The argument that section 72 should be construed so as to mean that it referred to the position of the applicant both before and after the application was rejected in *Hackwood Ltd v Areen Design Services Ltd*.¹⁵⁵ The effect would otherwise be that an applicant would be under no obligation to participate post-application.

152. [2010] EWCA Civ 110.

153. [2010] EWCA Civ 1100, [2011] 1 Lloyd's Rep. 243.

154. See para 50.

155. [2005] EWHC 2322 (TCC).

6.77 The condition to be satisfied by an applicant under section 72 is that it “takes no part” in the proceedings, and that phrase cannot be construed as being restricted to taking part in proceedings relating to a challenge to the jurisdiction of the arbitrators. At first instance in *Broda*, *Broda* had argued that the condition under section 72 was satisfied, as long as the applicant took no part in proceedings to challenge the jurisdiction of the arbitrators. That argument was rejected by Teare J because there was no reason to imply such condition, as the condition stipulated by section 72 of the Act is clear.

6.78 An argument that the loss of the right to apply for relief under section 72 of the Act was incompatible with Article 6 of the European Convention on Human Rights was rejected in *Broda* on the basis that a party could still challenge an award on jurisdiction under section 67 of the Act, despite losing its right under section 72 of the Act.¹⁵⁶

STAY OF PROCEEDINGS AND SECTION 72


6.79 The Court of Appeal made it clear in *Fiona Trust* that despite the provisions of section 72, the issue of the validity of the arbitration agreement should be a matter in the first instance for the arbitrators to deal with. A potential problem in relation to a section 72 application is where the other party has also made an application for stay of proceedings pursuant to section 9 of the Act. The court is then faced with two applications.

6.80 In *Law Debenture Trust Corp v Elektrim Finance BV*,¹⁵⁷ the court held that where a section 72 application gave rise to jurisdiction issues, these issues should be determined first, and the section 9 application would become unnecessary. This can be contrasted with the approach in *Fiona Trust*, where the Court of Appeal held that the correct approach was that the stay application ought to be considered first.¹⁵⁸ In the event that the court is satisfied that there is a valid arbitration agreement between the parties and a stay is granted, then the section 72 application would become irrelevant. Hence, an application under section 72 will only be considered if there is no application for stay or the same is refused.¹⁵⁹ The more logical approach must be that adopted by the Court of Appeal in *Fiona Trust*, that section 72 is of limited use, as it sits comfortably with the underlying philosophy of the Act of less interference by the courts.

156. See para 49.

157. [2005] EWHC 1412 (Ch), [2005] 2 Lloyd's Rep. 755.

158. The Court of Appeal made clear that: "... we would go further than this and say that, if the party who denies the existence of a valid arbitration agreement has himself (as the owners have here) instituted court proceedings and the party who relies on the arbitration clause has applied for a stay, the application for a stay is the primary matter which needs to be decided. It would only be if a stay were never applied for or were refused, but for some reason the party relying on the arbitration clause insisted on continuing with the arbitration that any question of an injunction should arise. Of course section 72 might well be applicable if the party denying the existence of an arbitration agreement had not started English proceedings and did not wish to do so. Such a party would then be entitled to apply under section 72 for a declaration that there was no valid arbitration agreement; even then an injunction would usually be necessary only if there was some indication that the other party was intending not to comply with any declaration that the court might make. This is all a long



way from the present case in which court proceedings have been instituted and an application has been made to stay (some part of) those proceedings. Section 9 governs the position and for that section to apply there must be an arbitration agreement. If the existence of an arbitration agreement is in issue, that question will have to be decided under section 9 and there is no reason, at the moment at any rate, for any invocation of section 72 at all.” At para 36.

159. See also *British Telecommunications v SAE Group Inc* [2009] EWHC 252 (TCC) and *Secretary of State for Transport v Stagecoach South Western Trains Ltd* [2001] EWHC 2431 (Comm).

CHAPTER

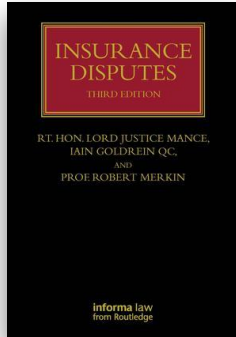
5

Loss, Causation and Burden of Proof

Christopher Butcher, QC

Chapter 5:: Loss, Causation and Burden of Proof

Christopher Butcher, QC



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1 . THE LOSS

The nature of a loss claimable under an indemnity policy

7.1 A contract of indemnity insurance covers the insured against the risk of loss caused by a specified peril or perils. In addition, the contract very often identifies the subject-matter of the insurance—for example, specific property. In such cases, only loss to the insured deriving from an event affecting that subject-matter gives rise to a valid claim on the policy.

7.2 The loss against which insurance protects is something which adversely affects the financial position of the insured. This can come about in many different ways. Deprivation of or damage to the insured's property is one obvious way, but certain forms of insurance cover the insured against specific types of pecuniary loss which do not derive from loss or damage to physical property. An example of a frequently encountered type of insurance where no loss of or damage to physical property is involved is credit insurance whereby a creditor insures himself against the risk of a debtor's failing to pay what he owes. Another example is liability insurance under which the insured is covered against the financial loss which would result from his being found liable to a third party.

7.3 What loss the insured is entitled to claim depends on the terms of the policy. If, however, the insured has suffered no financial loss at all, he will not be able to claim on a contract of indemnity insurance. Thus, for example, an insurance against loss of goods will not cover a merely sentimental value of those goods, or against the shock, disappointment or sorrow occasioned by their loss.¹

1. Re *Earl of Egmont's Trusts* [1908] 1 Ch 821; *Richard Aubrey Film Productions Ltd v Graham* [1960] 2 Lloyd's Rep 101; *England v Guardian Insurance Ltd* [2000] Lloyd's Rep IR 404 at 422.

7.4 In the case of liability insurance the fact that the insured can recover only for financial loss does not, however, necessarily mean that the insured need have paid the claim against him before he can recover from his insurers. Ordinarily an insured will be able to recover a money sum from his liability insurers once his liability to the third party claimant has been ascertained, as to existence and amount, by judgment, award or agreement.¹ Nevertheless, if sufficiently clear words are used, the insured will not be able to recover until he has actually paid.²

1. *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957.

2. *Firma C-Trade SA v Newcastle Protection & Indemnity Association* [1991] 2 AC 1. This may be

compared with *Charter Reinsurance Ltd v Fagan* [1997] AC 313.

7.5 Similarly, in the case of insurances of property, the insured will, in the absence of express provisions to the contrary, be able to recover once damage to the property has been caused by an insured peril.¹ His right to recover will not ordinarily depend on his having paid for repairs or replacement of the damaged property.

1. *Ventouris v Mountain (The Italia Express (No. 2))* [1992] 2 Lloyd's Rep 281; *Bank of America National Trust & Savings Association v Christmas* [1993] 1 Lloyd's Rep 137; *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep 541.

7.6 In the ordinary case, a contract of insurance cannot be said to be one which has as its object the protection of the peace of mind of the insured. Accordingly, an insured will not be able to recover damages from insurers for hardship, inconvenience or mental stress caused by any failure on the part of insurers to indemnify him in respect of the loss.¹


1. *Ventouris v Mountain (The Italia Express (No. 2))* [1992] 2 Lloyd's Rep 281 at 293; *England v Guardian Insurance Ltd* [2000] Lloyd's Rep IR 404 at 422.

7.7 Nor, apart from interest, can the insured recover consequential losses arising simply from the insurers' failure to pay, but he may be able to recover if he can show that insurers committed some other and separate breach of the insurance contract which caused him loss.¹ Furthermore, specific heads of consequential loss arising from the occurrence of an insured peril can be and often are insured by express words in the policy.

1. *Ventouris v Mountain (The Italia Express (No. 2))* [1992] 2 Lloyd's Rep 281; *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR 111. A failure to pay under a typical contract of insurance gives the insured a right to claim unliquidated damages, and no claim lies for damages for late payment of damages. On this basis it is doubtful whether the development of the law in relation to damages for late payment of a debt in *Sempra Metals v Inland Revenue Commissioners* [2008] 1 AC 561 has affected the position in relation to contracts of insurance. The reasoning and the decisions in *The Italia Express* and in *Sprung* have, however, been the subject of considerable criticism, in particular in the Law Commissions' Issues Paper 6 on Damages for Late Payment and the Insurer's Duty of Good Faith, which canvasses proposals for reform.

When must the loss occur?

7.8 For there to be a valid claim under an indemnity policy the insured must ordinarily have sustained the loss during the period of cover.¹ If the insurance is in



respect of a particular type of loss, a loss of that type must have been sustained within the period and if no such loss has been sustained, the insured has no claim.² If, however, some loss of the relevant kind has occurred within the policy period, then the insured can recover even though the full extent of the loss is not discovered or quantified until after the period of cover is at an end.³ For example, if the insured is covered against fire and against business interruption arising from fire, and a fire occurs within the policy period, he will be able to recover for the physical damage caused by the fire, even though the extent of that damage may not be ascertained until after the policy period has ceased, and for the business interruption, even though this continues beyond the period of the insurance.⁴

1. *Hough v Head* (1885) 55 LJQB 43 at 44 per Lord Esher MR.

2. *Ibid.* See also, eg, *Promet Engineering v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146.

3. *Knight v Faith* (1850) 15 QB 649 (a ship temporarily grounded during the period of cover; the extent of the damage, which in fact rendered the ship a constructive total loss, was not ascertained until several days later by which time the cover had expired; had notice of abandonment been given the insured would have been able to recover for a total loss; as it was they could in principle recover for a partial loss); *Hough v Head* (1885) 55 LJQB 43 at 45 per Bowen LJ.

4. Typically, there will be detailed provisions in the policy governing the cover for business interruption and the indemnity period in which this is assessed.

7.9 Furthermore, in marine insurance (as opposed to non-marine insurance), the insured may give notice of abandonment and claim for a constructive total loss whenever the actual loss of the subject-matter insured appears to be unavoidable, and thus be able to claim even though no actual total loss has yet occurred.¹

1. Marine Insurance Act ("MIA") 1906, s. 60(1); *Moore v Evans* [1918] AC 185. So that, for example, where a ship at sea is so badly damaged that sinking appears inevitable, an insured may claim for a total loss before the sinking actually occurs.

7.10 This usual position can be altered by the express terms of the contract. Thus, for example, the terms of the insurance may make it clear that in addition to (or instead of) the loss having to be suffered within the period of the policy, the event giving rise to loss must have occurred within the policy period.¹

1. *Kelly v Norwich Union Fire Insurance Society Ltd* [1989] 2 Lloyd's Rep 337.

7.11 In certain types of liability insurance it is the event, happening or injury—as may be specified in the policy—giving rise to liability which must have occurred in the policy period.¹ Other liability insurances are written on the basis that they

provide cover in respect of claims first made against the insured during the period of cover, irrespective of when the events giving rise to that claim took place or when the liability to the third party will be ascertained.²

1. See, eg, *Bolton MBC v Municipal Mutual Insurance Ltd* [2007] Lloyd's Rep IR 173; *Employers' Liability Trigger Litigation* [2011] Lloyd's Rep IR 1.

2. See, eg, *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437; *Cox v Deeny* [1996] LRLR 288; *J Rothschild Assurance Plc v Collyear* [1999] Lloyd's Rep IR 6; *HLB Kidsons v Lloyd's Underwriters* [2009] Lloyd's Rep IR 178.

Physical damage and deprivation

7.12 Many insurances are against loss or damage to property. "Damage" in this context represents some adverse physical alteration and not mere loss in value.¹ Equally, because cover is normally only provided for physical loss or damage, insurances of property do not usually cover "paper losses".² On the other hand, there can be damage even though it may not be visible and its extent could not be determined without testing.³ Something will not be regarded as damaged for the purposes of such insurances if it was defective at the outset of cover, but has not undergone any deterioration.⁴

1. *Ranigar v Frigmobile Pty Ltd* [1983] Tas R 113; *Horner v Commercial Union* (unreported, 18 May 1993). Cf., in another context, *Hunter v Canary Wharf* [1997] AC 655 at 676 per Pill LJ. There may even be damage to property when there has been no loss in value, but in such a case the insured may not have a financial loss for which he should be indemnified: see *Jan de Nul v Axa Royale Belge* [2002] Lloyd's Rep IR 589 at 609–610.


2. *Coven SpA v Hong Kong Chinese Insurance Co* [1999] Lloyd's Rep IR 565.

3. *Quorum v Schramm* [2002] 1 Lloyd's Rep 249 at 264.

4. To take a simple example, a motor vehicle which was dented at the outset of the policy would not be regarded as having been "damaged" during the policy period. See, generally, *Promet Engineering (Singapore) Pte Ltd v Sturge (The "Nukila")* [1997] 2 Lloyd's Rep 146. The policy can provide otherwise, and show that cover is provided for a pre-existing defect, but such provisions should be clear and unambiguous: *Shell (UK) Ltd v CLM Engineering Ltd* [2000] 1 Lloyd's Rep 612 at para. 20 per Steel J.

7.13 What constitutes such a deprivation of property as to amount to its "loss" within the policy period is a matter of considerable difficulty. The following appears to be the position:

(1) A policy may, on its true construction, provide cover for temporary deprivation



of property: ie for loss of the use of that property, even for a limited period of time.

(2) Typically, however, property insurance will insure against loss, in the sense of permanent deprivation.

(3) What is problematic is by what test and at what stage it is to be judged whether the deprivation is of sufficient permanence to constitute a "loss".

(4) In the field of marine insurance two types of loss are recognised in this area. In the first place there is an actual total loss, which will exist when the insured is "irretrievably deprived" of the subject-matter insured.¹ In the second place, as a concession to shipowners and to prevent them having their money locked up in ships whose fate they were unable to ascertain and prove,² marine insurance has a doctrine of the constructive total loss. In the present context, there will be a constructive total loss if it can be said that the insured has been deprived, by a peril insured against, of possession of the subject-matter insured, and that it is prospectively unlikely that he will recover that property within a reasonable time.³ "Unlikely" means that recovery is against the balance of probabilities.⁴

(5) The doctrine of constructive total loss does not apply, absent specific agreement, outside the field of marine insurance.⁵

(6) In relation to non-marine insurance the insured accordingly has to show an actual total loss. It has been said that, because of the absence of the doctrine of constructive total loss in non-marine insurance, the doctrine of actual total loss is more flexible in this sphere than in the field of marine insurance.⁶


(7) What exactly the insured must show will depend on the precise words of the policy. In general the position is as Bankes LJ expressed it: "Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie."⁷

(8) The best general test is whether there is deprivation in circumstances where the prospects of recovery can be said to be a "mere chance".⁸

(9) There will not be a loss merely because there is, at the time of deprivation, prospective uncertainty as to recovery within a reasonable period of time.⁹

(10) There will be cases in which a deprivation immediately gives rise to a loss.¹⁰ Applying the test mentioned above, recovery can be said, immediately, to be a "mere chance".

(11) In some cases, it may not be possible for the insured to prove the actual loss



until some time has elapsed. Thus, if property goes missing, it may be impossible to prove an actual loss without there having first been a proper search or searches.¹¹ Equally, where property such as a car is taken, an inference of theft, and thus of actual loss, will be drawn from the fact that the car is not found abandoned within a reasonable (and probably short) period after the deprivation.¹² It is probable that in these cases the loss can be said to occur when the deprivation is first discovered, or perhaps even earlier, at the time that the deprivation must have taken place.¹³

(12) Other situations, however, amount to what may be described as “wait and see” cases. The property cannot immediately be said to have been lost, but the insured has been deprived of it in circumstances which are subject to a process of development and change.¹⁴ There will only be a loss if the property is destroyed, or (in accordance with (8) above) if the prospects of recovery can be said to be a “mere chance”. This might be established if the assured has taken all reasonable steps to recover the property, but recovery remains uncertain.¹⁵ A potential injustice might arise if he has no claim under the policy in year 1 which was in force at the time of initial deprivation (because there has at that stage not been a loss), and can obtain no cover (or cover only on prohibitive terms) for year 2, because of the existence of the deprivation and the situation which led to it. This is probably met by applying a doctrine equivalent to those of the “death’s blow” or “grip of the peril”, which are recognised in marine insurance. Under the former, a loss may be regarded as falling within a policy when property has suffered some grievous damage which cannot be said to amount to a total loss and which only develops into a total loss after the policy expires. Under the latter, if a total loss follows as a result of a sequence of events following in the ordinary course upon a peril insured, it may be said that the property was in the “grip of the peril” from the time of that initial deprivation.¹⁶

1. MIA 1906, s. 57(1). There will not, at least usually, be “irretrievable deprivation” if recovery of the property can probably be obtained by the payment of a ransom which is comparatively small relative to the value of the property itself: *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24.

2. *Moore v Evans* [1918] AC 185 at 194.

3. MIA 1906, s. 60(2)(i); *Polurrian v Young* [1915] 1 KB 922; *Rickards v Forestal Land Timber & Railways Co Ltd* [1942] AC 50; *The Bamburi* [1982] 1 Lloyd’s Rep 312 at 314; *Royal Boskalis v Mountain* [1997] LRLR 523. MIA 1906, s. 60(2)(i), represented a modification of the law, which had previously permitted the insured to recover on the basis of a constructive total loss when he had been deprived of possession of the property and recovery appeared prospectively uncertain: *Polurrian v Young* [1915] 1 KB 922 at 937, *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24 at para. 15.

4. *Marstrand Shipping Co Ltd v Beer* (1936) 56 L.L. Rep 163 at 173 *per* Porter J; *Rickards v Forestal Land Timber & Railways Co Ltd* [1942] AC 50 at 87 *per* Lord Wright.

5. *Moore v Evans* [1917] 1 KB 458 esp. at 469 per Bankes LJ; [1918] AC 185 esp. at 193–194, 196 per Lord Atkinson; *Masefield AG v Amlin Corporate Member* [2011] EWCA Civ 24 at para. 15.
6. *Masefield AG v Amlin Corporate Member* [2011] EWCA Civ 24 at para. 16 per Rix LJ.
7. *Moore v Evans* [1917] 1 KB 458 at 471 per Bankes LJ.
8. *Ibid.* at 473 per Bankes LJ.
9. *Ibid.* at 471–472 per Bankes LJ; *Scott v The Copenhagen Reinsurance Co (UK) Ltd* [2002] EWHC 1348 at paras. 67, 70 per Langley J; cf. *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 644 at 686 per Rix J.
10. *Scott v The Copenhagen Reinsurance Co (UK) Ltd* [2002] EWHC 1348 at para. 67 per Langley J.
11. *Holmes v Payne* [1930] 2 KB 301 at 310; *Scott v The Copenhagen Reinsurance Co (UK) Ltd* [2003] EWCA Civ 688 at para. 76 per Rix LJ.
12. *Scott v The Copenhagen Reinsurance Co (UK) Ltd* [2003] EWCA Civ 688 at para. 76 per Rix LJ.
13. This question was left open by the Court of Appeal in *Scott v The Copenhagen Reinsurance Co (UK) Ltd* [2003] EWCA Civ 688: see para. 76.
14. *Scott v The Copenhagen Reinsurance (UK) Ltd* [2003] EWCA Civ 688 at para. 76 per Rix LJ.
15. *Webster v General Accident* [1953] 1 QB 520 at 531–532 per Parker J.
16. *Scott v The Copenhagen Reinsurance Co (UK) Ltd* [2003] EWCA Civ 688 at paras. 46–48 per Rix LJ. The point did not need to be, and was not, decided in that case.

2 . CAUSATION

Loss must be proximately caused by an insured peril

7.14 For there to be a valid claim on an insurance policy, in addition to its having to be shown that there has been a loss within the policy period, it is usually necessary for it to be shown, not only that the loss would not have occurred “but for” the peril(s) insured, but also that that loss was proximately caused by that peril or one of those perils.¹ This concept of proximate cause is applied in all branches of insurance. The courts generally treat the notion of proximate cause as reflecting the intention of the parties to a contract of insurance, and do not draw nice distinctions between varieties of phrase used in particular policies to express the causation of the loss.² The requirement of proximate causation can, however, be altered by the express terms of the contract of insurance, though clear words are required to do so.³

1. In marine insurance this requirement is contained in s. 55 of MIA 1906. As to the usual need to establish that there was “but for” causation, see *Orient-Express Hotels Ltd v Assicurazioni Generali* [2010] Lloyd's Rep IR 531.

2. *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co* [2002] Lloyd's Rep IR 113 at 123.

3. The use of the words "directly or indirectly" qualifying the causation requirement does alter the ordinary position: *Coxe v Employers' Liability Insurance* [1916] 2 KB 629; *Oei v Foster* [1982] 2 Lloyd's Rep 170; *Tappoo Holdings v Stuchbery* [2008] Lloyd's Rep IR 34. But even these words require that the relevant matter (whether peril or exception) must be at least a *causa sine qua non* of the loss: *Blackburn Rovers Football & Athletic Club v Avon Insurance Plc* [2005] Lloyd's Rep IR 447.

The meaning of proximate cause

7.15 The proximate cause does not have to be the sole cause, nor does it have to be the last cause.¹ The concept of "proximate cause" has been explained in the cases in a number of ways, judges having found a variety of adjectives to describe the requirement. Thus it has been said that the enquiry is for the direct,² efficient,³ effective,⁴ determining,⁵ or dominant⁶ cause. Of these words it is the last which is perhaps the most often used and most helpful in describing the nature of the test.

1. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350. It is proximity in efficiency, not in time, which counts. *Ibid.* at 369 per Lord Shaw.
2. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 365 per Lord Atkinson; *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 114 per Lord Sumner; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32, at 39 per Slade LJ.
3. *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 at 706 per Lord Wright.
4. *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 at 698 per Viscount Simon LC; *Wayne Tank Co v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57 at 66 per Lord Denning MR.
5. *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 at 697 per Viscount Simon LC, at 702 per Lord Macmillan.
6. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 363 per Lord Dunedin; *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 at 697 per Viscount Simon LC; at 715 per Lord Porter; *Wayne Tank Co v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57 at 66 per Lord Denning MR.

7.16 The requirement that the loss should be proximately caused by an insured peril has been said to be founded upon the express or implied intention of the parties.¹ As such it must be applied in order to give effect to, and not to defeat, the parties' expectations.²

1. *Reischer v Borwick* [1894] 2 QB 548 at 550 per Lindley LJ; *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 112–113 per Lord Sumner; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 365 per Lord Atkinson.
2. *Reischer v Borwick* [1894] 2 QB 548 at 550 per Lindley LJ; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 365 per Lord Atkinson; *Lloyds TSB General Insurance*

Holdings v Lloyds Bank Group Insurance Co [2002] Lloyd's Rep IR 113 at 123 per Potter LJ.

7.17 In particular, in determining what is the proximate cause the approach to be adopted is that of common sense. The court does not approach the matter as a metaphysician or as a scientist would do but as an ordinary businessman of common sense would.¹ The question has been said to be "really a matter for the common sense and intelligence of the ordinary man".²

1. *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 697–698 per Viscount Simon LC, at 702 per Lord Macmillan, at 706 per Lord Wright.

2. *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd* [1946] 1 KB 117 at 122 per Lord Greene MR. Also see *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society* [1918] AC 350 at 362 per Lord Dunedin; *Wayne Tank Co v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57 at 66 per Lord Denning MR, at 68 per Cairns LJ; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32 at 37 per Lawton LJ, at 39 per Slade LJ; *TM Noten BV v Harding* [1990] 2 Lloyd's Rep 283, 286–287; *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458, 466; *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5 at paras. 19, 79.

Two proximate causes

7.18 While in most cases a common sense approach will identify one cause as the "proximate" or dominant cause, in some cases such an approach will yield the answer that there were two causes of the loss which were of equal or almost equal importance although the loss would not have occurred in the absence of either. In such a case there are two proximate causes.¹ Clearly if both are insured perils, the insured can recover. Equally, if there are two proximate causes and one is insured while the other is not insured, the insured is entitled to recover under the policy.²

1. *Wayne Tank Co v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57 at 68–69 per Cairns LJ; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32.

2. *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32. The hull of a luxury yacht sustained damage during a Channel crossing. The proximate causes were both (i) the impact of an adverse sea upon the hull and (ii) the unseaworthiness of the craft due to defective design. The former was within the insured peril of "damage caused by ... external accidental means", and the latter was not in the circumstances an excepted peril. See also *Bovis Construction v Commercial Union* [2001] Lloyd's Rep IR 321 at 325–326 per Steel J; *Martini Investments v McGinn* [2001] Lloyd's Rep IR 374 at 375 per Timothy Walker J; *Seashore Marine SA v Phoenix Assurance Plc* [2002] Lloyd's Rep IR 51 at 65 per Aikens J.

7.19 The position is, however, different if there are two proximate causes, where the loss would not have occurred if only one of the causes had operated, and

where one cause is insured but the other is the subject of an exception in the policy. In such a case the insurer is entitled to rely on the exception, and the insured's claim will fail.¹

1. *Wayne Tank Co v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57. A fire in a factory was caused by a company (i) supplying and installing new equipment constructed of unsuitable materials, and (ii) switching on the equipment and leaving it unattended overnight before it had been tested. Cairns LJ held that both causes were proximate, whereas Lord Denning MR and Roskill LJ held that the former was dominant. All three considered that this difference in view made no difference in the result, since damage caused by goods supplied was an excepted peril. See also *Midland Mainline v Eagle Star Insurance Co* [2004] EWCA Civ 1042; *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5 at para. 22, but cf. para. 88.

7.20 If, however, two causes acting quite independently cause loss and one is insured while the other is not then the insured may recover the loss or damage which he can establish was caused by the insured peril.¹

1. This will usually, though not invariably, involve establishing that the loss would not have occurred "but for" the insured peril: see *Orient-Express Hotels Ltd v Assicurazioni Generali SA* [2010] Lloyd's Rep IR 531.


Identifying the proximate cause in a sequence of events

7.21 Difficult problems may arise in determining which is the proximate cause in a chain of events. It is a question for judgment in each case, based on the entirety of the facts, as to whether an insured peril was the dominant cause or whether there was some other cause either prior, concurrent with or subsequent to the insured peril which was dominant.

7.22 While this is the general rule, certain situations deserve specific consideration:

(1) An insured peril may be the dominant cause of a loss notwithstanding that it is followed by a chain of events (none of which is an excepted peril) which sequence of events culminates in a loss. If that sequence of events was such as might be anticipated in the circumstances, given the occurrence of the peril, it will not normally be held to break the chain of causation and the loss will be regarded as the natural consequence of the insured peril.¹

(2) Once an insured peril has started to operate, including where the peril is so imminent that it will occur unless immediate action is taken to avoid it, reasonable steps taken to avert or minimise the loss will not, in the absence of an express exception in relation to such efforts, be regarded as breaking the chain of causation. If a loss occurs as a result of those steps it will be regarded as caused by



the insured peril.² But steps taken before an insured peril starts to operate, in order to avoid the peril occurring, are not to be regarded as caused by the insured peril.³

(3) If an excepted peril is followed by an insured peril and in turn by the loss, it is necessary to decide whether the excepted peril was the proximate cause of the loss or whether the insured peril broke the chain of causation running from the excepted peril and was the dominant cause of the loss. The case of *P Samuel & Co Ltd v Dumas*⁴ is an example where the former analysis was correct. There the vessel was scuttled (scuttling being an excepted peril) by letting water into the ship (which was argued to be an insured peril). It was held that scuttling was the proximate cause “and the subsequent events—the entry of the seawater, the slow filling of the holds and bilges, the failure of the pumps and the break-up of the vessel—are as much parts of the effect as is the final disappearance of the ship below the waves”.⁵ The latter analysis, where the insured peril is regarded as the proximate cause, is illustrated by certain decisions in relation to accident policies where the insurance covered death by accident but where death in consequence of disease was excepted. In *Winspear v Accident Insurance Co*⁶ the insured had an epileptic fit while crossing a stream, fell and was drowned. In *Lawrence v Accidental Insurance Co Ltd*⁷ there was an express exception in respect of death arising from fits. The insured had a fit at a railway station and fell onto the line where he was hit by an engine and was killed. In each case it was held that the insurers were liable, the proximate cause being the accident. In both cases the insured’s fit did not render death certain or even likely and was in causative terms of secondary importance by comparison with the supervening misfortune of the drowning in the one case and the collision with the railway engine in the other.

(4) A number of cases have raised the converse situation of where an insured peril is succeeded by an apparently excepted peril and then by the loss. If the insured peril is the proximate cause of the occurrence of the excepted peril and of the loss then it will generally be the case that the insured is entitled to recover.⁸ This result is often reached by way of a construction of the policy whereby it is held that the apparent exception is not applicable in cases where it is simply the result of an insured peril.⁹ On the other hand, if clear enough words are used in framing the excepted peril, insurers can escape liability if that peril intervenes between insured peril and loss, however directly the excepted peril may itself have been caused by the insured peril.¹⁰

1. *Reischer v Borwick* [1894] 2 QB 548. A ship insured against collision, but not against perils of the seas, was holed in a collision. The captain managed to plug the hole, but the ship sank three days later after the hole became unplugged during the voyage under tow to the nearest dock. The collision, not the wash of the sea, was held to be the proximate cause of the sinking as well as of the

initial damage. See also: *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at 598–599 *per* Vaughan Williams LJ; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society* [1918] AC 350 (ship holed by a torpedo; anchored in harbour where she grounded with each low tide due to her deepened draught and then broke up; loss caused by torpedo, not by perils of the sea in the harbour).

2. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society* [1918] AC 350 at 370–371 *per* Lord Shaw; *Stanley v Western Insurance Co* (1868) LR 3 Ex 71 at 74 *per* Kelly CB (obiter view that loss caused by a bona fide effort to put out a fire would be loss caused by fire); *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 31 Ll L Rep 179 (cork on a jetty wetted with seawater in order to prevent a fire from spreading; damage to cork caused by the fire, not the seawater); *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] AC 55 (ship's ventilators closed to prevent ingress of water during a storm; heat damage to cargo as a result; damage to cargo caused by a peril of the sea, ie the storm); *Quinta Communications SA v Warrington* [2000] Lloyd's Rep IR 81. See also the statement of the general principle in *Pyman Steamship Co v Lords Commissioners of the Admiralty* [1919] 1 KB 49.

3. *Kacianoff v China Trades Insurance Co Ltd* [1914] 3 KB 1121; *Becker Gray & Co v London Assurance Corp* [1918] AC 101; *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 31 Ll L Rep 179; *Canada Rice Mills Ltd v Union Marine & General Insurance Co* [1941] AC 55 at 72 *per* Lord Wright.

4. [1924] AC 431.

5. *Ibid.* at 447 *per* Viscount Cave.

6. (1880) 6 QBD 42.

7. (1881) 7 QBD 216.

8. In *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 the policy insured against accident, excluding death by disease "even though the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon". The insured had a heavy fall while hunting and had to ride home while very wet. The combination of these two caused fatal pneumonia. Cover was provided since disease was the direct result of the accident and was not an "intervening cause". In *Boiler Inspection and Insurance Co of Canada v Sherwin-Williams Co of Canada Ltd* [1951] AC 319 the policy excluded fire and "loss from any indirect result of an accident". The door of a bleacher tank blew off due to a build-up of pressure. Gas escaped and ignited, probably due to some naked flame or spark in the factory, and there was a large explosion. The damage was covered because the explosion was the direct result of an accident (the breaking apart of the tank) and was not to be regarded as caused by fire.

9. *Fitton v Accidental Death Insurance Co* (1864) 17 CB (NS) 122 (accident insurance; fall; death from hernia caused by the fall; death not within the exception of "death ... arising from ... hernia ... arising within the system of the insured before or at the time or following such accidental injury"); *Mardorf v Accident Insurance Co* [1903] 1 KB 584 (accident insurance; cut injury to leg; germs introduced at the time of the cut; death from septic pneumonia; death caused solely by the cut and not within exception of "death caused by or arising wholly or in part from disease or other intervening cause"); *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591.

10. *Smith v Accident Insurance Co* (1870) LR 5 Ex 302. The insured cut his foot and fatally contracted erysipelas as a result. The policy insured against cuts arising accidentally, but it specifically excluded "death arising from ... erysipelas ... arising within the system of the insured before or at the time of or

following such accidental injury". The exception applied.

The relevance of negligence or wilful misconduct on the part of the insured

7.23 The fact that the insured, his servants or agents may have been negligent before or after operation of the insured peril does not prevent the insured from recovering under the policy, unless there are express provisions therein which have this effect. Thus if there is a loss by reason of an insured peril, the insured can recover, even if that loss would not have occurred but for the negligence of the insured: for these purposes and unless the contract otherwise provides, that negligence is not regarded as a cause of the loss.¹ By contrast if the loss is deliberately caused by the insured but not as part of an effort to avoid the consequences of a peril which has started to operate then, in the absence of contrary indications in the policy, the insured will not be entitled to recover because the loss will not be fortuitous.² Further, the insured will not be entitled to recover if the loss is occasioned by the wilful misconduct of the insured. Wilful misconduct would include acts of the insured intended to achieve a loss or damage to insured property or acts done by the insured when he was recklessly indifferent as to whether such loss or damage would be caused and when his immediate purpose was to claim on his insurers or if he subsequently advanced such a claim.³ It is apparently the case that such wilful misconduct need not be the proximate cause of the loss but merely one of the effective contributing causes without which the loss would not have happened, in order to prevent recovery.⁴

1. See MIA 1906, s. 55(2)(a); *Shaw v Robberds* (1837) 6 Ad & E 75; *Trinder Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114; *Mountain v Whittle* [1921] 1 AC 615 at 627 per Viscount Finlay; *Attorney-General v Adelaide Steamship Co* [1923] AC 292; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 711 per Lord Wright; *Global Tankers Inc v Amercoat Europa NV and Rust (The Diane)* [1977] 1 Lloyd's Rep 61 at 66 per Kerr J.

2. *British & Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41 at 57 per Lord Sumner; *Beresford v Royal Insurance Co* [1938] AC 586 at 595 per Lord Atkin (a policy of life insurance making no reference to suicide does not provide cover against the intentional suicide of a man of sound mind). The central idea is that under an insurance contract the trigger for the activation of the payment obligations on the insurer must be a fortuitous event, that is an event whose occurrence was uncertain.

3. *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582 at 622 per Colman J. 4. See *Thompson v Hopper* (1856) 6 E & B 937. See also *Trinder Anderson & Co v Thames & Mersey Marine Insurance Co* [1898] 2 QB 114 at 124 per A L Smith LJ; and MIA, s. 55(2)(a).

3 . THE BURDEN OF PROOF

The burden of proof generally

7.24 The onus of showing that a loss has occurred which was proximately caused by an insured peril rests on the insured. Precisely what it is that the insured has to show will depend on the nature of the insured peril. For example, if the insurance is against all risks the insured has to show a loss by reason of some accident or fortuity (as opposed to a certainty such as inevitable deterioration), but does not have to show which risk caused the loss or how the loss actually occurred.¹ Under a marine policy, to establish a loss by a peril of the sea the insured must establish that there was an accidental or fortuitous event amounting to a peril of the sea which caused the loss.² In contrast, under a fire policy, once an insured has established a loss by fire, he is prima facie entitled to recover and need not establish that the fire was accidental. It would be for the insurer to establish, if he could, that the fire was started with the insured's connivance.³

1. So in *British & Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41, where wool the subject of all risks cover was damaged by wetting during transport within Chile, the insured was not required to prove how the casualty occurred or which specific peril had operated. The insured was entitled to recover because he had provided sufficient evidence to justify the inference that the loss was occasioned by something accidental or fortuitous.

2. *Wilson Sons & Co v Owners of the Cargo per the Xantho* (1887) 12 App Cas 503 at 509 per Lord Herschell; *Trinder Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114 at 127–128 per Collins LJ; *Grant Smith & Co v Seattle Construction and Dry Dock Co* [1920] AC 162; *P Samuel & Co v Dumas* [1924] AC 431; *Compania Naviera Santi SA v Indemnity Marine Assurance Co (The Tropaioforos)* [1960] 2 Lloyd's Rep 469; *Michalos & Sons Maritime SA v Prudential Assurance Co Ltd (The Zinovia)* [1984] 2 Lloyd's Rep 264 at 270–271 per Bingham J; *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 Lloyd's Rep 1 at 2–3 per Lord Brandon.

3. *Slattery v Mance* [1962] 1 QB 676; *Continental Illinois National Bank v Alliance Assurance Co Ltd (The Captain Panagos DP)* [1986] 2 Lloyd's Rep 470 at 510–511 per Evans J; *Schiffhypothekenbank zu Luebeck AG v Compton (The Alexion Hope)* [1988] 1 Lloyd's Rep 311 at 316–317 per Lloyd LJ.

7.25 The insured discharges the burden on him only by satisfying the court on a balance of probabilities that the loss was proximately caused by an insured peril. If the evidence is such that the court is unable to say that the loss was probably caused by a peril insured against, then the insured's claim will fail.¹ Further, if the court considers the case presented to it as to the loss having been caused by an insured peril to be an unlikely one, the insured will fail even though no more likely explanation of the loss can be given.² Nevertheless, if there are in reality only a very limited number of possibilities, and that contended for by the insured is much more probable than the other(s), it is suggested that the burden may be held to be satisfied, even though all the explanations might, in themselves, be thought improbable.³

1. *NEM Neter & Co Ltd v Licenses & General Insurance Co Ltd* [1944] 1 All ER 341; *Regina Fur Co Ltd v*

Bossom [1958] 2 Lloyd's Rep 425; *Michalos & Sons Maritime SA v Prudential Assurance Co Ltd* (The *Zinovia*) [1984] 2 Lloyd's Rep 264 at 271 *per* Bingham J.

2. *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 Lloyd's Rep 1; *Lamb Head Shipping Co Ltd v Jennings (The Marel)* [1994] 1 Lloyd's Rep 624.

3. *Kiani v Land Rover* [2006] EWCA Civ 880 at para. 30; *Fosse Motor Engineers Ltd v Condé Nast & National Magazine Distributors Ltd* [2008] EWHC 2037 (TCC); *Amsprop Ltd v ITW Ltd* (trading as Hobart UK) [2009] EWHC 2689 (TCC).

The burden of proof in relation to exceptions

7.26 If the insured establishes a loss within the general cover it is for the insurer to establish that the claim falls within any exception upon which he relies. It may thus be of considerable importance to distinguish between cases where the general cover is limited and cases where there are exceptions to the general cover. The following have been stated as the general rules in relation to this issue¹:

(1) The insured must prove such facts as bring him within the terms of the general cover provided.

(2) If the general cover is subject to exceptions which simply exclude from the general cover certain particular classes of case which but for the exception would fall within it, leaving some part of the general cover unqualified, then the burden of showing that any one of those exceptions applies is on the insurer.


(3) On the other hand, if the general cover is qualified by an exception which applies to its whole scope, then it is for the insured to show that the facts are such as fall within the general cover as qualified. "There is *ex hypothesi* no unqualified part of the promise for the sole of his (the insured's) foot to stand upon."² An example is a particular average franchise or an excess. To bring himself within the cover at all the insured must show that he has suffered a loss of more than the excess.

(4) Whether there is general cover qualified by exceptions or limited as to its entire scope is a question of construction of the policy as a whole.

(5) In construing the policy it must be borne in mind that a promise with exceptions can generally be turned by an alteration in phraseology into a qualified promise. The precise terms of the policy are thus of the utmost importance.

1. *Munro Brice & Co v War Risks Association Ltd* [1918] 2 KB 78 at 88–89 *per* Bailhache J, reversed on other grounds [1920] 3 KB 94; *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Ltd* [2006] SGHC 65 at paras. 91–94.

2. *Ibid.* at 88 *per* Bailhache J.



7.27 To these five rules may be added a sixth, namely that if an exception contains an exception to itself, more limited in scope than the primary exception, then if the insurer has shown that the principal exception is applicable, the burden is on the insured to prove that the case falls within the exception to that exception.¹

1. *Rowett, Leakey & Co v Scottish Provident Institution* [1927] 1 Ch 55. It is a question of construction whether the words used provide for an exception to an exception or simply form part of the definition of the exception itself: see for example *Encia Remediations Ltd v Canopus Managing Agents Ltd* [2008] Lloyd's Rep IR 79.

7.28 An insurer faced with a claim may simply put the insured to proof that there has been a loss falling within the general cover provided by the policy. He does not have to advance a positive case that the loss was caused by an excepted peril, even though he may have reason to believe that it was.¹ If this is the course that the insurer takes and no positive case is put forward in his pleadings, then at the trial he may not, whether by evidence or in cross-examination, put forward an affirmative case but must confine himself to challenging the case put forward by the insured.²

1. *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425.

2. *Ibid.* at 428 *per* Lord Evershed MR; *Palamisto General Enterprises SA v Ocean Marine Insurance Co Ltd (The Dias)* [1972] 2 QB 625 at 640 *per* Buckley LJ, at 647 *per* Cairns LJ.

7.29 The judge trying the case should be astute to ensure that an insurer who has not pleaded any positive case, does not attempt to establish one in cross-examination or by other evidence. If the insurer does plead a positive case that the loss was caused by an excepted peril, it is for him to prove it. If the allegation is that the insured has been guilty of fraud¹ or wilful misconduct such as arson, the insurer will have to adduce evidence which leads the judge to conclude that the serious allegation made is true. Many cases in the area have spoken of the need for insurers to prove such a case to a high degree of probability, appropriate to the seriousness of the charge.² This is not, however, strictly correct. There is only one civil standard of proof: the balance of probabilities. There are, however, some cases in which, because of the nature of the allegation made, the court or tribunal may look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. One particular issue which may be relevant in some, but not all, cases is that serious misconduct may be considered of itself to be unlikely, and that this will be taken into account in assessing whether the allegation has been proved on a

balance of probabilities.³

1. If fraud is alleged, particulars will need to be pleaded pursuant to CPR Part 16, r. 16.4(1)(e) and 16 PD 10.2(1). Under the Bar's Code of Conduct, a barrister may not draft a document alleging fraud unless he has clear instructions to do so and he has before him reasonably credible material establishing a *prima facie* case of fraud.

2. *Bater v Bater* [1951] P 35; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Grunther Industrial Developments Ltd v Federated Employers Insurance Association Ltd* [1976] 2 Lloyd's Rep 259; *Michalos & Sons Maritime SA v Prudential Assurance Co Ltd (The Zinovia)* [1984] 2 Lloyd's Rep 264 at 272 *per* Bingham J; *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437 at 470 *per* Hirst J; *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379; *Continental Illinois National Bank v Alliance Assurance Co Ltd (The Captain Panagos DP)* [1989] 1 Lloyd's Rep 33 at 41 *per* Neill LJ; *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1995] 1 Lloyd's Rep 455 at 459; *McGregor v Prudential Insurance Co* [1998] 1 Lloyd's Rep 112.

3. *Re H* [1996] AC 563; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; *Re D* [2008] 1 WLR 1499; *Re B* [2009] 1 AC 11; *Re S-B (Children)* [2009] UKSC 17.

7.30 However, if the insurer does put forward a positive case but does not establish it to the appropriate standard, this does not of itself mean that the insured is entitled to succeed. The insured's claim will still fail if he does not discharge the burden on him of proving a loss proximately caused by the insured peril.¹

1. *La Compania Martiartu v Royal Exchange Assurance* [1923] 1 KB 650; *Compania Naviera Vascongada v British & Foreign Maritime Insurance Co Ltd (The Gloria)* (1936) 54 L.L. Rep 35 at 50–51 *per* Branson J; *Michalos & Sons Maritime SA v Prudential Assurance Co Ltd (The Zinovia)* [1984] 2 Lloyd's Rep 264 at 271 *per* Bingham J; *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458 at 465, 499 *per* Aikens J.

7.31 A policy may provide that the insured shall comply with certain "conditions", for example that the insured insure. If the insurer alleges a breach of such a term, it will be for him to prove that breach.¹

1. *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559 at 564 *per* Lloyd LJ.

7.32 The ordinary incidence of the onus of proof on a particular issue may be varied by express words in the policy.¹

1. *American Tobacco Co v Guardian Assurance Co* (1925) 22 L.L. Rep 37; *Levy v Assicurazioni Generali* [1940] AC 791; *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406 at 426 *per* Mustill J; *Grell-Taurel v Caribbean Home Insurance* [2002] Lloyd's Rep IR 655 (CA of Trinidad and Tobago).

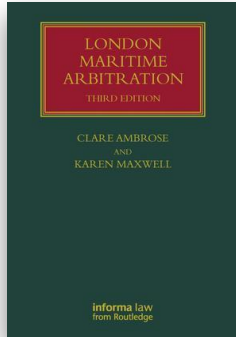
CHAPTER

6

Mediation and Arbitration

Chapter 6:: Mediation and Arbitration

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1. Introduction
2. Agreements to mediate
3. LMAA/Baltic Exchange Mediation Terms
4. Procedure
5. Confidentiality in mediation
6. The role of arbitrators in encouraging mediation
7. Costs implications of mediation
8. EU Directive 2008/52 on mediation

1. INTRODUCTION

Alternative dispute resolution (“ADR”) is a broad term covering methods of resolving disputes without resort to adjudication by a court or arbitrator. ADR has become a prominent potential alternative to these conventional methods of dispute resolution because the latter are increasingly associated with unduly high costs. The term ADR is most commonly applied to procedures such as mediation or conciliation where parties negotiate a settlement agreement with the assistance of a neutral third party. Mediation and conciliation are the most common forms of ADR. Both terms have broadly similar meaning and are often used interchangeably. Mediation has now become the more common term (and the most common form of ADR) and accordingly this chapter deals specifically with mediation.

The essential difference between arbitration and ADR is that in arbitration a binding decision is imposed on the parties whereas the purpose of ADR is to enable the parties to reach their own binding agreement. In ADR the parties remain in control of the outcome so that its success depends on the parties’ cooperation and genuine willingness to compromise. The key features shared by ADR and arbitration are that they are both confidential procedures used for resolving disputes and they are entered into by agreement. In commercial disputes the neutral third party (typically a mediator) will usually be chosen by the parties. This will generally be someone with respected experience in the area of the dispute or mediation, or a senior lawyer. A number of LMAA arbitrators act from time to time in this capacity. The mediator will invariably be paid a fee agreed by the parties in advance, broadly based on the time spent in dealing with the case.



ADR in shipping disputes was relatively slow to become established. This reflected a view that if compromise were a realistic possibility then this could usually be achieved without resorting to a formal procedure. Parties sometimes considered that if they could not reach a commercial settlement by themselves then mediation would be unlikely to succeed—it would be a waste of further time and money. However, perceptions have changed and parties are finding mediation increasingly attractive. Parties now have more experience of mediation and recognise that a formal procedure may be effective to resolve apparently unbridgeable differences. A reasonable settlement will generally be more preferable for commercial parties than resolving a dispute by arbitration. In particular the parties will have agreed on the outcome rather than having had a decision imposed on them and where successful, mediation is invariably cheaper, quicker and less damaging to commercial relations than arbitration. The costs consequences of refusing to mediate (see below) have also become a further incentive for parties to attempt mediation.

This chapter is intended to provide a brief introduction to mediation in relation to resolving disputes that would otherwise be determined in London arbitration. Reference to more detailed works is recommended for discussion in more depth.¹

2. AGREEMENTS TO MEDIATE OR USE ADR

Mediation agreements in shipping contracts are relatively rare. Most shipping contracts contain a relatively simple arbitration clause and if the parties decide to mediate after a dispute has arisen then they will conclude an additional mediation agreement. At this stage parties will often use institutional mediation rules (such as the LMAA's 2009 Mediation Terms) or use a standard form mediation agreement, possibly amended to cover any specific needs of the parties. The mediator chosen may even suggest using his own standard agreement. These agreements or mediation rules will usually cover matters such as the appointment process, the mediator's fees, costs, confidentiality and the termination of the mediation process. It may be useful to agree to suspend limitation periods during the mediation process (particularly in shipping disputes with short time-bar periods). Ordinary contractual principles govern such agreements.

Some parties will include more complex dispute resolution clauses in their contracts, sometimes called hybrid clauses or escalation clauses, that will provide for different methods of dispute resolution. Typically they will provide for one or more alternative dispute resolution procedures to be adopted by the parties to precede any arbitration. The wordings of such clauses vary enormously, but often provide for the following as a precursor to arbitration:

- the parties to negotiate in good faith;²
- the chief executives of each party to meet and endeavour to resolve the dispute amicably;³
- reference of a dispute for expert determination;⁴
- mediation under specific institutional rules.⁵

1. E.g. Mackie, Miles, Marsh and Allen, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd edn).

2. *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127, *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA 891; [2006] 1 Lloyd's Rep 121.

3. *Halifax Financial Services & Intuitive Systems* [1999] 1 All ER (Comm) 303.

4. *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] 1 AC 334, *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315.

5. *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041.

The parties may also agree that some disputes are referred to arbitration and others to a different form of dispute resolution. The effect of any of these types of clauses will depend largely on their wording and care should be taken when drafting them to ensure that they have the intended effect. Where possible, the courts will modify the arbitration provisions to give effect to the intentions of the parties and to ensure that the clause works sensibly.⁶

The most common issue that arises in relation to these types of clauses is whether the initial procedure is a condition precedent to the right to arbitrate. This will raise questions as to whether provisions for such procedures are enforceable. The traditional position under English law is that agreements to negotiate are not binding because they lack sufficient certainty to be enforced.⁷ However, the courts are becoming increasingly willing to give effect to the parties' intentions in this type of clause⁸ and have recognised the benefits of mediation. Accordingly the courts will give effect to provisions that parties use specific procedures such as mediation,⁹ or expert determination,¹⁰ but will not give effect to more vague or general undertakings to negotiate. In *Holloway v Chancery Mead Ltd*¹¹ Ramsey J put the requirements fairly high in suggesting that an ADR clause would be treated as enforceable if it met the following three requirements: "First, that the process must be sufficiently certain in that there should not be need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be

defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.” Ramsey J’s comment was obiter and the suggested requirements are unlikely to be applied rigidly. In practice the requirements will usually be satisfied by the choice of institutional rules for the mediation (such as LMAA or CEDR rules) and the most important consideration in deciding whether the agreement to mediate is enforceable is whether it is sufficiently well defined that it can be clearly determined whether a party has complied.

Even if the ADR provision is enforceable in principle, a further issue that may arise is whether it is appropriate for a tribunal to stay the arbitration or court proceedings while the parties comply with the contractual provisions on mediation. This will be a matter of discretion and will depend on factors such as whether the mediation has any prospect of success, whether there has been undue delay in raising the point and whether the costs of mediation would be disproportionate.

In *Cable & Wireless plc v IBM United Kingdom Ltd*¹² the parties had agreed an escalation clause under which the parties agreed to submit disputes to negotiation by senior executives, failing which “the parties shall attempt in good faith to resolve the dispute or claim through an ADR procedure as recommended to the parties by CEDR” (a mediation organisation). Colman J was willing to give effect to this clause by ordering a stay of proceedings while the parties complied with the agreement on ADR. The ADR procedure could be completed within a few weeks with no material prejudice to either party. In the event that ADR was unsuccessful the parties could reinstate the claim. He considered that the parties’

6. *Film Finance Inc v The Royal Bank of Scotland* [2007] EWHC 195 (Comm); [2007] 1 Lloyd’s Rep 382.

7. *Courtney & Fairburn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297, *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd’s Rep 127.


8. *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA 891; [2006] 1 Lloyd’s Rep 121, where the Court of Appeal indicated that an agreement to negotiate could be given legal effect if it was workable.

9. *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041.

10. *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] 1 AC 334, *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315; [2002] BLR 367.

11. [2007] EWHC 2495 (TCC); [2008] 1 All ER (Comm) 653, para 81.

12. [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041.



agreement on CEDR mediation was of sufficient certainty for the court to ascertain whether it had been complied with and that as a matter of public policy, as endorsed by the rules of civil procedure, the courts should be giving effect to parties' agreements to mediate.¹³


Sometimes failure to complete a procedure intended as a precursor to arbitration will be raised as a challenge to the jurisdiction of any arbitral tribunal appointed under the clause. This type of challenge would raise issues as to the effectiveness of the agreement to mediate (see above) and whether the intended procedure was a condition precedent to the right to arbitrate. It will be relatively rare that non-compliance with an agreement to mediate can be successfully raised as a ground for challenge to an arbitration award, since normally a party will have lost the right to object by failing to raise the objection at the outset.¹⁴

Another issue that arises is whether the court or the arbitral tribunal should decide on the legal effect of such clauses. Any question as to whether an ADR clause affects the jurisdiction of an arbitral tribunal would ordinarily be ruled upon by the tribunal in the first instance with the possibility of subsequent application to court under section 67 of the 1996 Act.¹⁵ However, the court would be willing to rule on such issues where this would be most practical, typically where the matter is likely to fall for determination by the court in any event or the tribunal has not yet been appointed.¹⁶

In *Holloway v Chancery Mead Ltd*,¹⁷ the parties disagreed as to the meaning of a construction contract arbitration clause which required claims to be referred to a dispute resolution service before any arbitration was commenced. Ramsey J rejected an argument that this issue was to be determined by the tribunal: it would be unfair if the parties could not raise such an issue in court and judicial reluctance to grant declarations as to whether a party is entitled to arbitrate (deriving from *Vale Do Rio Doce Navegacao SA & Anor v Shanghai Bao Steel Ocean Shipping Co Ltd*¹⁸) would be less likely to apply where the tribunal has not yet been appointed.

3. LMAA MEDIATION TERMS

Many members of the LMAA have specialist training in mediation and accept appointments as mediators. In 2002 the LMAA introduced Mediation Terms and in 2009 the LMAA teamed up with the Baltic Exchange to establish a mediation service for shipping and commodity disputes. The aim is for senior Baltic Exchange members and LMAA members trained in mediation to provide mediation services. For this purpose the 2002 Mediation Terms were revised (mainly as to the



procedure for appointing a mediator) so as to provide the LMAA/Baltic Exchange Mediation Terms (2009) (“the 2009 Mediation Terms”). These are likely to be the preferred terms for LMAA members undertaking mediations.

The 2009 Mediation Terms envisage the commencement of a mediation procedure whereby the parties to a dispute appoint a single mediator to take appropriate steps to assist the parties in reaching an amicable settlement. If parties to a dispute cannot agree on a mediator then the Terms make provision for appointment of a mediator. If both parties to a dispute are members of the Baltic Exchange then the 2009 Mediation Terms provide that they may apply to the Chairman of the Baltic Exchange for appointment of a mediator. Otherwise the parties may apply to the President of the LMAA for appointment of a mediator.

The 2009 Mediation Terms expressly provide that the parties should cooperate in good faith with the mediator in submitting written materials and attending meetings. On termination of the mediation procedure the mediator will give written notice to the parties of the costs of the mediation. These costs are to be paid in equal proportions unless he orders otherwise. They would include expenses incurred by him in the mediation plus his fees which are assessed with regard to the time involved, the amount and complexity of the dispute. Normally each party bears its own legal costs although the mediator is given express power to make costs orders where a party has failed to co-operate so as to thwart the mediation procedure or to cause increased costs.

13. Arbitrators are less likely to be influenced by court rules encouraging the use of mediation but considerations as whether mediation would resolve a dispute effectively would be relevant to their duty under section 33 of the 1996 Act to adopt procedures to ensure the fair and efficient resolution of a dispute.

14. Section 73 of the 1996 Act.

15. *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315; [2002] BLR 367, para 31, *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20; [2007] 2 Lloyd’s Rep 267 at 275.


16. *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315; [2002] BLR 367, *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC); [2008] 1 All ER (Comm), see also Chapter 7 on jurisdictional issues arising in the context of applications for a stay of proceedings.

17. [2007] EWHC 2495 (TCC); [2008] 1 All ER (Comm) 653.

18. [2000] 2 Lloyd’s Rep 1.

4. PROCEDURE

ADR procedures are extremely flexible although it is common to agree on




institutional rules or a model procedure or for a procedural framework to arise from the mediation agreement concluded between the parties and the mediator. Although lawyers are frequently involved in mediations, an important aspect of any mediation is the direct involvement of the parties in dispute, and in particular someone who has authority to conclude a settlement agreement. This usually means that a fairly senior representative of each party, with authority to settle, should attend the mediation.

In each case the procedure will be tailored to the nature of the dispute and the parties' needs. However, most mediations follow a basic pattern. In advance of the mediation each party will commonly provide the mediator (and the other party) with a case summary and important supporting documents such as the contract in issue, key correspondence or an expert's report on a critical issue. The case summary will usually set out the background to the dispute and the parties' relationship, identify the main issues and where the parties stand, in particular in relation to their objectives in mediating, costs at stake and past settlement attempts.

The mediation will usually start with a joint meeting with both parties and the mediator (although the mediator may discuss the matter separately with each party before the joint meeting). The mediator will normally commence by giving a brief introduction as to his role and then each party will give a short presentation—sometimes called an opening statement. This will usually introduce each party's position in relation to the dispute and focus on what each party wants to achieve in the mediation.

The mediator may then hold separate meetings with the representatives of both parties, asking them realistically to put forward the strengths and weaknesses of their case. Most mediators will take a facilitative approach and resist indicating their views as to the likely outcome. However, in some cases the mediator may be more willing to identify the determinative issues and express his views on them. The mediation will be an opportunity to assess the likely overall cost of the dispute (taking into account legal fees and possible damages, but also management time and commercial reputation) and to explore potential settlement options. The mediator will usually liaise between the parties and facilitate direct discussion between them. If the parties draw closer to settlement proposals he may assist in drawing up a settlement agreement.

If a settlement agreement is not concluded at the mediation (or shortly thereafter) then various options are available depending on the parties' willingness to take settlement discussions further. If a firm impasse has been reached then the parties may terminate the mediation and revert to the arbitral process. However, they may



want to take the negotiations further and ask for the mediator's continued assistance, whether at an adjourned mediation or simply by continuing availability to communicate with the parties. ADR is not covered by the 1996 Act and common law principles (typically of contract, tort and confidentiality) are applied to disputes arising out of the procedure, for instance a disagreement as to the effect of any settlement reached.


5. CONFIDENTIALITY IN MEDIATION

All stages of the mediation will be confidential (unless the parties agree otherwise) and the information or views exchanged within the mediation must generally not be used subsequently in arbitration or for other purposes. The principle of confidentiality in mediation currently has two sources. First, it derives from the parties' express¹⁹ or implied agreement that the mediation will be confidential. Most mediations will be preceded by a mediation agreement which will contain a clause on confidentiality. However, even if there is no express agreement, there would be an implied agreement reflecting the confidentiality that is necessary for the mediation to work effectively. Secondly, confidentiality in mediation is a reflection of the underlying public policy that parties should be encouraged, so far as possible, to resolve their disputes by negotiation, and should not be discouraged by the prospect that the content of the negotiations could be used against them in subsequent litigation.²⁰ EU Directive 2008/52 on mediation also recognises confidentiality in the mediation of EU cross-border disputes (see below on the scope of the directive) with exceptions where necessary for overriding considerations of public policy or for the enforcement of a settlement agreement resulting from mediation (this would probably also include situations where there is an issue as to whether the dispute was settled). When implemented (as required by 2011), it is likely to give rise to specific provision for confidentiality in mediation.

One aspect of confidentiality of mediation is the rule that communications in a mediation are not admissible in subsequent litigation. Such communications are regarded as privileged from disclosure on the basis of the rule protecting without prejudice communications. Without prejudice communications are those that pass between the

19. E.g., LMAA/Baltic Exchange Mediation Terms 2009, Article 15.

20. *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436.



parties as part of settlement negotiations “without prejudice” to their case in the proceedings. The courts have firmly taken the view that mediation takes the form of assisted “without prejudice” negotiation” and that, with some exceptions, what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful.²¹

The courts have not yet accepted that a distinct mediation privilege attaches to the mediation process.²² Accordingly, the exceptions to confidentiality in mediation are based on general principles of confidentiality and the without prejudice rule. In deciding admissibility of communications within a mediation, broadly the same exceptions apply as under the without prejudice rule relating to litigation.²³

In *Cumbria Waste Management Ltd v Baines Wilson*,²⁴ the claimant used mediation to settle a dispute with a third party and then sued its solicitor for negligence giving rise to the dispute with the third party. An issue in the negligence proceedings was whether the dispute with the third party was reasonably settled and the defendant solicitor sought disclosure of documents relating to the mediation but the third party refused consent to such disclosure. HHJ Frances Kirkham refused to order disclosure on grounds that the documents were protected by the without prejudice rule.

Privilege will obviously not cover documents that have already been openly disclosed (e.g., the governing contract, the pleadings, or expert reports that have been exchanged) even where such documents might otherwise come within a broadly worded confidentiality clause covering all documents exchanged in the mediation. One exception to the without prejudice privilege attaching to communications in a mediation is where an issue arises as to whether the mediation resulted in a concluded or enforceable settlement agreement.²⁵

In *Brown v Rice*²⁶ the parties’ mediation agreement had expressly provided that all statements in the mediation should be confidential and that any agreement would not be binding until reduced into writing. No settlement was reached at the mediation but an offer was left on the table overnight and alleged to have been accepted in a telephone conversation the following day. Stuart Isaacs QC, sitting as a Deputy Judge, admitted evidence as to what happened at the mediation in order to determine whether the dispute had been settled.

21. *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866; [2007] BLR 105, *Brown v Rice* [2007] EWHC 625 (Ch); [2008] FSR 3.

22. *Brown v Rice* [2007] EWHC 625 (Ch); [2008] FSR 3.

23. *Ibid.*, the exceptions are discussed in *Unilever plc v Proctor & Gamble Co* [2000] 1 WLR 2436.

24. [2008] EWHC 786 (QB); [2008] BLR 330.

25. *Brown v Rice* [2007] EWHC 625 (Ch); [2008] FSR 3.


26. *Ibid.*

6. THE ROLE OF ARBITRATORS IN ENCOURAGING MEDIATION

Under the English court rules, parties are expressly required to consider the option of ADR and the courts often allow time within the pre-trial timetable for its use. The courts increasingly consider that mediation would be appropriate in the majority of cases since it has established a high success rate. EU Directive 2008/52 on mediation also makes clear that the courts can invite the parties to use mediation. The Commercial Court currently offers the facility of early neutral evaluation; this is where a judge offers a without prejudice, non-binding evaluation of the merits of a case (or certain issues) at an early stage in the proceedings. The judge will then take no further part in the case.

Maritime arbitrators have generally not been as active as judges in encouraging the use of mediation. First, arbitrators are chosen and paid by the parties to resolve the dispute, so they may—perhaps understandably—be reluctant to encourage the parties to use another neutral third party (who will also charge further fees) to assist in resolution. Secondly, encouraging ADR within litigation reflects the fact that it saves court time; this is relevant because a judge is required to take into account the appropriate allocation of the court's resources towards the various cases before it. In contrast, arbitrators face no such issue as to the appropriate allocation of public resources when making decisions. Thirdly, early neutral evaluation (or a comparable procedure) is unlikely to occur within arbitration because it will not be as easy to pass the case on to another tribunal. If the arbitrator is unsuccessful in prompting settlement, the parties may think that he has unfairly pre-judged the case before giving them a reasonable opportunity to put their case. Fourthly, although the EU directive will give courts the power to invite parties to mediate, it remains to be seen whether the implementing legislation will also empower arbitral tribunals to give similar orders. These differences between court proceedings and arbitration may also affect the costs implications of refusing to mediate (see below).

Notwithstanding these differences, in some cases an arbitrator will raise the option of mediation or allow time for the parties to pursue it. This typically arises where both parties have shown a genuine interest in mediation, as if one party is firmly resisting the process, it is less likely to be useful. The questionnaire which



the Second Schedule to the LMAA Terms requires parties to complete after the exchange of submissions specifically asks whether they have considered mediation. An arbitrator could also give an indication of his views on the merits at an early stage but he must make it clear that these are only provisional views and he is not pre-judging the issue.²⁷ If an issue seems clear-cut or potentially determinative it may be safer to propose deciding it as a preliminary issue (see Chapter 16). The courts have not yet decided whether an arbitrator could stay an arbitration in favour of mediation in the absence of both parties' consent. However, it is arguable that arbitrators have such powers (unless there is express agreement to the contrary) since these measures, if appropriate to the circumstances of the case, would probably fall within their duty to adopt suitable procedures for a fair and efficient resolution of the dispute under section 33 of the 1996 Act. The courts would probably be reluctant to remove an arbitrator who took active steps to encourage ADR in an appropriate case as this is regarded as part of dealing with a case justly and efficiently under the CPR. Powers conferred on courts to invite parties to mediate under EU Directive 2008/52 may also provide further support for arbitrators making orders inviting the parties to mediate.


In some jurisdictions (e.g., Singapore) legislation expressly recognises that an arbitrator may switch roles between arbitrator and mediator—this is sometimes called a med/arb procedure. This type of procedure is unlikely to be adopted in London maritime arbitration where the roles of mediator and arbitrator are generally kept entirely separate. Unless the parties have specifically agreed upon it, an arbitrator should generally avoid any attempt to mediate or assist in settlement discussions as this is likely to give rise to the appearance of bias.²⁸

27. *Hagop Ardahalian v Unifert International SA, The Elissar* [1984] 1 Lloyd's Rep 206.

28. *Cf Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15; [2001] BLR 207.

7. COST IMPLICATIONS OF MEDIATION

Most mediations are preceded by a mediation agreement which will deal with costs. The usual agreement is that each party bears equally the costs of the mediation. This will ordinarily include the mediator's fees and any other expenses such as room booking fees. The mediator (or the organisation administering the mediation) will ordinarily be given power to fix the costs of the mediation. Each party will usually bear its own legal costs incurred in mediating (and any other



costs, e.g., the attendance of witnesses); such costs would, unless otherwise agreed, not ordinarily be treated as the costs of the arbitration subject to award by the tribunal. However, it is possible for the parties to agree that, if the matter does not settle at mediation, the mediator or the arbitral tribunal may assess and award costs incurred by the parties in mediating. For instance, under the 2009 Mediation Terms the mediator is given express power to make costs orders where a party has failed to co-operate so as to thwart the mediation procedure or to cause increased costs. In the absence of this type of agreement the costs of mediating will not usually be recoverable from the other party.

Costs implications of refusing to mediate

The general rule in English court proceedings and arbitration is that the unsuccessful party pays the costs of the successful party.²⁹ The most common exception to this general rule is where the unreasonable conduct of the successful party makes it inappropriate to award them the whole or part of his costs. In the context of court proceedings, there has been considerable case law on the issue of whether a successful party's refusal to mediate justifies a departure from the general rule, such that the successful party is not awarded all his costs. The leading case is *Halsey v Milton Keynes General NHS Trust*.³⁰ It established that a court may deprive a successful party of his costs (or part of them) where it refused to mediate, but the burden falls upon the unsuccessful party to establish that the successful party unreasonably refused to agree to mediate. Each case will depend on its facts but the Court of Appeal considered that the following considerations would be relevant to the question of whether a party unreasonably refused to mediate:

- (a) the nature of the dispute—(e.g., allegations of fraud may not lend themselves to mediation);
- (b) the merits of the case—a party who reasonably considers that its case is watertight may be justified in refusing to mediate;
- (c) the use of other settlement methods;
- (d) the disproportionate cost of mediation—this will be most relevant where the amount at stake is relatively small;
- (e) delay—if mediation is suggested late in the day it may be reasonable to refuse;
- (f) whether mediation has a reasonable prospect of success;
- (g) the encouragement given by the tribunal—where a successful party refuses to mediate despite the court's encouragement then it will be easier to show that the refusal was unreasonable.

29. Section 61(2) of the 1996 Act.

30. [2004] EWCA Civ 576; [2004] 1 WLR 3002.

The Court of Appeal made clear, however, that a party is entitled to adopt whatever position it wishes within a mediation; such conduct would remain confidential and would not be taken into account in assessing costs.

Halsey v Milton Keynes General NHS Trust has some application in arbitration since it is open to a party to ask the arbitrator to take into account a party's unreasonable behaviour in assessing whether it is entitled to all its costs of the arbitration. However, judges have given much more emphasis than arbitrators to the use of ADR for resolving disputes that would otherwise go to trial and, for reasons set out above, they are much more likely to encourage the parties to mediate. Accordingly, judges are much more likely than arbitrators to consider it appropriate to penalise a party for unreasonably refusing to mediate. An arbitrator is most likely to take such conduct into account in awarding costs where he has accepted at an earlier stage that the case would be appropriate for mediation.

8. EU DIRECTIVE 2008/52

In 2008 the European Union adopted a directive ("the Directive") on cross-border mediation in civil and commercial disputes. The Directive reflected a common consensus that mediation should be encouraged as a speedy and cost effective alternative to litigation. It applies where two or more parties to a cross border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable settlement with the assistance of a mediator. A cross-border dispute is defined here as being a dispute where one party is domiciled in a Member State other than that of any other party (the Directive does not cover Denmark) and would include disputes that are subject to an arbitration clause. The measures set out in the directive must be implemented in national legislation by 2011 so the UK Parliament should adopt legislation within that timescale. Its key measures aim to encourage and improve mediation within the EU.

- The Directive obliges Member States to encourage the training of mediators and the development of voluntary codes of conduct for mediators and organisations providing mediation services.
- It gives courts the right to invite the parties to use mediation and attend



an information meeting on mediation if the judge deems it appropriate.

- It will enable parties to apply to enforce settlement agreements concluded following mediation in a similar way to judgments.

- It protects the confidentiality of mediation. The parties or the mediator cannot be compelled to give evidence about what took place during mediation in subsequent proceedings (including arbitration) between the parties except where there are overriding public policy considerations or where disclosure is necessary for enforcement of the settlement resulting from mediation.

- The Directive lays down measures on limitation periods intended to ensure that, when the parties engage in mediation, any such period will be suspended or interrupted.

The Directive applies to the mediation of many shipping disputes which involve parties from different EU states. However, it is unlikely to make a significant change to arbitration or mediation in London of shipping disputes since the practice and law of mediation within the UK is already well developed. In particular, most mediators in London have training, the courts already encourage parties to use mediation and confidentiality is a recognised aspect of mediation. The provisions on enforcement, confidentiality and limitation periods are the main measures that are likely to make substantive changes. However, the Directive and implementing legislation is likely to increase awareness of mediation and go further in making it an established method for resolving disputes.