The House of Lords

Current constitution

The court is constituted by the Lords of Appeal in Ordinary (or Law Lords). There are at any one time between nine and 12 Law Lords, two of whom normally come from the Scottish judiciary. The Law Lords are life peers and each of them is appointed by the Queen on the Prime Minister's advice, who is in turn advised by the Lord Chancellor, from among persons who have a Supreme Court qualification, i.e. a right of audience in relation to all proceedings in the Supreme Court. No number of years is stated. (See Appellate Jurisdiction Act 1876, s 6, as amended by the Courts and Legal Services Act 1990, Sch 10.) Normally the appointments are made from the Lords Justices of Appeal. A minimum of three law lords is required to constitute a court, but in practice five normally sit to hear an appeal. The decision is by majority judgment.

Jurisdiction

(a) Civil. On the civil side the House of Lords hears appeals from the Court of Appeal (Civil Division), the Court of Session in Scotland, when one or two Scottish Law Lords sit, and the Supreme Court of Northern Ireland when a Law Lord from Northern Ireland sits. In all cases the lower court must certify that a point of law of general public importance is involved and either the lower court or the Appeal Committee of the House of Lords consisting of three Law Lords must give leave. In addition, there is a direct appeal from the High Court to the House of Lords by what is referred to as the 'leapfrogging method'. This phrase is used because the appeal goes straight to the House of Lords and not through the Court of Appeal. As we have seen all parties must consent and the appeal must raise a point of law of public importance relating wholly or mainly to a statute or statutory instrument. The trial judge must certify the importance of the case and the House of Lords must give leave. This 'leapfrogging' procedure is most likely to be used in revenue appeals and patent matters where construction of statutes is often very involved.

(b) Criminal. On the criminal side the court hears appeals from the Court of Appeal (Criminal Division) and the Queen's Bench Division of the High Court under the case stated procedure. In both cases the lower court must certify that a point of law of general public importance is involved and either the lower court or the Appeal Committee of the House of Lords must give leave. The House of Lords is not a final appellate tribunal for Scotland in criminal matters, but the Scottish Court of Criminal Appeal is.

Attorney-General's references, including those on sentence, may reach the House of Lords. The proceedings in the House of Lords are surprisingly informal. The Law Lords are not robed but sit in dark suits generally in panels of five at a table in one of the committee rooms in the Houses of Parliament at Westminster.

Effect of the Human Rights Act 1998

The House of Lords has played a vital part in the development of UK law on human rights (see further Chapter 3) where, as the final appeal court in the UK, it may sometimes clash with government by ruling that an Act of Parliament operates contrary to the Act and requires amendment. The former Lord Chief Justice, Lord Bingham, was appointed to head the 12 Law Lords. As senior Law Lord, the person involved is influential in deciding the composition of the panels of judges who hear appeals. This could be helpful in dealing with the

potentially difficult relationship between the government and the judiciary as the 1998 Act continues to bite. The post of Lord Chief Justice was filled by the Master of the Rolls and that appointment was filled by a Lord Justice of Appeal. Further judicial appointments were made at the more junior level of judiciary in preparation for the Act and wide-ranging training of the judiciary was instigated.

Reform: the Supreme Court

The Constitutional Reform Act 2005 includes the creation of a new Supreme Court to replace the House of Lords Judicial Committee (the Law Lords), which currently fulfils the role of highest appeal court. The Supreme Court will be the highest appeal court in the UK. The provisions of the Constitutional Reform Act 2005 (CLRA), which are described below, will not be fully in force until 2009. The problem has been the setting up of the Supreme Court courthouse. The matter has been resolved and the Middlesex Guildhall in Parliament Square, London has been chosen. It is undergoing refurbishment and will not be ready until 2009. At that time the other courts formerly constituting the Supreme Court of which the House of Lords Judicial Committee is not a part will be categorised as the Senior Courts under the Senior Courts Act 1981, as described in material earlier in this Chapter.

However, other changes have been made: for example, the Lord Chief Justice is President of the Courts in England and Wales in place of the Lord Chancellor. The office of Lord Chancellor is not abolished, as originally proposed, but is being modified. The Lord Chancellor is no longer head of the judiciary or a judge and is no longer the Speaker of the House of Lords. It is no longer necessary for him or her to be a member of the House of Lords or a lawyer.

The Supreme Court

(Section references are to the CRA unless otherwise stated.)

Under s 23 the Supreme Court will consist of 12 judges appointed by the Queen on the recommendation of the Prime Minister, but the Prime Minister can only recommend a person notified to him or her by the Lord Chancellor following selection by a selection commission set up by the Lord Chancellor. The Prime Minister has no discretion (s 26).

The number of judges may be increased by Order in Council. The Queen may appoint by letters patent one of the 12 judges to be President of the Court and one to be Deputy President of the Court. Recommendation is again by the Prime Minister, who can only recommend a person notified to him or her by the Lord Chancellor following selection by a selection commission. Other judges are called Justices of the Supreme Court.

First members of the court

Under s 24, and when s 23 is brought into force, persons who were immediately before that commencement Lords of Appeal in Ordinary (Law Lords) become Justices of the Supreme Court and the Senior Lord of Appeal in Ordinary becomes President of the Court. The person who immediately before the commencement is the second senior Lord of Appeal in Ordinary becomes the Deputy President.

Judiciary: qualifications for appointment

To be qualified for appointment as a judge of the Supreme Court, a person must under s 25 have:

- held high judicial office for at least two years; or
- been a qualifying practitioner for at least 15 years; in other words a person who has had a right of audience in relation to all proceedings in what becomes known as the Senior Courts, e.g. Court of Appeal and High Court.

High judicial office will include the senior courts of Scotland and Northern Ireland. Those who have practised before those courts as advocates for at least 15 years are also included. In practice, members of the Supreme Court are likely to be appointed from the Court of Appeal in England and Wales and from the top judiciary in Scotland and Northern Ireland.

Selection of members of the court: selection commissions

Schedule 8 deals with these commissions, which must be convened by the Lord Chancellor when a vacancy is required to be filled in the Supreme Court judiciary. A selection commission consists of the following members:

- the President of the Supreme Court;
- the Deputy President of the Supreme Court and one member of each of the following bodies:
  - the Judicial Appointments Commission;
  - the Judicial Appointments Board for Scotland;
  - the Northern Ireland Judicial Appointments Commission.

A selection commission is dissolved when the Lord Chancellor notifies a selection made by the commission to the Prime Minister for appointment.

Process of selection

Section 27 requires a commission to consult:

- senior judges who are not members of the commission and are not willing to be considered for selection;
- the Lord Chancellor;
- the First Minister in Scotland;
- the Assembly First Secretary in Wales;
- the Secretary of State for Northern Ireland.

Selection must be on merit (which is not defined). The commission must have regard to any guidance by the Lord Chancellor as to matters to be taken into account in making a selection and only one person can be selected.

Report

Having completed the selection process, the commission must submit a report to the Lord Chancellor stating who has been selected and state the senior judges consulted under s 27. The commission must supply any further information required by the Lord Chancellor. On receipt of the report, the Lord Chancellor must consult with those required to be consulted by the selection commission except, of course, himself or herself.

The report: Lord Chancellor's options

Under ss 30 and 31, the Lord Chancellor may:

- reject the person selected;
- the commission cannot put that person forward again;
- ask the commission to reconsider a person's selection;

- if after that reconsideration the commission puts forward the same person as before, the Lord Chancellor may notify or reject that person and that decision to reject is final and binding on the commission;
- if after reconsideration the commission selects a different person, the Lord Chancellor can notify for appointment that person or the person whom he or she asked to be reconsidered. This effectively amounts to a power to correct his request for reconsideration which has led to non-selection.

Terms of appointment

At an early date after appointment, members of the Supreme Court must take an oath of allegiance to the Queen and the judicial oath, which in summary is to the effect that they will do right by all manner of people after the laws and usages of the realm without fear or favour, affection or ill will.

As regards *tenure of office*, s 33 provides that a judge of the Supreme Court holds office during good behaviour but may be removed at the request of both Houses of Parliament. Salaries are determined by the Lord Chancellor with the agreement of the Treasury. The President, Deputy President and judges of the Supreme Court can resign at any time by giving written notice to the Lord Chancellor (s 35). There is also power for the Lord Chancellor to dismiss on the grounds of incapacity (s 36).

Acting judges

At the request of the President, a person who holds office as a senior territorial judge may act as a judge of the Supreme Court. A senior territorial judge is an appeal court judge in England and Wales, Scotland and Northern Ireland. In addition, a member of the supplementary panel may act (s 38). The supplementary panel contains members of the Judicial Committee of the Privy Council and those who ceased to be members of the Privy Council in the last five years and members of the House of Lords who have held high office in the last five years but no longer do so and have not reached the age of 75 years (s 39).

Jurisdiction of the Supreme Court

Section 40 and Sch 9 define the jurisdiction of the Supreme Court as follows:

- Appeals from the Court of Appeal (Civil and Criminal Divisions) in England and Wales but only with permission of the Court of Appeal or the Supreme Court.
- Appeals from the Scottish Court of Session in civil matters. The Supreme Court is not a final appellate court for Scotland in criminal matters but the Scottish Court of Criminal Appeal is.

Schedule 9 transfers the 'leapfrog' appeal arrangements from the House of Lords to the Supreme Court and the case stated appeal arrangements described on page 29. The Supreme Court will take appeals from Northern Ireland from the Court of Judicature of Northern Ireland (renamed and not in the future to be called the Supreme Court of Judicature of Northern Ireland) and takes over the devolution jurisdiction of the Judicial Committee of the Privy Council. These issues will arise from matters concerned with the devolution of certain central government functions to Scotland, Wales and Northern Ireland. When appeals are heard from Scotland and Northern Ireland, the President of the Supreme Court will normally request a judge or judges from the relevant appellate court in the relevant country to sit as acting judge or judges which they are qualified to be.

As before, appeal to the Supreme Court must involve a matter of public importance and be certified as such by the Supreme Court or the appellate court from which the case comes.

The composition of the Supreme Court

Under s 42 the Supreme Court is duly constituted when:

- the court consists of an uneven number of judges;
- there are at least three judges;
- more than half of the judges are permanent judges and not acting judges.

The quorum of three is to avoid a vote equal on each side: casting votes would be inappropriate. The above provision means that, where there are three judges, two must be permanent judges of the Supreme Court.

Specially qualified advisers

Under s 44, if the Supreme Court thinks fit, it may hear and dispose of the proceedings wholly or partly with the assistance of one or more specially qualified advisors appointed by it. The court will decide on the advisor's remuneration and this will form part of the costs of the proceedings.

The advisor is a new concept and has implications for counsel instructed by the parties, since the matter before the court can be disposed of wholly or partly with the assistance of the advisor.

Photography

Section 47 is important because photography is currently banned in the courts of England and Wales and Northern Ireland. Section 47 indicates that the Supreme Court will be excluded from the general prohibition. This could lead to the ban being removed in general.

Chief executive

Section 48 provides for the Supreme Court to have a chief executive to undertake the non-judicial functions of the court under the direction of the President of the court. The President appoints other court officers and staff with the number of these to be decided by the Chief Executive with the agreement of the Lord Chancellor.

Accommodation and other resources

The Lord Chancellor must ensure that the Supreme Court is provided with a courthouse and offices and other accommodation as are appropriate for the carrying out of its business.

This has been a major problem and has delayed the coming into force of the Supreme Court provisions. The Middlesex Guildhall has now been chosen, but refurbishment is required, with completion by 2009.

Annual report

At the end of each financial year the chief executive is required by s 84 to prepare an annual report about the business of the Supreme Court during that year. The Lord Chancellor must lay a copy of the report before Parliament. A copy is also to be sent to the First Minister in Scotland and in Northern Ireland and to the First Secretary of the Welsh Assembly.

The Judicial Committee of the Privy Council

The Privy Council is a lineal descendant of the ancient King's Council, and was originally a sort of cabinet advising the Crown. The Judicial Committee, which is not part of the Supreme Court, is a final court of appeal in civil and criminal matters from the courts of

some Commonwealth and Colonial territories, but the changes which have taken place in the Commonwealth have restricted the number of cases coming before it, many Commonwealth countries preferring to hear appeals within their own judicial systems. However, some aspects of this jurisdiction survive. For example, Malaysia and New Zealand retained the Privy Council as a final appeal court, in spite of their constitutional independence. The Australia Act Commencement Order of 1986 abolished appeals to the Privy Council from Australia. In October 2003 MPs in New Zealand voted in legislation to abolish appeals to the Privy Council. Under this legislation, which came into force in July 2004, the New Zealand Supreme Court of five judges became the country's final court of appeal.

Even in those countries where a general right to appeal to the Privy Council exists, a particular statute in that country may exclude appeal. Specific words are not necessary. The expression in a statute that an appeal to a national court 'is final' rules out appeal to the Privy Council (see *Sears* v *AG of New Zealand* (1997) *The Times*, 4 November).

The court is still the final court of appeal on criminal and civil matters from the Channel Islands and the Isle of Man, and also from those islands and colonies, such as Gibraltar and Belize, whose independence is not a viable proposition. There is strictly speaking no right of appeal, but it is customary to petition the Crown for leave to appeal. It is also the final court of appeal from English ecclesiastical courts, and here it is assisted by the Archbishops of Canterbury and York who, as assessors, advise on ecclesiastical matters. It also hears appeals from disciplinary bodies for dentists, opticians and professions relating to medicine.

The Judicial Committee of the Privy Council has jurisdiction under the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998 to decide the competence and functions in a legal sense of the Scottish Parliament and the Northern Ireland and Welsh assemblies. A question of the legal competence of those bodies to make laws within the powers given to them would be raised before the Judicial Committee.

Composition

The Judicial Committee (or the Board as it is called) is comprised of the Lord President of the Council, the Lord Chancellor, the Lords of Appeal in Ordinary, Lords Justices of Appeal (if Privy Councillors) and all Privy Councillors who have held high judicial office in the United Kingdom, together with Commonwealth judges who have been appointed members of the Privy Council. It does not actually decide cases, but advises the Crown which implements the advice by an Order in Council. This advice used to be unanimous, but since March 1966 dissenting members of the Privy Council who were present at the hearing of the appeal may express their dissent, giving reasons therefor. The court is not bound by its own previous decisions.

Reform

It has already been noted that the functions of the Privy Council in matters arising from devolution of some central government powers to devolved governments or assemblies in Scotland, Wales and Northern Ireland will be transferred to the Supreme Court as it comes into being. Other jurisdiction as described above will be taken over by a newly constituted court called, as before, the Judicial Committee of the Privy Council, which will be governed by Sch 16 to the CRA 2005 and the law relating to the Judicial Committee will be confined to that Schedule. The Judicial Committee is in effect reconstituted by Sch 16, which substitutes a new s 1 to the Judicial Committee Act 1833. It will comprise holders and former holders of high judicial office who are also privy councillors. High judicial office includes former membership of the Supreme Court, membership or former membership of the Court of Appeal in England and Wales and membership or former membership of the appellate courts in Scotland and Northern Ireland. The Judicial Committee Act 1881 will be repealed by the CRA 2005.

Judicial appointments and discipline

The Judicial Appointments Commission and Ombudsman

The following materials relate to the appointment of the judiciary and the role of the Judicial Appointments Commission and the provisions relating to the setting up of a Judicial Appointments and Conduct Ombudsman to hear complaints of maladministration by the Judicial Appointments Commission or the Lord Chancellor. All of the following sections and schedules are in force unless otherwise stated.

The Judicial Appointments Commission

Section 61 introduces Sch 12 to the CRA 2005, which is about the commission and establishes the commission. The JAC is a body corporate. The membership is a lay chairman and 14 other commissioners. There are five judicial members plus a tribunal member and a lay justice, together with two professional members and five lay members. They are appointed by the Queen on the recommendation of the Lord Chancellor. The commission will normally work through selection panels having four members.

Appointments

General provisions

Section 63 states that selection for membership of the judiciary must be solely on merit. Further, a person must not be selected unless the selecting body, be it the JAC or a panel of the JAC, is satisfied that the person is of good character. There is no definition of 'merit'. Section 64 goes on to state that the selecting body must have regard to the need to encourage diversity in the range of persons available for selection for judicial appointments. Section 64 is subject to s 63, which means that diversity should be achieved without diluting the principle of merit. Sections 65 and 66 give the Lord Chancellor power to issue guidance about procedures for the performance by the commission or a selection panel of its functions.

Selection of Lord Chief Justice and Heads of Divisions

Section 67 gives the detail by providing that ss 68–75 (see below) apply to a recommendation for appointment to one of the following offices:

- Lord Chief Justice;
- Master of the Rolls;
- President of the Queen's Bench Division;
- President of the Family Division;
- Chancellor of the High Court.

Duty to fill vacancies

Section 68 states that the Lord Chancellor must make a recommendation to fill any vacancy in the office of Lord Chief Justice (LCJ) and any other vacancy listed in an office listed above. However, the section allows the LCJ to keep a Head of Division vacant by agreement with the Lord Chancellor. The Lord Chancellor's recommendation for appointment is to the Queen, who makes the appointment. There is no longer any involvement of the Prime Minister.

Request for selection for appointment to the s 67 offices

The Lord Chancellor may request the commission for a person to be selected for recommendation for appointment but there must be consultation with the LCJ. Thus, the section leaves

the initiative for a selection to the Lord Chancellor. The Lord Chancellor may withdraw or modify the request for selection, but only if the LCJ agrees. The JAC does not have to respond to a withdrawal if the Lord Chancellor has already accepted a selection. The Lord Chancellor must give reasons for withdrawing a request.

The selection process

On receiving a request, the JAC must appoint a selection panel. A panel is a committee of the JAC. The panel has four members: normally a senior Supreme Court Judge (currently a Law Lord); the LCJ; the Chairman of the JAC; and a lay member (i.e. two judicial members and two lay members, the Chairman of the JAC being a lay person).

Panel report

The selection panel submits a report to the Lord Chancellor stating who has been selected (s 72). The Lord Chancellor then has the following options:

- to accept the selection;
- to reject it;
- ask the selection panel to reconsider the selection (the selection panel must be given the Lord Chancellor's written reasons for rejecting or requiring reconsideration of a selection).

Where the Lord Chancellor has asked for reconsideration the panel may select the same person or a different person, but where there has been a rejection and a request for reconsideration the panel may not select the person rejected.

Where the Lord Chancellor has asked for a reconsideration and the panel puts forward another person, the Lord Chancellor must accept that person *unless* he or she selects the person whose selection the panel had been asked to reconsider rather than the different person the panel has put forward. In other words, there may be a change of mind.

Selection of Lords Justices of Appeal

Sections 76 to 84 apply. The procedures follow a similar pattern to those listed above for Lord Chief Justice and Heads of Division.

Selection of puisne (High Court) judges

Sections 85 to 94 apply similar procedures to those listed above in connection with the Lord Chief Justice and Heads of Divisions, and Lords Justices of Appeal, with a major exception which is that when the Lord Chancellor gives the JAC notice of a request for the selection of a High Court judge, the Commission must seek to identify persons it considers would be suitable in advance of any judicial or other recommendation.

Other appointments

These can be filled by advertisements placed by the JAC as follows.

Circuit judge
Appointment is by the Queen on the recommendation of the Lord Chancellor following selection by the JAC. Qualification is a 10-year Crown Court or county court advocacy qualification.

Recorder
This is a part-time appointment by the Queen on the recommendation of the Lord Chancellor following selection by the JAC from those with a 10-year Crown Court or county court advocacy qualification.

Assistant recorders
There are also part-time but are appointed by the Lord Chancellor following selection by the JAC from persons with a 10-year Crown Court or county court advocacy qualification.

Common Serjeant (City of London Old Bailey)
Appointment is by the Queen on the recommendation of the Lord Chancellor following selection by the JAC. The qualification is the same as that for recorders and assistant recorders.

District judges (county courts)
Appointment is by the Queen on the recommendation of the Lord Chancellor following selection by the JAC from persons with a seven-year general advocacy qualification.

Deputy district judges (county courts)
Appointment and qualifications follow the same pattern as for a district judge.

District judges (magistrates' courts)
Appointment is by the Queen on the recommendation of the Lord Chancellor following selection by the JAC.

Deputy district judges (magistrates' courts)
Appointment is by the Lord Chancellor following selection by the JAC from those with a seven-year general advocacy qualification.

The advertisements of the JAC always make clear that selection is on merit by open competition and that the JAC encourages a wide variety of applicants to satisfy the diversity principle. An application pack is issued to applicants, who are required to submit a essay indicating why they are suitable for the relevant post.

The main function of the Lord Chief Justice in these appointments is consultation by the Lord Chancellor with the Lord Chief Justice. Importantly, as head of the judiciary in England and Wales the Lord Chief Justice allocates the appointee to particular courts in particular areas.

Complaints about appointments

Section 62 provides for the appointment of a Judicial Appointments and Complaints Ombudsman. Under s 125, a complaint is one of maladministration by the JAC or a committee of the JAC by a person who claims to have been adversely affected as an applicant for selection or as a person selected by the maladministration complained of. Complaints can be made:

- to the Commission;
- to the Lord Chancellor; or
- to the ombudsman.

The Lord Chancellor may refer a complaint to the Ombudsman.

Where the complaint or reference is to the Ombudsman, he or she must make a report. This may uphold the complaint in whole or in part or not uphold it. He or she may make recommendations including the payment of compensation where there is loss.

A copy of the draft report is sent to the JAC and the Lord Chancellor and to the complainant.

Under s 105, the JAC and the Lord Chancellor must provide the Ombudsman with such information as may reasonably be required for the investigation of the complaint.

Discipline

Disciplinary powers over the judiciary are given to the LCJ and/or the Lord Chancellor. A power of suspension from office is included. The LCJ exercises his powers only with the

agreement of the Lord Chancellor. The latter, who need no longer be a Lord or a lawyer, can act alone and may veto the disciplinary acts of the LCJ.

Applications for review and references

Application may be made to the Ombudsman by an interested party for a review of the exercise of a regulated disciplinary function on the grounds of failure to follow proper procedures or some other form of maladministration. 'Interested party' obviously includes the judge being disciplined but apparently also any person who has made a complaint under prescribed procedures. The complaint must be made within 28 days beginning with the latest failure or other maladministration alleged by the applicant.

The Ombudsman has power to recommend payment of compensation or set aside a decision of the LCJ or Lord Chancellor.

The Lord Chancellor or the LCJ may make a reference to the Ombudsman relating to a disciplinary matter.

Reports on reviews

The Ombudsman must send a draft copy of a conduct report to the Lord Chancellor and in this case also to the LCJ. The report must state the Ombudsman's proposed response to the review. The Lord Chancellor and the LCJ may make proposals and the Ombudsman must consider whether to change the report to give effect to the proposal or not. The final report goes to the Lord Chancellor and the LCJ and to the applicant but the applicant's report must not contain information relating to an identified or identifiable individual other than the applicant nor must the applicant's copy contain information that would be a breach of confidence.

The Ombudsman is also required to make a report where the investigation has been made on a reference by the Lord Chancellor or the LCJ.

Removal and retirement of judges

Section 17(4) of the Courts Act 1971 (as amended) contains the only formal power to remove a judge. The power relates to circuit judges and states that the Lord Chancellor may, if he thinks fit, and if the Lord Chief Justice agrees, remove a circuit judge from office on the ground of incapacity or misbehaviour. Recorders, assistant recorders, and magistrates are governed by similar provisions. Other judges can only be removed by a motion approved by both Houses of Parliament.

As regards retirement, the Judicial Pensions and Retirement Act 1993 imposes a general obligation on the judiciary at all levels to retire at 70. Those who were appointed before the Act may retain their former retirement age, which is 75 for judiciary in the High Court and above and 72 below High Court level, e.g. circuit judges and recorders. Removal by the Parliamentary procedure has never been used for an English judge since its creation in 1701. The power to remove circuit judges was exercised by the Lord Chancellor, Lord Hailsham, who removed Judge Campbell after he had admitted smuggling whiskey and cigarettes into this country. Judges who have been convicted of drink-driving can expect to be removed.

High Court judges, who are rarely removed, are persuaded to resign by the Lord Chancellor and/or the appeal judiciary. This happened in 1998 when Mr Justice Jeremiah Harman was persuaded to resign after his intolerable delay in producing a judgment.

Arbitration

Arising from contract

Not uncommonly commercial contracts, for example contracts of insurance, contain a provision under which the parties agree to submit disputes arising under the contract to an arbitrator who need not be a lawyer but might in, say, a building dispute, be a surveyor who has knowledge and experience of the subject matter of the dispute.

Arbitration proceedings differ from court proceedings in two main ways: first, they are private in that there need be no publicity (e.g. a public hearing followed by a law report), and second, the arbitrator will have special experience of the particular trade or business which a judge would not have. Privacy is usually the determining factor in the choice by the parties of commercial arbitration rather than litigation.

Arbitration is no longer cheap since experienced arbitrators can command daily fees of several hundred pounds, and the lawyers who appear before the arbitrators charge the same fees as for litigation in the courts. There is no guarantee of a quick resolution because it may be several months before the parties can agree upon the identity of the arbitrator(s) and also the parties are dependent in arranging the arbitration on the availability of the arbitrator, whose diary may be as full as the waiting lists in the ordinary courts.

The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) apply in regard to the possible abuse of clauses which businesses may put into their contracts with consumers. The Arbitration Act 1996, s 89 (as amended by SI 1999/2167) applies the provisions of the regulations to arbitration clauses and an unfair clause cannot be enforced against a consumer who may, therefore, use the civil court system where there is, say, a breach of contract by a supplier, provided the amount involved is £5,000 or less. Section 90 of the 1996 Act applies the rules relating to unfair arbitration clauses to cases where the consumer is a company. The 1999 Regulations are considered further in Chapter 15.

Other arbitrations

Arbitration also occurs under codes of practice prepared by various trade associations with the assistance of the Office of Fair Trading. The arbitration service for a particular code of practice is usually provided by the Chartered Institute of Arbitrators. The trade associations concerned, e.g. the Association of British Travel Agents and the Motor Agents Association, make a substantial contribution to the cost of administration but the consumer has to pay a fee. This is normally refunded if the consumer is successful.

Arbitration in the High Court

Arbitration in the Commercial Court, which is part of the High Court, has already been considered. There are now no arbitration arrangements in the county court, claims of £5,000 or less being referred to the small claims track.

Conciliation

Sometimes a dispute is settled following an initiative by an outside agency. For example, the Advisory, Conciliation and Arbitration Service (ACAS) is, under ss 18 and 19 of the Employment