



Neutral Citation Number: [2023] EWHC 1430 (Comm)

Case No: CC-2022-BHM-000034

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PRPOERTY COURTS IN BIRMINGHAM**  
**CIRCUIT COMMERCIAL COURT (KBD)**

Birmingham Civil Justice Centre  
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 13 June 2023

**Before :**

**HHJ WORSTER**

(sitting as a judge of the High Court)

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**Between :**

**Global Aerospares Limited**  
**- and -**  
**Airest AS**

**Claimant**

**Defendant**

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**Laurence Page** (instructed by **HCB Solicitors**) for the **Claimant**  
**Neil Berragan** (instructed by **Brabners**) for the **Defendant**

Hearing date: **17 May 2023**  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

## **HHJ WORSTER :**

### **Introduction**

1. The Claimant supplies parts for aircraft, and is a company registered in England and Wales. The Defendant is a company registered in Estonia, and carries on a business repairing aircraft from Tallinn airport. By a Part 8 Claim Form issued on 17 October 2022, the Claimant seeks directions pursuant to section 18 of the Arbitration Act 1996 (“the 1996 Act”). Section 18 is the section which provides for the court to give directions where there is a failure of the procedure for the appointment of the arbitral tribunal. The Claimant’s preference is that the arbitration be conducted by the London Court of International Arbitration (“LCIA”) but it would be content for the Court to appoint a named arbitrator. The Defendant contests the Court’s jurisdiction to try the claim, and has applied for an order setting aside the Claim Form.
2. The Claimant’s case is that it supplied aircraft parts to the Defendant which it has not paid for. The claim relies on a written Exchange Pool Agreement (“the Agreement”) made in December 2014. The Claimant’s case is that the Agreement has been terminated as a consequence of the Defendant’s failure to pay what it owed. The claim is put at a sum approaching \$400,000. The Agreement has an arbitration clause, but it makes no provision for the appointment of an arbitrator; it simply says this:

*11. This Agreement is subject to English jurisdiction. If a dispute cannot be settled by negotiation it shall be settled by arbitration in London.*

3. The Defendant initially denied that it knew anything about the Claimant, but now accepts that the two companies dealt with each other. In its letter of 29 October 2021 responding to the letter of claim, the Defendant accepted that the Agreement was signed in 2014, but said that it was signed by a former employee who did not have authorization to conclude the Agreement. It denies liability, although the precise basis of that denial is not entirely clear. Mr Page submits that the Defendant’s approach to this claim is indicative of an attempt to avoid or delay payment of a liability for which it has no genuine defence. Mr Berragan submits that the Defendant does have a defence to this claim, but that in any event, the merits of the underlying dispute are not the issue on this application. I am in no position to reach a concluded view on the underlying merits of the dispute. For the purposes of this application it is sufficient to note that the Defendant accepts that there is a good arguable case that there is a valid arbitration agreement. That is as far as I need to go.
4. Following the issue of the Claim Form, I made an order on 25 October 2022 in the following terms:
  1. *The Claimant has permission to serve the Claim Form, Particulars of Claim and any other document in these proceedings issued under the above claim number on the Defendant out of the jurisdiction at Lootsa 8A, C Tower 11 415 Tallinn, Estonia, or Majaka 26, 11412 Tallinn, Estonia or elsewhere in Estonia pursuant to CPR Part 62.5(1)(c)(ii).*
  2. *Further, and pursuant to CPR Part 6.15, the Claimant has permission to serve the Claim Form, Particulars of Claim and any other document in these proceedings issued under the above claim number on the Defendant out of the jurisdiction by serving the same on: (i) Brabners LLP, Solicitors, by first class*

*post to 55, King Street, Manchester, M2 4LQ and (ii) by email to [the email addresses of two identified employees of the Defendant]*

The order provided for deemed dates of service when these alternative forms of service were used.

5. The Claim Form and the witness statement in support were then served on the Defendant, and on 9 December 2022 the Defendant filed an Acknowledgement of Service indicating that it intended to dispute the Court's jurisdiction. On 19 January 2023 the Defendant made this application pursuant to CPR Part 11(1) for an order declaring that the Court has no jurisdiction to try the claim, and for the Claim Form and the order for service to be set aside.
6. The basis of the application is that:

*... the Court does not have jurisdiction to appoint an arbitrator under section 18 of the 1996 Act ...*

The challenge to the Court's jurisdiction is not a territorial one, but is said to go to the Court's jurisdiction to make the order sought. The Defendant's argument (to which I return in greater detail below) is to the effect that the relevant provisions of section 18 of the 1996 Act are not engaged, so that the Court has no jurisdiction to make the orders sought in the Claim Form. It is submitted on behalf of the Claimant that this analysis confuses the issue of jurisdiction and the merits of the claim, and that the application fails for that reason alone.

### **The procedural issue**

7. The first issue to consider is whether the Part 11 procedure is apt to deal with matters which go wider than issues of territorial jurisdiction. Mr Berragan submits that it is, and that this is apparent from the terms of Part 11 itself:

*(1) A defendant who wishes to –*

- (a) dispute the court's jurisdiction to try the claim; or*
- (b) argue that the court should not exercise its jurisdiction*

*may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*

He relies upon the decision of the Court of Appeal in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203. The Claimants in that case were farmers in Wiltshire, and the Defendant a well known house builder. There was no issue of territorial jurisdiction, and the case is referred to in the notes to the White Book at paragraph 11.1.3 as authority for the proposition that in r 11(1) the word "jurisdiction" does not denote territorial jurisdiction but is a reference to the court's power or authority to try a claim.

8. That proposition is drawn from the following passage in the judgment of Dyson LJ at [22]–[23], who gave the leading judgment in *Hoddinott*:

*22. In our judgment, CPR r 11 is engaged in the present context. The definition of "jurisdiction" is not exhaustive. The word "jurisdiction" is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the*

*sense in which the word is used in the definition in CPR r 2.3, and in the provisions which govern service of the claim form out of the jurisdiction: see CPR r 6.20 et seq.*

23. *But in CPR r 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR r 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR r 11(1)(b)). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR r 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR r 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim.*
9. The facts of *Hoddinott* are of relevance. The validity of the Claim Form in that case expired on 22 September 2006. The Claimants obtained an extension to 22 November 2006. The Defendant then applied to set aside the order for an extension. The Claimants served the Claim Form on 21 November 2006, and the Defendant filed an Acknowledgement of Service indicating an intention to defend the case, but not indicating an intention to contest jurisdiction. The court then set aside the order for the extension of time, holding that Part 11 did not require the Defendant to make an application to challenge the court's jurisdiction in order to apply for the extension of time to be set aside. The Claimants appealed, successfully. The Court of Appeal held that because the Defendant had failed to contest jurisdiction in the Acknowledgement of Service it was to be treated as having accepted that the court could exercise its jurisdiction to try the claim, even though the Claim Form had been served late. The Defendant was to be treated as having abandoned its earlier application to set aside the order for an extension, and consequently the Judge had been wrong to set aside the extension.
10. The argument in this case is rather different. It is not said that the Court has no jurisdiction to try the case because the Claim Form has not been served in time, or because there is some other problem with the constitution of the claim. The effect of the Defendant's argument is that the Court's power under section 18 of the 1996 Act is not engaged. To my mind, that is a matter which goes to the merits, rather than to the jurisdiction of the court to try the case or to exercise its jurisdiction to try the case.
11. Section 18 of the 1996 Act provides as follows:
- Failure of appointment procedure.*
- (1) *The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.*

- (2) *If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.*
  - (3) *Those powers are—*
    - (a) *to give directions as to the making of any necessary appointments;*
    - (b) *to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;*
    - (c) *to revoke any appointments already made;*
    - (d) *to make any necessary appointments itself.*
  - (4) *An appointment made by the court under this section has effect as if made with the agreement of the parties.*
  - (5) *The leave of the court is required for any appeal from a decision of the court under this section.*
12. The Defendant's case is that there has been no failure of the procedure for the appointment of the arbitral tribunal, and that consequently the Court does not have "jurisdiction" under section 18 to make the directions sought. That is the point which the Defendant submits goes to the court's jurisdiction, or the exercise of that jurisdiction, for the purposes of Part 11(1).
13. If a Claim Form is not validly served, then unless the court makes an order which cures the defect, the claim cannot proceed. The court cannot try the case because there is no valid claim before it. That goes to the "jurisdiction" of the court. The claim form in this case was validly served. There is no defect in the process. It may be that the Court does not have the power to make the order which the Claimant seeks because a pre-condition for the exercise of that power has not been met. But I agree with Mr Page that that is a matter which goes to the merits of the claim rather than to the jurisdiction of the court. Consequently the Defendant's application as framed must fail.
14. In *Hoddinott* the Court of Appeal considered the effect of a failure to comply with Part 11, and it is instructive to look at the consequences of the Defendant's approach to the breadth of the rule from that perspective. If a Defendant intended to argue in its Defence that the court did not have a certain statutory power, or that it should not exercise that statutory power, it would be incumbent upon it to contest the court's jurisdiction when acknowledging service. If that were not done, that Defendant would be taken to have accepted that the Court had that power and should exercise it. That would be a surprising outcome.

### **The substantive issue**

15. Whilst the Claimant succeeds on the procedural issue, it wanted to move the matter along. The parties had argued the matters which lay at the heart of the issue on the claim, and it was plainly better for the Court to determine those matters rather than

adjourn them to another hearing at some point in the future. Consequently I turn to the question of whether the Court can make directions pursuant to section 18 on the facts of this case. There are a few references to the documents in the hearing bundle, with page numbers given in square brackets.

16. The starting point is a consideration of the relevant provisions of the 1996 Act. Section 14 is headed “Commencement of arbitral proceedings”. It provides as follows:
  - (1) *The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.*
  - (2) *If there is no such agreement the following provisions apply.*
  - (3) *Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.*
  - (4) *Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.*
  - (5) *Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.*
17. There is no agreement in this case as to when arbitral proceedings are to be regarded as commenced. Nor does the Agreement name an arbitrator or provide for their appointment by a third person. Consequently the default provisions set out in section 14(4) apply. Nor is there an agreement as to the number of arbitrators, so by section 15(3) of the 1996 Act ... *the tribunal is to consist of a sole arbitrator.*
18. Section 16 deals with the procedure for the appointment of arbitrators. It provides as follows:
  - (1) *The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.*
  - (2) *If or to the extent that there is no such agreement, the following provisions apply.*
  - (3) *If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.*

...

*(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure.*

19. There is no agreement as to the procedure for appointing an arbitrator, so the default provision at section 16(3) apply. The Claimant no doubt had this provision in mind when it sought to serve its request in writing to appoint an arbitrator. This was done by sending an email to the Defendant on 30 November 2021, followed by an airmail letter.
20. The Defendant's case is that the request was not a valid request to appoint an arbitrator within the meaning of section 16(3), and that as a result the process for the appointment of an arbitrator provided for by the 1996 Act has not been begun. If the process has not been begun, it cannot be said that there has been a failure of that process. In the absence of such a failure, the courts powers under section 18 do not arise, or should not be exercised. The Defendant's challenge to the validity of the request to arbitrate is put on two bases. Firstly that the content of the request is not sufficiently clear to comply with the requirements of the 1996 Act; and secondly that it has not been validly served.
21. The Claimant's case is that:
  - (i) Section 18 is not subject to sections 14 and 16. Mr Page submitted that there is no requirement for a notice compliant with sections 14 and 16 to be issued before a section 18 application is made or directions given.
  - (ii) That in any event, the notice of 30 November 2021 was sufficient to comply with the requirements of the 1996 Act; and
  - (iii) That notice was validly served (there being a number of elements to this aspect of the argument).
22. The request in this case is a substantial document [46-51]. It is headed up in the following way:

***UNDER AN EXCHANGE POOL AGREEMENT DATED 7  
DECEMBER 2014***

***IN THE MATTER OF AN AD HOC ARBITRATION IN LONDON***

Having identified the parties, there is the following heading:

***REQUEST FOR ARBITRATION***

23. The request then refers to clause 11 of the Agreement, and sets out the Claimant's case as to the nature and circumstances of the dispute. At paragraphs 17-18 it deals with "Procedural Matters" in the following way:

17. *Under the Arbitration Agreement, the seat is in London, the language of the arbitration shall be English, and the governing law of the claim is the law of England and Wales*
18. *In circumstances where there is no stated procedure in the Arbitration Agreement as to the number of arbitrators or the mechanism [as to how they will be nominated, the Claimant will act as follows:*
- (a) *It proposes to appoint a single arbitrator*

At (b) and (c) three potential arbitrators are identified.

(d) *The Respondent is invited to respond to this Request for Arbitration by no later than 4pm on 21 December 2021 identifying which of the above arbitrators it wishes to appoint, or a list of three alternative arbitrators who fit the criteria set out above. In the absence of a response, the Claimant shall take steps to appoint one of the above arbitrators without further reference to the Respondent.*

24. Dealing firstly with the question of whether the content of the notice is sufficient. Mr Berragan referred me to paragraph 5-25 of Russell on Arbitration 24<sup>th</sup> ed..

***The notice must be objectively clear.***

*Subject to complying with the requirements of section 14 of the Arbitration Act 1996, there are otherwise no specific requirements as to the form of the notice. It must be in writing and is often simply in the form of a letter from the proposed claimant to the proposed respondent. It will not be construed in an unnecessarily strict or legalistic way and focus will be on its substance rather than its form. However the notice must be objectively clear about who is being asked to do what in accordance with section 14. ... It is not unusual to impose a time limit for compliance, failing which, if appropriate, an application can be made to court to have the arbitrator appointed.*

25. That summary accords with the judgment of Moore-Bick J (as he then was) in *Atlanska Plovidba v. Consignaciones Asturianas SA (The "Lapad")* [2004] 2 Lloyd's Rep. 109 at 113:

*Section 16 refers simply to a "request in writing to do so", that is to join in the appointment of an arbitrator, and similar language is to be found in s.14 of the Act which deals with the commencement of arbitration. Although the parties are free to agree when arbitral proceedings are to be regarded as having been commenced, and therefore what formalities are to be observed for that purpose, in the absence of any such agreement all that is required in a case such as the present is a notice in writing requiring the other party to agree to the appointment of an arbitrator in respect of the matter in dispute: see s.14. Arbitration is widely used by commercial parties, often acting*



*without the benefit of legal advice, and there are good reasons therefore, for concentrating on the substance of their communications rather than the form. If a notice of arbitration is to be effective, it must identify the dispute to which it relates with sufficient particularity and must also make it clear that the person giving it is intending to refer the dispute to arbitration, not merely threatening to do so if their demands are not met. Apart from that however, I see no need for any further requirements. Whether any particular document meets those requirements will depend on its terms which must be understood in the context in which it was written. The weight of authority supports a broad and flexible approach to this question.*

26. Mr Berragan points to a number of matters which he submits take this notice out of the realm of a notice which complies with section 16. He refers to the covering letter sent with the Request for Arbitration [79], which includes the following:

*Pursuant to the Exchange Pool Agreement dated 7 December 2014, please find enclosed by way of service the following:*

- 1. Request for Arbitration.*
- 2. A copy of the Exchange Pool Agreement dated 7 December 2014.*
- 3. Summary table of invoices*
- 4. Copy Invoices*

*We confirm that the enclosed documentation has today been filed with the London Court of International Arbitration in order to commence Arbitration proceedings.*

*For completeness, we confirm that this letter has been sent by both email and to the addresses detailed above together with a hard copy by airmail. As such, we calculate that the date for your response is within 21 days of the date of this letter, namely no later than 4pm 21 December 2021.*

27. Mr Berragan submits that the reference to filing the documents with the LCIA to commence proceedings is inconsistent with a request to appoint an arbitrator. Further, the time limit of 21 days for a response is not the time limit provided for by section 16(3) – which is 28 days. He submits that objectively, this is not a request to join in the appointment of an arbitrator. He also notes

that in paragraph 18(d) of the Request for Arbitration, the Claimant indicates that in the absence of response it will proceed to appoint unilaterally, when it had no right to proceed in that way.

28. This letter has to be read with the Request for Arbitration it enclosed. It may be that documents had been sent to the LCIA and the Claimant got the time limit wrong (and went too far in saying that it would proceed unilaterally if there was no response within that time limit), but when the Request for Arbitration is considered, there can be no sensible doubt that the Claimant is asking the Defendant to agree to the appointment of an arbitrator. The prominent title of the document, and the section dealing with “Procedural Matters” identifying three named candidates for appointment are particularly compelling. I regard this request as sufficient to comply with the requirements of the 1996 Act.
29. Secondly, the service of the request. Mr Berragan refers me to Russell at paragraph 5-30:

*The parties are free to agree how the notice of arbitration is to be served. Commercial contracts often contain specific provisions setting out how service is to be effected, for example by requiring service by registered post at a particular address and marked for the attention of a named individual or officer. Service of a notice of arbitration will be valid if effected in accordance with such contractual provisions. A failure to do so will mean that service is not effective, even if the notice of arbitration is in fact received by the other party.*

Mr Berragan underlines the last line of that extract.

30. Clause 9 of the Agreement provides as follows:

*Notices: Unless otherwise specified, any notice to be given for the purposes of this Contract must be in English, in writing and must be served personally; and sent by email (or such other postal service as is likely to achieve delivery in 7 days) to the address of the parties specified in this Agreement or such other address as that party notifies in writing.*

The request for arbitration was sent to the Defendant by email, and a further copy was sent by airmail. However, no attempt was made to serve it personally. In those circumstances, whilst the Defendant accepts that the notice was received, the simple point is that it was not validly served because it was not served in accordance with the Agreement.

31. On a literal reading of the words, this clause requires a notice to be served personally (the word used is “must”), and then (after a semi colon) requires service of the same notice (the word used is “and”) by airmail or some other similar means. The language used in a written contract between two commercial parties would normally carry significant weight, but I was puzzled as to the purpose of a requirement to serve the same document twice in an agreement such as this; particularly when the first requirement was for personal service, rather than some other form of “service” which might not involve the recipient actually receiving the document. How was this consistent with “commercial common sense”? Had something gone wrong with the language? Did the parties to the agreement use the term “served personally” to mean something other than the term of art employed by lawyers when they speak of personal service? Did, for example, the words after the semi colon somehow provide for how a notice was to be “served personally”.
  
32. I raised those matters with Mr Berragan at the outset of his submissions. I was reminded that the parties had not provided the Court with the relevant authorities because this point was not being taken. Mr Berragan submitted that the parties may well have seen the benefit of a second copy of a notice being provided by air mail or some equivalent means, particularly when they carried on business in different countries. The court was not to re-write the parties contract for them. The mistake had to be an obvious one, and there needed to be an obvious “correction”. The Arbitration Act emphasised party autonomy in these matters, and this was the parties’ agreement. Whilst I raised the issue, I determine the matter before me on the basis of the points which were argued before me.
  
33. I return to the language below, but the first argument to consider is whether clause 9 applies at all. Mr Page submitted that following the Defendant’s breach of the Agreement, the Claimant terminated it. Consequently, the terms of the Agreement “fall away” and the requirements of clause 9 with it. Mr Page observed that clause 11 does not expressly incorporate clause 9, and that whilst clause 6 includes some saving provisions for the parties existing rights in the event that the agreement is terminated, there is no saving provision to preserve the effect of clause 9. I pause to observe that in those circumstances, it appears that the requirements for service of the request to arbitrate would be those provided for by section 76 of the 1996 Act; in other words by any effective means. In this case we know the request was received.
  
34. This line of argument was not foreshadowed in Mr Page’s skeleton argument, which focussed on the construction of clause 9. Indeed it appears that the Claimant had been proceeding on the basis that it had to serve the request in accordance with clause 9; that seems to be the effect of the evidence the Claimant’s solicitor gave at paragraph 9 of her witness statement in support of the application to serve out of the jurisdiction [153]. Nor was it argued before me that clause 9 did not apply to a notice to be served under the arbitration agreement (clause 11) during the lifetime of the Agreement. No doubt that was because Clause 9 expressly applies to “any notice to be given for the purposes

of this Contract”, which is apt to cover any notice to be served pursuant to clause 11. Mr Page’s submission relied upon the effect of termination.

35. In reply Mr Barragan submitted that whilst the Agreement may have fallen away, the arbitration agreement survives; see section 7 of the 1996 Act. He submits that this would not simply be clause 11, but would include any other parts of the Agreement which were incorporated into the arbitration agreement, including the notice provisions in clause 9.
36. Despite the fact that the point arose rather late, Mr Page’s argument is an attractive one. That said, I am not persuaded that it is correct. If clause 9 was to apply to notices served pursuant to the arbitration agreement during the lifetime of the Agreement, then it can properly be said to have formed part of the arbitration agreement (or to have been incorporated into it as Mr Barragan submits). The arbitration agreement survived termination, and the better analysis is that (insofar as it applies to notices for the purposes of the arbitration) clause 9 survived with it.
37. Mr Page’s second line of argument is to construe the requirements of clause 9 “purposively” (my word rather than his). In other words, the purpose of the clause is to ensure that the recipient of the notice actually receives it, and the mechanics of how that is done cease to be relevant once that is achieved. Here that might be achieved by reading the clause as a directory provision rather than a mandatory one. Mr Page refers to the decision in *Yates Building Company v Pulleyn and Co* [1976] 1 EGLR 157, where the Court of Appeal considered a clause which required a written notice ... *to be sent by registered post or recorded delivery*. The case is to be distinguished from this one. The clause in *Yates* was an option clause, which (in effect) was an offer. Lord Denning MR says this towards the bottom of 157:

*When a person makes an offer, he does sometimes prescribe the method by which it is to be accepted. If he prescribes it in terms which are mandatory or obligatory, the acceptance is only good if it complies with the stated requirements. Thus in the present case the notice of acceptance must be in writing and must be given to Pulleyns or Pulleyns solicitors ... But the question is whether the words “such notice to be sent by registered or recorded delivery post” are mandatory or directory.*

Lord Denning MR went on to find that the words were inserted for the benefit of the buyer, were directory, and that so long as he got the letter in time, the buyer would be bound. However, the passage from Lord Denning’s judgment quoted above serves to emphasise that the use of the word “must” imports a mandatory requirement.

38. The language of clause 9 is clear. It provides that the notice ... *must be in English, in writing and must be served personally*; The language is mandatory and not directory. Whilst the effect of that construction is “double service”, the result is not an absurd one. It may be that Mr Page would be on stronger ground arguing that the words after the semi colon were directory, given the absence of the word “must” in that part of the clause. But that would not assist him on the present facts. Clause 9 requires that the notice be served personally. There is no evidence that personal service of the request was attempted.
  
39. Mr Page’s third line of argument is to consider the meaning of the opening words of clause 9 – “*Unless otherwise specified ...*”. Given that there is no provision in the agreement which specifies otherwise, he submits that this can be read as a reference to the Court specifying the means of service. He submits that the terms of clause 11 indicate that the parties were willing to accept the supervisory powers of the English court over their dispute. The argument is that because the order of 25 October 2022 as to service gave the Claimant permission to serve “any other documents in these proceedings” by alternative means, that is a means of service which is “otherwise specified” for the purposes of clause 9.
  
40. There are a number of problems with that argument. Firstly, my reading of the opening words of clause 9 is that they refer to some means of service being “otherwise specified” within the agreement. The fact that the agreement does not actually make some other provision does not take away from the clarity of the language. Secondly, it would need something more to give a third party (here the Court) a power to determine how contractual machinery was to work. Thirdly, the application for alternative service and the order of 25 October 2022 were expressed to be in relation to the Claim Form and *any other document in these proceedings issued under the above claim number*. The request to arbitrate is not such a document. Fourthly, the order for alternative service post dated the service of the request for arbitration by nearly a year.
  
41. Consequently I conclude that the request to arbitrate has not been served in accordance with section 14(4) of the 1996 Act, and that the process for the appointment of an arbitrator has not been validly begun. The Defendant’s case is that a process cannot have failed if it has not been begun. I can see no way around the logic of that submission.
  
42. Finally, I come to the question of whether the court has power to make an order under section 18 of the 1996 Act in circumstances where there has been no failure of the procedure for the appointment of an arbitrator (here) because of the failure to serve a valid request to arbitrate. In the *Atlanska* case (supra) Moore-Bick says this at [12]:

*It is clear that the court's jurisdiction to exercise its powers under section 18 depends on two things: a failure of the contractual procedure for the appointment of the tribunal and the absence of agreement between the parties as to the steps to be taken as a result.*

43. Section 18 is not expressly subject to the requirements of sections 14 and 16, but this Part of the 1996 Act provides for a series of default procedures which interlock and are to be read together. If there has been no failure in the appointment procedure an application for directions under section 18 will fail; see for example *Silver Dry Bulk v Homer Hulbert Maritime* [2017] EWHC 44 (Comm) per Males J at [32]. In that case, there was no failure of the process because the arbitration agreement provided “automatically” for the consequences of the “failure” which had occurred, and so there was no failure of the process, in the same way that a default caught by the provisions of section 17 is not to be seen as a failure for the purposes of section 18; see section 18(1).
44. Even if Mr Page is right in his submission that a party can make a “freestanding” section 18 application (without there having been a failure of the process of appointment), and the court had power to make orders, the fact that the contractual machinery had not been properly invoked would count against exercising the discretion to make such an order. If there had been difficulties in effecting personal service, and there was evidence of attempts to comply with the requirements of clause 9 which had been thwarted by the Defendant’s evasion of service, then an application could be made for an order pursuant to section 77 of the 1996 Act. Here, whilst there is the evidence which justified the order of 25 October 2022, it is not said that there has been any attempt to serve the request personally. It may be unattractive for the Defendant to take the point, and the Claimant may be frustrated by its approach, but the Claimant is obliged to comply with the requirements of the Agreement.

## **Disposal**

45. The Defendant’s application fails for the reasons I give at paragraphs 7-14 above, but the effect of the decisions I have made on the substantive issue is that the claim fails (or will fail). Having given a preliminary view on costs in the draft judgment circulated in May, the parties have agreed the terms of the order I should make on the handing down this judgment. They are that:
- (1) The Application is dismissed.
  - (2) The Claim is dismissed.
  - (3) The Claimant shall pay a proportion of the Defendant’s costs of the Application and the Claim.

- (4) The hearing is adjourned to a date to be fixed (by Teams with an ELH of 1 hour) when the appropriate proportion of such costs is to be determined and the Defendant's costs (before percentage reduction) are to be assessed summarily.