Judicial Supervision and Support for Arbitration and ADR

A presentation to be given by

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1. Introduction and Background

1.1 The purpose of this paper is to consider the supervisory and supporting role of the Courts for Arbitration and ADR taking both domestic and international arbitration cases into account. This will be reviewed against the backdrop of an examination of the means by which parties can bring challenges to tribunal and their awards other than by application to the courts and I will illustrate the work of the English courts by the use of examples of recent case law and appeals in arbitration proceedings.

1.2 The topics for discussion are grouped into the following sections:

1.2.1 Challenges to arbitral tribunals or awards in advance of applications to the courts in England and Wales

1.2.2 Challenges to arbitral tribunals or awards in advance of applications to the courts in international arbitration.

1.2.3 Judicial supervision and support for arbitration and ADR in England and Wales.

1.2.4 Judicial supervision and support for arbitration in France and Switzerland.

1.2.5 Case law and arbitration applications and appeals.

1.3 By way of introduction is it is relevant to consider the context in which both domestic and international arbitration is conducted in England and Wales today. Many substantial domestic construction disputes, and most international construction disputes, are habitually resolved by arbitration. Other forms of dispute resolution, particularly litigation, adjudication, mediation and more recently Dispute Review Boards also have a significant role to play in the resolution of construction disputes. These other forms of dispute resolution, notably adjudication, mediation and litigation of claims within the Technology and Construction Court, are dealt with in the papers and presentations of other speakers. This paper and my presentation will focus substantially on arbitration as a means to resolve construction or other commercial
disputes and judicial supervision and support for both that process and, to a lesser extent, ADR.\(^2\)

1.4 The English modern law of arbitration is codified and is to be found in the provisions of the Arbitration Act 1996 (variously referred to as “the 1996 Act” or “the Act” hereafter) which substantially came into effect on 31 January 1997. That act and the philosophy underpinning it are to be found in the UNCITRAL\(^3\) Model Law 1985\(^4\) (“the Model Law”). Before the introduction of the Model Law on Arbitration, in 1976 via General Assembly Resolution 31/98 UNCITRAL adopted and published the UNCITRAL Arbitration Rules. The UNCITRAL Model Law on Arbitration in fact forms the basis of the law of arbitration in over 50 nation states. Working Group II of UNCITRAL keeps the Model Law and Rules under continuous review and revisions are now proposed to the Rules\(^5\) in the current session of the Working Group which is meeting in Vienna this month.

1.5 The most important task for every arbitrator is to deliver a final and binding decision to the parties that is enforceable in the jurisdiction in which the award has to be given effect.

1.6 In International Arbitration the cooperation of nation states to ensure the recognition and enforcement of foreign arbitration awards is vital and has been secured through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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\(^2\) ADR: in particular adjudication, mediation, and supervised settlement processes feature significantly in the work and procedures of the TCC and for an in depth explanation of the use and regulation of the processes by the TCC the reader is referred to the TCC Guide, 2nd Edition, effective from 3rd October 2005.

\(^3\) United Nations Commission on International Trade Law

\(^4\) 1985 - UNCITRAL Model Law on International Commercial Arbitration Adopted by UNCITRAL on 21 June 1985, the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

\(^5\) Revisions to the Model Law on the form of arbitration agreements and interim measures were adopted by the Commission at its 39th Session in New York which took place between 19 June and 7 July 2006. The Commission also adopted a recommendation on the interpretation of Article II, paragraph 2 (the requirement of writing) and article VII, paragraph 1 (the continuing validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitration awards), of the New York Convention 1958.
which was made in New York in June of 1958. It is commonly referred to by practitioners as “The New York Convention”. The New York Convention has been ratified by some 137 countries and as UNCITRAL itself opines:

“Although the Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations prior to the establishment of UNCITRAL, promotion of the Convention is an integral part of the Commission’s programme of work. The Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959.”

1.7 The desirability or otherwise of major international venues as centres for the resolution of commercial disputes depends principally on the confidence which it engenders within the international business community. The scope and quality of the judicial machinery which is available to support and where necessary, supervise, the arbitral process is an essential feature of a modern and effective centre for commercial arbitration and ADR. London, Paris and Geneva, although possessing different legal regimes, are all major centres for international arbitration and dispute resolution. What I intend to highlight in this presentation, are the features, both common and individual, which have contributed to their reputations and success in achieving the status of preferred venues for the resolution of commercial disputes by arbitration and ADR.

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6 See the UNCITRAL website at www.UNCITRAL.org.
2. Challenges to arbitral Tribunals or awards in advance of applications to the courts in England and Wales

2.1 The most useful tool available to parties to arbitration proceedings is their capacity to deploy the principle of party autonomy enshrined in section 1(b) of the 1996 Act. Section 1(b) provides that:

"the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;"

It follows that if there are clear problems either with the Tribunal or with any award rendered by the Tribunal, the parties always have the capacity to reach an agreement and to put right any procedural difficulties; issues concerning the Tribunal; or obvious errors in the award; without recourse to the Court. The fact is that by virtual of the consensual nature of an arbitration agreement and arbitration proceedings governed by the Act, if the need arose, the parties have the power to agree to conduct the arbitration according to a procedure of their choosing\(^7\), to sack the Tribunal, and to set aside or remit its award. Equally the parties may agree to arbitrate pursuant to arbitration rules which provide machinery for such issues to be decided by a third party, for example the ICC. For reasons that are all too obvious, if they have not managed to address these issues when they made their agreement to refer disputes to arbitration, they seldom deal with these issues by agreement once the dispute has crystalised and arbitration proceedings are on foot.

2.2 On matters of jurisdiction, and apart from the ability of the parties to agree any issues which arise for decision, or prior agreement directing them to be dealt with by a neutral third party, there is a limited scope within the Act for the parties themselves to deal with challenges and disputes over jurisdictional matters. Sections 30 and 31 provide that unless the parties otherwise agree, the Tribunal may rule on its own substantive jurisdiction.

2.3 Another possibility, more likely to available in the context of scheme arbitrations

\(^7\) Subject always to the risk that if the procedure contravenes the general duty of the Tribunal under section 33 of the Act, the tribunal may have to reconsider its position and possibly to resign.
rather than ad hoc disputes, is that the organisation administering the scheme may well have a process for monitoring the performance of its arbitrators and the quality of their awards. There is also an unfortunate tendency in scheme arbitrations, which are generally undertaken by arbitrators at less than commercial rates of remuneration, for some disaffected parties to use professional conduct complaints procedures as a means to seek to, in effect, appeal the arbitrator’s award. Professional associations need to guard against the abuse of their professional regulatory processes in this way.

2.4 When it comes to making a challenge against the appointment of a Tribunal, absent agreement between the parties, or an agreement between the parties and the arbitrator concerning his resignation, there is generally no other avenue open to a party other than to make an application to the Court. As already observed, appointing and other professional associations, while they may monitor the conduct of their Tribunals, are unlikely to intervene in a “live” arbitration.

2.5 The Act itself contains some provisions which enable the parties or the Tribunal to correct errors and omissions in their awards. The provisions of section 57 are however non-mandatory and the parties are free to agree on the powers of the Tribunal to correct an award to make an additional award.

2.6 In section 30 of the Act, the Tribunal has the power to rule on its own jurisdiction. However, section 30 is non-mandatory which means that the parties are free to limit or exclude this power if they so choose, which would mean that the Tribunal would then not have that power and any disputes about jurisdiction, would have to be resolved by the Court.

2.7 As far as extensions to the Tribunal’s jurisdiction are concerned, only the parties to the arbitration agreement have the power to do that. Moreover it is a reasonably common occurrence for parties, particularly when they have reached a settlement on a range of disputes, perhaps arising from the same works, but not all made the subject of a reference to arbitration, to extend the Tribunal’s jurisdiction by agreement to

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8 Albeit they are unlike to intervene in an arbitration which is on going, any review would be “after the event”.

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enable it to render a consent award embodying the settlement they have made. Where however there are disputes about jurisdiction, particularly concerning the scope of the matters referred, it is equally common for the parties to refuse to agree an extension to the Tribunal’s jurisdiction and to insist that the party wishing to introduce new claims, bring them in separate proceedings. Sensibly this should not occur but often it does simply because it makes it more difficult and expensive to arbitrate the further claims and a tactical advantage may be gained in settlement discussions.

2.8 Where parties anticipate difficulty in ensuring that the Tribunal has covered all the issues put to it for decision, it is not uncommon for the parties or indeed for the Tribunal of its own motion to proffer a draft award to the parties for comment as to completeness or other matters. By this process it becomes more difficult for the parties subsequently to argue that the award is defective or incomplete in some way.

2.9 Failing that if the award has been delivered by the Tribunal, the parties are free to agree that it contains an omission or is erroneous in some particular respect and may refer it back to the Tribunal by agreement to correct any errors or omissions.

2.10 A further opportunity may arise, particularly in respect of scheme arbitrations, where there is a process or review or appeal to the arbitral institution which administers the scheme. Some appeal processes have been set up, although given the number of consumer arbitration schemes in existence, they are still comparatively few in number. Given the concept of finality, it is unsurprising that such appeal processes are still not widely available. Any general or automatic right of “internal” appeal would cost more and increase the time taken to resolve the dispute. That runs quite contrary to the principles both of final and binding arbitration awards, and the economic and speedy resolution of disputes by arbitration.

2.11 Quite clearly, in almost all situations, the cheapest and most effective way to avoid invoking the powers of the Court to supervise or support the arbitral process, is for the parties to act sensibly and to seek to agree all relevant procedural matters necessary

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9 See section 57, in particular the provisions of section 57(3).
for the proper and expeditious resolution of their disputes by arbitration by a Tribunal of their choice.
3. Challenges to arbitral Tribunals or awards in advance of applications to the courts in international arbitration.

3.1 Most major international commercial arbitration cases are conducted under the aegis of one or other of the principal arbitral institutions’ rules and very often also administered by the arbitral institutions. That said, there are well known examples of arbitral rules which do not necessary contemplate administration by the issuing institution or any arbitral institution, for example, the UNCITRAL Arbitration Rules or the CPR Rules for Non-Administered Arbitration of International Disputes.

3.2 As with both domestic and international arbitration in England and Wales, the principles of party autonomy provide the parties themselves with the power to reach binding agreements concerning challenges to tribunals or their awards, rather than to seek recourse through the state courts. Indeed, if they are using any of the principal sets of arbitration rules, they may have done so at the outset when they made their arbitration agreement, or at least agreed a process whereby such issues can be determined by others so as to avoid the time and expense involved in a court application.

3.3 Taking the Rules of Arbitration of the ICC 1998 as an example: The Court of the ICC has extensive powers of review which touch and concern the entirety of the arbitration proceedings.

3.4 At the outset the ICC Court is given powers to appoint arbitrators, and to confirm their nomination or appointment by others. Equally the Court, by article 11, is empowered to determine challenges made against arbitrators and, by article 12, the Court has the power to appoint replacement arbitrators upon acceptance of the challenge or upon an arbitrator’s death, incapacity or resignation. A replacement arbitrator may also be called for and appointed by the Court at the request of all the parties.

3.5 In ICC arbitration, where the award is drafted by the Tribunal, it must first be
submitted to the ICC court for scrutiny. The Court’s principal objective is to scrutinise the form of the award but article 27 of the ICC Rules makes it clear that the ICC Court has the right to draw the Tribunal’s attention to points of substance concerning the draft award.

3.6 The process of the arbitral tribunal issuing draft awards to the parties to ensure that all issues put to the Tribunal for decision have been covered is equally effective in international arbitration. In ICC arbitration, scrutiny by the Court tends to pick up both errors and omissions of this nature.

3.7 In ICC arbitration, the Tribunal, on its own initiative and/or on the application of a party within 30 days of delivering the award, may also make corrections or issue interpretation of the award. As with the final draft of the award, any correction or interpretation must be first sent to the ICC Court for scrutiny.10

3.8 Under the ICC Rules there is no monitoring of the Tribunal as such but in the case of serious default, the Court is able to decide to remove an arbitrator on the basis of his incapacity to fulfil his functions as set out in the Rules or within the time limits set by the Tribunal or the parties. Unless therefore, the Arbitrator defaults in a serious way concerning his obligations to the arbitration, he is unlikely to come under personal scrutiny by the ICC. By contrast, certain professional institutes in the UK do actually try to gather statistical information about the performance of their arbitrators.

3.9 The jurisdiction of the Tribunal regarding the scope of the substantive claims is settled by the Tribunal by drawing up the Terms of Reference with the parties as required under Article 18 of the Rules. Once drawn up and signed by the Tribunal and the parties, new claims or counterclaims which go beyond them, may only be added with the express permission of the Tribunal.11

10 Article 29 ICC Rules.
11 Article 19 of the ICC Rules refers.
4. **Judicial supervision and support for arbitration and ADR in England and Wales.**

4.1 Taking first Arbitration:

There is a very well established policy of non-intervention by the courts into arbitration proceedings both in relation to issues which arise during the arbitration proceedings and also in relation to issues which arise after the publication of the award. That said, there exists a well established statutory and common law framework of measures by which, if circumstances require, the court may intervene to provide support for, or supervision of, the arbitral process and its outcomes.

4.2 In many cases the parties to arbitration have chosen either the arbitrator or the professional body which appoints the arbitrator and therefore, in the view of the courts, the parties will be bound by the choice they have made, both as to the means of the resolution of the dispute, and as to the person or qualifications of the person appointed as arbitrator.

"By submitting their disputes to arbitration the parties consent to run the risk that the chosen tribunal will prove unequal to its task."\(^{12}\)

4.3 The same is true of the procedure employed by the tribunal to resolve the parties’ dispute:

"For at least 60 years judges have emphasised that traders who have chosen arbitration must reconcile themselves to the consequences of their choice and that it is no use for them to complaint after the event that the dispute might have been more thoroughly or skilfully investigated by some procedures closer to those adopted in court..."\(^{13}\)

4.4 Therefore, notwithstanding the apparent breadth of the Courts’ powers, the reality is that parties to arbitration are not encouraged to make applications to the court either at whim or at all, even when the going gets tough. In consequence, arbitration applications and appeals against awards are comparatively few, and the attitude of the Court remains very cautious. Even before the advent of the 1996 Act it was well

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\(^{13}\) Ibid.
established that the Court would not act unless the subject matter of the complaint had created a real risk of injustice contrary to the basic principles of justice which the parties were entitled to expect under the contract/bargain which the parties had made with the tribunal.

4.5 In the context of the modern law of arbitration, the DAC Report which informed the drafting of the Arbitration Bill which became the Arbitration Act 1996 is often referred to in this regard. The report stated:

“We have every confidence that the Courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted. Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by clause 33, should on no view justify the removal of an arbitrator, even if the Court would not itself have adopted that procedure. In short this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the Court confines itself in this way can this power of removal, be justified as a measure supporting rather than subverting the arbitral process.”

And

“Irregularities stand on a different footing... the test of “substantial injustice” is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is for far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action.”

4.6 What the drafters of the 1996 Act did therefore, was to emphasise at the outset, the principles of party autonomy and judicial restraint so that the Court and those involved in arbitration under the aegis of the Act would be clear that the Court would

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14 See DAC Report of February 1996, paragraph 106, referring in particular to the provisions of clause 24 concerning the Court’s power to remove an arbitrator from office. It is submitted however that this is a principle which is applicable generally to the Court’s supervisory powers in relation to arbitration.

15 See paragraph 280 concerning clause 68: Challenge to the Award: Serious Irregularity, which discusses the provision in the Bill which became section 68 of the 1996 Act.

16 Which principle is also enshrined in the UNCITRAL Model Law 1985, articles 5 and 34 in particular.
use its powers in relation to the supervision and support of the arbitral process sparingly and only in essential cases. In the decade since the Arbitration Act 1996 was enacted, the Courts charged with dealing with arbitration applications and appeals have substantially adhered to and reinforced these basic and important principles in their decisions.

4.7 The statutory powers governing Court intervention into arbitration proceedings whether by way of applications to support the proceedings or by way of challenge to the proceedings, the arbitrator, or the award, are set out in the Arbitration Act 1996. These powers are extensive but not all of them are mandatory. In a number of important respects, the powers given to the Court are subject to any agreement to the contrary by the parties, i.e. they are non-mandatory and accordingly they can be limited or excluded by the agreement of the parties. Those sections which are subject to the agreement of the parties and therefore “non-mandatory” are starred. I have grouped the Court’s powers under a number of headings as follows:

- **Juridical seat of the arbitration: section 3**: its relevance to Court intervention: section 2.

- **Powers relevant to a pending arbitration**
  - Stay of Court proceedings to allow disputes which are the subject of an arbitration agreement to proceed to arbitration: section 9, see in particular ss9(3) and 9(4).
  - Extension of time for the beginning of arbitration proceedings: section 12.
  - Establishing whether there is a valid agreement to refer disputes to arbitration: section 32.

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17 See section 1 of the Act, in particular section 1(c) which provides: “in matters governed by this Part the court should not intervene except as provided by this Part.”
18 See SI 1996 No 3146 (C.96), the bulk of the Act in fact came into force on 31 January 1997.
19 At first instance this is the Commercial Court or, in construction cases, the TCC.
20 Note that Part I of the Act: ss1-84, apply to both domestic and international arbitrations. Part III of the Act governs the recognition and enforcement of foreign arbitral awards under the Geneva and New York Conventions. (As a matter of interest Part II of the Act deals with consumer arbitration agreements.)
21 Important, especially with reference to International Arbitrations.
22 A fundamental requirement of the New York Convention, article II and article 8 of the Model Law.
23 NB the process provided for in sections 30 and 31 of the Act.
- **Constituting a tribunal**
  - Terms of the arbitration agreement, seat of arbitration, law: see section 32
  - Appointment of Arbitrator[s]: power in case of default to appoint a sole arbitrator: section 17*, failure of appointing procedure: section 18* and section 19*. \(^{24}\)
  - Death or resignation of arbitrator, power to appoint replacement: sections 26* and 27*.

- **Jurisdiction of the Tribunal**
  - Determination of questions as to the substantive jurisdiction of the Tribunal: section 32; see also ABB Lummus Global Ltd v Keppel Fels Ltd [1999] 2 Lloyds Rep. 24.

- **Powers exercisable during the course of the arbitration proceedings**
  - Removal of Arbitrators/fees disputes, section 24
  - Consequences of the arbitrator’s resignation, section 25*
  - Filling of vacancy when an arbitrator ceases to hold office: section 27*
  - Extensions of time, sections 50* and 79*. \(^{25}\)
  - Enforcement of peremptory orders of the Tribunal: section 42*
  - Securing the attendance of witnesses: section 43
  - Court powers exercisable in support of arbitral proceedings: section 44*
    - Taking of evidence of witnesses
    - Preservation of evidence
    - Making orders relating to property
    - The sale of any goods the subject of the proceedings
    - The granting of an interim injunction or the appointment of a receiver.
  - Determination of a preliminary point of law: section 45*
  - Power to withhold award in case of non-payment and Court intervention to

\(^{24}\) Concerns the duty of the Court to have regard to any agreement of the parties concerning the qualifications of the arbitrator[s].

\(^{25}\) Non-mandatory but note the decision of the Commercial Court in John Mowlem Construction plc v SoS for Defence (2000) CILL 1655: clear words are required to exclude the Court’s jurisdiction.
resolve dispute and secure delivery of the award to the parties: section 56.

- Power to determine the recoverable costs of the arbitration if not undertaken by the Tribunal: section 63(4).*
- Power to resolve disputes regarding the arbitrators’ fees and expenses: section 64*.

**Powers of the Court in relation to the Award**

- Extension of time for making the Award: section 50 ibid.
- Enforcement of the Award: section 66.
- Challenges to the Award: substantive jurisdiction: section 67.
- Challenges to the Award: Serious Irregularity: section 68.
- Appeal to the Court on a point of law: section 69.*
- Supplementary provisions concerning challenge or appeal under sections 67-69 and include a power for the Court to order the Tribunal to give reasons for its award: section 70.
- Power of the court to provide declaratory relief, injunction or other appropriate relief to determine the rights of a person who takes no part in the arbitration:
  - Whether there is a valid arbitration agreement;
  - Whether the Tribunal is properly constituted;
  - What matters have been submitted to arbitration in accordance with the arbitration agreement;
  - To bring a challenge against the award under sections 67-69 of the Act.
- Power to charge property recovered in the proceedings with the payment of solicitors’ costs.
- Miscellaneous supplementary provisions, e.g. regarding the service of documents: section 77.*

**Recognition and enforcement of foreign awards**

- This is governed by the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and the New York Convention 1958 and Part III
of the 1996 Act.

- Under the New York Convention, in order to make an award capable of recognition and enforcement, the award must meet the requirement of writing and be made in a territory or a state (other than the United Kingdom) which is a party to the New York Convention.\textsuperscript{26}

- Section 103 of the Act sets out the grounds upon which recognition and enforcement may be resisted and the provisions of that section follow closely Articles V and VI of the Convention. Recognition and enforcement is mandatory unless one of the specific grounds of objection is proved by the party seeking to resist enforcement.

4.8 Arbitration applications and appeals concerning construction cases are now mostly dealt with in the TCC which has developed its own procedural rules for dealing with arbitration cases.\textsuperscript{27} They can also be dealt with by the Commercial Court. The CPR Rules applicable to arbitration claims\textsuperscript{28} are those to be found in CPR 62. These are to be found in the TCC Guide at section 10. In addition, Judges of the TCC may accept appointments as arbitrator. This is dealt with in section 18 of the TCC Guide and section 93 of the Act. It should be noted however that a judge of the TCC may only accept appointment as a sole arbitrator and not as one of a 3-man panel. The process by which a TCC judge may be approached and invited to accept such appointments is dealt with in formal Guidance as is the procedure by which parties might expect such judge-led arbitrations to be conducted.

4.9 Turning to ADR: Judicial support for ADR in England and Wales manifests itself in a number of ways and has developed significantly in the last decade as different methods of ADR have grown in popularity. Support ranges from establishing and

\textsuperscript{26} These are the “writing” and “reciprocity” provisions. The territory or state for the purpose of recognition and enforcement is the territory or state which is the seat of the arbitration.

\textsuperscript{27} The TCC Guide states that arbitration claims involving construction disputes should be brought in the TCC [formerly claims were started in the Commercial Court and then transferred on application to the Commercial Court Judge to the TCC if he considered it appropriate to do so].

\textsuperscript{28} As defined in CPR 62.2(1), covers both claims under the Act and “any other application affecting—arbitration proceedings (whether started or not); or an arbitration agreement.”: 62.2(1)d.
recommending to parties schemes for the mediation of civil disputes which come before the courts, to the development of procedures which either require or anticipate that the parties to the dispute will either before or at some stage of the litigation of their disputes, resort to ADR.

4.10 A number of Court Centers have mediation schemes in place to handle non-family civil disputes, as does the Court of Appeal in London. The Court of Appeal Mediation initiative was set up in 1996. The Commercial Court also has an initiative, in use since 1993, where the court identifies cases appropriate to ADR and either suggests it to the parties or makes an ADR order directing the parties to attempt ADR. Reviews of the Court of Appeal and Commercial Court system indicates an increasing enthusiasm for those courts to promote or direct their ADR initiatives but a modest take up level by the parties. Of the two systems a review in 2002 for the LCD indicated that perhaps a more selective approach might be adopted by the Court of Appeal in suggesting cases for mediation because it was neither appropriate nor effective in many cases.

4.11 In the context of construction disputes, the TCC has developed a pre-action protocol (“PAP”) particularly tailored to construction and engineering disputes. Particular features of that PAP relevant to ADR are that:

- The parties are required to have at least one “without prejudice” meeting and if a party refuses to attend, that party’s default can be reported to the court and may result in an adverse order for costs against him; and
- If the claim is not settled the parties should consider ADR, instruction of joint experts and generally how the dispute is to be progressed.

4.12 The PAP for construction and engineering disputes is the only PAP under the CPR

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30 See paper by Professor Hazel Genn of UCL on Court Based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal.

31 See the Pre-Action Protocol for the Construction and Engineering Disputes which came into effect in October 2000 and applies to all construction and engineering disputes.
which requires the parties to meet, without prejudice, at least once to see if there is a
way forward without recourse to litigation. However, the PAP is under review and
not everyone considers this particular requirement to be beneficial. Concerns have
been raised by TECBAR at the cost and time implications generated by the “without
prejudice meeting” provisions.

4.13 As far as general ADR initiatives are concerned, the TCC Guide, at section 7, points
principally in the direction of mediation, inter party negotiations and early neutral
evaluation as preferred methods. The Guide emphasises that the process can be
embarked upon at any stage of the proceedings and it is voluntary. That said, the
court does not look well upon a party who has refused to undertake ADR and
sanctions in costs may follow if the court concludes that such conduct was
unreasonable.33

4.14 More recently the TCC has introduced a proposal known as the “Court Settlement
Process” under which TCC judges may offer their services as mediators. This
proposal has been out to consultation and now the TCC has introduced a pilot scheme
which is to run from 1 June 2006 to 31 July 2007. In a press release issued by the
Judicial Communications Office on 31 May 2006, it was said that the Process:

“...will be used where it is requested by the parties and the case managing
judge feels that they should be able to achieve an amicable settlement and that
a TCC judge will be able to assist. He may then, as part of the Court
procedure, offer a Court Settlement Process. If that is accepted by all parties,
he or another TCC judge will make a Court Settlement Order which includes a
date for a Court Settlement Conference. The Court Settlement Process will
then be conducted according to the order and if a settlement is not reached,

32 See paragraph 5 of the PAP: “Pre-Action Meeting”.
33 Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR 3002, the Court of
Appeal identified six factors that may be relevant to any such consideration:
a) the nature of the dispute;
b) the merits of the case;
c) the extent to which other settlement methods have been attempted;
d) whether the costs of the ADR would be disproportionately high;
e) whether any delay in setting up and attending the ADR would have been prejudicial;
f) whether the ADR had a reasonable prospect of success.
See too: Daniels v the Commissioner of Police for the Metropolis [2005] EWCA Civ 1312; The Times, October
28, 2005: the Court of Appeal held that the court should not exercise its discretion to disallow a successful
party’s costs on the basis of a refusal to negotiate if that refusal was reasonable in the circumstances.
Finally, Adjudication has now been used successfully for a number of years as a primary means of resolving construction disputes and throughout this time the TCC has been kept busy with a steady flow of cases concerning adjudication. Accordingly, in addition to the general range of Court procedures supporting or supervising arbitration and ADR, the rapid increase in the number of construction adjudications following the commencement of the Housing Grants Construction and Regeneration Act 1996 soon generated challenges and claims which were brought before the TCC for decision. The claims ranged from issues concerning substantive jurisdiction - the extent of the Adjudicator’s jurisdiction or the validity of the adjudication; the subject matter of the referrals; and the enforceability of adjudicator’s decisions.

The procedures devised by the TCC in order to support the process of adjudication and to ensure the speedy enforcement of adjudicators’ decisions pending final resolution by either litigation or arbitration are fully set out in the TCC Guide, 2nd Edition, section 9. When speaking elsewhere on this subject recently I concluded that the decisions of the TCC judges had not always been consistent in their approach to the disputes which have formed the subject matter of enforcement and other adjudication related applications to the Court. However, over the passage of time the cases have now, if not in all cases, and sometimes only with the assistance of the Court of Appeal, provided a measure of certainty which has assisted the process of adjudication to achieve its objectives of resolving speedily and cheaply many of the disputes which hitherto beset the construction industry. Without doubt however the positive attitude of the TCC to adjudication and its determination, wherever possible, to uphold the decisions of adjudicators has contributed to the success of the adjudication process notwithstanding its very evident shortcomings.

In so far as ADR is concerned, judicial support for the various processes is very clear, judicial supervision reflects that support and direct judicial participation in ADR processes as a means for resolving commercial and, in particular, construction disputes in the TCC, is increasing.
5. Judicial supervision and support for arbitration in France and Switzerland

5.1 The purpose of this part of the paper is to look briefly as the way the courts support and/or supervise arbitration in these two different countries by way of comparison with the system used in England and Wales.

5.2 Both France and Switzerland have statutory regimes governing arbitrations which are regulated under the limited jurisdiction of the French or Swiss Courts. Both countries have different regimes for domestic and international arbitration, in Switzerland domestic arbitration is still governed to the Swiss Intercantonal Convention (Concordat) on Arbitration of 1969 ("the Concordat") and in France it is governed by a chapter of the New Code of Civil Procedure ("NCPC"), article 1442 et seq, the French Civil Code, articles 2059 et seq, and the Code of Commerce, art 631 et seq.

5.3 International arbitration cases are governed in Switzerland by Chapter 12 of the Swiss Private International Law Act of 1987 ("PILA") and in France by Title V, "International Arbitration" of the New Code of Civil Procedure of 1981, articles 1492 et seq. and Title VI, articles 1498 et seq. concerning the recognition and enforcement of Foreign Awards.

5.4 Unlike the courts of England and Wales, there are differences between the scope of the authority of the courts in France and Switzerland to intervene in domestic arbitration disputes, and their authority to intervene in international arbitration disputes. What is summarised below, is the scope of their authority and willingness to support and supervise international arbitration disputes rather than domestic arbitration disputes on the basis that these aspects of the their arbitration law are likely

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34 Which came into effect in May 1998
35 Expected to be replaced by the Part III of the Federal Civil Procedure Act, which as far as I could tell, is still not in force at the time of writing.
36 These provisions limits the disputes which may be subjected to arbitration, specifically prohibiting arbitration of disputes about civil status, the capacity of individual and divorce: see article 2060. In addition, article 2060 also prohibits the arbitration of disputes concerning public policy. Tribunals may not rule on public policy matters but are able to render awards on claims which require the application of public policy rules.
37 Also referred to in English translations as the Federal Code on Private International Law ("CPIL") and The Federal Act on Private International Law ("PILA"). Note that parties to an international arbitration can exclude the provisions of PILA and agree to bring their arbitration under the jurisdiction of the Concordat
to be of relevance and interest to those of us engaged in international construction disputes which are referred to arbitration. In summary therefore:

**FRANCE:**

5.5 In most respects, but not all, the rules governing international arbitration in France follow those of the Model Law. That said, France has not adopted the UNCITRAL Model Law 1985. In France an arbitration is “international” if it involves the interests of international trade. The Model Law definition, which is more widely accepted elsewhere, states that an arbitration is “international” if the parties have their places of business in different states, or either the place of the arbitration or any place where a substantial part of the obligations of a commercial relationship is to be performed is situated outside the state in which the parties have their place of business.

- **Juridical seat of the arbitration; its relevance to Court intervention.**
  
  o French courts will assume supervisory jurisdiction over international arbitrations if the place of the arbitration agreed by the parties or determined by the Tribunal is France.
  
  o Where the substantive disputes are also governed by French law, the rules applicable to domestic arbitration will, absent agreement of the parties, also be applied - subject to articles 1493 and 1494 of the NCPC.

- **Powers relevant to a pending arbitration**

  o On matters of jurisdiction it is well established in French law that the arbitrator can and must rule on his own jurisdiction: art 1466 NCP. Accordingly, the court is likely to defer to the Tribunal on matters of both jurisdiction and competence, at least until there is a challenge to the award.
  
  o In France a court will refer a dispute to arbitration as soon as it is established that there exists a valid arbitration agreement. The single exception is where the arbitration agreement is manifestly void. The Courts construe this limitation very narrowly.
**Constituting the Tribunal**
- French law does not impose particular limitations on the parties regarding their choice of arbitrator but rather views such matters in the context to the overriding requirements of due process and public policy.
- If the appointing procedures chosen by the parties fail, the parties can apply to the Tribunal de Grande Instance to make the appointment. The matters would be dealt with as urgent business and the President’s order would not generally be open to challenge.\textsuperscript{38}

**Jurisdiction**
- See above on powers relevant to pending arbitration.

**Powers exercisable during the course of the arbitration proceedings**
- In proceedings which are not subject to French law generally, there does not appear to be much scope for this. As with issues concerning jurisdiction and the arbitration agreement, procedural issues are regarded as the province of the Tribunal and French courts do not have jurisdiction to interfere with procedural issues. See the case of Braspetro Oil Services Co – Brasoil v The Management and Implementation Authority of the Great Man-Made RiverProject (Libya) (1999).
- The law is not prescriptive about the procedures which must be adopted in the arbitration. Indeed French law recognises the right of the parties to agree or define the procedural rules of the arbitration or to subject the proceedings to a given procedural law: see NCPC art 1494.
- An exception may arise if, during the course of the arbitration, an event prevented the tribunal from functioning [an arbitrator’s death or incapacity].
- The abiding requirement is the observance of the rules of due process and public policy considerations. Failure to observe these requirements during the course of the arbitration may lead to annulment or affect the recognition of the award subsequently if it is challenged.

\textsuperscript{38} NCPC articles 1493(2) and 1457 refer.
Parties may apply to national courts for interim measures of preliminary relief, albeit that French law does not restrain the capacity of the Tribunal to award such measures. As with the Model Law, a request to the court for interim relief does not carry with it any implication of a waiver of the arbitration agreement.

- **Powers of the Court in relation to the award**
  - French courts concentrate their efforts on matters relevant to the award.
  - French law, NCPC 1502, provides 5 grounds for applying for annulment of the award, which are broadly in line with those set out in the New York Convention. No other basis of appeal against the award is permitted.

- **Recognition and enforcement of foreign awards**
  - By article 1504, foreign awards which parties seek to have recognised and enforced in France, are subject to the same review process as other awards where the seat of the arbitration is France.
  - France has ratified the New York Convention 1958 but its own rules are regarded as more flexible and it is more common for parties to seek recognition and enforcement via these rules than under the provisions of the New York Convention.
  - The general rule is that awards will be recognised in France as long as the party seeking to rely on the award proves their existence – subject only to French public policy considerations.

**SWITZERLAND:**

5.6 Arbitration activity in Switzerland has a long and distinguished history and is widely acknowledged to extend well beyond the arbitration of commercial disputes to include such prestigious disputes resolution processes such as the UN claims Commission for claims arising out of the Iraqi invasion of Kuwait, WTO dispute settlement procedures and the Property Claims Commission for the compensation of Victims of Nazi persecution.
5.7 In commercial cases, and as elsewhere, Swiss arbitrations may be undertaken on an ad hoc basis using one of the recognised sets of rules for international arbitration, such as UNCITRAL, and also through institutions, such as the ICC. Since January 2004 Switzerland has had its own “Swiss Rules of International Arbitration” which were produced by 6 members of the Swiss Chambers of Commerce. These rules are also substantially based on the UNCITRAL Model Law. PILA, while not based on the Model Law, does not conflict with it. What it seeks to do is to lay down the minimum necessary requirements and leave the parties free to regulate the arbitration in accordance with the principles of party autonomy.

- **Juridical seat of the arbitration, its relevance to Court intervention.**
  
  - Article 176 of the PILA provides that Chapter 12 applies to arbitrations if the seat of the arbitration is Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled or habitually resident in Switzerland.
  
  - If no seat of arbitration is designated by the arbitration agreement or the parties, the Tribunal decides.
  
  - Chapter 12 is non-mandatory and parties are free to exclude it use in favour of the cantonal rules of procedure concerning arbitration, i.e. the Concordat.\(^{39}\)

- **Powers relevant to a pending arbitration**
  
  - An arbitration agreement is valid if it is in writing and complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract or Swiss law.\(^{40}\)
  
  - Absent the agreement of the parties, the court at the place where the arbitration has its seat, has jurisdiction to appoint, remove or replace an

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\(^{39}\) The provisions of the Concordat are much more prescriptive in matters of procedure. In addition, whereas under PILA the tribunal has powers to order interim measures, the Concordat does not. PILA is also more liberal in relation to the form of the arbitration agreement, the issue of arbitrability (as to which see X SpA v Y Spa a decision of the Federal Tribunal where the Tribunal refused to review an award which considered and determined rights affected by Italian and European competition laws, holding the same to be arbitrable) and set off. Provisions concerning the grounds of appeal and the competence of the courts to determine appeals are different.

\(^{40}\) Article 178.
arbitrator. In so doing the Judge must apply, by analogy, the provisions of cantonal law.

- Any dispute concerning a challenge to an arbitrator is also adjudicated upon by the State Court.\(^{41}\) Grounds of challenge are:
  - If the Arbitrator does not possess the qualification agreed upon by the parties;
  - If there exist grounds for challenge in the rules of arbitration adopted by the parties;
  - If the circumstances permit legitimate doubt about his independence.

- There is no appeal against the decision of the Court on a challenge to the appointment of an arbitrator.

### Jurisdiction

- PILA, article 186 anticipates that the arbitral tribunal will rule on its own jurisdiction by means of an interlocutory decision. Such decision may only be challenged on the basis that:
  - a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
  - b. If the arbitral tribunal erroneously held that it did or did not have jurisdiction.\(^{42}\)

### Powers exercisable during the course of the arbitration proceedings

- Articles 183, 184 and 185 respectively provide that the parties may seek the assistance of the Court with issues concerning provisional and protective measures; the taking of evidence; and such further assistance as may be required.

- As a rule the state courts will not look to interfere with the jurisdiction of the arbitral tribunal once constituted if it has before it a request for interim measures.

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\(^{41}\) Article 180.

\(^{42}\) Article 180.
• Powers of the Court in relation to the award

  o The Swiss PILA expressly provides that the award shall be final when communicated and may be challenged only on 5 specific grounds. See the first two mentioned under “jurisdiction” above, the other three are:
    - c. If the arbitral tribunal rules on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
    - d. If the quality of the parties or their rights to be heard in an adversarial proceeding was not respected;43
    - e. If the award is incompatible with Swiss public policy (ordre public).

  o The only basis on which a party may seek a review of merits of the arbitral tribunal’s decision is if the effect of the award runs counter to Swiss public policy (ground e. above).

  o An appeal against the award may only be brought in the Swiss Federal Supreme Court and subject to the provisions of the Federal Statute on the Organization of the Judiciary. However, the parties may agree that the court at the seat of the arbitration may issue a final ruling and the cantons shall designate a sole court for that purpose.44 Such agreements are not common.

  o If the parties have waived their rights of appeal but seek to enforce the award in Switzerland, the New York Convention 1958 applies by analogy and is directly applicable as Swiss law.45 Moreover, it is applied to all foreign awards46 not just those which conform to the New York Convention.

• Recognition and enforcement of foreign awards

  o This is governed by the New York Convention 1958. See the preceding comments on appeals.

42 Article 190, grounds a and b.
43 This is the “due process” provision.
44 Article 191.
45 Article 192.
46 Art 194

- Pending arbitration proceedings
  - Section 9: staying a dispute to arbitration.
    Maintaining the confidentiality of proceedings ancillary to the arbitration process, i.e. the section 9 application to stay the dispute to arbitration: Glidepath BV & Ors v John Thompson & Ors (2005) 2 LLR 549. A stranger to the arbitration proceedings and to the proceedings seeking to stay the dispute to arbitration was not permitted to access documents on the court file under CPR r.5.4(5).47
  - Section 12 – application to extend the time for the commencement of the arbitration.
    Section 12: circumstances which did not justify the court granting an extension of time in which to commence the arbitration: L J Korbetis v Transgain Shipping BV (2005) LTL 25/8/2006, QBD, Toulson J. A failure to send an acceptance fax to the correct number or to chase up a response with reasonable despatch were not the kind of circumstances which would justify the granting an extension of time under section 12.

- Constituting the Tribunal
  - Nothing recent of importance to note

- Challenges to the Tribunal
  - Section 24: removal of an arbitrator.
    Section 24: bias, serious irregularity causing substantial injustice to the parties: Norbrook Laboratories Ltd v (1) A Tank (2) Moulson Chemplant Ltd (2006) EWHC Comm (Coleman J) 12 May 2006. An arbitrator’s conduct in contacting witnesses directly but failing to disclose that fact to the parties or to keep or disclose any record of what the witnesses said constituted a breach of section 24 of the Act and a failure properly to conduct the proceedings which, in the circumstances, caused substantial injustice.
    Sinclair v (1) Woods of Winchester (2) Harrison (2005). Applications to remove

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47 Provides for third party access to court documents “unless the court orders otherwise”.  

the arbitrator and set aside his award for serious irregularity under section 68 were dismissed. The right to seek the removal of the arbitrator under section 24 had been lost where there had been no proper criticism of his conduct either before or during the hearing. The appeal under section 68 was also barred in part by section 73 and in part by section 70(2) because the applicant had failed to exhaust all available recourse to H before making the application. **Torch Offshore Ltd v Cable Shipping Inc. (2004) EWHC 787 (Comm) applied.**

- **Jurisdiction of the Tribunal**
  - See under section 67 below.

- **Powers exercisable during the course of the arbitration proceedings**
  - Nothing recent of importance to note.

- **Powers exerciseable in relation to the award**
  - Cases concerning applications under section 57 of the Act.

  **Section 57: correction of award or additional award:** **Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (2006).** The Tribunal made an award on different issues under section 47 of the Act and in relation to the costs of the preliminary hearing it determined in the first award that it would deal with the question of costs in a subsequent award. Held that the Tribunal had addressed the issue of costs in its award and its decision to deal with it in a subsequent award was dealing with a claim for the purposes of section 57 of the Act. **World Trade Corporation Ltd v C Czarnikow Sugar Ltd (2005) 1 LLR 422, Comm Ct, Coleman J.** Criticism that the arbitrators failed to attach sufficient weight to particular evidence put before them when arriving at a conclusion on a question of fact was not a basis for deploying section 57 because it did not raise any ambiguity in the award.

  - Cases concerning appeals under sections 67, 68 and 69 of the Act.

  **Section 67: Challenge to the award: substantive jurisdiction:** **Claire and Co Ltd v Thames Water Utilities Limited (2005) BLR 366 TCC, Jackson J.** An arbitrator
did not lack substantive jurisdiction under section 67 to decide on a particular issue where there was no evidence to show that the issue in question was not in dispute and also no evidence to demonstrate any agreement between the parties that the issue should have been excluded from consideration by the arbitrator and resolved elsewhere.

Section 68, serious irregularity, excess of powers:  **Lesotho Highlands Development Authority v Impreggilo Spa & Ors [2005] 2 LLR 310 HL**, the erroneous exercise of an available power could not by itself amount to an excess of power; and a mere error of law, did not amount to an excess of power under section 68(2)b.

**ABB AG v (1) Hochtief Airport GMBH (2) Athens International Airport SA [2006] 2 LLR 1, Tomlinson J.** Issues as to whether the Arbitrators’ conclusions, orders and subsequent findings in the award were tainted by serious irregularity.

Section 69: Appeal on a point of law:  **Kershaw Mechanical Services Ltd v Kendrick Construction Ltd (2006)CILL 2359**. Discussion of the correct approach of the court to an appeal under section 69(2)(a), 48 **Demco Investments & Commercial SA & Ors v SE Banken Forsakring Holding Aktiebolag (2005) EWHC 1398 (Comm) Cooke J.** There could be no appeal against a finding of fact under section 69 of the Act since, for the purpose of an application for permission to bring the appeal, the facts had to be accepted.

**Sukuman Ltd v Commonwealth Secretariat [2006] 2 LLR 53, Comm Ct, Colman J.** The Court was asked to determine whether an exclusion agreement appearing in another document incorporated into the arbitration agreement was valid to prevent an appeal on a point of law under section 69 of the Act? Held: it was valid and precluded the section 69 appeal.

Section 73: loss of the right to appeal:  **Thyssen Canada Ltd v Mariana Maritime SA & Anr (2005) EWHC (Comm) Cooke J.** A challenge to the award under section 68 was barred in circumstances where a party participated in an arbitration when it

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48 i.e. an appeal brought with the agreement of all the other parties to the proceedings.
knew or could – with reasonable diligence – have discovered grounds of objection.

- Recognition and enforcement proceedings
  - Part III of the Act.
  
  Section 103: enforcement of New York Convention Award: **IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation (2005) EWHC (Comm) 726, Gross J.**
  
  The enforcement of the Convention award was adjourned on terms that the party resisting enforcement should pay an amount of US$13 million indisputably due and also provide appropriate security for the balance of US$50 million in London.

Karen Gough

7 September 2006