APPEALS FROM ARBITRATION AWARDS

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IN 1976 the New South Wales Law Reform Commission said in its Report on Commercial Arbitration in relation to a proposal that there be a simple appeal from arbitration awards that—

> "We do not favour the proposal. We have in several places in this report acted on the view that one of the main objectives people have in agreeing to arbitration is early finality, and that another is for determination of the difference outside the courts. We have recommended changes in the law whereby avenues of judicial review are restricted (no setting aside or remission of an award for error on its face; no appeal to the Court of Appeal except by leave) or may be restricted or closed by exempt contract. To permit appeals generally would go quite the other way and we are against it. It is true that the present law, and the changes we recommend, have some technicality. But the technicality is, we believe, inescapable if there are to be limits on the scope of judicial review." (par 9.8.3)

The Commercial Arbitration Bills introduced in Australian States in 1984 worked principally from this Report. When the Victorian Attorney-General (Mr. Kennan) introduced the legislation in Parliament he said—

> "The new commercial arbitration system is intended to supplement the jurisdiction of the Court where an agreement permits arbitration as a means of dispute resolution. It will encourage the development of a speedy and economical means for resolution of disputes by experts in their field. To appeal from an arbitrator's award, consent of the parties is required, or the leave of the Court must be obtained. The Court will, however, have strong powers to deal with instances of deliberate delay by a party, and incompetence on the part of an arbitrator."

Section 38 of the Australian legislation is very closely related to the U.K. *Arbitration Act* of 1979. The Master of the Rolls (then Sir John Donaldson) said in May 1983[1] that once the Act came into force things went adrift in two respects.

> "First, some parties who failed to obtain leave to appeal to the High Court applied to the Court of Appeal to appeal against that refusal and in one case there was an appeal against the grant of leave to appeal (the *Rio Sun*).[2] Curiously enough no one referred the court to a line of cases of which *Lane v. Esdail*[3] is the leading authority, which suggests that it is not possible to appeal against a refusal of leave to appeal. The opportunities for delay were horrifying and threatened the credibility of the 1979 Act as providing a simple speedy and efficient supervisory jurisdiction by the High Court. By a fortunate coincidence the *Supreme Court Act*, 1981, was before Parliament and section 148 was introduced making final and unappealable the decision of a High Court Judge on an application for leave to appeal unless he himself gave leave to

appeal. This is a matter which could have been dealt with by an Arbitration Rules Committee far more easily.

The second problem was more serious. In deciding whether or not to grant leave to appeal to the High Court, the judges of the Commercial Court adopted the procedure then in use in the Court of Appeal. It has since been changed, but at that time applications for leave to appeal immediately preceded the hearing of the appeal if leave was granted. The result, both in the Court of Appeal and in the Commercial Court, was that the application for leave to appeal became in effect the hearing of the appeal, at least in terms of length and complexity. Furthermore, since it is most unusual for a question of law to have no effect upon the rights of the parties and the Act did not define what is meant by "substantially" affecting their rights, the Commercial judges granted leave to appeal in a relatively high proportion of cases, using only the power to impose conditions as an effective brake."

To solve the second problem the House of Lords intervened in *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd.*[4], known as *The Nema.* Lord Donaldson said of *The Nema* that in essence it decides that

"There is a world of difference between an application for leave to appeal and the appeal itself. The application falls to be decided largely as a matter of first impression on the documents, supplemented at most by only minimal adversarial argument. Account should be taken of a number of circumstances. What is the nature of the dispute and how did it come to arise? Is speed of decision of the essence, as it was in 'The Nema'? In such a case, other things being equal, there will be an increased reluctance to grant leave to appeal, since this will, or may, frustrate the intentions of the parties. However, in the absence of special factors, the general rule is that leave to appeal will not be granted unless it is plain on a perusal of the award and its reasons that the arbitration has erred in law. This general rule is subject to qualification where the question of law arises in connection with standard contract clauses or the events which gave rise to it are common to many more or less similar transactions. In such cases there is still a strong public interest in finality and and therefore in leave to appeal being refused, but there is also a countervailing public interest in all similar disputes being decided upon the same legal basis. Accordingly, in such cases, leave to appeal should be granted if a decision by the court would 'add significantly to the clarity of English commercial law, notwithstanding that the arbitration was not plainly wrong'."

As Mustill & Boyd have said in their work, *Commercial Arbitration* (1982) the Nema guidelines although technically obiter dicta "were immediately accepted as authoritative statements of principle, which should form the starting-point of any subsequent discussion".[5]

Lord Diplock, the author of the Nema guidelines, restated his views with even more vigour in *Antaios Compania Naviera S.A. v. Salem*[6] in the light of further experience with arbitration appeals, in the following terms—

"My Lords, the course followed in the proceedings in the Supreme Court, illustrates the difficulty of preventing counsel instructed in commercial arbitrations of the kinds to which section 4 of the Arbitration Act 1979 applies, from indulging (no doubt in the supposed commercial interests of their clients) in delaying tactics, so as to attain a similar result to that which it had been possible to achieve before the passing of the Act of 1979 by using the procedure of demanding that an award be stated in the form of a special case whenever the contract sued upon raised a question of construction that was arguable, however faint the prospects of success.

Unless judges are prepared to be vigilant in the exercise of the discretions conferred upon them by sections 1 and 2 of the Arbitration Act 1979, including in section 1 the new subsection (6A) that was added by section 148(2) of the Supreme Court Act 1981, they will allow to be frustrated the intention of Parliament, as plainly manifested by changes in procedure that these statutes introduced, to promote speedy finality in arbitral awards rather than that insistence upon meticulous semantic and syntactical analysis of the words in which business men happen to have chosen to express the bargain made between them, the meaning of which is technically, though hardly commonsensically, classified in English jurisprudence as a pure question of law.

That such was Parliament's intention this House was at pains to indicate in the analysis of the provisions of the *Arbitration Act* 1979 made in my own speech in *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema)* [1982] A.C. 724 in which the other members of the House who were present at the hearing concurred. At that time the way in which the parliamentary intention was being thwarted was by parties to arbitrations applying for leave to appeal from any award that involved a question that was even remotely arguable as to the construction of the relevant contract, and by some, though not all, commercial judges following a policy of granting leave in virtually all such cases, albeit upon conditions as to provision of security for, or payment into court of, the whole or a substantial part of the amount of the award."

The guidelines were first applied in Victoria in *Zafir v. Papaefstathiou*[7] by Nathan J. who for the purposes of the Victorian Act distilled the following criteria for granting leave to appeal from *The Nema* and *The Antaios*—

(1) The Arbitration Act should be interpreted purposively that is to give weight to the objectives to be achieved rather than to a constrained meaning of the actual words used or as considered singularly.
(2) Applications for leave to appeal fall into two classes,
    (a) those concerned with standard form arbitration agreements. As this one is, or
    (b) "One-off" or particular agreements concluded sui generis between the parties.
(3) Leave to appeal in standard form cases, i.e. class (a) should only be granted if a strong prima facie case is apparent that the arbitrators were wrong.
(4) Leave to appeal in cases where a point of general commercial significance arises; even in a standard form contract should also only be granted if a prima facie case or error is apparent. (See also s.39 of the Act).
(5) Leave to appeal in "one-off" cases; i.e. class (b) should be restricted to cases where the error is so obvious as to appear "as a matter of first impression".
(6) The procedure a judge should follow in forming a prima facie view or of obtaining a first impression is to read the documents, if necessary hear concise argument but not argument on the merits of the issues of law as such. The tests for error are not those used when hearing a case on appeal but should be those akin to the tests used when 'judicially reviewing' inferior jurisdictions."

In so deciding Nathan J. refused to follow a decision of the New South Wales Court of Appeal in *Qantas Airways Ltd v. Joseland & Gilling*[8] in which that Court, in judgment delivered by McHugh JA said that

"We are not convinced that the statements of Lord Diplock, based as they are on a different background, are applicable to s.38 of our Act. The matters to which Lord Diplock refers are important factors in determining whether leave should be given. But the exercise of the discretion conferred by s.38 does not depend on whether the claimant has made out a strong prima facie case or fulfilled other requirements to

which his Lordship refers. It is a discretion to be exercised after considering all the circumstances of the case. We will postpone the question of granting leave until we have discussed the more substantial issues in the case."

In due course, the Court granted leave to appeal upon the basis of one of the Nema guidelines.

This difference of opinion became more acute for Victorians when Vincent J. followed Qantas in *Thompson & Anor. v. Community Park Developments Pty. Ltd.*[9] whereas Crockett J. accepted the conclusions of Nathan J. in *Karenlee Nominees Pty. Ltd. v. Robert Salzer Constructions Pty. Ltd.*[10]. The question was left unsettled when the Full Court of Victoria in *Costain Australia Limited v. Frederick W. Nielson Pty. Ltd.*[11] refused to interfere with a decision of O'Bryan J. following the approach taken by Crockett J. and Nathan J. An applicant for leave to appeal to the Full Court obviously has formidable obstacles to overcome. In the absence of a grant of leave by the primary judge, s.38(6) of the Victorian Act deprives the Full Court of any opportunity to review a decision of the primary judge to refuse leave to appeal. The Full Court in *Costain* was careful to give no indication in its judgment of any preference for or against the Nema guidelines.

In *Papaefstathiou,* Nathan J. said that "in cases such as this the approach of the trial judge must follow two steps. First whether the issue raised is a question of law? Second and only if yes, does the question satisfy the criteria set out in *The Nema* and repeated in *The Antaios.*" Crockett J. in *Karenlee Nominees* agreed that the obvious purpose of the section was to bring finality to arbitral awards by not only limiting appeals to questions of law, but even then, permitting them to go forward only in circumscribed circumstances. His view was that "the Nema principles should be applied in this State unless it can affirmatively be said that the case is not fit for their application".

It will be seen that Victorian judges have not only accepted the Nema guidelines, they have followed the English judicial path of treating them as authoritative statements of principle.

THE SUPREME COURT'S DISCRETION

There are some difficulties which can readily be observed in the approach taken by English and Victorian judges. The discretion given by s.38(4)(b) is in terms a general discretion, to be exercised subject only to the limitation in ss(5)(b) that leave shall not be granted unless the Court "considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement". The discretion is doubtless to be exercised in accordance with the obvious purpose of the legislation which is intended to bring finality to arbitral awards. But it is not easy to see why these considerations prevent the Court from

being required to consider all the circumstances of the case, as the N.S.W. Court of Appeal suggests.

There are serious risks to be found in creating rules of policy or guidelines which fetter the exercise of discretion. In de Smith's *Judicial Review of Administration Action*[12] the matter is stated as follows—

> "A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases" . . .
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> "But the rule that it formulates must not be based on considerations extraneous to those contemplated by the enabling Act; otherwise it has exercised its discretion invalidly by taking irrelevant considerations into account. Again a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases" . . .
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> "It is obviously desirable that a tribunal should only state any general principles by which it intends to be guided in the exercise of its discretion. The courts have encouraged licensing justices to follow this practice, and when a tribunal is required to give an individual an opportunity to be heard, it may be a denial of natural justice not to disclose the principles upon the tribunal proposes to exercise its discretion."

One of the best known statements of the distinction between a proper use of policy or guidelines and an impermissible fettering of the discretion occurred in a case[13] where the Port of London Authority had refused an application for a licence to construct certain works, on the ground that it had itself been charged with the provision of accommodation of that character. Bankes L.J. said—

> "There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case . . . if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

These principles are, of course, well known and frequently applied in Australian Courts. For example in *Howells v. Nagrad Nominees Pty. Ltd.*[14] the Full Federal Court held that the Delegate of the Permanent Head of the Health Department, by relying upon departmental guidelines and policy for determining scales of fees for approved nursing homes, had failed to give due weight to the matters required by the *National Health Act* 1953 for the relevant exercise of discretion. Smithers J. said—

> "Policy Guidelines
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> Reference to the evidence discloses that in determining the scale of fees on 23 June 1981 the Permanent Head acted in certain respects on the view that it was his duty to observe the terms of what were called departmental guidelines. Those were expressed in terms akin to department orders. This is no evidence as to the departmental source of these guidelines. Merely to observe such guidelines would not be to perform the duty imposed by the Act upon the Permanent Head. It is the decision of the Permanent

Head as to the scale of fees to be determined which is required. He may not surrender his judgment to departmental guidelines or even to departmental policy. This is not to say of course that he may ignore the directions of the Minister applicable to any particular case (see s.138)."

See also the decision of the High Court in *R. v. Hunt; Ex parte Sean Investments Pty. Ltd.*[15]

Notwithstanding provisions such as s.38(6) of the Victorian Act, it remains open to the High Court to intervene if a judge should decide to refuse leave to appeal by the application of the Nema guidelines. The question will not arise in its most compelling form unless a judge treats the guidelines as binding principles and can be said to have ignored other relevant circumstances in the case. The N.S.W. Court of Appeal itself agreed, in *Qantas*, that each of the matters Lord Diplock referred to in *The Nema* were important factors in determining whether leave should be given.

POSSIBLE DISCRETIONARY FACTORS

A decision to widen the scope of matters that might be considered under s.38 of the Australian legislation would not necessarily oppose the spirit of the legislation. Many of the factors which might be taken into account would necessarily tend against the granting of leave. For example even if an applicant for leave were able to raise a general question of law of importance, the court might well consider matters such as delay on the part of the applicant (for example during the arbitration proper) or other matters personal to the applicant or its conduct as factors disentitling it to discretionary relief. But equally a court might consider the conduct of the successful respondent, in a case which raised no general question of law, as justifying the grant of leave.

One purpose of this paper is to consider a particular rule which operated before the 1984 legislation to prevent appeals being taken from arbitral awards. The entitlement of a party to seek to have an award set aside for error of law on the face of the award was subject to an exception if the parties had specifically referred a question of law to arbitration.[16] If this exception is still to be treated by the courts as relevant, it would provide still further limitation on the entitlement to appeal. So stated, it can be seen that its survival would not oppose the spirit of the legislation. But clearly if the main entitlement (ie. to set aside for error of law on the face of the award) to which the Kelantan rule was an exception has been swept away, many would argue that the rule itself could have no possible application in the future. For instance the authors of Mustill & Boyd obviously take this view. The only reference in their work to the Kelantan rule (at p. 697) occurs in a section of the book which carries an opening note indicating that the discussion which follows has no application to arbitrations which are conducted under the provisions of the 1979 Act. It would also be said that the new legislation gives by

s.38(2) a perfectly general right of appeal on a question of law which does not admit the possibility of any exception of this kind and that any function previously performed by the Kelantan rule is now overtaken and impliedly (if not expressly) excluded by the right to make an exclusion agreement under s.40.

It remains possible that Australian Courts will take a path different from that followed in England. The words used by the N.S.W. Court of Appeal demonstrate that that court at least felt that the present English legislation had a different background to the one which might inform the Australian legislation. If the High Court were, in the future, to accept any such notion, an argument might be put successfully along the lines that it was already well-established in arbitration law that if the parties chose to refer a specific question of law to an arbitrator, if that question was the very thing referred for arbitration, then the arbitrator's conclusions on that point of law must stand and should not be interfered with merely because the court would itself have come to a different conclusion. It might be argued that, the clear intention of the 1984 legislation being to confine the ability to appeal and to bring finality to arbitral awards, it would be odd to permit appeals now to be brought in circumstances where the courts have in the past held that the parties have committed a particular question finally to the arbitrator. At the least, some may argue, it would be entirely consistent with the thrust of the legislation to permit courts to take into account that the parties had committed a specific question to an arbitrator when considering whether to exercise the discretion under s.38(b). For these purposes then it is necessary to examine something of the history of the Kelantan rule and the way it operated.

THE KELANTAN RULE

The rule is stated in Russell on Arbitration's 19th edition in the following terms—

> "Question of law specifically referred
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> The rule that an error of law, if it appears on the face of the award, is a ground for remitting it or setting it aside, is an exception to the general rule that an award is final as to both fact and law, and will not be applied where the parties have specifically referred a question of law to arbitration. In such cases an award will stand, notwithstanding that it is erroneous unless 'it appears by the award that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance, then there is error in law, which may be ground for setting aside the award; but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose.'[17]
>
> Intentional disregard of the law, however, would seem to be such misconduct on the part of an arbitrator as would justify setting his award aside."

It will be noted that in this version, the Kelantan rule appears to represent the mainstream of arbitration law and error of law on the face of the

award, the regretted exception—an expression of regret which goes back to the words of Williams J. in *Hodgkinson v Fernie*[18] in 1857.

The simple statement of the Kelantan rule, however, hides a number of questions which are difficult to answer in practice. How do parties specifically refer a question of law to an arbitrator? If a question of law will inevitably arise in an arbitration, is that question specifically referred? At what time is the referral assumed to have taken place; at the time of submission, when pleadings in the arbitration are complete, or by reference to the cases submitted by the parties to the arbitrator? If factual issues must be resolved by the arbitrator is it still possible to find that a question of law has been specifically referred? And, for that matter, what is a question of law? Does the rule require an examination of the intention of the parties, assessed subjectively or objectively, or does it simply involve the construction of the question or questions submitted by the parties to the arbitrator?

THE CASES

In *re King & Duveen*[19] an agreement had been made between a building owner and the adjoining owner, that the former would while erecting new buildings on the site of Gloucester House carry out his work in such a way as not to cause any undue interference with the interior of the next door premises at 138, Piccadilly. The agreement provided that should any damage occur either in the decorations or otherwise then the building owner was to make good any damage at his own expense or pay such sum to the adjoining owner for making good such damage as might be required by him or in the event of any dispute might be fixed by the arbitrator thereinafter mentioned. A new building was duly erected, and it was alleged by the adjoining owner that certain of the chimneys of his premises smoked, and the dispute was duly submitted to arbitration. The arbitrator was asked to answer a number of questions including which, if any, of the flues in the adjoining premises did emit smoke into any room or passage of those premises by reason of the erection of the new building adjoining, what works if any should be done with a view to cure such, if any, of the said flues as did emit smoke, and if any of these flues did continue to emit smoke after the completion of such works whether under the original agreement the building owner was liable to pay damages to the adjoining and if yes what damages should be paid. Chennell J. said—

> "It is no doubt a well-established principle of law that if mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside. . . . but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator . . .
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> I have some doubt whether the intention of the arbitrator in the case now before

us was not really to decide the question as one of fact rather than of law. But however that may be, it cannot affect our decision on this motion, for the arbitrator has undoubtedly given his decision in the terms of the submission, and if his decision involves an erroneous construction of the agreement, the same words were used in the submission, and therefore that question of law was referred to him. He has either given an erroneous decision on a specific question of law which was referred to him, or he has decided a question of fact. In either case, no grounds exist for setting aside the award."[20]

In the *Kelantan* case (supra) an indenture has been made between the Government of Kelantan and Duff Development by which the Government granted to the company certain portions of the State lands and certain mining rights as part consideration for the cancellation of a previous concession to the company and the deed contained a reference to arbitration. A dispute as to the construction of this deed was referred to an arbitrator who decided against the Government and a motion to set aside his award was refused by Russell J. and by the Court of Appeal. The questions referred to the arbitrator included: '(1) What, upon the true construction of the Deed of Cancellation, was the nature and extent of the obligation of the Government in regard to the making of the cart road? (2) Whether, upon the true construction of the Deed of Cancellation, the Government had entered into a covenant with the Company to construct the railway, and if so, in what terms, and what was the nature and extent of the obligation of the Government under such covenant.' Viscount Cave LC. said that this reference was a reference as to construction and continued that—

"If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the Deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose." . . .

"I come therefore to the conclusion that the award in the present case cannot be set aside only because the arbitrator may be thought to have been mistaken in his construction of the Deed of Cancellation, but only if it appears on the face of the award that he has proceeded on evidence which was inadmissible or on wrong principles of construction, or has otherwise been guilty of some error in law."[21]

Viscount Cave referred to the pleadings delivered in the arbitration for the purpose of deciding what questions of construction had been raised in the arbitration and referred also to the cases which had been delivered for the purposes of the appeal, as well as to the arbitration clause in the original deed which applied in terms to every dispute difference or

question which might arise between the parties touching the "construction, meaning, or effect" of the deed. Lord Parmoor said that—

> "It was argued by the counsel on behalf of the appellants that the question of the construction of the Deed had not been specifically referred to the arbitrator, although the construction of the Deed was absolutely necessary for the determination of the disputes which had been referred to him. In my opinion this contention is not maintainable. Whether, however, a question of law has been specifically submitted to arbitration, falls in each case to be determined on the terms of the particular submission. If the Court, for which the award is sought to be impeached, comes to the conclusion that the alleged error in law, even if it can be maintained, arises in the decision of a question of law directly submitted to the arbitrator for his decision then the principle stated by Channell J. in *re King & Duveen* applies, and the parties having chosen their tribunal, and not having successfully applied to the Court under either s.4, or s.19 of the *Arbitration Act*, 1889, are not in a position to question the award, or to claim to set it aside."[22]

The reasoning in *Kelantan* was applied shortly afterwards in *Latham v. Foster's Australian Fibres Ltd.*[23] A submission to the arbitration of an engineer in reference to a dispute over a contract for the supply of a machine set out various questions under the contract, some of which might depend upon its construction, having regard to technical matters of fact, and finally included a comprehensive submission of all other matters in difference between the parties arising out of or relating to the said contract or the subject-matter thereof as to the rights, duties or liabilities of either of the parties in connection with the premises. It was held that the submission committed finally to the arbitrator the ascertainment and interpretation of the contract. The case is interesting because it was a decision of Sir Owen Dixon at the very outset of his judicial career. In his judgment, Sir Owen said the following—

> "I have arrived at the conclusion that the reference in this case commits finally to the arbitrator the ascertainment and interpretation of the contract. The general reference of all matters arising out of or relating to the contract, and as to the rights duties or liabilities of either of the parties in connection with the premises, when considered with the allusion to penalty or liquidated damages in the previous question, seems to indicate a desire on the part of the parties to confide to the arbitrator's decision every matter of right to be determined by the true sense of their agreement. When it is remembered that the first two questions might wholly turn on the meaning of the contract, and that its interpretation almost entirely depends upon a proper understanding of the process, the business, and the machine to which the contract relates, matters with which an engineer such as the gentleman chosen to arbitrate is specially conversant, the conclusion that he was intended to decide matters of interpretation absolutely seems justified. The parties must have regarded such a question as one of the very things referred. Doubtless this inference is less plain that in *Kelantan*; but I think it is supported by the same reasoning as that adopted by their Lordships."[24]

The matter was next considered in Australia in *Melbourne Harbour Trust Commissioners v. Hancock*[25] where a contract between the appellants and the respondent, for the carrying out by the respondent of certain works in connection with the construction of a wharf, contained a clause providing that the appellants' engineer should have the power

of requiring from time to time the omission of any particular portion or portions of the work and of deducting the value of the omitted part from the amount of the contract and that the respondent should have no claim for loss damage or compensation on that account. Certain omissions having been required by the engineer and a dispute having arisen between the parties, a reference was made to an arbitrator of the question whether under the contract the omission could properly be made. The arbitrator by his award determined that the omission was not one that could properly be made under the contract and he stated in his reasons for his Award that the contract did not authorize the engineer to require an omission which fundamentally altered the contract, as he found that the particular omission did. The High Court applied *Kelantan*, and held that the construction of the contract was a matter committed to the arbitrator and the question whether the particular omission did fundamentally alter the nature of the contract being one for the arbitrator alone, that his award was not open to attack on the ground that in construing the contract he had proceeded upon wrong principles of construction or had otherwise been guilty of some error of law. Knox C.J. and Gavan Duffy J. said—

> "The inference which we draw from the insertion of this clause in the contract is that the parties intended to forego the right to submit for determination by a Court of law any dispute which might arise in carrying out the contract. They have, in effect, by the submission done no more than substitute an eminent lawyer for the engineer, being probably influenced in so doing by the nature of the questions submitted."[26]

Isaacs J. expressed the rule in his own words as follows—

> "I would say that as to every question of fact and of law necessarily included within the inner area of the submission, and therefore expressly confided to the judgment of the arbitrator, every conclusion of the arbitrator is final, however plainly it appears on the face of the award; but as to any matter of law not so included, however necessary it may be as an approach to the inner area, any error appearing on the face of the award is open to the consideration of the Court, because that has not been confided to the arbitrator."[27]

Rich J. said

> "I think that the parties by the submission intended to oust the jurisdiction of the courts. They submitted the specific question which was in controversy between them to the arbitrator as one containing matters of law and intepretation. Their agreement to abide by his decision on such question was intended to commit finally to him the ascertainment and interpretation of the contract".[28]

Starke, J. said that the question which had been referred to the arbitrator might be found either in the submission itself, or that the course of the arbitration might show that some question of law had been committed to the arbitrator for decision.

There is obviously an important distinction between the case where a dispute is referred to an arbitrator in the decision of which a question

of law becomes material as opposed to cases in which a specific question of law has been referred to the arbitrator for decision. In the former case the Court could interfere if and when any error of law appeared on the face of the award. This distinction was critical in *F. R. Absalom Limited v. Great Western (London) Garden Village Society Ltd.*[29] The case concerned a building contract under which the contractor was to be entitled under certificates to be issued by the architect to the contractor to payment by the employer from time to time by instalments when in the architect's opinion actual work had been executed to a particular value. The whole dispute between the parties was as to the amount due to the contractor in respect of the value of work done, the contractor claiming that the architect should have given certificates for a higher amount than had in fact been certified and the employer asserting that the certificates actually given were for an excessive amount and that the contractor had been overpaid. It was held that no specific question of construction had been referred and that insofar as questions of law had arisen such questions were involved incidentally or arose necessarily in the decision of a wider issue. Lord Wright contrasted with cases of this kind—

> "the special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute."[30]

Lord Wright clearly did not mean that if the issues referred to the arbitrator included questions of fact, there could not be a point of law specifically referred; because his Lordship referred with approval to the decision in *re King and Duveen* (supra) and said that—

> "There is here no submission of any specific question of law as such and as a specific question of law; no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission as to the true effect of the contract on the basis of undisputed facts, as in the *Kelantan* case, or as a separate and distinct matter on facts to be separately assumed or found, as in *re King and Duveen*. There is no reason to think that the parties had any specific questions of law in mind at all. What was wanted was a practical decision on the disputed issues. Even if questions of law were bound to emerge, the parties may never have envisaged them in going to arbitration."[31]

Lord Warrington of Clyffe referred to the pleadings in the arbitration for the purpose of ascertaining whether any specific question of law was in dispute and had been referred to the arbitrator for decision. Lord Russell of Killowen said that to find what exactly had been referred one ought to look at the notice which one party was to give to the other and, in the absence of that notice stated that it had been agreed that the terms of the reference were to be ascertained from the recitals contained in the

award. Lord Wright looked for this purpose at the pleadings in the arbitration.

In *Manufacturers' Mutual Insurance Limited v. Queensland Government Railways and Anor.*[32] the High Court considered a policy of insurance covering loss or damage arising out of or in connection with a contract for the supply and erection of a railway bridge, which excluded loss or damage arising from faulty design. The insured sustained loss when in an unprecedented flood certain piers collapsed due to the inadequacy of their design to withstand the forces then experienced. The question submitted to the arbitrator was: "are the insured entitled to be indemnified by the insurer in respect of the loss and damage sustained . . ." The arbitrator held that the design of the piers contained no element of personal failure or non-compliance with the standards to be expected of the designing engineers and awarded that the appellants were entitled to be indemnified. The High Court held that the basis of the submission was not to refer the construction of the policy as a specific question of law to the arbitrator but was that the policy should be construed in accordance with law so that an error in construction appearing from an award would be an error of law upon its face which would entitle the court to intervene. Barwick C.J., McTiernan, Kitto and Menzies J.J. said—

> "The submission to arbitration was, as has already appeared, in general terms, viz.: 'Are the insured entitled to indemnity?' Such a submission, although it no doubt involves the arbitrator in construing the policy, does not refer the construction of the policy to him as a specific question of law. The basis of a general submission, such as there was here, is that the policy will be construed by the arbitrator in accordance with law so that an error in construction appearing from the award is an error of law upon the face of the award."[33]

On the other hand in *N.S.W. Rutile Mining Company Pty. Ltd. v. Hartford Fire Insurance*[34] there was a submission to arbitration of a dispute between an insured and an insurer containing a provision that the reasons and findings of the trial judge in proceedings between the insured and the suppliers of a mining machine were to be treated as proof of the matters therein contained, but either party was to be at liberty to call such evidence as it might be advised to supplement such reasons and findings. A question was submitted to the arbitrator, whether within the meaning of the insurance policy in respect of the insured's separation plant the insured suffered destruction of or damage to the property insured due to, inter alia, capsizing, foundering and/or sinking from any accidental cause. The High Court held that this was the submission of a specific question of law, namely the construction of the relevant clause of the policy, notwithstanding that the arbitrator might have had to find some facts or to take some evidence about some facts in deciding his answer to the question. Barwick C.J. said that the nature of the question remained the same and "it is the nature of the question which determines the matter".

After saying that the form of the question in the present submission was in high contrast with the form of the question submitted to the arbitrator in *Manufacturers Mutual Insurance* (supra) Barwick C.J. continued—

> "Here the question is asked of the arbitrator on the hypothesis that there has been a capsizing of a separator. The question is whether it was accidental according to the terms of the policy. On its proper construction did the parties by their submission seek the decision of the arbitrator on the meaning of the contract? I think they did.
>
> I think the use of the word 'specific' in this area of discussion is useful to indicate that the decision on the point of law is sought by the parties by the question submitted to the arbitrator. It contrasts the case to which I have referred where the question asked is asked on the footing of the proper meaning of the contract and not on the footing of the arbitrator's decision as to the meaning of the contract. It neither means, in my opinion, that in all cases the question of law must be isolated in the submission nor that it must be isolated as a separate question. To my mind the right principle is, if upon the proper construction of the submission it is concluded that the parties by the language they have used have asked the arbitrator to decide for them a question of law, the resultant answer may not be set aside simply because the arbitrator has decided the question wrongly."[35]

In *Attorney-General v. Offshore Mining Co. Ltd.*[36] the Court of Appeal in New Zealand held that in determining whether a specific question of law had been referred it was entitled to consider all the documents placed before the independent expert at or before the commencement of the hearing. The conclusion reached was that what had been referred or submitted was solely a question of the construction of a contract, the case in reality and substance being one in which a specific question of law had been submitted. Cooke J. said—

> "In deciding on which side of the line a given case falls it must be essential to identify accurately the dispute that the parties referred to the arbitrator. The actual language of a reference will be important but a purely literal approach could not be enough. The Court must surely look for the reality and substance of the reference agreed on by the parties. I do not think that the use of such words as 'in express terms' and 'as such' by Lord Wright in his speech in *Absalom* at p.615 can have been meant to suggest otherwise. At the same time, if at the outset the parties have referred a dispute covering a number of issues to an arbitrator in general terms, admissions of fact during the hearing should not normally, it seems to me be treated as converting the reference to a specific reference of a question of law—even although in the end the dispute may reduce to construction. One would still have to be satisfied that there was an agreement to alter the reference itself. Otherwise counsel making a sensible concession on fact might unwittingly deprive a client of ordinary remedies in law."[37]

The question arose most recently in Victoria in *Oil Basins Limited v. BHP Petroleum and Ors.*[38] in which the Full Court of Victoria was invited to set aside the interim award of arbitrators made in August 1987 relating to a dispute concerning the calculation of amounts of royalties due and payable under a 1960 agreement relating to hydrocarbons produced in Bass Strait. In a joint judgment the Full Court said that—

> "The preliminary question which sometimes arises and has arisen in the present case is: What was referred to arbitration? This inevitably raises the question: How does

the Court ascertain *what* was referred, so as to enable the Court to characterise it either as a question of law specifically referred or as a general reference, within the meaning of the rule? In most cases there is no difficulty in ascertaining what was referred because the parties usually agree in a written form of reference the nature of which, in the context of the dispute, determines whether what was referred is a question of law as such, a general question of mixed law and fact or simply a question of fact. In such a case it is not necessary to go beyond that reference unless the further question arises whether the parties expressly or by conduct agreed to alter their reference by either limiting or extending its nature. Such an enquiry may necessitate an examination of the parties' pleadings and of their conduct in the course of the arbitration itself."

Oil Basins was a most complex arbitration which was heard for six weeks before three arbitrators led by Lord Roskill. The matter was then brought to the courts and referred by a single judge into the Full Court. In the Full Court argument lasted twelve days, five of which were devoted to discussion of whether specific questions of law had been referred. Ultimately the Court concluded that—

"the issues of fact are . . . so inextricably interwoven with the questions of construction that it is not possible to say that the facts are incidental to or subsidiary to the questions of construction. The one must depend on the other."

No error of law was, however, found on the face of the award.

CONCLUSION

The difficulties that may surround the investigation of whether specific questions of law have been referred make it most unlikely that a court, considering its discretion under s.38, would readily embark on the task. The fact that five days could be given over to argument on this issue in *Oil Basins* seems exactly the sort of consideration to which Lord Diplock was referring in *The Antaios* and a situation which should, above all else, be avoided in an application for leave to appeal. But parties do, in most cases (as the Full Court in *Oil Basins* said) make clear what they are referring to arbitration, and in some cases explicitly refer a question of law to a lawyer. In that situation at least there would seem to be some scope for an argument to be put to a judge that by referring a specific question of law the parties have chosen their tribunal and intended to commit finally to that person the resolution of that dispute. And if a judge accepted this argument as one matter relevant in refusing leave, even though a general question of importance was involved, it might be thought that the purposive nature of the legislation had been given precise application.

FOOTNOTES

1. Text of Sir John Donaldson's speech reproduced in the Law Society Gazette, May 1983 at pp.261-2
2. *Italmare Shipping Company v. Ocean Tanker Co. Inc.* [1982] 1 WLR 158
3. [1891] AC 210

4. [1982] AC 724
5. At 556
6. [1985] AC 191, 199
7. Unreported, 30 October 1986
8. (1986) 6 NSWLR 327, 333
9. Unreported, 4 March 1987
10. Unreported, 19 May 1987
11. [1987] VR 235
12. 4th ed. (1980) 311-3
13. *R. v. Port of London Authority, ex parte Kynoch* [1919] 1 KB 176, 184
14. (1982) 43 ALR 282, 301
15. (1979) 53 ALJR 552
16. *Government of Kelantan v. Duff Development Co. Ltd.* [1923] AC 395. The rule is referred to for the purposes of this paper as the Kelantan rule
17. *Kelantan* [1923] AC at 409
18. (1857) 3 CB (NS) 189 at 202
19. [1913] 2 KB 32
20. At 35-6
21. [1923] AC at 409-410, 411
22. At 418
23. [1926] VLR 427
24. At 431-2
25. (1927) 39 CLR 570
26. At 582
27. At 586
28. At 590
29. [1933] AC 592
31. AT 615
30. AT 616
32. (1968) 118 CLR 314
33. At 320
34. (1972) 46 ALJR 391
35. At 392
36. [1983] NZLR 418
37. At 422
38. Unreported, 27 May 1988