THE CHANGING FACE OF ARBITRATION

by

JUSTICE ANDREW ROGERS

a Judge of the Supreme Court of New South

Few areas of the law have been subjected to such dramatic changes in so short a time as the field of commercial arbitration. The changes are both in the substantive law and in procedure. Furthermore, the activity is in the field of international, as well as domestic, commercial arbitration.

At the forefront of change stands the enactment of the Commercial Arbitration Act 1984 (NSW) which will eventually find its counterpart in every State of the Commonwealth. The avowed purpose of the Act is to create a more hospitable climate for arbitration in Australia. At the outset I should mention that the title of the Act is a misnomer. In truth, the provisions of the Act are in no way confined to commercial matters, properly so-called. Disputes of all kinds may be subjected to arbitration conformably to the provisions of the Act.

I believe that the outstanding feature of the Act is its acceptance of the principle of party autonomy. Time and time again, one finds provisions which confide to the parties the entitlement to depart from what is the presently accepted norm. I will mention some of these in a moment. The other principal feature of the Act is the relaxation of judicial control over arbitrators and arbitrations, a topic

which will be dealt with in a later paper in this series of lectures. I must mention, however, the abolition of the procedure of the stated case. There is no doubt in the mind of anyone who has practised in the field that, in recent years, requests to arbitrators for cases to be stated have become instruments of abuse in the hands of disputants determined to postpone the delivery and enforcement of an award or to crush an economically weaker opponent by making the proceedings both longer and more expensive. The abolition of the procedure will be regretted by no-one who wishes to promote arbitration as a method of dispute resolution.

S 19(3) of the 1984 Act provides that, unless otherwise agreed in writing by the parties, an arbitrator or an umpire is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit. This is a reversal of what had been a fundamental principle of English law and had been received into Australian law. That arbitrators were ordinarily bound by the laws of evidence was laid down in England more than a century ago in Attorney General v Davison (1825) McCl&Yo 160; 148 ER 366 and emphatically reaffirmed in Re Enoch and Zaretzky Bock & Co 1910 1 KB 327. One can only applaud the legislative initiative which has brought about the change. It will allow a more widespread use of the technique of sniff and smell arbitrations as well as the full and proper application of the arbitrator's own

expertise. Sniff and smell arbitrations are those where the matter in issue is the quality of goods and the arbitrator inspects the goods in question and, applying his own expertise, determines whether or not they are up to the standard required. The benefits of such a procedure, as compared with court proceedings where a judge has no idea of what is required of the goods in question, or even with an arbitration in which experts have to be called, is quite obvious. Of course, the section contemplates that dispensing with rules of evidence may be taken considerably further. Arbitrators will need to exercise their power carefully so that it does not become a weapon of oppression in their hands. On the other hand it will more fully give effect to the common sense purpose in appointing as arbitrator, not a lawyer, but an expert in the field. I regard the provision as a powerful weapon in the endeavour to reduce costs and expedite the resolution of disputes.

An equally far-reaching provision is s 22(2) of the 1984 Act. Subs (1) reiterates the existing law that any question arising for determination shall be determined according to law. However, this obligation is relaxed by subs (2) which enables the parties to agree in writing that the arbitrator may determine any question as amiable compositeur or ex aequo et bono. The basic principle expressed in subs (1) embodies the long-held view, best expressed in the graphic phrase of Lord Justice Scrutton, in Csarnikow v Roth Schmidt & Co (1922) 2 KB 478 at 488, that "there must be no Alsatia

in England where the King's writ does not run". The English courts were determined to ensure that mercantile arbitrators would not create two systems of law in England, one applied in the courts and the other in arbitrations. In the result, arbitrators were required to apply, as best as they could, principles of law in the same way as any judge. Attempts by parties to agree to a contrary effect were held ineffective as being contrary to public policy. The effect of utilisation of the provisions of s 22(2) will be many. For one, arbitrations are likely to reach results which more accurately reflect the sense of the commercial community. Probably, its outstanding effect, so far as lawyers are concerned, will be that it will make any right of appeal from a decision of an arbitrator for error of law impossible to implement. Having regard to the fact that the arbitrator is given a charter to depart from accepted principles of law, how can it be said that his award infringes otherwise applicable principles of law? The problem has engaged the attention of learned commentators. Eminent as the editors of Mustill and Boyd on "Commercial Arbitration" are, and with the very greatest of respect to them, their attempt to accommodate the conflict between a determination as amiable compositeur and a continued right of appeal on questions of law is unconvincing. It might also be thought that the role of lawyers may need to be re-evaluated in arbitrations of this kind.

S 27 enjoins the arbitrator to seek to arrive at a

settlement of the dispute by conciliation, not only at the time of inception, but thoughout the arbitration. Significantly, subs (2) provides that an arbitrator shall not be disqualified from hearing the arbitration or continuing with the hearing merely by reason of the fact that the arbitrator had attempted to conciliate the dispute between the parties but had failed to obtain a settlement of the dispute.

It will be remembered that a little used but significant feature of the 1902 Arbitration Act was s 15. That gave power to the court, with the consent of the parties, and, in some rare instances, without such consent to remit either the entirety of the proceedings or certain questions arising in them for determination by an arbitrator. Such arbitrations bore significant differences from those which found their genesis in arbitration agreements. Instead of re-enacting s 15 in the new 1984 Act the Legislature adopted another course. S 124(2) was introduced into the Supreme Court Act simultaneously with the passing of the 1984 Commercial Arbitration Act enabling rules to be made providing for cases in which the whole of the proceedings or any question or issue may be referred by the court to an arbitrator or referee for determination or for enquiry or report. Significantly, the power to make rules for such action to be taken is not restricted to instances where the parties consent. Further, it permits the appointment of a judge, with or without other persons, to be the arbitrator.

The Rules will provide for the extent, if any, and the manner in which a determination or report may be called into question. A committee, on which Grieve QC represents the Bar, is presently engaged on the task of drafting appropriate rules for the consideration of the Rule Committee. It may be anticipated that judges will seek to utilise more and more the new procedure where the conflict turns on matters of expertise. As illustrated by the Chamberlain Case, the accepted role of judges and juries is very difficult to discharge where there is a conflict in matters of expert evaluation by honest and impartial experts. At the very least, the time and expense occupied in tutoring the tribunal in the field of the relevant expertise in order to seek to qualify it in judging the issue is likely to be extensive and expensive. Often this will be avoided by utilising the new procedure.

The modernisation of the arbitration procedure provided for by the 1984 Acts has had its counterpart in the steps which have been taken in order to improve the methods for resolution of international commercial disputes by means of arbitration. During 1985 the United Nations Committee on International Trade Law (UNCITRAL) finalised its review of a Model Law for International Arbitration. After its receipt and adoption by the General Assembly of the United Nations, it will be available for enactment with or without amendment by national legislatures. In many ways, the Model Law can be seen as reproducing some of the best features of the new

1984 Australian Acts. There is, however, one significant respect in which it differs from the local enactment. The civil lawyers and representatives of the United States were successful in further restricting judicial review of arbitral procedures even beyond those enshrined in the 1984 Act. Whether or not any of the Australian parliaments will, at least in relation to international arbitrations, adopt the Model Law without change remains to be seen. Time does not permit of a consideration of the details of the provisions of the Model Law or enable me to do more than make passing reference to the fact that there is now a plethora of rules available for adoption in the conduct of international arbitrations. UNCITRAL has made rules both for arbitration and conciliation, as has the International Chamber of Commerce (ICC) and the London Court of International Aviation (LIAC) (which, of course, is not a court at all). The last mentioned rules were adopted as recently as this year. They have quite fascinating features for those interested in case management and could well be adopted for domestic arbitrations. Article 10.3 states that the Tribunal may, in advance of the hearing, submit to the parties a list of questions which it wishes them to treat with special attention. Article 11.1 gives the Tribunal power to require parties to give notice, not only of the identity of witnesses they wish to call, but also the subject matter of their testimony and its relevance to the issues. Pursuant to Article 11.2 the Tribunal has discretion to allow, refuse or limit the appearance of

witnesses, whether lay or expert. Article 12.1 permits the Tribunal to appoint experts to report to it. Article 13.1(b) gives the Tribunal power to rectify contracts, add parties and, in effect, consolidate proceedings.

It is appropriate to mention, however briefly, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention") to which, of course, Australia is a signatory and the provisions of which appear now as part of the 1984 Act. The Convention provides for the reciprocal recognition and enforcement of awards in Convention countries. Furthermore, it makes mandatory the grant of a stay of court proceedings where the international agreement calls for arbitration.

The last mentioned requirement has, in recent times, achieved added importance. This flows from the judgement of the Supreme Court of the United States in Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc (1985) 53 LW 4069 given in July this year. Until delivery of this decision, the accepted doctrine in the United States, resting on the decision of the Second Circuit Court of Appeals in American Safeways, was that, at least in matters where the cause of action or the defence was based on the Sherman Act or similar anti-trust legislation, or on statutes self-evidently for the protection of the public, the United States courts would not allow the parties to resort to arbitration. By a majority of five to three, the Supreme

Court has rejected that approach. The majority held that, at least in the case of international commercial agreements, even claims based on rights springing from such statutes were required to be arbitrated unless Congress itself evinced an intention in the statute to preclude a waiver of judicial remedies for the statutory right in question. I believe the decision is of importance to Australia, not only in relation to arbitrations arising from international commercial agreements, but in its likely application to domestic arbitrations.

Mitsubishi, of course, is the Japanese car manufacturer. 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, relying upon the principles settled in American Safeways, 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. It emphasised that judicial suspicion of arbitration was the product of another age. It was made clear that any doubts concerning the scope of arbitrable issues required to be resolved in favour of arbitration.

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."

It is significant to note that, although the Supreme Court restricted itself to international agreements and based a great deal of its reasoning on the perceived needs of

international commerce, it is by no means unlikely that the scope of the decision will eventually extend to domestic agreements. Certainly, what fell from Justice White in the earlier decision in Dean Witter Reynolds Inc v Lamar Byrd (1895) 53 LW 4222 would suggest that much. If the reasoning is applied to arbitration clauses in Australia, a wide range of disputes, hitherto thought to be the preserve of the courts, would open up for arbitral decision-making. Even if the view is restricted to international agreements, the decision in Dean Witter is interesting. The Court there was unanimously of the opinion that agreements to arbitrate must be enforced, even if the result is that part of the dispute will be before arbitrators and part before the courts. Whilst recognising that this might be inefficient, it was said to be mandated by the need to hold parties to their agreement.

The decision in Mitsubishi 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 57(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 Indian cases I mention later might perhaps be one example, although I hope that the Australian dollar will not fall sufficiently far to place us in the predicament referred to by the Supreme Court of

India.

It is appropriate to mention s 55 in this context. Somewhat in contradiction to the rush to enforce agreements to arbitrate, the Parliament has given power to the courts to allow judicial proceedings to take place, notwithstanding the presence of a Scott v Avery clause. Notwithstanding this apparent contradiction in Parliamentary intention, the provision has been shown to be necessary to avoid recurrence of a number of reported cases of injustice.

The rush to arbitration has brought to light a new problem. Where the parties neglect to nominate a forum for the arbitration in the agreement they make and cannot agree on one, how is the forum to be determined? Further, does the doctrine of forum non conveniens have any role to play? The parties in BHP Petroleum Pty Limited v Oil Basins Limited (unreported 3 April 1985 Supreme Court of Victoria Murray J) engaged the attention of both the Supreme Court of Victoria and the United States District Court for the Southern District of New York in a dispute, inter alia, on this question.

The royalty agreement, pursuant to which BHP Petroleum Pty Limited is bound to pay royalty to Oil Basins Limited, in respect of Bass Strait oil, provides for the arbitration of all disputes. In apparent breach of that provision, Oil commenced proceedings in the District Court for the

Southern District in New York and against Esso in Texas. Subsequently, Oil Basins sought an order in New York for arbitration in the Southern District of New York. Judge Cannella pointed out that BHP had not moved to dismiss the action before him on the grounds of forum non conveniens. However, he expressed the view that he had a discretion to compel arbitration only in the district of the court or in a place specified in the contract. As no place had been specified explicitly or implicitly in the contract, he could only order the parties to proceed to arbitration in the Southern District. Although he granted a motion to compel arbitration in New York, he said that, in the light of the fact that Australia appeared to be the most logical situs for arbitration, he would entertain a motion to reconsider the decision to compel arbitration in New York if the arbitrator, once selected, determined that the proceedings would be best conducted in Australia. In the Australian proceedings, Murray J agreed with the comments of the United States District Judge that Australia appeared to be the most convenient and appropriate forum. However, neither judge expressed any final view as to his power to force the parties to arbitrate in the forum which would be most convenient, other than their own. It is of considerable interest to note that in effect Judge Cannella was leaving the decision to the arbitrator.

The problem of a nominated place of arbitration being a forum non conveniens in arbitration has been discussed in

India, but only in the context of an application for stay of judicial proceedings and not in a competition between two possible sites for the arbitral hearing. In V/O Tractoroexport v Tarapore & Co 1971 AIR 1, the parties had entered into an agreement for sale of machinery which called for all disputes to be submitted for settlement by the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce in Moscow. Proceedings were taken in India by the Indian importer of the machinery. An application for stay eventually came before three judges of the Supreme Court of India. It seems to me that what fell from the majority on the question of forum conveniens was strictly speaking only obiter. They said (para 30):

> "The current restrictions imposed by the Government of India on the availability of foreign exchange, of which judicial notice can be taken, make it virtually impossible for the Indian firm to take its witnesses to Moscow for examination before the arbitral tribunal and to otherwise properly conduct the proceedings there. Thus, proceedings before that tribunal are likely to be in effect ex parte. The High Court was, therefore, right in exercising discretion in the matter granting an interim injunction in favour of the Indian firm."

That decision was followed and applied by a single judge of the High Court of Bombay in Indian Organic Chemicals Limited v Chemtex Fibres Inc 1978 AIR 106. There were three agreements between the plaintiff on the one hand and various members of the Chemtex Group on the other. The first agreement provided for arbitration in London to be governed by the rules of the ICC Paris. The second agreement called for arbitration in India in accordance with

the ICC Rules. The third agreement again provided for arbitration in London. An application was made to the High Court of Bombay for a stay of proceedings commenced in that Court, based on these various arbitration clauses. The judge took the view that the balance of convenience required the refusal of the application for stay. It was pointed out that the whole of the evidence would be in India. There was also the difficulty in the matter of grant of foreign exchange. On the basis of the balance of convenience, he considered that the proceedings ought not to be stayed and the foreign arbitration should not be permitted to proceed so as to considerably prejudice the claims or the defences of the plaintiff.

I should conclude by pointing out that the changes in the law are matched by the evolution of facilities for arbitration. The Australian Commercial Disputes Centre presently being established by the New South Wales Government in Sydney should provide a sound forum where dispute resolution may take place in accordance with the enlightened provisions of the 1984 Act.

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