REVOCATION OF AUTHORITY AND REMOVAL OF ARBITRATOR

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At Common Law

At common law, the authority of the arbitrator is revocable. Given the uncertainty of the legal nature of the relationship between the arbitrator and the parties, either party may revoke the authority of a named arbitrator at any time prior to the making of the award[1].

There was some debate whether at common law the court had the power to revoke the authority or remove an arbitrator. The 3rd Edition of Halsbury's Laws of England[2] states that the court has neither been given nor claimed the power to remove an arbitrator. On the other hand, Walton and Victoria have suggested that the court has power to remove an arbitrator for misconduct or delay but it has no power to replace him[3].

However, the court has inherent jurisdiction to ensure that arbitration proceedings are conducted judicially. In common law arbitration, the parties must be given a fair hearing otherwise the resultant award will not be enforced

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[1] *Vivion v Wilde* (1609) 2 Brownl 290; *Milne v Gratrix* (1806) 7 East 608; *Marsh v Bulteel* (1822) 5 B & Ald 507; *Haggett v Welsh* (1826) 1 Sim 134; *Slee v Coxon* (1830) 10 B & C 483; *Bright v Durnell* (1836) 4 Dowl 756; *Mills v Bayley* (1863) 2 H & C 36; *Thomson v Anderson* (1870) LR 9 Eq 523; *Re Rouse & Co Ltd and Meier & Co Ltd* (1871) LR 6 CP 212; *Randell, Saunders & Co Ltd v Thompson* (1876) 1 QBD 748; *Re Smith & Service and Nelson & Sons* (1890) 25 QBD 545.

[2] Halsbury's Laws of England, (3rd Edn), Vol. 2 at p 3.

[3] A Walton and M Vitoria, *Russell on the Law of Arbitration* (20th Edn, 1982) p 53.

by the court[4]. The court has power to remit an award to the arbitrator for reconsideration or to set it aside on similar grounds as under the statutes[5].

It is the authority of the arbitrator that is revoked and not the reference to arbitration[6]. The principle applies not just to the arbitrator appointed by the revoking party, but to an arbitrator appointed by the other party or by some other means as was the case in *In re an Arbitration between Fraser v Ehrensperger*[7] where the arbitrator whose authority had been revoked by party A had been appointed by party B as sole arbitrator in the light of A's default in appointing his own arbitrator.

A party to an oral arbitration agreement can repudiate it by revoking the arbitrator's authority or otherwise frustrating the arbitral process. Such unilateral withdrawal of the arbitrator's mandate by a party would constitute a breach of a valid and binding contract at common law. Since the injured party cannot specifically enforce a contract to arbitrate, he will be entitled only to damages based on the circumstances of the case[8]. Both parties are entitled to sue on the dispute upon abandonment of the arbitration. Indeed, either party can sue on the dispute even while arbitral proceedings are pending for the existence of submission does not oust the jurisdiction of the court[9].

Under the Arbitration Act 1952 (Act 93)

Section 3 of the Arbitration Act 1952 (Act 93) removes the self-apparent difficulties and provides that the authority of an arbitrator or umpire appointed by or by virtue of a written arbitration agreement is, unless a contrary intention

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[4] *Re, Morphett* (1845) 2 Dow & L 967; *Walker v King* (1724) 9 Mod 63.
[5] A Walton and M Vitoria, *Russell on the Law of Arbitration* (20th Edn, 1982) p 53.
[6] *Harcourt v Ramsbottom* (1820) 1 Jac & W 505; *Moffat v Cornelius* (1878) 39 LT 102; *Piercy v Young* (1879) 14 ChD 200.
[7] (1883) 12 QBD 310, CA (Eng). See also *Siemens AG v Dutco Construction Co (Pvt) Ltd* (1992) 18 YB Com Arb 140.
[8] *Doleman & Sons v Ossett Corp* [1912] 3 KB 257 at 262.
[9] *Thompson v Charnock* (1799) 3 TR 139; *Mitchell v Harris* (1701) 1 Ld Raym 671; *Harris v Reynolds* (1845) 7 QB 71.

is expressed in the agreement, irrevocable except by leave of the High Court. The authority of the arbitrator is irrevocable without leave of court even though he had been appointed orally[10].

Lord Esher MR in *Smith and Services and Nelson & Sons*[11] in discussing the word irrevocable under a repealed English Act, explained that it did not mean that the agreement to refer is irrevocable 'because that always was in the true sense irrevocable' but the Act makes the authority of the arbitrator irrevocable where he has once been appointed[12].

Section 3 of the Arbitration Act 1952 (Act 93) also presumes that the court has such powers which it alone exercises. The power to grant leave is discretionary to be exercised according to the circumstances of each particular case. The court will consider the balance of convenience and inconvenience in exercising the discretion. Parties will not be relieved from an arbitral tribunal they had chosen because they fear that the award may go against them.

This power operates in a negative manner. The parties themselves can by agreement remove their arbitral tribunal in whole or in part, or agree to revoke their submission to arbitration. To do so, an intention to that effect must be manifest in the agreement. An example of such an agreement is found in the Revised PAM Arbitration Rules which provides the appointment of the arbitrator may be revoked at any time by the written agreement of the parties[13]. This provision envisages a situation where the parties act jointly and agree in writing to revoke an arbitrator's authority. In the absence of the agreement enabling the parties to revoke the authority of the arbitrator or umpire, it can be effected only with the leave of the High Court. Any such leave granted was to have the same effect in all respects as if it had been made an order of court[14].

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[10] *Frota Nacional de Peroleiros v Skibsaktieselskapet Thorsholm* [1957] 1 Lloyd's Rep 1. The court said that there is no power in the court to revoke the authority of an arbitrator against the will of the party appointing him.

[11] (1890) 25 QBD 545 at 550.

[12] See also *Doleman & Sons v Ossett Corp* [1912] 3 KB 257 at 270, 271, CA (Eng), per Fletcher Moulton LJ.

[13] See *Revised PAM Arbitration Rules* (March, 2003 Edn), Art 4.4.

[14] See *Penang Development Corp v Trikkon Construction Sdn Bhd* [1997] 3 MLJ 115, CA.

The authority of the arbitrator continues until the applicant is given leave[15]. Under s 4(2) of the Arbitration Act 1952 (Act 93), the authority of an arbitrator is not revoked by the death of any party by whom he is appointed. However, this provision operates without prejudice to any rule of law whereby the death extinguishes any cause of action with which the dispute under arbitration may be concerned. A party's bankruptcy does not in itself operate as a revocation of the submission, and the trustee in bankruptcy has no power to revoke it[16].

The court will give leave only in respect of an arbitrator appointed by the applicant where the provision is for an arbitrator to be appointed by each of the two parties. The court has no power to revoke an appointment against the will of the appointing party. It could in a proper case give leave for that party to revoke it[17]. Once the arbitrator has made his award or the parties have settled the dispute or difference, his jurisdiction cannot be revoked as he is functus officio[18].

It is open to the parties to settle the dispute or difference at any stage of the proceedings. The arbitrator may or may not be called to record a consent award as it depends on what the parties have agreed. If it has not been agreed that the arbitrator must make an award against one party, the effect of the settlement is that the arbitrator's jurisdiction is abrogated.

However, a party to an oral arbitration agreement may revoke the authority of an arbitrator appointed by him at will and without leave, though he might as a result be liable in damages for breach of contract. The reason is that, apart

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[15] Mustill and Boyd, *Commercial Arbitration* (2nd Edn, 1989) p 526.
[16] *Andrews v Palmer* (1821) 4 B & Ald 250; *Snook v Hellyer* (1818) 2 Chit 43; *Ex p Edwards* (1886) 3 Morr 179; *Hemsworth v Brian* (1845) 1 CB 131*; Taylor v Shuttleworth* (1840) 8 Dowl 281; 9 LJCP 138; *Tayler v Marling* (1840) 2 M & G 55; 10 LJCP 26.
[17] *Frota Nacional de Petroleiros v Skibs Aktieselskapet Thorsholm* [1957] 1 Lloyd's Rep 1, CA (Eng). See also *Den of Airlie SS Co Ltd v Mitsui & Co Ltd* (1912) 17 Com Cas 116 at 131, CA (Eng); *Burkett Sharp & Co v Eastcheap Dried Fruit Co and Perera* [1962] 1 Lloyd's Rep 267 at 276, CA (Eng); *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff* [1980] 2 Lloyd's Rep 381.
[18] *Phipps v Ingram* (1835) 3 Dowl 699.

from statute, the courts will not specifically enforce an arbitration agreement[19]. Revocation of the arbitrator's authority is exactly equivalent to his removal[20].

Circumstances in which leave may be given

An arbitration agreement is a mutual undertaking by the parties to submit their disputes to arbitration and to abide by the arbitrator's award. All questions of fact are within the sole domain of the arbitrator and errors of fact in an award are not open to challenge whereas errors of law are subject only to a limited regime of review[21]. However, there is a possibility that errors of fact or law, misconceptions and misstatements may in certain limited circumstances contribute to a complaint of bias.

Revocation of the authority of an arbitrator or an umpire deprives one party of his contractual rights. It may result in great delay and expense for the parties concerned[22]. The court in *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff Ltd*[23] held that if the other party was content to allow the arbitrator to remain in office, and the arbitrator remained willing to continue to serve, leave was to be refused unless the arbitration was in some way fundamentally flawed and removal is the only right course to take. Lord Denning explained[24], 'The original purpose of the section was to impede and not promote the removal of arbitrators … it remains a remedy of last resort, and the Court should not intervene with a well-established reference unless convinced that it is the only right course to take'.

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[19] *Doleman & Sons v Ossett Corpn* [1912] 3 KB 257 at 268, CA (Eng); *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846; *Bankers and Shippers Insurance Co of New York v Liverpool Marine and General Insurance Co Ltd* (1925) 21 Ll L Rep 86.

[20] See A Walton and M Vitoria, *Russell on the Law of Arbitration* (20th Edn, 1982) p 141.

[21] *Mcpherson Train & Co v J Milhem & Sons* [1955] 2 Lloyd's Rep 59, CA (Eng).

[22] *Scott v Van Sandau* (1841) 1 QB 102; *Forwood v Watney* (1880) 49 LQB 447; *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha, The Golden Anne* [1984] 2 Lloyd's Rep 489; *City Centre Properties* (*ITC Pensions*) *Ltd v Tersons Ltd* [1969] 2 All ER 1121, affd [1969] 1 WLR 772, CA (Eng).

[23] [1980] 2 Lloyd's Rep 381.

[24] *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff Ltd* [1980] 2 Lloyd's Rep 381 at 388.

For these reasons, the courts treat the leave to revoke the authority of an arbitrator or an umpire as an extreme remedy, which is used sparingly, and only in unusual cases. A much stronger case must be made to induce the court to make an order giving leave to revoke the authority of an arbitrator or umpire appointed by or by virtue of the arbitration agreement than is necessary to induce the court to make an order staying legal proceedings in respect of the matter agreed to be referred to arbitration[25]. In practice, parties may prefer merely to protest at misconduct or irregularities during the proceedings and seek to set aside the award after it is made.

The application for leave to revoke the arbitrator's authority cannot be used as a device to avoid arbitration. The court in *Turk Gemi Kurtama v Ithaka* (*Owners*), *The Ithaka*[26] refused to give leave for revocation when the effect of leave was to allow the judicial proceedings to go ahead. The court will consider the balance of convenience and expense, in deciding whether to allow an arbitration to proceed or to grant leave to revoke the arbitrator's authority. Lord Denman in *Scott v Van Sandau*[27] stated, 'On a balance, therefore, of the conveniences and inconveniences that await our decision on the one side or the other, we have no doubt that the continued progress of the inquiry before the arbitrator, with the hope of his coming to a just and satisfactory conclusion, holds out the prospect of greater benefit and lesser evils to both parties'.

A material consideration is the time when the application is made or whether the proceedings would be prolonged by leave being granted. If it is made at an early stage of the arbitration proceedings, the court will more readily grant leave to revoke, assuming always that a good case for revocation

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[25] *City Centre Properties* (*ITC Pensions*) *Ltd v Tersons Ltd* [1969] 2 All ER 1121, affd [1969] 1 WLR 772, CA (Eng); *Scott v Van Sandau* (1841) 1 QB 102; *Den of Airlie SS Co Ltd v Mitsui & Co Ltd* (1912) 17 Com Cas 116, CA (Eng); See also *Belcher v Roedean School Site and Buildings Ltd* (1901) 85 LT 468 at 471 per Mathew LJ, CA (Eng); *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff Ltd* [1980] 2 Lloyd's Rep 381; *Stockport Metropolitan Borough Council v O'Reilly* [1983] 2 Lloyd's Rep 70; *James v Attwood* (1839) 7 Scott 843 per Tindal CJ; *James v James & Bendall* (1889) 22 QBD 669 at 674 per Stephen J.

[26] [1939] 3 All ER 630.

[27] (1841) 1 QB 102.

is shown[28]. Vaughan Williams LJ in *Den of Airlie SS Co Ltd v Mitsui & Co Ltd*[29] explained, 'When you are considering whether you shall make an order for leave to revoke or not, one matter that you ought always to bear in mind is that you should make no order which is likely to lengthen the arbitration proceedings; and obviously, in a case where a question of construction of the submission to arbitration arises, you will be very likely to lengthen the proceedings enormously if you do not allow first the facts to be found to which the submission to arbitration, when ultimately construed, will apply'.

The court will not give leave merely on the fact that the arbitrator had erred in some way[30] or was proposing to admit or exclude particular evidence[31], or was arguably exceeding his jurisdiction[32]. The court will also not give leave because of the existence of judicial proceedings between the same parties on a different matter as it is immaterial to the arbitration[33].

Misconduct

The first situation where the court may give leave is where there is serious and irreparable misconduct[34]. Section 24 of the Arbitration Act 1952 (Act 93) makes reference to 'misconduct'. There is no express reference in s 24 to failure to be impartial, such as is found in s 25(1). However, the Act does not define what amounts to misconduct. Misconduct is difficult to define[35].

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[28] *Re Gerard (Lord) and London & North Western Railway Co* [1895] 1 QB 459, 11 TLR 170, CA (Eng).
[29] *Den of Airlie SS Co Ltd v Mitsui & Co Ltd* (1912) 17 Com Cas 116, CA (Eng).
[30] *James v James & Bendall* (1889) 22 QBD 669, CA (Eng); *Property Investments* (*Developments*) *Ltd v Byfield Building Services* (1985) 31 BLR 47; *Ulysses Compania Naviera SA v Hutingdon Petroleum Services Ltd, The Ermoupolis* [1990] 2 Lloyd's Rep 160.
[31] *Scott v Van Sandau* (1841) 1 QB 102; *Re Hart v Duke* (1862) 32 LJQB 35; *Re Dreyfus & Sons and Paul* (1893) 9 TLR 358.
[32] *SS Den of Airlie Steamship Co Ltd v Mitsui & Co Ltd* (1912) 17 Com Cas 116, CA (Eng); *Faviell v Eastern Counties Railway Co* (1848) 2 Exch 344 (where the remedy was granted).
[33] *City Centre Properties* (*ITC Pensions*) *Ltd v Tersons Ltd* [1969] 2 All ER 1121, affd [1969] 1 WLR 772, CA (Eng).
[34] *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210. See also *Pearl Hill Sdn Bhd v Trikkon Construction Sdn Bhd* [1984] CLJ 191.
[35] [1971] 2 MLJ 210 at 211.

Raja Azlan Shah J in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*[36] explained, 'In the law of arbitration, misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality'.

Therefore, misconduct includes what is sometimes called technical (legal) misconduct where the integrity and competence of the arbitrator is not impugned but it is said that he has made a procedural error[37] and extends from mere indiscretion to sheer dishonesty or fraud[38]. It is not misconduct for an arbitrator to make an error of law[39].

The arbitrator must follow the rules of natural justice. Natural justice as it applies to arbitration comprises of two broad propositions, namely: (1) that the arbitrator must act impartially and must not be a judge in his own cause, and (2) that he must act fairly and give the parties a reasonable opportunity of being heard. Essentially, the arbitrator in performing his judicial function brings with it the duty to act without bias. Most cases depend as much upon the terms of the reference and on the surrounding circumstances as upon the conduct of the arbitrator or umpire, and it is therefore difficult to provide an exhaustive definition of the term.

Misconduct justifying intervention by the court may take place at any stage: before appointment, between appointment and entering upon the reference, during the reference, or in the making of the award. Breach of this duty amounts to misconduct as embodied in s 24 of the Arbitration Act 1952.

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[36] *KS Abdul Kader v MK Mohamed Ismail* [1954] MLJ 231, CA.
[37] *Chung and Wong v CM Lee* [1934] MLJ 153, [1934] SSLR 190.
[38] *Gillespie Bros & Co v Thompson Bros & Co* (1922) 13 Ll L Rep 519; *RS Hartley Ltd v Provincial Insurance Co Ltd* [1957] 1 Lloyd's Rep 121; *Oleificio Zucchi SpA v Northern Sales* [1965] 2 Lloyd's Rep 496; *Moran v Lloyd's* [1983] QB 542, [1983] 2 All ER 200, CA (Eng). See also *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 All ER 494, [1958] 1 WLR 271, affd [1958] 2 All ER 411, [1958] 1 WLR] 611, CA (Eng).
[39] See *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep 45; *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14.

The court's powers under s 24(2) and (2) are reflective of the position at common law[40].

In conformity with the notion of justice, the court has an inherent jurisdiction to make a declaration that the arbitration should not proceed, or to grant an injunction restraining arbitration if there are objections to the fitness of the arbitrator. The same test applies in relation to the court's power to remove an arbitrator on the ground of bias under s 24(1) of the Arbitration Act 1952 and the court's power to set aside an award on the ground of bias under s 24(2) of the Arbitration Act. The use of the singular 'an arbitrator' in s 24(2) emphasises that misconduct by one of several arbitrators may justify the setting aside of an award[41].

Actual or apparent bias

The second situation where the court may give leave to revoke the arbitrator's authority is provided in s 25(1) (and s 24(1) and (2)) of the Arbitration Act 1952 where there is actual or apparent bias. An arbitrator must act impartially, objectively and without bias. Even though an arbitrator may in good faith believe that he was acting impartially, his mind may be unconsciously be affected by bias[42]. Bias is a predisposition to decide for or against one party without proper regard to the true merits of the dispute. The proceedings before the arbitrator and the result will be tainted. The moment he becomes partially inclined towards a party, he loses his judicial character and the award which is the result of such bias may be set aside.

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[40] *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14.

[41] See also *City Centre Properties* (*ITC Pensions*) *Ltd v Tersons Ltd* [1969] 2 All ER 1121, affd [1969] 1 WLR 772, CA (Eng), per Lord Denning MR. For examples where there exist a serious breach of the rules of natural justice: *Kirk v East & West India Dock Co* (1887) 11 App Cas 738; *Re Gerard (Lord) and London & North Western Railway Co* [1895] 1 QB 459, 11 TLR 170, CA (Eng); *Glamorganshire Canal Navigation Co v Nixon's Navigation Co* (1901) 85 LT 53.

[42] See *R v Gough* [1993] 2 All ER 724 at 728, per Lord Goff based on *R v Barnsley County Borough Licensing Justices, ex p Barnsley and District Licensed Victuallers Association* [1960] 2 All ER 703 at 715, per Devlin LJ.

Lord Hewart CJ in *R v Sussex Justice ex parte McCarthy*[43] stated that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done', without giving currency to 'the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done'. This celebrated dictum has been particularly applied to disqualification of arbitrators or other adjudicators as part of the overriding public interest that there should be confidence in the integrity of administration of justice.

However, the proposition does not at all mean that once one of the parties has lost or claims to have lost confidence in an arbitrator, the arbitrator should stand down or be removed on the grounds that 'justice should not only be done but seen to be done'. The High Court Judge in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin*[44] disqualified himself upon application by one of the parties. While the case did not involve an arbitrator, the principles enunciated may be applied to arbitration.

In directing the same High Court Judge to preside over the trial, Gopal Sri Ram JCA said, 'Secondly, a judicial arbiter must decide any question presented to him for decision in the light of the objective facts and in accordance with settled principles. On no account should his personal sentiment enter upon the scene. Criticism of a judge is part of the territory in which he operates. So long as that criticism is made bona fide, based on fact and in conformity with law, none, least of all a judge, should mind: for there is no acquisition of knowledge without criticism. Over-sensitivity to criticism may result in ignorance, or much worse, intellectual arrogance. To decide a point in fear of criticism is to abdicate duty. These are matters that form part of a well-recognised judicial philosophy and should require no reiteration. In my judgment the learned judge failed to act in accordance with these principles. He decided upon disqualification, not on grounds argued before him. The record makes no mention of the grounds relied upon by him as ever having been put to either

[43] [1923] All ER 304.
[44] [1995] 2 MLJ 213.

side. His fear that an allegation may later be made against him is a non sequitur. In his carefully reasoned judgment, the learned judge was at pains to point out his lack of prejudice. Yet he was not prepared to hear the case. That to my mind is wrong.'

Actual bias occurs where the arbitrator is shown, in fact and for whatever reason, to have been influenced in his decision making by prejudice, predilection or personal interest. An irrebuttable presumption of bias occurs when the arbitrator has a direct pecuniary or proprietary interest in the outcome of the case[45].

The learned authors, De Smith, Woolf and Jowell opined, 'No person is qualified to adjudicate in any judicial proceedings in the outcome of which he has a direct pecuniary interest. The rule applies no matter how exalted the tribunal … or how trivial the interest. Nor is it material that the judge could not reasonably be suspected of having allowed himself to be influenced by his pecuniary interest. The rule applies to members of magistrates' courts, licensing justices and arbitrators'[46].

Blackburn J in *R v Rand*[47] said, 'there is no doubt that any pecuniary interest, however, small, in the subject of inquiry, does disqualify a person from acting as judge in the matter'. It is now settled that close family relationship of the arbitrator with any of the parties to the proceedings before him will disqualify him[48]. There is scanty authority on bias arising from personal friendship because this type of bias is rarely alleged[49]. The court in *Ex parte*

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[45] See *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759 at 793–794 per Lord Campbell; *Sellar v Highland Railway Co* (1919) SC (HL) 19; R v Rand (1866) LR 1 QB 230 at 232 per Blackburn J; *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 at 47, [1954] 2 All ER 850 at 855 per Slade J; *R v Glough* [993] 2 All ER 724, HL, at 730 per Lord Goff of Chieveley; *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* [1999] VSCA 35 at para 59 and para 3 per Charles JA and Winneke P.

[46] De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th Edn, 1995, p 528.

[47] [1886] LR 1 QB 230 at 232-233.

[48] *Bridgman v Holt* [1693] 1 Show PC 111; *R v Armagh County Justices* (1915) 49 ILT 56; *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304.

[49] See *Cottle v Cottle* [1939] 2 All ER 535.

Blume, Re Osborn[50] considered the degree of intimacy in personal friendship and set aside a decision of a tribunal.

Strong personal animosity towards a party by an arbitrator will disqualify the arbitrator from adjudicating in the arbitration as his adverse disposition or hostility will rise to a real likelihood of bias[51]. The court in *Catalina (Owners) v Norma (Owners*)[52] removed an arbitrator who was overtly biased in his behaviour in saying that 'Portuguese people are liars' in the courts of the proceeding to which Portuguese were the claimants. Another example was where a magistrate with a history of hostility and hatred against a defendant, used strong words of enmity against the defendant after convicting him. The conviction was quashed[53].

However, the mere fact that litigation is pending between the arbitrator and one of the parties, by itself, will not lead to an inference of bias, as long as it is unconnected with the matter being arbitrated[54]. Similarly, an arbitrator cannot be said to be biased by merely showing that he had agreed to give evidence against the solicitors to one of the parties in unconnected legal proceedings arbitrated[55]. It is not relevant to show the fact of a commercial relationship between an arbitrator and one of the parties when that fact has no bearing on the dispute in question arbitrated[56].

The arbitrator's professional relationship as a lawyer, architect, engineer, quantity surveyor or claims consultant with a party may give rise to real likelihood of bias if it is shown that their interest is directly related to the subject matter

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[50] [1958] 58 SR (NWS) (334).
[51] *R v Handley* [1921] 61 DLR 656; *Maclean v Workers Union* [1929] 1 Ch 602. Cf *White v Kuzych* [1951] AC 585.
[52] (1938) 61 LI L Rep 360; 82 Sol Jo 698, DC (Eng).
[53] *Re Donoghue v Cork County Justices* [1910] 1 IR 271; *Re Kingston v Cork County Justices* [1910] 2 IR 658; *Re Harrington v Clare County Justices* [1980] 2 IR 116.
[54] *Re Barring Brothers & Co and Doulton & Co* (1892) 61 LJQB 704; *Belcher v Roedean School Site and Building Ltd* (1901) 85 LT 468.
[55] *Fletamentous Maritimos SA v Effjohn International BV (No 3)* [1997] 2 Lloyd's Rep 302. See also *Rustal Trading v Gill & Duffus* [2000] 1 Lloyd's Rep 14.
[56] *Re Clout and Metropolitan & District Railway Co* (1882) 46 LT 141; *Re Haigh and London & North Western & Great Western Railway Companies* [1896] 1 QB 649.

of the proceedings[57]. The courts will intervene to remove an arbitrator if he is a direct employee of one of the parties as there is real danger of bias[58]. Sometimes, the contract administrator for example, the architect, engineer or project manager in building contracts may be designated also as arbitrators in the arbitration agreement.

The court in *Eckersley v Mersey Dock and Harbour Board*[59] summarised the legal position in such a circumstance as follows: 'This rule which applies to a Judge or other persons holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties, does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the court in saying that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish, at least, a probability that he will, in fact, be biased in favour of one of the parties in giving his decision … Where, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employer in respect of the carrying out of the contract'.

A party who has agreed to an arbitrator who is an employee of the other party cannot complain that the arbitrator is biased. The fact that the arbitrator is an employee of the party is known to both parties at the time when they signed the contract. The party, in order to secure the contract, submitted to the jurisdiction of such an arbitrator. The mere fact that the arbitrator is an employer cannot lead to a conclusion that he will or is likely to act as a biased person. As such, the party cannot lead evidence based on this mere fact of

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[57] D Sutton, J Kendall, J Gill, *Russell on Arbitration*, 21st Edition, 1997, paragraph 4.034, p 121. See also *Stevens v Stevens* [1929] 93 JP 120.

[58] *Pickthall v Methyr Tydfil Local Board* [1886] 2 TLR 805. Cf *Blackmell & Co v Derby Corporation* (1909) 75 JP 129; *Bremer Handelsgesellschaft mbH v Ets Soules et Cie* [1985] 2 Lloyd's Rep 199.

[59] [1894] 2 QB 667.

employment to prove that the arbitrator is biased or he had prejudged the issue. Nevertheless, the arbitrator is still required to act fairly and cannot be in collusion with his employer[60]. Any complaint of bias against the arbitrator must be supported by credible evidence which satisfies the test of real likelihood of bias.

The courts will not intervene merely because the arbitrator has appointed as his solicitor a member of a firm advising one of the parties[61], or the barrister arbitrator had in the past taken instructions from the solicitors for one of the parties[62], or because the barrister arbitrator practises in the same chambers as counsel for one of the parties[63]. There is real likelihood of bias if the arbitrator is creditor to one of the parties, as an award in favour of the debtor party is of direct benefit to the arbitrator[64]. On the other hand, it is not thought to give rise to a sufficient likelihood of bias if the arbitrator is indebted to one of the parties[65].

As can be seen from the above example, the modern approach favours a pragmatic analysis. The court will refuse leave to revoke the arbitrator's authority where the potential effect of any decision on the arbitrator's personal interest is so small or *de minimis* as to be incapable of affecting his decision one way or the other[66]. His interest must be direct. A remote or very tenuous interest will not qualify to disqualify him[67].

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[60] De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th Edn, 1995, p 538; *Jackson v Barry Rly Co* [1893] 1 Ch 238 at 247-248 CA (Eng), per Bowen LJ; *Ranger v Great Western Rly Co* [1854] 5 HLC 72; *Kemp v Rose* [1858] 1 Giff 258; *Kimberley v Dick* (1871) LR 12 Eq 1; *Ives & Barker v Williams* [1894] 2 Ch 478 at 488; *Eckersley v Mersey & Harbour Board* [1894] 2 QB 667; *Panamena Europea Navigacion (Comp Lim) v Fredk Leyland & Co* [1947] AC 428 (distinguishing *Hickman & Co v Roberts* [1913] AC 229); *Nelson Carlton Construction Co (Liquidator) v Hatrick (AC) (NZ) Ltd* [1965] NZLR 144; *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233.

[61] *Bunten and Lancaster (Product) Ltd v Kiril Mischeff Ltd* [1964] 1 Lloyd's Rep 386.

[62] *Bright v River Plate Construction Co Ltd* [1990] 2 Ch 835.

[63] *Laker Airways Incorporated v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep 45.

[64] *Cook International Inc v Handelsmaatschappij Jean Delavaux BV and Braat, Scott and Meadows* [1985] 2 Lloyd's Rep 225.

[65] *Morgan v Morgan* (1832) 1 Dowl 661.

[66] See *R v Inner West London Coroner, ex p Dallaglio* [1994] 4 All ER 139, CA (Eng) at 162, per Sir Thomas Bingham MR; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, CA (Eng).

[67] *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304.

The House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)*[68] held that the rule extended to a limited class of non-financial interest. The House of Lords stated the implication of the principle in the following language, 'This principle, as developed by the courts, has two very similar but not identical implications. First, it may be applied literally; if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example, because of his friendship with a party. The second type of case is not strictly speaking an application of the principle that a man must not be judge in his own case, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.'

Apparent bias is where if the facts are approved which would lead to a reasonable person, not knowing the arbitrator's state of mind, to think likely that there was bias, ie proof of the appearance of bias. It is no answer to such an application that the agreement refers to a named arbitrator and that the applicant, at the time when he made the agreement, knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.

The courts have established the limits of apparent bias by two competing tests, namely at one end of the spectrum where there has been a 'reasonable suspicion of bias' and at the other end, the arbitrator will only be disqualified where there is a 'real likehood of bias'. The two tests range between the possibility of bias (this test being closer to that of reasonable suspicion) and the probability of bias (this being closer to the actual bias test).

[68] [2000] 1 AC 119 at 142, HL.

The real likelihood of bias test has been restated in *R v Gough*[69] as the real danger of bias test. If right-minded persons would think that, in the circumstances, there was a real danger of bias on the part of the arbitrator, and then he should not sit[70]. Here the court itself must decide the matter based on the impression it has of the bias in the circumstances of the case. The test is concerned with the actuality of the injustice and not its mere appearance. The bias must be shown to be present before the decision is invalidated or removal ordered.

On the other end, the reasonable suspicion of bias test is when it might be reasonably suspected by fair-minded persons that the arbitrator might not resolve the questions before him with a fair and unprejudiced mind[71]. It is suspicion derived from the circumstances of the case from the point of view of a reasonable observer, who may suspect that the decision making process was unfair. The court will invalidate the decision or order revocation of the arbitrator's authority where there is reasonable suspicion from the circumstances of the case that bias might have infected the decision.

The House of Lords in *R v Gough*[72] reviewed the various tests in relation to 'real likelihood of bias' and 'reasonable suspicion of bias' in contradistinction to 'real danger of bias'. As the test refers to 'possibility' and not 'probability' of bias, it is somewhat similar to that of the 'real likelihood of bias'. The House of Lords rejected the 'reasonable suspicion test' and suggested that for

[69] [1993] 2 All ER 724.

[70] *Maleb bin Su v PP* [1984] 1 MLJ 331 at 312–313 per Hashim Yeop A Sani, FJ; *Hock Hua* (*Sabah*) *Bhd v Yong Liuk Thin* [1995] 2 MLJ 213, CA, at 226, per NH Chan JCA; *Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd* [1997] 3 MLJ 524, CA, at 530, per Mahadev Shanker JCA; *Insas Bhd v Raphael Pura* [1999] 4 MLJ 650; *R v Camborne Justices, ex p Pearce* above at pp 47 and 855 respectively per Slade J; *AT & T Corporation v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 at 135 per Lord Woolf MR.

[71] *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding* (1988) Sdn Bhd [1999] 5 MLJ 137; *Turner* (*East Asia*) *Pte Ltd v Builders Federal* (*Hong Kong*) *Ltd* (*No 2*) [1988] 2 MLJ 502, [1988] SLR 532; *R v Liverpool City Justice, es p Topping* [1983] 1 All ER 490 at 494 per Ackner LJ.

[72] [1993] 2 All ER 724 at 729 per Lord Goff. See also R v *Gaming Board for Great Britain ex parte Kingsley* [1996] 10 CL 113 (CA). Cf *Webb v R* [1994] 181 CLR 41; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.

the sake of uniformity the test of 'real danger of bias' should be applied to all cases of apparent bias from the point of view of the Court, not from the 'reasonable man'.

Lord Goff said, 'Since however the Court investigates the actual circumstances, knowledge of such circumstances as are found by the Court must be imputed to the reasonable man; and in the results it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the Court, here personifying the reasonable man.' Lord Woolf concurred with Lord Goff's view by observing that 'the real danger test is quite capable of producing the right answer that the purity of justice is maintained across the range of situations where bias may exist.'

The House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*[73] extended the rule of automatic disqualification where the adjudicator is shown to have a non-pecuniary interest in the outcome of the case. Lord Browne-Wilkinson stated, '… once it is shown that the Judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure… I will call this automatic disqualification'.

It would appear that an arbitrator with direct pecuniary interest in the outcome of the arbitration, or common cause with one of the parties to the arbitration, will be removed by the court as a matter of course and his award be set aside if it has reached that stage[74]. However, it will be subject to any waiver where the complainant being fully aware of the potential conflict of interests involved, had participated in or possibly had failed to object to the arbitrator's appointment. A party with a right of objection on the ground of bias may waive his right so long as he acts freely and in full knowledge of the

[73] [1999] 1 All ER 577 at 589, per Lord Browne-Wilkinson.
[74] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65.

facts[75]. The English Court of Appeal in *AT & T Corporation v Saudi Cable Co*[76] held that there is no basis for applying a lower standard to arbitrators than to judges. The court rejected the tenuous link set up to justify the removal of an arbitrator. It held that there was no automatic disqualification as the arbitrator was not a judge in his own cause and there was no danger of bias.

In favouring substance over appearance, the Court of Appeal has applied the real likelihood test of bias in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin*[77] and in *Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd*[78]. The respondent in *Progressive Insurance Sdn Bhd* requested the arbitrator, Mr M Sivalingam (who was an advocate and solicitor in Messrs Kean Chye & Sivalingam), to stand down as arbitrator on a rather tenuous ground that he had a connection between a company of which the arbitrator was a director and the claimant. The arbitrator refused and stated that there is no question of his discharge as there was no conflict or bias. The respondent then withdrew from the arbitration proceedings. The arbitrator proceeded to make his award. The respondent applied to set aside the award on the basis of the arbitrator's misconduct. The High Court granted the application.

On appeal, the Court of Appeal reversed the decision and reinstated the award. Mahadev Shanker JCA[79] said, 'However, it is a serious thing to allege

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[75] *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256; *Shrager v Basil Dighton Ltd* [1924] 1 KB 274; *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 at 20 per Moore-Bick J.

[76] [2000] 1 Lloyd's Rep 22, affirmed in appeal in [2000] 2 Lloyd's Rep 127.

[77] [1995] 2 MLJ 213.

[78] [1997] 3 MLJ 524, CA. See also the following cases for the approach taken in Australia, New Zealand, Canada and Scotland: *Webb v The Queen* (1994) 181 CLR 41; *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49; R v S (RD) (1997) 151 DLR (4th) 193; *Doherty v McGlennan* 1997 SLT 444. In cases of *R v Moore, ex p Brooks* [1969] 2 OR 677, 684, 6 DLR (3d) 465; *Re Baring Brothers & Co and Doulton & Co* (1892) 61 LJQB 704; *Re Frankenberg and Security Co* (1894) 10 TLR 393. Cf *James v Attwood* (1839) 7 Scott 841; *Drew v Drew and Leburn* (1855) 2 Macq 1; *Re Donkin and Leeds Canal Co* (1893) 9 TLR 192; *Belcher v Roedean School Site and Buildings Ltd* (1901) 85 LT 468; *Town Centre Securities plc v Leeds City Council* [1992] ADRLJ 54 (leave was refused as there was little likelihood of bias).

[79] *Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd* [1997] 23 MLJ 524 at 529.

bias against an arbitrator. If the facts had been properly understood, it should have been apparent that the objection was devoid of merit'. He added, 'In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, this court dealt in some depth with the test for a real likelihood of bias. We only need repeat a passage from *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 at pp 51-52 (also at [1954] 2 All ER 850 at p 855) where Slade J formulated the test prescribed by Blackburn J in *R v Rand* (1866) LR 1 QB 230 at p 232 thus: '*…that, to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceedings, a real likelihood of bias must be shown … not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of this inquries.*' (Emphasis added) and continued: '*The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in* R v Sussex Justices, ex p McCarthy *[1924] 1 KB 256 at p 259, that is "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" is being urged as a warrant for quashing convictions, or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.*'

In accordance with the principle of stare decisis, the real likelihood of bias test as adopted by the Court of Appeal in *Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd* above prevails.

Deficiencies in arbitrator's capability or performance

The third situation where the court may give leave to revoke the arbitrator's authority is where there are deficiencies in capability or performance for which

the Arbitration Act 1952 provides no other remedy[80]. Another case where injustice is being done and no other remedy is available to prevent may include where the arbitrator exceeds or refuses the jurisdiction which has been given to him by the parties[81] or the arbitrator is disqualified from acting as such as he does not have any special qualities predicated, eg, that he must be a commercial man, or member of a particular association[82]. In such cases, removal of the arbitrator is an alternative remedy, as in cases of misconduct.

Justice of the case

Finally, the court may leave to revoke the arbitrator's authority is where justice requires that the proceedings should be halted, temporarily or permanently, and no other method of doing so is available to the court. A substantial miscarriage of justice will take place in the event of its refusal[83]. If the court decided that an order for removal would be of no use for this purpose and an injunction might not be enough, then the only just course is to dispense with the arbitration altogether and have the matter litigated[84].

Issue of Fraud

It is provided in s 25(2) of the Arbitration Act 1952 where an agreement between any parties provides that disputes which may arise in the future

[80] *Copper v Shuttleworth* (1856) 25 LJ Ex 114; *Burkett Sharp & Co v Eastcheap Dried Fruit Co and Perera* [1962] 1 Lloyd's Rep 267, CA (Eng).
[81] *Re Gerard (Lord) and London & North Western Railway Co* [1895] 1 QB 459, 11 TLR 170, CA (Eng); *Den of Airlie SS Co Ltd v Mitsui & Co Ltd* (1912) 17 Com Cas 116, CA (Eng); *Re Donkin and the Proprietors of the Leeds Canal* (1893) 9 TLR 192.
[82] *Drew v Drew and Leburn* (1855) 2 Macq 1, HL, per Lord Cransworth LC; *Jungheim Hopkins & Co v Foukelmann* [1909] 2 KB 948, 25 TLR 819; *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173, [1967] 3 All ER 301.
[83] *James v James and Bendall* (1889) 22 QBD 669 at p. 674 per Stephen J; *Den of Airlie SS Steamship Co Ltd v Mitsui & Co Ltd* (1912) 106 Lt 451, CA (Eng).
[84] *Stockport Metropolitan Borough Council v O'Reilly* [1983] 2 Lloyd's Rep 70 at 78–80; *Copper v Shuttleworth* (1856) 25 LJ Ex 114; *East v West India Dock Co v Kird & Randall* (1887) 12 App Cas 38.

between them will be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court will, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement will cease to have effect, and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement[85].

Fraud is defined in s 17 of the Contracts Act 1950 to include certain acts which are committed with intent to induce another party to enter into the contract. Section 17 then lays down five different acts which may constitute fraud. As a general rule, Visu Sinnadurai states that whenever a person causes another to act on a false representation which the maker himself does not believe to be true, he is said to have committed a fraud[86]. Wills J in *Re Watson*[87] stated that 'fraud … is a term that should be reserved for something dishonest and morally wrong, and much mischief is done, as well as much pain inflicted by its use where ''illegality'' or ''illegal'' are the real appropriate expressions.'

The party against whom a serious charge of fraud is made should have the opportunity of an investigation in open court on the basis that a judge is better capable of dealing with such an issue as compared to an arbitrator[88]. However, the said party does not wish the matter to be tried in court, the fact the charge has been made will not in itself justify the court to exercise its power[89]. The court may consider additional grounds if there is public interest arising from the charge of fraud, or if it is undesirable that a particular arbitrator should try the issue of fraud. An issue of fraud is capable in principle of falling

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[85] *Capital Insurance Bhd v Wierig Prefab (Selangor) Sdn Bhd & Anor* [2003] 1 MLJ 449; *Permavox Ltd v Royal Exchange Assurance* (1939) 64 Ll L Rep 145.

[86] Visu Sinnadurai, Law of Contract, Vol. 1, 3rd Edn, 2003, Lexis Nexis Butterworths, paragraph 5.06, p. 227. See also *Derry v Peek* (1889) 14 App Cas 337; *Keng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, FC.

[87] [1888] 21 QB 301.

[88] *Wallis v Hirsch* (1856) 1 CBNS 316, 26 LJCP 72.

[89] *Cunningham-Reid v Buchanan-Jardine* [1988] 2 All ER 438, [1988] 1 WLR 678, CA (Eng).

within the scope of an agreement to arbitrate; whether or not, it does so depends on the wording of the agreement[90].

Parties cannot use a wild allegation of impropriety to avoid a reference to arbitration. A bare allegation of fraud is not sufficient reason for the court to exercise its power. There must be a concrete and specific charge of fraud. There must be substance in the charge[91]. Fraud does not encompass all forms of personal misconduct but means the knowing or reckless making of a misstatement[92]. Fraud has to be strictly construed and its meaning does not extend to cover professional negligence. The revocation of the arbitrator's authority is limited to the single issue of fraud, the arbitration continuing before the same arbitrator on all the other issues[93]. The court cannot exercise the discretion under the Arbitration Act 1952 s 25(2) the same way as in s 6 stay proceedings where there is a submission to arbitration.

Practice and effect

The court's jurisdiction to revoke arises only after a difference has arisen and the arbitrator has been appointed[94]. The application for leave to revoke the authority of an arbitrator is made by originating summons to a judge in chambers

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[90] *Heyman v Darwins Ltd* [1942] AC 356; [1942] 1 All ER 337, HL; *Trainor v Phoenix Fire Assurance* (1891) 65 LT 825, 8 TLR 87; *Kenworthy v Queen Insurance Co* (1892) 8 TLR 211; and *May v Mills* (1914) 30 TLR 287.

[91] *Wallis v Hirsch* (1856) 1 CBNS 316, 26 LJCP 72 (distinguished in *Hirsch v Im Thurn* (1858) 4 CBNS 569, 27 LJCP 254); *Rusell v Rusell* (1880) 14 ChD 471, 42 LT 112; *Barnes v Youngs* [1898] 1 Ch 414, 46 WR 332 (approved on this point in *Green v Howell* [1910] 1 Ch 495); *Minifie v Rly Passengers Assurance Co* (1881) 44 LT 552; *Camilla Cotton Oil Co v Granadex SA and Tracomin SA* [1976] 2 Lloyd's Rep 10, HL; *Cunningham-Reid v Buchanan-Jardine* [1988] 2 All ER 438, [1988] 1 WLR 678, CA (Eng).

[92] *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd* [1998] 2 MLJ 20, CA.

[93] *AG v Aoki Construction Co Ltd* (1981) 23 BLR 85 per Jackson-Lipkin J.

[94] *James v Attwood* (1839) 7 Scott 841; Re an intended Arbitration between Smith & Service and Nelson & Sons (1890) 25 QBD 545, CA (Eng); *Belcher v Roedean School Site and Buildings Ltd* (1901) 85 LT 468, CA (Eng); *Doleman & Sons v Osset Corporation* [1912] 3 KB 257, 81 LJKB 1092, CA (Eng).

or a senior assistant registrar[95]. Leave to revoke the authority of an arbitrator cannot be granted ex parte[96].

The court has no power to direct the issue of orders of certiorari or of prohibition addressed to an arbitrator directing that a decision by him be quashed or that he be prohibited from proceeding in arbitration unless he is acting under powers conferred by statute[97].

Where the court also exercises its power to order that the arbitration agreement shall cease to have effect[5], the whole tribunal is divested of any authority. Having revoked the arbitrator's authority, the court is empowered under s 26(2)(a) and (b) of the Arbitration Act 1952 (Act 93) either firstly, to appoint a person to act as sole arbitrator in place of the person or persons removed; or secondly, to order that the arbitration agreement will cease to have effect with respect to the dispute referred. It may then also order that any provision making an award a condition precedent to the bringing of an action upon the dispute shall also cease to have effect[98].

It would seem that under s 26(2)(a) of the Arbitration Act 1952 where the authority of only one of a panel of arbitrators is revoked, the court has power to dismiss the entire panel and replace it with a sole arbitrator. It is not clear whether the court will exercise its power under s 26(2)(b) of the Arbitration Act 1952 if some arbitrators remained in office, particularly as it would effectively force the claimant into litigation[99].

The courts will not use the power of revocation as a device of doing away with an arbitration. As such, the court will not revoke the authority of the arbitrator and then use its powers under s 26(2)(b) of the Arbitration Act

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[95] See the RHC O 69 rr 2(1)(b) and 3(1).
[96] *Clarke v Stocken* (1836) 2 Bing NC 651, 5 LJCP 190.
[97] *R v Disputes Committee of National Joint Council for Craft of Dental Technicians, ex p Neata* [1953] 1 QB 704, [1953] 1 All ER 327.
[98] *Pratt v Swanmore Builders Ltd and Baker* [1980] 2 Lloyd's Rep 504.
[99] Mustill and Boyd, *Commercial Arbitration* (2nd Edn, 1989) p 529.

1952 to terminate the arbitration. Revocation is an end in itself and not a means to a rather wider end[100].

Actual revocation by notice to the arbitrator should follow the grant of leave, and the other party or parties should be informed[101]. In other cases, presumably only where the authority of the whole tribunal has been revoked under s 26(2)(a) of the Arbitration Act 1952, the court has power to appoint a sole arbitrator to replace the tribunal. The appointment of the substituted arbitrator by the High Court takes effect as if the appointment has been made under the terms of the agreement. No fresh mandate or terms of reference is necessary[102].

Where this power is not exercised, the party responsible for appointing the arbitrator whose authority has been revoked must make a fresh appointment. Otherwise the court may exercise its default powers under s 9 and s 12 of the Arbitration Act 1952. Any right to remuneration of the arbitrator whose authority has been revoked depends upon his agreement with the parties.

In the absence of any express provision, the arbitrator is able to claim any accrued fees and incurred expenses, plus fees which would have been recoverable by him had his contract been allowed to run. If the arbitrator is guilty of breach of contract or breach of his obligations under the Arbitration Act 1952, he is presumably not entitled to loss of future fees but by virtue of the immunity he enjoys, is not liable in damages[103].

Removal of arbitrator for misconduct or delay

The High Court has a statutory jurisdiction under the Arbitration Act 1952 to remove an arbitrator or umpire for misconduct or delay on application by any

[100] *Thai-Europe Tapioca Service Ltd v Seine Navigation Co Inc, The Maritime Winner* [1989] 2 Lloyd's Rep 506. See also *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, [1984] 3 All ER 229, HL; *The Multitank Holsatia* [1988] 2 Lloyd's Rep 486.
[101] *Marsh v Bulteel* (1822) 5 B & Ald 507.
[102] *Penang Development Corp v Trikkon Construction Sdn Bhd* [1997] 3 MLJ 115, CA.
[103] Mustill and Boyd, *Commercial Arbitration* (2nd Edn, 1989) p 243.

party to the arbitration. A Judge in chambers or a Registrar may exercise the jurisdiction of the High Court under the Arbitration Act 1952 (Act 93)[104].

In judging whether an arbitrator failed to act, OP Malhotra states that the following considerations may be relevant, 'Which action was expected or required of him in the light of the arbitration agreement and the specific procedural situation? If he has not done anything in this regard, has the delay been so inordinate as to be unacceptable in the light of the circumstances, including technical difficulties and the complexity of the case? If he has done something and acted in a certain way, did his conduct fall clearly below the standard of what may reasonably be expected from an arbitrator? Amongst the factors influencing the level of expectations are the ability to function efficiently and expeditiously and any special competence or other qualifications of the arbitrator by agreement of the parties. There may be other reasons on account of which, he may fail to act expeditiously or without undue delay. Besides, there may be other reasons of propriety, expediency or impossibility.[105]'

Misconduct under s 24(1)

The court may exercise its statutory jurisdiction of removal under s 24(1) of the Arbitration Act 1952 if the arbitrator misconducts himself or the proceedings[106]. Most applications involve allegations of actual or possible unfairness[107]. The decision whether to apply for the removal of the arbitrator

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[104] RHC O 69 r 3(1).

[105] See OP Malhotra, *The Law and Practice of Arbitration and Conciliation*: The Arbitration and Conciliation Act 1996 (1st edn, 2002) p 450-451. LexisNexis Butterworths.

[106] See the Arbitration Act 1952 s 24(1). As to what constitutes misconduct for this purpose see earlier discussion under the revocation of the arbitrator's authority and the cases cited in the notes thereto. See also *Modern Engineering* (*Bristol*) *Ltd v C Misyin & Son Ltd* [1981] 1 Lloyd's Rep 135, CA (Eng); *Pratt v Swanmore Builders Ltd and Baker* [1980] 2 Lloyd's Rep 504; *Veritas Shipping Corporation v Anglo-Canadian Cement Ltd* [1966] 1 Lloyd's Rep 76.

[107] *Interbulk Ltd v Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep 66; *Turner* (*East Asia*) *Pte Ltd v Builders Federal* (*Hong Kong*) *Ltd* (*No 2*) [1988] 2 MLJ 502, [1988] SLR 532.

for misconduct will, in practice, depend upon the view held of the arbitrator, and the course of the proceedings and costs incurred to date[108].

The court in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*[109] applied the tests as follows: (1) whether there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine the issue; and (2) whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion.

The applicant in *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding* (*1988*) *Sdn Bhd*[110] contended that the arbitrator, Mr Ng Chee Keong had committed several acts of misconduct, namely:

(1) prejudging the issue;
(2) taking into consideration matters which he ought not to consider;
(3) delegation of power and duty;
(4) refusing to grant a proper hearing as to the question of costs;
(5) reversing the burden of proof in deciding the quantum of costs payable to the first respondent; and
(6) communicating with counsel for the second respondent by phone without the knowledge of the lawyers of the other party.

It was also contended that the arbitrator might not be impartial on the ground of an earlier relationship between him and the architect. The applicant

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[108] *Gillespie Bros & Co v Thompson Bros & Co* (1922) 13 Ll L R 519; *RS Hartley Ltd v Provincial Insurance Co Ltd* [1957] 1 Lloyd's Rep 121; *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 Lloyd's Rep 496; *Moran v Lloyd's* [1983] QB 542, [1983] 2 All ER 200, CA (Eng).

[109] [1971] 2 MLJ 210. See also *Hagop Ardahalian v Unifert International* SA, *The Elissar* [1984] 2 Lloyd's Rep 84; *Modern Engineering* (*Bristol*) *Ltd v C Misyin & Son Ltd* [1981] 1 Lloyd's Rep 135, CA (Eng); *Holland Stolte Pty Ltd v Murbay Pty Ltd* (1991) 105 FLR 304 at 308–309 per Miles CJ.

[110] [1999] 5 MLJ 137 at 147–150 per Nik Hashim J. See also *AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultan Senicipta)* [1998] 2 MLJ 393; *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd (No 2)* [1988] 2 MLJ 502.

applied to set aside the interim award of the arbitrator dismissing the applicant's application for the disqualification and removal of the arbitrator and the incidental award relating to such dismissal on the ground of misconduct under the Arbitration Act 1952 s 24 and for leave to revoke the authority of the arbitrator to act as the arbitrator on the ground of reasonable suspicion of bias on his part pursuant to s 25 of the Act.

Nik Hashim J, in applying both the 'reasonable suspicion' test and the 'real likelihood' test held: 'Therefore, applying the above principles to the facts of the present case, I am satisfied that a reasonable suspicion or real likelihood of bias on the part of the arbitrator has been made out. The appearance of bias has been established by his conduct. The arbitrator has committed the acts of misconduct complained of subsequent to his appointment as the arbitrator, and such misconducts, to my mind, are sufficient to remove him as the arbitrator. The allegations of the 'earlier relationship' between the arbitrator and the architect … may not on their own be sufficient to satisfy the two tests, but the arbitrator's misconduct committed subsequent to his appointment as the arbitrator, seen in the light of his earlier relationship with the architect, irresistably gives rise to the conclusion that there is a reasonable suspicion or real likelihood of bias by the arbitrator in the proceedings. That conclusion is based on the following acts of misconduct by the arbitrator. … There can be no doubt that an arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect ... He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment. This the learned arbitrator in this case has failed to do. An arbitrator, once appointed, must take note that his duty is to dispense justice according to law to the best of his ability, and he must always be conscious of Lord Hewart's reminder in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p 259, that 'justice should not only be done but should manifestly and undoubtedly be seen to be done'. In the present case, it has been amply established that the arbitrator has not only misconducted himself but also the proceeding itself. He has shown bias in the proceedings. The misconducts committed by the arbitrator have made the proceedings radically wrong and vacuous…'

The court in *Catalina (Owners) v Norma (Owners)*[111] removed an arbitrator who made remarks during the hearing suggesting that he held preconceived views as to the general truthfulness of witnesses of the nationality of the claimants; the court in *Re Enoch & Zaretzky, Bock & Co*[112] removed an arbitrator who had called witnesses to fact without the consent of the parties. On the other hand, the court in *Re Whitwham Trustees etc and Wrexham, Mold & Connah's Quah Ry Co*[113] refused to remove an arbitrator who refused a contractor's application to start hearings early because he had not done anything which he was not entitled to do.

Failure to be impartial under s 25

The court may exercise its statutory jurisdiction of removal under s 25 of the Arbitration Act 1952 if the arbitrator fails to be impartial or to act impartially[114]. The court in *Catalina* (*Owners*) *v Norma* (*Owners*)[115] removed an arbitrator who had shown bias by his remarks at the hearing was removed. It was held in *Schofield v Allen*[116] that the test is whether there exist grounds from which a reasonable person would think that there was a real danger of bias.

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[111] (1938) 82 Sol Jo 698.
[112] [1910] 1 KB 327, CA (Eng).
[113] *Re Whitwham Trustees etc and Wrexham, Mold & Connah's Quah Ry Co* (1895) 39 Sol Jo 692. See also *Schofield v Allen* (1904) 48 Sol Jo 176, 116 LT Jo 239, CA (Eng).
[114] See the Arbitration Act 1952 s 25. As to what constitutes bias for this purpose see earlier discussion under the revocation of the arbitrator's authority and the cases cited in the notes thereto.
[115] (1938) 82 Sol Jo 698; *Veritas Shipping Corpn v Anglo-Canadian Cement Ltd* [1966] 1 Lloyd's Rep 76.
[116] (1904) 48 Sol Jo 176, 116 LT Jo 239, CA (Eng). See also *Tracomin SA v Gibbs Nathaniel* (*Canada*) *Ltd and George Jacob Bridge* [1985] 1 Lloyd's Rep 586. See also *Metropolitan Properties Co* (*FGC*) *Ltd v Lannon* [1969] 1 QB 577, [1968] 3 All ER 304, CA (Eng); *Hannam v Bradford Corpn* [1970] 2 All ER 690, [1970] 1 WLR 937, CA (Eng); *R v Liverpool City Justices, ex p Topping* [1983] 1 All ER 490, [1983] 1 WLR 937; *Ardahalian v Unifert International SA, The Elissar* [1984] 2 Lloyd's Rep 84, CA (Eng).

Failure to enter and proceed

The court may exercise its statutory jurisdiction of removal under s 14(3)(b) of the Arbitration Act 1952 if the arbitrator fails to enter and proceed with the reference and make an award with reasonable despatch. For these purposes 'proceeding with the reference' includes, in a case where two arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire[117].

An arbitrator who is guilty of culpable delay, either in concluding the hearing or making an award would be clearly be guilty of either misconduct or misconducting the proceedings. An arbitrator is not at risk of being removed by inactivity if nobody asked him for be active[118].

Whether the arbitrator is culpable depends upon the nature of the arbitration, the complexity of the issues and interests of the parties, not individual circumstances of the arbitrator. So if the arbitrator were delayed in proceedings by illness or unexpected absence abroad, he would be open to removal[119]. Incompetence or misconduct is not sufficient to amount to a failure to use all reasonable dispatch[120].

The court when exercising its power under s 14(3) of the Arbitration Act 1952 may weigh the extent of time and costs spent already spent on the reference which will be wasted, the warnings the arbitrator gave with regard to his availability, information which parties had or should have had, with regard to his general availability and the extent to which the reference surpassed expectations.

Before the arbitrator is removed for delay in making an award, there should ordinarily either be prejudice caused by the delay[121], or the delay should

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[117] Arbitration Act 1952 s 14(3)(b).
[118] *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff Ltd* [1980] 2 Lloyd's Rep 381 at 384.
[119] *Lewis Emanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629; *Korin v McInnes* [1990] VR 723.
[120] *Pratt v Swanmore Builders Ltd and Baker* [1980] 2 Lloyd's Rep 504 at 512.
[121] *Boncorp Pty Limited v Thames Water Asia/Pacific Pty Limited* (1996) 12 BCL 139.

lead to a justifiable lack of confidence in the arbitrator being able to complete his task[122].

Not qualified as required in contract

An additional ground added to by judicial decisions where the court may remove the arbitrator is where the arbitrator did not have the qualifications required by the contract between the parties[123]. Mustill and Boyd state that if the requirement of contractual qualification is not met, the person appointed is not in truth an arbitrator at all, and has no power to making a binding award[124]. In other words, failure to satisfy it makes the appointment and the resulting award, if any, a nullity.

Power of last resort

This is a power of last resort. Given the onus to be discharged, the remedy of removal granted only in very exceptional circumstances[125]. For example, Goff

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[122] See also *Lewis Emanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629.

[123] *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261, [1953] 2 All ER 650; *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948, 25 TLR 819; *MacLeod Ross & Co Ltd v Cradock Manners & Co* [1954] 1 Lloyd's Rep 258; *Myron* (*Owners*) *v Tradax Export, SA Panama City RP* [1970] 1 QB 527, [1969] 2 All ER 1263; *Royal Commission on Sugar Supply v Trading Society Kwik-Hoo-Tong* (1922) 38 TLR 684; *Pando Compania Naviera SA v Filmo SAS* [1975] QB 742, [1975] 2 All ER 515; *Aramco Servsco v EAC Bulk Transport Inc* (1993) WL 405996 [MDFLA 25 January 1993]; *WK Webster & Co v American President Lines Ltd* (1994) Mealey's International Reports 5-6; *Palmco Shipping Inc v Continental Ore Corpn, The Captain George K* [1970] 2 Lloyd's Rep 21 at 25; *Robinson, Fleming & Co v Warner, Barnes & Co* (1922) 10 LI L Rep 331; *FE Hookway & Co Ltd v Alfred Issacs & Sons* [1954] 1 Lloyd's Rep 491; *Cook International Inc v BV Handelmaatschappij Jean Delvaux and Braat, Scott and Meadows* [1985] 2 Lloyd's Rep 225; *Ewart & Sons Ltd v Sun Insurance Office* (1925) 21 Ll L Rep 282; *Vincor Shipping Co Ltd v Transatlantic Schiffahrtskontor GmbH* [1987] HKLR 613 at 617 per Nazareth J; *Pan Atlantic Group Inc v Hassneh Insurance Co of Israel* [1992] 2 Lloyd's Rep 120, CA (Eng).

[124] Mustill and Boyd, *Commercial Arbitration*, 2nd Edn., 1989, p 247.

[125] *Property Investments* (*Development*) *v Byfield Building Services* (1985) 31 Build LR 97 per Steyn J; *Spurrier v GF La Cloche* [1902] AC 446, PC.

J in *Modern Engineering* (*Bristol*) *Ltd v C Misyin & Son Ltd*[126] set aside an award on the ground of the arbitrator's grave error but refused an application for his removal. It is confined to those cases where the arbitration simply cannot be allowed to continue with the particular arbitrator in office.

There must be some real dereliction of duty by the arbitrator[127]. Miles CJ in *Holland Stolte Pty Ltd v Murbay Pty Ltd*[128] explained, 'To remove an arbitrator from office for [procedural errors which were indeed errors of law] which must inevitably occur from time to time would render the position of an arbitrator too precarious and deprive the arbitration system of the regularity and stability necessary to an efficacious dispute resolution system which might be a proper alternative to judicial resolution'.

Instances where removal was refused

The arbitrator in *Ian Keith Brown v CBS (Contractors) Ltd*[129] had heard matters alleged to have been made 'without prejudice' during the hearing. The court held that it was not in the interest of justice or the parties for the arbitrator to be removed. The matter was remitted to the arbitrator with the direction that he should hear submissions from the parties on this point.

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[126] [1981] 1 Lloyd's Rep 135, CA (Eng). See also *Traynor v Panan Constructions Pty Ltd* (1988) 7 ACLR 47 per Hunt J; *Pinas Construction Pty Ltd v Metropolitan Waste Disposal Authority* [1988] 7 ACLR 68 per Brownie J.

[127] *City Centre Properties* (*ITC Pensions*) *Ltd v Tersons Ltd* [1969] 2 All ER 1121, affd [1969] 1 WLR 772, CA (Eng), per Lord Denning MR; *Den of Airlie SS Co Ltd v Mitsui & Co Ltd* (1912) 17 Com Cas 116, CA (Eng); *Scott v Van Sandau* (1841) 1 QB 102 at 110; 113 ER 1068 at 1071; *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff Ltd* [1980] 2 Lloyd's Rep 381; *Stockport Metropolitan Borough Council v O'Reilly* [1983] 2 Lloyd's Rep 70 at 78-79; *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha, The Golden Anne* [1984] 2 Lloyd's Rep 489; *Property Investments* (*Development*) *v Byfield Building Services* (1985) 31 Build LR 97.

[128] (1991) 105 FLR 304 at 309.

[129] [1987] 1 Lloyd's Rep 279.

In the past, the Court has refused an application to remove the arbitrator for misconduct of a technical nature[130], admitting inadmissible evidence[131] and adhering persistently to an incorrect view[132]. The court in *Turner v Stevenage Borough Council*[133] ruled that an arbitrator who had sought an interim payment from both parties was not guilty of wrongful conduct in accepting payment from one party and in seeking to negotiate payment from the other in genuine and open discussions. The applicant had alleged that there was a demand for the payment of fees at an unreasonable time.

The jurisdiction may be exercised by a judge in chambers

An application to the court for the removal of an arbitrator under s 24(1) of the Arbitration Act 1952 is to be made in the usual form under the Rules of the High Court 1980. An application for removal is made by originating notice of motion to a single judge in court[134]. An order for removal takes effect immediately. It is a remedy exercised by the court. In the case of revocation, when the order is made, the party is at liberty to issue the notice of revocation. Until then, the arbitrator retains his authority. It is a remedy exercised by the party[135].

The jurisdiction may be exercised by a judge in chambers or a master[136]. The proceedings should be served on the arbitrator[137]. The fact that an application to remove an arbitrator has been made does not affect the

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[130] *Hagop Ardahalian v Unifert International* SA, *The Elissar* [1984] 2 Lloyd's Rep 84; *Holland Stolte Pty Ltd v Murbay Pty Ltd* (1991) 105 FLR 304.
[131] *Jeuro Development Sdn Bhd v Teo Teck Huat* (*M*) *Sdn Bhd* [1998] 6 MLJ 545; *Hartela Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481, CA; *Suppu v Govindacharyar* (1887) 11 Mad 84; *Howard v Wilson* (1878) 4 Calc 231.
[132] *Asia Construction Company v Crown Pacific Ltd* (1988) 44 BLR 135.
[133] [1997] ADRLJ 409.
[134] RHC O 69 r 2.
[135] Mustill and Boyd, *Commercial Arbitration* (2nd Edn, 1989) p 526.
[136] RHC O 69 r 3(1).
[137] The proceedings should be served on the arbitrator. See also *Succula Ltd and Pomona Shipping Co Ltd v Harland and Wolff Ltd* [1980] 2 Lloyd's Rep 381; *Pratt v Swanmore Builders Ltd and Baker* [1980] 2 Lloyd's Rep 504.

arbitrator's jurisdiction. In fact, the arbitrator may continue the arbitration proceedings and indeed proceed to an award pending the outcome of the application to the court. To ensure that the arbitration is not delayed by a tactical application, the court should exercise its power to grant an injunction halting the proceedings only in very exceptional circumstances. In practice, if the application appears to be well founded, it may be that parties would agree to suspend the proceedings pending the outcome of the application, for if it is successful there will have been a waste of costs where the arbitration continued[138].

In the case of a dilatory arbitrator or umpire who is removed for such failure is not entitled to receive any remuneration for his services, the removal of an arbitrator has no consequences for the future of the arbitration itself. Section 14(3) of the Arbitration Act 1952 confers no discretion. A subsequent onset of delay deprives the arbitrator of all right to payment even if he may have done good work in the early stages of the arbitration.

This is a compelling reason why the court should use some other route instead of s 14(3). In getting rid of a dilatory arbitrator, it may be more expedient to offer him a reasonable sum for work done even if not obliged to do so. Before any application is made to the court, the dilatory arbitrator or umpire should first be called upon to proceed[139].

After the mandate of an arbitrator terminates, he becomes *functus officio*. His removal of an arbitrator creates a vacancy. The court may appoint a person or persons to act as arbitrators or umpire in place of the person or persons so removed under s 26 (1) of the Arbitration Act 1952. Where the arbitrator removed is the sole arbitrator, or where the court removes all the arbitrators or an umpire who has entered on the reference, the court may

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[138] See *Japan Line v Aggeliki Charis Compania Maritima SA, The Angelic Grace* [1980] 1 Lloyd's Rep 228, CA (Eng).

[139] *Drummond v Hamer* [1942] 1 KB 352, [1942] 1 All ER 398. See also *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 1 Lloyd's Rep 166 at 178 per Donaldson J (judgment was reversed in the Court of Appeal on other grounds: see *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5, CA (Eng)).

either appoint a sole arbitrator or order that the arbitration agreement ceases to have effect with respect to the dispute referred[140].

In theory, where an arbitrator is removed, the arbitration must begin completely afresh because the new arbitrator has a duty to deal with the whole dispute in all its aspects[141]. However, the parties are free to agree on the question as to whether after replacement, the new arbitrator should continue with the proceedings from the point of time where the mandate of the original arbitrator terminated or commence the proceedings *de novo*.

In practice, parties may agree to use the pleadings and discovery or even allow the new arbitrator to take over the reference at the point where his predecessor left off[142]. Once the arbitrator either in accordance with the agreement of the parties or in his discretion decides that the hearing previously held may not be repeated, it would not be open to the party to question the decision[143].

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[140] See the Arbitration Act 1952 s 26(2); Mustill and Boyd, *Commercial Arbitration* (2nd Edn, 1989) p 529.
[141] As happened in *Re Enoch & Zaretzky, Bock & Co* [1910] 1 KB 327, CA (Eng).
[142] See *Mustill and Boyd's Commercial Arbitration* (2nd Edn, 1989) at 533.
[143] *Kalyan People's Coop Bank Ltd v Dulhanbibi Aqual Aminsaheb Patil* AIR 1966 SC 1072.