ARBITRATION PRACTICE AND PROCEDURE

INTERLOCUTORY AND HEARING PROBLEMS

By

D. MARK CATO

FRICS, FCIArb

SECOND EDITION

FOREWORD BY

The RT. HON. LORD MUSTILL

President of the Chartered Institute of Arbitrators

ENDORSED BY THE ROYAL INSTITUTION OF CHARTERED SURVEYORS AND THE ROYAL INSTITUTE OF BRITISH ARCHITECTS

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FOREWORD

BY THE RT. HON. LORD MUSTILL
President of the Chartered Institute of Arbitrators

Many people think that arbitration law is simple to understand and simple to apply, given a modicum of common sense. Ideally, this would be so, but is not. The great advantage of arbitration is that it combines strength with flexibility. Strength because it yields enforceable decisions, and is backed by a judicial framework which, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose procedures which fit the nature of the dispute and the business context in which it occurs. A system of law which comes anywhere close to achieving these aims is likely to be intellectually difficult and hard to pin down in practical terms. This has traditionally been the case with the English law of arbitration. Its strength was the great wealth of practical guidance given by judicial decisions arising from concrete practical disputes. The trouble was, that its wealth could rarely be drawn on, or employed to yield general principles, except by those who already knew their way round it. Anyone writing on the subject had therefore to explain the principles and their sources whilst anchoring them to practicalities. Many attempts have been made, but none resembling the First Edition of this work. To exclaim as I did at first reading: "I have never seen anything like it", would not always be a commendation. Yet it was true, for the intertwining of practical example, at every step of the procedure, with statute, decision and dictum was I believe quite unique.

The techniques which gave the book its particular flavour must however have made the preparation of this Second Edition a particularly difficult task. The merits of the Arbitration Act 1996 need no emphasis here. Without doubt the Act represents a fundamental change for the better. But equally without doubt it transforms, for the moment at least, English arbitration law from a kaleidoscope of individual decisions and *dicta* into a tight statutory code. Its clarity and simplicity bring with them their own conceptual and practical problems. To reconstruct a work which originally reflected that kaleidoscope into one which accommodates the new kind of arbitration law must have required great resource and endless labour. The new edifice has yet to be inhabited. Nobody could doubt the craftsmanship and resource with which one original work has been replaced by another: different, but just as original.

August 1997 MUSTILL

PREFACE TO THE SECOND EDITION

With the enactment of a new Arbitration Act—The Arbitration Act 1996—a complete re-write of the First Edition of this book became inevitable.

I started this task shortly after the DAC's July 1995 Report on the Bill was published. Where the initial intention was to have a consolidating Act of current legislation—the AA '50, AA '75 and AA '79 with amendments—that was altered before the July Report to be:

> *"An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement..."*

The original clause 69 of the Draft Bill limited the application of the new legislation to arbitration agreements made *after* the commencement of the Act. Thus, it was generally accepted that it could be two or three years after the enactment of the new statute before the first disputes started to come through in the form of arbitral references. With that very much in mind, all of the initial updating of the book concentrated heavily on what is now the "old law" with only passing speculative reference to the proposed legislation.

All of that changed during the progress of what is now AA '96 (the Act) such as to make the Act applicable to all references commenced following enactment whenever the actual arbitration agreement was made. This caused me to have a total re-think concerning the structure and contents of this book and here is the result: a monstrous enlargement of the first edition, now covering all aspects of this immensely important piece of legislation—important, that is, to the commercial and arbitral world.

I will not dwell on the new Act as I expect that by the time this work reaches the bookshops most of my readers will have had a surfeit of seminars and conferences explaining the intent and purpose of the various sections. However, I must just say that I believe that this Act provides the most exciting of challenges to arbitrators and those practising around them. It has come at a time when the court lists are overcrowded; when delay in litigation is inevitable and the need to reform civil litigation to provide access to justice on a wider scale is recognised as a priority. It has followed closely on the Woolf report recommending over 300 changes in procedures to improve civil litigation, foremost amongst which is better case management by judges. The difference between arbitration and litigation is that the arbitration world has its new law already. It has its powers and the structure is in place *now* with the passing of the Act. It could take years to achieve the substance of the proposed Woolf reforms, so arbitrators and practitioners have a uniquely long head-start to re-establish arbitration as *the*

alternative form of dispute resolution—indeed, as the *preferred* form of dispute resolution.

Provided arbitrators and the parties, or their representatives, where they get involved in deciding what powers the tribunal should have under s.34 AA '96—*Procedural and Evidential Matters* recognise that the tools now exist for flexible, speedy and cost-effective resolution of their disputes and spurn the old ways that mimicked the High Court procedure (unless, of course they happen to be most appropriate to the case in hand), then arbitration should be entering into a very exciting era.

What I have tried to do in the rewriting of this book is to reflect this available flexibility and suggest just some of the ways that the innovative exercise of the powers vested in the tribunal to case manage the disputes entrusted to them could be used, if appropriate. In fact, I have attempted to do no more than to demonstrate ways that I believe arbitrators could approach the duty imposed upon them by s.33 AA '96, to:

> *"(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."*

This section must be read in conjunction with s.1 which sets out the overall objectives of this legislation:

> *"(a) ... to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
> *(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."*

And last, but not least, the arbitrator's new duties and powers must be considered in the light of the parties' responsibilities, not only to themselves but also to the arbitrator; in particular s.40 where the parties are mandated to

> *"(a) ... do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*
> *This includes—*
> *(a) complying without delay with any determination of the tribunal as to procedural and evidential matters, or with any order or direction of the tribunal..."*

As most arbitral references start with a preliminary meeting, that is an excellent starting point for the new thinking that this Act dictates. So, I say this to all arbitral practitioners: start by asking yourselves "is a preliminary meeting necessary at all?" and go from there. In section 12.1.2 I have included a 12-page agenda for the preliminary meeting, covering matters which I believe now need to be considered at the start of most arbitrations. Scorn has been poured on this document by some of my dear friends in the business, mainly because of its length. They prefer the "wait and see" approach. Their argument goes like this. Why bother to raise the "default" sections of the Act? If the parties don't bother to make an agreement then so be it, I get the powers. Who am I to say that they are wrong? My approach at the moment is different—I may well change as time goes on and I gain more experience under the Act. However, at present, I believe one should bring all of these matters out in the open at the Preliminary Meeting. It really takes very little longer than the older pre-AA '96 meeting, and at least everyone knows where they stand.

Having said that, I fully accept that this agenda would be a nightmare, and indeed totally inappropriate, to, say, unrepresented parties in a relatively modest dispute. To emphasise this point I would really like to head this document

PIC 'N' MIX AGENDA

except that might be taken to be too frivolous, but that is the intent—total flexibility. Approach every new arbitration (the Act does not say "reference" anymore—although I still use the term) with an open mind and a blank sheet of paper. Use your Agenda as an *aide memoire*. In some cases, involving heavy legal representation, it may be entirely appropriate to use the agenda in the form set out herein. In other cases, a substantially slimmed down version would be more appropriate. (See, for example, 27.2.9 where this agenda is reduced to a one page Appendix to a letter to the parties.)

The reader will, no doubt, develop his own agenda and, as I say, in due course I may well slim down my own.

Beyond that, much of the guidance humbly offered in this work is based on good commonsense, good practice and using AA '96 powers to the full to attempt to achieve the objective of fair, speedy and cost-effective resolution. In this regard, I should be very happy to hear from any of my readers about their own experiences under AA '96; the sort of problems they faced and possibly how they resolved them—hopefully there will be future editions of this book in which such experience can be shared with others and become part of the essential nexus of arbitral knowledge.

Where, in my first book, I sought problems from many colleagues, and indeed, received a goodly number of letters, the overall result was disappointing. There were very few situations which were not fairly commonplace and, in the end, less than 10 per cent of the original examples were gleaned from outside sources. This time round I have based most of the new examples on my own experience or imagination—I opened a file the day after the First Edition was published in 1992 and have fed this over the years with situations I found myself in, in over 80 different references for which I was appointed over this period.

In addition, where necessary to illustrate a point, I have drawn heavily on decided cases; by making the facts of the example similar to the facts of a decided case, the "course of action" in such an example is itself authoritative.

Another ploy I have used is to introduce Thomasina (from my other book, *The Sanctuary House Case*). Thomasina, it will be recalled for those of you who have read the other book, was the arbitrator's pupil. She is a dear girl who is very keen to learn and frequently tries the patience of my "*alter ego*", the kindly arbitrator in *The Sanctuary House Case*—Mr D Emsee. By listening to what he has to say on a possible course of action and then asking "*but what if...*", Thomasina stands in the shoes of all of us who would like to ask "*what if*", but perhaps feel that, either we should know the answer and therefore should not be asking, or we are reticent about putting that question to the person to whom we are talking.

To confuse matters further, Thomasina has a boyfriend called Charley, who is what is known in the trade as a "rent boy" or, more correctly, the pupil of a rent review arbitrator. Charley occasionally adds his comments to solutions to problems from a rent review arbitrator's perspective. Having said that, let me assure the more serious reader who finds these characters intrusive and distracting that there is very little input into this book by either of these pupils; they have merely been used, *very occasionally*, as a

transparent didactic device for exploring situations from different angles. My own reason for even mentioning this is to avoid the reader suffering the same fate as a colleague of mine who, coming across Thomasina for the first time, in one of my examples, asked who on earth she was?

I must mention the JCT Arbitration Rules, which feature in a number of examples. When I started this update I was aware that these Rules were themselves being updated to incorporate some of the changes that practitioners have recommended should be made after some years of using these Rules. The revised version of these Rules was then delayed due to the imminence of the new Act and I had hoped that the new Rules would have been published in time for me to incorporate them into this book. However, that was not to be. There was an added complication. A working party, comprising members of all interests in the building industry, have been compiling a composite set of Rules which it is hoped will eventually apply to all building arising out of standard construction contracts. Although the first draft of these Rules is currently in circulation for consultation, as there is no guarantee, if and when these composite Rules will be implemented, the JCT Rules committee have published their own draft revisions. I suspect that the JCT Rules will apply for many years to come irrespective of any composite Rules which may be introduced and adopted.

The July 1995 Draft of the JCT Rules in its final and approved form is included in Appendix 3 to this work. This draft was not approved until the end of May 1997 and therefore came too late to incorporate into the examples in this book. Having said that, this is not too serious as there are only a few examples in which these Rules are cited. Also the changes that have been made to these Rules are not substantive.

Basically these changes can be summed up as follows:

1. *Rule 6 is now split into 6A and 6B—6A: Full Procedure with Statements and a hearing.*
   6B: Full Procedure with Pleadings and a hearing.
   A rather surprising change really, considering we are being urged to move away from High Court procedures, whereas this change takes us back towards them. However, I gather that there have been criticisms over the years that this alternative was not available (although, I must say it never stopped me agreeing with the parties when Full Pleadings were obviously more appropriate than Statements of Case!).
2. *Rule 11 has introduced the concept of the "part award", reflecting the similar provision in AA '96.*
3. *Rule 12 again covers the Arbitrator's powers, specifically related to the "default" and "optional" sections of the Act.*
4. *Rule 13 is new and covers the removal of the arbitrator.*

All of these changes, plus the other drafting changes, can be seen in Appendix 3.

Whilst much has changed since the First Edition I recommend readers to glance through the Preface to that work, as it explains succinctly what I had in mind when I started out on this project. For example, it warns that for "Course of Action" read "*just one reasonable and sound solution to the problem posed by the question*".

Apart from the Preface from this First Edition, which remains intact, scarcely anything else does. Most of the 300 odd original examples are buried deep in the new and wider exploratative discussions which flowed from the questions posed.

I have frequently incorporated an article or a talk on a particular topic which is apposite to the answer to the question in the example being considered. So much research goes into articles or talks for seminars which then so frequently get consigned to that ever-increasing pile of paper that most of us store in the misplaced anticipation

of referring to it as some stage in the future. Alas, if your pile is anything like mine, it is so high and the relevant material buried so deep in it that it scarcely, if ever, sees the light of day again. Now, such pearls of wisdom are encapsulated for ever into examples (or, perhaps in this case, discussions) in this book for all to learn from and apply in practice.

Similarly, the reader will note that many sections of this book start with a "Generally" example. This has enabled me to introduce the key sections of the Act applicable to the subject matter of the chapter in which we are then in. The pattern which I have followed is to set out the relevant section of the Act and then follow this with the immensely informative comments from the DAC's *February 1996 Report*, which they prepared for the Third Reading of the Bill. For the very reason that the *February 1996 Report* does not always reflect the precise final wording of AA '96, however, this was clarified in January 1997, by a *Supplementary Report on the Arbitration Act 1996*—again, from the DAC Committee under the chairmanship of the Rt Hon Lord Justice Saville—and, where applicable, I have included comments from this *Supplementary Report*. I have also been fortunate to be able to add comments from Lord Justice Saville, as well as those from Toby Landau, the barrister to whom the DAC Committee were indebted for his assistance. Following these comments I have then drawn on the three seminal works which followed publication of the Act.

The Arbitration Act—A Commentary by Bruce Harris, Rowan Planterose and Jonathan Tecks.
Arbitration Act 1996—A Practical Guide by Margaret Rutherford and John Sims.
Arbitration Act 1996—An Annotated Guide by Robert Merkin.

These commentaries/guides have been very helpful and each, in its way, contributes something to the interpretation of the Act. I wholly recognise the contribution made by these learned authors to the discussions which form part of the example in which they are cited.

I can thoroughly recommend to those of you who have not already acquired all three of these works to do so, as each in its way puts its own slant on the interpretation of the Act. Each brings experience from a different perspective—Robert Merkin from academia; Margaret Rutherford and John Sims primarily from the arbitrator's view (although, of course, it must be remembered that Margaret is also a QC); and the nice combination of maritime arbitrator in Bruce Harris, coupled with his two barrister colleagues from Gray's Inn Square, Rowan Planterose and Jonathan Tecks.

In dealing with acknowledgments, although the substance of this work is my own, I have already highlighted elements drawn from the experience of others.

In addition, I owe grateful thanks to the following:

Lord Mustill, one of our Law Lords, and doyen of the arbitration text book writers, President of the Chartered Institute of Arbitrators, for his unflagging support and kindness in taking time out from an over-crowded schedule to look through this work and generously to grace it once more with his Foreword.
Nicholas Carnell of S.J. Berwin & Co, solicitor—for some useful examples in Chapter 13—Discovery.
Tim Cooper of Butters, surveyor and arbitrator—for some rent review examples (Charley's comments).
Julian Critchlow of S.J. Berwin & Co, solicitor—for reading the entire work for legal accuracy and for writing Chapter 7—Common Law Arbitration.

Tony Ensom of Bucknall Austin, expert and arbitrator—for writing most of the initial draft of Chapter 15—Expert Determination.
Ann Glacki of James R. Knowles, librarian—for allowing me to quote from their weekly digest publication BLISS (in instances *verbatim*) in the examples listed following the main Bibliography.
Toby Landau of Essex Court, barrister—for reading and useful comments on Chapter 21—Serious Irregularity.
Professor Michael O'Reilly of Kingston University, Surrey—for reading and offering suggestions on Chapter 9—Costs.
Keith Pickavance, expert and arbitrator—for some useful comments on section 14.3—Expert Evidence in Chapter 14.
Rowan Planterose, barrister and arbitrator—for reading and commenting on section 27.6—Multi-Party Arbitrations, in Chapter 27.
John Riches of Henry Cooper Consultants, expert, claims consultant and arbitrator—for researching and producing much good material for Chapter 21—Misconduct—Serious Irregularity.
Victoria Russell of Berrymans, solicitor—for allowing me to quote from the paper she presented to Arbrix in March 1997 on arbitrators' misconduct.
Margaret Rutherford QC, arbitrator/barrister—for reading section 13.4 of Chapter 13—Documents Only—and allowing me to reproduce her Model Award on a travel dispute.
Neville Tait, expert and arbitrator—for providing some useful material for section 13.4—Documents Only, in Chapter 13.
Dr Donald Valentine of Atkin Chambers, barrister—for a number of examples in Chapter 35—Appeals.

Finally, and by no means least, I thank my long-suffering secretary Doreen Burford, who has typed every page of this mammoth tome at least twice and is certainly as pleased as I am that it is finished—although possibly for different reasons.

In this vein I also thank the presidents of the Royal Institution of Chartered Surveyors and the Royal Institute of British Architects for agreeing to allow the bodies that they represent to "endorse" this work, thus giving it a unique seal of approval, particularly when they are coupled with the Chartered Institute of Arbitrators, through its President, Lord Mustill.

The galaxy of experienced practitioners whom I have listed above should undoubtedly add some weight of authority to this work but, at the end of the day, I take full responsibility for the opinions stated—generally in the Course of Action—and any errors (other than typographical errors) which occur in the text.

That reference brings me neatly to my publishers, not in terms of errors—for they take immense care to avoid them—but for the encouragement and support they have given me in bringing out this Second Edition of what was undoubtedly a successful First Edition that plugged a gap in practical advice to arbitral practitioners which clearly needed filling.

D. Mark Cato
Clavering
April 1997

PREFACE TO THE FIRST EDITION

"Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, even though pertinent."

SIR FRANCIS BACON, *Essay of Judicature*
(for "judge" read "arbitrator"—Author's note)

Having decided in my early fifties to pick up the threads of arbitration which I had abandoned 30 years earlier, following qualifications as a chartered surveyor, I found myself once more a student.

It transpired that I was still *compos mentis* enough to pass the Chartered Institute of Arbitrators' examination leading to Fellowship following which I took up pupillage under my eminent contributing editor Ian Menzies.

It was when I started to sit as an arbitrator on my own account that I realised there were numerous situations in which the tyro arbitrator would find himself where there is very little printed guidance to which he could refer. There is, of course, the *magnum opus* on arbitration—Mustill & Boyd—in which I suspect virtually every situation is covered in one way or another, if you knew where to look. There are also many other useful books which cover elements of practice and procedure but none entirely devoted to practical examples. This being so I conceived the idea of compiling such a book, initially to be based on my own limited experience and that of my erstwhile Master Ian, who of course, has a far richer tapestry of cases on which to draw.

It then occurred to me that maybe I should give other arbitrators the opportunity to share their experiences with our readers through the pages of this book. As a result, and with the considerable assistance of the magic of word-processing, I personally wrote to around 3,000 arbitrators worldwide. My letter invited anecdotes from the recipient's own arbitral experience. Arbitrators in all fields were approached, most of whom were members of the Chartered Institute, but a number who were not. I wanted the book to enjoy the widest possible appeal and so included letters to the Arbitrator's panels of such bodies as G.A.F.T.A.; L.M.M.A.; L.M.E.; F.O.S.F.A.; I.S.V.A.; A.S.I. *et al.* I then sat back waiting for the avalanche of material to come in as a result. I had visions of being able to use a quotation similar to that at the beginning of Hepple & Matthews' Book on *Tort—Cases and Materials*:

"I have gathered a posy of other men's flowers and nothing but the thread that binds them is my own."

MONTAIGNE

Sadly, this was not to be. Despite sending an example of the type of material in which I

was interested many of the responses which I received assumed I was seeking details of bizarre or unusual situations. As a result one or two little gems emerged.

The following extract comes from a letter written at the end of the last war by an eminent arbitrator who demonstrates the need to retain a sense of humour at all times.

> *"Bearing in mind that this dispute had been in existence for about the length of the First Great War I think it not inappropriate to publish my Award on Armistice Day. Despite the considerable attachment I have formed for this case I hope that my Award results in a cease fire and will not lead to further and prolonged battle so as to result in a voyage to the House of Lords and a final aggregate of time which might equal the combined durations of both World Wars."*

In another situation counsel was faced with a long-winded and evasive witness from whom, in cross-examination, he was unable to obtain a straight answer. Out of the blue he posed the following question. "Do you own a helicopter?" "Certainly not", retorted the witness. "Ah!" said counsel. "So you can give me a direct answer if you wish."

Finally, a response I had from a commodity arbitrator referred to the G.A.F.T.A. rules having been refined to cater for the man "who lives on the top of the mountain in Peru". Presumably this is the international equivalent to our reasonable man on the, more mundane, Clapham omnibus.

Sadly this is the extent of the deliberate humour in this book. What we set out to do was to give good sound practical guidance to new and experienced practitioners alike on situations which they might face in their arbitral work. However experienced an arbitrator is, every new appointment offers potentially new challenges. Add to this new matters affecting the conduct of the arbitration proceedings such as the introduction of the J.C.T. Arbitration Rules—since the middle of 1988 and now becoming more and more prevalent in construction arbitration cases—and statutory changes such as those introduced by the Courts and Legal Services Act 1990, then good practical advice is always welcome.

Beware of the sort of arbitrator who replied to my letter to the effect that he had been appointed to over 150 references and never yet had a problem!

Faced with a new situation to which the solution is not immediately obvious the sensible arbitrator will take time to consider his preferred "Course of Action" and, of course, there may well be a number of ostensibly satisfactory solutions. In this book we have either used situations drawn from reported and unreported cases, or hypothesised facts in order to illustrate a particular point in a "Course of Action". For "Course of Action" read "just one reasonable and sound solution to the problem posed by the question".

The odd response to my mailshot was that a practical book such as we were suggesting containing recommendations could be quite dangerous. The facts of individual cases are rarely identical and even where they are very similar, different considerations may apply. The authors entirely accept this reservation however and we trust the good sense of practitioners using this book to realise its limitations. If they do that and remember that the "Course of Action" are by no means gospel but merely one possible solution, they should find this book an extremely useful tool.

This conveniently leads me to the question of authorities. The solution suggested to the problems posed in this book could be likened to a party citing authority to a tribunal in support of their contentions except that the "Courses of Action" given here are *not*

authority. As a judge or arbitrator would weigh the authorities given to him against the facts of the case he was hearing, so readers of this book should view the "Course of Action" proposed against their own particular problem.

Initially I had not intended to cite any authorities at all for the very reason that it would prompt the sort of criticism I have outlined. Then, as I got into the book, I realised that without authorities the value of it as a tool in the arbitral process would be severely diminished in some obvious circumstances. As a result the bulk of examples given have authorities cited. We hope that they are the latest and prior to publication have not been overruled. If any readers are aware of a later more apposite authority than we have cited then we shall be happy to hear from them. Having said that, a warning about following precedents too rigidly.

The arbitrator's task is to do justice to the parties within the scope of the law governing the dispute. He may have many cases cited to him from each side in support of their respective arguments; each equally persuasive and perhaps, on first heaing, apparently equally applicable to his present case. Having heard the evidence he will then have to decide which of these *rationes decidendi* he prefers, bearing in mind the facts of the case. In doing so he will be well advised to recall Lord Denning's words:

> *"If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. They will be lost in 'the codeless myriad of precedent. That wilderness of single instances'. The common law will cease to grow. Like a coral reef it will become a structure of fossils."*
>
> From Precedent to Precedent

> *"It would, I think, be a great mistake to cling too closely to a particular precedent at the expense of fundamental principle."*
>
> London Transport Executive *v.* Betts *[1959] A.C. 213, H.L.*

> *"The doctrine of precedent does not impel your Lordships to follow the wrong path until you fall off the cliff... you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps."*
>
> Ostime (Inspector of Taxes) *v.* Australian Mutual Provident Society *[1960] A.C. 459, H.L.*

It is only fair to point out that their Lordships were not necessarily of a mind with Lord Denning on this issue, but then, their Lordships are not bound by their own decisions.

Of course, arbitrators are not judges and should be ever mindful of this; their decisions bind no-one—not even themselves in disputes involving different issues. Their awards do not create precedent but they should dispense justice or rather not work injustice, in which case this objective should be kept firmly to the forefront when weighing in the balance various precedents cited.

Where we have cited judgments we have sought to include that part of the *ratio* or *dictum* which is most applicable to the problem being dealt with, with all the dangers of quoting out of context which that implies, so again we would urge the reader to remember that these examples are intended for guidance only. Similarly, where statutes or rules are referred to the relevant section is reproduced within the "Course of Action". We were determined that this book should be complete in itself and not make reference to cases and other documents, the full text of which may not be readily accessible to the average reader.

The Arbitration Acts, relevant parts of the Courts and Legal Services Act 1990 and

other Acts, extracts from the Rules of the Supreme Court (*The White Book*) and various arbitration rules are all reproduced in the appendices.

The structure of the book follows a simple alphabetical order commencing with "Arbitration Agreement" and ending with "Witnesses".

It is sectioned by each new subject matter. Some sections are very short and may comprise only one brief examples. Others, particularly those where problems are frequently encountered, may have up to a dozen different examples, some of which may appear to overlap. We make no apology about this—it was intentional. It demonstrates that the solution of problems derived from different sets of facts may well lie in the same or similar "Course of Action". Rather than referring a reader back to a previous example we have, where appropriate, repeated a solution incorporated in a "Course of Action" suggested for a previous example.

The reader will also observe that from a relatively simple set of facts a "Course of Action" may be developed to explore possible related side issues. For this reason we have taken immense care over the indexing to ensure that the reader will readily be able to locate the subject matter on which he requires guidance.

The subject headings are listed in the table of contents. At the beginning of each new subject heading within the body of the book there is listed the headnote principle for each separate example which follows under that heading. Then at the back of the book is what I hope will prove to be a comprehensive index.

Also ... will be found the Acknowledgements. Although I received several hundred replies to my invitation for contributions to this book, in the event very little of great value materialised. Where anyone took the trouble to respond with an anecdote or problem we have listed them in the Acknowledgement section, whether all or any of their material was used or not.

Speaking of acknowledgements Ian and I owe an enormous debt of gratitude to Lord Mustill—as he is now—our congratulations to him on his elevation to the House of Lords—for kindly writing the Foreword and to Ron Plascow, the Head of the Construction Division of Mills & Reeve, Solicitors of Cambridge, for reading the draft for legal correctness and as a result making a number of very useful suggestions and for his assistance in editing.

I am personally indebted to Ian Menzies, my contributory editor and erstwhile Master, who in his year of office as Chairman of the Chartered Institute of Arbitrators found time from an extremely busy schedule to read and comment on the draft where he may have had an alternative viewpoint on my proposed "Course of Action". I am glad to say that there were very few situations where we held diametrically opposed views and if we did, after more research, one or other—more often me than Ian—came round to the other's viewpoint.

You, the reader, may too hold strong views about some of the suggested "Courses of Action". If such views are based on authority we should, of course, be pleased to hear from you. Also, now that the serious nature of this book is manifest, should any reader have dealt with a situation not presently covered amongst our 316 examples in this book which he feels would be of general interest, by all means send me details—there is always the second edition to consider!

Inevitably, with Ian and Ron Plascow's suggestions, my own second thoughts to the structure of the book evolved and in the final editing, it meant that my secretary, Doreen

Burford, had to amend and reprint a substantial number of pages of the text at least twice—I thank her for her patience and fortitude.

D. MARK CATO

Clavering
March 1992

Any credit for the conception, gestation and parturition of this book belongs to Mark Cato. My contribution has been minimal but, I trust, not ineffective.

A very high proportion of arbitrations settle before getting to the stage where an arbitrator has to make an award other than one, by consent, confirming the settlement terms, but all arbitrations go through some of the interlocutory stages. It, therefore, appeared to Mark and to me that some practical thoughts culled from a variety of sources, dealing with typical and some not-so-typical, problems which occur during these interlocutory stages would be of some value to those involved, in whatever capacity, in arbitration. I cannot claim that the solutions suggested are the only, or even the best available, but they are, I believe, solutions which have worked. No two cases are identical but if readers find that some of the practices we have included can be adapted or adopted in their own particular situations then we will have achieved what we set out to do.

IAN MENZIES

Tonbridge
March 1992

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