PUBLIC POLICY AND ARBITRABILITY

by

JUSTICE ANDREW ROGERS

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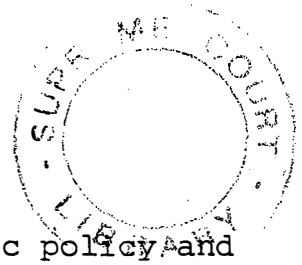

In Australia and England the requirements of public policy and arbitrability rested, until recently, on twin pillars. First, that certain disputes by reason of their very character fell to be determined by the courts and were inappropriate for arbitral decision. Second, was the requirement that all disputes be determined in accordance with the municipal law.

The two concepts are related in that a major reason for requiring determination by the courts was usually the perception that only a court could correctly interpret the law, particularly a statute relating to the dispute and give effect to it in accordance with the wishes of Parliament. As will be seen both these concepts have been the subject of erosion, partly due to Parliament, but in a large measure, as a result of the pressures of international commercial arbitration and the United States experience flowing from it.

As Professor Park put it in "National Law and Commercial Justice; Safeguarding Procedural Integrity in International Arbitration" (1989) 63 Tul L Rev 648 @ 700:

> "The central theme in nonarbitrability cases is a concern that society will be injured by arbitration of public law claims. Courts express a fear that public law issues are too complicated for arbitrators; that arbitration proceedings are too informal; or that arbitrators are like foxes guarding the chicken coop, with a pro-business bias that will lead to under-enforcement of laws designed to protect the public. Lack of appeal on the merits of arbitral

> awards in the United States makes arbitration seem to some as a "black hole" to which rights are sent and never heard from again".

The now 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; Shearson/American Express Inc v McMahon (1987) 482 US 220. 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 prevail. In Dean Witter Reynolds Inc v. Lamar Byrd (1985) 470 US 213 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 was realised by the decision of the Supreme Court in McMahon (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 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 the decision of the Supreme Court in Wilko v. Swan (1953) 346 US 427. In Wilko the court held that the Securities Act forbade waiver of the right to a judicial determination because "Arbitration lacks the certainty of a suit at law under the Act to enforce (the Customer's) rights". That right to select a judicial forum was thought by the court in Wilko to be a particular valuable feature of the Securities Act. The Supreme Court reversed the decision of the Court of Appeals with respect to the RICO claim and by majority as to the securities legislation claim as well. The judges 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 (sic) finding waiver of their #10(b) rights is that arbitration does 'weaken their ability to recover under the [Exchange] Act'. 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.

As Justice Frankfurter noted in his dissent in Wilko, the Court's opinion did not rest on any evidence, either 'in 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 the 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); Sherk v. Alberto-Culver Co. 417 US 506 (1974).

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 cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court')".

This last point appears to have been overlooked somewhat. Yet in my view it could be very important in practice in some cases. However, it should be noted that the supposed protection is limited in a very significant respect. The opportunity for review 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 (supra p.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 Professor Park refers arise from the fact that in Mitsubishi the parties had expressly chosen Swiss law at 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 throw-away line by the Supreme Court in Wilko v. Swan (1953) 346 US 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 (p.933):-

> " [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".

There is another very interesting aspect of the decision in McMahon that has not received a great deal of attention. One of the reasons given by the majority for accepting arbitration procedures as appropriate was that the Securities and Exchange Commission has power to abrogate, add to and delete from any rule if it finds such change necessary or appropriate to further

the objectives of the Act. As the Court said (p.1):-

> "In short the Commission has broad authority to oversee and to regulate the rules adopted by the SRO's relating to a customer dispute, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights".

As a logical follow on to McMahon, the US Supreme Court in de Quijas v. Shearson/American Express Inc. (1989) L. Ed 2d 526, overruled its previous decision in Wilko (supra) and held that pre-dispute agreements to arbitrate disputes arising under the Securities Act were enforceable. The reversal of Wilko (supra) was another important milestone in the march to supremacy of the Federal Arbitration Act. In de Quijas (supra), Justice Kennedy, for the majority, said (p.534):-

> "To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favouring this method of resolving disputes.
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> Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that para 14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers. Wilko identified two different kinds of provisions in the Securities Act that would advance this objective. Some are substantive, such as placing on the seller the burden of proving lack of scienter when a buyer alleges fraud. See 346 US, at 431, 98 L Ed 168, 74 S Ct 182, citing 15 USC para 771(2) [15 USCS

> para 771 (2)]. Others are procedural. The specific procedural improvements highlighted in Wilko are the statute's broad venue provisions in the federal courts; the existence of nationwide service of process in the federal courts; the extinction of the amount-in-controversy requirement that had applied to fraud suits when they were brought in federal courts under diversity jurisdiction rather than as a federal cause of action; and the grant of concurrent jurisdiction in the state and federal courts without possibility of removal. See 346 US, at 431, 98 L Ed 168, 74 S Ct 182, citing 15 USC para 77v(a) [15 USCS para 77v(a)].
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> There is no sound basis for construing the prohibition in para 14 on waiving "compliance with any provision" of the Securities Act to apply to these procedural provisions. Although the first three measures do facilitate suits by buyers of securities, the grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive those protections by filing suit in state court without possibility of removal to federal court. These measures, moreover, are present in other federal statutes which have not been interpreted to prohibit enforcement of pre-dispute agreements to arbitrate".

A question that, as far as I am aware, has not yet received attention is the application of the second look doctrine to domestic awards. Will there be a more rigorous judicial review of awards on an application to enforce them as judgments?

In the present state of authority, in the United States, it is difficult to think of any field which is foreclosed to arbitration. It is interesting to contrast the position in West Germany. The Federal Supreme Court in West Germany held in 1987 that, according to the German Stock Exchange Law, the German plaintiff's transactions with the German subsidiary of Merrill Lynch were not binding on him and therefore he could not, as a matter of public policy, conclude a binding arbitration clause

in relation to them. Therefore the Court found that an agreement to arbitrate before a foreign tribunal and to apply foreign law to the dispute was invalid. Moreover in complete contrast to Mitsubishi, the Court took the view that it would not be appropriate to allow the arbitral proceedings to go forward under New York law and then have the plaintiff object to enforcement of a possible award in Germany as a violation of German public policy. The certainty that under New York law the German statute would not apply made it useless for the arbitration to be allowed to go forward (cf. Kunner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany under the New York Convention" (1990) 7 J. Int.Arb. 71, 76).

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 pursuant 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? The likely answer has now been given by the New South Wales Court of Appeal in IBM Australia Ltd. v. National Distribution Services Pty. Ltd. (unreported, 5 March 1991). Before discussing this decision, I should mention an interesting New Zealand case.

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 proceedings 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 I may be permitted to say so, was a most carefully crafted judgment, Heron 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.

The question in IBM was whether claims for relief made pursuant to ss.52 and 87 of the Trade Practices Act 1974 (Cth) fell within the terms of an arbitration clause entered into by the

parties. Although it was not argued that it was against public policy to submit such claims to arbitration, the argument that on its proper construction the clause did not clothe the arbitrator with such power was supported by reference to the width and nature of the remedies which could be afforded pursuant to s.87 of the Act. As Kirby P said (p.21):-

> "The appellant asked rhetorically whether it should really be imputed to the parties that they envisaged that the arbitrator should have a power to declare the contract void ab initio from which his own jurisdiction derived? Could it really be suggested that the arbitrator should have a power of injunction, whether limited to the particular parties or to officers of those parties, at least in the absence of an express conferral of such power in the agreement? Could it be contended that there should be read into the arbitration clause an intention of the parties that the arbitrator should enjoy such wide power as the Trade Practices Act confers upon courts? Originally those powers were confined to the Federal Court of Australia exercising an exclusive jurisdiction. Since 1986, the jurisdiction to exercise such powers has been conferred concurrently upon State courts exercising Federal jurisdiction. But those courts are part of the constitutional machinery of the Commonwealth. They have such wide powers (so it was argued) because they are courts constituted by people trained in the law and versed in the traditional respect for liberties which our law safeguards. The notion that the parties to the present agreement should be taken to have agreed that such powers were conferred upon a then still undetermined arbitrator was one which the appellant argued was so unlikely that it should not be the construction preferred by the Court. Not only did the appellant point to the width of the powers themselves. It also pointed out that the very width of some of the powers contemplated (eg an order varying the contract or an order for the supply of services) was so fundamentally inconsistent with the other express terms of the agreement itself that it would not be a construction put on clause 9. In particular, the appellant referred to those provisions of the opening words of the agreement and clauses 5, 7, 10(b) and 10(e) as showed an endeavour to confine the parties to limited damages and to rights defined within the four walls of the agreement.

....

> If the arbitrator, armed with the "authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter" were persuaded to provide relief of a particular kind (such as injunction) any such order as the arbitrator purportedly made could only be enforced, as a judgment or order of the Court, after judgment is entered in the terms of the award. But that might only be done "by leave of the Court". It might be expected that the Court, in considering whether or not to grant such leave, would have regard to the nature of the relief given in the arbitrator's award.
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> The appellant urged that the very width of the relief available under the Trade Practices Act was an argument against imputing to the parties the intention to provide all of the relief of the afforded to courts by that Act. It is sufficient to answer this argument by saying that the holding in Atkinson-Leighton contemplates that the very purpose of a reference to arbitration will frequently be to confer on the arbitrator the powers which would be enjoyed, even by statute only, by the court of law of competent jurisdiction that would otherwise hear the case."

It is noteworthy that Kirby P relied in part on Mitsubishi.

Decisions to like effect have earned particularly strong criticism from Professor Sornarajah of Singapore in "The UNCITRAL Model Law; A Third World Viewpoint" (1989) 6 J Int.Arb. 7. He said (p.16):-

> "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 agreement 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 agreements could be removed from the public law sphere by a mere commercial contract".

I turn then to the second point that an arbitrator was required to apply the municipal law. At the risk of wearisome repetition I would remind you that the attitude of courts in the British Common Law countries, prior to the last decade, was epitomised by the graphic statement by Scrutton LJ in Czarnikow v. Roth Schmidt & Co. 1922 2 KB 478 that "there will be no Alsatia in England". In that phrase, Lord Justice Scrutton encapsulated the philosophy that whether a dispute was subjected to arbitration, or heard in the courts, the result and decision, be it in award, or a judgment, had to conform to the principles of English law. Practical effect was given to this requirement by the obligation of an arbitrator if so requested to state a case for the opinion of the court thereby ensuring that an award could be scrutinised for failure to follow principle.

This doctrine has come under strong challenge in three types of cases. First, where the arbitration clause excluded any right of appeal. Second, where the arbitrator was directed to apply another system of law. Third, where the arbitrator was directed to apply what has become known as an equity clause. The struggle has been between party autonomy, that is giving parties the most complete freedom of choice on the one hand or requiring them to conform to municipal law.

A sea change in the courts' attitude was heralded by the decision of the English Court of Appeal in Eagle Star Insurances Co. Ltd. v. Yuval Insurance Co. Ltd. [1978] 1 Ll.R 357. The clause of the treaty of reinsurance calling for arbitration included the following provision:-

> "The Arbitrator and Umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of these Agreements."

In relation to a provision much the same as the one before the Court of Appeal, Mr. Justice Megaw held in Orion Compania Espanola de Seguros v Belfort Maatschppij Voor Alge mene Verzekringen [1962] 2 Ll.R. 257 that it was invalid as being contrary to public policy. This view was rejected by Lord Denning MR in the Eagle Star (ib p.362). The other two members of the Court agreed. it must be noted, however, that Denning MR gave the clause a narrow construction. He said: "It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this". The Privy Council gave an even more narrow scope for the amiable compositeur clause in Rolland v Cassidy [1988] 13 App.Cas. 770 @ 772 when it said:

> "Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as amiable compositors to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of

> those rules of law the non-observance of which, as applied to awards, results in no more than irregularity".

In Arab African Energy Corp Ltd v. Olieprodukten Nederland B.U. [1983] 2 Ll.R. 419, the English Court of Appeal held that the incorporation of the ICC Rules in the arbitration clause was a sufficient "agreement in writing" excluding the right of appeal for the purposes of s.3 of the Arbitration Act 1979. The Court said: "True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency".

As the high water mark of the change in attitude by the English courts, stands the decision of the English Court of Appeal in Deutsche Schatbau-Und Tiefbohrgesellschaft m.b.h. v The R'as Al Khaimah National Oil Company [1987] 2 Ll.R. 246. An oil exploration agreement between the parties provided for ICC Rules. (Art.13(3)) In the absence of any indication by the parties as to the applicable law, the arbitrator is directed to apply the proper law determined by the rule of conflict which he deems appropriate (Art.13(3)). The arbitrators 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 Woolf 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 nations governing contractual relations - is out with the scope of choice which the parties left to the arbitrators".

If I may be permitted to say, to me, there is difficulty in reconciling this comment with the approach of Lord Diplock in Amin Rasheed Shipping Corporation v Kuwait Insurance Co [1984] AC 50 @ 65. Lord Diplock said that contracts are incapable of existing in a legal vacuum and are mere pieces of paper devoid of all legal effect unless made by reference to some system of private law.

Notwithstanding the decision in DST, English courts continue to take a restrictive view. This emerged, by way of an obiter dictum, in a decision involving the interpretation of a clause in a reinsurance agreement requiring that the agreement by interpreted "as an honourable engagement and they (the arbitrators) shall make their award with a view to effecting the general purpose of their 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. In Home & Overseas Insurance Co. Ltd. v Mentor Insurance Co (U.K.) Ltd. (1989) 3 AER 74, the Court of Appeal has expressed its views. 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 LJ 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 according, 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. Referring to the decision in DST, Lloyd LJ said in Home Insurance (supra p.84):-

> "Counsel from 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?
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> 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 meaning of the Arbitration Acts 1950 to 1979. It is sufficient to say that I disagree. I would only add (although it cannot

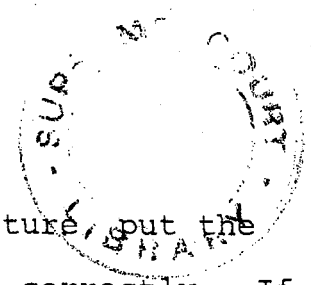
affect that argument) that if Counsel for Home is right, no ICC arbitration could be held with confidence in this country for fear that the arbitrators might adopt the same governing law as they did in DST v Raknoc.

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 cl.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.

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 [(1989) 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 difficult 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".



Steward 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?

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 fact 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 judgments distinguished the decision of the English Court of Appeal in Czarnikow v Roth Schmidt & Co (1922) 2 KB 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 Cnarnikow 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 fact of the award - and especially not to the freedom of parties to an international business contract to agree to oust that doctrine".

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. Somewhat to my surprise, I find that, within recent times, an appellate tribunal, followed Czarnikow without any debate. in Antrim New Town Developments Ltd v The Dept 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 of law, would be contrary to public policy.

Notwithstanding 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 as an "amiable compositeur"? The problem seems to be most acute in England. In Australia the Act makes specific provision for awards to be given in accordance with "equity and good conscience".