# THE WORLD SCENE: ARBITRATION DEVELOPMENT WORLDWIDE; RELATIONSHIPS BETWEEN THE COURTS AND ARBITRATORS - AN AUSTRALIAN PERSPECTIVE

by

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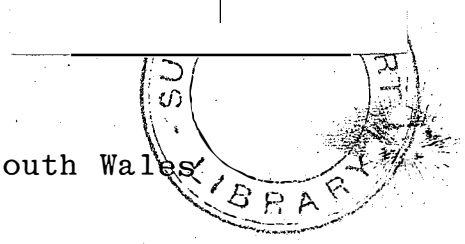

The most impressive feature of my paper must surely be its title. Of necessity, I will be selective and gracefully skip from hobby horse to hobby horse.

The stature of arbitration worldwide at the present time may best be described in the words of Blackmun J in Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc (1985) 53 LW 4069 at 5073:

> "We are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

The hospitable climate to arbitral decision making referred to by the judge is worldwide. Nor yet is the advance confined to the courts. Legislatures have been in the forefront of the endeavour to establish a framework designed to attract disputants to arbitration as a means of resolving both domestic and international disputes. The efforts made by the United Kingdom by the 1979 Act to restrict judicial supervision of arbitrators and in other ways to make arbitration more attractive, particularly to foreign disputants, were echoed and amplified in the 1982 Hong Kong Arbitration Ordinance and blossomed into full flower in the Commercial Arbitration Acts passed in 1984 by the States of

Victoria and New South Wales which are to be copied shortly by other States.

I might digress to say that it is not at all clear to me why the legislation bears the title it does. The provisions of the legislation are in no way confined to arbitration of "commercial" disputes and the Acts in question replace completely the Arbitration Acts heretofore in force and covering all submissions to arbitration.

Dr Herrman has explained the work of UNCITRAL in designing the Model Law of International Arbitration intended to travel in the same direction so far as international commercial dispute resolution is concerned.

Of course, establishing appppropriate legislative setting is but one manifestation of the desire of most countries around the world to provide dispute resolving mechanisms designed to underpin the promotion of the countries involved as centres for international finance and commerce. If one may so crudely describe them, arbitration boutiques have in the recent past, and are about to in the near future, burst into flower in many countries to supplement the more established mechanisms already in place in countries such as the United Kingdom. As most of you know, the Victorian Government has sponsored the establishment in Melbourne of the Australian Centre for International Commercial Arbitration. The Premier of New South Wales has announced the Government's

intention to establish and fund a Commercial Dispute Centre in Sydney. A Committee studded with talent has been established to further this project. A Consultant/Director will shortly be commencing investigations, enquiries and surveys from operators in the spheres of commerce and finance to determine the type of facility expected by and required by prospective users, both domestic and foreign. It is hoped to make the market survey as comprehensive as possible and to engage the assistance and obtain the advice of all appropriate commercial, financial and professional organisations. We have in contemplation that some workshops may be held at which the tentative views of the Committee may be exposed to scrutiny by interested persons and organisations. Consistently with putting the Centre in place as soon as possible, we desire the widest possible input and informed suggestions and proposals are sought and warmly welcomed. The Consultant is a well known commercial lawyer, Mr Michael Ahrens, a partner in Baker & McKenzie, and he would be grateful for all assistance.

In this context there are two matters in particular I would wish to emphasise. Firstly, the Committee sees conciliation as an integral and essential function and considers it a threshold exercise in the disposition of each and every dispute that will be brought before it. Indeed, in this regard, the Centre will be giving effect to the legislative intention enshrined in s 27 of the Act which, I might add, also contemplates attempts at conciliation even after the

commencement of arbitration. Enquiries will be made to learn from the experience of cultures such as the Japanese and Chinese where conciliation is deeply embedded. We are attempting to ensure that teaching courses will be available so that the necessary skill may be learnt by our prospective conciliators.

Secondly, as the judge presently in charge of the commercial work of the Supreme Court of New South Wales, and with the full support of the Chief Justice, I can say that the Court will stand wholeheartedly behind the Centre. We recognise that our function should be primarily, and almost exclusively, supportive and not supervisory. I will deal with the relationship between arbitration and the courts shortly but I want to make the point emphatically that we recognise a clear need for co-operation between the courts and arbitrators and we are ready to give it. It is in this spirit that Justice Smart and I are members of the Committee designing the Centre.

Two recent decisions of the Unites States Supreme Court vividly illustrate what I suggest is a worldwide trend towards permitting parties the greatest possible autonomy to bypass the court system, if they so desire, and seek comfort in arbitration and, furthermore, to render the resulting award final. The first of the decisions is perhaps of more relevance to us in this country who live under a federal system and who have in recent times been blessed with all

the advantages of a parallel state and federal court system than to our English visitors. In Dean Witter Reynolds Inc v Lamar Byrd (1984) 53 LW 4222, a broker and its client entered into a written agreement to arbitrate any dispute that might arise out of the transactions effected by the broker on behalf of the client. Subsequently, the client commenced an action in the Federal District Court alleging violations of the Federal Securities Exchange Act and of various state law provisions. The broker filed a motion to compel arbitration of the claims brought pursuant to state law and to stay resolution of the federal cause of action pending arbitration. Justice Marshall, who delivered the opinion of the Court, explained that the motions were thus framed because the broker assumed that the federal securities claim was not subject to the arbitration provision of the contract and could be resolved only in the federal forum and therefore it did not seek to compel arbitration of that claim. There is reason to think that, notwithstanding earlier authority to this effect, the broker's view in this regard may not have been well founded. Indeed, Justice White, who, in a concurring judgement, emphasised that the question whether rights of action conferred by federal legislation was or was not arbitrable was not before the Court, said that previous decisions which returned a negative answer to that question were, in his opinion, to be viewed with some doubt. On the basis of the assumption made by the broker, the Court held that arbitration was required even when the result would be the

possibly inefficient maintenance of separate proceedings in different forums. In the opinion of the Court, the Federal Arbitration Act mandated that District Courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement had been signed. This audience will perhaps not entirely appreciate the court's statement that the Act's legislative history establishes that its principal purpose was to ensure judicial enforcement of privately made arbitration agreements and not to promote the expeditious resolution of claims.

In a judgement given on 2 July 1985 in Mitsubishi (supra), the doubts expressed by Justice White were held to be well founded, at least so far as international agreements are concerned. Mitsubishi, of course, is the Japanese corporation engaged in car manufacture. Soler is a Puerto Rican corporation which was distributing motor cars pursuant to an agreement with Mitsubishi. The agreement provided that all disputes arising out it, or breach of it, should be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association. Disputes arose between the parties and Mitsubishi commenced an action in the Federal District Court in Puerto Rico seeking an order for arbitration of the dispute. Soler mounted counter claims not only for alleged breaches of the agreement, but also defamation, breaches of the anti-trust provisions of the Sherman Act, the Automobile Dealers' Day in Court Act and of Puerto Rican competition

legislation. The Court of Apppeals for the First Circuit held that the rights conferred by the Sherman Act were of a character inappropriate for enforcement by arbitration and declined to make an order for arbitration of those causes of action. Certio rari was granted primarily to consider whether a United States court should enforce an agreement to resolve anti-trust claims by arbitration when the agreement arises from an international transaction. In the course of returning an affirmative answer to this question, the majority opinion made general statements of principle calculated to warm the hearts of all supporters of arbitration, of disputes, whether domestic or international.

The first argument for Soler was that a claim arising out of statutes designed to protect a class of persons is not encompassed in an arbitration agreement unless the specific category of claim is in terms referred to in the agreement. In dealing with that submission Blackmun J said (p 5073):

> "Absent such compelling considerations, the Act (ie Federal Arbitration Act) provides no basis for disproving agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability. That is not to say that all controversies implicating statutory rights are suitable for arbitration ... it is the congressional intention expressed in some other statute on which the Courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."

It is of interest to note how Blackmun J identified the similarities and differences between arbitration and the courts when he went on:

> "By agreeing to arbitrate a statutory claim, a party does not forego the substantive right afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom with the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate."

Addressing himself specifically to the suggestion that anti-trust matters were inherently insusceptible to resolution by arbitration, His Honour conferred the badge of high approval on the arbitral process when he said (p 5075):

> "In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. Moreover, it is often a judgement that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their dispute; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forego access to judicial remedies. In sum, the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an anti-trust matter."

The decision is more than just a useful example of the overwhelming trend in national courts all over the world to give effect to the consensual arrangements of parties for

resolution of their disputes by the arbitral process. I believe that it mandates a rethinking in the approach that we have been making to applications for stay of proceedings in courts in prima facie breach of agreements to arbitrate.

The 1984 Act repeats the provisions of s 6 of the 1902 Act with respect to the granting of stay of court proceedings commenced in breach of domestic arbitration agreements. In form, the making of an order remains discretionary. In relation to international agreements, the obligation is mandatory in terms of the New York Convention (see s 56(2) of the Act). The authorities in relation to the provisions of the former Act teach us that for half a century courts have espoused the philosophy that in an application for a stay all the circumstances of the case have to be considered but with "a strong bias in favour of maintaining the special bargain between the parties" (Bristol Corporation v John Aird & Co 1913 AC 241 at 258). However, the "strong bias" the House of Lords spoke of was insufficient to overcome the conviction of many judges that cases of complexity should be the province of courts (eg Dillingham Constructions Pty Limited v Downs (1969) 90 WN (Pt 1) 258). In this field of discourse, what fell from the majority in Mitsubishi, although framed in the context of the more explicitly mandatory provisions of the United States Federal Arbitration Act, should have the effect of persuading judges to pay more than lip service to the principle that the bargain of the parties should be enforced save in the most

exceptional cases. At present I can think of very few circumstances where I would regard s 53 of the 1984 Act as leaving a real measure of discretion to the judge hearing an application for a stay.

The rush to arbitration has brought to light a new problem. Where the parties neglect to nominate a forum for the arbitration and cannot agree on one, who determines the forum conveniens? The parties in BHP Petroleum Pty Limited v Oil Basins Limited (unreported 3 April 1985 Murray J) have engaged the attention of both the Supreme Court of Victoria and the United States District Court for the S D of New York in a dispute on this precise topic.

When I was explaining the philosophy which underlies the establishment of the Commercial Disputes Centre in Sydney, I laid stress on the co-operation which is called for and will be provided by the Supreme Court in its Commercial Division to arbitration and arbitrators. That co-operation will be manifested in two ways. Firstly, by exercise of the Court's powers under the Commercial Arbitration Act 1984. Pursuant to provisions of the Act the Court will be available to fill vacancies in the positions of arbitrator or umpire where the need arises (s 10) and will, in appropriate cases, remove arbitrators (s 44). Awards will be registered and enforced as judgements of the Court (s 33). The Court is there to grant such interlocutory orders as may be required (s 47). As my brother Clarke has already held, the Court is

available to assist in furtherance of awards yet to be made by the grant, in appropriate cases, of Mareva injunctions. Furthermore, the Court will exercise appropriate judicial restraint where its supervisory jurisdiction in invoked. As you know, the only appeal to the Court will lie on questions of law and only with the leave of the Court (s 38(2) and (4)) and no leave will be granted except in the restricted category of cases nominated in s 38(5). No doubt, the Court will be as circumspect in granting leave to appeal as the House of Lords has suggested judges of the Commercial Court in England should be. We recognise and will pay deference to the anxiety of parties resorting to arbitration to obtain finality by refraining from granting leave except in special circumstances. Needless to say, even that residuary power to grant leave may, in appropriate cases, be excluded by the parties (s 40(1)). The power to set aside an award for misconduct or where the award was improperly procured (s 42) is, of course, as essential for a healthy arbitral system as it is necessary to vindicate the aims of proper administration of justice.

Now is not the time to dwell on the interesting problems which may be posed in relation to the residuary rights of appeal by the introduction into New South Wales law for the first time by the 1984 Act of the concept of the amiable compositeur. The learned and distinguished editors of Mustill and Boyd on Commercial Arbitration have brought all their sophistication to bear in offering suggestions

(p 605 ff) on the manner in which the courts may continue to exercise their supervisory jurisdiction by way of appeal, notwithstanding that the parties have authorised the arbitrator to act as amiable compositeur. For myself, I see great difficulty in envisaging what role can be left for a court in such circumstances.

Secondly, the area in which courts may be able to exercise great creativity and initiative in fostering co-operation between arbitrators and referees on the one hand and judges on the other is in arbitrations where the court remits either discrete issues or the whole of the case to arbitration. I have already experimented with this approach in remitting part of a case to an arbitrator pursuant to the provisions of s 15 of the old Act. I so doing I sought to encapsulate the philosophy which I propose to follow in making similar orders under the new Act. At the risk of immodesty, I venture to quote from what I said in Maschinenfabrik Ausburg-Nurenberg Aktiengesellschaft v Altikar Pty Limited in a judgement delivered 4 August 1983:

> "As has been made clear by the High Court, even though an order is made under s 15, the Court remains in a very real sense in charge of the dispute (see s 16 of the Arbitration Act), and can ensure that the legislative purpose which is enshrined in the creation of the Commercial List is not lost by remitting the matter to arbitration. It seems to me that the section provides an opportunity for an arbitrator and a judge to work in a very real sense in partnership, in order to ensure that as quickly as possible and as cheaply as possible the arbitrator is seized of the technical aspects of the dispute, whilst the judge assists in the resolution of such questions of fact and law as may arise. This necessitates that the arbitrator should have an opportunity of

> approaching the judge for assistance in any respect which may become necessary. There is no room, in my view, in such proceedings for the dispute to be delayed by requirements for special cases or for stated cases. Equally, there should be no need for the judge to have to forumulate with great specificity the subject of the matter to be resolved by the arbitrator. Ideally, a judge should have the opportunity of sitting with a technical expert as an assessor. The legislature has not yet been able to bring itself to allow for such method of trial, but as I see it, it should be possible to utilise s 15 in that fashion.
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> In the present dispute I have given two judgements, restricted to resolution of matters of law, as to the proper interpretation of the documents covering the legal relationship between the parties. There are still some matters of law outstanding. However, it seems to me, and indeed to counsel for the parties, that the present is an opportune time to bring into the dispute resolution exercise a technical person, who may either be called an arbitrator or a referee - it matters not - so that he may assist in both identifying the matters of technical expertise calling for resolution, and assist in their resolution. I want to make it clear, for the assistance of those present, that in ordering the proceedings to be tried before him, I am not depriving him of the opportunity to come back to the court, either at the request of the parties or either of them, or indeed of his own motion, on short notice, should it become necessary that, for effecting the purpose of his appointment, he requires assistance from the Court."

The power now conferred on the court will be much wider than that contained in the previous s 15. It will no longer be necessary to have the consent of the parties or that the issue referred be of a certain category of technicality before an appointment may be made. The power stems initially from s 124(2) of the Supreme Court Act 1970 which subsection was introduced, by way of amendment, simultaneously with the enactment of the 1984 Act. It provides:

"(2) The rules may make provision for or with respect to--

(a) the cases in which the whole of any proceedings or any question or issue arising in any proceedings may be referred by the Court to an arbitrator or referee for determination or for inquiry or report;

(b) the appointment of a Judge, master, registrar or other officer of the Court or other person as an arbitrator or referee;

(c) the fees to be paid to such an arbitrator or referee;

(d) the persons by whom the whole or any part of any such fees are payable;

(e) the consequences of a determination or report by an arbitrator or referee;

(f) the manner in which such a determination or report may be called in question;

(g) whether or not, or to what extent, a determination or report may be called in question on a matter of fact or law;

(h) the provision of the services of officers of the Court and the provision of court rooms and other facilities for the purpose of a reference of any proceedings or any question or issue arising in any proceedings to an arbitrator or referee; and

(i) any other matters associated with such a reference."

In the first instance it will be for the Rule Committee of the Supreme Court to be adventurous and innovative in defining the circumstances where a reference may be made. Similarly, the Rules should permit the appointment of experts as arbitrators or referees to sit jointly with the judge. In this manner, de facto assessors will be brought into being. Further, the determination or report of the arbitrator or referee should be challengeable only on the

most restricted basis. If the Rules make the appropriate provisions then it will be necessary for the judges to act in the spirit which I believe informs the provision. If all that comes to pass, then I think we shall be able to present disputing parties with a dispute resolving mechanism of a binding nature, as distinct from alternative methods of dispute resolution which I intend to address on Wednesday, that should be second to none.

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