CONTEMPORARY PROBLEMS

IN

INTERNATIONAL COMMERCIAL ARBITRATION

by

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> "The ideal system of arbitration law in the view of the Committee is one which gives the parties and their arbitrators a legal underpinning for the conduct of disputes which combines the maximum flexibility and freedom of choice in matters of procedure with a sufficiently clear and comprehensive set of remedies which will permit the coercive, supportive and corrective powers of the courts to be invoked when, but only when, the purely consensual relationships have broken down". Report of the Mustill Committee (par. 75)

It was suggested that, I give simply an updated version of the paper with the same title I delivered at the Bicentennial Australian Legal Convention in September 1988 at a session held in conjunction with the I.B.A. However that paper, together with the commentary by Lord Justice Mustill, has been reproduced in (1989) 17 IBL 154 and may be known to a number of you. It seemed more appropriate to start again. There have been many recent developments in the field and, in the time available, I can focus only on some of the highlights.

The first topic will be of particular interest to our New Zealand hosts who are currently engaged in updating their Arbitration Act and struggling with the question whether to adopt the UNCITRAL Model Law and, if so, with what adaptations. In June 1989 a committee, chaired by Lord Justice Mustill, recommended against adoption in England (cf (1989) 1 A.M. 4 p 5). In September 1989 the Scottish Office announced that Scotland would adopt the Model Law for international commercial arbitration. In Australia, following a report from a Working Party, in 1989, the Model Law, with some additions, became Part III of the International Arbitration Act 1974 (C'th). The

provinces in Canada as well as Federal Parliament have adopted the Model Law. ~~The Law Reform Commission of Hong Kong has recommended that the Model Law be adopted~~ In Hong Kong the Arbitration (Amendment) (No 2) Act adopted the Model Law. I believe that Nigeria and Cyprus have already adopted the Model Law. The Indian Council of Arbitration has resolved to recommend to the Government the adoption of the Model Law deleting only Article 1(2) [(1989) 31 Jnl Indian L. Inst. @ 130]. Why, of the Commonwealth countries, did only one, England, decide against adoption?

The Mustill Committee considered that the first three, out of the four categories into which it divided the countries of the world, could with advantage adopt the Model Law. The categories were:

(1) States with no developed law and practice in the field of arbitration.

(2) States with a reasonably up-to-date body of arbitration law, which has not been greatly used in practice.

(3) States with an outdated or inaccessible body of arbitration law.

(4) States with an up to date body of arbitration law and with a sufficient volume of arbitrations over a sufficient period to have permitted the growth of an expertise in putting their law into practice.

I suggest that many of the countries which have resolved on adoption fall into category four. Although, for example, Australia may not have had as great a volume of arbitrations, or as large a body of expertise as England, the Commercial Arbitration Act 1984, in force in each of the States, with the exception of Queensland, certainly provided the country with an arbitration statue which, if I may say so, is in some respects ahead of the legislation in England.

The first important point made by the Mustill Committee was that the Model Law applied only to "international commercial" arbitrations. The Committee said (par 11):

> "This fact reflects the proposition which is now treated as axiomatic in some legal systems, that international commercial arbitration possesses a quite different character, and is properly subjected to quite different rules, from ordinary domestic arbitration".

It is undoubtedly true that there are many legal systems which accept this differentiation. Although undoubtedly designed with international commercial arbitrations in mind, there is no inherent reason why the Model Law should not be selected as the sole regime for all arbitrations in a particular country. In Quebec, that is the position. As well federal law in Canada applies the Model Law to both domestic and international arbitrations which fall within its competence. The proposition many require one slight modification which however does not

feature in existing statutes. There is a strong argument for treating differently contracts of adhesion, entered into by parties in an unequal bargaining position.

One of the reasons advanced by the Committee for rejecting the Model Law is that it would introduce two different regimes, one for international commercial arbitrations and the other for domestic arbitrations (paras 70-72). This seems a doubtful basis for rejection, bearing in mind that the committee earlier said (par 11), that it was axiomatic that international commercial arbitrations should follow a different procedure from domestic arbitrations. A further answer was given by Lord Dervaird, the Chairman of the Scottish Committee, who incidentally was also a member of the Mustill Committee. In his 1989 Ronald Bernstein lecture he said that practitioners, prepared to practice across the whole spectrum of arbitrations, already have to deal with a series of different regimes with different consequences.

Second, a related point is made by the Committee that there may be difficulty, if the Model Law is adopted only in relation to international commercial arbitrations, in determining whether a particular arbitration is governed by it or by some other, perhaps differently framed statue, as would be the case in England. In an effort to obviate part of the problem arising from the loose definition of "commercial" arbitration the Hong Kong Reform Commission opted simply to delete the word. Mr. Kaplan Q.C. wrote in (1988) 54 Arb 173:-

"The LRC were aware that in some jurisdictions the word "commercial" is a term of art. It was felt that 'if a party has submitted itself to the process by agreeing to an arbitration clause in a contract, we do not think it right that it should later have the possibility of escaping the arbitration on the basis of technical arguments about the nature of the dispute or the status of the parties. We have in mind particularly the problem of state trading bodies carrying on commercial business' (para 4.15)

and

'while we have no doubt about the meaning of the term "commercial" in Hong Kong Law and in a Hong Kong context, there are undoubtedly differences in its meaning in other jurisdictions. Given the fact that the parties to arbitrations under the new law will inevitably come from other jurisdictions it would invite problems to omit a definition. In the end we felt the best solution to this dilemma was to remove the reference to "commercial" altogether. This will have the effect of making the law apply to all international arbitrations - not just commercial ones'. (para 4.13)

> The report went on the recognise that this very option was discussed at the drafting meetings but was rejected. Given all the different views expressed it was felt that the proposal to omit the word "commercial" would avoid all the problems referred to in that discussion".

One has to accept the next point made by the Committee that the Model Law is not, and indeed it does not purport to be, a complete code for the purposes of arbitration. Thus there is nothing in it as to the interpretation of arbitration agreements; the powers, duties and liabilities of arbitrators; costs; interest; res judicata; capacity; arbitrability; multi partite proceedings; discharge, nullity or avoidance of the contract to arbitrate. These are all left to be determined by the national law. The effect is that even adoption of the Model Law in full, without any adaptation, would not lead to complete harmonisation. In my earlier paper, I argued that for other reasons as well one has to view with scepticism the argument that adoption of the Model Law will lead to harmonisation of arbitration in international commerce.

In the view of the Committee (par 16) the main thrust of the Model Law is to determine the relationship between arbitration and the Courts rather than to prescribe the way in which those arbitrations, forming all but a tiny fraction of the total which never have any contact with the Court, should actually be

carried out. This meant that, even if the Model Law is adopted the room for diversity in procedure will continue and therefore the harmonisation which some expect to be derived from the adoption of the Model Law is limited. With due respect I would suggest that it is to take entirely too narrow a view of the Model Law to describe its main thrust in the way stated. I would suggest that the comment does however reveal what many U.K. critics fault in the Model Law. That is the limited role for courts. The virtual abandonment of review of awards is something that the U.K. delegation has argued against at the final UNCITRAL meeting in Vienna and is something which has continued to dominate the thinking of a number of commentators. The Committee reported (page 81):-

> "In the responses to our own consultative document in relation to England and Wales we have detected no solid body of opinion adverse to this view, nor do we ourselves see any reason to depart from what was said by the Commercial Court Committee. This being so, it would be illogical to regard the Model Law as an advance on English law in this particular respect, the more so since the existence of a right of appeal coupled with a right, subject to exceptions. to contract-out seems more in accordance with the principle of party autonomy on which the participants in the drafting of the Model Law laid such stress, than would a mandatory exclusion of any right of appeal.

The Committee accepted that Scottish opinion in general and the Scottish Committee in particular favoured adoption of the Model Law for Scotland. The Committee took the view that the law in Scotland was in a different position because the law as to practice and procedure in arbitration had to be found in text books and law reports and there was nothing of a statutory

nature akin to the English Arbitration Act 1950 (par 29). It was therefore thought that codification by adoption of the Model Law would be to the advantage of participants in an international commercial arbitration in Scotland who were unacquainted with Scots law.

It is interesting to note that a Committee to Study the Model Law, established by the Washington Foreign Law Society, reported (3 Ohio St. J. Dispute Res 303 (1988)), that the Federal Government should not, but the individual States should, adopt the Model Law. The rationale given for the recommendation not to adopt the Model Law in its entirety for the federal legislation "at least at this time" is that provisions of the present Act and federal case law are "adequate to support arbitration in general and international commercial arbitration law in particular "(ib p 311). Two reasons were given for the recommendation that the Model Law be adopted by the States. First, the Committee considered that the Model Law was more comprehensive and fully elaborated than the Uniform Arbitration Act ("UAA") which is the pattern for most State legislation. Second, unlike the UAA, which was drafted primarily to govern domestic arbitrations between the parties in the same state the Model Law addressed many of the problems peculiar to international arbitrations (ib p 327). The recommendation in the Report that Congress not adopt the Model Law has been subjected to criticism in a note in 10 Mich Jnl. Internat Law 912. In contrast to the drafters of the Report who

expressed general satisfaction with the Federal Arbitration Act Mr. Potter thought it inadequate (ib p 925).

How then does one explain the decision of Canada, Australia, Scotland and Hong Kong to go the other way? The report of the Working Group in Australia put forward the following reasons for adoption of the Model Law:-

> it provides an internationally agreed legal framework for the conduct of international arbitrations:
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> * it could therefore assist Australia's efforts to establish itself as a centre for international commercial arbitration;
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> * it complements the UNCITRAL Arbitration Rules, which are becoming increasingly used in the conduct of international ad hoc arbitrations;
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> * it complements and expands on parts of existing Australian commercial arbitration laws;
>
> * in a more general context, party autonomy is respected and facilitated by the Model Law. Parties are not frustrated by unknown provisions of national laws which may conflict with their intentions in respect of their arbitration. While the law in Australia is relatively modern it may be unfamiliar to foreign parties and may be perceived to be undesirable to them; and
>
> * while the Model Law recognizes the supportive and corrective role to be played by the courts, it limits judicial intervention and supervision of an arbitration.

It may perhaps be thought by the uncharitable that all the countries I have mentioned were motivated by the same objective of gaining a foothold in international commercial arbitration which they have hitherto failed to attract. England and Wales having fulfilled this objective already were not driven by the same needs. In effect the Mustill Committee concluded that the

system in place was working well, there was no support for the introduction of the Model Law and no overall superiority in its provisions over the present statutes. Interestingly then it looks as though it may be left to the market place to determine who made the more accurate assessment.

I should not leave this topic without drawing attention to a recent article by Prof. Sornarajah of Singapore. In "The UNCITRAL Model Law; A Third World Viewpoint" (1989) 6 J. Int. Arb. 7 he argued that the Model Law was slanted in the interests of developed countries and therefore inappropriate for adoption by developing countries. An interesting feature of the argument is that the Professor aligns himself with some of the English critics of the Model Law in criticising the provisions of the Model Law for excluding judicial review.

Adoption of the Model Law, may enlarge the scope for collision between the expressed wish of parties to go to arbitration and the will of a national Parliament that particular disputes be left for the courts. Two very recent illustrations of the room for such collision can be found in a decision of the English Court of Appeal and a judge of the Supreme Court of New South Wales.

In John Kaldor Fabric Maker Pty. Limited -v- Mitchell Cotts Freight (Australia) Pty. Limited (1990) 6 A.N.Z. Insc. Cases 60-960 the defendant filed a cross claim against its

insurer and broker. The insurer sought a stay of the claim pursuant to provisions of section 7 of the International Arbitration Act in its unamended form. Section 7 of the Act incorporated the provision of the New York Convention requiring, in the prescribed circumstances, the mandatory grant of a stay pending arbitration. The complication which arose was that section 43 of the Insurance Contracts Act 1984 (C'th) provided that any provision in a contract of insurance requiring a dispute to be referred to arbitration was void. Fortunately for the judge's peace of mind section 7 of the Insurance Contracts Act provided in terms that it was the intention of the Parliament that the Act should not, except in so far as it expressly or by necessary intendment otherwise provided, affect the operation of any other law. In the result then notwithstanding that the requirement to proceed to arbitration is, by the Insurance Contracts Act, declared to be void, the judge held that the International Arbitration Act required a stay to be granted. It does not appear to have been argued that the New York Convention and therefore section 7 of the International Arbitration Act which adopted it applied only to provisions for arbitration which were valid. In the result it was unnecessary for the judge to consider this question because he found that the proper law of the insurance contract was English law and therefore the Insurance Contracts Act did not apply to it.

The other decision is of the English Court of Appeal in Furness Withy (Australia) Pty. Limited -v- Metal Distributors (U.K.) Limited (~~unreported 10 November 1989~~ 1990 1 Lloyd's Rep 236). Oddly, again it was Australian legislation that was involved. The appellant was the charterer and the respondent the subcharterer of a ship. In the judgments they are respectively referred to as "the owners" and "the claimants". The appellant had commenced proceedings for a declaration that there were no valid arbitration proceedings on foot between it and the respondent. By clause 33 the charter was made subject to the terms and provisions of the Australian Sea - Carriage of Goods Act 1924. Clause 34 provided for arbitration of all disputes arising under the charter. The problem was that by the Sea Carriage of Goods Act any stipulation or agreement purporting to oust or lessen the jurisdiction of the courts of the Commonwealth of Australia or of a State were declared null and void. The requirement for arbitration was taken to be of such a character. However the court held that the parties had made an ad hoc agreement for arbitration governed by English law. The leading judgment was delivered by Staughton LJ who stated the problem as follows:-

> "If the arbitration agreement had been governed by Australian law, it is no longer disputed that it would have been illegal and void. I next have to consider whether Australian law has any effect on it although its proper law is English law".

The court came to the conclusion that the answer to this question should be in the negative because there were no relevant connecting factors between the ad hoc arbitration agreement and Australia. There is much else in the judgment that is of great interest but relevantly for present purposes it is a surprising illustration of how easy it can be to get around a statutory provision against arbitration of the kind set out in the Australian legislation. Interesting questions may arise if ever an application was made to enforce the award in Australia.

Another related and major question which has been agitating the arbitration community in recent years and which appears to be accelerating in momentum is the arbitrability of disputes which involve the application of, or consideration of, national legislation of general public importance. These are cases where there is no specific prohibition of arbitration as a method of dispute resolution but rather it is argued that considerations of public interest require that the dispute be determined in court. The current trend to judicial acceptance of arbitration as a method of dispute resolution even in such cases can be identified as reaching a high point with the decision of the United States Supreme Court in Mitsubishi Motors Corporation -v- Soler Chrysler - Plymouth Inc. (1985) 473 US 614 followed by Shearson/American Express Inc -v- McMahon (1987) 482 U.S.

220. These decisions are too well known to require description from me.

Less well known may be the New Zealand decision in Attorney General of New Zealand -v- Mobil Oil New Zealand Ltd. (1989) 2 NZLR 649. The New Zealand Attorney General sought a declaration from the High Court that, an agreement, which had been entered into in 1982, conflicted in its operation with the Commerce Act as amended in 1986. The claim was that the agreement had the effect of substantially lessening competition in the relevant market. The agreement contained a provision, in Article VII, whereby any dispute arising on a matter contained in the agreement was to be submitted to resolution by arbitration by the International Centre for Settlement of Investment Disputes (ICSID). The trial Judge was asked to refuse, in the exercise of his discretion, to make an order for a stay . That discretion was provided for by the 1979 New Zealand statute which brought into operation in New Zealand the ICSID Convention. It seems to me that a strong case was made out for the grant of a stay on public interest grounds. It was pointed out that the public policy objective of the Commerce Act was to promote competition in markets in New Zealand and the High Court had the significant and indeed exclusive jurisdiction to formulate the policy for the future. In order to enable it to discharge this function with a proper appreciation of New Zealand commercial life the Court was required to sit with additional lay members with experience in

industry, commerce, economics, law or accountancy. Furthermore, while ICSID was able to determine, as a matter of law, the applicability of the section of the Act to the agreement, it was not able to make an order by way of injunction, or any order varying the particular covenants between the parties, as the Court was able to do. The Judge said (p 666):-

> "For my part I see this as a very serious disadvantage to both parties if it comes about, because the Commerce Act 1986 is a comprehensive code for the resolution of such disputes when they arise. But I cannot forecast the likely outcome of these proceedings in a way which would enable me to conclude that the mutual disadvantages of proceeding with international arbitration are such that they should influence my discretion in the face of an application for stay. One must assume that the defendants have considered the flexibility, or lack of it, which the Centre may demonstrate once seized of this matter. Indeed it may be that it will consider it appropriate to decline jurisdiction".

The difference between the Mitsubishi case and the New Zealand application was self evident. Nonetheless in what, if may be permitted to say so, was a most carefully crafted judgment, Herron J, after referring to the U.S. decisions said (p 668):-

> "Such expressions are of course expressions of United States judicial policy towards international investments and contracts. I think such principles are appropriate even in this small country as international trade and commercial relationships are of critical importance. In holding the Crown to its agreement I see no reason for departing from those principles of international commercial comity, and in my view they accurately reflect the attitude that New Zealand courts should take to international arbitration provisions of this kind".

The decision was a robust affirmation of the primacy of the arbitral procedure, bearing in mind that, at the time when the arbitration clause was incorporated in the agreement, the Commerce Act was in a substantially different form.

Decisions to this effect have earned particularly strong criticism from Prof. Sornarajah (supra p 16) He said:-

> "Developing states are also likely to have stronger views on arbitrability. Thus, an Indian court has held that a dispute arising from an international agreement for the transfer of technology is not arbitrable under Indian law because such agreements implicate national economic policies. Likewise, "exploitation agreements and concessions" which are facilely included in the Model Law definition of commercial agreements are subject to the doctrine of permanent sovereignty over natural resources, a doctrine which, whatever its validity in international law may be, is constitutionally enshrined in many countries. Such countries may not lightly accept the notion in the Model Law that these agreement could be removed from the public law sphere by a mere commercial contract".

I should perhaps point out that in the midst of all the congratulations exchanged in the arbitration community on the outcome in Mitsubishi (supra) little attention was paid to the few words at the conclusion of the majority judgment. The Court pointed out that if, and when, an award, was delivered against Mitsubishi and an attempt made to enforce it in the U.S. under the New York Convention an American Court would have to consider a possible defence under article V(2)(b) that the recognition, or enforcement, of the award would be contrary to

the public policy of the United States. As the Court said in Mitsubishi (Supra @ 638);

> "The national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed... to ascertain that the arbitral tribunal took cognisance of the antitrust claims and actually decided them".

This is all well and good assuming that the claimant succeeds and obtains an award which it then seeks to enforce. However where the claimant is unsuccessful there will be no opportunity for a U.S. court to consider whether the claimant's failure was due to the arbitrator's failure to apply, or to apply correctly, the anti-trust provisions.

The dicta in Mitsubishi has come to be known as the "second look doctrine". As Professor Park pointed out in (1989) 63 Tul. L. Rev. 647 @ 669:-

> "It is uncertain if the second look involves a broad examination of whether the arbitrator properly applied the law, or merely involves a mechanical examination of whether the arbitrator in fact considered the American statute.
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> Mitsubishi thus exacts a problematic price for arbitrability of antitrust matters. Judicial review of the contents of awards, at least for their conformity with public policy, is the cost for letting the dispute go to arbitration.
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> In a situation like Mitsubishi the arbitrator is in a bind. If a contract includes a choice of law clause explicitly selecting the legal system of a country whose competition law fundamentally differs from that of the enforcement forum, the arbitrator, mindful of

> Justice Blackmun's caveat, may nevertheless decide the antitrust claims according to United States law. This departure from the parties' express choice of Swiss law might increase the award's chances of enforcement in the United States, but could open the door to a challenge of the award outside the United States not once, but twice. First, the loser in an arbitration in which the Sherman Act was applied could be expected to seek annulment of the award where rendered, on the theory that the arbitrator decided inconsistently with his mission, which is a ground for review in most major arbitral centres. Annulment would make the award more difficult to enforce throughout the world, because the New York Convention permits refusal of recognition to awards set aside in the country where made.
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> Departure from the parties' chosen law also might result in a challenge to enforcement of the award against assets outside the jurisdiction in which the award is rendered. Article V(1)(c) of the New York Convention permits the refusal of enforcement to awards when arbitrators decide matters not submitted to them, which is not a totally unreasonable characterization of an adjudication of Sherman Act claims under a Swiss governing law clause.
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> Because the mandatory national norms of the enforcement forum, often called lois de police, arguably may apply notwithstanding the parties' choice of law clause, the arbitrator could be required to choose whether to give effect to the will of the parties, or to respect the imperative rules of a country with a vital interest in the subject of dispute. Such an interest might exist in matters such as competition law, currency controls, trade boycott, environmental protection and bribery. Even if compatible with the policy of the place of arbitration, an award might run afoul of the mandatory public law of the place of performance, thus giving rise to a refusal of recognition of the award under article V(2) of the New York Convention."

It will be appreciated of course that many of the difficulties to which Prof. Park refers arise from the fact that the parties had expressly chosen Swiss law as the applicable law. Presumably the rationale for this was that Mitsubishi Motors corporation was a Japanese corporation owned by Chrysler International S.A, a Swiss corporation and Mitsubishi Heavy Industries Inc. of Japan.

It is not clear to what extent the second look doctrine is bound up with the throwaway line by the Supreme Court in Wilko -v- Swan (1953) 346 U.S. 427, 436 that an arbitrator's "Manifest disregard of the law" in rendering an award could constitute a non statutory ground for vacating an arbitration award. The only real guidance to be had at the moment, is in the opinion in Merrill Lynch, Pierce Fenner & Smith -v- Bobker (1986) 808 F 2 d 930 where the Second Circuit said (p933):-

> "... [a]lthough the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. To adopt a less strict standard or judicial review would be to undermine our well established deference to arbitration as a favoured method of settling disputes when agreed to by the parties. Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it".

The Court of Appeal of New Zealand took a similarly principled approach to that of the U.S. Supreme Court in CBI New Zealand Ltd. -v- Badger BV (1989) 2 NZLR 669. The dispute there in question arose from a contract for the construction of a refinery by an international joint venture. The joint venturers were a Dutch and Japanese company. The subcontract in question included a clause providing for arbitration under ICC

Rules. Article 24 of the ICC Rules provided that parties shall be deemed to have waived the right to any form of appeal. An application was made for setting aside the partial award, relevantly for present purposes, on the ground that there were errors on the face of the award. The question thrown up for decision then was whether the exclusion of the right of appeal, otherwise provided by New Zealand law, by operation of the ICC Rules was contrary to public policy.

The Court unanimously rejected the submission. The judgements distinguished the decision of the English Court of Appeal in Czarnikow -v- Roth Schmidt & Co 1922 2 K.B. 478. What the New Zealand Court held in effect was that whatever may have been the dictates of public policy in England in 1922 it certainly did not represent the requirements of New Zealand public policy in 1988. I would respectfully draw attention to an important justification appearing in the judgment of Cooke P. His Honour said (p 678):-

> "Certainly there are broad statements in the Czarnikow judgments on the lines that the agreement of the parties cannot oust the jurisdiction of the King's Courts to apply the law of England. But, in my respectful opinion, they have to be read against the background and subject to the practical exceptions, discussed by the Lords Justices, which have just been mentioned. I do not think that Czarnikow can safely be extended to the doctrine concerning error of law on the face of the award - and especially not to the freedom of parties to an international business contract to agree to oust that doctrine". (emphasis added)

The judgments, concluded that if a court was satisfied that the parties had agreed that there should be no appeal then the court will give effect to that intention. In an interesting commentary [(1989) 105 L.Q.R. 539] on the New Zealand decision Martin Hunter posed the question whether it would be followed everywhere. Somewhat to my surprise, I find that, within recent times, in Antrim New Town Developments Ltd. -v- The Department of the Environment for Northern Ireland (unreported 15 May 1989), the Northern Ireland Court of Appeal expressed the opinion that any clause which made an award "final", thereby attempting to prevent a review by a court on a point law, would be contrary to public policy.

Notwhithstanding the views of the Court in Antrim the conclusion in Badger is hardly surprising, bearing in mind, that modern arbitration statutes customarily offer parties this option. It is the consequence that is important. It means that the courts are no longer able to ensure that awards will conform to the municipal law. In those circumstances will the law in Commonwealth countries take a different view of awards in accordance "with equity and good conscience" or given by an "amiable compositeur"? In my earlier paper I addressed some of the difficulties thrown up by such clauses. In England the problem seems to be most acute. In Australia the Act makes specific provision for awards to be given in accordance with "equity and good conscience".

The question is what latitude is given to arbitrators by such, so called, equity clauses. That English courts continue to take a restrictive view emerged, by way of an obiter dictum, in a decision involving the interpretation of a clause in a reinsurance agreement requiring that the agreement be interpreted "as an honourable engagement and they (the arbitrators) shall make their award with a view to effecting the general purpose of this reinsurance in a reasonable manner rather than in accordance with a literal interpretation of the language". The clause therefore raised the question whether an award could be given in England otherwise than in accordance with English law. Of course, until recently, as I have said in my previous paper, it was one of the basic tenets of English law that any agreement between parties that an arbitrator may resolve a dispute otherwise than in accordance with English law was held contrary to public policy. In his commentary Mustill LJ. mentioned the decision of Hirst J. in Home & Overseas Insurance Co Ltd -v- Mentor Insurance Co (U.K.) Ltd. At that time only a report in The Times was available and for that reason Sir Michael forebore from commenting on the decision. Since then the Court of Appeal has expressed its views [(1989) 3 A.E.R 74]. If I may say so, with very great respect, some of the obiter from the Court represented a reversion to the stand which many had thought had been dead and buried. Thus Parker L.J. said (p 80):-

"I have no hesitation in accepting ... that a clause which purported to free arbitrators to decide without regard to the law and accordingly, for example, to their own notions of what would be fair would not be a valid arbitration clause"

With respect, this statement in Home Insurance discloses a conceptual difficulty. As I explained in my previous paper, in Deutsche Schachtbau-und- Tiefbohrgesellschaft mbH. -v- The R'as Al Khaimah National Oil Company 1987 2 AER 769, a differently constituted Court of Appeal, held that an award made in accordance with Article 13(3) of the ICC Rules was enforceable in England. That sub-rule provided that where the parties made no selection of the applicable national law the arbitrators were free to apply the law selected by the rule of conflict which the arbitrators deemed appropriate. The arbitrators applied "internationally accepted principles of law governing contractual relations". In a judgment delivered by Lord Donaldson M.R. the award was held enforceable as a judgment. Referring to that decision Lloyd LJ said in Home Insurance (supra p 84)

> "Counsel for Home argued that DST -v- Raknoc was concerned only with the enforcement of a foreign award, and that it has no bearing on the present case, where the contract calls for arbitration in London. But why not? If the English courts will enforce a foreign award where the contract is governed by a 'system of "law" which is not that of England or any other state or is a serious modification of such a law' (see [1987] 2 AER 769 at 778, [1987] 3 WLR 1023, why should it not enforce an English award in like circumstances? And if it will enforce an English award, why should it not grant a stay?

> Counsel for Home argued that it would be impossible for the court to supervise an arbitration unless it is conducted in accordance with a fixed and recognisable system of law; he even went so far as to submit that the arbitration clause in the present case is not an arbitration agreement within the making of the Arbitration Acts 1950 to 1979. It is sufficient to say that I disagree. I would only add (although it cannot affect the argument) that if counsel for Home is right, no ICC arbitration could be held with confidence in this country for fear that the arbitrators might adopt the same governing law as they did in DST -v- Raknoc.
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> Finally, counsel for Home argued that, since there are apparently as many as 80 arbitrations in which the same or similar points have arisen, and since the scope and validity of the arbitration clause, and the meaning of cll 1, 5 and 15 of the contract are bound to be decided ultimately by the court, it would be better for us to decide the points now. He submits that we would be doing the insurance community no service by granting a stay.
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> I take exactly the opposite view. we would be doing the insurance community great disservice if we were to usurp the decision which rightly belongs at this stage to the tribunal chosen by the parties. No doubt there will be important questions of law to be decided in due course by the court, both as to the contract as a whole, and as to the arbitration clause in particular. But these should not be decided in advance. They should be decided, as counsel for Mentor submitted, on a case by case basis as they arise".

Sir Michael Mustill took the view in his paper (17 IBL @ 162) that there was no inconsistency between DST and decisions such as Home Insurance. He said:-

> "Whether in a case where a dispute has arisen under a contract containing such a clause and has gone to arbitration, the resulting award can be enforced is rather a different matter. If the award is made in a foreign country whose law recognises the validity of such a contract, I believe that the court where enforcement is sought could properly give effect to it, even if its own law is different; for it is by now well recognised that the arbitration clause is a severable agreement, distinct from the substantive rights created by the contract in which it is embedded. Even if the receiving court would not itself have enforced the main

> contract it would not necessarily be wrong to enforce the new agreement to pay arising from the foreign award. On the other hand, the position where the award is made in the country where the validity of the contract is not recognised may very well be different".

Stewart Boyd QC, in his 1989 Ronald Bernstein Lecture, put the question the other way and in my respectful view correctly. If there is no principle of public policy precluding the enforcement in England of a foreign award not in accordance with any recognised system of national law should not such an award be equally enforceable if made in England under English arbitration law? Then, once English courts accept that equity clauses allow full latitude to arbitrators and consequently that awards will no longer require to accord with English law what of the right of appeal? Will the time then have come to think again of adopting the Model Law?