COURT REVIEW OF AWARDS— AN AUSTRALIAN PERSPECTIVE

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DIVERGENT APPROACHES TO THE ROLE OF COURTS IN REVIEWING AWARDS

THE broad policy considerations underlying the question of how far national courts should go in reviewing arbitral awards on their merits have been illuminated by many recognised authorities in recent years. I refer in particular to Lord Justice Kerr,[1] Mr Justice Rogers[2] and Professor Schmitthoff[3]. These three learned contributors have laid bare the problem and presented it for appraisal by the legal institutions, legislative and judicial, of individual nations. For present purposes it is sufficient to acknowledge the persuasive force of Professor Gaillard's assertion that:

> "Arbitration cannot develop if national courts heavily intervene in the arbitral process, as was the case until recently under English law, or if national courts control the substance of the law applied by the arbitrators other than to ensure compliance with the minimum requirements of international public policy. These outdated principles that have impeded arbitration have been eliminated by the (UNCITRAL) Model Law."[4]

In Australia we have, until very recently, been little more than spectators of the process of the comparative evaluation of the demand for a non-interventionist approach by national courts, on the one hand, and, on the other hand, the recognition that nations with well established, comprehensive and widely respected court systems are apprehensive about their courts withdrawing totally from an appellate authority over the merits of awards. The judicial policy that gave rise in 1922 to Scrutton LJ's famous dictum "there must be no Alsatia in England where the King's writ does not run"[5] is by no means obsolete; nor can it be denied a measure of continuing justification.

It might, perhaps, be valid to speculate that the origin of the divergence thrown up by this comparative evaluation is to be found in the differing experiences of the national practitioners in arbitration and in the courts. In civil law countries arbitrators and judges tend to follow separate career paths. Hence those active in each field are conditioned by experience of their own mechanism, be it arbitral or curial. The mechanisms function in parallel with only a limited cross-over relationship.

By way of contrast, in common law countries, of which England is the premier example, Lord Justice Kerr makes the telling point:

> "Our judges have been brought up in the context of the arbitral system, and many

of them have been involved in it as closely as in litigation. There is no jealousy or opposition between the two systems. Our practice of appointing judges from experienced practitioners in middle life is part of the background which has led to the intense development of arbitration in this country, and this in turn has made an immense jurisprudential and practical contribution to our law for the general benefit of those who resort to it."[6]

IMMINENCE IN AUSTRALIA OF THE UNCITRAL MODEL LAW; CONSEQUENTIAL CONSIDERATIONS.

In Australia, we shall shortly be enacting the UNCITRAL Model Law strictly, I believe and hope, in terms of the Model and without any locally introduced qualifications or modifications. The die will then be decisively cast in favour of a non-interventionist approach by the courts in the field of international commercial arbitration. Judicial review will be tightly constricted within the boundaries of Article 34 of the Model Law. I quote Article 34 in full in footnote 7.

There are two consequential considerations which will arise out of adoption of the Model Law. The first of these is that international commercial arbitration will be lifted out of the current matrix of the Commercial Arbitration Acts of the various States. These lastmentioned Acts will continue to govern domestic arbitrations. It seems almost inevitable that the law for domestic arbitrations will require adjustment to accommodate any overlapping with the UNCITRAL Model Law. As I indicate in Part VII of this paper, there already exists a clear need for some statutory clarification of the State laws. This consequential legislative activity will serve to re-activate the awareness of judges and parliamentarians of the developments in arbitration elsewhere in the world. The result will be a reinforcement of the positive policy shift in favour of arbitration generally both international and domestic. This in turn will have some effect on the approach made by courts in the discharge of their limited functions under the Model Law in relation to international arbitrations, as well, of course, as in the discharge of their wider functions in relation to domestic arbitration. We will thus travel yet further down the road towards the elimination of any residual mistrust of the arbitral process.

The second consequential consideration arising out of the enactment of the Model Law relates to the speed and efficiency with which it can be given life and operation. In this regard Dr Hermann has pointed out:

"adoption of legislation based on the Model Law provides only the statutory part of the necessary hospitable environment. It should be, and in practice often is, accompanied by any needed organisational measures improving the infrastructure and by programmes of training and information which should help arbitrators, lawyers, judges and, in particular, businessmen to better understand and appreciate the arbitral process."[8]

I am confident, indeed I may say enthusiastically confident, that this

agenda set out by Dr Hermann will be implemented. The existing and potential economic realities of trade and commerce throughout the Pacific region of the world will give rise to a major campaign to ensure that the Model Law will be given vitality and utility in this nation.

AUSTRALIAN ATTITUDES TO ARBITRATION IN THE PAST

It will, I believe, assist the process of sloughing off outdated mistrust, with its attendant interventionist overtone, to recount something of the background of our current perceptions in this country—the Australian perspective, to use the title of this paper—upon the role of the courts in relation to arbitration with particular reference to the review of awards.

Whilst we are a common law country in the English tradition, our professional experience has been markedly different from that of our English cousins as described by Lord Justice Kerr in the passage I have quoted.[6] Australia does not have a history of being the hub of international commerce—a clearing house for the financial, legal and other concomitants of world trade. That may be our destiny in the future in the Pacific region of the world—a destiny I hope to see fulfilled; but it has not been our past.

As a very broad generalisation it can be said that prior to World War II there was very little domestic arbitration, and no international arbitration, conducted in Australia. Arbitrations were principally confined to building disputes and partnership disputes. They were carried out by experienced builders, architects and engineers and, to a minimal extent, by members of the Bar.

Deriving from our English inheritance we in New South Wales, for example, had in our statute book an Arbitration Act passed in 1902. This was a simple statute that followed substantially the then current legislation in England—the Arbitration Act of 1889. It included provision for the stating of a special case for the opinion of the Supreme Court and recourse to the Court was available in respect of any error appearing on the face of the award.

The procedure of arbitration was viewed by lawyers and by the courts with a measure of distrust. The whole process was very much a poor relation method of resolving disputes. Lord Justice Kerr has, I believe, enabled us to perceive the reason: the lawyers and judges of the day had had but little professional contact with arbitration. We were not a centre of trade, and commercial arbitration was a foreign concept.

THE CLIMATE OF REFORM IN AUSTRALIA; THE UNIFORM COMMERCIAL ARBITRATION ACT, 1984

In the immediate post World War II years the pattern continued along similar lines. To their eternal credit, it was the arbitrators of this country, not the lawyers or the legislature, who recognised the need to improve the quality of Australian arbitration and to extend the range of service

provided by it. This gave rise in due course to the founding in 1975 of the Institute of Arbitrators Australia. It is neither exaggeration nor idle flattery of our host Institute to recognise that it has played a major part in establishing in this country arbitration services that can fairly be described as wide-ranging and highly professional.

Australia is geographically remote from the centres of world trade and commerce in the Northern hemisphere. This no doubt contributed to the lateness of arbitration coming on to the scene out here in comparison with its advanced state of development in England and Europe. The remoteness of earlier years has now been replaced by recognition that Australia is a part, a potentially focal part, of a rapidly developing major trading region of the world—the Pacific. There has also developed a realisation of the world-wide policy shift in favour of arbitration and an awareness that properly structured professional arbitration can play an invaluable role in the resolution of disputes.

In the United States the policy shift is documented in a series of decisions in the U.S. Supreme Court. I shall not encumber the text of this paper with particulars. I note the shift and some of the relevant cases in footnote 9.

In civil law countries the path of recent history is traced by Dr Yves Derains in his paper at the ICCA Tokyo Conference 1988:

> "This parallel justice (i.e. arbitration) has long been mistrusted by national legislatures and the courts which used to view it as a dangerous rival.
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> This situation has changed since arbitration became the normal method for resolving international commercial disputes. The legislatures and courts of the civil law countries have replaced the attitude of mistrust of arbitration with a legislative and case law policy tending to encourage its development. This action has been exercised in five main areas: effectiveness of the arbitration agreement, freedom of the parties and arbitrators in procedural matters, assistance to arbitral tribunals in setting up and conducting arbitrations, reduction in means of recourse against awards and facilitation of their enforcement.
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> This general development has not occurred at the same speed everywhere, nor along the same lines. It has hardly started in some countries and is virtually completed in others. Some countries have given arbitration in general an acceptable status, whilst others have favoured international arbitration by endowing it with rules specially adapted to its needs."

The 1958 New York Convention on Enforcement gave some impetus towards developing our awareness in Australia of the international field. Australian legislation carrying it into effect was passed in 1974. Thereafter, stimulated by the debate in England and the passing in that country of the Arbitration Act 1979, we turned our attention to modernising our own legislation governing arbitrations.

The federal structure of Australia presents some difficulties in achieving uniformity throughout the whole nation and this has undoubtedly been a significant handicap to us. The Commonwealth's constitutional power to legislate throughout Australia in respect of arbitration is to be found

in, and thus is confined to, the specific clauses of s.51 of the Constitution. Those of principal present relevance are:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—
> (i) Trade and commerce with other countries,
> and among the States:—
> . . . . . .
> (xxix) External affairs:"

These powers are, plainly enough, readily available to enable the Commonwealth to legislation for international and interstate commercial arbitration. They do not, however, extend to permit legislation for the arbitration of disputes, whether commercial or otherwise, that do not involve any international or interstate element. Domestic arbitration in this sense is the province of the State legislatures.

With a praiseworthy intention of achieving uniformity, there were consultations between all of the States and the Commonwealth with a view to agreeing upon a text which could be precisely carried into effect by identical legislation in each of the six States. Unfortunately, as we are prone to do in this Federation, this plan was not faithfully carried through. There are minor textual differences in the various Acts passed by five of the States; and Queensland has not passed it at all. For present purposes, however, it will suffice to refer to the N.S.W. Commercial Arbitration Act 1984. It includes a section (s.38) taken from the English Act of 1979 under the marginal heading "Judicial review of awards". I quote it in full in footnote 10. The court is given jurisdiction, subject to the grant of leave, to entertain an appeal on any question of law arising out of an award. There are some qualifications I need not mention; they are apparent in the terms of the section. What is important for the purposes of this paper is that a measure of judicial review of awards is permitted by s.38.

JUDICIAL REVIEW; THE NEMA GUIDELINES; VICTORIAN AND N.S.W. COURTS DISAGREE

Before referring to the unfortunate judicial conflict that has emerged in applying this section, I should emphasise that, although s.38 applies on its face to all arbitrations, domestic and international, there is wide provision to exclude judicial review in international arbitrations and limited provision to exclude it in domestic arbitrations if so agreed between the parties (s.40).

The courts in England, informed by the experience of which Lord Justice Kerr wrote[6], have adopted restrictive principles to be applied in granting leave—the "Nema guidelines".[11] Lord Roskill in 1984 went out of his way to recall the undesirable implications of the liberal availability of judicial review of awards prior to the 1979 legislation:

> "The resultant abuse was notorious. Hence the demand for the abolition of the special case successfully accomplished in 1979. But if the restricted appellate system substituted for the special case and the equally outdated motion to set aside an award for error of law on its face, is to be operated in such a way as to make appeals to the High Court, and even beyond the High Court, readily available, not only are the worst features of the system now abolished restored but the additional, albeit not unrestricted autonomy, of arbitral tribunals which the Act of 1979 was designed to establish, seriously hampered."[12]

I turn to the Australian scene. In Victoria, although there has been some wavering, it would seem that the weight of authority favours the adoption of the Nema guidelines.[13] In New South Wales, however, a different view has been taken. The Court of Appeal of the Supreme Court has declined to apply the Nema guidelines:

> "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 the other requirements to which his Lordship refers. It is a discretion to be exercised after considering all the circumstances of the case."[14]

This settles the law for N.S.W., and later in 1986 Smart J took the same approach.[15]

I do not presume to enter the controversy by offering an extra-judicial view of my own. It is plain enough, however, that the conflict must be resolved. Preferably this should be done by the legislature. This brings me to the concluding portion of this paper.

UNCITRAL MODEL LAW WILL RESOLVE DISAGREEMENT FOR INTERNATIONAL ARBITRATION

The imminent enactment of the UNCITRAL Model Law will effectively free all international commercial arbitration awards from review on the merits by the courts of this nation. Our Australian perspective will thereafter be clear. The approach by our courts will be, as prescribed by the Model Law, non-interventionist. Moreover it can be confidently predicted that, in embracing that new approach, the courts will recognise, and where necessary implement, the policy shift in favour of arbitration that has been recognised in the United States[8] and elsewhere amongst commercially active nations. We shall then have fully implemented the resolution of the United Nations General Assembly in plenary session on 11 December 1985 recommending that "all states give due consideration to the Model Law on International Commerical Arbitration in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."

LEGISLATION REQUIRED TO RESOLVE DISAGREEMENT FOR DOMESTIC ARBITRATION

So much for the Australian perspective on judicial review in international commercial arbitration. But what of domestic arbitration? How is the Victoria-N.S.W. conflict likely to be resolved?

An informed report has recommended in February 1988 that the Nema guidelines should be incorporated by each State in s.38(5) of its Commerical Arbitration Act.[16] But is this likely to be accomplished? And, in any event, is it the best solution in the context of the increasing professionalism of arbitrators and consequent enhancement of the quality of the arbitral mechanism? There is much to be said for extending immunity from review even further—for example by giving the parties an unqualified right to exclude judicial review under s.38. This would involve an amendment of s.40(6).[17] There seems no reason in principle or in policy not to permit this. Lord Diplock has made the point that:

> "Exclusion agreements, which oust the statutory jurisdiction of the High Court to supervise the way in which arbitrators apply the law in reaching their decisions in individual cases, are recognised as being no longer contrary to public policy".[11]

An unqualified right to exclude review in domestic arbitrations was not included in the recommendation of the February 1988 report, but I commend it for consideration.

Regrettable in the short term though the Victoria-N.S.W. conflict may be, it undoubtedly will serve the purpose of attracting prompt remedial measures. It is no credit to our legislatures that the terms of the "uniform" Commercial Arbitration Act differ between the two States. For example the N.S.W. Act envisages the possibility of an arbitrator determining a question "as amiable compositeur or ex aequo et bono"; the Victorian equivalent section uses the terminology "by reference to considerations of general justice and fairness".[18] They probably mean the same thing. But why confuse the issue with different wording? The conflicting views on the Nema guidelines, however, present a far more serious divergence, a divergence that demands speedy resolution in the interests of uniformity in the law on this topic throughout Australia. It is destabilising and unacceptable in a single nation that parties to an arbitration agreement can be subjected to differing approaches to appellate interference with their award according to whether the question arises in N.S.W. or Victoria.

SUMMARY

In conclusion I summarise the points I have been seeking to make. Arbitration, both international and domestic, has come of age in Australia with the passing of uniform Commercial Arbitration Acts in five of the six States in 1984. The distrust of earlier years has almost been dissipated and replaced by a clear policy favouring arbitration. Judicial review of awards is more (Victoria) or less (N.S.W.) fettered under the 1984 Act.

For international commercial arbitration this uncertainty is about to be resolved when review on the merits is swept away by the passing of the UNCITRAL Model Law with its tight delineation of the role of national courts. This will hopefully be followed by implementing Dr Hermann's agenda.[8] Judicial review of awards in domestic arbitrations will continue to be governed by State legislation and judicial decision. Urgent legislative action is necessary here to remove divergent approaches that have already emerged. At least the Nema guidelines should be adopted and possibly amendment could go somewhat further (cf s.40(6)).

FOOTNOTES

1. Lord Justice Kerr, 1984 Alexander Lecture within the Chartered Institute of Arbitrators, London.
2. Mr Justice Rogers, Address at the Institute of Arbitrators Australia 1986 Conference in Hong Kong, The Arbitrator, May 1987, p. 5.
3. Professor Schmitthoff, "Finality of Arbitral Awards and Judicial Review" in Contemporary Problems in International Arbitration, p. 230.
4. Dr. E. Gaillard, "The UNCITRAL Model Law" ICSID Review FILJ, 1987, p. 427.
5. Czarnikow v. Roth Schmidt (1922) 2 K.B. 478 at 491.
6. Lord Justice Kerr, op. cit., p. 14.
7. "Article 34. Application for setting aside as exclusive recourse against arbitral award.
   (1) Recourse to a court against an arbitral award made [in the territory of this State] [under this Law] may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
   (2) An arbitral award may be set aside by the Court specified in article 6 only if:
   (a) the party making the application furnishes proof that:
   (i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
   (ii) the party making the application was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or
   (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
   (b) the Court finds that:
   (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award or any decision contained therein is in conflict with the public policy of this state.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

8. Professor G. Herrmann "Overcoming Regional Differences", a paper delivered at the ICCA Tokyo Conference, June 1988, p.13.
9. As recently as June 1987 O'Connor J., delivering the judgment of the U.S. Supreme Court observed that "the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time" (Shearson/American Express v. McMahon 96 LED 2d 185 at 189). This case attracted the encomium (no doubt understandable) from the AAA: "The impact of this decision is to strongly support arbitration as a fair and effective dispute resolution process" (Arbitration Times, Spring 1987, p. 8). In the same month the Court struck down a Californian statute purporting to vacate a class of private arbitration agreements on the ground that the statute conflicted with Federal legislation favouring arbitration (Perry v. Thomas 96 LED 2d 426). Some thirteen years earlier the U.S. Supreme Court had noted with approval that "The Courts of Appeal have consistently concluded that questions or arbitrability must be addressed with a healthy regard for the Federal policy favouring arbitration" (Scherk v Alberto Culverco 714 U.S. 506 at 519). Reference should also be made to Moses H. Cove Memorial Hospital v Mercury Construction Corp. 460 US 1 at 24 (1983) and to Mitsubishi Motors v Soler Chrysler-Plymouth, 87 LED 2d 444 (1985).
10. "S.38. Judicial review of awards. (1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jursidiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under subsection (2) the Supreme Court may by order—

(a) confirm, vary or set aside the award; or

(b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under subsection (2) may be brought by any of the parties to the arbitration agreement—

(a) with the consent of all the other parties to the arbitration agreement; or

(b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court—

(a) shall not grant leave under subsection (4)(b) unless it 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; and

(b) may make any leave which it grants under subsection (4)(b) conditional upon the applicant for that leave complying with such conditions as it considers appropriate.

(6) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire."

11. Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (1982) A.C. 724.
12. Antaios Companies Naviera SA v Salem (The Antaios) (1985) A.C. 191 at 208-209. Aden Refinery Co. Ltd. v Ugland Management Co. (1987) Q.B. 650.
13. In Zafir v Papaefstathiou, (Supreme Court of Victoria unreported 30.10.86) Nathan J. applied the Nema guidelines. In Thompson v Community Park Developments (Supreme Court of Victoria unreported 4.3.87) Vincent J. was persuaded to follow a NSW approach rejecting the Nema guidelines. In Karen Lee Nominees Pty Ltd v Robert Salzer Constructions Pty Ltd (Supreme Court of Victoria unreported 19.5.87) Crockett J. followed Zafir and applied the Nema guidelines. In Costain Australia Ltd v Frederick W. Neilson Pty Ltd (Supreme Court of Victoria unreported 21.8.87) O'Bryan J. also preferred to follow Zafir and applied the Nema guidelines; in refusing leave to appeal on jurisdictional grounds (1988 V.R. 235), the Full Court expressly refrained from indicating a view one way or the other.
14. Qantas Airways v Joseland & Gilling (1986) 6 NSWLR 327 at 333.
15. Abignano v Electricity Commission (Supreme Court of NSW unreported, 4.7.86).
16. Report to Attorney General of the Working Group on the Operation of Uniform Commercial Arbitration Legislation in Australia, February 1988.
17. "40 (6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises."
18. Commercial Arbitration Acts, 1984 of NSW and Victoria, s.22.