ARBITRATION AS AN ALTERNATIVE MEANS OF DISPUTE RESOLUTION
AN INTRODUCTORY ROAD MAP

1. **Introduction**

There are three (3) recognised acceptable methods of dispute resolution: (1) Litigation, (2) Alternative Dispute Resolution (ADR) (which includes mediation, conciliation, mini trials, rent-a-Judge, adjudication, Dispute Review Board) and (3) Arbitration not necessarily in that order. There is another method which is an adjunct to all these methods and that is negotiation.

Today this paper addresses the use of Arbitration as an alternative method of dispute resolution.

The topic was chosen in an effort to stimulate consideration of the view that there may be other more suitable methods of settling or resolving certain types of disputes other than resorting to physical violence or the Court house. But, why are we lawyers seeking alternative methods of resolving disputes when it is as a result of the use of the old methods of revolving disputes i.e. duels and litigation that we lawyers have traditionally earned our living? Please note that I am not using the word alternative here to mean A.D.R., I am in fact using it in the dictionary sense, to connote "a choice" or the "use of another method".

The answer to the question I just posed is that, Arbitration as an alternative method of dispute resolution has been in existence from as for back as litigation (i.e BC), it is just that in recent times particularly in this jurisdiction it has for all intents and purposes fallen into disuse. Lawyers from the early days had as much of a role to play in Arbitration as they did in Litigation and as they now have in ADR. So we need not worry that these alternative methods will cut into our "turf".

What we should really be doing is looking to see what is the best method of resolving the dispute or the potential dispute and ensuring that this method is

utilised in resolving it. In commercial matters for example a clause or clauses should be incorporated in the Agreement or Contract providing for the resolution of disputes in the most appropriate manner, so that if and when the dispute arises there is by agreement a selected proper method for resolving the same.

This paper is designed to introduce in a general way Arbitration as an alternative and the methodology for its use. This paper has of necessity to be general as there are many entire text books which have been dedicated to this topic. Therefore in the limited time and space allowed me I will just touch generally on some of the main areas of importance.

I have throughout this paper when referring to Arbitrator and Arbitration placed them in capitals for emphasis.

2. What is Arbitration

An Arbitration (in this jurisdiction) usually arises out of a written agreement to submit present or future differences to Arbitration whether an Arbitrator is named therein or not. (Section 2, The Arbitration Act).

This Arbitration although arising by way of contract or agreement is usually substantially affected by the provisions of our Arbitration Act (1900) and by the Common Law.

Arbitrations can however be commenced by virtue of a reference under an Order of the Court to the Registrar or a Special Referee . (Section 14, The Arbitration Act); or in any cause or matter other than a criminal proceeding by the Crown, by the consent of the parties; or in other specified circumstances (Section 15, The Arbitration Act) the Court may order the matter tried by the Registrar or a Special Referee or an Arbitrator agreed on by the parties. In some instances also there are Statutory Arbitrations (i.e. provided for by statute).

The sort of Arbitration with which this paper is concerned is where some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of to a Court. A good definition of Arbitration is to be found in the fifth edition of the Encyclopaedia of Forms and Precedents Volume 3 page 11:

> *Arbitration is a process by which disputes between two or more parties are determined in private with final and binding effect by an impartial third person or persons acting in a judicial manner rather than by a Court of competent jurisdiction.*

Most Arbitrations are held pursuant to an Arbitration Agreement entered into by the parties but there is no reason why an ad hoc submission to Arbitration should not be made orally. In the case of an oral submission there would be no written agreement as is contemplated by Section 2 of the Arbitration Act and therefore for practical purposes it would be difficult to enforce the oral agreement since the supportive features of the Arbitration Act would not be applicable.

Further the enforcement of the award could not be effected pursuant to Section 13 of the Act which provides that an award on a "Submission" (which is a written agreement to submit present or future differences to Arbitration) may by leave of the Court or a Judge be enforced in the same manner as a judgement or order of the Court. It could only be enforced under the common law by virtue of a suit on the award.

In order therefore that such a method of settling disputes shall be effective it is necessary that some assistance should be had from the Courts, in particular recourse is often had to the Courts to enforce the agreement e.g. When a party seeks to go to Court instead of to Arbitration or in the enforcement of the Arbitrator's decision or award as referred to above. Therefore the Arbitration Act does provide

for some degree of control to be exercised over Arbitration proceedings by the Court. The role of the Court as defined by our legislation is:

(a) to stay Court proceedings where there is a valid Arbitration agreement (Section 5 the Arbitration Act);

(b) supportive (Sections 3,4,6,7,8,9,10,13,19,20,21 and 22, The Arbitration Act);

(c) supervisory (Sections 11 and 12, The Arbitration Act);

The English Arbitration Acts also provide for the Court to have limited appellate functions in respect of Arbitration awards. Our Act at section 11 provides for remission of matters by the Court for reconsideration by the Arbitrator or the Umpire but our legislation does not give our Courts any appellate jurisdiction in relation to Arbitrations.

The disputes, the subject matter of an Arbitration are determined after a hearing in a quasi-judicial manner either instead of having recourse to litigation or after litigation by an Order fo the Court. For an Arbitration to exist there must be three (3) elements present:

(a) There must be a real dispute. The dispute must be justiciable which is based on the premises that the award is capable of being enforced as a judgement by the leave of the Court under the Arbitration Act or can be enforced under the common law.

(b) There must be an agreement between the parties to refer the disputes to one or more specially nominated Arbitrators for hearing.

(c) The parties must intend to settle their disputes in this way rather than in a Court of law - the Agreement to submit to Arbitration must be a binding contractual obligation.

3. **The Arbitration Act (1900)**

The Arbitration Act in our jurisdiction was passed on the 30th June 1900 and has been in force since then with only minor amendments. This Act is a very basic Act and unlike the English law on Arbitrations which is contained in the Arbitration Acts of 1950, 1975 and 1979 it really is very skeletal in form and deals with only the most fundamental aspects of Arbitration in the jurisdiction.

I have in the previous section outlined the structure and effect of this Act which is supportive, supervisory and the enforcement of Arbitration Agreements by virtue of the giving of the power to the Court to stay Court proceedings where there is a valid Arbitration Agreement or to compel a party to commence the Arbitration and to proceed in accordance with the Agreement and the law. There is also the section dealing with references under an Order of the Court (i.e. section 14 - 18). The Act only has 24 sections and rather than repeat them in this paper I have attached as Appendix 1 a copy of the entire Act.

Because of the limited range of the Arbitration Act in Jamaica and of the Acts of the U.K., if Arbitrators had to depend only upon the statute for sole guidance on the conduct of Arbitrations there would be ample opportunity for procrastination and uncertainty in the proceedings. It is for this reason that a number of international bodies have drawn up their own rules of conduct for a reference made pursuant to their rules. In particular the following rules are generally used primarily in major commercial Arbitrations wherever the location for the hearing of the Arbitration is:-

(1) Rules for the International Chamber of Commerce (ICC) Court of Arbitration (known as the ICC Rules)

(2) United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (known as the UNCITRAL Arbitration Rules)

(3) International Centre for Settlement of Investment Disputes (ICSID) Rules for Procedure for Arbitration Proceedings (known as the ICSID Arbitration Rules)

(4) American Arbitration Association (AAA) Arbitration Rules and Supplementary Procedures. (Known as the AAA Arbitration Rules)

(5) Permanent Court of Arbitration (PCA) Rules of Arbitration and Conciliation (known as the PCA Rules of Arbitration)

(6) The Association of Chartered Institute of Arbitrators (ACI) Arbitration Rules (known as the ACI Arbitration Rules)

(7) The London Court of International Arbitration Rules (Known as the LCIA Rules)

(8) Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

There are other rules which are more trade specific such as the Grain and Feed Trade Association Arbitration Rules (GAFTA Arbitration Rules) and other Maritime Arbitrator's Association Rules.

4. **References under Arbitration Rules**

As the proceedings in an Arbitration are founded on agreement the parties may in large degree themselves determine the procedure and or rules which they wish to follow and the powers the Arbitrator is to have as well as the constitution of the arbitral tribunal. All of these factors are usually considered at the agreement stage and are incorporated in the Agreement as part of the clauses dealing with "settlement of disputes" otherwise called the Arbitration Clause(s).

The Arbitration Act lays down a code governing how Arbitrations should proceed but many of its provisions may be excluded by agreement between the parties. This is often achieved by the parties agreeing to the conduct of the Arbitration by a

reference under one of the aforementioned Rules of Arbitration or by some other agreed procedure.

In fact it is possible for the parties either by design or by inadvertence to so arrange matters that the Act is substantially excluded from application to the Arbitration proceedings. If the parties decide on such a course and the Arbitration is carried through to a final decision by the Arbitrator it is unlikely that his award will be enforceable under section 13 of the Arbitration Act and it will therefore only be enforceable by action, if his award is valid as something which the parties have agreed with each other to carry out. The power of the Court to intervene on the ground of impropriety in the proceedings is substantially however outside the control of the parties.

It should be noted that some of the Arbitration Rules are quite complex and require strict adherence to the procedures laid down therein. Failure to strictly comply with these rules can be fatal. It is therefore crucial that draftsmen of agreements should before just simply copying arbitration clauses or incorporating Arbitration Agreements into a form of Contract which requires the Arbitration to be conducted pursuant to particular Arbitration Rules, to make sure that it is a body of rules that your party is able to comply with and that it is appropriate for resolution of the sort of dispute contemplated.

5. **Parties (who may refer matters to Arbitration)**

Every person who has a right of which he can dispose is competent to submit questions, differences, and disputes affecting that right to Arbitration. Any disabilities that affect the right of disposal will equally affect his right of submission. (**Russell on Arbitration 20th Ed. Chapter 4**)

Persons under disability include infants, bankrupts and persons mentally disordered. Corporations sole are usually subject to restrictions which could affect

their ability to submit to Arbitration likewise some partners, Attorneys -at-Law and agents could also be so restricted.

6. (a) **Matters that can be referred to Arbitration**

All matters involving disputes which affect a parties civil rights in which only damages are claimed may be referred to arbitration. Therefore all actions where damages only are to be recovered are suitable for arbitration. Hence all matters in dispute concerning any personal chattel or personal wrong may be referred. Breaches of Contracts, trespass, slander, questions relating to real property, separation deeds in matrimonial causes and construction of Wills are all suitable for arbitration.

(b) **Why we use Arbitration over Litigation**

(i) Arbitration proceedings are most suitable for certain specific commercial disputes e.g. in the construction industry and the maritime industry where an Arbitrator with a special skill in the trade may be more appropriate than a judge who would not have the special training.

(ii) Arbitration is more suited for disputes involving technical matters where a technically skilled Arbitrator can be appointed, than is litigation.

(iii) Arbitration is much more flexible than litigation and in certain types of disputes, it is easier to resolve issues if the strict rules of evidence are not followed.

(iv) Arbitration is a lot quicker if properly managed than a Court case.

(v) Arbitration is better for trade specific issues.

(vi) Because Arbitration is a contractual animal, it is accordingly more consensual than litigation.

(vii) In Arbitration, the parties are free to, if they agree, adopt virtually any forum and procedure which they consider suitable in the particular

circumstances, while in litigation you have no choice of forum, Judge or procedure.

(viii) The decision of the Arbitrator is final in this jurisdiction, while judgments in court cases can be appealed up to the Privy Council. There is, therefore, more certainty in Arbitration.

(ix) Arbitrations are more confidential than litigation and are, therefore, more useful for sensitive and large commercial matters.

(x) Arbitrations using International Arbitration Rules are more acceptable to international contractors, than is litigation.

(xi) Because of the contractual nature of an Arbitration, the parties are able to choose the tribunal and the identity of the Arbitrators making up the tribunal which the parties cannot do in litigation. As a result, not only are the Arbitrators more likely to be more informed and skilled in the area of the dispute than judges but they are available to do all the interlocutory applications as well as the final hearing. This means that by the time the parties get to the final hearing the Arbitrator is totally familiar with the matter thus leading to a more consistent and interactive adjudication process than in Court.

(xii) In an Arbitration, the location of the hearing can move from place to place in order to facilitate the Arbitrator or the parties and their witnesses, while in litigation, the location is confined to a particular Court. Arbitrations are therefore more convenient.

(xiii) In an Arbitration, the Arbitrator can give directions at any stage which he considers appropriate for resolving the dispute while in litigation the Summons for Directions is at a particular stage of the proceedings.

There are other advantages to Arbitration but I think I have been able to list the main ones.

Undoubtedly, there are some disadvantages to Arbitration and benefits to litigation, but this paper is not directed to the benefits of litigation so these will not be dealt with here.

The English Court system obviously accepts the advantages of Arbitration in certain cases. They have as a consequence developed a court called the Official Referee's Court whose procedure takes on the appearance of Arbitrations in a lot of instances and the Judges are usually trade or industry specialists who are assigned depending on the area of the dispute.

7. (a) **Arbitration Agreements**

There are three (3) ways in which a "reference" to arbitration may originate:-

(1) By agreement between the parties

(2) By virtue of an Order of the Court

(3) By Statute

As stated earlier this paper is about arbitration by agreement between the parties and this section is about the Arbitration Agreement.

A voluntary agreement to refer disputes when they arise at a future time to arbitration is entered into with the mutual consent of the parties. Arbitration Agreements like any other types of agreements are open to variation and determination by the parties. These agreements are by law required to be in writing but may be made orally and/or informally, but under our Arbitration Act a submission to arbitration means a written agreement. Therefore under our legislation an oral agreement would not be governed by the Arbitration Act and as such the parties could not rely on the sections of this Act to govern arbitration proceedings commenced pursuant to an oral agreement. The parties would have to rely on the common law. In most cases the parties enter into agreement at the time that they

enter into a commercial relationship (i.e. when they sign their commercial agreement) and the agreement is usually to refer future disputes and differences" to Arbitration. If there is no such prior agreement however the parties in dispute can then at the time of the dispute agree in writing to submit the dispute to arbitration and get the benefit of the Arbitration Act as the Act provides as follows at section 2 thereof:

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

In practice it is usual for the parties to arrange for the inclusion of an arbitration clause in the main contract such as those incorporated in our Joint Consultative Committee for the Building and Construction Industry of Jamaica (JCC) standard Form of Building Contract (known as the JCC Form of Contract) or the Federation International Des Inqenieurs Conseils (FIDIC) Form of Contract or the Joint Contracts Tribunal (JCT) Form of Contracts. Some parties however subscribe to a separate agreement concerning the mode of settling differences, actual or contingent.

(b) **Enforcement of the Arbitration Agreement**

If a party refuses to settle a dispute by arbitration when there is a valid agreement to do so then by Section 6 of the Arbitration Act any party may serve the other party or parties with a written notice to appoint an Arbitrator(s) and if the appointment is not made within seven (7) clear days the Court will appoint the Arbitrator(s).

It is also a breach at common law to refuse to settle a dispute by Arbitration when there is a valid agreement to do so. Of itself, this remedy would be quite weak since it would be difficult to prove what damage the aggrieved party has suffered, as he could always sue in the Courts in respect of the breach of contract or dispute which would otherwise have been referred to Arbitration. This is one of the areas for which you can always seek relief

under the Arbitration Act, even if the Arbitration Agreement provides for the Arbitration to be held pursuant to one of the Rules aforementioned, which could have the effect of substantially excluding the Act.

On the other hand if a party to an Arbitration Agreement seeks to sue in the Courts rather than go to Arbitration the Court will on the application by the other party under section 5 of the Arbitration Act, stay the proceedings until the Arbitration has taken place.

It is however a mistake for a claimant to assume that because the contract contains an arbitration clause that he is necessarily bound to pursue his claim in Arbitration rather than in the Courts. If one party proceeds with the matter in Court and the other party does not seek to stay the proceedings but proceeds to file a Defence then he is deemed to have waived his right to proceed by way of Arbitration and the matter can be proceeded with to finality in the Courts without any right to objection from the other party. Therefore it is important to consider which forum suits your particular situation before making the decision whether to proceed by way of Arbitration.

Also it is important to decide whether to go by way or Arbitration or suit when the matter of limitation is an issue. The English Limitation Acts deals with Arbitrations while our Limitation Act makes no special reference to Arbitrations. The conclusion one has to come to is that the normal six (6) year limitation for actions for breach of contracts will therefore be applicable to Arbitrations, unless the agreement specifically sets a limitation period which is different and if the limitation period is shortly to expire it might be prudent to preserve ones position by filing a suit even if the suit is likely to be stayed and also serving the notice for arbitration at the same time.

There is also the matter of summary judgements under Title 13 of the Judicature (Civil Procedure Code) Act (CPC) to be considered. There is often the view that Arbitration and litigation are mutually exclusive, however this is not so at all. If a part of the claim is within the scope of Title 13 of the CPC then it is in order for the claimant first to sue and recover under Title 13 of the CPC the indisputable part of the claim and to pursue the disputed portion in arbitration proceedings if there is a valid Arbitration Agreement. In such a matter if a party chooses to go by suit alone and the other party objects, the Court will give judgement for such part of the claim as falls within Title 13 of the CPC and then grant a stay of the Court proceedings under section 5 of the Arbitration Act so that the disputed portion of the party's claim can proceed to Arbitration. Lord Denning in **Ellis Mechanical Services Ltd v Wates Construction Ltd** (1976) 2 BLR 57 said:

"..... there is a point on the contract which I might mention.....there is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgement for such sum as appears to be indisputably due, it can refer the balance to arbitration. The defendant cannot insist on the whole going to arbitration simply saying that there is a difference or a dispute about it. If the court sees that there is a sum which is indisputably due, then the court can give judgement for that sum and let the rest go to arbitration....."

8. **Notice to concur in the Appointment of the Arbitrator**

The first requirement for a party who is initiating arbitration proceedings is to comply strictly with the Arbitration Agreement; for example, if the parties have executed a FIDIC form of agreement, then the party raising the dispute would first have to give notice to the engineer that a dispute has arisen, specifying the cause of the dispute and requiring a decision by the Engineer. If the Engineer replies within one month giving an unsatisfactory decision, or if he fails to reply within the one month period then in either case the aggrieved party can then invoke the full arbitration procedure. There are other contracts, for example, the JCC Form of Contract provide for the dispute to be referred directly to one Arbitrator initially and if there is no agreement as to the one Arbitrator it provides for the dispute to be referred to two (2) Arbitrators who then appoint an Umpire. Some clauses provide for one Arbitrator only while others provide for two and an Umpire. Attached hereto as Appendix II are some specimen Arbitration Clauses.

The notice of arbitration and notice to concur need not be in any prescribed from and it is usual for it simply to contain a notice of the dispute and request the other party to concur in the appointment of an Arbitrator. The terms of the notice generally depend upon the terms of the arbitration clause in the contract. If the arbitration clause in the contract provides for the Arbitration to be conducted pursuant to any of the aforementioned Rules then the method of appointing the arbitrator may be circumscribed by these Rules. Further it is quite usual for the arbitration clause in certain agreements to provide for an appointing authority whose duty it is to appoint an Arbitrator, for example, the President of the Bar Association, the President of the Institution of Engineers or the President of the Chamber of Commerce etc. The Arbitration Act at Section 4 provides inter alia that:

> *A submission unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the*

provisions of the Act as far as they are applicable to the reference under the submission -

(a) If no other mode of reference is provided the reference shall be to a single Arbitrator; and

(b) If the reference is to two Arbitrators the two may appoint an umpire at any time within the period during which they have power to make the award;.....

Section 6 of The Arbitration Act provides further:

that where a submission provides that the reference shall be to a single Arbitrator and the parties do not concur in the appointment of the Arbitrator or if the appointed Arbitrator refuses to act, dies or is incapable of acting and there is no provision for his replacement or where an Umpire or a third Arbitrator refuses to act, dies or is incapable of acting then any party may serve the other parties with a written notice to appoint an Arbitrator or an Umpire or a third Arbitrator as the case may be. If the appointment is not made within seven clear days after service of the notice, the Court or a Judge may on application by the party who gave the notice appoint an Arbitrator, Umpire or third Arbitrator who shall have like powers to act in the reference and make an award as if he/she had been appointed by the consent of all parties.

The final section of the Arbitration Act dealing with the appointment of the Arbitrator(s) is section 7 which provides:

Where a submission provides that the reference shall be to two Arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention -

(1) *if either of the appointed Arbitrators refuses to act, or is incapable of acting or dies the party who appointed him may appoint a new Arbitrator in his place;*

(2) *if, on such a reference, one party fails to appoint an Arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his Arbitrator has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that Arbitrator to act as sole Arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent; provided that the Court or Judge may set aside any appointment made in pursuance of this section.*

It should always be noted that these sections of the Act will apply if there are no contrary provisions in the arbitration agreement, or clause, or any arbitration rules which the agreement or clause may incorporate.

It is noteworthy that an Arbitration does not commence until the Arbitrator is actually appointed. Further, there is nothing to prevent a claimant from serving an arbitration notice before, at the same time as, or after issuing a writ in Court. However, a party favouring Arbitration where there is a valid arbitration agreement can apply to the Court in accordance with section 5 of the Arbitration Act after entering an Appearance but before delivering any pleadings or taking any other steps in the proceedings for a stay of the Court proceedings so that the Arbitration can proceed. Usually a writ is issued in Court where there is an arbitration agreement for three main reasons:-

Firstly if the party is of the view that the dispute is better resolved in the Court he can try proceeding by suit and if the other party consents or waives his right to go to Arbitration the matter can proceed in the Courts.

Secondly if the party is of the view that the particular dispute does not fall within the arbitration agreement or clause.

Thirdly for limitation purposes. For this reason it is common practice in appropriate cases to make the position entirely plain in the arbitration notice by adding a paragraph as follows:-

> *Please take note that (our client) this party takes the view that the proper forum for the hearing of this dispute is the High (or Resident Magistrate) Court. This notice is accordingly served in order to protect our clients position in particular in relation to any limitation period which may exist by virtue of the agreement or otherwise.*

9. (a) **The Arbitrator - his appointment, his powers and his duties**

The Arbitrator derives his powers from the arbitration agreement or the arbitration clause in the contract and from The Arbitration Act. As a result, the arbitration clauses in some contracts especially building and engineering contracts are usually drawn extremely widely. For example, in the arbitration clause in the JCT Form of Contract the parties refer to the Arbitrator:

> *"Any dispute or difference ..... between the employer ..... and the contractor as to ..... the construction of this contract or..... any matter or thing of whatever nature arising hereunder or in connection herewith....."*

Unless the parties otherwise agree, the Arbitrator has no power to determine whether or not the contract came into being or not because that would of necessity have to entail his deciding whether the arbitration clause and hence his own appointment was valid. Therefore if one party is contending that the contract is void ab initio, because lets say, the making of the contract is illegal, then the arbitration clause could not operate, for on his view the clause itself would also be void. See **Heyman v Darwins Ltd** [1942] AC 356. An Arbitrator does however have jurisdiction to decide a claim for rectification.

The Arbitrator's jurisdiction in many instances goes further than that of merely resolving disputes since the arbitration clauses in certain contracts do give him additional powers. For example, the JCT Form of Contract provides that the Arbitrator has power:-

> *"To ascertain and award any sum which ought to have been the subject of or included in any certificate (i.e., Architects or Engineers certification as to the value of the work completed and materials supplied at a point in time) and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given."*

In **Northern Regional Health Authority v Derek Crouch Construction Co. Limited** [1984] 2 All ER 175 it was held by the Court of Appeal that this gave to the Arbitrator powers that the court would not have. The primary effect of

this decision is that only an Arbitrator by virtue of the provisions of the contract may enforce the contract terms themselves as opposed to the certificates, in many areas where the contract calls for certification.

As stated earlier the arbitrator's powers needed to conduct the proceedings and make an enforceable award come from the arbitration agreement or clause and the Arbitration Act. His powers may be extended by agreement between the parties or modified by the various rules incorporated under some of the contracts in particular the standard form ones. Where the Arbitrator considers it necessary for the proper conduct of the reference the Arbitrator may seek such extensions of his powers from the parties.

9. (b) **Some Important procedural considerations**

(i) Once the parties have been able to concur on the appointment of a suitable Arbitrator one or other or both of them should write to the proposed Arbitrator asking whether he is prepared to accept the appointment. The letter should briefly outline the dispute and the form and contents of the letter should be agreed on by the parties. It is customary to enclose copies of correspondence following the arbitration notice and to ask for details of his/her remuneration.

(ii) Neither party should engage in any verbal communication with the proposed Arbitrator about the matter except in the presence of the other party either before or after his appointment.

(iii) Each party should avoid sending any written communication in respect of the matter to the proposed Arbitrator or the Arbitrator once he has been appointed, which was not first agreed with the other side and in the event any such communication is sent then a copy of the same should immediately be sent to the other side.

(iv) Telephone messages should only be relayed through the Arbitrator's secretary. These procedural considerations are important as the

Arbitrator's authority does not commence until he/she has accepted the appointment.

(v) Once he/she has accepted the appointment the conditions of his/her appointment (usually the Contract with the arbitration agreement or clause) should be sent to him.

(vi) The basis of his charges should then be agreed if not settled before. Some agreements and rules provide that both parties are jointly and severally liable for the Arbitrator's agreed fee and expenses pending the award of costs by the Arbitrator. In fact some Arbitrators set out the basis of their charges when they write accepting their appointment.

9. (c) **The Duties of an Arbitrator**

(i) Not to depart from the normal rules of procedure laid down in the Agreement, the rules thereunder and the statute.

(ii) To act fairly and impartially.

(iii) Not to hear one party or his witnesses in the absence of the other party or his representative.

(iv) Not to receive information from one side which is not disclosed to the other.

(v) To act judicially and to hear the evidence.

(vi) Not to depart from any of the ordinary rules for the administration of justice.

(vii) To decide on disputes submitted and no more.

(viii) Strictly to comply with the terms of the Submission.

(ix) Duty to decide according to law.

9. (d) **Some general procedural powers of Arbitrators**

(i) The Arbitrator has the power to order pleadings and particulars.

(ii) He may give directions if he deems it necessary.

(iii) He may administer oaths or take affirmations of parties or witnesses (Section 8(a) The Arbitration Act).

(iv) To state an award as the whole or part thereof in the form of a special case for the Opinion of the Court. (Section 8(b) The Arbitration Act).

(v) He has no power to dismiss for want of prosecution unless he is given this power in the Submission.

(vi) He can order discovery and inspection. (Section 4(f) of The Arbitration Act).

(vii) He has no power to order security for costs unless he is given this power in the submission.

(viii) An Arbitrator cannot delegate his duties unless this is specifically provided for in the submission.

(ix) He has the power to correct any clerical mistake or error in the award arising from any accidental slip or omission.

10. **The Preliminary Meeting**

The first step that an Arbitrator usually takes upon his/her appointment is to call the parties to a preliminary meeting, which is analogous to an immediate summons for directions. At that meeting the Arbitrator usually makes directions as to time limits for the essential steps to be taken in the Arbitration which will include pleadings (i.e. Points of Claim, Points of Defence and Counterclaim and Reply if necessary), discovery, and agreed bundles of documents if possible, witness statements if required, involvement of expert witnesses and if the Arbitrator is not a lawyer the right to refer legal issues to one of his choice and finally hearing dates.

Under certain Arbitration Rules e.g., the J C T Arbitration Rules, the Arbitrator has to fix the preliminary meeting not later than twenty one (21) days from his appointment, that is the notification date, unless he and the parties agree to fix a later date or to dispense with the preliminary meeting altogether.

As a general rule the preliminary meeting should in all cases be held except where the Arbitrator is satisfied that the issues are sufficiently certain, clear and simple in which case limited directions may be agreed by consent or directions may be dispensed with altogether and a hearing date set immediately.

At that meeting it is usual for the Arbitrator to get the parties to outline the dispute so that he/she can get a good grasp of the real issues which will enable the appropriate procedure to be adopted and employed. Once the Arbitrator is aware of the basic issues, he can, in consultation with the parties, give directions as to the timetable for delivery of all matters relevant to the dispute.

There are many directions and matters which may be considered at the preliminary meeting depending on the sort of dispute. For example, in construction disputes it is quite normal for the Arbitrator to require the parties to prepare a "Scott Schedule" which is a document which sets out in tabular form all the relevant allegations as to defects in the work done and costs of rectifying them together with answers to the complaints or admissions as to their validity and any comments as to their validity and any comments as to their relevance or significance. If properly administered, a Scott Schedule could save a lot of time at the Arbitration.

The preliminary meeting is also helpful in that the directions concentrate the parties minds by fixing an early hearing date thus accelerating the process and the hearing. This usually causes parties to look more seriously at the matter and the dispute at a much earlier time than they would in a court case. The end result of this is that this early concentration of the parties' minds and attention often leads to settlement of the dispute.

11. **Pleadings and Discovery**

(a) Pleadings

Once an Arbitrator observes the rules of natural justice, does not breach the provisions of the Arbitration Act and respects the wishes of the parties as is contained in the Arbitration Agreement or clauses which sometimes incorporates Arbitration Rules, he can set whatever procedure he deems fit. Where his orders are opposed, the Arbitration Act provides for the reinforcement of his powers.

The benefit of arbitration rules or orders made by an Arbitrator in the absence of these rules, which insist upon statements of the case (i.e. Statement of the Claimant's Claim, Statement of the Respondent's Defence and Counterclaim as the case may be and Statement of the Claimant's Reply and Defence to Counterclaim as the case may be) and full written submissions, is that not only does the Arbitrator have the benefit of having been able to be fully acquainted will all the disputes and issues, but also, having been able to read through the written submissions before the hearing he/she is able to get a good working knowledge of each party's case. Further, the parties will be alerted to which documents (out of the many hundreds of documents in most cases) will be produced and relied on by each side in the presentation of their respective cases to the Arbitrator.

The reason why we tend to have so much paper is of course a product of the technical nature of the disputes in many cases and a product of our legal tradition with its roots not only in the openness of the court but also in the jury system, where everything had to be read out for the benefit of (illiterate) jurors.

With the ready availability of computers, word processors and photocopiers, to say nothing of the ever-improving knowledge and competence of experienced arbitrators, there is now very little to prevent any party from elaborating its case on paper right from the start.

Time and again, too many cases end up being tried because the parties' lawyers have not got down to the task of clearly identifying the issues and marshalling the facts and evidence in a way to support their client's best arguments. If these exercises are undertaken at an early stage, which the statements of each party's case with documentation would force, much time and money would be saved.

When everything is said and done, if all the pleadings and the documents are in writing, they can be perused at leisure and in detail. This obviates the risks of some evidence being 'lost' through problems with the recording of the evidence at the hearing. As good as the Arbitrator's own notes can be, it cannot be a word for word account of the arguments and the oral evidence advanced. If counsel's case is comprehensively pleaded and advanced in writing, it will reduce the time for the eventual final hearing and the possibility of salient matters being lost.

(b) Discovery (Section 4(f) of the Arbitration Act)

As in litigation the process of discovery in an Arbitration usually requires each party to list the documents in its possession, custody or power that are relevant to the matters in issue in the arbitration. Once these lists have been studied, the documents listed therein, other than those which are said to be privileged, they are usually inspected by the opposition. Inspection usually takes place at the most appropriate venue, sometimes on site if they are too numerous to deliver to the lawyer's office or otherwise at your opponent's office.

Discovery is probably the most troublesome and problematic area for any litigation lawyer to work in, particularly as more and more material is processed and collated both on paper and computer disks. It is a virtual nightmare in most large cases and it is the most tedious procedure which a lawyer must undertake in contested matters; it is incredibly time-consuming

and, in the writer's experience, generally proves to be contentious. All the difficulties are enhanced when Arbitrations under our law involve parties whose home base is a country where the concept of discovery is unknown.

Many people, even foreign lawyers, find astonishing our legal system, where they are obliged to produce, for example, the documents passing within their own organisation which are certainly never intended for outside distribution. The thought of directors' board minutes being distributed to the other side often is unheard of. These people can say, with some justification, that even the outside possibility of a future obligation to disclose would inhibit their discretion in expressing themselves with candour, in writing, to their own colleagues.

There are certain types of documents which, although material to the matters in dispute, are not subject to the obligation to disclose. The most common example of these documents is correspondence passing between a lawyer and his client and witnesses, either prior to commencement of the proceedings and in contemplation of them, or during the course of the proceedings. These documents are what is known as privileged from disclosure.

The discovery and inspection phases are usually followed, where necessary, by preparation of the relevant bundles of documents for use by the Arbitrator. This is the most prudent and productive stage for this task to commence since contents of the documents should be fairly fresh in the minds of the consultants and lawyers. A master bundle should be prepared, numbered, indexed and cross-referenced where necessary.

12. **Evidence**

There is a requirement in the discovery process that even if a document is prejudicial to a party once it is not privileged, he has to disclose it. The general obligation of discovery on a party is to disclose all documents in his possession which are material to the matters in dispute.

The well known statement by Lord Donaldson M.R. in the case of **Davies v Ely Lilly & Co [1987] 1 ALL ER 801**, gives a clear explanation of the reason for discovery as follows:

> *"In plain language, litigation in this country is conducted cards face up on the table. Some people from other lands regard this as incomprehensible. Why, they ask, should I be expected to provide my opponent with the means of defeating me? The answer, of course, is that litigation is not a war or even a game, it is designed to do real justice between opposing parties and, if the court does not have all relevant information, it cannot achieve this object."*

The requirement for discovery in arbitration is the same as in litigation so the explanation and principle so well stated by Lord Donaldson applies as much to arbitration as it does to litigation.

There are no other guidelines and therefore it is up to each party to work out for itself which documents fall within the scope of this obligation to disclose. The general obligation is enforced by what is known as specific discovery where particular documents can be identified either by the Arbitrator or by the opposing party, which can result in the Arbitrator making an order in the proceedings against the possessing party for their disclosure.

So far as evidence is required by one party which the other party either is reluctant to, or refuses to adduce voluntarily, then by Section 9 of the Arbitration Act any

party to a submission may sue out a writ of subpoena ad testificandum or a writ of subpoena duces tecum, but no person shall be compelled under any such writ to produce any document he could not be compelled to produce on the trial of an action in Court.

The Arbitration Act at Section 8(a) provides for an Arbitrator or Umpire the power to administer oaths to, or take the affirmation of the parties and witnesses appearing; and by Section 22 of the Arbitration Act "any person who wilfully and corruptly gives false evidence before the Registrar, or any Special Referee, Arbitrator or Umpire shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly.

13. **Proceedings at the Hearing**

(a) Expert Evidence

In many claims, in particular, construction and engineering claims, be they in relation to claims for defective work or for extensions of time or for loss and expense, one or more expert witnesses will be required.

The value of expert witnesses in Arbitration proceedings of this nature should never be underrated. Their evidence in a lot of instances is the deciding factor in the Arbitration.

In the circumstances, their involvement notwithstanding their paymaster, should require then to provide an objective view of the merits of the case. So long as that objectivity is maintained by the experts in their reports and in their subsequent meetings following the exchange of the reports, then they should be able to significantly narrow the issues and may be even agree some important facts which can then form the basis for the Counsel for the parties to prepare a schedule of agreed facts for the Arbitrator.

There seems, however, to be two somewhat conflicting decisions of the Court in relation to the meeting of the expert witnesses. On the one hand the Court held in **Richard Roberts Holding v Douglas Smith Stimpson (1989) 22 CLR 94** that the meeting was strictly "without prejudice" and that any agreement reached by the experts were not binding on the parties; while in **Murray Pipework v UIE Scotland Ltd [1990] CLR 92**, the Court took the view that although the meeting was in the nature of "without prejudice" negotiations once these negotiations proceeded through to an agreement the without prejudice veil would fall away and the agreement is binding and may be referred to in Court.

In view of this slight confusion, it is suggested that if and when the expert witnesses arrive at any agreed facts or positions that the schedule is expressly made to be free from the without prejudice label.

What normally takes place following all of the pre-hearing stages i.e., the exchange of pleadings, discovery, the exchange of experts witness statements and in some cases the exchange of submissions, is that each party should have a fuller idea than at the outset of the strengths and weaknesses of each others case. This is the stage when more often than not, settlement discussions prior to trial are initiated and pursued.

(b) Open Offer

This is an open without prejudice offer which can be made by either party at any stage of the proceedings offering to settle the matter for a particular sum of money which usually includes interest, as well as for an amount to settle the party's costs incurred in the Arbitration up to that stage and offering to pay the Arbitrator any outstanding fees. This offer is usually made in writing.

If the other party accepts the Offer this usually can form the basis of a consent award, or alternatively, if all amounts agreed are paid, the Arbitrator(s) can just endorse his/their records settled.

(c) Sealed Offer

This type fo Offer is known as a "Calderbank Offer" (taking its name from the case of **Calderbank v Calderbank** [1975] 3 All ER 333. It is often referred to as an "Offer to protect costs".

There is no formal procedure in arbitrations equivalent to payments into Court and accordingly there has evolved a practice of making sealed offers in appropriate cases. Under this process the Respondent makes an offer to the Claimant in writing, which is protected from discovery. If the offer is not accepted, a copy of it is placed in a sealed envelope and is handed to the Arbitrator at the conclusion of the hearing, with a request that the envelope not be opened until after he has made his substantive award, but before he deals with costs.

The Offer should state that it is intended to have the effect of a payment into Court. It should say whether or not it includes interest. Normally it should include interest. It should offer to pay costs up to the time of an acceptance within 21 days of the offer (in order to preserve the analogy with payment-in), but should not perhaps otherwise make payment of the sum offered conditional upon acceptance within a particular time. The reason for this would be that if an offer of payment is withdrawn before trial the judge may ignore it when considering costs. If the offer does not stipulate a time for acceptance, it is likely, depending on its terms and all the circumstances, to be construed as being open for a reasonable time. While a reasonable time may be held to have expired before the making of an award, at the very latest it would be held to have expired when an award is made. It is thought,

however, that an offer could validly and more closely simulate the effect of a payment into court if it stipulated that it was open for acceptance for 21 days from its receipt and that thereafter acceptance was to be conditional on the recipient agreeing to pay the offeror's subsequent costs or on an application being made to the Arbitrator in respect of those costs. Where there is a counterclaim the offer should, by analogy with the rules, state whether it is intended to take into account and satisfy the counterclaim. The claimant can make an offer in respect of the counterclaim.

Such an offer is sometimes called a "sealed offer" from the practice of handing the Arbitrator a sealed envelope containing the offer. This has the disadvantage that it may inferentially tell the Arbitrator that an offer of some kind has been made. It is also thought to be unnecessary. At the end of the hearing, the Arbitrator should be asked, without the existence of the offer being disclosed, to defer consideration of costs until he has made his award on all other issues. As he can ordinarily make only one final award this requires that his award on liability and debt or damages will be an interim award. Costs are usually of such importance and the issues relating to them are sometimes so complex that this procedure is frequently and conveniently followed even if there is no offer to be taken into account. A request to follow this procedure should not, therefore, cause the Arbitrator to think that an offer has necessarily been made.

An Arbitrator has the same discretion as to costs as a High Court judge, (see Section 4(i) Arbitration Act) and the effect of such an offer on costs should in substance be the same as that of a payment into court. On being informed of the offer at the appropriate time, the Arbitrator's approach is to ask himself whether the claimant achieved more by rejecting the offer and going on with the arbitration than he would have achieved if he had accepted the offer.

In those circumstances it would be possible for the Arbitrator to apply the reasoning of Donaldson J. in **Tramountana Armadora SA v Atlantic Shipping Co. SA** [1978] 1 Lloyds Rep. 391 where he said:

> *"If the claimant in the end has achieved no more than he would have achieved by accepting the Offer the continuance of the Arbitration after that date has been a waste of time and money. Prima facie, the claimant should recover his costs up to the date of the Offer and should be ordered to repay the respondent's costs after that date."*

14. **The Hearing**

Hearings are usually held in a convenient venue agreed upon by the parties and usually paid for by them.

The hearing will be held in private and only the Arbitrator, the parties, their witnesses and their advisors or lawyers are entitled to be present. With the consent of the parties and the Arbitrator(s) others may attend such as clerks, stenographers, pupils and so on. As for witnesses if there are any, other than the parties themselves they would be required to remain outside the room until they have given evidence after which they may remain inside.

15. **The Award**

The award by an Arbitrator is akin to a judgment in a Court. It is the climax of the arbitration reference. The purpose of the award is to inform the parties of the decision of the Arbitrator and should be written in such a way and in such a form as to enable it to be enforced by leave of the Court in the same manner as a judgment or order to the same effect (Section 13 of the Arbitration Act). As a matter of law there is no special or set form that an award has to take, although some arbitration rules and agreements require written reasons to accompany the decision. If there

are no such specific requirements all the Arbitrator need to put in his/her award is his/her decision, no reasons are necessary. Section 4(c) of the Arbitration Act, however, requires the Arbitrator(s) to make their award in writing.

There are, of course, also good practical reasons, not least of all the question of enforceability, why the award should be expressed in an appropriate form. In this regard it is usual for the Attorneys-at-Law for the parties to ask at the preliminary meeting for the award to be in a particular form and signed by the Arbitrator, whose signature should be attested by a witness for evidential purposes.

The Arbitrator in making his/her award will have to bear in mind that the award is the final judgment in the reference (see Section 4(h) of the Arbitration Act). As such, the Arbitrator as well as the lawyers for the parties should ensure that everything is covered including costs and interest, as generally there is no going back to the Arbitrator after he/she has published a final award, since by doing so he/she is functus officio and has no power to rehear the case or alter the award save to correct clerical mistakes or errors arising from any accidental slip or omission pursuant to Section 8(c) of The Arbitration Act.

There are instances, however, where the Arbitrator may have to make an interim award before he can make a final award on the reference. This would arise in a case where the quantum of damages cannot be assessed until issues of liability are determined, for example where liability depends upon the true construction and interpretation of an agreement. In such cases, the Arbitrator has to be careful in making his/her award on liability an interim award so as not to be caught by Section 4(h) of the Arbitration Act which provides that:

> "the award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively".

It should also be noted that under Section 11 of the Arbitration Act, the Court or a Judge may remit the matters referred including the award for reconsideration by the arbitrators or umpire.

Further, under Section 12 of the Arbitration Act where an award has been improperly procured, the Court may set the award aside. Under this section of the Act, the Court can also remove an Arbitrator for misconduct.

In closing this section on the award, it is important to note the following:-

(a) Unless otherwise provided for by the Arbitration Agreement or clause or by some rules thereunder, the Arbitrators must, pursuant to Section 4(c) of the Arbitration Act, make their award in writing within three months after entering on the reference or after having been called on to act by notice in writing from any party to the submission unless the Arbitrators by any writing signed by them from time to time had enlarged the time for the making of the award.

(b) If the time for making the award has expired and the Arbitrator did not enlarge the time for the making of the award as aforesaid, then the Court or Judge on application to them may by Order enlarge the time for making the award from time to time pursuant to Section 10 of the Arbitration Act.

16. **Enforceability of the Award**

An award under the Arbitration Act may be enforced under Section 13 thereof by an application to the Court by the successful party for leave for the award to be enforced in the same manner as a judgment or order. This is done by an Originating Notice of Motion with an Affidavit in Support exhibiting the award.

An award, on the other hand, which is made in relation to an Arbitration which was not conducted under the provisions of the Arbitration Act is enforceable at common law by way of a suit on the award.

17. **Arbitration as a condition precedent to Litigation**

While parties cannot by contract oust the jurisdiction of the Courts they can agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an Arbitrator. Such a clause is called "Scott v Avery Clause" (which got its name from the case of the same name reported at [1843-1860] All ER (REPRINT) 1).

It is quite common for the contract to have in the clause submitting disputes and differences to Arbitration a provision that there is no right of action save upon the award of the Arbitrator. The parties in such a case made Arbitration followed by an award a condition of any legal right of recovery on the contract. This is a condition of the contract to which the Court must give effect, unless the condition has been waived.

It follows that where a dispute is governed by such a condition an action in respect of that dispute cannot succeed and such an action will not be allowed to continue.

18. **Other Acts dealing with Arbitration**

The following Acts deal with foreign awards:

(a) The Arbitration (Foreign Awards) Act

(b) Judgments and Awards (Reciprocal Enforcement) Act and the Arbitration Clauses (Protocol) Act deals with submissions where the protocol on Arbitration clauses apply.

These statutes deal with issues which are for another paper.

S.M. SHELTON

12TH June 2001

APPENDIX I

ARBITRATION

THE ARBITRATION ACT

ARRANGEMENT OF SECTIONS

1. Short title.
2. Interpretation.
3. Effect of a submission.
4. Provisions as to a submission.
5. Stay of proceedings
6. Notice to appoint arbitrator or umpire.
7. Refusal, incapacity or death of arbitrator. Failure to appoint arbitrator.
8. Powers of arbitrators or umpire.
9. Subpoenas.
10. Enlargement of time for award
11. Remission of matters by the Court for re-consideration of arbitrators or umpire.
12. Misconduct of arbitrator or umpire.
13. Enforcement of awards.

References under Order of Court

14. References by order of the Court.
15. References by consent of parties in any cause or matter to Registrar or Special Referee.
16. Registrar or Special Referee officers of the Court.
17. Power of Court of Judge as to references by order.
18. Court of Appeal.

General

19. Court may order writ of subpoena.
20. Stating case for opinion of the Court.
21. Terms of order.
22. Perjury.
23. Cases to which the Crown or Government is party.
24. Application of Act.

THE ARBITRATION ACT

[30th June, 1900]

1. This Act may be cited as the Arbitration Act.

2. In this Act -

"Court"	means the Supreme Court;
"Judge"	means a Judge of the Supreme Court;
"Registrar"	means the Registrar of the Supreme Court of Judicature of Jamaica;
"rules of court"	includes the Judicature (Civil Procedure Code) Law;
"Special-Referee"	means any Resident Magistrate, Clerk of the Courts, or other person who may be appointed in any action or matter as Special Referee by the Court or a Judge;
"submission"	means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

3. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court.

4. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the following paragraphs as far as they are applicable to the reference under the submission -

(a) if no other mode of reference is provided, the reference shall be to a single arbitrator;

(b) if the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award;

(c) the arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award;

(d) if the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators;

(e) the umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award;

(f) the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require;

(g) the witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation;

(h) the award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively;

(i) the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

6. In any of the following cases -

(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator;

(b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference, and make an award as if he had been appointed by consent of all parties.

7. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention -

(a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court or a Judge may set aside any appointment made in pursuance of this section.

8. The arbitrators or umpire acting under a submission Powers of shall, unless the submission expresses a contrary intention, have power -

(a) to administer oaths to or take the affirmation of the parties and witnesses appearing; and
(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and
(c) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

9. Any party to a submission may sue out a writ of subpoena *ad testificandum* or a writ of subpoena *duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

10. The time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not.

11. (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

12. (1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the Court may set the award aside.

13. An award on a submission may, by leave of the Court of or a Judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court

14. (1) Subject to rules of court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for enquiry or report to the Registrar or a Special Referee.

(2) The report of the Registrar or a Special Referee may be adopted wholly or partially by the Court or a Judge, and if so adopted may be enforced as a judgment or order to the same effect.

15. In any cause or matter (other than a criminal proceeding by the Crown) -

(a) if all the parties interested who are not under disability consent; or
(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury; or
(c) if the question in dispute consists wholly or in part of matters of account,

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before the Registrar or a Special Referee.

16. (1) In all cases of reference to the Registrar or a Registrar or Special Referee or arbitrator under an order of the Court or a Judge in any cause or matter, the Registrar or Special Referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by rules of court, and subject thereto as the Court or a Judge may direct.

(2) The report or award of the Registrar or a Special Referee or arbitrator, on any such reference shall, unless set aside by the Court or a Judge, be equivalent to the verdict of a jury.

(3) The remuneration to be paid to any Special Referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge.

17. The Court or a Judge shall, as to references under Power of order of the Court or a Judge, have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court.

18. The Court of Appeal shall have all the powers conferred by this Act on the Court or a Judge thereof under the provisions relating to references under order of the Court.

General

19. (1) The Court or a Judge may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum* shall issue to compel the attendance before the Registrar or a Special Referee, or before any arbitrator or umpire, of a witness whenever he may be within Jamaica.

(2) The Court or a Judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before the Registrar or Special Referee or before any arbitrator or umpire.

20. The Registrar or any Special Referee, arbitrator, or umpire may at any stage fo the proceedings under a reference, and shall if so directed by the Court or Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of thereference.

21. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

22. Any person who wilfully and corruptly gives false levidence before the Registrar, or any Special Referee, arbitrator or umpire shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly.

23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which the Attorney General, either in right of the Crown- or otherwise, or the Attorney-General on behalf of the Crown or-the Government of Jamaica is party, but nothing in this Act- shall empower the Court or a Judge to order any proceedings to which Her Majesty, or the Attorney-General on behalf of the Crown or the Government of Jamaica is a party, or any question or issue in any such proceedings, to be tried before the Registrar or any Special Referee, arbitrator, or. officer without the consent of .the Attorney-General, or shall affect the law as to costs payable by the Crown.

24. This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the law regulating the arbitration, or with any rules or procedure authorized or recognized by that law.

APPENDIX II

ARBITRATION CLAUSES

CLAUSE referring future disputes to a single arbitrator to be appointed by an appointing authority.

Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by a sole arbitrator to be appointed by ... (*the appointing authority*).

CLAUSE referring future disputes to a single arbitrator: long form

1. Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by a sole arbitrator ('the Arbitrator') such arbitration to be held in [ ].

2. The Arbitrator shall be appointed by agreement between the parties or in default of agreement by ... (*the appointing authority*).

3. The procedure to be followed shall be agreed by the parties or in default of agreement determined by the Arbitrator.

4. In the event of default by either party in respect of any procedural order made by the Arbitrator, the Arbitrator shall have power to proceed with the arbitration in the absence of that party and to deliver his award.

CLAUSE referring future disputes to a sole arbitrator in accordance with the UNCITRAL Arbitration Rules

Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by a sole arbitrator, such arbitration to be held in [ ] under the Arbitration Rules of the United Nations Commission on International Trade Law. The arbitrator shall be appointed by agreement between the parties or in default or agreement by ... (*the appointing authority*).

CLAUSE referring future disputes to two arbitrators: short form

Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by two arbitrators, one to be appointed by each party.

CLAUSE referring future disputes to two arbitrators or an umpire: long form

1. Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by two arbitrators, such arbitration to be held in [ ].

2. Each party shall appoint one arbitrator, and the arbitrators so appointed shall forthwith appoint an umpire. The umpire shall all hearings, including preliminary meetings, but shall not be called upon to act unless the arbitrators appointed by the parties fail to agree.

3. If either party fails to appoint an arbitrator within 7 clear days after the other party, having appointed his arbitrator, has served the defaulting party with a notice to make the appointment, the party who has appointed an arbitrator shall be entitled to appoint that arbitrator to act as sole arbitrator in the reference.

4. The procedure to be followed shall be agreed by the parties or, in default of agreement, determined by the arbitrators or, if necessary, by the umpire.

5. In the event of default by either party in respect of any procedural order made by the arbitrators or umpire, the arbitrators or umpire shall have power to proceed with the arbitration in the absence of that party and to deliver the award.

CLAUSE referring future disputes to a tribunal of three arbitrators: short form

Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration in [ ] by a tribunal or 3 arbitrators. Each party shall appoint one arbitrator and the third arbitrator shall be appointed by agreement between the arbitrators so appointed, or in default of agreement between them, by ... (*the appointing authority*).

CLAUSE referring future disputes to a tribunal of three arbitrators: long form

1. Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration in [ ].

2. The tribunal shall consist of three arbitrators and shall be constituted as follows:

   2.1 The claimant shall nominate an arbitrator and may by notice in writing call on the other party to nominate an arbitrator within 30 days of the notice, failing which such arbitrator shall at the request of the claimant be appointed by ... (*the appointing authority*).

   2.2 The third arbitrator [who shall serve as president of the tribunal] shall be appointed by agreement between the two parties appointed under 2.1 above or, in default of agreement within 30 says of the appointment of the second arbitrator, on the nomination of ... (*the appointing authority*) at the written request of either or both of the parties.

   2.3 Should a vacancy arise because any arbitrator dies, or resigns, refuses to act, or [in the opinion of his fellow arbitrators] becomes incapable of performing his functions, the vacancy shall be filled by the method by which the arbitrator was originally appointed.

3. The procedure to be followed shall be agreed by the parties or, in default of agreement, determined by the tribunal.

4. In the event of default by either party in respect of any procedural order made by the tribunal, the tribunal shall have power to proceed with the arbitration in the absence of that party and to deliver its award.

CLAUSE referring future disputes to a tribunal of three arbitrators: alternative form

1. Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration in [ ].

2. The tribunal shall consist of three arbitrators and shall be constituted as follows:

   2.1 The claimant shall nominate an arbitrator and may by notice in writing call on the other party to nominate an arbitrator within 30 days of the notice, failing which such arbitrator shall at the request of the claimant be appointed by ... (*the appointing authority*).

   2.2 The third arbitrator [who shall serve as president of the tribunal] shall be appointed by agreement between the two parties appointed under 2.1 above or, in default of agreement within 30 says of the appointment of the second

arbitrator, on the nomination of ... (*the appointing authority*) at the written request of either or both of the parties.

2.3 Should a vacancy arise because any arbitrator dies, or resigns, refuses to act, or [in the opinion of his fellow arbitrators] becomes incapable of performing his functions, the vacancy shall be filled by the method by which the arbitrator was originally appointed.

3. The procedure to be followed shall be agreed by the parties or, in default of agreement, determined by the tribunal.

4. In the event of default by either party in respect of any procedural order made by the tribunal, the tribunal shall have power to proceed with the arbitration in the absence of that party and to deliver its award.

5. Any award or procedural decision of the tribunal shall if necessary be made by a majority vote. In the event of no majority vote being formed, the president shall make an award or procedural decision as if he were sole arbitrator.

CLAUSE for inclusion in partnership deed

1. Any dispute or difference in connection with this deed which may arise between the partners or their respective representatives concerning the construction or application of this deed, or in connection with any account, valuation or division of assets, debts or liabilities to be made under this deed, or as to any act, deed or omission of any partner or as to any other matter in any way relating to the partnership business or its affairs, or the rights, duties or liabilities of any person under this deed shall be referred to arbitration. Such arbitration shall be held in [ ] and the matters in dispute shall be referred to a [sole arbitrator or a tribunal of three arbitrators].

CLAUSE appointing arbitrator to decide disputes and to settle documents under Heads of Agreement

Any dispute or difference between the parties in connection with these Heads of Agreement shall be referred to and determined by a sole arbitrator ('the Arbitrator') to be appointed by agreement between the parties or in default or agreement by ... (*the appointing authority*) and the Arbitrator shall have power to settle the full form of such clauses as he may in is discretion deem necessary for completely carrying into effect the true intent of the parties, such intent to be determined by the Arbitrator.

CLAUSE for inclusion in arbitration clause where one party is resident outside the jurisdiction

All proceedings, notices of proceedings and other notices in connection with or to give effect tot he arbitration shall be served upon ... (*the agent in England for the foreign party*) at this address in [ ] on behalf of ... (*the foreign party*) and ... (*for foreign party*) shall be found by such service as if he had himself been personally served within the jurisdiction.

CLAUSE referring future disputes to arbitration administered by the Chartered Institute of Arbitrators

Any dispute or difference of any kind whatsoever which arises or occurs between the parties in relation to any thing or matter arising under, out of or in connection with this agreement shall be referred to arbitration under the Arbitration Rules of the Chartered Institute of Arbitrators.

CLAUSE referring future disputes to arbitration under the Rules of Arbitration of the International Chamber of Commerce

Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration in [ ] under the International Arbitration Rules of the London Court of International Arbitration.

CLAUSE referring disputes to arbitration under the Rules of Arbitration of the International Chamber of Commerce

Disputes arising in connection with the present contract shall be finally settled under the Rules of [Conciliation and] Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules.

CLAUSE referring disputes to arbitration under the Rules of the International Centre for Settlement of Investment Disputes

The parties to this agreement submit to the jurisdiction of the International Centre for Settlement of Investment Disputes any dispute relating to or arising out of this agreement for arbitration pursuant to the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States.

CLAUSE referring future disputes to arbitration under rules to be agreed between the parties or in default of agreement under the International Arbitration Rules of the London Court of International Arbitration

Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration in [London]. Such arbitration shall be conducted in accordance with such arbitration rules as the parties may agree or in default of agreement in accordance with the International Arbitration Rules of the London Court of International Arbitration.

CLAUSE referring future disputes to arbitration in accordance with the Rules of the American Arbitration Association

Any controversy or claim arising out of or relating to this contract or the breach of it shall be settled by arbitration in accordance with the Commercial Arbitration Rules of th American Arbitration Association and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

LIST OF CASES REFERRED TO:

1. *Ellis Mechanical Services Ltd v Wates Construction Ltd (1976) 2 BLR 57*
2. *Heyman v Darwins Ltd [1942] AC 356*
3. *Northern Regional Health Authority v Derek Crouch Construction Co. Limited [1984] 2 All ER 175*
4. *Davies v Ely Lilly & Co [1987] 1 WLR 428 or [1987] 1 All ER 801*
5. *Richard Roberts Holdings v Douglas Smith Stimpson (1989) 22 CLR 94*
6. *Murray Pipework v UIE Scotland Limited [1990] CLR 92*
7. *Calderbank v Calderbank [1975] 3 All ER 333*
8. *Tramountana Armadora SA v Atlantic Shipping Co. SA [1978] 1 Lloyds Rep 391*
9. *Scott v Avery [1843-1860] All ER REPRINT 1*

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Encyclopaedia of Forms and Precedents 5th Edition Volumes 3 and 3(1)

The Journal of the Chartered Institute of Arbitrators

Keating on Building Contracts 5th Edition

The Arbitration Act

The Judicature (Civil Procedure Code) Act