Commercial Arbitration

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Lord Mustill

Stewart C Boyd QC

Second Edition

2001 Companion



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Commercial Arbitration

2001 Companion Volume to the Second Edition

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2001 Companion Volume to the Second Edition

Preface

The lapse of time since the Second Edition, much longer than planned, would ordinarily have required no more than continues patience from the readers of the Second Edition, and from the authors the analysis of a larger volume of reported decisions, coupled perhaps with the expression of a greater concern about the cost and duration of arbitrations and about the deterioration of the spirit in which they are being conducted, and the suggestion of ways to put things right. In short, there would have been a Third Edition, to project the developments already on foot in 1989 into the dispute resolution environment of the twenty-first century. The intervention of the Arbitration Act, 1996 has ruled out this option. Updating is still necessary, and the substance of the law remains, except in a few important respects, very much the same as if the Act had not been passed. The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities, the marshalling of which was the function of the two previous editions, have been replaces by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.

These fundamental changes in the basis, although not the immediately applicable detail, of English arbitration law could perhaps have been accommodated within a Third Edition simply by patching the substance and statutory origins of the new laws into the text of the Second Edition. In agreement with the Publishers we have rejected this option. Until now, the work has been an exercise in speculative discussion based in the decided cases. The principles derived from them may well be largely intact, but their origins and philosophy are new. Only a radically rewritten work will suffice, and experience has shown that the time-scale for producing a largely new book will be longer than is fair to those who have to rely on the Second Edition. We have concluded that a large-scale refurbishment, extending well beyond a supplement, is the best way to bridge the gap to whatever further edition may be justified by demand.

The resulting 'Companion Volume' is in three parts. Part I is concerned with general features of the 1996 Act. Its history and the influences which bore upon its conception; its drafting and legislative techniques; the substantive changes which it brings about; its intellectual foundations, seen in terms of the four 'Pillars' which we identify — these and other features are identified and discussed. Part I concludes by identifying, and dealing in bare outline with a miscellany of contemporary issues, not covered either by the Act or by the Second Edition. The

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purpose of this material is not, we must emphasise, to offer a complete study of these questions, but simply to draw attention to their existence, and to suggest a few directions for intellectual exploration, together with a few pointers towards the published sources which, if the courts are to give an adequate account of the problems, will need to be researched and analysed in more depth, and with a more cosmopolitan breadth of learning, than has hitherto been the case.

In summary therefore the object of Part I is to provide, in quite general terms, a series of navigational aids for the new landscape.

Part II of the Companion Volume has a more practical aim; or to be precise, two aims. The first is to identify for current users of the work who are concerned with arbitrations under the new law those parts of the text which still hold good in the new environment and those which should be approached with caution or disregarded altogether. The second aim is to set out in a less discursive manner than the rest of the text, and in the style of a conventional supplement, the changes and the developments in the old law, mainly through the decided cases, which have arisen since the Second Edition. This is intended not only for those who are concerned with the dwindling number of arbitrations which are still progressing under the old law, but also for those who will occasionally need to refer back to the old law to elucidate the Act or fill gaps which the Act has left for decision under the common law. This part of the text is printed in shaded type.

Part II consists of a commentary on the 1996 Act, section by section. We do not attempt here to revisit matters of general application which have already been discussed in Part I, merely to point the reader to those passages in Part I which bear on the section under discussion. We have tried to anticipate the detailed difficulties of interpretation and of practical application which we expect to arise in the course of time and to suggest solutions. Given the rapid pace of developments in arbitration practice, we cannot expect that every problem has been foreseen. Some difficulties which seemed acute when the Act first came into being have already been tackled and largely overcome; no doubt others will arise which we cannot presently predict.

Finally, we include as Appendices a number of texts which we expect that the reader will from time to time need to have readily to hand, such as DAC Reports, the New York Convention, the Model Law, and the UNCITRAL Notes on Organising Arbitral Proceedings. We have also included the current Practice Direction for Arbitrations, although the reader should be aware that this is likely to be replaced fairly soon by a new and shorter Practice Direction.

The authors wish to express their gratitude to Mr Nathan Pillow and Mr John Meyers for invaluable help during the preparation of this Companion, to Mrs Jan Campbell for typing with her accustomed skill from a challenging manuscript, and to a long-suffering succession of editors for their help in preparing the text for publication.

The Companion takes no account of developments in the law published after 30 April 2001.

M.J.M.
S.C.B.

Table of Statutes

PAGE

Access to Justice Act 1999
s 55 ... 358
Administration of Justice Act 1920 ... 578
Administration of Justice Act 1970
s 4 ... 380
(1) ... 261
Sch 3 ... 246, 380
Administration of Justice Act 1982
s 15(6) ... 204, 247
Sch 1
Pt IV ... 247
Arbitration (1698)
preamble ... 5, 37
s 2 ... 37
Arbitration Act 1889 ... 132, 446
Sch 1 ... 58
Arbitration Act 1934 ... 132, 267, 275, 405, 407 445, 446
s 12 ... 345
16(6) ... 407
Arbitration Act 1950 ... 9, 36, 58, 67, 123, 148, 160, 162, 203, 221, 224 280, 284, 288, 398, 446
Pt I (ss 1–34) ... 84
s 1 ... 99, 100, 223, 224, 290
2 ... 405, 406
(1) ... 267
(2) ... 293
(3) ... 267, 405
3 ... 255
(1) ... 153
(2) ... 153
4 ... 145, 377
(1) ... 269, 447
5 ... 407
6 ... 281
7 ... 159, 281
(a) ... 290
(b) ... 282, 410
8 ... 159
(1) ... 174, 281
(2) ... 190
9 ... 159, 99
10 ... 10, 159, 293
(b) ... 280, 290
(d) ... 290

PAGE

Arbitration Act 1950—*contd*
s 10(1) ... 109
(3) ... 283
11 ... 177, 380
12 ... 130, 131, 189, 191, 193, 195, 309
(1) ... 33, 63, 190, 195, 276, 308
(2) ... 195
(4) ... 431, 574
(5) ... 431
(6) ... 129, 132, 194
(a) ... 312
(b) ... 190
(f) ... 183, 192, 194
(g) ... 192
13 ... 189, 291
(1) ... 161, 334
(2) ... 46, 334
(3) ... 41, 290
13A ... 182, 183, 246, 312, 319 371, 430
14 ... 195, 329
15 ... 330
16 ... 209, 342
17 ... 341
18 ... 209, 344
(1) ... 344, 346
(2) ... 344
(3) ... 344, 345, 439
(4) ... 341
(5) ... 365
19 ... 339, 344, 438
19A ... 204, 205, 247, 331
20 ... 247, 331
21 ... 39, 207
22 ... 39, 207, 353, 574, 575
(1) ... 352
23 ... 99, 100, 101
(1) ... 41, 290, 574
(2) ... 352, 574, 575
(5) ... 224
24 ... 224
(1) ... 41, 143, 224
(2) ... 74, 136
(3) ... 74
25 ... 293, 415

PAGE

Arbitration Act 1950—*contd*
s 25(1) 41
(2)(b) 224
26 ..... 381, 576, 577
(1) 349
27 ..... 41, 135, 161, 163, 164, 275, 276, 277, 278, 407 408
29(2) 247
31 380
32 ..... 261, 402, 404
Pt II (ss 35–42) 209, 212, 349, 381, 451, 459
s 36(1) 350, 381
42(3) 381
Arbitration Act 1975 ..... 9, 82, 83, 84, 87, 123, 148, **255**, 268, 398, 406, 447, 451, 574
s 1 ..... 23, 40, 141, 145, 154, 217, 218, 269, 406, 447
(3) 84, 138
(5) 46
(6) 84
(7) 457
2 381
3 383
(1) 212
(a) 576, 577
4 ..... 383, 577
5 383
6 383
7 ..... 383, 402
(1) 261, 383
9(1) 141, 160
Arbitration Act 1979 ..... 7, 8, 9, 49, 53, 56, 123, 124, 141, 191, 199, 205 207, 214, 240, 243, **255**, 398, 400, 442, 576
s 1 ..... 142, 235, 239, 244, 356, 432
(2) 49, 574, 575
(3)(b) 240, 432
(5) 359, 574, 575
(b) 236
(6) 357
(7)(b) 240
2 ..... 235, 239, 240, 432
(1) 574, 575
(2) 432
(3)(b) 240
3 357
(6) 377

PAGE

Arbitration Act 1979—*contd*
s 4 ..... 357, 449
5 ..... 35, 218, 225, 226, 574
7(1)(e) 261
Arbitration Act 1996 ..... 3, 4, 11, 12, 17, 19, 26, 53, 66, 70, 71, 83, 94, 99, 104, 106, 117, 118, 119, 121, 140, 172, 180, 196 215, 235, **255**, 398, 461
Pt I (ss 1–84) 16, 20, 29, 30, 61, 147, 153, 166, 256, 257, 261, 273, 288, 344, 345, 349, 365, 369, 372, 379, 388 462, 464, 471, 561
s 1 ..... 23, 24, 39, 57, 65, 67, 68, 69, 185, **256**, 285, 308 348, 354, 372, 563
(a) 14, 25, 181, 271, 284, 299, 310
(b) 15, 62, 297
(c) 28, 29, 30, 61, 101, 105, 288, 306, 313, 352, 362
2 ..... 46, 123, **256**, 259, 462, 464
(1) 21, 122, 123, 327, 336 464, 465
(2) 21, 123, 258, 464
(a) 16, 216
(b) 16
(3) 21, 123, 127, 258, 324, 464
(a) 16, 323
(b) 16
(4) 21, 123, 127, 258, 464, 465, 567
(b) 465
(5) 258, 464, 465
3 ..... 16, 46, 195, 257, **258**, 327 336, 384, 464, 465
(1) 87

PAGE

Arbitration Act 1996—*contd*
s 4 ..... 15, 23, 24, 40, 41, 56, 103 257, **259**, 291, 293, 295 304, 305, 306, 317, 351, 360, 362, 364, 365, 388
(1) 35, 37, 38, 57, 267, 278, 280, 300, 345, 350
(2) 39, 57, 265
(3) 38, 39
(4) 257, 372
(5) 257, 372, 464
5 ..... 20, 84, 213, 224, **260**, 261 265, 288, 372, 379, 383, 465
(1) 13, 20, 27, 59, 149, 179 262, 300, 466
(2) 13, 20, 134, 263
(f) 213
(3) 13, 20, 134, 149, 263
(4) 58, 134, 264
(5) 13, 20, 263, 264, 265
(6) 13, 20, 263, 264
6 ..... 261, **265**, 372, 379, 383
(1) 22, 265, 383
(2) 261, 265
7 ..... 79, 258, **266**, 301, 372 465
8 ..... 153, 258, **267**, 465
9 ..... 39, 40, 57, 145, 156, 216 264, 267, **268**, 303, 306, 568, 569
(1) 40, 267, 269
(2) 270
(3) 270, 271, 564
(4) 16, 40, 272, 273
(5) 40, 156, 271
10 ..... 267, **272**, 464
(2) 147, 272
(3) 147
11 ..... 57, 194, 267, **273**, 464
(1)(b) 273
12 ..... 14, 41, 57, 161, 162, 163 164, 258, **274**, 275, 278, 280, 369, 465, 564, 573
(1) 278
(b) 41, 278
(2) 164, 278, 564
(3) 41, 278
(4) 278

PAGE

Arbitration Act 1996—*contd*
s 12(5) 280
(6) 278
13 ..... **278**, 280
(1) 280
(3) 57
(2) 161, 279
(3) 274
(4) 280
14 ..... 161, **279**, 280, 366
(2) 161
(3) 161
(4) 161
(5) 465
15(2) 41, 174, 175, **280**, 281
(3) 159, 284, 286, 571
16 ..... 170, 225, **281**, 294
(1) 175
(3) 41, 282, 366, 368
(4) 41, 282, 366, 368
(5) 41, 199, 282, 368
(a) 366
(6) 41, 163, 282, 368
(a) 262, 366
(b) 466
(7) 282, 284
17 ..... 42, 159, **282**, 283, 285
(1) 262, 366
(2) 41, 368
(3) 283
18 ..... 42, 159, 225, 258, 282 **283**, 284, 294, 564
(2) 564
(3) 41
(c) 159, 283, 297
(4) 285
(5) 285
19 ..... 41, 57, 284, **285**
20 ..... 41, 204, **286**
(1) 175
(3) 174, 175, 199
(4) 174, 175, 286
21 ..... 14, 41, 42, 281, **286**, 564
(1) 174
(3) 174, 287
(4) 174, 175, 190, 287, 294 366, 466
(5) 175, 287, 294, 564
(6) 175, 287
22 ..... 41, 286, **287**, 335
23 ..... 14, 41, 73, 227, **288**, 292 294, 297, 306, 372, 373
(1) 288, 289, 306,
(3) 223, 288
(a) 288, 306
(4) 288, 372, 373

PAGE

Arbitration Act 1996—*contd*
s 24 ..... 42, 73, 96, 101, 111, 225, 227, **289**, 291, 292, 294, 299, 302, 363, 466, 564, 568
(1) 29, 41, 62, 100, 291,
(a) 225, 227, 290
(b) 101, 170
(c) 170, 171, 227, 291, 372
(d) 110, 306
(ii) 189
(2) 100, 143, 225, 291, 564
(d) 190
(3) 291
(4) 41, 62, 169, 291, 295, 297 300, 344, 466
(5) 291
(6) 291
25 ..... 41, 42, 110, 111, **292** 294, 300
(1) 164, 291, 306
(2) 464
(3) 42, 111, 292, 466
(a) 62
(b) 295, 297, 344
(e) 169
(4) 42, 111, 292
26 ..... 41, 194, 267, 291, **292**
(1) 293, 294, 297
(2) 293
27 ..... 110, 123, 225, 227, 289 290, **293**
(1) 170, 225
(a) 294
(3) 41, 225
(4) 225, 294
(5) 294
28 ..... 15, 41, 42, 57, **294**, 295 296, 297, 298, 339, 340 344, 345, 347, 568
(1) 42, 167, 169, 295, 296 298, 347
(2) 42, 167, 296, 297, 346
(3) 296, 297, 339
(4) 297
(5) 42, 167, 169, 296, 306, 340
(6) 294
29 ..... 14, 30, 39, 41, 42, 57, 111, 112, 291, 295, **299**, 300 307, 365

PAGE

Arbitration Act 1996—*contd*
s 29(1) 29, 30, 60, 62, 64, 300
(2) 300
(3) 292, 300, 307
30 ..... 42, 43, 135, 171, 228, 232 266, 298, 301, **302**, 303, 304, 307, 346, 349, 351, 361, 373
(1) 298, 302, 303, 363
(a) 373
(b) 170, 285, 290
(4) 192
31 ..... 24, 43, 57, 232, 298, 301 **302**, 307, 346, 349, 351
(1) 43, 171, 290, 301, 303 304, 364
(a) 181
(b) 112
(2) 43, 301, 303, 304, 364
(3) 43, 171, 303
(4) 72, 301, 303
(a) 107
(5) 301, 303
32 ..... 43, 57, 165, 183, 223, 228 232, 298, 303, **304**, 346, 349, 363, 464, 564, 572
(1) 72, 304
(2) 43
(b) 304
(i) 325
(ii) 171, 305, 325
(iii) 326
(3) 305, 564
(4) 301, 303, 307
(5) 301
(6) 43, 301, 305
33 ..... 25, 27, 30, 31, 32, 34, 46, 57, 58, 178, 182, 196, 291, 295, 298, 303, **305**, 306 307, 308, 311, 312, 313, 316, 321, 329, 348
(1) 31, 36, 39, 61, 62, 63, 64, 65, 109, 170, 179, 181 185, 190, 320, 354
(a) 27, 31, 47, 62, 187, 188, 219
(b) 14, 25, 31, 62, 188, 189 220, 308, 311

PAGE

Arbitration Act 1996—*contd*
s 33(2) 31, 307,
(3) 62
34 ..... 27, 179, 189, **307**
(1) 27, 185, 186, 197, 308
(f) 188
(g) 197
(2) 14, 31, 185, 197, 308
(a) 181, 195, 308
(b) 186
(c) 190, 308
(d) 308
(e) 190, 308
(f) 181, 308
(g) 15, 308
(h) 187, 308
35 ..... 14, 43, 150, 307, 309
36 ..... 14, 307, **310**
37 ..... 199, 307, **310**
(1)(a) 198, 311
(b) 311
(2) 295, 344, 345
38 ..... 191, 307, **311**, 316, 329, 331, 360
(1) 312
(3) 35, 57, 193, 312, 313 467, 469
(4) 108, 312, 313
(a) 192
(5) 15, 198, 312, 314
(6) 312, 314
(8) 14
39 ..... 14, 46, 108, 201, 208, 220 307, **314**, 329
(1) 108, 314, 315, 330
(2) 315
(3) 108, 314, 316
(4) 314, 315
40 ..... 15, 24, 25, 32, 34, 36, 39, 57, 58, 61, 63, 64, 65, 178, 221, **316**, 317, 373
(1) 27, 32, 33, 34, 35, 36, 37, 61, 63, 64, 187, 223, 316
(2) 33, 34, 64
(a) 34, 63
(b) 305, 325
(4) 64
(5) 64
(6) 64
(7) 64
(d) 63

PAGE

Arbitration Act 1996—*contd*
s 41 ..... 34, 35, 36, 63, 64, 104, 182, 187, 201, 222, 223, 225, 227, 285, 307, 316, **318**, 319, 322
(1) 34, 319
(3) 14, 30, 34, 35, 57, 63, 182, 221, 227, 319, 371
(4) 35, 63, 197, 227, 320, 366
(5) 63, 108, 227, 313, 316 320
(6) 34, 35, 63, 313
(7) 35, 63, 227, 320, 321
(c) 321
(12) 40
42 ..... 34, 35, 36, 63, 64, 104, 182, 187, 201, 222, 223, 225, 227, 316, 320, **321**, 322, 324, 564
(1) 227, 322
(2) 322
(3) 309, 322, 564
(4) 322
(5) 322
(7) 322
43 ..... 198, 258, 314, **322**, 571
(2) 309
(3)(a) 323
(b) 323
(4) 198, 323
44 ..... 16, 104, 191, 258, 313, 314, 317, **323**, 564, 567, 571, 572
(2)(c) 192, 313, 314
(d) 192
(e) 192, 315
(3) 309, 324, 363
(4) 191, 309, 324, 363, 564
(5) 108, 191, 192, 324, 564, 571
(6) 108, 324
45 ..... 14, 50, 165, 183, 200, 223 241, **325**, 328, 363, 466, 564, 571, 572
(1) 239, 240, 326, 336
(2) 200, 240, 325, 326
(b) 57, 240, 326, 571
(ii) 240

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PAGE

Arbitration Act 1996—*contd*
s 45(3) 200, 305, 326, 564
(4) 326
(6) 240, 325
46 ..... 45, 48, 50, 148, 297, **326** 327, 328, 357
(1) 21, 50, 124, 179, 203
(a) 45, 50, 124, 243, 327
(b) 45, 50, 80, 124, 127, 148 328, 467, 562
(2) 124, 125, 328
(3) 45, 50, 55, 124, 327
47 ..... 15, 107, 220, 303, 315 **328**, 329
(2) 201, 329
48 ..... 204, 315, **329**
(1) 45, 330
(3) 204, 330
(4) 204, 330
(5) 192
(a) 45, 330
(b) 204, 330
(c) 45, 136, 330
49 ..... 15, 204, 315, **331**, 332 337
(1) 333
(2) 333
(3) 45, 331
(4) 204, 331, 332
(5) 331
(6) 333
50 ..... **333**, 337, 363, 564
(2) 46, 334, 564
(3) 46, 57, 334,
(5) 334
51 ..... 297, **334**
(2) 577
52 ..... 203, 303, **335**, 336, 337
(4) 46, 202, 229, 236, 357, 359
(5) 46
53 ..... 303, **337**, 384, 567
(3)(b) 341
54 ..... 303, 336, **337**
55 ..... 303, **337**, 366
(3) 338
56 ..... 14, 294, 295, 297, 303, 306, **338**, 339, 344, 345, 347, 363, 564, 568
(1) 167, 339,
(2) 167, 339, 346, 564
(b) 296, 297, 340
(3) 296, 340, 347
(4) 339

PAGE

Arbitration Act 1996—*contd*
s 56(6) 339, 345
(7) 339
57 ..... 107, **340**, 341, 354, 359, 468
(3) 341
(a) 208, 333, 341
(b) 209, 344, 468
(4) 354, 368
(5) 341, 368
(6) 341, 368
58 ..... 145, 209, 330, 338, **341**, 372
(1) 101, 107, 201, 209
(2) 101, 342
(g) 82
(3) 347
59 ..... 15, 206, 295, **342**, 344
(1) 206
(a) 62
(2) 345
(3)(e) 238
60 ..... 206, 295, 344, 345
61 ..... 295, 298, 303, 315, 345
(2) 57, 206, 346
62 ..... 206, 295, 345
63 ..... 206, 295, **343**, 345, 346
(1) 346
(3) 346
(4) 346, 347
(b) 346
(5) 206
(6) 347
(7) 296
64 ..... 15, 206, 295, **343**, 345, 347
(1) 347
(2) 346
(4) 296, 347
(5) 346, 347
65 ..... 14, 206, 295, **344**, 348
(1) 46, 206
(2) 348
66 ..... 16, 57, 84, 87, 101, 107, 149, 201, 212, 229, 301, 303, 316, 330, 334 335, 337, 346, **348**, 350, 360, 381, 385, 464, 468, 576, 577
(1) 204, 210, 349, 349
(2) 210, 349
(3) 43, 210, 349
(4) 210, 212, 349, 468

PAGE

Arbitration Act 1996—*contd*
s 67 ..... 39, 43, 57, 101, 107, 229 232, 298, 301, 302, 337, 346, 349, **350**, 353, 359, 360, 361, 363, 469, 564, 573
(1) 43
(a) 43, 67, 170
(b) 43, 351
(2) 301
(3) 351
(4) 301, 351
68 ..... 33, 45, 46, 48, 50, 57, 101, 107, 179, 184, 229, 230 299, 304, 306, 317, 337, 346, **351**, 352, 353, 354, 359, 360, 361, 363, 468 469, 564, 573
(1) 47
(g) 101
(2) 47, 48, 62, 81, 100, 278 352, 353, 363
(a) 47, 291, 353
(b) 184, 291, 353
(c) 353
(d) 333, 354, 363
(e) 208, 291, 353
(f) 354, 363
(g) 353
(h) 336, 354, 357, 359, 363
(i) 47, 208, 353
(3) 48, 353
(b) 297
(4) 355
(5) 48, 238
69 ..... 14, 21, 45, 46, 50, 57, 81, 101, 107, 179, 183, 239, 244, 299, 325, 326, 328, 336, 337, 346, **355**, 356 359, 361, 363, 466, 468, 564, 571, 573
(1) 236, 326, 336, 356, 357, 377
(2) 356, 564
(b) 571
(3) 49, 57, 81, 236, 243, 305, 356, 572

PAGE

Arbitration Act 1996—*contd*
s 69(3)(a) 357
(b) 357
(c) 357
(d) 326, 358
(4) 81, 239, 356, 564
(5) 238, 356, 358, 572
(6) 49, 356, 358
(7) 237, 239, 358
(c) 297
(8) 50, 237, 244, 326, 356, 358
70 ..... 43, 81, 101, 107, 351, 353 356, **358**, 359, 468, 469
(2) 43, 200, 232, 301, 355, 564
(a) 200
(3) 43, 232, 301, 337, 338, 355, 359, 366, 368, 469, 564, 573
(4) 62, 202, 236, 335, 359
(5) 62, 359
(6) 238, 359, 469, 571
(7) 239, 360
(8) 359, 360
71 ..... 353, 358, **360**
(4) 156, 360
72 ..... 301, 302, **360**, 361, 363
(1) 361, 363
(2) 301, 359, 361, 363
73 ..... 57, 163, 171, 210, 225, 232, 234, 290, 298, 298, 346, 349, 351, **362**, 371
(1) 43, 225, 301, 364, 364
(a) 363
(c) 291
(d) 163
(2) 43, 301, 364
74 ..... 14, 39, 42, 57, **364**, 365, 469
(1) 364
(2) 365, 469
(3) 365
75 ..... **365**
76 ..... 161, 280, **365**, 367, 469
(1)–(2) 320
(3) 187, 197, 320
(4) 187, 197, 320, 367
(6) 320, 469
77 ..... **367**, 564
(3) 368, 564
(4) 368

PAGE

Arbitration Act 1996—*contd*
s 78 ..... **368**
(1) 368
79 ..... 49, 282, 283, 301, 338, 341, 354, 363, 364 **369**, 469
(1) 469
(3) (a) 369
(6) 369
80 ..... 363, **370**, 469
(2) 370
(3) 370
(4) 370
(5) 355, 359, 371, 469
(6) 371
(a) 359
81 ..... 24, 265, 289, 298, **371** 468, 469,
(1) 30, 55, 61, 82, 101, 182 349, 365, 371
(a) 384
(b) 21, 261
(c) 101
(3) 13
82 ..... 363, 373, 467, 470
(1) 23, 49, 268, 294, 313 314, 320, 345
(2) 145, 268, 342
83 ..... 363, **374**, 470
84 ..... 39, **375**, **467**
Pt II (ss 85–98) 261, 273
s 85 ..... 39, 40, 79, 268, 273, 375 470, 471, 561
86 ..... 18, 39, 79, 154, 216, 222 268, 273, **376**, 377, 470, 561
(2) 46
87 ..... 18, 39, 79, 268, 273, **376** 377, 470, 561
(1) (a) 241
88 ..... 268, 273, 274, 376, 471
89 ..... 261, 275, **378**, 471
(2) 261
90 ..... 261, **378**, 471
91 ..... 261, **378**, 471, 561
92 ..... **379**
93 ..... 177, 261, **379**, 380, 471
(5) (a) 261
94 ..... 261, **380**, 471
95 471
(1) (a) 261, **380**
96 ..... **380**, 471
(2) 471

PAGE

Arbitration Act 1996—*contd*
s 97(a) 267, 380
(b) 278
98 ..... **380**
Pt III (ss 99–104) 84, 261, 349, 471
s 99 ..... 107, 209, 212, 255, **380**
100 ..... 107, 149, 211, **381**
(1) 16
(2) 471
(a) 261
(b) 384
101 ..... 107, 209, 211, 381, **382**, 472, 576, 577
(2) 87, 472
(b) 212
102 ..... 107, 211, 381, **382**, 472, 577
103 ..... 86, 88, 107, 211, 381, **382**
(1) 87
(2) 87, 88, 89, 90, 91, 92, 212
(b) 384
(c) 320
(f) 90
(3) 74, 75, 84, 86, 87, 88, 89, 90, 91, 92, 151, 212, 336, 384
(4) 87
(5) 84, 95, 96, 384
104 ..... 84, 87, 89, 107, 212, 350 381, **383**, 472
(5) 84
Pt IV (ss 105–110) 472
s 105 ..... **384**, 385, 470, 472, 561
(1) 244
106 ..... **386**
(1) 153
107 ..... **386**, 561, 573
(1) 248, 350, 561
(2) 204, 247, 251, 252, 273, 379, 380, 381, 561
108 ..... **387**, 561
(2) 257, 379, 380
109 ..... **387**, 561
(1) 387
110 ..... **387**, 561
Sch 1 ..... 37, 38, 41, 43, 57, 260 267, 291, 293, 295, 300, 304, 305, 306, 315, 317, 345, 351, 360, 362, 364 365, **388**

PAGE

Arbitration Act 1996—*contd*
Sch 2 ..... 380, **388**
Sch 3 ..... 350, 391, 561
para 24 249
46 255
Sch 4 ..... 204, 247, 251, 254, 273, 278, 280, 350, 379, 380, 381, 391, 561
Arbitration (International Investment Disputes) Act 1966 578
s 1 579
(1) 578
3 249
Bills of Lading Act 1885 146
Carriage by Air Act 1961 327
Carriage by Air (Supplementary Provisions) Act 1962 327
Carriage of Goods by Sea Act 1971 327
Carriage of Goods by Sea Act 1992 146
Civil Evidence Act 1968 198
Civil Evidence Act 1972 198
Civil Evidence Act 1998 198
Civil Jurisdiction and Judgments Act 1982 ..... 194, 212, 216
s 1(a) 273
25 ..... 252, 463, 464
26 ..... 252, 273, 407
(2) 194, 273
32(4)(a) 252
33(2) 252
Civil Jurisdiction and Judgments Act 1991
s 3 252
Sch 2 252
Common Law Procedure Act 1854 ..... 3, 6, 17
Companies Act 1985
s 726(1) 313
Competition Act 1998 79
Consumer Arbitration Agreements Act 1988 ..... 379, 449, 450, 470
s 1 79
Contracts (Applicable Law) Act 1990 ..... 125, 327
Contracts (Rights of Third Parties) Act 1999 145
s 8 147
Courts and Legal Services Act 1990
s 99 ..... 177, 245, 380
101(1) 245
(3) 245
102 ..... 182, 246, 319, 430

PAGE

Courts and Legal Services Act 1990—*contd*
s 103 246
125(7) 246
Foreign Judgments (Reciprocal Enforcement) Act 1933 578
Pt II (ss 8–14) 579
Foreign Limitation Periods Act 1984 409
Human Rights Act 1998 ..... 76, 101
Insolvency Act 1986
s 130(3) 153
165–167 153
178 153
349 153
349A 153, 255
Sch 4
Pt II
para 4 153
Interpretation Act 1978
s 7 367
Sch 1 263
Judgments Act 1838 ..... 204, 247, 332
Law Reform Miscellaneous Provisions (Scotland) Act 1934
s (1)(a) 332, 333
Law Reform Miscellaneous Provisions (Scotland) Act 1990
s 66 8
Sch 7 8
Limitation Act 1980
s 34 251
(1) 280
(2) 280
(3) 162, 280
(a) 247
(4) 280, 366
(5) 161, 280
Merchant Shipping Act 1995
s (314)(1) 247
Sch 12 247
Misrepresentation Act 1967
s 2(1) 139
Private International Law (Miscellaneous Provisions) Act 1995 .....
s 3 ..... 204, 247
Securities Act 1933 (United States of America) 76
Supreme Court Act 1981 ..... 132, 240
s 35A(1) 205
43A 155
68(1)(a) 246
70 296
Third Parties (Rights Against Insurers) Act 1930 146
Unfair Contract Terms Act 1977 163

Table of cases

A

ABB Lummus Global Ltd v Keppel Fels Ltd (formerly Far East Levingston Shipbuilding Ltd) [1999] 2 Lloyd's Rep 24 259
AT & T Corpn v Saudi Cable Co [2000] 2 Lloyd's Rep 127, CA 99
AT & T Technology v Communications Works of America 475 US 642 (1960) 72
Aectra Refining and Marketing Inc v Exmar NV, The New Vanguard [1995] 1 All ER 641, [1994] 1 WLR 1634, [1995] 1 Lloyd's Rep 191, CA 142
Aegean Dolphin, The. See Dolphin Hellas Shipping SA v Itemslot Ltd, The Aegean Dolphin
Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace [1995] 1 Lloyd's Rep 87, CA 139, 215
Aghia Marina, The. See Transpetrol Ltd v Ekali Shipping Co Ltd, The Aghia MarinaAgios Lazaros, The. See Nea Agrex SA v Baltic Shipping Co Ltd and Intershipping Charter Co, The Agios Lazaros
Al Midani v Al Midani [1999] 1 Lloyd's Rep 923 120
Albany Marine Inc v South Loyal Shipping Inc and Sassari Investment Ltd, The Ville de Titana [1994] 1 Lloyd's Rep 541 230
Alexander (Philip) Securities and Futures Ltd v Bamberger [1997] IL Pr 72; on appeal [1997] IL Pr 104, [1996] CLC 1757, [1997] Eu LR 63, CA 79, 377, 470
Ali Shipping Corpn v Shipyard Trogir [1998] 2 All ER 136, [1999] 1 WLR 136, [1998] 1 Lloyd's Rep 643, CA 113
Allianz Versicherungsaktiengesellschaft v Fortuna Co Inc, The Baltic Universal [1999] 2 All ER 625, [1999] 1 WLR 2117, [1999] 1 Lloyd's Rep 497 162
Allied Vision Ltd v VPS Film Entertainment GmbH [1991] 1 Lloyd's Rep 392 232
Almare Societa di Navigazione SpA v Derby & Co Ltd, The Almare Prima [1989] 2 Lloyd's Rep 376 ..... 143, 144
Amazona and Yayamaria, The. See Sierra Leone (Government of) v Marmaro Shipping Co Ltd, THe Amazona and YayamariaAmazonia, The. See Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd, The Amazonia
Andrews Property (Trustee) v Brock Builders (Kessingland) Ltd [1997] QB 674, [1997] 3 WLR 124, [1997] 05 LS Gaz R 32, 140 Sol Jo LB 259, CA 218
Angelic Grace, The. See Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace
Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1985] AC 191, [1984] 3 All ER 229, [1984] 3 WLR 592, [1984] 2 Lloyd's Rep 235, 128 Sol Jo 564, [1984] LS Gaz R 2776, HL 127
Aquator Shipping Ltd v Kleimar NV, The Capricorn 1 [1998] 2 Lloyd's Rep 379 230
Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 485 ..... 129, 212, 213
Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 2 All ER 181, [1998] 1 WLR 1426, CA 30
Arras and Hoegh Rover, The. See Mosvolds Rederi AS v Food Corpn of India, The Arras and Hoegh Rover
Ashmore v Corpn of Lloyd's [1992] 2 All ER 486, [1992] 1 WLR 446, [1992] 2 Lloyd's Rep 1, [1992] 18 LS Gaz R 35, 136 Sol Jo LB 113, HL 434
Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488, [1988] 2 All ER 577, [1988] 3 WLR 867, [1988] 2 Lloyd's Rep 73n, 10 Con LR 72, 37 BLR 55, CA 138, 139

Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd [2000] 2 Lloyd's Rep 550 146
Athenian Harmony, The. See Derby Resources AG v Blue Corinth Marine Co Ltd (No 2), The Athenian Harmony
Atlantic EmperorThe. See Rich (Marc) & Co AG v Società Italiana Impianti PA, The Atlantic Emperor: C-190/89
Atlantic Emperor (No 2), The. See Rich (Marc) & Co AG v Società Italiana Impianti PA, The Atlantic Emperor (No 2): C-190/89
Aughton Ltd v M F Kent Services Ltd (1991) 31 Con LR 60, 57 BLR 1, CA 121, 134, 404
Avala, The. See Glencore International AG v Beogradska Plovidba, The Avala
Axelstrom (Application 11960/86) unreported 77, 78
Azov Shipping Co v Baltic Shipping Co [1999] 1 All ER 476, [1999] 1 Lloyd's Rep 68 32

B

BKMI v Dutco Construction Co 1992 Bull Av1, No 2, [1992] Rev Arb 470 159
BP Chemicals Ltd v Kingdom Engineering (Fife) Ltd [1994] 2 Lloyd's Rep 373, 38 Con LR 14, 69 BLR 113 ..... 202, 205
Baiona, The. See Unitramp SA v Jenson & Nicholson (S) Pte Ltd, The Baiona
Baker Marine (Nig) v Chevron (Nig) 191 F 3d 194 (0000) 86
Baleares, The. See Geogas SA v Trammo Gas Ltd, The BalearesBaltic Universal, The. See Allianz Versicherungsaktiengesellschaft v Fortuna Co Inc, The Baltic Universal
Bani K/S A/S and K/S A/S Havbulk I v Korea Shipbuilding and Engineering Corpn [1987] 2 Lloyd's Rep 445, CA 131
Bank Mellat v Helleniki Techniki SA [1984] QB 291, [1983] 3 All ER 428, [1983] 3 WLR 783, [1983] Com LR 273, 127 Sol Jo 618, 133 NLJ 597, CA 130
Bankers Trust Co v PT Jakarta International Hotels and Development [1999] 1 Lloyd's Rep 910, [1999] 1 All ER (Comm) 785 215
Bankers Trust Co v PT Mayora Indah (20 January 1999, unreported) 215
Banner Industrial and Commercial Properties Ltd v Clark Paterson Ltd [1990] 2 EGLR 139, [1990] 47 EG 64 233
Barrett v Henry Boot Management Ltd [1995] Constr Ind Law Letter 1026 404
Baytur SA v Finagro Holdings SA [1992] QB 610, [1991] 4 All ER 129, [1991] 3 WLR 866, [1992] 1 Lloyd's Rep 134, CA 146, 153
Bazias 3 and Bazias 4, The [1993] QB 673, [1993] 2 All ER 964, [1993] 2 WLR 854, [1993] 1 Lloyd's Rep 101, CA 194
Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] 1 AC 266, [1998] 2 All ER 778, [1998] 2 WLR 860, [1998] 24 LS Gaz R 33, [1998] NLJR 869, 88 BLR 1, [1998] EGCS 85, 142 Sol Jo LB 172, HL 154, 155, 177
Beldis, The [1936] P 51, 106 LJP 22, 18 Asp MLC 598, [1935] All ER Rep 760, 154 LT 680, 52 TLR 195, 53 Ll L Rep 255, CA 211
Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Éditeurs (BRT) v SV SABAM and NV Fonior: 127/73 [1974] ECR 51, [1974] 2 CMLR 238, ECJ 80
Birkett v James [1978] AC 297, [1977] 2 All ER 801, [1977] 3 WLR 38, 121 Sol Jo 444, HL 183, 238
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1974] QB 660, [1974] 2 All ER 611, [1974] 2 WLR 789, [1974] 1 Lloyd's Rep 573, 118 Sol Jo 365, CA; revsd [1975] AC 591, [1975] 1 All ER 810, [1975] 2 WLR 513, [1975] 2 Lloyd's Rep 11, 119 Sol Jo 221, HL 68
Blexen Ltd v G Percy Trentham Ltd (1990) 21 Con LR 61, [1990] 2 EGLR 9, 54 BLR 37, [1990] 42 EG 133, CA 207
Boot (Henry) Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [2001] 1 All ER 257, [2000] 3 WLR 1824, [2000] 2 Lloyd's Rep 625, [2000] NLJR 867, [2000] BLR 509, [2000] 2 All ER (Comm) 960, CA 49, 358
Boss (Application 18479/91) unreported 78
Boucraa, The. See L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa
Breakbulk Marine v Dateline (19 March 1992, unreported) 441

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