ARBITRABILITY

by

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Recent decisions have thrown into high relief the wide gulf that persists between the approach of courts in Australia and, to a much lesser extent, England on the one hand and the United States on the other to the enforcement of agreements to arbitrate disputes. Whilst the United States courts are giving ever greater recognition to the width and compass of such obligations, Australian courts seem to have difficulty in moving from the concepts pre-dating the Model Commercial Arbitration Acts.

The decision of Mr Justice French in Bond Corporation Pty Limited v Thiess Contractors Pty Limited (1987) 71 ALR 125 is a good illustration of Australian orthodoxy. Bond Corporation Pty Limited ("Bond") sued Thiess Contractors Pty Limited ("Thiess"), a civil engineer responsible for carrying out the works, as well as a consulting and supervising engineer responsible for the design, cost and time estimates. Thiess had earlier commenced arbitral proceedings to recover fees alleged to be due to it. Bond moved the Federal Court to restrain Thiess from proceeding with the arbitration. Thiess reposted by asking for the action to be stayed.

Bond's action was based on alleged misrepresentations by

Thiess concerning its knowledge of engineering matters and its experience in carrying out work of the kind in question, the availability of plant and labour for the work and in connection with the tender process. It was alleged that in all these respects Thiess had been guilty of misleading and deceptive conduct within the meaning of s 52 of the Trade Practices Act. As well, the claim included alleged breaches of express and implied terms of the agreement between the parties and an allegation of fraud against Thiess.

The application by Thiess for a stay of the action was, of course, based on the provisions of s 53 of the Commercial Arbitration Act 1985 (WA). However, in considering whether to exercise his discretion in favour of a stay, His Honour applied principles which he derived from decisions given under the former arbitration legislation. Thus, he said the fact that a dispute raises questions of law of some difficulty or complexity is a consideration which may weigh against the grant of a stay. Typical of the decisions he cited was Dillingham Constructions Pty Limited v Downs (1969) 90 WN (Part 1) (NSW) 258. He mentioned in passing and apparently without attaching any great significance to it that in The Eschersheim [1974] 3 AER 307, Brandon J "attached only small importance to the argument that difficult question of law or of mixed fact and law would be involved in a proposed arbitration". He does not appear to have been referred to the judgment of the English Court of Appeal In re Phoenix Timber Co Limited's Application [1958]

2 QB 1. Lord Evershed MR pointed out (p 7) that "the mere fact that the dispute is of a nature eminently suitable for trial in court is not a sufficient ground for refusing to give effect to what the parties have by contract agreed".

His Honour next mentioned the desirability of avoiding a multiplicity of proceedings and the possibility of inconsistent findings of fact by different tribunals as weighing in the balance against the grant of a stay and referred, inter alia, to Taunton-Collins v Cromie [1964] 2 AER 332. He then referred in detail to the decision of the Full Court of the Supreme Court of Tasmania in Tasmanian Pulp & Forest Holdings Limited v Woodhall Limited [1971] Tas SR 330. French J said (p 142):

> "The last mentioned case had some similarities to the present in that the plaintiff sued its engineers, its builders and the installers of certain equipment in connection with the construction of a wood chip mill. There was a possibility of separate arbitrations between the plaintiff and different parties if a stay were to be granted. Neasey J, with whom Burbury CJ agreed, observed (at 346):
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> > 'It is true there are a number of grave issues raised by the pleadings against the engineers which are not raised against the respondent; concerned primarily with the advice given the appellant by the engineers, and designing done by the engineers. It would seem to me, prima facie, that the resolution of those issues is likely to be closely connected with resolution of the issues common to both the engineers and the respondent. That is to say, once responsibility is determined as between the engineers and the respondent for that which went wrong with the construction and operation of the mill (if and in so far as things did go wrong and either party was responsible), resolution of the issues which lie solely between the appellant and the engineers will probably at least be materially affected.

> These considerations, together with others which I regard in the context as being relatively minor, and do not explore in detail (such as procedural advantages - rights of discovery and the like - which the trial process possesses over separate arbitrations in a case like this) would have been, to my mind, clearly sufficient in the whole context to outweigh the strong bias in favour of arbitration which the parties' agreement sets up.'

It can be said that in the present case, as in that case, the resolution of issues between the applicant and the second respondents is closely connected with the resolution of issues common to both first and second respondents.
There have been cases involving chains of contracts, only one of which contained an arbitration clause and where third and sometimes fourth and fifth party proceedings were involved. Courts have nevertheless been prepared to stay proceedings as between those parties whose contract provided for reference of their dispute to arbitration: Reid v Ericsson [1938] VLR 90; W Bruce Limited v J Strong [1951] 2 KB 447.

In GWJ Blackman & Co SA v Oliver Davey Glass Co Pty Limited [1966] VR 570 at 581 the Victorian Full Court said:

> '...It seems that the courts have not felt constrained to attribute much weight to the mere circumstance that a party to a submission has been made a defendant to litigation instituted by others as a ground for refusing a stay of third party proceedings which are covered by the submission.'

See also W C Thomas & Sons Pty Limited v Bunge (Australia) Pty Limited [1975] VR 801.

However, in Tasmanian Pulp & Forest Holdings Limited v Woodhall Limited (supra), Neasey J (at 348) drew a distinction between the chain of contract case and the case in which the plaintiff sues several parties all as co-defendants in the one action and where many issues of fact are common to them all. That, with respect, is a distinction which I accept as relevant for the purposes of the exercise of this discretion. Further, the present case is one which falls into the latter category."

With due respect to His Honour, it is not at all apparent to

me why the distinction should have relevance. His Honour concluded that there was a probability that the arbitration proceedings would raise some questions of law:

> "which are not necessarily straightforward, particularly as to whether the first respondent [Thiess] is, in the circumstances, entitled to be paid on a quantum meruit basis and as to whether the contract was frustrated.
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> More importantly, the arbitration will raise issues between the first respondent and the applicant which are closely related, if not common, to the issues raised between the applicant and the second respondents. There is a possibility that inconsistent findings of fact may emerge from the arbitration and from the proceedings in this court. There are issues of law raised in the proceedings in this court which are closely related to some of the questions that may arise in the arbitration and which cannot be resolved by the arbitrator....
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> In the end, however, I am of the view that in order to avoid a multiplicity of proceedings, the possibility of inconsistent findings and to enable the proper resolution of questions of law which may arise, the first respondent's motion for a stay of the proceedings pending the determination of the arbitration hearing should be refused."

As will be seen, His Honour took into account matters, and came to a conclusion directly opposed to that of the Supreme Court of the United States in, Dean Witter Reynolds Inc v Lamar Byrd (1985) 470 US 213. I will refer to that decision shortly. His Honour does not appear to have been referred to any of the American cases.

As an illustration of the more relaxed attitude in England, I should like to refer to two recent unreported decisions of the English Court of Appeal. The question in Ashville Investments Limited v Elmer Contractors Limited (unreported,

20 May 1987) was whether an arbitrator could order rectification of a contract. This time, the court construed the arbitrator's powers widely and held that there was power to order rectification but it was a close run race. The arbitration clause called for arbitration of any dispute or difference "as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith".

Referring to the approach a court should have to construction of an arbitration clause, the trial judge said:

> "The climate has grown milder in relation to aribtrations during the last 45 years and it was thus right to adopt a broad and liberal approach to the construction of arbitration clauses rather than too narrow and legalistic an approach."

However, Lord Justice May in the Court of Appeal rejected the statement as incorrect by saying:

> "In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that that clause is ambiguous, that it has two possible meanings. In those circumstances the court has to prefer one above the other in accordance with settled principles.... There are, however, well recognised principles of construction; they are not the consequences or examples of adopting any particular approach to the question of construction, save to ascertain the true intention of the parties and the correct meaning of the words used."

The contrast with the US approach will become patently clear.

The Court of Appeal accepted that given that a dispute was within the jurisdiction of the arbitrator the latter was not only entitled but bound to grant such relief to a party as the law permits for the resolution of that dispute, provided that the arbitration agreement does not exclude that particular relief. Thus, there is no reason in principle why an arbitrator cannot make an order for the rectification of a contract provided that is justified at law and by the arbitration agreement.

Interestingly, the English Court of Appeal followed decisions in South Africa, New Zealand and in the Queensland Supreme Court in coming to the conclusion that the words of the provision on the contract providing for arbitration were wide enough to cover a claim for rectification. Balcombe LJ, another member of the court, gave an interesting view as to the approach that a court should make to the construction of an arbitration clause. That was:

> "1 It may be presumed that the parties intended to refer all the disputes arising out of this particular transaction to arbitration;
> 2 It may also be presumed that the parties intended that all disputes should be determined finally by the same tribunal;
> 3 As a result of the decision in the Crouch case it is clear that an arbitrator may have powers which are not available to the court; therefore, he should at least have those powers which are available to the court."

I must say that the second leg of the third conclusion seems somewhat remarkable.

Bingham LJ, the third member of the court, referred to earlier English cases which held that the arbitration provisions there in question did not confer jurisdiction upon the arbitrator to order rectification. However, as he said:

> "It may I think be said that the leading cases were decided at a time when both the general attitude towards arbitration and the judicial approach towards arbitration clauses were very different from what they are today. It is not without significance that in recent years courts in South Africa, New Zealand and Queensland have declined to follow the cases by which we are said to be bound."

One should contrast this approach with that of French J in Bond's Case where His Honour placed heavy reliance on decisions given prior to the coming into force of the Commercial Arbitration Act.

In another unreported decision of the English Court of Appeal in Cunningham-Reid v Buchanan-Jardine (unreported, 23 June 1987), an application was made for a stay in an action where the plaintiff had charged the defendant with fraud. The plaintiff and the defendant had been parties to an agreement for carrying out interior decorating services. The agreement contained an arbitration clause. The plaintiff claimed that the defendant had arranged for dummy invoices to be made out by suppliers and had misapplied moneys received from the plaintiff for personal purposes. The English 1950 Arbitration Act contains a provision (s 24(2)) whereby an agreement for arbitration may be

ordered to cease to have effect where there is a charge of fraud. Back in 1856 in Wallis v Hirsch the Court of Appeal said that it was inconceivable that there should be an arbitration where a charge of fraud was made. As Chief Justice Cockburn said: "It cannot be supposed that the parties contemplated to refer a case of fraud." This, of course, was back in the days when it was thought questions such as fraud should go to a jury.

The leading judgment in the recent case was delivered by Lord Justice Woolf who said:

> "In my view this is a case where there is a serious charge of fraud made but in which there is no good reason why the normal course should not be adopted of allowing the matter to proceed to arbitration in accord with the parties' agreement. First of all, it is to be noted that in this case the arbitration agreement is silent as to who is to be the arbitrator. Thus, if the parties do not agree as to who is to be appointed as the arbitrator, the arbitrator will be appointed by the court in the usual way. If the parties cannot agree on a suitable arbitrator, then the court will certainly appoint a suitable arbitrator. There is no difficulty in this day and age in appointing an arbitrator who is well capable of properly determining and trying an issue of fraud of this sort; indeed, many members of both sides of the profession now have very considerable experience as recorders of trying just such issues."

His Lordship recognised that there may be a public interest which could make it undesirable from the public's point of view that a charge of fraud should be disposed of by arbitration rather than in open court.

Bingham LJ went further than the other members of the court

in holding that the court will not ordinarily refuse a stay simply because the plaintiff has alleged fraud against the defendant if the defendant does not want trial in court. The desire of a party alleging fraud against another to have a trial in open court would not ordinarily amount to a sufficient reason why the matter should not be referred in accordance with the agreement to arbitrate. As he said:

> "It is no doubt true that parties making an agreement of this kind do not expect to have to investigate allegations of dishonesty but nonetheless they have made an arbitration agreement without reservation. If a party charged with fraud wants trial in an open court as the authorities make clear that is a very powerful consideration. Such a party may wish to exercise his right to trial by jury under s 69 of the Supreme Court Act 1981 or may wish to have the benefit of the more extended rights of appeal available in court proceedings."

He concluded:

> "In my judgment there is everything to be said for arbitration. I do not accept that arbitration is likely to prove more expensive because, although an arbitrator no doubt requires to be paid a fee, the arbitration process does better lend itself to the possibility of well devised procedural shortcuts than ordinary court proceedings. Moreover, it is possible to avoid the very long delays which now attend trials in the Queen's Bench list."

In the United States, even the party against whom a charge of fraud is brought cannot avoid the operation of an arbitration clause and demand a trial in open court (cf Prima Paint Corporation v Flood & Conklin Manufacturing Co (1967) 388 US 395; Meyer v Dans un Jardin (1987) 816 F 2d 533 (CA 10)).

The question of inconsistent findings by two tribunals that so corcerned French J in Bond's Case is a good illustration of the difference in approach that persists even between the English and US courts. There are powerful dicta in the English courts warning against allowing for this to arise. Lord Denning MR said in Taunton-Collins v Cromie [1964] 1 WLR 633 at 635:

> "It seems to me most undesirable that there should be two sets of proceedings in two separate tribunals - one before the official referee, the other before an arbitrator - to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side and there would be more delay."

Lord Justice Pearson put the dilemma starkly (p 637):

> "In this case there is a conflict of two well established and important principles, one is that parties should normally be held to their contractual agreements. The present parties, the employer and the building contractors, have agreed that any dispute or difference between them shall be referred to arbitration. It can be said in support of the application here that that is what the parties have agreed, and when the question is brought before the Court the Court should be willing to say by its decision what the parties have already said by their own contract. That is one principle. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same questions and a great confusion may arise."

In The Eschersheim (supra) Brandon J said: "These authorities show that such avoidance is certainly an important, and may in some cases be a decisive, factor

against a stay." The statement was approved on appeal by Denning MR ([1976] 1 AER 441).

By contrast, in Bulk Oil (Zug) AG v Trans Asiatic Oil Limited [1973] 1 Lloyd's Rep 129 Kerr J undertook a much more detailed examination. In his view, the true test was possible ultimate injustice. The plaintiffs brought two actions, each on a different agreement and the defendants counterclaimed in each and also relied on the subject matter of the counter claims by way of defence. The plaintiffs sought a stay of the counter claims. One agreement provided for an ICC arbitration in Geneva. The other submitted to the jurisdiction of the English courts with an option of a London arbitration which was not exercised. The two agreements were closely linked both in conception, performance and breach. As well as the two actions, the plaintiffs commenced arbitral proceedings. After referring to what Pearson LJ said in Taunton-Collins (supra), Kerr J said (p 136):

> "There are two reasons why such multiplicity of proceedings is undesirable. First, though probably of lesser importance, is the fact that multiplicity of proceedings leads to a substantial increase in costs; usually also to substantial delay, and generally to inconvenience. Secondly, and of greater importance, there is the risk that two different tribunals dealing with the same issues may reach different conclusions. The latter ground was the main basis of the decision of Mr Justice McNair in Halifax Overseas Freighters Limited v Rasno Export; Techno-Prominport; and Polskie Linie Oceaniczne PPW (The Pine Hill) [1958] 2 Lloyd's Rep 146. That case was approved and followed by Lord Denning MR in the Court of Appeal in Taunton-Collins v Cromie.

> Both these were cases in which the plaintiffs sued two defendants under linked agreements of which one contained an arbitration clause. In the first case, the plaintiff shipowner sued in the alternative the bill of lading holder under a bill of lading which contained no arbitration clause, and also the charterers under a charter-party which contained such a clause. It is clear that the same principal issue arose in relation to both these claims. Mr Justice McNair refused to accede to the charterers' application to stay the action because of the risk of inconsistent findings of fact, and also to some extent because it was the charterer who had stipulated for the bills of lading to be issued without an arbitration clause, though this would of course normally be unusual.
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> There are two distinctions of some materiality between those cases and the present case. First, in both these cases the multiplicity of proceedings covering the same issues did not arise solely from a choice made by the party wishing the whole of the dispute to be dealt with by litigation. In the first case the difficulty was due to the party which was applying for the stay, ie the charterers. In the second case the difficulty was due to a defence raised by a party which was not concerned with any arbitration clause, ie the architect seeking to blame the contractors. In neither case was the difficulty in which the plaintiff found himself due to his own procedural choice. This is the first distinction.
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> Secondly, as pointed out by Mr Libbert, the multiplicity of proceedings relating to the same issue was in these cases liable to result in substantial injustice to the plaintiffs, because they were making alternative claims which might both be defeated if different conclusions were reached by two different tribunals.
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> It therefore follows that in both these cases the effect of granting a stay in favour of the party seeking to rely on the arbitration clause, and the consequent risk of inconsistent conclusions in two different proceedings, were liable to cause substantial injustice to the plaintiffs."

His Lordship pointed out that the parties had deliberately made the two agreements subject to different jursidiction clauses. He then went on to deal with the question of

inconsistent results (p 139):

> "Further, I do not see how it can be said that the risk of different conclusions being reached by the two tribunals is in itself a potential source of injustice to the defendants. The defendants' contention here is that they are likely to succeed on the issues of liability under the transportation agreement. They cannot be prevented from raising them by way of defence to the charter-party claim. Suppose then that - as they say - all these issues in fact have to be investigated and determined and that the defendants satisfy the Judge that the plaintiffs wrongfully repudiated the transportation agreement. What injustice - apart from the resulting inconvenience and additional costs and delay, due to the duplication of issues, for which the defendants must take responsibility - is then liable to be done to them if the Geneva tribunal should reach a different conclusion, which in itself is not to be supposed? The defendants could not be heard to say, and have not sought to say, that the Geneva arbitration tribunal is in itself more likely to arrive at a wrong conclusion than this Court.
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> The defendants are therefore not in the same position as the plaintiff in The Pine Hill and in Taunton-Collins v Cromie, in which the plaintiffs were faced with a duplication of issues before different tribunals through circumstances for which they were not directly responsible, and were also faced with the risk of losing both their alternative claims due to this duplication, which would have been an unlikely result if both claims were tried by the same tribunal." (emphasis added)

Kerr J, in my view, identified the ultimate vice in the approach in Taunton-Collins and therefore in Bond. Why should it be supposed that there will be inconsistent results?

In The Jemrix [1981] 2 Lloyd's Rep 544, Sheen J was not deterred by the hypothetical possibility of inconsistent findings of fact. He said: "It seems to me that it is theoretically possible but highly improbable that an

arbitrator would make findings of fact different from the facts found in this Court." In fairness, in the cirucumstances of that case, a refusal of a stay would not necessarily have avoided the possibility of multiplicity of proceedings. Nonetheless, the judge's approach, I suggest, is the right one.

Faced with the same dilemma, the United States Supreme Court took an even more emphatic approach in Dean Witter (supra) than Kerr J had adopted and one that was in another field of discourse altogether from French J. Delivering the unanimous judgment of the Court, Justice Marshall said:

> "I agree with these latter courts that the Arbitration Act requires District Courts to compel arbitration of pendant arbitral claims when one of the parties files a motion to compel, even where the result would be possible inefficient maintenance of separate proceedings in different forums. ... Passage of the Act was motivated, first and foremost, by a Congressional desire to enforce agreements into which parties had entered and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. ... The pre-eminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." (my emphasis)

He went further, and arguably too far, when he said the purpose of the Federal Arbitration Act was to ensure judicial enforcement of arbitration agreements and not necessarily to promote the expeditious resolution of claims.

It is interesting to note that a US court will adhere to this philosophy in what we might regard as extreme circumstances. In the Hops Antitrust Litigation (1987) 655 F Supp 169 the plaintiff was a US brewery. For many years it had purchased its hops from certain German companies. From 1969 to 1982 the contracts did not include arbitration or choice of law provisions. From 1982 each contract for the sale of hops provided for arbitration in Munich. The German companies sought arbitration of all claims arising from the pre-1982 contracts as well as from contracts specifying arbitration. Their argument was the familiar one that it would be wasteful and most inconvenient for all parties concerned if the post-1982 purchases were to be decided by abitration in Munich and a separate trial were conducted in Missouri on claims arising from the earlier dealings. Attention was drawn to waste of judicial resources and duplication of expense if simultaneous litigation and arbitration were permitted. The court relied, inter alia, on Dean Witter in rejecting the submission.

The question to be confronted is whether in the years to come Australian courts should subscribe to orthodoxy as the court did in Bond's Case and indeed as other Australian courts did prior to the model Commercial Arbitration Act or opt for the more robust US attitude or perhaps take a mid-way position as Kerr J did. The choice will not be easy.

The all pervasive US approach of permitting all manner of disputes to be arbitrated, is well illustrated by the judgments in Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc (1985) 473 US 614 and more recently in Shearson American Express Inc v McMahon (unreported, 8 June 1987). The claims in Mitsubishi included alleged breaches of securities and anti-trust legislation. It had long been thought that these were areas which would be jealously guarded as the preserve of the courts both because of their highly complex and technical nature and also because of their extreme importance to the economy of the state. Notwithstanding the vigorous dissent of three members of the Court, a majority of five judges considered that, in international transactions at least, the call of the arbitration provision must predominate. In Dean Witter (supra) Justice White filed a concurring opinion in which he seemed to suggest that even in domestic arbitration the same view might well be taken. This anticipation has now been realized by the decision of the Supreme Court in Shearson (supra). Mr and Mrs McMahon were customers of Shearson, a brokerage firm. They signed customer agreements which included arbitration clauses. They brought action in the Federal District Court alleging violations of the Securities Exchange Act and the Racketeer Influenced and Corrupt Organisations Act (RICO) as well as fraud and breach of fiduciary duties. Shearson sought to compel arbitration of all the complaints the subject of the court proceedings. The Court of Appeals held that public policy considerations

made it inappropriate to apply the provisions of the Arbitration Act to RICO suits. It distinguished the reasoning in Mitsubishi concerning the arbitrability of anti-trust claims on the ground that the transactions which gave rise to the dispute were international business transactions. In relation to the claim under the securities legislation the Court of Appeals relied on a decision of the Supreme Court in 1953 on similar legislation. The Supreme Court reversed the decision with respect to the RICO claim and by majority the securities legislation claim as well. The judges involved so held on the basis that there was no inherent conflict between arbitration and the statutes' underlying purposes. The judgment of the Court was delivered by Justice O'Connor. The key to the judgment lies in the following:

> "The other reason advanced by the McMahons for finding waiver of their #10(b) rights is that arbitration does 'weaken their ability to recover under the [Exchange] Act' ibid. That is the heart of the Court's decision in Wilko, and respondents urge that we should follow its reasoning. Wilko listed several grounds why, in the Court's view, the 'effectiveness [of the Act's provisions] in application is lessened in arbitration' 346 US at 435. First, the Wilko Court believed that arbitration proceedings were not suited to cases requiring 'subjective findings on the purpose and knowledge of an alleged violator' id at 435-436. Wilko also was concerned that arbitrators must make legal determinations 'without judicial instruction on the law', and that an arbitration award 'may be made without explanation of [the arbitrator's] reasons and without a complete record of their proceedings' id at 436. Finally, Wilko noted that the 'power to vacate an award is limited', and that 'interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation' id at 436-437. Wilko concluded that in view of these drawbacks to arbitration, #12(2) claims 'require[d] the exercise of judicial

> direction to fairly assure their effectiveness' id at 437.
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> As Justice Frankfurter noted in his dissent in Wilko, the Court's opinion did not rest on any evidence, either 'in the record ... [or] in the facts of which [it could] take judicial notice', that 'the arbitral system ... would not afford the plaintiff the rights to which he is entitled' id at 439. Instead, the reasons given in Wilko reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals - most apply with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally. It is difficult to reconcile Wilko's mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act. See eg Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc, supra; Dean Witter Reynolds Inc v Byrd 470 US 213 (1985); Southland Corp v Keating 465 US 1 (1984); Moses H Cone Memorial Hospital v Mercury Construction Corp 460 US 1 (1983); Scherk v Alberto-Culver Co 417 US 506 (1974).
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> Indeed, most of the reasons given in Wilko have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In Mitsubishi, for example, we recognised that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. See 473 US at 633-634. Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights, id at 628. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. See id at 636-637 and n. 19 (declining to assume that arbitration will not be resolved in accordance with statutory law, but reserving consideration of 'effect of an arbitral tribunal's failure to take congnizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court').

It should be pointed out that the minority dissented on the securities legislation point only because it thought that

Congress had displayed a contrary intention to the applicability of the Federal Arbitration Act.

In the result, at least in the United States, it is difficult to think of any field which is foreclosed to arbitration. What will happen in Australia when, pursuant to an arbitration clause of the widest import, an application for a stay of proceedings is made in an action brought prusuant to the provisions of the Trade Practices Act or the Companies Code? Is the test to be applied in Australia the same as in the US? If so, has the Parliament manifested an intention in the relevant act to "preclude a waiver of judicial remedies"? It is of interest to note that the Shearson court allowed arbitration of a claim under the Exchange Act notwithstanding that s 27 of the Act gave the federal district courts exclusive jurisdiction in all actions under the Act. Nonetheless, the court permitted a pre-dispute waiver of this provision. Does this mean that, notwithstanding s 86 of the Trade Practices Act, a claim under the Act may fall within an arbitration clause? To me, the interesting question in the next few years will be whether Australian courts will give effect to the evident intention of Parliament in enacting the Model Arbitration Act.

The decision of the Federal District Court in New York in Builders Federal (H K) Limited v The Turner Construction and ors (1987) 655 F Supp 1400 highlights the adventurous use of

the arbitral power by United States courts and incidentally reveals a deficiency in the Commonwealth and New South Wales legislation adopting the New York Convention. The plaintiffs were a Hong Kong and German company who formed a joint venture for carrying out some subcontract work on a building site in Singapore. The defendants were three United States companies. A subsidiary of one of them, a Singapore company called TEA, was the main contractor on the site in Singapore. The building contract between TEA and the proprietor called for arbitration in the event of any dispute. The plaintiffs and TEA entered into a subcontract which also contained an arbitration clause. The plaintiff brought proceedings in the District Court in New York to compel TEA's corporate parents to act so as to procure the plaintiffs' claim against TEA to be arbitrated in Singapore. The plaintiffs founded their claim against the corporate parents on the basis that either they should be regarded as the alter ego of TEA or alternatively that there was an implied contract of guarantee given by the corporate parents of TEA's liabilities.

The defendants argued that the New York Convention authorises only defensive petitions which arise when a party to a contract incorporating an arbitration clause sues the other party in court. The defendant then responds with a defensive petition to stay the suit and compel arbitration. It was submitted that the Convention did not permit offensive petitions to compel arbitration. The judge

concluded that "an offensive petition to compel arbitration abroad properly lies in this court under the Convention as implemented by Chapter 2 of the Act". The plaintiffs relied on Article II(3) of the Convention which provides:

> "The court of a contracting state when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (emphasis added)

The defendants submitted that a court was "seized of an action" under the Convention only when a party to a written arbitration agreement commenced a plenary suit against the other party in derogation of the agreement. The argument went on that Article II(3) does no more than empower the court in such circumstances to grant a defensive petition and refer the parties to arbitration. The basis on which the judge rejected that submission was that the Federal Arbitration Act provides that the Convention "shall be enforced in United States courts in accordance with" Chapter 2. S 206 of the Act provides that a court having jurisdiction under Chapter 2 may direct that arbitration be held in accordance with the agreement at any place whether that place was within or without the United States. In the judge's view, a court of a contracting state becomes "seized of an action" under the Convention when a party to a written arbitration agreement seeks to compel arbitration in accordance with any procedures available under the internal laws of the contracting state where enforcement is sought.

It is interesting to contrast s 4 of the United States Act with the Australian provisions. Both s 7(2) of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cwth) and s 57(2) of the Commercial Arbitration Act 1984 (NSW) are in the same terms. In relation to arbitration agreements within the Convention, they provide as follows:

> "Subject to this Part, where -
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> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
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> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration,
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> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case requires, and refer the parties to arbitration in respect of that matter."

Now, clearly, the subsection requires for the application of the Convention that there should be proceedings instituted by a party to an arbitration agreement against another party. Those proceedings have to be of a kind which involves the determination of a matter that in pursuance of the agreement is capable of settlement by arbitration. That means that the proceedings cannot simply be an action for the enforcement of the arbitration provision of an agreement subject to the New York Convention. It seems to me that the very desirable jurisdiction which the American courts have for the enforcement of the New York Convention in an offensive way are unavailable to Australian courts.

The decision also adverts, albeit in a fairly summary fashion to established principles in the United States whereunder an arbitration agreement can be enforced not only against a party to the agreement but against an entity of which the party is an alter ego. In Fisser v International Bank (1960) 282 F 2d 231 the Second Circuit accepted the alter ego theory. The court pointed out (p 233) that there was a long series of decisions which recognised that an entity may become bound by a written arbitration agreement even though not a signatory in accordance with ordinary principles of contract law. The court held (p 234):

> "While we discover no authority on this precise point, it is clear that the consequence of applying the alter ego doctrine is that the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all. Weisser v Mursam Shoe Corp, supra; Shamrock Oil & Gas Co v Ethridge, D C Colo 159 F Supp 693; Chilean Nitrate Sales Corp v The Nortuna, supra; Powell, Parent & Subsidiary Corporations Chpt 1. There is no reasonable basis for distinguishing between the parent's obligation to respond in damages for its instrumentality's breach of contract and its obligation to arbitrate the measure of those damages. In neither instance does the parent consent to a contractual obligation; to the contrary it carefully avoids any such agreement, express or implied in fact. Farm Security Administration, Department of Agriculture v Herren 8 Cir 165 F 2d 554.
>
> We have heretofore held that the obligation to respond in damages arises from a contract to which the alter ego theory binds that parent which as 'puppeteer' had 'directed his marionette' to sign. Weisser v Mursam Shoe Corp, supra. We hold now that if the parent is bound to the contract then like its marionette it is bound to submit to arbitration"

Closely related to the question of arbitrability is the

question of the law to be applied. In the United Kingdom there still lingers the principle, developed centuries ago, that there should not be permitted two systems of law, one practised in the courts and the other in the field of arbitration (cf Czarnikov v Roth Schmidt & Co [1922] KB 478). Even in England there has been a relaxation of this view. There appears to be developing a notion that there exists something described as lex mercatoria, a modern law merchant, and that arbitrators nominated as amiables compositeurs should be permitted to apply that supposed body of law. The existence of such a law appears first to have been taken up by Professor Goldman of the University of Paris and has been adopted by both the Austrian Supreme Court and the Italian Supreme Court. Its existence was vehemently denied by Professor F A Mann in a lecture given at the University of Birmingham on 8 February 1985 intituled "Private Arbitration and Public Policy".

Something akin to it now appears to have obtained judicial endorsement in England in Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras al Khaimah National Oil Company [1987] 2 All ER 769. An oil exploration agreement between the parties provided for ICC arbitration of disputes. Under the ICC rules the arbitrator was directed to apply the proper law determined by the rules of conflict he deemed appropriate. The arbitrator determined that the proper law governing the substantial obligations of the parties was "internationally accepted principles of law

governing contractual relations". The appellant submitted that it would be contrary to English public policy to enforce an award which determined the rights of the parties "not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law". Sir John Donaldson MR, in whose judgment Woolff and Russell LJJ agreed said:

> "I can see no basis for concluding that the arbitrators' choice of proper law - a common denominator of principles underlying the laws of the various notions governing contratual relations - is outside the scope of the choice which the parties left to the arbitrators."

Once again, will Australian courts follow?

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