Part 1

Materials

A. Arbitration Clauses

Examples

We have prepared two sample arbitration clauses specifically designed for use with the Act. In each case they are intended simply to establish the arbitration tribunal and do not embark upon the possible powers that the tribunal might have.

It should be noted that both these clauses anticipate another clause in the relevant contract which provides for a notice to be given that will determine when the arbitration starts. In the absence of such a provision, the default provisions in s.14(3) to (5) will apply.

Clause (1) — Sole arbitrator

'Any dispute or difference arising out of or in connection with this contract shall be referred to the arbitration of a sole arbitrator to be appointed in accordance with s.16(3) of the Arbitration Act 1996 ('the Act'), the seat of such arbitration being hereby designated as London, England. In the event of failure of the parties to make the appointment pursuant to s.16(3) of the Act, the appointment shall be made by the President for the time being of the Chartered Institute of Arbitrators. The arbitration will be regarded as commenced for the purposes set out in s.14(1) of the Act when one party sends to the other the notice described in clause [ ] of this contract. The arbitrator shall decide the dispute according to the substantive laws of England and Wales.'

Clause (2) — Two arbitrators and a chairman

'Any dispute or difference arising out of or in connection with this contract shall be referred to the arbitration of two arbitrators and a chairman to be appointed in accordance with s.16(5) of the Arbitration Act 1996 ("the Act"), the seat of such arbitration being hereby designated as London, England. S.17 of the Act shall not apply. In the event of failure of either of the parties to make the appointment pursuant to s.16(5) of the Act, or in the event of failure by the arbitrators to appoint a chairman, such appointment shall be made by the President for the time being of the Chartered Institute of Arbitrators who

The Arbitration Act 1996: A Commentary, Fifth Edition. Bruce Harris, Rowan Planterose and Jonathan Tecks.

shall have the powers otherwise given to the court under s.18(3) of the Act. The arbitration will be regarded as commenced for the purposes set out in s.14(1) of the Act when one party sends to the other the notice described in clause [ ] of this contract. Save that in respect of matters of procedure (other than where the parties are agreed) decisions or orders may be made by the chairman acting alone, s.20(3) and (4) of the Act shall apply. The arbitrators shall determine the dispute in accordance with the substantive laws of England and Wales.'

B. Agreements Prior to or on Constitution of Arbitration

Introduction

This is one of a number of checklists of points arising for consideration or agreement designed to assist with implementing the Act.

Whilst the lists have been drawn up broadly by reference to the different stages or aspects of an arbitration, such an exercise is arbitrary since many such points may be addressed at more than one stage or in relation to more than one aspect. We have therefore tried to identify those matters which we think *most likely* to be addressed at certain stages.

Dealing with preliminary meetings and awards, the checklists are, of course, primarily addressed to the arbitrator.

Checklist for agreements prior to or on constitution of the arbitration

Seat of the arbitration — (s.3)

- The parties may designate the seat;
- The parties may empower an arbitral institution or other person to designate the seat;
- The parties may authorise the tribunal to designate the seat;
- Otherwise, the court will determine the seat.

General means of providing for non-mandatory provisions — (s.4)

- The parties may make their own agreement or agreements dealing with specific non-mandatory provisions;
- The parties may adopt institutional rules;
- The parties may adopt the laws of another state;
- The parties may use a combination of the above;
- Otherwise, default provisions apply.

Separability of arbitration agreement — (s.7)

- The parties may agree that an arbitration clause is not separable from the main agreement;
- Otherwise, it is so separable.

Death of a party — (s.8)

- The parties may agree that an arbitration agreement is discharged by the death of a party and so may not be enforced by or against the personal representatives of that party;
- Otherwise, it is not so discharged.

Commencement of arbitral proceedings — (s.14)

- The parties may agree when arbitral proceedings are to be regarded as commenced for the purposes of Part I of the Act and of the Limitation Acts;
- Otherwise, default provisions apply.

Arbitral tribunal — (s.15)

- The parties may agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire;
- Where the parties have agreed on an even number of arbitrators, they may agree that there should be *no* additional arbitrator as chairman (otherwise an agreement for two arbitrators is understood as requiring the appointment of a third, as chairman);
- In default of agreement as to number, there will be a sole arbitrator.
- (Note, therefore, that if the parties require more than one arbitrator, agreement is essential.)

Procedure for appointment of arbitrators — (s.16)

- The parties may agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire;
- Default provisions apply if there is no agreement, or only an agreement covering some of these matters.

Appointment of sole arbitrator in case of default — (s.17)

- The parties may agree that s.17 (appointment of first party's arbitrator as sole arbitrator where second party fails to make an appointment) does *not* apply.

Failure of appointment procedure — (s.18)

- The parties may agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal;
- Default provisions apply if or to the extent that there is no agreement.

Chairman — (s.20)

- Where there is to be a chairman, the parties may agree his functions as to the making of decisions, orders and awards;
- Default provisions apply if or to the extent that there is no agreement.

Umpire — (s.21)

- Where there is to be an umpire, one should be appointed once the party-appointed arbitrators are in place, absent agreement to some other effect;
- Where there is to be an umpire, the parties may agree his functions;
- Default provisions apply if or to the extent that there is no agreement.

Decision making where there is no chairman or umpire — (s.22)

- The parties may agree how the tribunal is to make decisions, orders and awards where they have previously agreed that there shall be two or more arbitrators with no chairman or umpire;
- In the absence of such an agreement, decisions are made by all arbitrators or a majority.

Revocation of arbitrator's authority — (s.23)

- The parties may agree in what circumstances the authority of an arbitrator may be revoked;
- Default provisions apply to the extent that there is no agreement.

Jurisdiction of the arbitral tribunal — (s.30)

- The parties may agree that the tribunal *cannot* rule on its own substantive jurisdiction;
- Otherwise, it can.

Consolidation — (s.35)

- The parties may agree on consolidation of arbitrations or concurrent hearings, or that the tribunal shall have power so to order;
- Otherwise, the tribunal has no such power.

Representation — (s.36)

- The parties may agree that rights to representation be limited;
- Otherwise, they may be represented by a lawyer or other person.

Appointing experts, legal advisers or assessors — (s.37)

- The parties may agree that the tribunal may *not* appoint experts, etc.;
- Otherwise, the tribunal has such power of appointment;
- The parties may agree they should not be given a reasonable opportunity to comment on the output of such an expert;
- (Note that s.37(2), in relation to the fees and expenses of such experts, is mandatory.)

General powers of tribunal — (s.38)

- The parties may agree on the powers exercisable by the tribunal;
- *But* the powers in subss.(3) to (6) *will* apply unless a contrary agreement can be spelt out.

Power to make provisional orders — (s.39)

- The parties may agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award;
- If there is no such agreement, the tribunal has no such power.

Powers on default of party — (s.41)

- The parties may agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration;
- *But* the powers in subss.(3) to (7) *will* apply unless a contrary agreement can be spelt out.

Court powers in support of arbitral proceedings — (s.44)

- The parties may agree to exclude the court's powers in relation to any or all of the matters listed in s.44(2)(a) to (e);
- *But* its powers in respect of those matters *will* remain unless a contrary agreement can be spelt out.

- (Note, we do not think that the parties can make an agreement that excludes the effect of subss.(3) to (7) in respect of any matter within subs.(2) as to which the court has powers.)

Determination of preliminary point of law — (s.45)

- The parties may agree, in advance of any arbitration or dispute as well as after an arbitration has commenced, to exclude the court's power to determine any question of law arising in the proceedings;
- An agreement to dispense with reasons for the tribunal's award is equivalent to an agreement to exclude this jurisdiction;
- *But* the provisions of the section *will* apply unless a contrary agreement can be spelt out.

Rules applicable to substance of dispute — (s.46)

- The parties may choose the substantive law that is to apply;
- Or, the parties may agree as to what other considerations should be applied;
- Or, the parties may agree that the tribunal should determine the considerations to be applied;
- In default, the tribunal will apply the substantive law determined by the applicable conflict rules.

Awards on different issues — (s.47)

- The parties may agree to *exclude* the power to make more than one award at different times on different aspects of the matters to be determined;
- Otherwise the tribunal has this power.

Remedies — (s.48)

- The parties may agree on the powers the tribunal may exercise as regards remedies;
- *But* the tribunal *will* have the powers set out in subss.(3) to (5) unless a contrary agreement can be spelt out.

Interest — (s.49)

- The parties may agree on the powers the tribunal may exercise as regards interest;
- *But* the tribunal *will* have the powers set out in subss.(3) to (5) unless a contrary agreement can be spelt out.

Form of award — (s.52)

- The parties may agree on the form of the award;
- Note that the parties may agree to dispense with reasons;
- Default provisions apply if or to the extent that there is no agreement.

Place where award made — (s.53)

- The parties may agree that the award shall *not* be treated as made at the seat of the arbitration, where that seat is in England, Wales or Northern Ireland;
- Otherwise, it will be treated as so made.

Date of award — (s.54)

- The parties may agree that the tribunal shall *not* decide on the date of the award;
- If they so agree, or the tribunal fails to decide the date, subs.(2) applies.

Notification of award — (s.55)

- The parties may agree on the requirements as to notification of the award to the parties;
- In the absence of agreement, subs.(2) applies.

Correction of award or additional award — (s.57)

- The parties may agree on the powers of the tribunal to correct an award or make an additional award;
- Default provisions apply if or to the extent that there is no agreement.

Effect of award — (s.58)

- The parties may agree on the effect of the award;
- In the absence of contrary agreement, the award is final and binding.

Appeal on point of law — (s.69)

- The parties may agree, in advance of any arbitration or dispute as well as after an arbitration has commenced, to exclude the court's power to determine any question of law arising out of an award;
- An agreement to dispense with reasons for the tribunal's award is equivalent to an agreement to exclude this jurisdiction;
- *But* the provisions of the section *will* apply unless a contrary agreement can be spelt out.

Service of notices — (ss.76 and 77)

- The parties may agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of an arbitration agreement or for the purposes of arbitral proceedings;
- Default provisions apply if or to the extent there is no agreement under s.76;
- The parties may agree that the court should *not* have the powers set out in s.77 relating to service.

Time periods — (s.78)

- The parties may agree on the method of reckoning periods of time for the purposes of any of their own agreed provisions or any non-mandatory provisions of the Act having effect in default of other agreement;
- Default provisions apply if or to the extent that there is no agreement.

Extension of time limits by court — (s.79)

- The parties may agree to *exclude* the power of the court to extend time limits.

C. Agreements as to Tribunal and Court Powers

This is a checklist for the more significant powers of the tribunal and the court which the parties may affect by their agreement. The list has been drawn up in the format of draft agreements that could be entered into, so as to indicate some of the options that are available.

Of course, where the parties' wishes concur with the default provisions of the Act, no agreement will be necessary since, in the absence of *contrary* agreement, the default provisions will apply.

'The parties have agreed as follows (all references to "the Act" being references to the Arbitration Act 1996)':

Jurisdiction (s.30)	'The tribunal may not rule on its own substantive jurisdiction.'
Consolidation (s.35)	'The tribunal shall have the following power of consolidation/power to order concurrent hearings, namely …'
Appointment of experts etc. (s.37)	'The tribunal shall not have the power to appoint its own experts, legal advisers or assessors.' (s.37(1)(a)) 'In relation to any expert appointed by the tribunal, the parties shall not be given any opportunity to comment on the opinion expressed by him.' (s.37(1)(b))
General powers (s.38)	'The tribunal has the following powers (and only those powers) for the purposes of and in relation to these proceedings, namely …' 'S.38(3)/s.38(4)/s.38(5)/s.38(6) of the Act does/do not apply to these proceedings.'
Provisional order (s.39)	'The tribunal shall have power to order on a provisional basis any relief which might be granted in the final award [limited to …] …'
Power on party's default (s.41)	'In the event that either party fails to do something necessary for the proper and expeditious conduct of the arbitration, the tribunal shall have the following powers (and only those powers) namely …' 'S.41(3)/s.41(4)/s.41(5)/s.41(6)/s.41(7) of the Act does/do not apply to these proceedings.'
Court's power to enforce peremptory orders (s.42)	'The court shall not have the power to require any party to comply with any peremptory order made by the tribunal in these proceedings pursuant to s.41(5) of the Act, and s.42 of the Act shall not apply to these proceedings.'
Court's power in support of arbitral proceedings (s.44)	'For the purposes of and in relation to these proceedings, the court shall not have the power to make orders about the matter[s] listed in s.44(2)(a)/(b)/(c)/(d)/(e) of the Act.'

Determination of preliminary point of law (s.45)	'Neither party shall be entitled to apply to the court for the determination of any question of law arising in the course of these proceedings, and the court's jurisdiction under s.45 of the Act is hereby excluded.'
Awards on different issues (s.47)	'The tribunal shall not have the power to make awards on different issues, and it will make only one substantive award in respect of the matters referred to it in these proceedings.'
Remedies (s.48)	'The tribunal may make an award including some or all of the following remedies (and only those remedies), namely …' 'S.48(3)/s.48(4)/s.48(5) of the Act does/do not apply to these proceedings.'
Interest (s.49)	'The tribunal shall have the following power (and no further power) to award interest, namely …' 'S.49(3)/s.49(4) of the Act does/do not apply to these proceedings.'
Extension of time for making award (s.50)	'The power of the court to extend the period of time provided in clause [ ] of this agreement within which the tribunal is to make its award shall not apply, and the court's jurisdiction under s.50 of the Act is hereby excluded.'
Power to correct awards or make additional awards (s.57)	'The tribunal shall have the following powers (and only those powers) to correct awards or make additional awards, namely …' 'S.57(3)(a)/s.57(3)(b) of the Act does/do not apply to these proceedings.' 'S.57(4) to (6) of the Act applies to these proceedings with the following amendments, namely …'
Power to limit recoverable costs (s.65)	'The tribunal shall not have the power to direct that the recoverable costs of these proceedings or any part of them be limited to a specified amount, and its jurisdiction pursuant to s.65 of the Act is hereby excluded.'
Determination of question of law arising out of an award (s.69)	'Neither party shall be entitled to appeal to the court on any question of law arising out of an award made in these proceedings, and the court's jurisdiction under s.69 of the Act is hereby excluded.'

D. Checklist for Preliminary Meetings

This is a checklist of some of the more significant points that might come up for consideration at a preliminary meeting. It has been drawn up bearing in mind some of the requirements — and also possibilities — created by the Act.

It should be remembered that in dealing with *all* the points below, the tribunal should have its s.33 duty — 'to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined' — very firmly in mind.

Appointment — (ss.16–18)

- Are all matters in relation to the appointment of the arbitrators resolved?
- Is a chairman or umpire to be appointed?
- Are there any outstanding matters relating to fees?

Seat — (s.3)

- Has the seat of the arbitration been designated?
- If not, how is it to be designated?

Provision for non-mandatory sections — (s.4)

- Are institutional rules to be adopted?
- Have the parties made any other agreement or arrangement in respect of such sections?

Jurisdiction — (ss.30–32)

- Does the tribunal obviously have jurisdiction?
- Are there likely to be issues as to substantive jurisdiction requiring resolution?
- If so, is the tribunal to rule on the matter in an award as to jurisdiction, or deal with the objection in its award on the merits?
- Or is there to be an application to the court for a determination? If so, should the proceedings continue in the meantime?

Procedure and evidence — (s.34)

- What form should the proceedings take so as to be best suited to the case?
- Are written statements of claim and defence to be used? If so, what form should they take — statements of case, annexing documents, witness statements and the like, or some other form?
- Should there be disclosure of documents, and if so, to what extent?
- Are strict rules of evidence to apply?
- When and how should witness statements be exchanged?
- Should the tribunal proceed inquisitorially, itself taking the initiative in ascertaining facts and law?
- Should there be an oral hearing or only (and if so, what) written evidence and/or submissions?

Consolidation — (s.35)

- Have the parties made some agreement in this respect?
- Or does the tribunal have power to consolidate or hold concurrent hearings, and is it being asked to use it?

Representation — (s.36)

- Are the parties to be represented, and if so, by whom?

Experts — (s.37)

- Should the tribunal consider appointing its own experts, legal advisers or assessors?

General powers — (s.38)

- Does the tribunal have all the powers set out in s.38?
- If not, what are its general powers?
- Should the tribunal make any order in respect of security for costs? (Directions for dealing with an appropriate application, possibly at a separate hearing, will probably be necessary.)
- Should the tribunal give directions in relation to any property? (Directions for dealing with this may again be necessary.)
- Are any directions necessary in respect of witnesses and their examination?

Provisional orders — (s.39)

- Is there, or is there likely to be, an application for any relief on a provisional basis? (Directions for dealing with this would almost certainly be necessary.)

Substantive law — (s.46)

- Is there any dispute or doubt about what substantive law (or which other considerations) the tribunal is to apply?
- If yes, how is this to be resolved?

Awards on different issues — (s.47)

- Is this a case in which it would be appropriate to make awards on different issues at different stages?

Remedies/Interest — (ss.48 and 49)

- Are there any agreements of which the tribunal should be aware as to its powers to include different remedies and provisions as to interest in its award?

Reasons — (s.52)

- Do the parties choose *not* to have a reasoned award?
- Do they otherwise wish to exclude the powers of the court under s.45 to determine a preliminary point of law, and under s.69 to entertain an appeal on a point of law?

Costs capping — (s.65)

- Are there any aspects of the arbitration that suggest themselves as appropriate for a ceiling on recoverable costs?

Writing — (s.5)

- Have any agreements made by the parties as to procedure or otherwise been put into writing?
- Does the tribunal have authority to record any agreements reached at the preliminary meeting on behalf of the parties?

E. Agreement with Arbitrator on Resignation

Resignation

Under s.25, the parties may agree with the arbitrator the consequences of his resignation as to his fees and any liability he may have incurred for breaching his contract with them. In the absence of agreement, the arbitrator may apply to the court, which may grant him relief from liability if his resignation was reasonable and may rule on his entitlement to fees.

These provisions could well be of considerable importance if arbitrators, regarding a particular course or procedure as appropriate pursuant to their s.33 duty, find themselves in conflict with the parties who have agreed on a course which the arbitrator would (reasonably) regard as unacceptable. Resignation may then be the preferred option.

Whilst an agreement as to the consequences of resignation may be made at any time, our model is a simple form of agreement made after resignation.

The parties may agree whether the vacancy left by the resigning arbitrator is to be filled, and if so, how. They may also agree whether and to what extent the proceedings prior to the resignation should stand, and what effect there is on any appointment in which the resigning arbitrator has had a part. Default provisions apply to the extent there is no such agreement, (s.27).

Model agreement with arbitrator on his resignation

'Mr Arbitrator having resigned his appointment as arbitrator in the aforesaid arbitration, the parties and Mr Arbitrator hereby agree as follows:

(a) Mr Arbitrator may retain such fees and expenses as have been paid to him at the date of this agreement, but his invoice of 31st July 200X is cancelled and he shall not be entitled to the fees sought therein;
(b) as between the parties payment of the fees and expenses of Mr Arbitrator will be dealt with as part of the costs of the arbitration, and the tribunal as reconstituted shall make an award allocating such costs as part of the costs of the arbitration under s.61 of the Act;
(c) Mr Arbitrator will incur no further liability to the parties, save that he will bear the expenses of the Chartered Institute of Arbitrators [or some other arbitral institution] in the appointment of a replacement arbitrator.'

F. Checklist for Awards

Checklist for arbitrators on awards

We have tried here to provide some guidance in short form for arbitrators making awards under the regime contained in the Act.

When are formal awards required?

Apart, of course, from an award on the merits, awards are also required in the following circumstances:

S.31(4)(a)	Specific award as to the tribunal's substantive jurisdiction
S.41(3)	Dismissal of claim for inordinate and inexcusable delay
S.41(6)	Dismissal of claim for failure to comply with peremptory order to provide security for costs
S.47	Awards on different issues
S.49	Awards as to interest
S.51(2)	Agreed award on settlement
S.57(3)(b)	Additional award in respect of any claim presented to the tribunal but not dealt with in the original award
S.61	Allocation of costs as between the parties
S.63(3)	Determination of the recoverable costs of the arbitration

Should the award contain reasons?

Yes, in all cases, unless there is agreement to dispense with reasons under s.52(4) or it is an agreed award under s.51. The court may refer an award back to the tribunal for sufficient reasons to be given to enable a challenge or appeal to be properly considered, (s.70(4)).

Other determinations, decisions and orders, and in particular provisional orders under s.39, need not be given or made with reasons (although, in our experience, brief reasons are often informally provided in such situations, especially where the arguments have been extensive or the subject matter of the decision is particularly contentious).

Form of the award

(1) The parties may have agreed on formal requirements. If so, they must be followed, (s.52(1)).

(2) In the absence of agreement, every award:

  (a) must be in *writing*;
  (b) must be *signed*, at least by all those assenting to its contents;
  (c) must contain *reasons* (unless the award is agreed, or the parties have agreed to dispense with reasons);

(d) must state the *seat* of the arbitration;
(e) must state the *date* when the award is made (see s.54: the power of the tribunal to decide this date may be taken away from them by the parties).

(3) If the award is made under s.47, it must additionally specify the issue, or the claim or part of a claim, which is its *subject-matter*.

(4) Where applicable, the award must deal with *interest* either in accordance with the power so to award conferred by the parties, or in accordance with the default provisions of s.49. There may be a contractual provision for interest which should be dealt with.

Interest is normally awarded by reference to the periods leading up to the date of the award and after the award. See our drafting suggestion at paragraph 49F of the main text.

Note that the tribunal must positively provide for interest after the date of the award. It will not automatically accrue (as it did prior to the Act).

(5) Where applicable, the award must allocate the *costs* of the arbitration as between the parties (subject to any agreement by them), following the general principle that costs should follow the event (s.61).

The costs of the arbitration are defined in s.59 and are:

(a) the arbitrators' fees and expenses;
(b) the fees and expenses of any arbitral institution concerned;
(c) the legal and other costs of the parties.

The award should deal with each of these in turn. See our drafting suggestion at paragraph 61E of the main text.

Form of agreed award

(6) An agreed award will follow the form set out above with certain differences:

(a) it will not contain reasons;
(b) it must state that it is an award of the tribunal (s.51(3));
(c) it will probably deal with interest and costs in accordance with the parties' request because these matters will have been agreed. If they have not been agreed, the award may deal with the costs of the arbitration (s.51(5)). These include the arbitrators' own fees.

G. Agreements as to Costs

We have prepared here a list of possible agreements that may be made concerning costs at various stages of the arbitration. For our drafting suggestion as to an award of costs, see paragraph 61E of the main text.

Agreements before dispute

(1) The parties may agree there should be no allocation of costs, or may make some other agreement as to how costs should be allocated (e.g. that each party will bear its own) that does not infringe s.60.
(2) Note the effect of s.60: an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made *after* the dispute in question has arisen.
(3) The parties may agree the principles applicable to the award of costs (if different from 'costs following the event' under s.61(2)).
(4) The parties may agree that the allocation of costs extends to something other than the 'recoverable costs' referred to in s.63 —see s.62.
(5) The parties may agree the nature or classes of the costs of the arbitration which are, in principle, recoverable — see ss.63(1) and 64(1), but not (at this stage) their quantum.
(6) The parties may agree to exclude the power of the tribunal to limit the recoverable costs of the arbitration to a specified amount — see s.65.

Agreements after dispute and before award on merits

(7) The parties may agree the matters set out in (1) and (3) to (6) above. Additionally they may make an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event.

Agreements after award on merits

(8) The parties may agree the allocation of costs as between themselves.
(9) The parties may agree that the tribunal allocate costs, but on a basis other than 'costs following the event' under s.61(2).
(10) The parties may agree that the allocation of costs under an agreement between themselves or under an award extends to something other than 'recoverable costs' referred to in s.63 — see s.62.
(11) The parties may agree the nature or classes of the costs of the arbitration which are, in principle, recoverable.
(12) The parties may agree the quantum of recoverable costs.

H. Arbitration Claims
General Note on Arbitration Claims

The procedure for applications to the court in relation to arbitration matters is governed by Part 62 of the Civil Procedure Rules (CPR) and the Practice Direction on Arbitrations supplemental to Part 62.

Claim form

Arbitration claims (defined in Part 62) are begun by issuing an arbitration claim form. This must be substantially in Form N8. It is simple to complete, but to comply with Part 62 and the Practice Direction the completed form must:

(1) include a concise statement of

  (a) the remedy claimed, and
  (b) (where appropriate) the questions on which the claimant seeks the decision of the court;

(2) give details of any arbitration award that is challenged by the claimant identifying which part or parts of the award are challenged, and specifying the grounds for any such challenge;

(3) where the claimant claims an order for costs, identify the defendant(s) against whom the claim is made;

(4) specify the section of the Act under which the claim is made;

(5) show that any statutory requirements have been satisfied (we have dealt with these under the heading 'Application' in our commentary on relevant sections);

(6) specify either

  (a) the persons on whom the arbitration claim form is to be served, stating their role in the arbitration and whether they are defendants, or
  (b) that the claim is made without notice under s.44(3) of the 1996 Act and the grounds relied on.

Issue of claim form

The allocation of arbitration proceedings between different courts is dealt with by the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996 No. 3215 as amended by SI 1999 No. 1010, together with paragraph 2 of the Practice Direction.

Applications for a stay of legal proceedings under s.9 of the Act must be made by way of application in the court in which the legal proceedings which it is sought to stay are pending. (The application is made in the legal proceedings by a Part 23 application notice.)

Otherwise, and subject to the Order and paragraph 2 of the Practice Direction, an arbitration claim form may be issued at:

(1) the Admiralty and Commercial Registry of the Royal Courts of Justice, London (for entry in the Commercial List);

(2) the Technology and Construction Court Registry, London (for entry in the TCC List);
(3) any District Registry of the High Court where a mercantile court is established (for entry in the Mercantile List);
(4) a District Registry of the High Court for entry in the TCC List and so marked in the top right hand corner.

Note that an arbitration claim form relating to a landlord and tenant or partnership dispute must be issued in the Chancery Division of the High Court. In the case of an appeal, or application for permission to appeal, from a judge-arbitrator, it must be issued in the Civil Division of the Court of Appeal.

CPR r.30.5 (concerning the transfer of claims between Divisions of the High Court and to and from a specialist list) applies with the modification that a judge of the TCC may transfer the claim to any other court or specialist list.

Service within the jurisdiction

An arbitration claim form is valid for service within the jurisdiction for one month (r.62.4(2)). Generally, service is effected as for other types of court proceedings, in accordance with CPR Part 6. The court may also exercise its powers under r.6.8 to permit service at the address of a party's solicitor or representative.

Note that there is a particular provision governing service of an application notice seeking a stay of legal proceedings under s.9 of the Act. By r.62.8 the notice must be served on all parties to those proceedings who have given an address for service.

Service outside the jurisdiction

For the purpose of service outside the jurisdiction, an arbitration claim form is valid for such period as the court may fix. The permission of the court is required. Permission may be granted if the application seeks to challenge or appeal against an arbitration award made within the jurisdiction; if the application is for an order under s.44 of the Act (court powers exercisable in support of arbitral proceedings) whether the arbitral proceedings are taking place within or outside the jurisdiction; and, in relation to other applications, where the seat of the arbitration is or will be within the jurisdiction or, where no seat has been designated, if there is an appropriate connection with the jurisdiction. The application for permission must be supported by written evidence:

(1) stating the grounds on which the application is made, and
(2) showing in what place or country the person to be served is, or probably may be found.

If granted, service may be effected overseas in the same way as for other types of claim form.

Notice

In most instances, the Act requires applications to be made on notice. We have noted these in our commentary on individual sections. This is generally done by making the other parties and, in the case of applications under ss.24, 28 or 56 of the Act, the arbitrator or arbitrators defendants to the application and serving on them the arbitration claim form and evidence in support.

Otherwise, notice to the arbitrator *may* be effected simply by sending a copy of the arbitration claim form and supporting evidence to the arbitrator at his last known

address for his information. This has commonly, and inappropriately, been interpreted as requiring that the arbitrator be served with *all* the material accompanying an application, whereas all that will generally be required (on the extra-judicial authority of a former judge in charge of the Commercial Court) is a copy of the arbitration claim form (save in respect of s.68 applications where it will normally be important for tribunals to know what is being said in detail). The arbitrator may request to be made a defendant to the application. Alternatively (and, we suggest, normally) the arbitrator may make representations to the court by filing a witness statement or making representations in writing.

Note that different provisions concerning notice apply to applications for a stay under s.9: see paragraph 9J and r.62.8.

Acknowledgment of service

A defendant to an arbitration claim may acknowledge service by filing and serving on the other parties the appropriate form (No. N15) within 14 days of service of the claim form. Failure to do so will debar the defendant from contesting the application without the permission of the court and the court will not notify such a defendant of the hearing date. In relation to applications under s.9 of the Act (as to which see paragraph 9J) and subsequent applications relating to the same arbitration this rule as to acknowledgment of service does not apply.

Directions

Unless the court otherwise directs, certain directions take effect automatically (see r.62.7 and paragraph 6.1 of the Practice Direction):

(1) a defendant may serve evidence in response to the application within 21 days after the time for acknowledging service or, if acknowledgment of service is not required, within 21 days after service of the claim form;
(2) any further evidence in response by the claimant must be served within 7 days after service of the defendant's evidence;
(3) the claimant (with the co-operation of the defendant) is responsible for the preparation of agreed, indexed and paginated bundles of all the evidence and other documents for use at the hearing;
(4) not less than 5 clear days before the hearing date time estimates and a complete set of the bundles must be filed with the court;
(5) not less than 2 days before the hearing date the claimant must file with the court and send to the defendant —

    (a) a chronology cross-referenced to the bundles;
    (b) (where necessary) a list of the persons involved;
    (c) a skeleton argument listing succinctly the issues; the grounds relied upon for seeking or opposing relief; submissions of fact cross-referred to the evidence; and submissions of law cross-referred to relevant authorities;

(6) not less than the day before the hearing the defendant must file with the court and send to the claimant a similarly configured skeleton argument.

If the court gives specific directions then these will be such as it thinks best adapted to secure the just, expeditious and economical disposal of the application. The CPR Part 29 case management rules which usually apply to cases allocated to the multi-track (as all arbitration claims automatically are) do not apply to arbitration claims, giving way to

the automatic directions referred to above. Nevertheless, the court may give particular directions for the attendance of witnesses for cross-examination; for hearing the application on oral evidence or partly on oral and partly on written evidence if there is or may be a dispute as to fact; and indeed any other directions which the court could give in other types of proceedings.

Accordingly, although the majority of claims are dealt with simply on written evidence and documentation, in some instances the hearing of the application may take on the characteristics of a small trial.

The sanctions for the claimant who defaults or delays are that the court may dismiss the claim or make such other order as may be just. In relation to the defaulting defendant the court may determine the claim without having regard to his evidence or submissions.

Hearing

Generally, arbitration claims are heard in private with the exception of the substantive determination of a preliminary point of law under s.45 and the substantive appeal on a question of law under s.69, which are heard in public. However the court may order differently.

Security for costs

The court may order any applicant (including one granted permission to appeal) to provide security for the costs of any arbitration claim. See also s.70(6) of the Act in this regard.

Specific provisions

There are specific provisions in relation to a number of different kinds of application under the Act which are dealt with in our commentary on those sections.