THE ARBITRATOR'S JURISDICTION UNDER A DOMESTIC ARBITRATION AGREEMENT

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1. Present liberal judicial trends.

The present judicial climate in England, the United States of America, Australia and many other jurisdictions tends to encourage arbitration as a dispute resolution mechanism both on a national and international level.

Examples of judicial pronouncements evidencing the present judicial climate towards arbitrations in Australia, within the context of an application for a stay of curial proceedings, the principles being nevertheless relevant to the court's attitude to arbitrator jurisdiction, are:

Dupal v Packett & Son Construction Pty Ltd (unreported), Supreme Court of New South Wales, 21 July, 1983.

Rogers J stated:-

> "I yield to no-one in my view that arbitrations are a useful weapon in dispute resolutions. A necessary corollary of that proposition is that courts should be reluctant in the extreme to interfere with the conduct of arbitrations... Furthermore, in committing oneself to arbitration, one commits oneself to a decision-maker who hopefully will be right both in fact and in law".

Qantas Airways Ltd v Dillingham Corp (1985) 4 NSWLR 113 at 118.

Rogers J stated:-

> "that, to some extent at any rate, the objections so raised [to a stay] need to be reconsidered in the light of current thinking. It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created."

Rogers J found the United States case law (particularly in *Witter Reynolds Inc v Byrd* 470 US 213 at 221 (1985) and *Mitsubishi Motors Corporations v Soler Chrysler-Plymouth Inc* 473 US 614 (1985)) persuasive, and as a consequence it is necessary to refer to some of these decisions.

In *Mitsubishi*, the plaintiff-respondent argued that because the claim was based on anti-trust laws, it was inappropriate for arbitration and a stay should not be granted. In holding for the defendant, the court averred that the contention that a claim was not arbitrable because it was based on a statutory right, was erroneous and contravened congressional policy of enforcing arbitral agreements.

A similar approach was taken in *Scherk v Alberto-Culver* Co 471 US 506

(1974), which involved the *Securities Exchange Act* 1934 (USA). The court held that the invalidation of the arbitration clause would not only allow the respondent to go back on a solemn promise, but would reflect a "parochial concept that all disputes must be resolved under [USA] laws and in [USA] courts".

This principle was extended to domestic arbitrations by the United States Supreme Court in *Shearson/American Express Inc v McMahon* 482 US 220 (1987), where the issues were a claim brought pursuant to the *Racketeer Influence & Corrupt Organisations Act* (18 USCS para 1962cc) and the *Securities Exchange Act* 1934. Justice O'Connor writing for the court held:

> "The *Arbitration Act* establishes a federal policy favouring arbitration, requiring that the courts vigorously enforce arbitration agreements this duty is not diminished when a party bound by an agreement raises a claim found on statutory rights".

This tendancy in the United States is also evident in *Rodriguez de Quijas v Shearson/American Express Inc* (1989) 490 US 477; 109 St C 1917 where the erosion of "the old judicial hostility towards arbitration" was intensified and the court stressed that questions of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration. These sentences are also forcibly endorsed by Judge John T Nixon in *Tennessee Imports Inc v Pier Paulo Filippi and Prix Italia SRL* (1990) *5 Mealey's International Arbitration Report* E-1 at E-7, with particular reference to an application for compulsory reference (stay) under the provisions of the New York Convention.

There has been a similar liberalisation in judicial attitudes towards the issue of arbitrability in Australia as well. This aspect is discussed below more fully under the heading of 'Separability'. There is a clear correlation between separability, arbitrability and certain aspects concerning the jurisdiction of arbitral tribunals. This will become more apparent from the discussions below.

2. Instances where lack of jurisdiction arises.

A lack of jurisdiction can arise where:

(i) The subject matter of the dispute is not capable of being determined by arbitration (non-arbitrability);
(ii) There is no binding agreement to arbitrate;
(iii) The dispute falls outside the scope of the arbitration agreement (breadth);
(iv) The arbitration agreement is no longer in force (length);
(v) The arbitrator is not validly appointed: a lack of qualifications falls under this heading;
(vi) The arbitrator applies the wrong system of law;
(vii) The contract appointing the arbitrator is illegal from its inception: *Prodexport State Co for Foreign Trade v ED & F Man Ltd* [1973] 1 All ER 355 (subject to the principle of separability referred to below);

(viii) The contract was originally valid but subsequent illegality intervenes: *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948;

(ix) The prescribed formalities have not been compiled with: *Andrews v Mitchell* [1905] AC 78, where a member of a friendly society was summarily expelled by an arbitration committee without written notice of any charge against him having been provided, as stipulated in the rules. It was held that the committee had no jurisdiction to entertain the charge and the court was entitled to intervene to declare the decision null and void.

A useful categorisation of the "trichotomy" of jurisdictional disputes in arbitration matters has been given by the United States Supreme Court in *AT & T Technologies Inc v Communications Workers of America* 475 US 643 (1986):-

(i) First, thee are disputes over formation, ie whether or not there is a binding agreement to arbitrate. The Supreme Court held that this issue was for the courts and not for the arbitrator to determine.

(ii) Secondly, disputes arise as to whether a certain issue falls within the scope of the arbitration agreement. This, it was held, is generally for the courts to determine but provided the arbitration agreement is sufficiently wide, there is nothing in principle preventing the arbitrator determining the issue.

(iii) Thirdly, disputes may arise as to the "length" of the arbitration agreement, ie whether the arbitration agreement is still in existence when a dispute arises. In that regard, the Supreme Court held:-

> "if we allow such questions to be arbitrated, then the willingness of parties to enter into arbitration agreements may be drastically reduced out of fear that arbitrators will tend to have an over-expansive view of their own jurisdiction. As to questions of length, however, the parties have it within their power to specify the date and hour at which their obligation to arbitrate is to end... Where they have done so, there is nothing fairly arguable to refer to arbitration. Where they have not, the court performs its office of interpretation when it infers that they intended for the arbitrator to resolve the ambiguity".

Further, the court established "general rules" of construction which would apply in determining the length of an arbitration agreement. If the arbitration clause is narrow, with reference to specific types of disputes, there will be a presumption that the parties did not intend that disputes over the contract duration should be referred to arbitration. Where there is a broader arbitration clause, such as one providing that disputes "arising under" or "concerning" the contract are to be arbitrated, there will be a presumption that disputes which occur after determination or the expiration date should be submitted.

3. When questions of jurisdiction arise.

The question of the jurisdiction of an arbitral tribunal may arise at the stage when:-

(i) An application is made for a stay of curial proceedings under

Section 52(3) of the *Commercial Arbitration Act;*

(ii) An injunction is sought restraining the arbitral tribunal from proceeding with an arbitration on the ground of lack of jurisdiction;

(iii) The enforcement of an arbitral award is sought.

It is interesting to note that in *Bulk Chartering & Consultants Australia Pty. Ltd v T & T Metal Trading Pty Ltd ("The Kranogrosk")* (1993) 114 ALR 189 per Handley & Sheller, J.J.A. with Kirby, P. dissenting it was held that once an award had been made it was then too late to challenge the jurisdiction of the arbitrator on the ground that the arbitration clause was in conflict with the provisions of section 9(1) of the *Sea Carriage of Goods of Act,* 1924 Cth. See the judgment per Sheller, J.A. at 212. The making of the award "should be regarded as being of the character of an accord and satisfaction by substituted agreement and imposing a new obligation... which sprang from the act of the arbitrator in making it".

This is a fascinating proposition which obviously requires substantial further thought. If his Honour is correct, it would mean that it would be too late to challenge the jurisdiction of an arbitrator to have made an award, once an award has been made.

4. An Arbitrator cannot confer jurisdiction upon himself or herself.

As the jurisdiction of the arbitrator depends essentially upon the consensus of the parties as expressed by them in their arbitration agreement, it is a fundamental principle that an arbitration tribunal cannot confer jurisdiction on itself, beyond the scope of the submission. In *Attorney-General for Manitoba v Kelly* [1992] 1 C 268 at 276, it was held that:

> "It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties".

5. Competence-Competence/procedure to be followed by arbitration tribunal when jurisdiction is challenged.

The competence-competence theory holds that an arbitral tribunal may rule on its jurisdiction. This power, however, is not unlimited and is ultimately subject to the determination of the court.

It follows that the arbitral tribunal may proceed to investigate the challenge to its jurisdiction and further determine the dispute, leaving the jurisdictional aspects to be resolved by some court of competent jurisdiction at a later stage: *Christopher Brown Ltd v Genossenschaft Osterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte Genossenschaft mit Beschrankter Haftung* [1954] 1 QB 8 at 12.13.

In *Robertson v Asva Holdings Pty Ltd and Barrass* (unreported, Supreme Court of Victoria, 25 September, 1989) Fullagar J observed that a court

would ordinarily require the arbitrator to decide the disputed facts giving rise to the challenge to jurisdiction, rather than immediately accede to a request to decide the question of the arbitrator's jurisdiction itself. His Honour cited the following passage from *Halsbury's Law of England,* 4th ed, vol 1, p 61 with approval:

> "Where the jurisdiction of a tribunal is dependent upon the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an enquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and give a ruling on the preliminary or collateral issue, but that ruling is not conclusive".

Fullagar J's view is consistent with the observations of Phillips J in *Thirteenth Talfit Pty Ltd v Dowsett and others* (1991) 1 *Doyle's Dispute Resolution Practice* [800-006], and the views expressed by Mackay LC in *Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd* [1990] 1 WLR 115 at 117 where his Lordship stated:

> "I believe it is highly desirable that the question whether or not there was a concluded contract and if there was, whether or not there was an arbitration clause included in it, should be decided before costs are incurred in the arbitration."

See further the judgment of Ryan J in *Contrapac Pty Ltd (formerly the Australian Wool Corp)* (unreported, supreme Court of Queensland, 17 July, 1992).

A distinction was drawn by McPherson J in *Neil Iselin and Janic Iselin v WH Sommer and MJ Davis and SP Davis* (1983) 2 ACLR 70 between : (i) the case where the question is whether the appointed arbitrator fulfils a specific requirement laid down in the arbitration agreement, in which case her or his continued participation may not be fatal and (ii) the case where there is an objection to the validity of the reference, and proceedings for that purpose are instituted.

As both questions deal with the jurisdiction of the arbitrator, it is submitted that there can be no difference in principle.

See also *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173; Crusader Resources NL v Santos Ltd and others (unreported, Full Court of Supreme Court of South Australia, 21 March, 1990, White J at 15).

6. Does lack of jurisdiction amount to misconduct?

It has been said that there is no misconduct where there is either no agreement to arbitrate or where there is no valid appointment, ie there is no jurisdiction: *Kawasaki Kisen Kaisha Ltd v Government of Ceylon* [1962] 1 Lloyd's Rep 424 per McNair J.

This view and the assertion that a court cannot set aside something that does not legally exist (above) have given rise to the debate as to whether an award "in excess of jurisdiction: constitutes misconduct and falls to be set aside on that ground, or whether such facts must be dealt with by a court by virtue of its inherent jurisdiction.

See also the *Prodexport case; Finzel, Berry & Co v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep 370, affmd [1962] 2 Lloyd's Rep 11; *Oil Products Trading Co Ltd v Societe Anonyme Societe de Gestion D'Entrepreises Coloniales* (1934) 150 LT 475; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *May v Mills* (1914) 30 TLR 287.

7. The effect of excess jurisdiction

Where an award is made without jurisdiction to do so, it is void and can simply be ignored: *Re an arbitration between Bland Bros and Borough of Inglewood* [1918] VLR 467; *Falkingham v Victorian Rlys Commissioner* [1900] AC 452 at 463. It is not necessary for the court to declare it invalid, but this might be a wise precautionary move in order to avoid an application for enforcement in a foreign jurisdiction.

In *Cook International Inc v BV Handelsmaatschappij Jean Delvaus and Braat, Scott and Meadows* [1985] 2 Lloyd's Rep 225, it was suggested that an award beyond the jurisdiction of the arbitrator is effective until set aside. It is submitted that this assertion is unfounded.

8. The arbitrator's jurisdiction and the identification of the issues of the notice appointing the arbitral tribunal.

The issues delineated in the notice also affect the jurisdiction of the arbitrator, particularly when the arbitration clause requires detailed particulars. In order to ascertain whether or not an arbitral tribunal enjoys jurisdiction over a particular dispute or claim, it is necessary to objectively analyse the contents of what has passed between the parties to the reference so as to determine whether or not the matter in issue was included therein.

In *Food Corp of India v Achilles Halcoussis, The Petros Hadjikyriakos* [1988] 2 Lloyd's Rep 56 Steyn J had to consider a letter of appointment of arbitrators, in which there was no reference to one of the issues that had actually been decided by the umpire. It was held that, as a letter of appointment had to be strictly construed, the umpire, in the circumstances had exceeded his jurisdiction and the award was ***pro tanto*** bad.

Casillo Grani v Napier Shipping Co, The World Ares [1984] 2 Lloyd's Rep 481, cited with approval by Savill J in *Interbulk Ltd v Ponte Dei Sospiri Shipping Co, The Standard Ardour* [1988] 2 Lloyd's Rep 159 at 162, where it was held: "It is not sufficient for a party privately to seek to invest his arbitrator with power to determine a particular claim unless this is also made clear to the other party".

9. Determining whether the agreement under which the arbitrators were apparently appointed constituted the operative contractual document

In *Shenzhen Nan Da Industrial & Trade United Co Ltd v FM International Ltd* (unreported, Supreme Court of Hong Kong HIgh Court, 2 March, 1991)

there were conflicting contractual documents providing for arbitration both in China and in Hong Kong. Arbitration commenced under CIETAC (China's International Arbitration Organisation). After hearing evidence, CIETAC determined that it had jurisdiction under the operative documents, to determine the dispute by arbitration in China. When the successful party attempted to enforce the award in Hong Kong, the point was taken that the awaRd could not be enforced as the parties did not agree to an arbitration in China under CIETAC, but in Hong Kong. Implicit in the decision of Kaplan J who sat in the matter, was the holding that it was competent for CIETAC to have enquired into and to have determined its own jurisdiction. Kaplan J categorised the intent to relitigate this issue as an impermissible attempt to appeal against the award. Although this decision concerned itself with international commercial arbitration its importance is not to be overlooked in a domestic context, as it tends to emphasise the modern philosophy which is adverse to premature curial intervention in the arbitral process, even to the extent of acknowledging an arbitral tribunal's power to determine it own jurisdiction.

10. The determination of the preliminary point on which the arbitrator's jurisdiction rests.

The weight of English authority is to the effect that an arbitration tribunal cannot determine its own jurisdiction by deciding in its favour some preliminary point upon which its jurisdiction depends confining the arbitrator's jurisdiction to disputes arising during a tenancy. It was held that this finding of fact, vi whether the dispute arose during the tenancy, had not been referred to the arbitrator and "he could not clothe himself with jurisdiction by finding the preliminary fact in favour of the plaintiff so as to bind the defendant".

Devlin J, in *Windsor Rural District Council v Otterway & Try Ltd* [1954] 1 WLR 1494, held that an arbitrator cannot test his jurisdiction by way of a stated case because, if he has no jurisdiction initially, it follows that he has no jurisdiction to state a case.

In the same year, Devlin J, in *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte Genossenschaft mit Beschranker Haftung* [1954] 1 WB 8 at 12-13, said in unqualified and no uncertain terms "[t]he arbitrators cannot determine their own jurisdiction".

In the light of the separability principle below, these decisions may no longer reflect the present state of the law.

11. The scope of the arbitration clause and its determination.

Reference has been made in para 2 to a lack of jurisdiction arising where the dispute falls outside the scope of the arbitration agreement (bredth). It is beyond the scope of this lecture to discuss the meanings attributed to

the infinite number and variety of arbitration clauses that have received judicial consideration over the years. Each clause must be looked at against the matrix of the other contractual provisions. In *Ashville Investments Ltd v Elmer Contractors Limited* [1983] WLR 867 it was held that:-

> "the question whether a dispute, or 'difference'... falls within a relevant arbitration clause is primarily a question of construction of the clause itself in the circumstances of the particular case".

The importance of the *Ashville* judgment is emphasised by Evans J in *Overseas Union Insurance Limited v AA Mutual International Insurance Co. Ltd* [1988] 2 lloyd's Rep 63 at 66-67 where its effect was referred to as follows:-

> "This [the giving of the words of the arbitration clause their natural and proper meaning in the circumstances of the case] means in turn that reported decisions in earlier case, even of high authority, cannot necessarily be binding in later cases, unless exceptionally the relevant words and all the relevant circumstances are the same in both cases. Even then, the binding nature of the earlier decision would only become relevant if the court in the later case, if unaided by authority, would reach a contrary conclusion as to the nature and proper meaning of the words in question".

It is of interest to note that the superior courts of the United States of America have held that particularly in *International Commercial Arbitrations* because of the bias of the courts towards arbitrations, a presumption arises that a dispute falls within an arbitration clause and it is for the party who contends to the contrary, to establish that fact.

Without referring to this line of authority, Cole J in *State of New South Wales v Coya (Constructions) Pty Ltd* (unreported, Supreme Court of New South Wales, 20 April, 1993), at 8, expressed similar sentiments when his Honour held:-

> "The modern authorities upon the proper approach to construction of arbitration clauses so usefully collected and carefully analysed in the judgement of Kirby, P. in *IBM Australia*, an analysis I respectfully adopt, makes clear the scope of clauses conferring powers upon arbitrators are not to be narrowly construed. It must be doubted, in the light of the President's analysis, whether the majority view in *Mir Bros Developments v Atlantic Constructions Pty Ltd* (1984) 1 BCL 80 would today prevail".

At 10 his Honour held:

> "As a matter of construction of clause 45, in my view, the arbitrator is entitled to determine what comprises the contract, whether it includes express or implied terms and whether it includes oral terms in addition to the written terms and in that manner to "ascertain the rights and obligations of the parties in relation to the work under the Contract... having so determined he must then decide whether the dispute or difference before him arises out of the Contract or is concerned with the performance or non-performance by either party of his obligations under the contract:.

It is stressed that the scope of the arbitration clause itself can be a matter for arbitration: *Willesford v Watson* F(1973) LR 8 Ch D App 473; *Piercy v Young* (1879) 14 Ch D 200 at 208; *De Ricci v De Ricci* [1891] P 378 at 391-392. The essential enquiry is whether the arbitration agreement is wide enough to clothe the arbitrator with jurisdiction to determine the scope of

the arbitration clause itself.

Support of this general principle is found in the speech of Dunedin LJ in *Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480 at 488, where his Lordship stated:

> "The question of whether an arbitrator acts within his jurisdiction is, of course, for the court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference".

In *Hyundai Engineering & Construction Co. Ltd v Active Builders & Civil Constructions (Pte) Ltd* (1988) 45 BLR 62, Hirst J, at 70, did have this principle in mind when he stated that in his Lordship's judgment

> "... it is only in the most exceptional cases, and where very clear words are used, that an arbitrator can be entitled to determine the scope of his own jurisdiction".

In *James Wallace Pty Ltd v Abbey Orchard Property Investments Pty Ltd* (unreported, Supreme Court of New South Wales, 21 October 1980). Samuel J did not feel it helpful to categorise the question which arose in that case, ie whether the dispute fell within the ambit of the arbitration clause, as one which touches the arbitrator's jurisdiction. His Honour stated:

> "It is a question whether the dispute which has arisen is one which falls within the scope of the arbitration clause".

In arriving at this decision, his Honour found support in the speech of MacMillan LJ in *Heyman v Darwins Ltd* [1942] AC 356 at 371, as follows:

> "If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question".

It is respectfully submitted that his Honour was incorrect in holding that the problem was not one which touched upon the arbitrator's jurisdiction, as it clearly did. If the agreement containing the arbitration clause had been lawfully terminated, the arbitrator might have been without jurisdiction to act any further. But the question as to whether or not this was so, depended upon a construction of the arbitration clause.

The facts and the arbitration clause in the *James Wallace* case are to be distinguished from those which obtained in *RW Woss v Paul Odden Architects Pty Ltd as trustee for the O P Odden Family Trust* (unreported, Supreme Court of Western Australia, 28 May, 1990, per Master White). The relevant arbitration clause provided as follows:-

> "B4.404 Disputes
>
> In the event that any dispute or difference whatsoever shall arise *from the performance or as to the meaning of this agreement* such dispute or difference shall be submitted to arbitration in accordance with and subject to The Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitrations. The arbitrator when making an award shall state his reasons for such award in writing."

The defendant submitted that the issue whether or not the agreement containing the arbitration clause was validly terminated by mutual

agreement was within the scope of the arbitration clause. Master White in distinguishing the arbitration clause in the *James Wallace* case above held that the matters in issue could not correctly be described as matters which either arose from the performance of the agreement or as to its meaning. Accordingly, the dispute did not fall within the arbitration agreement.

12. The distinction between awarding a correct remedy and making an award in an incorrect manner.

Mustill & Boyd, *Commercial Arbitration*, pp 497, 498 make the submission that where an arbitrator's award mistakenly grants a remedy other than that prescribed by the contract, there is an excess of jurisdiction for which the award can be set aside. If, on the contrary, the correct remedy is applied, but in an incorrect manner, for example an error in the assessment of damages where damages are within the arbitrator's jurisdiction, thee is no excess of jurisdiction.

Applying this submission to the model uniform legislation, in the first example the award would be void, and as such, unenforceable. In the second case, there would be an error of law, for which the only relief that could be obtained would follow a successful application for leave to appeal under s 38.

There is Canadian authority inferentially supporting Mustill & Boyd's view in *Hughes Boat works v United Automobile Workers Local* 1620 (1979) 26 OR (2d) 420 at 428, Reid J stated:

> "It seems to me that below the veneer of the traditional discussion about whether there exists an error of jurisdiction or one 'merely' of law there are two matters of constant and unchanging concern. The first is whether there is a genuine error of law. The second is whether it is of such magnitude that it requires an interference by the court in the administrative process in light of the desirability of refraining from interference as much as possible. I think that what may transmute an effort of law in our minds into one of jurisdiction is frequently little more than the conviction that the error is a serious one justifying an intervention".

The narrow dividing line between an excess of arbitrator authority and a decision which is merely incorrect on the merits is further illustrated by *Mobil Oil Indonesia Inc v Asamera Oil (Indonesia) Ltd* 487 F Supp 63 (SDNY 1980). Clearly, an error of law does not amount to a jurisdictional excess. As Scrutton LJ said in *African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd* (193) 36 Ll L Rep 113 at 114:

> "if the arbitrator whom you chose makes a mistake in law that is your lookout for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment".

Similarly, Hobhouse J in *Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyds' Rep 306 at 306 state:

> "For arbitrators to make errors of law (or fact) in the course of a reference is not to exceed their jurisdiction; it will not even, without more, be misconduct".

In light of this principle, it is respectfully submitted that the distinction drawn by Mustill & Boyd above cannot be supported, and Steyn J in *Bank*

Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Rep 44 at 53, is, with respect, correct in finding the distinction "less than compelling".

Steyn J (at 53 reasoned):

> "Regard must be had to the precise purpose for which the distinction is advanced; the only relevance [being] for the purpose of drawing a line between matters which do and do not fall within the consensually conferred authority of an arbitrator".

His Lordship added:

> "In the rare case where the arbitration agreement... excludes a certain remedy, it is clear that the award of such an excluded remedy would amount to excess of jurisdiction.

Steyn J continued (at 54):

> "if the observation of Mustill & Boyd were to be accepted, it would afford an undesirable new route to attacking awards... because the distinction between substance and remedy will sometimes be elusive. And thee is no need for such a power because the concept of misconduct is broad enough to cover bizarre interpretations where arbitrators have consciously and deliberately refused to apply a clearly applicable provision of a contract, eg a limitation of liability for consequential loss".

The observations of Steyn J are more in accord with the philosophy behind the model uniform legislation than the propositions of Mustill & Boyd.

The jurisdiction of the arbitrator to award damages and penalties.

It is beyond the scope of this lecture and would require a paper separately devoted to the subject to discuss whether an arbitral tribunal sitting in Australia has jurisdiction to award penalty damages. However, it is appropriate to make the statement here that it is up to the parties generally, when drafting the arbitration agreement, to limit or enhance the arbitral tribunal's powers with regard to the awarding of any particular remedy. The better view is that an arbitral tribunal has jurisdiction to grant equitable relief and of course, under the Commercial Arbitration Act, thee is specific provision for an arbitral tribunal to have jurisdiction to award specific performance.

13. The arbitrator's jurisdiction to determine whether or not an agreement was made to settle a disputed claim.

In *Colin Bayly and Rosalie Bayly v Lindsay Sinclair Pty Ltd and Lindsay Sinclair* (unreported, Supreme Court of Victoria, 21 October 1991) the arbitration clause read:

> "Should any dispute or difference arise between the proprietor and the builder either during the progress of the works or after the termination, abandonment or breach of the contract as to the construction of this contract or as to any matter or thing whatsoever nature arising thereunder or in connection therewith, then such dispute or difference shall be and is hereby submitted to arbitration in accordance with provisions of the *Commercial Arbitration Act,* 1984".

A claim made by the builder was disputed by the proprietors, who

tendered a cheque for the amount which they admitted. The cheque was accepted but not banked by the builder. The proprietors maintained that this and other facts showed that there was an agreement between the builder and the proprietors to settle the disputed claim. The builder gave notice of a dispute which is required resolved under the above Arbitration clause. An arbitrator was appointed. At the preliminary conference, the solicitor acting for the proprietors maintained that the question of whether or not there was an agreement of settlement did not fall within the Arbitration clause.

Ashley J, correctly with respect, rejected this submission. In doing so, Ashley J relied on the judgment of Fullagar J in *Construction Planning and Management Pty Ltd v Nikolaou* (1988) 4 BCL 255.

In the *Nikolaou* case, Fullagar J referred with approval to the remarks of Samuels JA in *James Wallace Pty Ltd v Abbey Orchard Pty Ltd* (unreported, Court of Appeal of Supreme Court of New South Wales, 21 October, 1980) in which Samuels J at 6-7 adopted the dicta of Lord Macmillan in *Heyman v Darwins Ltd* [1942] AC 356 at 371:

> "If a question arises whether the contract has for any reason come to an end, I can see no reason why the arbitrator should not decide that question."

And where Samuels JA added:

> "Conformably with that statement I see no reason why the arbitrator should not decide the question whether the parties have by agreement comprised claims which would otherwise flow from the building contract and fall to be decided by an arbitrator".

14. The arbitrators jurisdiction to deal with issues of misrepresentation relating to rescission or avoidance of a contract.

The weight of English authority is that there is nothing in principle which precludes an arbitrator from determining issues of misrepresentation, whether they relate to a rescission or avoidance of a contract: *Stevens & Sons v Timber & General Mutual Accident Insurance Association Ltd* (1933) 102 LJKB 337; *Golding v London & Edinburgh Insurance Co Ltd* (1932) L1 L Rep 487.

It is submitted that the same principles are applicaole in Australia.

15. Separability; the arbitrator's jurisdiction to make a binding determination as to the validity of the main contract

In essence, the doctrine of separability deals with the effect on an arbitration clause of an averment that the main agreement is invalid. The jurisdiction of an arbitration tribunal is obviously dependent on e validity of the arbitration agreement. The question may be put thus: "If the main agreement is invalid, is the arbitration agreement ***ipso facto*** invalid?"

Those who answer in the affirmative base their submissions on the ground that the arbitration agreement is an integral part of the main agreement. This argument is initially attractive, as it is ***prima facie*** logical to

argue that an arbitration clause cannot apply to a non-existent agreement. Those who answer the question in the negative submit that by virtue of the doctrine of separability, the main agreement and the arbitration agreement have a separate existence, and the fact that the former is invalid does not affect the validity of the latter; nor is the arbitrator deprived of jurisdiction to determine the validity f the former. The doctrine of separability appears to rest on the practical necessity to enable the dispute resolution process (intended by the parties to be effective) to be proceeded with.

There are two broad categories within the doctrine of "separability". The first is where the parties admit that the principal contract and the arbitration clause were entered into, but one of the parties seeks to avoid the arbitration clause by attacking the validity of the principal contract by contending that it is void or voidable ***ab initio*** on any ground cognisable in law. The second category takes in those cases where there is a denial that either the principal contract or the arbitration clause was even concluded where, for example, it is contended that a party's signature to one or more of those documents was forged.

There is a correlation between the principles of separability and arbitrability: Harbour Assurance (UK) Ltd v Kansa General International Insurance Co [1993]. 1 Lloyds Rep 456 at 459.

The overwhelming weight of judicial authority in the United Kingdom, the United States of America, most continental countries, but see the decision of the Court of Appeal Bermuda in the Sojuznefteexport case below, where the doctrine of separability appears to have been extended to include cases under the second category, and Australia, as analysed below, recognises the doctrine of "separability" under the first category. It may be pointed out that there is a school of academic writers who contend that the doctrine of "separability" extends even to those cases which fall under the second category. There is as yet, however, no weight of judicial authority in favour of such a contention.

In *Smith Coney & Barrett V Becker Gray & Co* (1916) 2 Ch 86, it was held that an arbitrator did not have jurisdiction to adjudicate upon the alleged illegality of the principal contract containing the arbitration clause. Lord Cozens-Hardy MR held, at 91:

> "The plaintiffs in this action sought a declaration that the contract which I have just read was illegal by reason of the war. Of course, if it was illegal, then any question of arbitration under the contract would fall with it".

It has been contended that the House of Lords in *Heyman v Darwins Ltd* [1942] Ac 356 at 366 per Viscount Simon LC, at 371 per Lord MacMillan, at 384 per Lord Wright and at 398 per Lord Porter, held (in ***obiter dicta***) that, however widely drawn, an arbitration clause cannot authorise the arbitrator to make a binding determination as to whether the principal contract ever bound the parties. The various speeches in *Heyman's* case require careful analysis to ascertain whether there is a consistent principle.

Lord MacMillan (at 370) said:

> "Arbitration clauses in contracts vary widely in their language for there is not limitation on the liberty of contracting parties to define as they please the matters which they desire to submit to arbitration."

Lord Porter (at 393) supports this submission as well, in the following words:

> "The question of the arbitrator's jurisdiction must, therefore, ultimately depend on the wording of the arbitration clause".

This passage is consistent with an earlier passage (at 392), where his Lordship suggests that a sufficiently wide arbitration clause can empower an arbitrator to determine the initial validity of the contract. Lord Wright's speech (at 385) also appears to be ambiguous on this point.

Tentative authority for the proposition that an arbitration clause in sufficiently wide terms can confer jurisdiction upon an arbitrator to determine the voidability of the main contract, appears from *Societe Anonyme Hersent v United Towing Co Ltd, The Tradesman* [1962] 1 WLR 61 at 68, where Karminski J distinguished the consequence of a contract void ***ab initio*** from one that may, on examination, be pronounced void:

> "But quite different... is the position where the contract is not void ab initio but may on examination be pronounced void; ie, until that stage it is voidable only".

Of significance is the fact that his Lordship was prepared to accept that, in the circumstances, the arbitrator had jurisdiction to determine the issue.

In *Dalmia Dairy Industries Ltd v National Bank of Pakiston* [1978] 2 Lloyd's Rep, 223 at 286-287, the plaintiff conceded that an arbitration tribunal in an arbitration conducted under the rules of the International Chamber of Commerce could not determine the validity of the contract containing the arbitration clause. This concession was accepted (wrongly, it is submitted) by the court. The debate on this point proceeded through the courts in cases that were often later cited. Examples are *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 WLR 562; *Mackender v Feldia AG* [1966] 2 Lloyd's Rep 449; [1967] 2 QB 590; *Prodexport State Co for Foreign Trade v ED & F Man Ltd* [1973] 1 QB 389.

Mustill and Boyd, in *Commercial Arbitration*, p 113 state:

> "[t]he arbitrator appointed under an illegal contract of this nature has no jurisdiction to rule either on the issue of illegality itself, or on any other matter arising out of the contract".

This statement is obviously inconsistent with recent authority and calls for a revision.

Further authority for the principle that an arbitration cannot determine the initial validity of a contract containing an arbitration clause is found in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co. Ltd* [1988[2 Lloyd's Rep 63 at 66, where Evans J stated:

> "arbitrators can never have jurisdiction to decide whether there was or was not a valid contract under which, if it exists, that jurisdiction arises. This rule owes much to logic as it does to authority, and it does not extend to disputes as to whether that

> was initially a valid contract has been or may be avoided, eg for (cf *Mackender v Feldia* AG [1966] 2 Lloyd's Rep 449; [1967] 2 QB 590) or has been discharged, eg by frustration or by wrongful repudiation and acceptance".

Various dicta in *Ashville Investments ltd v Elmer Contractors Ltd* [1988] 3 WLR 867, are also not altogether consistent. Balcombe LJ (at 883) held:

> "an arbitrator cannot have jurisdiction to decide that the contract under which he is appointed is void or voidable, since by so doing he would be destroying the very basis of his own position".

Bingham LJ (at 890) strongly suggested the contrary.

Bingham LJ ***obiter dicta*** loses sight of the principle that an arbitration clause is ordinarily collateral to the principal contract, giving rise to primary and secondary obligations of its own. See the *Hanna Blumenthal* [1983] 1 AC 854 at 917 and the other dicta to that effect above.

Diplock LJ in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* (1981) AC 909, at 980, must have had the doctrine of separability in mind when he held that:

> "The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself".

This is consistent with the judgment of the Court of Appeal (England) in *Furness Withy (Aust) Pty Ltd v Metal Distributors (UK) Ltd, the Amazonia* [1990] 1 Lloyd's Rep 236 at 244 per Staughton LJ and the judgment of Mustill J in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenbufg AB* p1981] 2 Lloyd's Rep 446.

Hobhouse J in *Compagnie Europeenne de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 306, accepts the principle as trite.

In *Paul Smith Ltd v H & S International Holdings Inc* [1991] 2 Lloyd's Rep 127, Steyn J at 130-131 referred to the more advanced state of arbitration law in England than at the time *Heyman v Darwins Ltd* above was decided.

His Lordship, at 130, observed that as yet no English court has:-

> "... been asked to take the final step of ruling that an arbitration clause, which forms part of a written contract, may be wide enough to cover a dispute as to whether the contract was valid ab initio. An arbitration agreement separately executed at the same time as the principal contract, is capable of conferring authority on an arbitrator to decide an issue as to the validity ab initio of the contract. If that is so, why should the same not apply to the arbitration agreement which physically forms part of the contract? After all, it has been recognised as having an independent existence." His Lordship went on to state that he was not asked to take this final step, but "[g]iven the development of English arbitration law, this step may be a logical and sensible one which an English court may be prepared to take when it arises".

Although the occasion arose in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* (1992) 1 Lloyd's Rep 81 at 95, Steyn J (as he then was) held, with some reluctance, that the issue of the initial illegality of the contract is always beyond the arbitrator's jurisdiction. His Lordship's holding was based upon the *Smith Coney & Barrett* judgment above, by which his Lordship considered himself bound.

The Court of Appeal [Eng] in the *Harbour Assurance* case [1993] 6 Lloyds Rep 455, held that Steyn J was incorrect in his judgment above and should have held that the arbitration clause was sufficiently wide in its terms to take in a dispute and confer jurisdiction upon the arbitrator to determine whether the principal agreement was void ***ab initio***.

At 460, Ralph Gibson Lj rejected the notion that if it is alleged that a contract is void ***ab initio***, the arbitration clause contained therein is also void.

Legatt LJ did likewise. At 464, his Lordship stated that:

> "[t]he arbitration agreement, if sufficiently widely drawn, is from its nature intended by the parties to govern any dispute that may arise between them, including a dispute about the initial illegality of a contract. There is no reason why the parties should have intended to exempt from the scope of the arbitration clause a dispute such as... whether the... agreement was infected by illegality... Otherwise it would put it in the power of one contracting party to prevent arbitration from taking place simply by alleging that the contract was void for initial illegality".

Hoffman LJ, at 467-8, stated that it was an oversimplification rather than logic to say that merely because an arbitration clause was included in another document, it necessarily formed part of that other document. His Lordship reasoned thus:

> "The flaw in the logic, as it seems to me, lies in the ambiguity f the proposition that the arbitration clause "formed part" of the retrocession agreement. In one sense of course it did. It was Clause 12 of a longer document which also dealt with the substantive rights and duties of the parties. But parties can include more than one agreement in a single document. they may say in express words that two separate agreements are intended. Or the question of whether the document amounts to one agreement or two may have to be answered by reference to the kind of provisions it contains. In any case, it is always essential to have regard to the reason why the question is being asked. Thee is no single concept of "forming part" which will provide the answer in every case. From some purposes a clause may form part of an agreement and for other purposes it may constitute a separate agreement. One must in each case consider the terms and purpose of the rule which makes it necessary to ask the question".

It must therefore follow that provided the arbitration clause is wide enough in its scope, it will confer jurisdiction upon an arbitrator to determine all aspects concerning the validity, and alleged illegality, whether ***ab initio*** or otherwise, of the main contract containing it.

Concerning the question of separability and the court's new approach regarding arbitration, Domke, *On Commercial Arbitration*, papa 8.01, p 89-90 noted:

> "However, there has been a fundamental change in the attitude of the courts concerning the nature of the arbitration clause in a normal commercial contract. The doctrine of severability, under which the arbitration clause is treated as an independent contract, even though within the main contract, has finally received wide acceptance after much debate, both in the United States and abroad. Of course, the separability theory can only apply to contracts containing a broad arbitration agreement. Where the clause restricts arbitration to disputes and controversies relating to specified matters, arbitrability is, in any case, to be determined by the court".

Domke emphasised (p 90) that the arbitrator's authority is contained in an agreement, which is deemed to be "separate". Domke, continues (para 8.02, p 93):

> "Under the separability rule, the only test of what may be arbitrated is the measure of the scope of the arbitration clause. Thus, responsibility for arbitrability of any issue, is, first of all, in the hands of the draftsmen of the arbitration clause. Whether a clause is sufficiently broad will be decided on a case-by-case basis by the Court".

There is authority in the USA which favours the separability doctrine. In *Sauer-Getriebe KG v White Hydraulics Inc* 715 F 2d 348 (7th Cir 1983), it was submitted that the contract containing an arbitration clause was unenforceable for lack of consideration and vagueness. It was held that the arbitration clause was severable.

The Californian courts have held that where the existence of an arbitration contract is admitted or found, "it is for the arbitrator and not the courts to resolve any doubts as to its meaning and extent": *Berman v Renart Sportswear Corp* 222 Cal App 2d 385 at 388 (1963), cited with approval in *Cook v Superior Court of Country of Los Angeles* 240 Cal App 2d 880 (1966).

There is further authority to the same effect in the courts of other States: *De Laurentiis v Cinematografica de Las Americas* 9 NY 2d 503 (1961); *Allentown Supply Corp v Hamburg Municipal Authority* 463 Pa 167 (1975). Other decisions hold that in situations where the entire contract is submitted to arbitration, including all issues of law or fact and the interpretation of the terms of the contract, and the agreement empowers them to do so, the arbitrators are permitted to decide conclusively what matters are submitted to them and in so doing, define their own jurisdiction: *B Fernandez & Hnos, S en C v Rickert Rice Mills Inc* 119 F 2d 809 (1941); *Sloan v Journal Publishing Co* 324 P 2d 449 (1957). Case law in New York also favours the separability doctrine: *International Components Corp v Klaiber* 54 App Div 2d 550 (1976). The New York courts have also held that an arbitration clause is sufficiently broad to cover a claim for fraud in the inducement, notwithstanding that certain questions were excluded from the ambit of the arbitration clause: *Information Sciences Inc v Mohawk Data Science Corp* 43 NY 2d 198 (1978).

In *Lido Fabrics Inc v Clinton Mills Sales Corp* 49 App Div 2d 869 (1975), the arbitration clause provided for the arbitration of disputes "arising out of or in connection" with an agreement relating to the sales of textiles. The Appellate Division held that fraud inducing the agreement was a proper matter within the jurisdiction of the arbitrator.

The United States Supreme Court concurs with that approach. In *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), the United States Supreme Court concluded that an averment of fraud inducing a contract did not pertain directly to the arbitration clause. The dispute was therefore referable to arbitration. Fortas J, in delivering the judgment of the court, distinguished the case from one in which it is alleged that the

fraud induced the arbitration agreement. The latter would be an issue which went to the "making" of the agreement to arbitrate. In such a case, the court may proceed to adjudicate that particular question.

This principle is consistent with the decision in *HW Moseley v Electronic & Missile Facilities Inc* 374 US 167 at 171-172 (1963). The *Prima Paint* case has been cited with approval and explained in *Peoples Security Life Insurance Co v Monumental Life Insurance Co* 867 F 2d 809 (1989).

One of the most recent pronouncements on the *Prima Paint* doctrine is in *Republic of Philippines and National Power Corp v Westinghouse Electric Corp* (unreported, District Court of New Jersey, 18 May, 1989) where the court stated:

> "*Prima Paint* is alive and healthy... The challenge for the party who believes himself to be the victim of a fraud and wishes to fight it out in court is to demonstrate that the fraud was specifically directed to the arbitration clause or to convince the court to craft some exception to the *Prima Paint* doctrine".

See also G Aksen, "Prima Point v The Flood & Conklin – What does it mean?" (1968) 43 St John's Law Review 1, wherein the author hails Prima Paint as "undoubtedly the most significant judicial opinion ever rendered concerning agreements to arbitrate commercial controversies".

JW Stempel in "A Better Approach to Arbitrability" [1991] 65 *Tulane Law Review*, 1377 at 1399 observed that some courts in the United States have drawn a distinction between

> "(1) fraud in the inducement – fraud in which the consent to the contract is not at issue but where the consent was obtained through fraudulent representations (that is the financial health of the company, the wisdom of an investment); and (2) fraud in the factum – fraud that makes the consent to the contract ineffective (that is, representing to the party that the document has no legal effect or misstating its legal effect)"

Stempel points for example to *Cancanon v Smith Barney, Harris Upham & Co* 805F 2d 1988 (11th Cir 1986), 3-29.

There is considerable Continental writing and authority in favour of the doctrine of separability.

The French courts distinguish between international and domestic arbitrations. In regard to international arbitrations it was held in *Gosset v Carapelli* cass (Civ) 7 Mai, 1963, a decision of the French Cour de Cassation, that:

> "The arbitration agreement, whether a separate agreement or included in the juridical act to which it refers, always presents, save in exceptional circumstances... a complete juridical autonomy excluding the possibility of its being affected by the eventual invalidity of this act."

Decisions in other Continental jurisdictions which support this principle are the following: the Swedish courts, *AB Norrkopings Trikafabrick v AB Per Persson* NJA 1976 125; The Netherlands courts, HR, 27 December, 1935, NJ 1936 442; the courts of the Federal German Public, Bundesgerichtshof, 27 February, 1970, BGHZ 53 at 315.

BV Poznanski, "The Nature and Extent of an Arbitrator's Powers in

International Commercial Arbitration" (1987) 4 Journal of International Arbitration 71 at 96-100; LS Sealy, "Arbitration – Contract Alleged Void – Jurisdiction of Arbitrator" [1962] Cambridge Law Journal 14; Adam Samuel, "Separability in English Law – Should an Arbitration Clause be Regarded as an Agreement Separate and Collateral to a Contract in Which it is Contained?", (1986) 3 Journal of International Arbitration 95 at 96-98, 100-101; C Schmitthof, "The Jurisdiction of the Arbitrator", the Art of Arbitration 285 at 289; PA Lalive, "Problemes Relatifs a l'Arbitrage International Commercial" (1967) 120(1) Recueil des Cours Academie de Droit International 574 at 592.

SM Schwebel (a Judge of the International Court of Justice) in *International Arbitration: Three Salient Problems,* argues in Ch 1, pp 1-70 that separability is based upon the intention of the parties. He writes:

> "First, when two parties enter into a contract or a treaty providing for arbitration of disputes arising thereunder, and do so as they typically do in comprehensive terms – 'any dispute arising out of or relating to this agreement' – they intend to require arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty. Had the parties, when concluding the agreement, been asked, 'Do you mean, in providing that, "any dispute arising out of or relating to this agreement' shall be submitted to arbitration to exclude disputes over the validity of the agreement?', surely they would have replied that they did not mean to exclude such disputes."

Schwebel J's thesis is criticised by Adam Samuel in his book review (1988) 5 *Journal of International Arbitration,* 119 at 120-124. After contending for the principle that a court applies a presumption in favour of separability of an arbitral clause, it precludes unnecessary disruption of the arbitration, Samuel asks (at 121) "why Schwebel has to persist with this argument that separability is based on the intention of the parties".

Samuel notes (at 120) that the Swiss courts have had a separability doctrine since 1933. This doctrine has been adopted in all the major arbitration countries in Western Europe and in the United States (see the references in note 7 at 120) but for England:

> "probably due to the paucity of cases in which the issue has arisen. Reported decisions, where the separability doctrine would have changed the result, are very rare in an arbitral scene dominated by maritime and commodity cases".

Ultimately, the arbitrability of any issue (other than the validity of the arbitration agreement itself) depends upon the construction of the arbitration clause, which stands separately from the main contract.

See further C Svernlov, "What Isn't Ain't: The Current Status of the Doctrine of Separability" (1991) 8 *Journal of International Arbitration* 37.

In *Sojuznefteexport (SNE) (USSR) v Joc Oil Ltd* (1989) 4 Mealey's International Arbitration Report 8 (Court of Appeal of Bermuda, 7 July, 1989); (1990) Vol XV Yearbook of Commercial Arbitration 384, particularly pp 404 et seq, a majority of the Court of Appeal, per da Costa and Sir Dennis Roberts JJ with Sir Alastair Blair-Keer J dissenting, upheld the validity of an arbitral award where the main contract was invalid but

not non-existent. The majority of the court held that the arbitration clause was valid. But see the criticism of this decision by Hoffman LJ in Harbour Assurance above [1993] Lloyds Rep 455 at 468/9. Perhaps the majority of the court took the separability principle too far.

16. Conclusion in regard to the applicability of the separability doctrine in Australia.

Heyman's case above, was cited without analysis by Kearney J in *Jennings Construction Ltd v Ralph Symonds Australia Ltd* (unreported, Supreme Court of the Northern Territory, 6 July, 1987 at 12) as authority for the proposition that an arbitrator had no power to decide whether the arbitration agreement exists. Limited to the question as to whether or not the arbitration agreement exists, his Honour's decision was probably correct.

In *IBM Australia Ltd v National Distribution Services* (1991) 22 N.S.W.L.R. Clarke and Handley JJA, at 485 and 487 respectively, suggest that an arbitral tribunal does not have jurisdiction to determine the question whether or not the main contract is void ***ab initio.***

As pointed out by Rogers CJ in his article "The Indestructible Arbitration Clause" (1993) *The Arbitrator,* their Honours' observations were ***obiter.***

In a scholarly judgment, Foster J in *QH Tours Ltd and Sazalo Pty Ltd v Ship Design & Management (Aust) Pty Ltd and Charles Russel Gibbons* (1991-1992) 105 ALR 371, after analysing the above and other passages in the speeches in *Heyman's* case above, held (at 383):

> "One might be pardoned for thinking that one could not derive from these various obiter expressions, any firm rule that there was a legal prohibition upon parties to a submission to arbitration granting to the arbitrator the power to declare their agreement void ab initio. Rather one might have thought that the prevailing view was that, at the most, in the construction of any arbitration clause, there was a presumption against the conferral of such a power, but that, if that was what the parties wished, they could confer the power by appropriate language. There would appear to be an underlying concept that, whereas a court always had power to determine whether or not it has jurisdiction, a similar power to determine whether or not it has jurisdiction, a similar power could not be, as a matter of course, entrusted to an arbitrator, presumably, on the basis that being a lay person (if such were the case) he might lack the necessary legal ability to determine such a fundamental matter> It might be noted that, if this assumption be correct, then it would appear to be inconsistent with present day views of the abilities of arbitrators. At best, the proposition would appear to be founded upon a logical rather than a practical approach. It was somehow inconceivable that an arbitrator could declare void ab initio (or even perhaps at some later point in its existence) a contract upon which the arbitrators own appointment depended. It was logically unthinkable that he could exercise a power, the very existence of which destroyed it. One might have thought that Lord Wright's discussion, referred to above, of the essentially different nature of the arbitration clause from the other clauses of the contract of which it formed part, and also its potential for being severed from that contract, contained the answer to this problem".

His Honour continued (at 384):

> "I am not satisfied that there is any rule of law which prohibits the empowering of an arbitrator to decide the initial validity of the contract containing the arbitration clause. with respect to those who hold a different view, I do not consider that there is any "received doctrine" to this effect. Moreover, having regard to the specific nature of an arbitration clause, as discussed by Lord Wright in *Heyman*, I consider that, generally speaking, it can be regarded as severable from the main contract with the result that, logically, an arbitrator, if otherwise empowered to do so, can declare the main contract void ab initio without at the same time destroying the basis of his power to do so.
>
> I am therefore of the view that, in the present case, an arbitrator appointed under clause 16, having regard to the width of the clause, as already discussed, would have the necessary power to declare the main contract void ab initio as a result of breaches of s 52 of the Act".

It is respectfully submitted that his Honour has taken a bold step in the right direction.

In *Graham John Morton and Valfont Pty Ltd v David Lewis Baker, John Edward Mitton Barns and 23 others* (unreported, Federal Court NSW Registry, 25 March, 1993), Einfeld J accepted the correctness of Foster J's decision in the *QH Tours* case above without question.

In *State of New South Wales v Coya (Constructions) Pty Ltd* (unreported), Supreme Court of New South Wales, 20 April, 1993), Cole J had before him a dispute concerning clause 45 (the arbitration clause) in the general conditions of contract in the form NPWC3 (1981) which provided in part:

> "All disputes of differences arising out of the Contract or concerning the performance or non-performance by either party of his obligations under the Contract whether raised before or after the execution of the work under the contract shall be decided as follows"

The proprietor contended that the arbitrator had no jurisdiction to determine whether or not there was an additional oral term in the contract and whether questions of estoppel arose.

At 8 his Honour held:

> "There is, in my view, a clear distinction which may be drawn between the power of an arbitrator under a clause such as clause 45 to determine what constitutes the contract and what are its terms as an adjunct to an award resolving a dispute or difference between the parties to a contract on the one hand, and the question whether an arbitrator has a power to declare void a contract where his arbitral power stems from a clause within that contract *(IBM Australia Limited* at 485 per Clarke JA, 487 per Handley JA; compare *QH Tours Limited & Anor v Ship Design & Management (Aust) Pty Ltd & Anor* 1991 105 ALR 371 at 383-4 Foster J). If it be the law that an arbitrator cannot declare that the contract under which he functions was void ab initio, it is because of the circularity inherent in him denying the existence of the contract under which he purports to speak. There is no such inhibition in an arbitrator determining what constitutes a contract: whether he may do so or not depends upon the width of the terms of the jurisdiction conferred upon him by the arbitration clause".

With respect, his Honour's conclusion was correct, but in so far as his Honour failed to answer the question by simply referring to the doctrine of separability and the scope of the arbitration clause, his Honour's

reasons tend to confuse rather than elucidate the relevant legal principles.

Young J in a seminal judgment in *Ferris v Plaister* (unreported, Supreme Court of New South Wales, 6 May, 1993), after noting at 6 that the observations of Clarke and Handley JJA above in the *IBM* case were obiter, and after referring to Foster J's judgment in *QH Tours* above, *Heyman v Darwins,* the *Harbour Assurance* case, both in the court below and in the Court of Appeal, *The Hannah Blumenthal, The Bremer Vulkan, Prima Paint,* the Bermudan decision in *Sojuznefteexport, re Weinrott, Lido Fabrics, Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337 and *Dowell Australia Ltd v Truden Contractors Pty Ltd* (1982) 1 N.S.W.L.R. 508, held at 11 that an arbitrator was entitled to consider whether the main contract was properly rescinded because of fraud.

At 10 his Honour isolated the two questions for consideration:

(i) Whether the arbitration clause was separable from the main contract; and

(ii) Whether or not the arbitration clause was wide enough to cover the dispute touching on the allegation that the main contract was void ***ab initio*** because of fraud.

His Honour answered both questions in the affirmative.

There can no longer be any doubt in New South Wales that an arbitrator has jurisdiction to determine whether or not the main contract was void or voidable ***ab initio*** whether because of an alleged illegality, or for any other reason.

It is submitted that for the reasons discussed above the doctrine of separability has now been received in Australia.

17. Jurisdiction to rectify the terms of the main contract containing the arbitration clause.

The seminar judgment dealing with an arbitrator's jurisdiction to determine the issue of rectification of the agreement containing the arbitration clause is *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 AD (South African), where Rumpff JA explained that ***ex hypothesi*** in a rectification case, where the parties executed the agreement in writing between them, they must have believed, albeit mistakenly, that it contained their real agreement, at the time of execution. Consequently, if the parties intended to submit their disputes arising out of or concerning their real agreement to arbitration, it followed that a dispute about any term of that agreement, would be a dispute arising out of or concerning the agreement and was, therefore, referable to arbitration under an arbitration clause.

Prior authority in England held that an arbitrator does not have such jurisdiction: *Printing Machine Co. Ltd v Linotype & Machinery Ltd* [1912] 1 CH 566; *Monro v Bonor UDC* [1915] 3 KB 167; *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68.

In *Roose Industries Ltd v Ready Mixed Concrete* [1974] 2 NZLR 246, the New

Zealand Court of Appeal declined to follow the *Printing Machinery* and *Crane* cases.

Thomas J in *Drennan v Pickett* [1983] 1 Qd R 445 at 447-448, preferred the decision in the *Kathmer Investment* case to the reasoning found in the English case, and held that the question was essentially one of construction of the arbitration clause.

In *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 3 WLR 867, all the judges in the Court of Appeal followed the dicta in the *Kathmer* and *Drennan* cases. It is submitted that they were correct in so doing and that *Drennan* should be followed in all Australian jurisdictions. The approach taken in *Kathmer* has been endorsed in *Ethiopian Oilseeds and Pulse Export Corporation v Rio Del Mar Foods Incorporated* [1990] 1 Lloyd's Rep 86 per Hirst J.

In *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508 at 515, Yeldham J held that an arbitration clause which provided for reference to arbitration of any future disputes "as to any matter or thing whatsoever arising... in connection" with the contract included and was intended to include matters as frustration, rescission and rectification.

A majority of the Court of Appeal in *Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1985) 1 BCL 80, held that an arbitration clause, which read as follows:

> "All disputes or differences arising out of the contract or concerning the performance or the non-performance by either party of its obligations under the contract, whether before or after the completion of the works"

properly construed, was not wide enough to give the arbitrator jurisdiction in respect of either rectification or a collateral contract. Samuels JA, with whom Mahoney JA agreed, did not consider that "the assertion that the contract mistakenly expressed the parties' bargain – can be regarded as one arising out of the contract".

His Honour held that the assertation was not generated by the contract, but by "the terms of the parties' alleged intention". It is submitted that the reasoning of the majority is incorrect and should not be followed, as there is an identity between the contract as recorded and the common intention giving rise to the claim for rectification. The dissenting judgment of Glass JA (at 81) where his Honour held that the dispute was properly to be regarded as a dispute arising out of the contract, is preferable, and is consistent with the dicta referred to above.

To the extent that *Mir Brothers* is in conflict with *Drennan*, it is respectfully submitted that the former case was incorrectly decided.

Marks J in *State Electricity Commission of Victoria v Alcoa of Australia Ltd, Perpetual Executors Nominees Ltd; Permanent Trustee Co Ltd & Citic Nominees Pty Ltd* (unreported, Supreme Court of Victoria, 24 November, 1986 at 6) was attracted by the observations of Glass JA, and held that the words "arising out of or in connection with the provisions of this agreement" and the words "the construction of such provisions" embrace a dispute in

which there is a claim for rectification.

In *Hooper Bailee Associated Ltd v Natcon Group Pty Ltd* (F199) 6 BCL 142, Cole J had before him the form of contract known as SCNPWC edition 3 February, 1981, with cl 44(b) containing the arbitration provisions. The line of authority referred to above, that a suitably worded arbitration clause may be sufficiently wide to clothe the arbitration tribunal with jurisdiction to deal with a claim for rectification, was confirmed.

In *IBM Australia Ltd v National Distribution Services Pty Ltd* F(1991) 100 ALR 361, Kirby P, Clarke and Handley, JJA, at 368-369, distinguished *Mir Brothers* on the basis that the wording of the clause in that case as critical for Samuels JA's decision, and at 730 followed the *Kathmer* case above, which the Court of Appeal characterised as "a new approach" and an "influential decision".

18. The use of extrinsic evidence in an application to set aside award on the ground of lack of jurisdiction.

When applying to set an award aside on the ground that there has been an excess of jurisdiction, the parties may place the parameters of the dispute before the court by adducing extrinsic evidence: *Christopher Brown Ltd v Genossenschaft Osterreirschischer Waldbesitzer* [1954] 1 QB 8 at 10.

A court is entitled to consider a wide range of evidence, including the reasons given by the arbitration tribunal, even though they were not given contemporaneously with the award: *Sundell v Queensland Housing Commission (No. 1)* [1955] QSR 12 at 24; *Duke of Buccleuch v Metropolitan Board of Works* (19872) LR 5 HL 418, [1861-73] All ER Rep 654.

See also *Fountain Mfg Co (Bury) Ltd v Fish & Co* (1921) 8 L1 L Rep 363; *James Laing, Son & Co (M/C) Ltd v Eastcheap Dried Fruit Co* [1961] 1 Lloyd's Rep 142, affmd on appeal [1961] 2 Lloyd's Rep 277; *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1971] 1 Lloyd's Rep 401 at 411.

By appearing under protest, a party does not lose the right to challenge the arbitrator's jurisdiction on the ground that the arbitration had proceeded without authority. The right is not jeopardised even if the adversaries' witnesses are cross examined and evidence is called: *Ringland v Lowndes* (1864) 17 CB (NS) 514; 144 ER 207.

19. Conclusion.

In conclusion, it will be seen that arbitration has gone a long way in its acceptance by the courts as a viable alternative dispute resolution mechanism. Within this climate, the courts will take an increasingly liberal view of arbitrator jurisdiction and hopefully curial intervention in the arbitral process will be kept at a minimum.