

An Arbitrator's Procedural Powers and the Court's Limited Supervisory Role

A. Introduction

1. There is a growing demand for low-cost, speedy and efficient alternative dispute resolution services resulting from Legal Aid cut-backs, Ministry of Justice initiatives to privatise court disputes, the amalgamation of the courts and tribunals into one organisation and the ever growing number of private law disputes.

2. Two ways to open up the LCIA to private disputes generally:

(1) To persuade further bodies, organisations and groupings to adopt arbitration clauses with the CI Arb as the appointing body and CI Arb Arbitration Rules with the Short-form procedure as the appropriate rules. Before long, all lease-associated disputes that are litigated will be transferred to the property chamber of the Tribunal Service once it becomes part of the Court Service (e.g. service charges, possibly private possessions, dilapidations, lease renewal disputes and such valuation disputes as used to be heard by the old Lands Tribunal). All these disputes could be made subject to arbitration (along with disputes now usually made subject to arbitration) in a comprehensive arbitration clause. Such a clause could be promoted for inclusion by draftsmen of leases.

(2) By successfully promoting one-off and ad hoc arbitrations with appointments obtained by joint applications from parties to a dispute not governed by a pre-existing binding arbitration clause.

3. Thought should be given to preparing an even more flexible short-form set of CI Arb rules which give full effect to the powers available to arbitrators in the AA 1996. It would also be helpful if an accompanying guide was produced that explained how a short, informal arbitration would be conducted under this standard form, how the Arbitrator would exercise his or her case management and hearing management powers and how the Arbitrator, with the consent of the parties, could following appointment combine or replace the arbitral role with a conciliation, mediation or expert determination role following discussion and agreement at the preliminary hearing.

4. With the withdrawal of legal aid from matrimonial property disputes and the ever-rising cost of representation in big money cases, there is surely scope for the development of ad hoc arbitrations in such disputes with an arbitrator/conciliator/mediator role for the appointed dispute resolver.

B. Outline of the range of an Arbitrator's Procedural Powers

5. The 1996 Act is only now beginning to come into its own. It provides an excellent basis for an arbitrator to provide a flexible and genuinely alternative procedure which, if managed and delivered with care and sensitivity, will be immune from court intervention.

6. Structure of the Act:

(1) **General principles and duty – sections 1, 33 and 40.** These involve party autonomy, overriding duties of fairness, impartiality, economy, speed and the over-riding discretion of the arbitrator (subject to the express agreements of the parties reflected in the arbitration rules and ad hoc consents reached following the arbitrator’s appointments). Even such express party agreements are subject to the arbitrator’s final say where he/she considers that the express agreement’s implementation would involve a breach of the general principles and duties imposed by sections 1, 33 and 40 (note Article 1.2 of the CI Arb Rules:

“The parties may not amend or modify these Rules (which provide in any case considerable latitude for the arbitrator to dispense or modify) or any procedure under them after the appointment of an arbitrator unless the arbitrator agrees to such amendment or modification.”

(2) **Procedure and evidential matters – sections 34, 41.** These include the power to adopt inquisitorial procedures, dispense with pleadings and discovery, limit or even in appropriate cases dispense with an oral hearing. Note the wide-ranging powers provided or sanctioned by section 34.

(3) The court has only limited, supportive and long-stop powers to intervene during the course of the arbitration and its limited powers relating to the control or correction of procedural matters in section 68 may only be exercised following the publication of the award.

7. These powers may be, and should be, used in all situations including those involving recalcitrant and non-appearing parties, parties acting for themselves, parties under any form of disability (with the arbitrator’s procedures adapted to cater fairly for any disability) and documents-only arbitrations. The arbitrator can (and should) make extensive use of email communications so long as the procedure adopted has adequate safeguards built into it, particularly with regard to service, retention of a complete record of the arbitration and fairness to non-IT literate parties or representatives. An IT protocol could usefully be devised by the CI Arb and, in default of such a protocol, an arbitrator is well-advised to adopt his/her own and to incorporate it into the initial case management directions – see in particular sections 38 and 41.

C. Boundaries Beyond Which a Court Could Intervene

8. The principal control is the arbitrator’s over-riding duties imposed by the AA, his/her fidelity to his/her contractual duties supporting the AA duties and his/her commitment to the arbitral process and to his/her fellow arbitrators within the CI Arb imposed by membership of the CI Arb. These should be buttressed by extensive and continuous training and peer advice and monitoring and continuous honing of the necessary (extensive) personal skills associated with the arbitral process.

9. **Court intervention – General matters.** This is only possible via section 68. In general:

(1) Note section 70(2) and the general power (unless removed by agreement) of the arbitrator to review, and for the parties to apply for review, of procedural directions, orders and rulings.

(2) Even where serious irregularity has arisen, the court may only intervene if the consequence “has caused or will cause substantial injustice to the applicant” (section 68(2)). This cannot be created by aggregating a number of separate but relatively minor irregularities (**London Underground Ltd v Citylink Telecommunications Ltd** [2007] EWHC 1749).

(3) There is, save in exceptional circumstances, no over-lap with section 69 (see **Lesotho Highlands Development Authority v Impreglia SpA** [2005] 2 Lloyd’s Rep 310).

(4) The application must be brought under, and the irregularity expressly provided for, in one of the section 68 gateways. There is no jurisdiction to intervene on a general basis of unfairness.

10. Cases illustrating procedural irregularity which crosses the non-intervention/intervention threshold:

(1) Interference with right to present a parties case – **Comania Sud-America de Vapores SA v Nippon Yusen Kaisha** [2009] EWHC 1606 (Comm).

(2) Arbitrator’s right to decide whether or not to hold an oral hearing (section 34(2)(h)) – **O’Donoghue v Enterprise Inns plc** [2008] EWHC 815 (Ch).

(3) Arbitrator’s ability to use inquisitorial powers in a rent review arbitration – **Checkpoint Ltd v Strathclyde Pension Fund** [2003] EWCA Civ 84.

(4) Failure to resolve all matters in dispute – **Van Der Giessen-De-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV** [2008] EWHC 2904 (Comm).

D. The Award

11. This is the vital and most significant act of the arbitrator and it is essential that its drafting should comply with the requirements of the AA, should contain adequate and adequately expressed reasons and should provide a succinct and readily understood record of the arbitration, its result and the reasons for the result.

12. The formal requirements of an award, including the need for writing, the date of publication, the place of the award and publication to the parties must be complied with.

13. The substantive requirements of an award, including the need for the resolution of all issues, the non-inclusion of issues beyond the scope of the reference, finality and unconditionality, lack of ambiguity and certainty and enforceability.

14. The reasons. The authorities are replete with statements to the effect that perfection in drafting and reasoning is not required and that the reasons need not be lengthy nor deal with immaterial issues. There is little guidance as to what reasons should contain and how they should be structured and drafted. Reasons should:

- (1) Identify the significant issues of fact and law that the arbitrator has dealt with and resolved.
- (2) Explain the facts and general reasoning adopted by the arbitrator which led to the conclusion that the identified issues were the decisive issues.
- (3) Explain why the core findings of fact were made.
- (4) Explain why the legal issues and principles that were considered were crucial.
- (5) Explain what the applicable law is and identify the reasoning leading to that conclusion.
- (6) Set out the conclusions and explain the reasoning that led to those conclusions. That explanation should include an explanation of how the relevant law was applied to the relevant and crucial found facts

15. It is advisable to develop a personal template for all awards which can be used (adapted as necessary) for all awards that an arbitrator drafts. The LCIArb could consider producing model templates for its members.

Provisions of Arbitration Act 1996 Defining an Arbitrator's Procedural Powers and Duties

1 General principles.

The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

33 General duty of the tribunal.

(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

34 Procedural and evidential matters.

(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include—

(a) when and where any part of the proceedings is to be held;

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

40 General duty of parties.

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

(2) This includes—

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

41 Powers of tribunal in case of party's default.

(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.

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

...

(4) If without showing sufficient cause a party—

(a) fails to attend or be represented at an oral hearing of which due notice was given, or

(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions,

the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.

(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same

effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(6) If a claimant fails to comply with a preemptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.

(7) If a party fails to comply with any other kind of preemptory order, then, without prejudice to section 42 (enforcement by court of tribunal's preemptory orders), the tribunal may do any of the following—

(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;

(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;

(c) proceed to an award on the basis of such materials as have been properly provided to it;

(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

68 Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

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