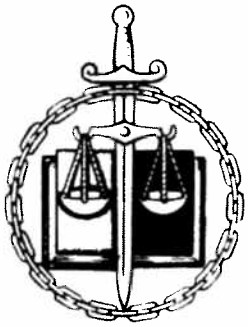

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Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment

by MURRAY L. SMITH

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by MURRAY L. SMITH*

THERE was a time when arbitrators were not able to sue for their fees and were immune from liability. This was true in common law jurisdictions and was probably the case in most civil law countries as well. Compensation for services was viewed as an honorarium. Arbitrating is now much more of a business transaction and arbitrators can sue and be sued. The legal relationship of arbitrators to the parties who appoint them is becoming increasingly important as the amount of litigation involving arbitrators expands. This trend toward arbitrators bringing suit against the parties and vice versa should be causing alarm bells to ring in the minds of legal practitioners and arbitrators alike. In the world of international commercial arbitration, arbitrators will need to consider the location of the arbitration and the various laws which may be applicable to the contract of arbitration before they will be able to discover which rights and obligations will apply to them. An English arbitrator sitting in Paris may be governed by the laws of Germany in respect of obligations owed to the parties depending upon what choice the parties have made as to the law governing the arbitration agreement or, where no choice is expressly made, perhaps depending upon the place where the agreement to be an arbitrator was made. This area of the law is not well developed in most countries. There have, however, been some recent developments in English cases.

Recent decisions of the English courts have raised the issue whether or not arbitrators have a contractual relationship with the parties to the arbitration. The alternative is to regard the position of an arbitrator as being of too high an estate to characterise the relationship as a commercial transaction. The ability of an arbitrator to sue and be sued turns on the distinction. The rights and duties of arbitrators fall to be determined within the legal framework of the relationship to the parties, the nature of which may affect fee arrangements and liability. If a contractual relationship does exist then questions arise as to whether or not an arbitrator should insist on certain terms or conditions of appointment before acceptance and whether or not both parties to the arbitration must agree to those terms. It is also necessary to determine whether or not the contract

* The author is a Canadian lawyer associated with the firm of McAlpine and Hordo in Vancouver and is also an English barrister attached to chambers at Four Essex Court in London.

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between an arbitrator and the parties is a trilateral contract based on the arbitration agreement of the parties or a separate and distinct contract independent of the arbitration agreement.

The approach taken by English courts in developing a theory of contract will be particularly persuasive in other common law countries. Canada and Australia have adopted the UNCITRAL Model Law and thus have a different statutory framework for the conduct of international arbitrations, but their common law has developed on lines similar to those in England. The immunity of arbitrators in these other common law countries will be determined on the basis of local policy considerations in the background of common law traditions and evolving public interest. However, courts in other common law countries will pay close attention to the example set in English cases.[1]

Consider the case of an arbitrator who failed to attend at a hearing. The fault was entirely his own, perhaps because two different matters had been scheduled for the same week. The parties, their representatives, witnesses and the other arbitrators did attend. The hearing room had been reserved and stenographers had been hired to transcribe the proceedings. The costs were substantial. Will the absent arbitrator be liable for the wasted costs? May the other arbitrators charge the parties their usual fees for the period reserved? Answers to these questions will be suggested in the discussion which follows.

In the context of examining the nature of the relationship of arbitrators to the parties, Model Terms of Appointment will be suggested in relation to fees, due diligence obligations and exemption from liability. These Model Terms will be discussed under relevant headings and collected in an Appendix. The suggested terms are offered for the purpose of discussion and may not be appropriate in every case. For the most part they would be more suitable for use in *ad hoc* arbitrations rather than those administered by arbitral institutions such as the London Court of International Arbitration or the International Chamber of Commerce. Many institutions will have their own terms of appointment and the arbitrators will look to the institution for payment of fees. An arbitrator may nevertheless wish to consider specific conditions or terms of appointment in relation to liability where institutional terms provide no exemption.[2]

The courts have yet to expound a cohesive theory of contract that will satisfactorily account for the rights and duties owed by and to both parties where an arbitrator is nominated by just one of them. Most arbitrators simply

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1 In civil law countries such as France, it is well established that contractual obligations are owed by an arbitrator to the parties and are enforceable under the Civil Code. It has been suggested that an arbitrator would be liable for, *inter alia*, failure to complete the case or observe time limits and failure to observe confidentiality: See Robine, 'The Liability of Arbitrators and Arbitral Institutions in International Arbitrations Under French Law', (1989) 5 *Arbitration International* 323.

2 Rule 14 of the Arbitration Rules of the Chartered Institute of Arbitrators and Article 19 of the LCIA Rules provide that the arbitrator shall not be liable for any act or omission in connection with the arbitration. The ICC Rules and the London Maritime Arbitrators' Association Terms do not include any exemption from liability.

notify their acceptance without condition. The courts may find that terms necessary to give business efficacy to the contractual relationship will be implied. It may be that some of the terms of the contract will be overtaken by considerations of public policy. It would be difficult to identify all the pitfalls of a contract theory but cases which have attempted to answer specific problems which have arisen will be considered in the discussion which follows.

Two main schools of thought regarding the relationship of parties to arbitrators may be identified. The first is the status approach and the second is the contract approach.

I. THE STATUS APPROACH

In the leading treatise on English arbitration law, Mustill and Boyd prefer to regard the position of an arbitrator as *sui generis*.[3] They argue that it would be wrong to define the relationship in purely contractual terms. Even though a contract between the arbitrator and the parties could be devised, the authors argue that the contract approach would be misleading:

> To proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the case of a massive reference, employing a professional arbitrator for a substantial remuneration, we doubt whether a business man would, if he stopped to think, concede that he was making a contract when appointing the arbitrator. Such an appointment is not like appointing an accountant, architect or lawyer. Indeed it is not like anything else at all.[4]

They would prefer an approach which defines the relationship in terms of status:

> We hope that the courts will recognise this, and will not try to force the relationship between the arbitrator and party into an uncongenial theoretical framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of arbitrator.[5]

The status approach would, for example, leave the arbitrator immune from liability on the basis of the position he holds. Judges and diplomats enjoy immunity because of their status. The judge is immune from liability for acts done in his judicial capacity but is not immune from suit. He may be sued for acts outside jurisdiction or outside the judicial function.[6] The diplomat is immune not from liability but from suit.[7] In English law a barrister enjoys immunity with respect to court related activities independent of any contract with his client.[8]

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3 Mustill and Boyd, *Commercial Arbitration*, (2nd ed. Butterworths 1989) pp. 220–223.
4 *Ibid.*, at 223.
5 *Ibid.*
6 *Sirros* v. *Moore* [1975] 1 Q.B. 118.
7 *Musurus Bey* v. *Gadban* [1894] 1 Q.B. 533.
8 *Rondel* v. *Worsley* [1969] 1 A.C. 191.

The immunity of a judge, a diplomat or a barrister derives from considerations of public policy. Such considerations are similarly applicable in respect of arbitrators even if there is no contractual relationship to the parties. With the status approach no contract is necessary for the effective enforcement of rights and duties owed by the arbitrators to the parties and by the parties to the arbitrators. The matter of fees may be determined in accordance with statutory provisions which require that a reasonable fee be paid[9] or may be left to be enforced by a lien over the award. There are statutory remedies available to the parties which allow for the arbitrator to be removed if he breaches the duties of due diligence and impartiality.[10] The arbitrator may be removed or the award may be set aside if the arbitrator has misconducted himself or the proceedings.[11] Unless the parties have entered into an exclusion agreement, an appeal lies to correct significant errors of law made by an arbitrator.[12]

II. THE CONTRACT APPROACH

The hope of Mustill and Boyd that a contract should not be found has proved to be in vain. English courts have adopted the premise that contractual principles should be applied to the relationship between the arbitrators and the parties.

The first modern case[13] to address the issue of the arbitrator's position was *Compagnie Européene De Céréales S.A.* v. *Tradax Export S.A.* in which Mr. Justice Hobhouse said:

> It is the arbitration contract which the arbitrators become party to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract.[14]

This comment was made in the context of determining whether or not an injunction could issue against an arbitrator acting outside the terms of the

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9 Arbitration Act 1950, ss. 18 and 19. The UNCITRAL Model Law makes no provision for the fees of the arbitrators but British Columbia has amended the Model Law to provide that the fees and expenses of the arbitrators shall be in the discretion of the tribunal unless otherwise agreed by the parties: International Commercial Arbitration Act of British Columbia, s. 31(8).

10 Arbitration Act 1950, ss. 13 and 24; UNCITRAL Model Law, Article 14.

11 Arbitration Act 1950, s.23.

12 Arbitration Act 1979, ss. 1 and 4. The UNCITRAL Model Law, Article 34, provides limited grounds for setting aside an award including a denial of due process or an excess of jurisdiction but not including an error of law.

13 More than one hundred years ago an English court found a contractual relationship to exist. In *Crampton & Holt* v. *Ridley & Co.*, (1887) 20 Q.B.D. 48, a contract was found to have been made between the parties and the arbitrators. More recently, Lord Kilbrandon distinguished judges from arbitrators on the basis that there is no contract between the state and a judge: *Arenson* v. *Arenson*, [1977] A.C. 405, 430. In the U.S., a contractual relationship has long been found to exist: *Carpenter* v. *Bloomer*, 148 A.2d 497 (1959); *Hoboken Manuf'rs R.R. Co.* v. *Hoboken R.R.W. & S.S.C. Co.*, 27 A.2d 150 (1942).

14 [1986] 2 Lloyd's Rep. 301, 306.

arbitration contract. The answer given was that the arbitrator was a party to the arbitration contract, a breach of which could be restrained by an injunction in an appropriate case. Mr. Justice Hobhouse gave as an example a case in which the arbitrator, at the request of one of the parties, decided to hold the arbitration in Paris in breach of a term of the arbitration agreement that the arbitration should be held in London. *Prima facie*, such breach could be restrained by injunction. By deciding that the arbitrator is a party to the arbitration agreement, Mr. Justice Hobhouse was able to restrain the arbitrator from departing from the terms of that agreement. No comment was made as to whether or not the arbitrator would also be liable to suit for so acting outside jurisdiction.

Cie Européene v. *Tradax* and the contractual nature of an arbitrator's appointment were next considered in *K/S Norjarl A/S* v. *Hyundai Heavy Industries Co. Ltd.*[15] The case went to the Court of Appeal but some of the remarks of Mr. Justice Phillips in the Commercial Court are still relevant.

After reproducing the second comment of Mustill and Boyd quoted above,[16] Mr. Justice Phillips said:

> In the present case I do not find the contractual framework an uncongenial one within which to consider the position of the arbitrators and shall proceed upon the premise, common to both parties, that contractual principles should be applied.
>
> The basic rights and obligations of the arbitrators can be simply stated. By accepting their appointments [they] undertook, in the words of s. 13(3) of the Arbitration Act 1950, 'to use all reasonable dispatch in entering on and proceeding with the reference' – a due diligence obligation. Having accepted appointments as arbitrators [they] have become entitled to reasonable remuneration for their services.
>
> These are conventional features of a contract to provide services.[17]

An appeal to the Court of Appeal was dismissed with each of the three judges giving reasons. The contractual premise of the decision in the lower court was not rejected. In the reasons for judgment of the Vice-Chancellor, the view of Mustill and Boyd 'that a purely contractual approach is unsatisfactory and that it may be better to concentrate on the quasi-judicial status of the Arbitrator' was noted. He went on to say that:

> For myself, I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of those two elements.
>
> The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see *Cie Européene* v. *Tradax*, [1986] 2 Lloyd's Rep. 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status.[18]

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[15] [1991] 1 Lloyd's Rep. 260 (Commercial Court). The text of the judgments of the Court of Appeal dated February 21, 1991 is reported at [1991] 1 Lloyd's Rep. 524.

[16] *Supra*, note 5.

[17] *Supra*, note 15 at 266.

[18] *Norjarl* v. *Hyundai* [1991] 1 Lloyd's Rep. 524, 536 (C.A.).

Lord Justice Stuart Smith noted that 'once appointed an arbitrator cannot unilaterally change the terms of his appointment . . . any more than any other party to a contract can change the terms of the contract'.[19] Lord Justice Leggatt referred to a submission of counsel premised upon the 'trilateral contractual relationship constituted by the arbitration agreement' without disagreeing with that premise.[20] He doubted whether an analysis in terms of contract would yield a different result from analysis in terms of status and that an analysis in terms of status would be less easy to reconcile with the arbitrator's right to fix his own fees. Lord Justice Leggatt went on to comment that once an arbitrator has accepted appointment, the arbitration agreement cannot be varied without the consent of all parties and that by accepting appointment the arbitrators 'by implication undertook to conduct the arbitration with due diligence and at a reasonable fee'.[21]

It would appear that the contract approach has been accepted over the status approach although the Vice-Chancellor would adopt a contractual analysis with additional rights and obligations flowing from the status of an arbitrator. Presumably he meant that the status of an arbitrator would allow the implication of terms consistent with that status and that public policy would ameliorate the rigorous application of contractual principles. An understanding of the doctrines of public policy and implied terms is necessary before proceeding to examine particular incidents of an arbitrator's contractual relationship to the parties.

(a) *Implied Terms*

In English law a term may be implied in a contract as a matter of fact if it is necessary to give the transaction business efficacy.[22] The test is one of necessity not reasonableness and is based on the presumed intention of the parties. The term must be precise and obvious. The test is a strict one and requires that the term be one without which the contract will not work.[23] Terms may also be implied in fact if the court is satisfied that reasonable men faced with the suggested term at the time the contract was made would say: 'yes of course, that is so obvious that it goes without saying'.[24]

Terms may also be implied in a contract as a matter of law. Terms implied in law do not necessarily depend upon the presumed intention of the parties but rather follow the requirements of the law whether found in statute or at common law. An example of a term implied by law in a contract between an arbitrator and the parties is the duty to remain impartial. This duty and the duty of due diligence may be seen as legal incidents of the arbitrator's

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19 *Ibid.*, at p. 535.
20 *Ibid.*, at p. 531.
21 *Ibid.*, at p. 532.
22 *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108.
23 *The Moorcock* (1889) 14 P.D. 64.
24 Per Steyn, J. in *The 'Damodar General T.J. Park'*, [1986] 2 Lloyd's Rep. 68, 70.

contractual relationship to the parties. Reasonableness is a factor in relation to terms implied in law and public policy may be a relevant consideration. A term will not be implied simply because it is reasonable but an unreasonable term will never be implied.

In England, a duty of due diligence and a duty to pay reasonable fees are deemed to be implied in contracts for services as a matter of law. These duties are applicable to arbitrators but the implication of a duty of care and skill is specifically excluded from application to arbitrators.[25]

Terms may also be implied by custom or trade usage if the custom or usage is notorious, certain and reasonable.

It is often difficult to distinguish between a term which will be implied in fact or in law or by custom and usage. The courts of England have found implied terms in contracts between arbitrators and parties that a reasonable fee will be paid[26] and that there is a duty of due diligence[27] but have not specified whether these terms are to be implied in fact or in law or both.

Implication of terms is a rich source for the courts to draw from in determining the rights and obligations flowing from the contractual relationship between arbitrators and parties. The courts may presume an intention to include terms necessary to give business efficacy to the transaction or may find legal incidents of the relationship flowing from decided cases or from provisions in the Arbitration Acts or other relevant statutes. The courts may also find implied terms based on the long history of custom and usage in arbitration practice.

However, the courts will not rewrite the contract to make it more reasonable[28] and terms may not be implied which contradict express terms of the contract.

(b) *Public Policy*

The courts will use the doctrine of implied terms to construe a contract and to give effect to the intention of the parties. The doctrine of public policy however, will be applied by the courts not as a rule of construction but as a rule of law whatever the intention of the parties. A term of a contract which is contrary to public interest will not be enforceable.

Application of the doctrine of public policy goes to the validity of terms of the contract, express or implied, rather than the finding of terms not expressly agreed. Public policy is a manifestation of economic conditions and social mores which will vary over time but the heads of public policy can only be

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[25] The Supply of Goods and Services Act 1982, sections 13 and 14 and the Supply of Services (Exclusion of Implied Terms) Order 1985 (S.I. 1985 No. 1).

[26] *Crampton & Holt* v. *Ridley*, *supra*, note 13.

[27] *Norjarl* v. *Hyundai*, *supra*, note 21.

[28] *Liverpool City Council* v. *Irwin* [1977] A.C. 239.

expanded in exceptional circumstances. Novel applications of the doctrine will be resisted by the courts.[29]

Public policy is relevant to arbitrators in respect of liability to suit. The immunity of arbitrators may be seen as an exception to the general principle of liability for breach of an implied contractual duty of care which will not be given any wider application than is necessary to meet the demands of public policy.[30]

The public policy factors which support arbitral immunity include: (1) the need to protect arbitrators from frivolous actions alleging negligence in the giving of a decision which would be very difficult to prove;[31] (2) the need to protect arbitrators from vexatious actions brought by disappointed arbitrants seeking a collateral route to attack the award;[32] (3) the public interest in arbitrators remaining independent to exercise their judicial function free from concerns that a decision one way may lead to litigation;[33] (4) the reluctance of arbitrators to undertake a reference if there was potential liability;[34] and (5) the public interest in finality and conclusivity of arbitral proceedings.[35]

Reliance upon public policy to preserve the integrity of the arbitral process allows for a contractual underpinning of the relationship with certain rights (such as the right to expect reasonable care and skill to be exercised) being rendered unenforceable.[36]

III. PROBLEMS INHERENT IN THE CONTRACT THEORY

Reliance upon a contract theory as the theoretical underpinning of the arbitrator's relationship to the parties creates a number of problems for which the decided cases have not provided answers. These problems are most visible when examining the position of an arbitrator who is appointed by just one of the parties. The premise that the arbitrators become parties to the arbitration agreement may establish trilateral privity of contract but it is difficult to see how there can be *consensus ad idem* in respect of terms and conditions, beyond those contained in the arbitration agreement, that are agreed by only one of the parties. This is particularly relevant in relation to fee arrangements. The trilateral contract theory also begs the question of what law governs the contract with the arbitrators. If contractual duties of due diligence and of care and skill are found then issues arise as to liability for breach. Further, reliance upon the arbitration agreement of the parties as the foundation of a contract

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29 *Geismar* v. *Sun Alliance and London Insurance Ltd.* [1978] 1 Q.B. 383, 389.
30 *Arenson* v. *Arenson, supra,* note 13 per Lord Simon of Glaisdale at p. 419 and Lord Salmon at p. 436.
31 Per Lord Reid in *Sutcliffe* v. *Thackrah* [1974] A.C. 727, 735.
32 Per Lord Salmon *ibid,* at p. 757.
33 Per Lord Reid, *ibid,* at p. 735.
34 *Lingood* v. *Croucher* (1742) 2 Atk. 395.
35 Per Lord Simon of Glaisdale in *Arenson* v. *Arenson, supra,* note 13 at p. 422.
36 Immunity will be discussed in more detail below.

with the arbitrators raises the spectre of rights and immunity falling away if the arbitration agreement proves to be null and void.

(a) *The Agreement of Both Parties*

The type of problem encountered when there is no express agreement between the parties as to the terms of the arbitration was dealt with in *Fal Bunkering of Sharjah v. Grecale Inc. of Panama.*[37] The issue was whether or not the parties were bound by the rules of the London Maritime Arbitrators' Association when the arbitration clause in the main contract did not incorporate the LMAA Terms and only one of the arbitrators appointed by the parties accepted his appointment on those Terms. Mr. Justice Saville ruled that the arbitration was not subject to LMAA Terms. He tested his conclusion under principles of contract law:

> To my mind, the matter can also be tested by looking at it in terms of offer and acceptance. For the reasons given above, I cannot see how the notification of Mr. Newcombe's appointment [who accepted in accordance with the LMAA Terms although the other party was not notified that the acceptance was so qualified] without more could amount to an offer by the disponent owners to conduct the arbitration on LMAA Terms; nor how the notification of Mr. Baker-Harber's appointment [who accepted the appointment without saying anything about his acceptance being on LMAA Terms] be treated as the acceptance of such offer, or as the making by the charterers themselves of such an offer. In short, it seems to me that neither party was reasonably entitled to conclude from the attitude of the other, that the reference would be governed by LMAA Terms. Put another way, in my judgment the parties were simply not ad idem on this matter.[38]

The approach taken was to inquire as to what had been agreed by the parties to the arbitration over and above their agreement as contained in the arbitration clause rather than to consider the terms and conditions of acceptance of appointment of an arbitrator nominated by only one of the parties.[39]

This case is authority for the proposition that an arbitrator who accepts his appointment on certain terms and conditions may only enforce those terms as against the appointing party unless they are expressly set out or implied in the contract.

This raises the obvious question of whether the non-nominating party would be able to frustrate the nomination of the other party by refusing to agree to terms agreed between the arbitrator and his nominator. The answer to this question may perhaps be found in the *Norjarl v. Hyundai* case in which Lord Justice Leggatt ruled that an agreement with just one of the parties as to fees which is consummated prior to acceptance of the appointment may not be frustrated by the other party reserving agreement as to the fees.[40] This is

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[37] [1990] 1 Lloyd's Rep. 369 (Commercial Court).
[38] *Ibid.*, at 373.
[39] *Ibid.*, at 372.
[40] *Supra*, note 15, at p. 531.

not a satisfactory answer because there is no explanation of how the principles of contract may be applied to come to that result. Would the other party be bound to agree to exorbitant fees for the arbitrator nominated by his opponent? To say that mandatory agreement to reasonable fees would be an implied term gives no more than the statute already allows, that is, the right to have reasonable fees taxed. It cannot be an implied term of the arbitration agreement that the non-nominating party agrees to be bound by every term agreed between the nominating party and the arbitrator before appointment. It may be that Lord Justice Leggatt was simply saying that the agreement of the parties to submit future disputes to arbitration (with a term that each is entitled to one nomination) carries with it an obligation to agree to reasonable terms agreed between the arbitrator and his nominating party. Whilst this would give the arbitrator no higher rights in respect of fees than those already provided for in statute it would allow for reasonable terms in respect of commitment fees and potentially might allow for reasonable terms as to choice of law and exemption from liability.

(b) *Choice of Law*

The requirement in contract law that the parties be *ad idem* raises an acute problem in relation to the choice of law. The validity, effect and interpretation of an arbitration agreement are governed by its proper law.[41] The arbitration agreement will presumptively be governed by the same law as the contract in which the arbitration clause is embedded if the parties make no express choice of law.[42] If *Norjarl* v. *Hyundai* is correct then the arbitrator, by accepting an appointment, becomes a party to the arbitration agreement between the parties. Unless both parties to the arbitration agree otherwise the express choice of law in the arbitration agreement will determine the rights and obligations of the arbitrators. Implied terms may not contradict express terms in a contract and there is no head of public policy which would render the choice of law unenforceable.[43]

This may lead to serious consequences for an arbitrator who accepts a nomination by one party on condition that the appointment will be subject to English law and the exclusive jurisdiction of English courts. Unless the other party accepts that condition it may not be binding on them. This is certainly the case if the other party expressly objects to the term.

If the arbitrator accepts an appointment pursuant to an arbitration agreement which is subject to Austrian law his liability is subject to determi-

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41 Dicey and Morris on *The Conflict of Laws*, L. Collins Ed. (11th ed. Stevens and Sons 1987) 534.

42 *Ibid.*, at p. 537.

43 There would only be a problem if there is an express choice of law by the parties in respect of the arbitration agreement. In the absence of an express choice, the law of the arbitral forum would be implied: See Thomas, 'Proper Law of Arbitration Agreements' [1984] LMCLQ 304, 305.

nation under Austrian law which does not recognise the immunity of arbitrators in the same way as English law. Most arbitrators have never considered the proper law of the arbitration agreement to be a relevant factor to take into account before accepting an appointment.

The appended Model Terms of Appointment contain a term for a choice of law and jurisdiction. This is linked to an exemption from liability and is discussed further in the section on immunity below.

(c) *The Duty of Due Diligence*

The *Norjarl* v. *Hyundai* case establishes that the arbitrators owe the parties a duty of due diligence to enter upon and proceed with the reference with reasonable dispatch.[44] It is not necessary to decide whether this duty arises from statute or at common law for the the purposes of the present discussion.[45] It is not at all clear that arbitrators are at liberty to resign from the arbitration without breaching this implied term of the contract. Whilst the Arbitration Act 1950, section 13(3) provides for the court to remove an arbitrator who is in breach of the duty of due diligence, the statutory remedy does not abrogate any right of the parties to sue in contract for breach.[46] Mustill and Boyd doubt whether the court would grant a remedy for failing to proceed with reasonable dispatch[47] but *Russell on Arbitration* states that an arbitrator might be sued for breach of contract if he failed to make an award in reasonable time or refused to complete the reference.[48]

In *Norjarl* v. *Hyundai*, Lord Justice Leggatt said:

> Arbitrators are under no absolute obligation to make particular dates available: their obligation is to sit on such dates as may reasonably be required of them having regard to all the circumstances including the exigencies of their own practices.[49]

The members of the Court differed as to whether in the circumstances of the case it was appropriate for the arbitrators to withdraw. Lord Justice Leggatt said that arbitrators who find themselves unable to sit on dates satisfactory to the parties may refuse to act (at a stage when the parties still had time to appoint proper substitutes). However, Lord Justice Stuart Smith was of the view that, at least on the facts of that case, the arbitrators could not decline to

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[44] *Supra*, note 15 per Lord Justice Leggatt at p. 532 and Lord Justice Stuart Smith at p. 535.

[45] For principles related to breach of a statutory duty see *Cutler* v. *Wandsworth Stadium Ltd.*, [1949] A.C. 398. For recent cases regarding principles of liability in tort see *Caparo Industries plc.* v. *Dickman* [1990] 1 W.L.R. 358 and *Van Oppen* v. *Bedford Trustees* [1990] 1 W.L.R. 235. Mutual obligations in tort cannot be any greater than those found by necessary implication in contract: *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* [1986] A.C. 80, 107.

[46] The UNCITRAL Model Law, Article 14 provides that the mandate of an arbitrator terminates if he fails to act without undue delay.

[47] *Supra*, note 3, at p. 231.

[48] *Russell on the Law of Arbitration*, Walton and Vitoria Eds., (20th ed. Stevens and Sons 1982) p. 121.

[49] *Supra*, note 15 at p. 533.

commit themselves for the 12 week hearing.[50] The Vice-Chancellor did not address the right of arbitrators to withdraw.

The right of an arbitrator to resign was dealt with in the case of *Succula Ltd.* v. *Harland and Wolff*.[51] One of the parties wished to have their nominee withdraw after the appointment had been accepted. It was held that after appointment an arbitrator has equal duties to both parties and that there is no procedure for resignation without the consent of both parties.[52]

As a matter of English law it is an implied term of a contract for the supply of services that the service will be carried out within a reasonable time.[53] Such a term would not be implied if it is inconsistent with the course of dealing between the parties or usage and an exclusion of liability may be stipulated in the contract if it would be reasonable in the circumstances.[54]

Arbitrators may be reluctant to leave the matter of demands on their time entirely to the good faith of the parties. The concern for arbitrators is not that the law would allow the parties to make unreasonable demands but that they may have personal or professional obligations which they consider to be paramount but which the parties or the courts might not view in the same way. There is also a concern if the contractual relationship is governed by the law of a different country. In Austria, for example, the Code of Civil Procedure provides for the liability of an arbitrator for loss caused by his wrongful delay or refusal to fulfil his obligations.[55]

The corollary of a due diligence obligation being owed to the parties is a duty owed by the parties to the arbitrator to perform the contract. It would be an implied term of the contract that the parties may terminate the appointment of an arbitrator if a settlement is reached but it is arguable whether or not the parties may jointly revoke an appointment in the absence of a settlement without being in breach of contract. The remedy of specific performance would not be available.

The following clauses are suggested in relation to the duty of due diligence. They are framed so as to leave the decision to the arbitrator as to what obligations will reasonably limit his availability. For barristers and other professionals who might be appointed as judges or deputy ministers, an exemption is recommended.

(1) The arbitrator undertakes to make himself available on such dates as may be reasonably required of him having regard to all the circumstances of the case including personal and professional commitments of the arbitrator.

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50 *Ibid.*, at p. 535; it should be noted that he was of the opinion that if existing commitments of the arbitrators did not permit the reasonable and timeous hearing of the case then other arbitrators would have to be appointed. This begs the question of whether an arbitrator would be liable for wasted costs should he withdraw.

51 [1980] 2 Lloyd's Rep. 381.

52 *Ibid.*, at p. 385.

53 Supply of Goods and Services Act, s. 14.

54 *Ibid.*, s. 16; see the reference to the Unfair Contract Terms Act 1977 under the discussion of immunity below.

55 Article 584(2) CCP; see the discussion of Austrian law by Melis in *The Immunity of Arbitrators*, Lew Ed., (Lloyd's of London Press Ltd. 1990) 15–19.

(2) The arbitrator undertakes to enter on and proceed with the arbitration and the making of an award subject only to death, incapacity or judicial or other state appointment. The parties should take out insurance against such eventualities.

(d) *Fees*

The English Arbitration Act 1950 contains various provisions for the taxation of arbitrators' fees where fees are not fixed by agreement but there is no provision to deal with the situation where fees have been agreed in advance of appointment with just one of the parties. As discussed above, the requirement of consent in contract law means that the non-nominating party is not necessarily bound by an agreement between the arbitrator and the other party.[56] The trilateral contract theory by which the arbitrator becomes a party to the original arbitration agreement does not provide an answer to this problem. The worst scenario for the arbitrator is that his fees will be taxed in the High Court if he refuses to deliver up the award until they are paid. This does not create any serious problem. Where problems may lie is in respect of commitment fees. If both parties do not agree to a commitment fee then the arbitrator will be bound, by the duty of due diligence to the party with whom he has no agreement, to continue with the arbitration even if the commitment fee is not paid. As noted above, it has been held that after appointment is accepted an arbitrator becomes a judicial officer with exact duties to both parties and may not resign without the consent of both parties.[57]

The controversy in *Norjarl* v. *Hyundai* involved a request by arbitrators that they be paid a commitment fee in advance of the hearing to secure them against loss of remuneration should the numerous days to be reserved be cancelled. The arbitrators had accepted appointment without stipulation as to fees and the parties to the arbitration were unable to agree on fees to be paid. One of the parties applied for a declaration that it was open to arbitrators, after appointment, to conclude an agreement with just one of the parties for the payment of fees where no agreement could be reached between the parties. The other party sought the removal of the arbitrators for misconduct. Lord Justice Leggatt was of the view that it exceeded the duty of the arbitrators to be obliged to fix a 12 week hearing without a commitment fee.[58] Lord Justice Stuart Smith indicated that the arbitrators could not decline to commit themselves.[59]

The arbitrator must continue with the reference in any event of disagreement as to fees if fees are not fixed before appointment is accepted. In particular, a commitment fee may not be demanded unless there are

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[56] Note the comment of Lord Justice Leggatt in *Norjarl* v. *Hyundai*, *supra*, note 15 at p. 531 that an agreement to secure the fees of an arbitrator made before appointment with just one of the parties is unobjectionable. The agreed fees would be restricted to reasonable fees to which the arbitrator has a right in any event of specific agreement.

[57] *Supra*, note 51.

[58] *Supra*, note 15 at p. 533.

[59] *Ibid.*, at p. 536.

exceptional circumstances. The Court of Appeal agreed that it was not misconduct for the arbitrators to seek a commitment fee as long as both parties agreed.[60]

In the example given earlier of the arbitration which could not proceed because of the fault of one of the arbitrators a question was raised as to the entitlement of the other arbitrators to fees. Would the parties be required to compensate them for lost time if there was no commitment fee agreed? The logical answer is that it would be reasonable for them to be compensated and a taxing officer would likely so find.

An arbitrator should attempt to secure the agreement of both parties as to fees. Because the parties may be from another country and of unknown financial standing, arbitrators would prefer to look to the legal representatives of the parties in England to be responsible for their fees. This would require an undertaking from the parties' lawyers who could then ensure that there were sufficient funds held in trust to meet fees and expenses. The alternative is for the arbitrators to require the parties to secure their fees.

The following Model Terms of Appointment are suggested for consideration by arbitrators who wish to minimize disagreement in respect of fees.

(3) The legal representatives in England of each party will give their consent in writing to the appointment of the arbitrator and an undertaking to be jointly and severally liable for his fees and disbursements as provided for herein.
(4) A fee on appointment of £ will be paid to and retained by the arbitrator in any event as a non-refundable deposit against subsequent charges.
(5) A fee of £ per hour/day or part thereof spent in connection with the arbitration for the purpose of preparation for the arbitration or the making of an award, reading papers, travelling or other related activities will be charged.
(6) A fee of £ per hour/day or part thereof spent in England in connection with the arbitration for the purpose of hearings, meetings, inspections, site visits or similar activities will be charged.
(7) A fee of £ per hour/day or part thereof spent outside of England in connection with the arbitration for the purpose of hearings, meetings, inspections, site visits or similar activities will be charged.
(8) All reasonable disbursements incurred in connection with the arbitration in relation to travel will be charged.
(9) All reasonable disbursements incurred in connection with the arbitration in relation to meals and accommodation outside of London will be charged.
(10) In lieu of disbursements for meals and accommodation a per diem of £ for each day or part thereof spent outside of London in connection with the arbitration will be charged.
(11) An advance payment of £ per day for each day reserved for hearings (as a deposit against charges for fees for the days reserved or cancellation fees) is payable within 14 days of confirmation of the reservation or six months in advance of the first day reserved whichever occurs later.

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[60] In the U.S. it has been held that it is contrary to public policy for an arbitrator to seek any additional compensation after appointment on the premise that 'the parties should not be placed in a position where they feel compelled to accede to the demands of the arbitrators for fear of adverse consequences': *Double-M Construction Corp.* v. *Central School District No. 1, Town of Highlands, Orange County*, 402 N.Y.S.2d 442 (1978).

(12) A cancellation fee of two-thirds of the fees otherwise payable for days reserved for hearings will be charged where the hearings are adjourned or cancelled within two months of the first day reserved unless the adjournment or cancellation is at the request of the arbitrator save that if the arbitration ultimately proceeds to a hearing and an award, one-half of such cancellation fee will be credited back against fees payable when the award is taken up.
(13) A cancellation fee of one-third of the fees otherwise payable for days reserved for hearings will be charged where the hearings are adjourned or cancelled more than two months before the first day reserved unless the adjournment or cancellation is at the request of the arbitrator save that if the arbitration ultimately proceeds to a hearing and an award, one-half of such cancellation fee will be credited back against fees payable when the award is taken up.
(14) All fees and disbursements charged by the arbitrator shall be paid within thirty days of their submission as provided for herein.
(15) Interest on monies outstanding after the date provided for their payment shall accrue at a rate 2% above the base rate charged from time to time by the Bank of England.
(16) Value Added Tax where applicable shall be paid in addition to all charges.

(e) *Lien Over the Award*

It is a well established rule of common law that an arbitrator has a lien over the award against the payment of fees.[61] For the avoidance of doubt, the following clause is recommended.

(17) Any preliminary, interim or final award shall be taken up within fourteen days from receipt of notice of its publication and all outstanding fees and disbursements charged by the arbitrator shall be paid in full before any final award is taken up.

The lien is of no use to the arbitrator if the parties do not take up the award which may occur if the claimant is sure that the claim has failed. The respondent has no need for the award unless the claimant renews the action. In this event it may be necessary to fall back on the right to bring an action for fees.

(f) *Immunity*

The starting point in considering the immunity of arbitrators under English law is an assumption that English law is the governing law. If the proper law of the arbitration agreement is Austrian law for example, and (following *Norjarl* v. *Hyundai*) the arbitrator becomes a party to that contract then Austrian conceptions of arbitral immunity may apply. Without elaborating on Austrian law, suffice to say that there is no specific immunity and an arbitrator is liable to be sued.[62] Even if English public policy in favour of arbitral immunity would block an action in England or enforcement of an Austrian judgment in England, the arbitrator will want to avoid defending an action in a foreign country which may imperil assets there or in a country where the judgment may be enforceable.

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[61] Mustill and Boyd supra, note 3 at 234.

[62] An arbitrator would be immune in the same way as a judge for acts or omissions in the conduct of the proceedings and the making of the award; see Melis in *The Immunity of Arbitrators*, *supra*, note 55.

English law provides for the immunity of arbitrators in the same way as for judges. In *Sutcliffe* v. *Thackrah*, the House of Lords, in *obiter dicta*, affirmed the long standing rule of immunity from liability for negligence or want of skill in making an award.[63] The House of Lords reaffirmed the rule in obiter statements in *Arenson* v. *Arenson*.[64] However, there were reservations expressed by three of the five judges which ranged from the view that arbitrators should not be entitled to any immunity at all to the view that arbitrators should not be entitled to immunity in every case.[65]

The House of Lords have yet to hear a case in which the immunity of arbitrators was squarely in issue and have not had the benefit of full argument on the subject. They may re-examine the issue and the law may change in response to the exigencies of modern arbitration practice and the evolving nature of the business relationship with the parties. Arbitrating is now a recognised avocation in which the arbitrator pledges his skill and experience. Many of the old policy arguments no longer obtain. The reluctance of arbitrators to undertake a reference will be met by the market, by exemption clauses and by insurance. There are suitable safeguards in place to protect against frivolous and vexatious actions. Not every action against an arbitrator will be misconceived and bound to fail. Public policy demands responsibility for negligence.[66] As stated by Lord Reid, the reason for the immunity of arbitrators is hardly self evident.[67] If arbitral immunity is denied it will not be the death knell of arbitrations in England because the parties may prefer a place where arbitrators are held legally responsible for breach of a duty of care or due diligence.[68]

For the moment arbitrators are safe in England from any action except for fraud or dishonesty. It may be that acts which are outside the remit of the arbitrator such that they go to jurisdiction do not attract immunity. Accordingly, the potential for an action exists even in England. The precise limits of arbitral immunity have not been set. It would be safe to say that the right of an arbitrator to be wrong will be preserved. This is a matter of public policy common to most systems.[69]

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63 *Supra*, note 31 per Lord Reid at p. 735; Lord Morris of Borth-y-Gest at p. 744; Viscount Dilhorne at p. 754 and Lord Salmon at p. 758.

64 *Supra*, note 13.

65 *Ibid*, per Lord Kilbrandon at p. 431 and Lord Fraser of Tullybelton at p. 442. Lord Salmon at p. 440 noted that the extent of arbitral immunity may have to be examined in the future.

66 See the comments of Lord Salmon in *Arenson* v. *Arenson* supra, note 13, at p. 436.

67 *Sutcliffe* v. *Thackrah*, *supra*, note 31, at p. 735.

68 It should be noted that the UNCITRAL Model Law contains no provision regarding the immunity of arbitrators. The Secretariat suggested that the matter should not be dealt with 'in view of the fact that the liability problem is not widely regulated and remains highly controversial'. See Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1989) 1119 and 1148-1150.

69 In Switzerland and Austria, for example, doctrine holds that an arbitrator is entitled to immunity in respect of acts related to the conduct of the case and the rendering of an award – he has the right to be wrong ('droit a l'erreur'): See Lalive and Melis in *The Immunity of Arbitrators*, *supra*, note 55 at pp. 15 and 117. For a discussion of the immunity of arbitrators under English law see Lew in *The Immunity of Arbitrators*, *supra*, note 55 at 21.

English cases speak of immunity for acts done honestly and in good faith which presupposes liability if there is bad faith or dishonesty. In a recent American case an arbitral award for ninety-two million dollars was challenged because there was strong evidence that the arbitrator was having an affair with the female counsel for the successful party. In England the arbitrator might be found to have acted in bad faith and be liable for the wasted costs of the arbitration if the award were set aside.[70]

As arbitrator should insist on terms of appointment which encompass both the applicable law and exemption from liability. Exemption clauses have been suggested by members of the House of Lords who have doubted the existence or reach of arbitral immunity.[71] The availability of exemption clauses in England may depend upon the requirements of reasonableness under the Unfair Contract Terms Act 1977 which limits the right to contract out of negligence.[72] Exemption clauses will be construed strictly and must be drawn sufficiently wide to encompass negligence.[73]

To return to the example of the arbitrator who caused the parties substantial losses by reason of his failure to attend at the scheduled hearings, it could hardly be said that, as the foundation for an implied term, the parties at the outset would have agreed to immunity from liability.[74] It is not a necessary term to give business efficacy to the contract. Neither is there any basis in law to imply such a term. Public policy should not be invoked to protect the arbitrator from liability. Most of the policy considerations do not apply to conduct outside the decision making function. Does his status render him immune from liability? An analogy might be drawn to the immunity of a barrister. In *Rondel* v. *Worsley*, the House of Lords found the immunity of a barrister to be based in public policy.[75] The status of a barrister was not determinative of his immunity. The barrister's immunity extends only to acts and omissions closely connected with the conduct of litigation. This has been held to encompass a failure to attend proceedings but this would be doubtful

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70 The *Mission Insurance* case reported in the Wall Street Journal, February 14, 1990 page 1. This case would be a severe test of the concept of absolute immunity recognised in some States even for acts which constitute misconduct or fraud: see *Coopers and Lybrand* v. *Superior Court of California and Schwartz*, 260 Cal. Rptr. 713 (Cal.App.2 Dist. (1989) but see also *Grane* v. *Grane*, 493 N.E.2d 1112 at 1118 (Ill.App.2 Dist. 1986) where it was held that an arbitrator is immune only when acting within jurisdiction.

71 *Supra*, note 65.

72 The implication of a duty of care under the Supply of Goods and Services Act 1982 is specifically excluded from application to arbitrators – see supra, note 25; The Unfair Contract Terms Act 1977 prohibits unfair or unreasonable exemptions from liability. Liability for breach of a duty to take reasonable care or to exercise reasonable skill may only be excluded if it is reasonable having regard to the circumstances when the contract was made. The Act is not applicable to international supply contracts but the arbitration agreement is considered to be separate and distinct from any contract in which the arbitration clause may be embedded and would itself be a contract for services. There are similar statutes to the English legislation in many countries.

73 *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192.

74 *Ibid.*

75 *Supra*, note 8.

authority in a modern context.[76] There is no policy basis to support any analogy to diplomatic immunity. The arbitrator would therefore likely be held liable for the wasted costs.

As so clearly described by Lord Kilbrandon, an arbitrator should qualify his appointment as follows:

> I decline absolutely to accept the risk of having to defend a negligence suit, even though I be confident that I have not been negligent. I have no ambition, nor can I afford, to be a successful defendant, even in a leading case.[77]

As a starting point for discussion, the following Model Terms are suggested in relation to liability on the premise that it is better to be safe than sorry. There is a danger that this may lead to a loss of business for some arbitrators.[78] An arbitrator should secure the consent of both parties to these terms of appointment.

> (18) This agreement is subject to English law and the exclusive jurisdiction of English courts.
> (19) The arbitrator is exempt from liability for breach of any legal duty or for any act or omission in connection with or related to the conduct of the arbitration whether or not such act or omission is within jurisdiction.

IV. A SUGGESTED APPROACH

To identify all of the permutations and deficiencies of a contract theory would be like Sisyphus attempting to push a rock uphill. However, an answer to some of the more obvious problems created by the current approach may be available. It is *not* necessary to find a trilateral contract based on the arbitration agreement of the parties. The contract of appointment is a separate and distinct contract subject to its own terms and conditions. This separate contract of appointment would incorporate by implication the minimum necessary terms of the arbitration agreement to get the arbitration effectively under way. A choice of law clause in the arbitration agreement is not a necessary term and would not be incorporated by implication. However, terms of the arbitration agreement setting out such matters as rules of procedure and the place of arbitration would be incorporated by reference and would form part of the contract of appointment. The contract of appointment would not work without these terms because an arbitrator may not proceed except in accordance with the terms agreed by the parties in their arbitration agreement. The parties and the arbitrators would also have said at the outset that the arbitrators should abide by the agreement of the parties as to the procedures to be followed in the arbitration.

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[76] *Robertson* v. *McDonagh* (1880) 6 L.R.Ir. 433.
[77] *Supra*, note 13, at p. 431.
[78] As suggested by Lord Salmon in *Arenson* v. *Arenson*, *supra*, note 13 at p. 440.

A separate contract theory is not unprecedented. More than a century ago an English court ruled that a separate contract from the arbitration agreement exists between the arbitrators and the parties.[79] More recently Mustill J. (as he then was) took the view that there is a separate contract of reference between the parties which comes into being when a dispute arises and the parties act on the agreement contained in their arbitration clause.[80] This new contract of reference may be subject to its own proper law different from the proper law of the agreement to submit future disputes to arbitration.[81] In theory there could also be a separate contract of appointment. In the absence of an express or implicit choice of law the usual conflict of laws rule would apply and the law with the closest and most substantial connection to the contract would govern. In most cases this would be the law of the place where the contract of appointment is entered into and the arbitration takes place.

In the absence of agreed terms as to fees, the right to reasonable fees would be an implied term. Fee agreements including cancellation fees concluded with just one of the parties would probably not form part of the contract with the other party. Exemptions from liability would similarly need the consent of both parties to be binding on both parties. Blame for frustration of the nomination of one of the parties can hardly be placed on the party who refuses to agree to terms and conditions not necessarily implied in the contract of appointment. The party with the right to nominate an arbitrator may have to find an arbitrator who is prepared to accept appointment on the understanding that his contract with the other party will include only the bare necessary terms which would be implied or incorporated by reference to the arbitration agreement or otherwise. The only caveat to this is that the non-nominating party may be estopped from objecting to reasonable terms agreed between an arbitrator and his nominating party before appointment by virtue of the undertaking in the arbitration agreement to submit to the authority of the nominee of the other party. The courts might find an implied term in the arbitration agreement itself that the parties will accept reasonable terms negotiated by the other party with the nominee. This may allow for reasonable terms regarding choice of law, commitment fees and exemption from liability.

With a separate contract of appointment each party would have a separate contract with each arbitrator. The individual bilateral contracts would share a common core of terms derived from the terms of the arbitration agreement plus any additional terms agreed between the arbitrator and each party. Duties of impartiality and due diligence would be terms implied by law. Each bilateral contract would be governed by its own proper law. If all terms were agreed with both parties then there could be a trilateral contract. A single or third arbitrator would necessarily be party to a trilateral contract because it

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[79] *Crampton & Holt* v. *Ridley*, *supra*, note 13 at p. 54.

[80] *Black Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep. 446.

[81] *Ibid*, at p. 455.

would be inappropriate for separate arrangements to be made with the different parties. However, this would not preclude the negotiation of terms with both parties prior to acceptance of appointment. The separate bilateral or trilateral contracts of appointment with each arbitrator would survive the nullity of the arbitration agreement and the contractual rights, obligations and immunity of the arbitrators would be preserved.[82]

V. CONCLUSION

It must be conceded that the appointment of arbitrators is now much more of a commercial transaction. It is no longer a matter of honour and duty alone which lead arbitrators to accept appointments. Many experienced professionals act as arbitrators as a lucrative sideline to their usual practice. With the expansion of world trade and the increasing choice of arbitration as a dispute resolution mechanism there is a growing number of professional arbitrators. It is to be expected that the law will keep pace with the increasingly commercial nature of the relationship. The parties expect a high degree of skill and expertise from arbitrators who are paid handsomely for their experience.

It might be a very useful exercise to have someone with a knowledge of civil law canvass the other major arbitration countries to see if they conform to French conceptions of contractual liability. Rather than consider potential liability from the immunity perspective it would be most useful for arbitrators in international cases to know the fundamental basis on which an action might proceed. They would then govern themselves accordingly, either by taking out insurance, insisting upon contractual terms for their own protection or sitting somewhere else.

The common law high water mark of contractual obligation is the *Norjarl* v. *Hyundai* case. However, in that case the parties proceeded on the premise that contractual obligations did apply. There has yet to be a case in England argued on the basis that there was never any intention to create binding legal relations and the courts have not had the benefit of full argument. Nevertheless, to argue that there is no contract flies in the face of long standing precedent.

Many questions are left unanswered and further developments in the law are to be expected and welcomed. The piece-meal way in which individual problems have been dealt with has left the law in an unsatisfactory state. Squeezing the balloon in one place only causes it to bulge in another. With the greatest respect, the theory of a trilateral contract premised on the arbitration agreement of the parties is unworkable. A comprehensive statement of the nature of the relationship of the arbitrators to the parties is

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[82] In the U.S. it has been held that an arbitrator's immunity and authority derive from a valid arbitration agreement: *Grane* v. *Grane, supra*, note 70 at 1115.

required. Until the law is clarified the prudent arbitrator will only accept appointments after terms of appointment have been agreed with both parties.

The Model Terms suggested may be seen by the parties as too onerous. This is a matter for negotiation. The Model Terms may not be appropriate in every case. The arbitrator must consider each appointment on its own merits. In most cases it is to be expected that both parties will agree to reasonable terms negotiated by each arbitrator before accepting appointment. However, it may not be possible for the nominee of one of the parties to obtain the consent of the non-nominating party. Slight modifications would have to be made to the Model Terms of Appointment to reflect the agreement of the nominating party alone.

Arbitrators must keep pace with developments in commerce and law. Adequate insurance is the minimum requirement. There are those who will deprecate the move to insurance as a faux pas which will only establish deep pockets and serve to encourage litigation. It falls to the individual arbitrator to decide to not take out insurance and thus risk being sacrificed on the altar of general deterrence. Many arbitrators will deprecate reliance upon terms of appointment as unseemly. They may prefer to rely upon the good faith of the parties and the legal protections already in place. They do so at their own peril.

APPENDIX

IN THE MATTER OF AN ARBITRATION

BETWEEN

X Ltd.

CLAIMANT

AND

Y Ltd.

RESPONDENT

TERMS OF APPOINTMENT

A dispute or difference subject to an arbitration agreement having arisen between X Ltd. and Y Ltd. (hereinafter referred to as the parties), John Browne Esq. (hereinafter referred to as the arbitrator) hereby accepts appointment as an arbitrator subject to the following terms:

(1) The arbitrator undertakes to make himself available on such dates as may be reasonably required of him having regard to all the circumstances of the case including personal and professional commitments of the arbitrator.
(2) The arbitrator undertakes to enter on and proceed with the arbitration and the making of an award subject only to death, incapacity or judicial or other state appointment. The parties should take out insurance against such eventualities.
(3) The legal representatives in England of each party will give their consent in writing to the appointment of the arbitrator and an undertaking to be jointly and severally liable for his fees and disbursements as provided for herein.
(4) A fees on appointment of £ will be paid to and retained by the arbitrator in any event as a non-refundable deposit against subsequent charges.
(5) A fee of £ per hour/day or part thereof spent in connection with the arbitration for the purpose of preparation for the arbitration or the making of an award, reading papers, travelling or other related activities will be charged.
(6) A fee of £ per hour/day or part thereof spent in England in connection with the arbitration for the purpose of hearings, meetings, inspections, site visits or similar activities will be charged.
(7) A fee of £ per hour/day or part thereof spent outside of England in connection with the arbitration for the purpose of hearings, meetings, inspections, site visits or similar activities will be charged.
(8) All reasonable disbursements incurred in connection with the arbitration in relation to travel will be charged.
(9) All reasonable disbursements incurred in connection with the arbitration in relation to meals and accommodation outside of London will be charged.
(10) In lieu of disbursements for meals and accommodation a per diem of £ for each day or part thereof spent outside of London in connection with the arbitration will be charged.

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(11) An advance payment of £150 per day for each day reserved for hearings (as a deposit against charges for fees for the days reserved or cancellation fees) is payable within 14 days of confirmation of the reservation or six months in advance of the first day reserved whichever occurs later.
(12) A cancellation fee of two-thirds of the fees otherwise payable for days reserved for hearings will be charged where the hearings are adjourned or cancelled within two months of the first day reserved unless the adjournment or cancellation is at the request of the arbitrator save that if the arbitration ultimately proceeds to a hearing and an award, one-half of such cancellation fee will be credited back against fees payable when the award is taken up.
(13) A cancellation fee of one-third of the fees otherwise payable for days reserved for hearings will be charged where the hearings are adjourned or cancelled more than two months before the first day reserved unless the adjournment or cancellation is at the request of the arbitrator save that if the arbitration ultimately proceeds to a hearing and an award, one-half of such cancellation fee will be credited back against fees payable when the award is taken up.
(14) All fees and disbursements charged by the arbitrator shall be paid within thirty days of their submission as provided for herein.
(15) Interest on monies outstanding after the date provided for their payment shall accrue at a rate 2% above the base rate charged from time to time by the Bank of England.
(16) Value Added Tax where applicable shall be paid in addition to all charges.
(17) Any preliminary, interim or final award shall be taken up within fourteen days from receipt of notice of its publication and all outstanding fees and disbursements charged by the arbitrator shall be paid in full before any final award is taken up.
(18) This agreement is subject to English law and the exclusive jurisdiction of English courts.
(19) The arbitrator is exempt from liability for breach of any legal duty or for any act or omission in connection with or related to the conduct of the arbitration whether or not such act or omission is within jurisdiction.

John Browne Esq.
ARBITRATOR

A & Co. Lawyers on behalf of X, Ltd.
CLAIMANT

B & Co. Lawyers on behalf of Y, Ltd.
RESPONDENT