Chartered Institute of Arbitrators

East Anglian Branch

The Glorious First of June

"Arbitration Reborn"

or "Arbitration - the new alternative to Adjudication"

PROFESSOR GEOFFREY M BERESFORD HARTWELL

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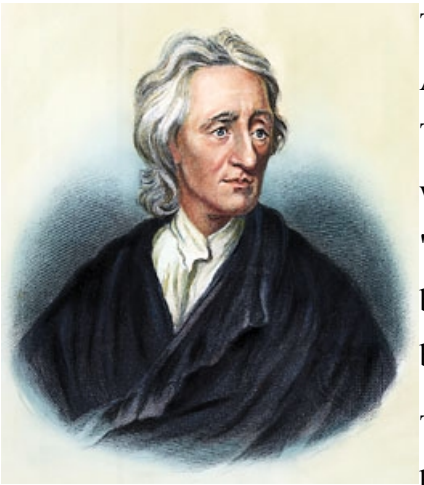
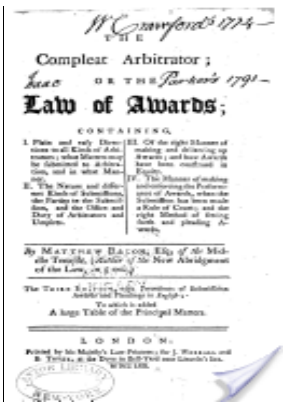
Before I begin, I make no apology for displaying a painting of the Battle of Ushant in 1794, better known as the Glorious First of June[1]. It was a noble battle, and takes us back in time.

I don't know how many of you are familiar with the philosopher John Locke[2], who lived before that, in the seventeenth century and the first few years of the eighteenth. Without him, I suggest, none of us would be here.

It is true that arbitration has a noble and ancient history. Professor Derek Roebuck (I think he's a member of the Thames Valley Branch) has written books on arbitration in Ancient Greece[3] and among the Romans[4] as well as in Early English[5] times.



The modern story, I suggest, starts in the seventeenth century, on 19 August 1696, 300 years before the English Arbitration Act 1996. That was when John Locke, a physician by profession, by the way, was commissioned by his fellow members of the Board of Trade "to draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal."



The scheme was Arbitration. The first book devoted to Arbitration - *Arbitrium Redivivum: Or the Law of Arbitration*[6] had been published in 1694. Matthew Bacon's *The Compleat Arbitrator* appeared in 1731, with further editions to follow in 1744 and 1770.[7]

Books on Arbitration were evidently big business in the eighteenth century.

But you didn't ask me here to give you a bibliography. It seems widely accepted that arbitration is failing; that arbitration is failing the people it was intended for: merchants and their customers; often also merchants and merchants.

For my friends in construction, *merchants and their customers* are builders and employers; *merchants and merchants* are contractors and sub-contractors; architects, engineers and other hangers-on are all in there somewhere.

The point of my excursion into history is simply to say that then, as now, the sponsoring ministry was not the Home Office, nor the Office of the Lord Chancellor, but the Board of Trade. Admittedly it was a physician then, who dealt with the details, but it was a practical business that Locke was to propose.

The idea of a process with no appeal was simply, I would argue, so that each matter could be dealt with as a matter between parties, with no precedent created and therefore no need for the Arbitrator or Arbitrators to look over their shoulders to the possibility of influencing anything but the matter on the table (and in those days of arbitration of goods by sample it often was on the very table before them – your shoddy goods could, quite literally, be weighed in the balance and found wanting[8].).

Jumping forward to 1892 when a precursor of the LCIA was established as the City of London Chamber of Arbitration, the tribunal – sitting at the Guildhall – was, according to the Law Quarterly Review, "to have all the virtues which the law lacks.". "It is," the journal continued, "to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife."

We all know that makes sense; we all know that is what business deserves and should expect. We know too, however, that what we have given business is such a top-heavy system that it isn't worth trying to recover anything less than £100,000 and even then the costs may well be more than the amount claimed.

We have given business Arbitrations that last for years, but a man like the late Cedric Barclay would join a ship in the Pool of London and leave with the pilot, having heard all the evidence and perhaps examined the cargo or the machinery and spoken his Award.

And thirdly, perhaps most importantly, we have deprived business of arbitration as a peacemaker, the product of an amicable agreement not to go to Law.

In short, whatever happened to *all the virtues that the Law lacks*?[9]

That's a rhetorical question. Instead of answering it directly, I'll look further at the the history and the way James Oldham[10] put it in his paper *On the Constancy and Pedigree of The Arbitrator's Heritage*. Of John Locke's task, he said "He discharged his commission by drafting what became a 1698 statute encouraging the use of arbitration, both in England and in America. Locke was undoubtedly motivated by his belief that among those persons who actively hindered trade were "multitudes of lawyers."[11]

That was the Arbitration Act of 1698, described as "An Act for determining differences by Arbitration, . . . It shall and may be lawful for all merchants and traders and others desiring to end any controversy, suit or quarrel. . . . by a personal action or suit in equity, by arbitration whereby they oblige themselves to submit to the award or umpirage of any person or persons . . . so agreed".

I'll dwell there briefly to emphasise the last words – **so agreed.**

It's that agreement that lies at the root of everything we do in arbitration. I make no apology for saying that – or if I do I justify it by saying that it is the implication of that agreement, that arbitration agreement, that is the source, the *fons et origo* of all arbitral theory, of all arbitral jurisprudence or meta-jurisprudence if you like.

Whether Locke was right or not in accusing those multitudes of lawyers of hindering trade I know not. What I do know is that any such hindrances would have been swept away by the act of 1698. Lawyers are not to blame for the state of arbitration. Look at the English Arbitration Act 1996; as I recall, but I'm open to correction, lawyers are mentioned twice: in section 36[12] it is necessary to permit a party to be represented by a lawyer or other person; if a solicitor is involved, section 75[13]may protect his costs.

Unless you're all very old-fashioned academics I'll bet that you won't have thought about s. 36 very closely before. I argue that it's a permissive provision. Just look at the words, "a party . . . may be represented."

I'm not suggesting that parties should not be represented by lawyers or by engineers, by quantity surveyors or by accountants or anyone else if they chose. Of course they may. That's what the English and other statutes say. But it's a permission.

My contention is that there is nothing in the English legislation, or in the history of arbitration that requires lawyers or anyone else to bring their baggage with them. Their legal knowledge, yes of course; their analytical skills, yes please. We won't discuss whether the Common Law uses logic; now isn't the time.

Let's remind ourselves of Locke's brief: "to draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal." If I may, I'll ask you to look, too, at my favourite extract from the OED (in deference to our hosts, I didn't spell out the words in full). **Arbitration** 2. a. The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision.

The first thing to notice is that, from these sources, we learn what an arbitrator is. He or she is a referee, but that means nothing more (or less) than some one to whom the parties refer. Not a Judge at all but possibly a juror or an investigator of a kind. Alone, or one of three, or more rarely one of five. I'd like to tell you of the excellent tribunals of two, one expert, one lawyer, each deciding issues in their own field, but I would be drummed out of the Brownies.

As to the equitable decision that might be decisive without appeal, as we are in England, I'll let the Arbitration Act 1996 speak for me – again. “Section 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.”

Oh yes, you've seen it before. Many times; many, many times. You've all seen it, but have you read it; really read it, word by word? Parliamentary draughtsmen don't waste words. Powerful words “the fair resolution of disputes”. Does that mean a fair result, or does it mean we have to use a fair method? Due process, as they say three or four thousand miles to the west of us. And is the operative word “process” or is it “due”, meaning appropriate or necessary?

In the Court, our friends, our learned friends, believe that, if the correct procedure is followed, necessarily the result is correct. Well, I'm not a lawyer and I know nothing about that. In Court, one is concerned with what has gone before; experience within Courts and among Counsel and other lawyers is of vital importance. And so it should be – it is out of that experience that law develops.

An Arbitrator is in the here and now. There are no arbitral precedents. They can't be made because an arbitral Award binds only the two (perhaps more) involved in the immediate matter. Even the Arbitrators aren't bound by their own past decisions; tomorrows arguments may be different from yesterday's.

Nothing I say should discourage the lawyers who dominate modern arbitration. Of course I respect them; many of my best friends, and indeed my best students, have been lawyers from Anglo-Saxon, Asian and Continental jurisdictions, to say nothing of that distinguished legal district to the North,

fish fowl and good red herring. I only wish that, when Arbitrators, more of them would act like Arbitrators and not like Judges. Judge not, that ye be not judged![14]

It has been my purpose to suggest that the key to Arbitration is not the emulation of the Court, whether in letter or in spirit. Arbitration is fundamentally different. Easier in that a depth of legal experience isn't necessary. It may be nice, of course, but it may also tie your hands. Arbitration may be more difficult because, as the English Act says at section 33[15] the Arbitrator has 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".

That's asking a lot. What you did last time isn't good enough; your immediate task, your duty as Arbitrator is to understand the particular case well enough to know precisely what you need to decide that case. If I'm right, then the skill the Arbitrator needs is the skill required to ascertain how to determine this one dispute; I say that part of that skill is knowing what evidence or argument you want for your decision.

That sounds dangerous. Don't we have to give each party "a reasonable opportunity of putting his case and dealing with that of his opponent"? (Also in section 33). Yes, of course, but his case as to the decision you have to make, that's all.

By now you'll be feeling that sensation you get in the hair of the neck when something's odd. I'd better come down to earth and explain myself.

In the usual procedure in the Court and in many arbitrations, each party sets out his case and nowadays files statements, first of witnesses of fact then of expert witnesses, who are often themselves witnesses also of fact. All the documents required by a party are copied and served; in the United States but now more rarely in Britain, the entire files of a project may be disclosed with other documents of notional relevance but no use. Any site inspection may be late in the day and possibly during the very period set down for hearing.

Now, all that may be needed to decide the issues; but it may well not. The Arbitrator ought to have looked at the initial Claim and Defence, which may be no more than Request for Arbitration and Answer (*audi alteram partem*, remember) and then, in correspondence with the parties, or in teleconference or in preliminary meeting if practical (a journey to East Asia from London costs around £4,000 and we have to avoid unnecessary expense!) to have discussed exactly what the parties seek and how it's to be done.

I say again that is part of an Arbitrator's skill. I don't like to think how many times I've come home from a preliminary meeting to report that the parties have settled or are likely to settle. One's ac-

counts department will be unimpressed but I have to say that, if your reason for practising in arbitration is mainly financial, you need to think carefully. I had better stop there. I'm ashamed to say that I seem to have settled more Arbitrations and Adjudications than I have Mediations, but that's by the way. I do fewer Mediations.

If the parties, their Counsel and experts have to prepare blind, so to speak, then of necessity each will have to deal with every point and every argument that their opponent may decide to canvas. The Respondent may have to find witnesses to refute the evidence of each of the Claimant's witnesses and *vice-versa*. I wonder how many of you have known of witnesses summoned but not called; some of you may have had that experience. It all costs money, contrary to s.1(a) of the Arbitration Act 1996.

If the Arbitrator is on the ball, he or she may see straight-away the salient features which will lead to the decision. I don't suggest jumping to conclusions, far from it. But to ask questions may help the parties a great deal provided that your mind remains open.

You can see already that to be an old-fashioned arbitrator, a seriously hands-on arbitrator, is hard work. You have to read the papers; you have to understand the issues better than Counsel.

Let me call your attention to a remark by Mr Justice Coulson in a case in December 2011. He said, *"Although there was a good deal of factual material before the court, the vast majority of it seemed to me to be wholly irrelevant to the dispute between the parties."*[16] Judges and Arbitrators have been saying such things since time immemorial[17].

I hope that the approach I have been describing will help to discourage the disclosure of irrelevant material. It's important to bear in mind that a tribunal is only human and that, in making a finding when faced with a great bulk of material , inevitably will have to choose what appears to be relevant and discard the rest. Decision making is based on what is selected: the wheat sorted from the chaff.

If I have been leaning heavily on the differences between Litigation and ADR in general, Arbitration in particular, it is because we already have been taught the similarities but the differences are fundamental.

I'd like now briefly to explore an implication of one of the differences. Some of you may know that a number of arbitral institutions, of which the ICC is, as always, a leading example, have introduced "Emergency Arbitration" to provide parties with a means for obtaining interim measures without having recourse to the injunctive powers of a Court.

I don't criticise that; it isn't my place to do so. I merely mention three points: a) an arbitral tribunal, however constituted, cannot bind those, such as a bank holding assets[18], not party to the arbitration agreement[19] b) an arbitral tribunal has no coercive powers if its orders are disobeyed[20], c) an application *ex parte*[21], which necessarily has to be made without notice to the respondent, is contrary to the rules of Natural Justice which should govern private conduct in general and ADR in particular.

The distinction between a private process agreed between two willing parties[22] and the overarching power of a State, to which all in the jurisdiction are subject, seems obvious[23]. Arbitration, I argue, isn't some autonomous legal system; it's just what people have agreed to do. No more but certainly no less.

That simple thought gives one something to hang on to in the most complex of matters. Arbitration is just something agreed between the parties. It isn't a Court process, although it may look like it on occasion. It isn't a process at Law at all, although it is recognised by the Law; because it is agreed.

In some ways Arbitration is difficult to discuss. I argue that it isn't a process at Law. It's legitimate, we would hardly be here if it were not. It's legal, but it isn't of the Law. It's legal in the sense that marriage is legal. The analogy is not bad, marriage is legal, but lawyers have little or no business with marriage until it goes severely wrong. In the first edition of Commercial Arbitration, Lord Mustill said words to the effect that the Law of Arbitration was actually the Law regulating the intervention of the Court into Arbitration. In my admittedly lay opinion, although the arbitrator now has duties to the State the broad principle is unchanged. You may care to consider whether S.1 (c)[24] repeats Lord Mustill's original contention[25].

When a student is asked how an arbitration should be conducted, he or she probably will refer to the procedure of one of several mighty institutions LCIA, ICC, perhaps the UNCITRAL Rules or CIMAR the Rules drafted by the Society of Construction Arbitrators both of which are for use where an arbitral institution is not involved. When you ask an experienced arbitrator what is the correct procedure for arbitration, however, I suggest that he or she will say they don't know.

So what do we do at a preliminary meeting before giving directions? The purpose of the meeting is clear, I hope, from what I have said already.

It is not to fit the issues and the steps in the reference into the structures we know well. It is not simply to create a timetable for the submission of Claim, of Defence and Counter-claim, of Defence to Counter-claim, to be followed by witness statements, discovery and the rest.

I say that the purpose of a preliminary meeting is to tell the Arbitrator enough to let him decide what he or she needs to know in order to make the decision or decisions that are needed for the Award. It is very much more than a hearing for directions.

Now, Counsel, used to the Court and its procedures, may find my idea of a preliminary meeting something of a surprise. Nothing in arbitration should be a surprise, so it seems to me that it is up to the arbitrator to make it clear, quite clear, exactly what he or she will expect of the parties and such lawyers or other persons as will represent them.

It's high time that I sought to justify the title of my talk. In particular, the phrase, "Arbitration – the new alternative to Adjudication". Adjudication, of course, is prescribed by law for the British construction industry. There are other countries that have followed suit. Adjudication, albeit in a slightly different regime, is prescribed in the FIDIC series of contract forms.

In essence, I have argued, the intellectual task of an Adjudicator is no different from that of an Arbitrator. It is to form a view as to the facts and circumstances and to apply to them the intention of the contract between the parties. Some would say, "to apply the law" but that creates a difficulty in England and Wales with section 1(a) of the Arbitration Act 1996, *"the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"*

Why is the AA 1996 relevant in Adjudication? Simply because, in the British legislation[26] the decision of the Adjudicator is effective unless and until it is superseded by a decision of a Arbitrator or a Judge. In the international example, the FIDIC series of contract forms, the decision of an Adjudication is similarly effective unless a Party gives a Notice of Dissatisfaction within a fixed period, failing which the decision becomes final.

These differences appear to have a psychological as well as a procedural effect. They enable the procedure to be less formal, less obsessive. The result is that many Adjudication decisions are achieved in a fraction of the time and with less procedural preparation than would be required for Arbitration. A good thing? Yes, of course, but the purpose of this talk is, quite simply, to argue that such efficient simplicity is available in Arbitration and always has been.

I'll digress, if I may, to mention a curiosity of the laws of England & Wales and of Scotland. The English Arbitration Act and the Housing Grants Act[27] were drafted at the same time. In the Arbitration Act 1996 there is a provision [28] for provisional awards or provisional relief to be made. Had it not been necessary for the parties to make a special agreement, that section could have provided a regime precisely like that of the Housing Grants Act, save that it would have been universal in application and not limited to the construction industry.

But the English legislation is irrelevant. It is always open to parties in arbitration to agree that their arbitrator or arbitrators may make a provisional award that stands subject to revision by the same or a different tribunal. A number of commodity associations have used standard contracts with an in-built appeal arrangement for years. I would argue that, in such a context, the awards at first instance are, in fact, provisional.

I am conscious that I have touched on but a little of the fascinating subject of ADR, the regime in which two or more individuals or entities create their own solutions without the intervention of the State. I don't feel I have told you much. If I have encouraged you to ask yourselves questions, I have done what I set out to do. And I think I have taken too long over it. If you ever wondered why so many of us talk so much, let me commend this link - **http://tiny.tw/axf** *"The Science of Bragging and Boasting"* by Robert Lee Hotz, Health & Wellness updated May 7, 2012.

Thank you for your patience.
Professor Geoffrey M. Beresford Hartwell

There are other papers on arbitration at http://www.hartwell.pwp.blueyonder.co.uk
Any enquiries please send to arbitrator@computer.org
My blog is at http://tiny.tw/azz

[1] *The Glorious First of June* (also known as the *Third Battle of Ushant*, and in France as the *Bataille du 13 prairial an 2* or *Combat de Prairial*) of 1794 was the first and largest fleet action of the naval conflict between the Kingdom of Great Britain and the First French Republic during the French Revolutionary Wars. The British Channel Fleet under Admiral Lord Howe attempted to prevent the passage of a vital French grain convoy from the United States, which was protected by the French Atlantic Fleet, commanded by Vice-Admiral Louis Thomas Villaret de Joyeuse. The two forces clashed in the Atlantic Ocean, some 400 nautical miles (741 km) west of the French island of Ushant on 1 June 1794. http://en.wikipedia.org/wiki/Glorious_First_of_June accessed Wednesday 15 February 2012:14:12:45

[2] John Locke FRS (29 August 1632 – 28 October 1704), known as the Father of Liberalism, was an English philosopher and physician regarded as one of the most influential of Enlightenment thinkers. Considered one of the first of the British empiricists, following the tradition of Francis Bacon, he is equally important to social contract theory. His work had a great impact upon the development of epistemology and political philosophy. His writings influenced Voltaire and Rousseau, many Scottish Enlightenment thinkers, as well as the American revolutionaries. His contributions to classical republicanism and liberal theory are reflected in the American Declaration of Independence.

[3] *Ancient Greek Arbitration,* Derek Roebuck, Arbitration Press, Holo Books Ltd, ISBN 0-9537730-1-9, Hardback, 420 Pages, Published by HOLO Books: The Arbitration Press, 2001.

[4] *Roman Arbitration,* Derek Roebuck and Bruno de Loynes de Fumichon ISBN 0-9537730-3-5, Hardback, 295 Pages, Published by HOLO Books: The Arbitration Press, 2004.

[5] *Early English Arbitration,* Derek Roebuck, ISBN780954405618, Hardback 336 pages, 4 maps, endpapers, dustjacket, 220x140mm, Published by HOLO Books: The Arbitration Press, 2008. He quotes a fragment of an award dated 14 March 114AD.

[6] *Arbitrium redivivum: or The law of arbitration; collected from the law-books both ancient and modern ... with several forms of arbitrements or awards,* Printed by R. and E. Atkins, for Issac Cleebe, 1694, 93 pages.

[7] Bacon, *The Compleat Arbitrator* (1731).

[8] *Daniel* v.27

[9] The Law may not lack those virtues as much as it did then. Still technical in their approach the courts have nevertheless improved in their accessibility and efficiency. The writer would argue today that the principal virtue of Arbitration is that of the judgement of one's peers.

[10] Member, National Academy of Arbitrators; Professor, Georgetown University Law Center, Washington, D.C.

[11] Public Record Office, London, Colonial Office 39,1/9, 62. The full story of the legislation resulting from this commission is told in Horwitz & Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century,* 36 Hist.J. 137 (1993). at 139.

[12] **36 Legal or other representation.** Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

[13] **75 Charge to secure payment of solicitors' costs.** The powers of the court to make declarations and orders under section 73 of the Solicitors Act 1974 or Article 71H of the Solicitors (Northern Ireland) Order 1976 (power to charge property recovered in the proceedings with the payment of solicitors' costs) may be exercised in relation to arbitral proceedings as if those proceedings were proceedings in the court.
A selfish little trick favouring the legal professions (if the solicitors get their money, the barristers are paid!).

[14] Matthew 7,1.

[15] **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.

[16] Leander Construction Ltd v Mulalley & Company Ltd [2011] EWHC 3449 (TCC) (21 December 2011) URL: http://www.bailii.org/ew/cases/EWHC/TCC/2011/3449.html

[17] By the first Statute of Westminster (3 Edw. I cap. 5) 1275, , the time of memory was limited to the reign of Richard I (Richard the Lionheart), beginning 6 July 1189, the date of the King's accession. Since that date, proof of unbroken possession or use of any right made it unnecessary to establish the original grant under certain circumstances. Later, time immemorial was re-defined by the Prescription Act, 1832 (2 & 3 Will. IV cap. 71) s.1 as "Time whereof the Memory of Man runneth not to the contrary." Just so that we are clear!

[18] Unless it can be established as an *alter ego* of the principal party.

[19] But who is party to the agreement may be an open question. *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 cf. *Gouvernement du Pakistan Ministere des Affaires Religieuses v Société Dallah Real Estate and Tourism Holding Company,* Cour d'Appel [CA][regional court of appeal] Paris, Feb. 17, 2011, 09-28533, 09/28535 and 09/28541.

[20] Although, in most jurisdictions, a court may enforce an arbitral order at its discretion

[21] This term is widely used, in ADR practice, for hearings of one party in the voluntary absence of the other. The crucial requirement of such a proceeding is that notice be given so that the absent party can take part. In English (and other) Courts, however, *ex parte* often means "without notice".

[22] All right, but at least we deem them to have been willing when they made the agreement!

[23] But note: ". . . the main premise -- which has it that, in international commercial relations , the incremental organic creation of an autonomous system may be observed which operates on the basis of rules of law rather than legal systems -- is appealing and increasingly well-founded." *Unidroit Principles Applied as "Most Appropriate Rules of Law" in a Swedish Arbitral Award,* Loukas Mistelis*, Uniform Law Review / Revue de droit uniforme, vol. VIII (2003-3) 631-640.

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[24] S.1 (c) AA 1996 *in matters governed by this Part the court should not intervene except as provided by this Part*.

[25] The writer believes that his Lordship now favours the view of the arbitrator's role as one of status, rather than of contract. No reference can at present be given but the author's lay opinion is that, whether status or contract the arbitrator's role is a role *sui generis,*

[26] The *Housing Grants, Construction and Regeneration Act 1996.*

[27] See *supra*

[28] **s39 Power to make provisional awards.**
(1)The parties are free to 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.
(2)This includes, for instance, making—
(a)a provisional order for the payment of money or the disposition of property as between the parties, or
(b)an order to make an interim payment on account of the costs of the arbitration.
(3)Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.
(4)Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.This does not affect its powers under section 47 (awards on different issues, &c.).