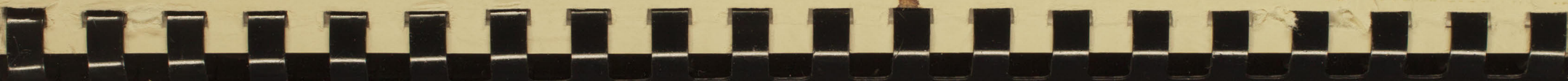
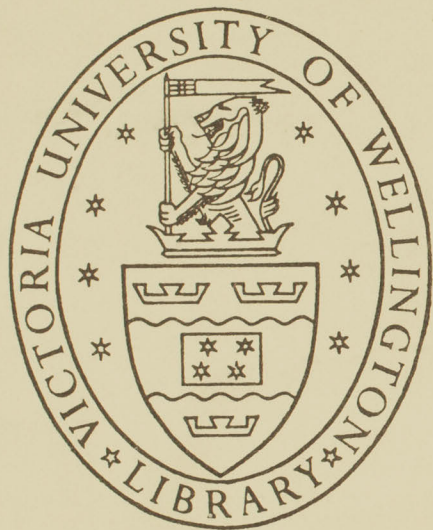


rx BU BULL, S.N.H. The arbitral process and the courts.









ABSTRACT

This paper is not intended to be a discourse on the law and practice relating to arbitrations. For that there are Statutes and textbooks available. Its purpose (consistent with its being prepared in an administrative law course) is rather to examine the process of arbitration from the point of view of autonomy and control. To that end the potential points of contact and conflict between the arbitral process and the ordinary courts have been examined.

STEPHEN NOEL HENRY BULL

Why should arbitral tribunals be concerned with the exercise of public powers and duties, and control over these? True, there are distinctions clearly apparent between administrative and arbitral tribunals. The source of their authority - public and private; the nature of the issues submitted to them - public and private; the nature of the powers attached to each. But on the other hand, they share common features. Both are deciding issues in a non-curial forum. The decisions in each case are binding. Both exercise delegated powers.

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AND  
THE COURTS

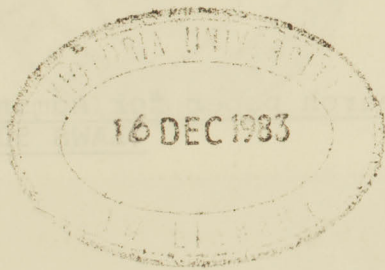
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because of their informality. In each basic standards of fairness are required. Finally, the courts - in some legal systems at least - are willing to treat them as inferior tribunals and thus subject to controlling judicial powers. The latter characteristic - or consequence of the other characteristics - is central to the paper. The basic questions are why and how do the courts exercise their control. What limits are





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PREFACE

This paper is not intended to be a discourse on the law and practice relating to arbitrations. For that there are Statutes and textbooks available. Its purpose (consistent with its being prepared in an administrative law course) is rather to examine the process of arbitration from the point of view of autonomy and control. To that end the potential points of contact and conflict between the arbitral process and the ordinary courts have been examined.

Why should arbitration be looked at from this point of view? Is not administrative law concerned with the exercise of public powers and duties, and control over these? True, there are distinctions clearly apparent between administrative and arbitral tribunals. The source of their authority - public and private; the nature of the issues submitted to them - public rights, duties, interests, compared with essentially lites inter partes; the coercive powers attaching to each. But on the other hand, they share common features. Both are deciding issues in a non-curial forum. The decisions in each case are binding. Both exercise delegated power. Both are preferred to courts because of their expertise, their flexibility and informality. In each basic standards of fairness are required. Finally, the courts - in some legal systems at least - are willing to treat them as inferior tribunals and thus subject to controlling judicial powers. The latter characteristic - or consequence of the other characteristics - is central to the paper. The basic questions are why and how do the courts exercise their control. What limits are



there on the use of the supervisory powers? How do judges (and legislatures) treat the distinction between bodies set up by law and private bodies created by individuals?

Arbitral procedure and law varies quite widely between different legal systems. The approach taken here is to focus on New Zealand law, a fairly typical common law system, and to which other Commonwealth systems are highly relevant. But for the purposes of comparison other domestic laws have been considered - especially American which, though founded on the common law, employ a contrasting approach to arbitration - and public international law. In this way it is hoped to cover in an adequate way both the general principles of the arbitral process and the detail of a particular system.

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## I INTRODUCTION

### A. Arbitration and Adjudication

Arbitration and adjudication resemble each other in that in each the decision maker's ruling is binding on the disputants. They are also alike in that each assumes a decision by a third party reached after a fair hearing and generally according to a pre-determined set of criteria. What distinguishes them is that in arbitration the reference to the decider is voluntary, whereas in ordinary adjudication a defendant must submit to the judicial process if it is lawfully<sup>1</sup> invoked against him. It should be recognised, however, that in some instances the reality of the consent of the person submitting to arbitration is doubtful - as in cases of discrepancy of bargaining power. The law has developed special rules - both legislative and judge-made - to meet this fact, at least in part.

A second difference between the two processes relates to the identity of the decider. In adjudication a hierarchy of forums is provided by the State, with a permanent staff of judges, in most cases appointed for the whole of their working lives, impeachable only with difficulty, and paid by the government. Litigants are not free to select, even from the limited panel, which judge is to decide their case, save to the extent that practical constraints on the organisation of the courts allow parties to pursue a limited strategy in the matter. Considerations of time, geography and occasionally expertise are relevant in this regard.

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1. The law protects certain people from some types of court proceedings: eg those with diplomatic immunity, and those against whom substantially the same charge has previously been brought.



This relative lack of freedom arises in part out of the governmental character of the ordinary judiciary, rather than solely any fears as to their independence. It is not necessary that deciders of disputes be chosen by independent persons in order that the deciders themselves will be impartial. The existence of arbitration itself bears witness to this. Independence and fairness in the arbitral process are, to the extent that they are required, assured by the parties' self-interest. They will be assumed to have agreed on an arbitrator whom they believe will be fair, because of his integrity, to their respective interests. This applies also where both parties appoint arbitrators who in turn designate a third arbitrator or an umpire.

The choice of arbiter is a crucial part of the arbitration - since review of an arbitral decision is relatively restricted, it is vital that the arbitrator be accepted by both parties, and that his conduct of the procedure is fair.

The procedure employed may itself be a distinguishing feature of arbitration compared with litigation. From the consensual basis of the proceedings flows the consequence that procedure is largely in the hands of the parties. This is consistent with some of the reasons for preferring arbitration in the first place, namely that the subject matter is more suited to a less formal procedure. The disputants can agree on what issues are to be resolved, which may in turn have an effect on the conduct of the arbitration. In theory it can range from a highly formal process, virtually indistinguishable from a judicial one, to an extremely simple operation, without a hearing, counsel,



or representations other than the bare details of the matter in contention. Arbitrations on the quality of goods are an example of the latter. This flexibility of procedure has implications for the relationship between ordinary courts and arbitral tribunals: the fewer and the less rigid are the norms of arbitral procedure, the narrower is the scope of the parties to complain about deviations and the greater the difficulty of proving them.

It should be noted that the great freedom of choice available in the conduct of the arbitration does not rule out the use of a formal code agreed in advance. Many arbitration agreements incorporate the rules of established arbitration institutions as a matter of convenience. Moreover, some rules are implied by the law - either as supplementary or residual.

#### B. Advantages of Arbitration

Parties go to arbitration for different reasons. Its attraction is due in part to its inherent characteristics, as previously outlined. Another advantage lies in the privacy surrounding the proceedings. Disputants may favour a resolution of their differences in a court-like manner but without the concomitant publicity. Their motivations may be diverse, including the desire to present an efficient and untroubled image to the rest of the world, or the wish to avoid the leaking of information which may be of value to their competitors. An additional benefit obtained from separation from the courts is speed; in theory an arbitration may be set up and completed immediately the dispute arises - there is no need to await court fixtures, filing of pleadings, time for interrogatories and other



intermediate processes, and so on. Moreover, if the parties so agree, the delay in delivering the decision can be considerably reduced by dispensing with a reasoned judgment. However, in practice it is not always the case that advantage is taken of these opportunities to avoid wasting time. But the parties may be willing to forego such benefits in favour of some of the arbitration's other attractions.

Another advantageous feature of arbitral decisions as opposed to judicial resolution is occasionally said to be the cheaper cost. It is unlikely that this claim is true in many instances today. Arbitrators have to be paid by the parties; a place for a hearing must be provided: in many cases the parties are represented by counsel. In addition international commercial arbitrations often involve travel: there may be three or more arbitrators, each of a different nationality. In less complex proceedings there may be a saving in costs, due to the more flexible nature of the process which can permit a much quicker hearing.

In some cases the particular context of the dispute enjoins recourse to arbitration, not because of its inherent advantages but rather because adjudication is unavailable or unsuitable. This is evident in the case of differences between States and individuals who are citizens of foreign States. Thus if an oil company obtains a concession from a petroleum-producing country and disputes later arise from the arrangement, arbitration is an obvious contender for the choice of method to settle the matters. Adjudication in the national courts of the State will often be unacceptable to the company, for fear of political influence. Litigation in the International Court is ruled



out since only States may appear as litigants.<sup>2</sup> Recourse to the courts of the country where the company is incorporated (or of any other country) may be inefficacious because of the doctrine of sovereign immunity, despite recent developments in that doctrine which curtail the immunities of States in some respects.<sup>3</sup> Thus a non-curial method of resolution is necessary. The international community has recognised this need by providing institutional arbitration and conciliation facilities.<sup>4</sup>

Finally, an important feature of arbitration which often commends itself to parties seeking a speedy solution is finality. As a procedure constituted and conducted by private persons the rights of recourse normally available against judicial decisions are not invoked. The disputants can agree to establish an avenue of appeal or a more limited right, but the basic premise is that they will be bound by the decision of the arbitrator.

#### C. Areas of Use

Arbitration as a means of settling disputes is used in a variety of fields, ranging from the small and specific area of quality arbitration (the "see and sniff" type) through major commercial disputes to the level of public international law, where the parties are States and the issues of great importance to millions. Interest in public

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2. Statute of the International Court of Justice, Art.34. Such litigation is possible if the "parent" State enters the dispute on the company's behalf.

3. E.g. State Immunities Act 1978 (U.K.); Foreign Sovereign Immunities Act 1976 (U.S.); I Congreso del Partido [1983] A. C. 244.

4. E.g. Convention on the Settlement of International Investment Disputes (known as I.C.S.I.D.): (1965) 4 I.L.M.532.



international arbitration increased markedly after the success of the Alabama Claims case, in which the United States and the United Kingdom governments arbitrated the question of the latter's breaches of neutrality in the American Civil War. The award and the British submission to judgment did much to enhance the reputation of compulsory settlement by a third party as a peaceful means of resolving international conflicts. The possibilities were developed at the peace conferences held at The Hague in 1899 and 1907, both of which adopted instruments calling on States to resort to arbitration in questions of a legal nature.

Article 37 of the 1907 Convention states :

"International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to an award."

The Hague Conventions moreover established the Permanent Court of Arbitration, which in essence provides a panel of arbitrators suitable for parties to select for international disputes. The treaties also laid down a detailed procedure for the conduct of arbitration proceedings.

Public international arbitration has not developed as fast in the period following the Second World War as it did in the first half of the century. The creation of the International Court of Justice may have influenced this, although the use of adjudicative bodies proper in disputes between States has also been somewhat disappointing. Some see the diminution of both adjudication and arbitration at the global level as due to a greater blurring of the differences between political and legal disputes.

Differences of law cannot always be separated from general



political tensions, nor can they necessarily be formulated separately.<sup>5</sup> Political disputes, it has come to be realised, are not truly susceptible of settlement in the detached legalistic fashion of international judicial or arbitral proceedings.

But the models provided by public international law have influenced the use of arbitration in relations between private individuals of different States. The increase in arbitration of "transnational" commercial disputes is notable. The use of institutes such as the International Chamber of Commerce and the London Court of Arbitration has grown in response.<sup>6</sup> The arbitrators sponsored by these bodies are experts in maritime law and other fields. Transnational trade contracts are thus particularly suited to this type of arbitration by reason of both the neutrality and expertise of the judges. Contracts between States and aliens are also susceptible to arbitration.

On a smaller scale, clauses providing for arbitration of disputes are found in many types of contract. The building trade and local body contracts present examples, as do leases of real property where arbitration is often stipulated to decide on rental values at the time of renewal.

In these areas, varied though they may be, the differences between the parties often concern mixed

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5. See C. de Visscher "Reflections on the Present Prospects of International Adjudication" (1956) 50 A.J.I.L.467.

6. See J.G. Wetter The International Arbitral Process: Public and Private (Oceana Publications, New York, 1979) Vol.4.



questions of fact, custom and law. As such, they are theoretically justiciable in ordinary courts; but the effort of proving complicated factual matters, including the adducing of expert evidence, presents great practical problems. Formerly a jury of businessmen of the City of London was used in some ordinary courts of law to overcome some of the difficulties; and today judges of the English Commercial Court are expert in these esoteric fields of law and custom. But obviously only some parties are able to avail themselves of such a facility.

Some areas of activity, however, are not arbitrable. "Non-arbitrability" has two different meanings. First, it refers to fields in which, as a matter of positive law, arbitration is prohibited. In countries like New Zealand, matters which cannot be arbitrated are few, but they do exist. In New Zealand an Act of Parliament renders arbitration clauses in insurance policies unenforceable against the policy-holder.<sup>7</sup> The restriction is intended to avoid unfairness caused by inequality of bargaining power. In the United States securities disputes are generally not arbitrable,<sup>8</sup> for similar reasons.

Secondly, "non-arbitrable" may refer to the innate unsuitability of particular types of disagreement for resolution by arbitration. In these cases settlement by court adjudication is a fortiori inappropriate. Lon Fuller cites as examples the division of a valuable art collection and the positioning of players in a football team.<sup>9</sup>

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7. Insurance Law Reform Act 1979, s.8.

8. Wilko v Swann 346 U.S.429 (1953).

9. L.L.Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv. L.R. 353, 394-395.



A less extreme example is industrial relations. The formalities of some processes in this area suggest that arbitration is being employed. But labour arbitration can be seen as a different category to arbitration as discussed above. The issues being decided go more to what should be the position than to what is: the distinction is between disputes of interest and disputes of right. The criteria differ in each case, as does the role of the "arbitrators". A recent New Zealand case refers to the "broad and basic distinction between industrial arbitration and the determination of legal rights".<sup>10</sup> Industrial arbitration often resembles negotiation more than determination - just as some form of negotiation, such as mediation, would be necessary to divide the art collection.

On the other hand, in some countries resort to interests arbitration is compulsory. It has been said that<sup>11</sup>

"[A]lthough voluntary and compulsory arbitral institutions may appear ... to bear a superficial resemblance to each other, the two systems are totally divergent conceptually and philosophically."

But it can be noted that disputes of right too are sometimes mandatorily referred to "arbitration."<sup>12</sup> This is a hybrid form because, although the dispute must be submitted, the choice of the arbitrator often remains with the parties, as does the regulation of the procedure. In the United States there are statutes providing for compulsory referral of

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10. N.Z. Drivers Association v N.Z. Road Carriers [1982] 1 N.Z.L.R.374, 391

11. F. Raday Compulsory Interests Arbitration (Hebrew Univ., Jerusalem, 1983) 11.

12. See e.g. Government Life Insurance Act 1908, s.14(3); Waterfront Industry Act 1976, s.10(4).



ordinary civil disputes, in order to alleviate the workload of the courts. Although these obligatory references of legal disputes may be practically useful, even necessary,<sup>13</sup> it is questionable whether they can properly be described as arbitration at all.

The fundamental distinction is that arbitration is founded in contract. Consequently, the question arises as to the role of the courts in intervening in a process which is *prima facie* a relationship between the parties alone. The question is all the more important in that the very thing that the contract seeks to do is to shut out the courts' jurisdiction in the matters agreed to be submitted to arbitration. The parties might, had they wished, have provided for an appeal from the arbitrator to the courts. But such a right of appeal would be rare. Any right of appeal is generally to an appeal tribunal within the context of a trade association. The essence of the award is that it is final and binding, as both the legislature and the courts<sup>15</sup> have recognised.

The source of the arbitrator's authority lies in the parties' contract. Without an agreement he cannot act, and he cannot act outside the terms of the contract. A judge, on the other hand, does not depend on the litigants before him for his powers, although they may withdraw their dispute from him.<sup>16</sup> The essential elements of the arbitration are

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13. R. Broderick "Compulsory Arbitration: One Better Way" (1983) 69 A.B.A.J. 64.

15. Arbitration Act 1950, s.4 and s.4(2); and A. Walton Eggell *on Arbitration* (15 ed., Stevens, London, 1975) 324.

16. Though in a recent criminal case the Court refused to let the applicant withdraw his appeal: *Harwood v Ministry of Transport* [1982] 1 S.L.R. 333.



## II. THE COURTS' RELATIONSHIP WITH ARBITRATION.

### A. Basis of Judicial Intervention

This issue goes to the very nature of the arbitral process. The preceding part of the paper discussed the differences between the judicial and arbitral processes; the fundamental distinction is that arbitration is founded in contract. Consequently, the question arises as to the role of the courts in intervening in a process which is prima facie a relationship between the parties alone. The question is all the more important in that the very thing that the contract seeks to do is to shut out the courts' jurisdiction in the matters agreed to be submitted to arbitration. The parties might, had they wished, have provided for an appeal from the arbitrator to the courts. But such a right of appeal would be rare. Any right of appeal is generally to an appeal tribunal within the context of a trade association. The essence of the award is that it is final and binding, as both the legislature and the courts<sup>15</sup> have recognised.

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15. Arbitration Act 1908, s.4 and sch.2; and A. Walton Russell on Arbitration (19 ed., Stevens, London, 1979) 378

16. Though in a recent criminal case the Court refused to let the appellant withdraw his appeal: Waymouth v Ministry of Transport [1982] 1 N.Z.L.R.358.



designating one), the issues to be submitted to him, the procedure to be adopted, the undertaking to be bound by the award. These considerations argue in favour of the courts restricting themselves from interfering in the process. If arbitration is seen as an autonomous institution, set up and regulated by individuals and not the State, it can be contended that the courts' jurisdiction does not extend to controlling it. Judges are sometimes disposed to accept this type of argument, even when the tribunal under scrutiny does not depend for its existence on the free consent of individuals, but rather on action by the State.<sup>17</sup> If the intention is that disputes be settled outside the ordinary judicial system, then that aim should be assisted.

As might be expected, there are several countervailing arguments to the proposition that arbitration is a purely contractual creature and thus should be left untouched by the courts. The first relates to the law of contract itself and develops the theme that the parties do not intend to abdicate their legal rights in toto. In particular, when entering the arbitration contract, which may be but one clause in a complicated commercial document, they expect that any arbitration which may arise following a dispute will be conducted according to principles of fairness. These principles might be expressed in the arbitration agreement, or, more usually, assumed as a matter of course. But the precise content of the rules of fairness is less easy to assume. Presumably the parties, in choosing arbitration, have opted out of an elaborate procedure such as is found in court proceedings. A fortiori, it is difficult to justify intervention by State judges not for

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17. See Barraclough v Brown [1897] A.C.615.



defects in procedure, but for errors in the award.<sup>18</sup> It is at least arguable that the parties agree to forego the safeguards provided by the ordinary courts related to reaching a correct legal decision.<sup>19</sup> Where speed, privacy and certainty as to obligations take a high priority it is reasonable to infer an agreement to abide by the arbitrator's decision, even if potentially erroneous.<sup>20</sup>

Another argument for judicial supervision of arbitration proceedings is that sometimes the consent of the parties is artificial. Concern has been expressed, particularly in the context of large commercial contracts where trade associations play an important part, that arbitration clauses have been foisted upon contracting parties through monopolistic power. If so then the very basis of the arbitration is undermined and the courts feel themselves justified on modern contractual principles to intervene.

Arguments based on the law of contract are not the only basis for an activist judicial approach to arbitrations. Others emphasise the external character of intervention. These analyses see arbitration as just one system of dispute settlement which, like all other systems

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18. Lord Denning M.R. in Halfdan Grieg & Co. v Sterling Coal & Navigation Corp (The Lysland) [1973] Q.B. 843, 862, said "When the parties agree to arbitrate, it is, by our law, on the assumption that a point of law can ... be referred to the courts". The reality of the assumption may be questionable, in some cases at least.

19. See e.g. the arbitration clause in London Export Corporation Ltd. v Jubilee Coffee Roasting Co. Ltd. [1958] 1 W.L.R.271.

20. This need not have to be inferred since a finality clause will generally be express or implied (supra n.15), though such clauses are given limited efficacy by the courts.



potentially suited to supervision by courts, will in fact be subjected to control. Some types of disputes are acknowledged not to be amenable to ordinary judicial determination. Disputes of interest in the field of labour relations furnish an example. But since the arbitral process resembles in many instances the court process - similar sorts of issues arise, involving a limited number of parties and covering reasonably well-defined ground - it is a suitable forum for the courts to supervise.

This position is considerably strengthened by the argument that arbitration, and moreover the whole law of contract, are only possible in municipal systems because the law allows them: lex facit arbitrum<sup>21</sup>. Since the courts are a branch of the State and are entrusted with enforcing the law on its behalf they are entitled to see that all subordinate tribunals, whether based on statute or the law of contract, observe the law. The argument is perhaps particularised when it is recognised that the courts lend their support in enforcing arbitration proceedings, by nominating arbitrators in default of appointment, and by issuing subpoenas - and the execution of awards. The quid pro quo is that arbitrations and awards should conform to the standards laid down by the courts.

This argument - the "jurisdictional theory"<sup>22</sup> is also supported by regarding the function of adjudication as a sovereign one; that in fact the arbitrator's authority is

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21. F.A. Mann "Lex Facit Arbitrum" in P. Sanders (ed.) International Arbitration: Liber Amicorum for Martin Domke (Martinus Nijhoff, The Hague, 1967) 157.

22. See J. Lew Applicable Law in International Commercial Arbitration (Oceana Publications, New York, 1978) 52.



delegated from the State, albeit through the medium of the parties' agreement. Thus the State is justified in imposing certain conditions as to the exercise of the power.

It should be noted that the jurisdictional theory does not fit the arbitral process in public international law, where the manifest lack of a sovereign reduces the source of the power of the arbitrator to the contracting parties themselves. Another feature is that it does not define the extent to which the court is entitled to intervene. The courts sometimes display an active approach and sometimes a self-denying one;<sup>23</sup> if the State is secure of its overriding powers it ought to be consistent by, for example, enacting a clear statement of the grounds for intervention in the arbitral process.

It has been said that common law countries generally reflect the jurisdictional theory:<sup>24</sup>

"The English ... writing and case law seem to adhere to [the jurisdictional theory] although it is difficult to be very positive in the matter, as the writers appear to take scant interest in the theoretical question of the juridical nature of private arbitration. Nevertheless one of the essential provisions of positive English law can only be explained by the jurisdictional theory of private arbitration."<sup>25</sup>

One particular justification for curial intervention, advanced and long established in English and other

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23. Compare Halfdan Grieg, supra n.18, with Exormisis v Oonsoo [1975] 1 Lloyd's Rep. 432, 434.

24. G. Sauser-Hall "L'Arbitrage en Droit International Privé" (1952) 44-I Ann. inst. dr. int'l. 521 (translation).

25. The reference is to the special case stated, infra.



Commonwealth courts, is the goal of uniformity of the law.<sup>26</sup> It is said that if the courts held their hand in relation to arbitrators' decisions the consequence would be awards based not on law but on the preference of the particular arbiter, unchecked by legal principles. Moreover this might lead to the fragmentation of commercial law in England which would be contrary to public policy. The particular concern for uniformity and certainty is viewed as of great importance, since the pre-eminence of English commercial law rests, it is claimed, on continuing guidance by the judges; many of its important features have been developed in cases stated by arbitrators.<sup>27</sup> It should be recognised that this argument, however well entrenched, derogates considerably from the autonomy of the parties and emphasises the common interest in individual disputes. An alternative attitude is found elsewhere. For example, in the State of New York, an important arbitration centre, the proceedings are viewed as essentially a private matter and not subject to close judicial scrutiny.

Further, if arbitrators were at liberty to decide on the justice of the case, as they saw it, it is argued that the way would be open for powerful trade associations to dictate what should be the standards applied, and would lead to oppression of the commercially weak. Finally the approach is supported on the basis that the courts should be able to supervise any "sphere of national activity":<sup>28</sup> as

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26. See Czarnikow v Roth, Schmidt & Co. [1922] 2 K.N.478, C.A.

27. See Lord Diplock "The Case Stated - its Use and Abuse" (The Alexander Lecture, 1978) reproduced in J.G. Wetter, supra n.6, vol.4, 151.

28. Commercial Court Committee Report on Arbitration (1978, Cmnd.7284).



Scrutton L.J. put it, "[t]here must be no Alsatia in England where the King's writ does not run".<sup>29</sup>

A compromise theory defines the institution of arbitration as "sui generis, which has its origin in the agreement and draws its jurisdictional effects from the civil law".<sup>30</sup> Thus it is said to depend in part on the parties' will, in that they agree to go to arbitration, to the procedure to be applied (insofar as it does not conflict with mandatory laws of the place of arbitration), and to the time, place and arbitrator. But it also depends in part on the law of the place of arbitration (locus arbitri). Obligatory procedural rules must be followed, as failure to do so will risk the denial of force to the award either by invalidation or refusal of enforcement. The law of the locus arbitri can decide what effect, if any, to give to the award.

This theory has obvious attraction as a realistic description of the position, as well as having academic support.<sup>31</sup> It seems clear that arbitration cannot be viewed as wholly contractual nor wholly "jurisdictional"; there are elements of both present. The more powers given by law to arbitrators and to courts supervising them, the less contractual the institution becomes, but the real question, it is submitted, is where the balance lies.

Much of the foregoing discussion is weighted towards the power of judges to intervene in arbitrations in a negative way. But the relationship has another aspect

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29. *Supra* n.26, 488. (Alsatia was a sanctuary for criminals in Whitefriars, London).

30. G. Sauser-Hall (1957) 47-II Ann.inst.dr.int'l. 398. (translation); and see *supra* n.24.

31. E.g. C. Schmitthoff "The Jurisdiction of the Arbitrator" in Schmitthoff (ed.) 3 International Commercial Arbitration (Oceana Publications, New York, 1980) Documents, Part IV (1983) 13.



whereby courts can intervene to support the process, by providing coercive powers and expert advice. Sometimes the court is called on to nominate an arbitrator. These powers<sup>32</sup> are more mechanical and excite less controversy than discretionary control of arbitral proceedings and awards, but they are nonetheless important. Because they are specified in the statute there is no doubt about their existence nor, generally, their scope; but the questions are raised as to what should be the division of powers as between the court and the arbitrator, who can invoke them, and whether they can be excluded by agreement.

#### B. Qualifications on Intervention

In administrative law, when it is desired to protect the proceedings or decisions of statutory bodies from review by the ordinary courts several devices are used. An obvious and direct way is to expressly preclude the court from taking jurisdiction, at least in relation to some aspects of the decision. Thus privative clauses and their attenuated variants purport to take away the remedies ordinarily available for irregular administrative action; and sometimes oust even the court's right to entertain proceedings. Another more indirect way is to grant the original decision-maker a wide scope of authority. Sometimes the court will itself adopt a self-denying approach: the nature of the subject matter<sup>33</sup> and the trivalency of the tribunal's error are relevant factors in this regard. A discretionary remedy may also be influential.

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32. For an outline of the court's powers in New Zealand see Part III, *infra*.

33. E.g. abortion legislation - see Wall v Livingston [1982] 1 N.Z.L.R.734.



In the field of arbitration there is the important extra factor of the source of the tribunal's authority, namely, the parties' agreement. Arguably the existence of this feature alone should restrict the breadth of the court's intervention. However, as noted, that is not the position in practice. But what if the disputants take the further step of specifically prohibiting the right of access to the courts? This would represent a sort of contractual privative clause: those who grant the power also hedge it with protections. The exclusion agreement would reconcile some of the opposing contentions in the contractual versus jurisdictional debate, since it would admit the validity of judicial powers while at the same time permitting the express contracting out of such powers.

There are two questions: the first concerns preventing the court from taking original jurisdiction over the dispute, and the second is whether any rights to review can be excluded. As to the former the arbitration agreement itself implies the exclusion of primary jurisdiction; if the court hears the case the arbitration clause is rendered nugatory. This is dealt with further below.<sup>34</sup>

Exclusion of review powers is impermissible at common law, as exemplified in the decision of the English Court of Appeal in Czarnikow v Roth, Schmidt & Co.<sup>35</sup> There a contract in standard form for the sale of sugar was expressed to be subject to the rules of the Refined Sugar Association, a trade body. The rules provided that any

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34. Part IV infra.

35. Supra n.26.



disputes in sugar contracts were to be referred to arbitration, and further that the parties were not to apply to the High Court by way of case stated as permitted by the Arbitration Act. In this particular arbitration the buyers asked the arbitrator to state a special case but the request was refused in accordance with the rules of the Association.

The buyers then applied to the High Court to have the award set aside for the misconduct of the arbitrators. In reply the sellers denied that there was any misconduct in view of the rule which indirectly formed part of the contract. The court found for the buyers and the sellers appealed.

A strong court<sup>36</sup> dismissed the appeal. The reasons, which have been mentioned in the preceding section, were essentially that the court's function in correcting errors of law by means of the special case stated was both entrenched and useful. Control would prevent abuse of the arbitration system by strong trade bodies while allowing for the enrichment of commercial law and the promotion of uniform legal principles. The rule that the court's ordinary jurisdiction must not be ousted was invoked and further:<sup>37</sup>

"The jurisdiction which is ousted in this case is not the common law jurisdiction of the Courts to give remedies for breaches of contract, but the special statutory jurisdiction of the Court to intervene to compel arbitrators to submit a point of law for determination by the Courts. This appears to me to be a provision of paramount importance in the interests of the public."

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36. Bankes, Scrutton and Atkin L.JJ.

37. Supra n.26, 491 per Atkin L.J.



The principle adopted in the decision has since been affirmed by other courts and law reform bodies.<sup>38</sup>

In contrast, clauses which do not purport to oust the court's powers in toto but only to defer them until an award has been made are upheld. This is the effect of the House of Lords' decision in Scott v Avery.<sup>39</sup> The House held that no cause of action arose under the contract until the arbitration had been completed. Further, in Atlantic Shipping & Trading Co. v Louis Dreyfus & Co,<sup>40</sup> where the agreement barred access to the court on account of a failure to begin the arbitration, it was decided that the court could not intervene.

The cases cited suggest that direct exclusion of the court's jurisdiction is likely to meet strong resistance from judges; but if the parties only go so far as limiting rights of access the agreement may be better received. It seems that even a mildly controllable power is sufficiently acceptable to the court.

A recent development in the English law of arbitration should be noted. By legislative intervention there has been created the right to contract out of judicial review in some circumstances.<sup>41</sup> Where the exclusion agreement is entered into after the dispute has arisen the court can not interfere. And in contracts involving a foreign party exclusion agreements are permitted, even if made before a

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38. Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekering [1962] 2 Lloyd's Rep. 257; Re an Arbitration between Broughton and Renown Collieries Ltd [1941] N.Z.L.R.277; Report of the Commercial Court Users Conference (1962, Cmnd.1616).

39. (1856) 5 H.L.C.; 10 E.R.1121. But see Arbitration Amendment Act 1938 (N.Z.), s.5(4).

40. [1922] 2 A.C. 250. But see 1938 Amendment (N.Z.), s.18(6).

41. Arbitration Act 1979 (U.K.), ss.3-4.



disagreement arises. This is also allowed where the main contract is governed by foreign law. But the departure from the Czarnikow<sup>42</sup> principle thus permitted does not apply to all the court's powers. Exclusion agreements are valid to prevent review of the award itself, of material points of law arising during the reference and of questions of fraud by the parties. They do not impede review of the arbitrator's conduct of the proceedings nor, probably, the issue of whether there is a valid arbitration agreement at all. Moreover the court's powers remain entrenched in certain types of commodity contract.

A more fundamental restriction on intervention has arisen in the context of transnational arbitration. This is the phenomenon of "delocalisation" of the arbitral process, a concept which has been propounded in recent years by some writers as part of the internationalisation of commercial law. Delocalisation contemplates more than the autonomy of arbitration within a legal system; it envisages detachment of the process from any one system, at least until the enforcement of the award is sought. In particular, "the obligatory force of an arbitral award need not necessarily be derived from the law of the place where the award happened to be rendered".<sup>43</sup> Thus the fact that a mandatory rule of procedure of the lex loci arbitri is

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42. Supra n.26.

43. J. Paulsson "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 I.C.L.Q.53. For support of delocalisation see also Paulsson "Arbitration Unbound: Award Detached from the Law of its Country of Origin" (1981) 30 I.C.L.Q.358. For criticism see Park "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 I.C.L.Q.25; F.A. Mann, supra n.21. The International Law Association is treating the argument seriously enough to consider an amending protocol to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: see (1983) 17 J.W.T.L.184.



infringed, which would prevent execution of the award in that country, is irrelevant to its enforcement in another State not possessing a similar rule. An even bolder extension of the concept entails the enforceability of the award even after it has been annulled in its country of origin, but as yet there are no examples of this.

Another feature of delocalisation is that the courts of the locus arbitri should recognise the "international" character of transnational arbitration and consequently decline to scrutinise it as closely as they would a purely domestic arbitration. There are signs that this attitude is appearing. The English legislation of 1979 may be seen in this light, as "non-domestic" awards form one category eligible for exclusion of appeals. And the United States Supreme Court in Scherk v Alberto-Culver<sup>44</sup> distinguished an earlier decision that securities disputes were not arbitrable on the ground that the contract was international:

"A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes but would invite unseemly and mutually destructive jockeying by the parties ... The invalidation of such an agreement ... would, as well, reflect 'a parochial concept that all disputes must be resolved under our laws and in our courts'".

The attempts to sever the arbitral process from the ordinary legal system are not without their critics,<sup>45</sup> and it seems obvious that the effect of an award must depend

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44. 417 U.S.506 (1974).

45. See e.g. supra n.43; and Wetter, supra n.6, vol.2, 403.



ultimately on the attitude of the court in which execution is sought. But there is still scope for the judge to act with restraint, even in the fact of an award invalid in the country of origin, so long as it fulfils the conditions of validity in the place of execution. How important the development will prove is still speculative nevertheless.

The character of the courts' relationship with arbitration is subject to three variable factors - time, means and grounds of intervention. These are considered in the following sections.

C. Timing

The nature of the interaction between the arbitral process and the courts is conditioned by, inter alia, the time when application to the court is made. First, there may be intervention at the initial moment of setting up an arbitration. The purpose might be to prevent it proceeding because of lack of authority or defects in the constitution of the tribunal; or to assist in the process by refusing to allow litigation to advance in the face of an arbitration clause governing the matter. The court might also support the establishment of an arbitral tribunal by appointing personnel.

Secondly, faults in the proceeding of the hearing may call for remedy. Again the court's task may be either positive or negative. Where the arbitrator exceeds or misuses his powers or ignores his duties, or acts in breach of a procedural requirement the court can be called on to apply sanctions. In other cases the coercive powers possessed by State courts may be required to assist the progression of the arbitration by, for instance, summoning witnesses or ordering inspection of property.



In the third place, once the award has been given it might be attacked by the losing side on the basis that it embodies an erroneous decision. Or it may still at that point be challenged on the basis of irregularities at either of the earlier stages of the process. Further, the formal or technical consequences of the decision might be impugned; for example, orders for costs or interest.

Lastly, the ultimate point of intersection with the judicial process, the enforcement of the award, will possibly become the scene of a final assault on the validity of the agreement, process or decision.

Timing is also relevant in two other ways. The type of remedy sought will depend on when the application to the court is made. Thus if the challenger alleges that the arbitrator is biased by reason of interest, an application before he commences the hearing may enable him to be replaced, without impeaching the validity of the whole process. Moreover a request during the course of proceedings for directions can ensure that the arbitration is conducted on proper lines, thereby preventing the process going astray before it does so. If the goal desired is the quashing of the award or its remission to the arbitrator for reconsideration, the opportunity can only occur at the end of the proceedings.

The second point is that the moment of the challenge to the arbitration will sometimes influence the attitude taken to it by the judge. He may be more willing, for instance, to order the substitution of a member of the tribunal early on than to vacate a delivered award in which the parties have invested time and money; and this may be a vital factor in the choice between setting aside and remission.



D. Means

In this regard there are again two opposing facets of the court's relationship with the arbitration, both supportive and controlling. Included among the former are methods of assisting the conduct of the hearing (which are better considered in a particular statutory context).<sup>46</sup> Methods of preventing the arbitration even commencing are also considered elsewhere. Means of controlling the arbitration and award will be discussed in this section. The court enforcement of the award shares the two characteristics in that it assists the arbitration to its ultimate conclusion but also provides a further opportunity to oppose implementation.

It is important to note at the outset that the methods of recourse against an award are not confined to applying to the court. There are various possibilities of the arbitral tribunal itself acting to correct an irregularity which merit exploration. The existence of these powers is relevant to the approach a court will take. There are also practical advantages in being able to return to the original decider. The range of options depends on the nature of the complaint and the relief sought; possibilities included are rectification, interpretation and revision of the award. Questions are raised as to the power of the arbitrator to correct his decision and the basis on which he can do so.

Some alleged errors are so fundamental as to necessitate a challenge before a different body. The methods here can also be subdivided according to the scope of the issues to be traversed and the extent of the court's

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46. Part III, *infra*.



power. Broadly there are two subcategories, appeal and review. A device peculiar to English-derived legal systems is the case stated which can be used either to consult the court during the arbitral proceedings or, in effect, to challenge an award on a point of law.

An exceptional category of recourse can be noted: right to trial de novo in a court if either party is dissatisfied with the award. Examples of this are apparently limited to compulsory referrals to arbitration under American statutes.<sup>47</sup>

#### 1. Rectification

If through oversight or miscalculation there is a mistake in the award it is convenient that the arbitrator be able to correct it simply and speedily. But once he has delivered his award the arbiter is functus officio and not entitled to change it. In most legal systems exceptions to the principle exist to avoid needless inconvenience. For example section 8 of the New Zealand Arbitration Act reads:

"The arbitrators or umpire acting under a submission may, unless the submission expresses a contrary intention, ... (c) correct in an award any clerical mistake or error arising from any accidental slip or omission."<sup>48</sup>

The courts have tended to read the section narrowly so that only an inadvertent mistake is corrigible by the arbitration. In Harrison v Bolton<sup>49</sup> the arbitrators awarded a sum against the defendants. On receiving representations from the plaintiff they purported to amend

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47. Supra n.13 and text.

48. In the Supplement to the 19th edition of Russell supra n.15, (notes to p.447) the editor states that the power given by this section is also in the court's inherent jurisdiction.

49. [1975] 1 N.Z.L.R.457.



the award to increase the sum due. Under the award he plaintiff was entitled to half the amount realised by a certain transaction. The arbitrators mistook the sum realised and consequently awarded a lesser amount. They had made a second mistake based on incomplete evidence.

It was held that section 8(c) did not apply since "the arbitrators wrote down precisely what they meant to write down". In the first issue they misunderstood the facts; in the second fresh evidence became available; neither of these fell within the section. In the result, however, the judge exercised his power to remit the award; his power was more extensive than the arbitrators'. The section does not answer the question whether the arbitrator can act on his own initiative in correcting the award, even to the limited extent permissible.

By contrast American statutes recognise more extensive powers of arbitrators to rectify awards. The federal Arbitration Act<sup>50</sup> allows modification (on application) where there is an "evident material miscalculation ... or mistake in the description of any person, thing [etc]". It proceeds to permit modification where there has been an excess of jurisdiction in the sense of deciding a matter outside the submission.<sup>51</sup> Moreover the correcting order is to "effect the intent [of the award] and promote justice between the parties". The New York law is to a similar effect, except it adds that where jurisdiction has been

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50. 9 U.S.C. ss.1-14, s.11.

51. Cf. Pedler v Hardy (1902) 18 T.L.R.591 where Channel J. refused to allow rectification under the equivalent of section 8(3) on the basis of excess of jurisdiction.



exceeded the modification may not affect the merits of the decision on the issues that were referred. Both American statutes impose time limits on applications for rectification.

In public international law there are several examples of rectification clauses, limited in the main to clerical or arithmetical errors<sup>52</sup>. However it is at least arguable that the power to rectify is inherent in the arbitral tribunal in which case a specific treaty article would be unnecessary:

"[T]here is authority for the proposition that an international tribunal has an inherent power to rectify an error apparent on the face of the award, at least up till the time of execution. Rectification in this sense does not involve so much a modification of the judgment or award as the expression of the true intention of the tribunal, and therefore does not conflict with the principle that judgments and awards are final."<sup>53</sup>

There are problems however in determining the limits of a general power. Rectification should be confined to mistakes not touching the merits of the award; other procedures are available for more serious irregularities. The application of the basic principle presents difficulties.

## 2. Interpretation

If the award is ambiguous or otherwise unclear there is the possibility of requesting clarification from the tribunal. The New Zealand Act contains no provision for interpretation. The parties could make allowance for it in their agreement but in ad hoc arbitrations this would seem

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52. E.g. International Law Commission Model Rules on Arbitral Procedure, 1958; Wetter, supra n.6, vol.5, 240. These still have the status of lex ferenda.

53. J.L. Simpson and H. Fox International Arbitration: Law and Practice (Stevens, London, 1959) 241.



to be uncommon. Again interpretation does not breach the principle of *res judicata* because the parties are seeking only an elucidation of their rights, not to amend them.

Where there is an international element in the transaction the arbitration is more likely to be subject to the rules of an arbitration institution. Some of these make specific provision for interpretation of awards. Thus both the U.N.C.I.T.R.A.L.<sup>54</sup> and I.C.S.I.D.<sup>55</sup> rules allow interpretation within a limited time; the former deem any interpretation to be part of the award, thus acknowledging the *res judicata* point. The latter deal with an important practical problem in interpretation (and also in rectification), namely, the impermanence of the tribunal. It may be impossible to reconvene the same panel of arbitrators to interpret their award. In this event the administrative authority under the I.C.S.I.D. Convention may constitute a new tribunal. How satisfactory this solution will prove in all cases is doubtful, since the authors of the award are presumably those best qualified to interpret it. But the problem is unavoidable if the award is ambiguous and the arbitrator is not able to assist, either the parties must agree on its meaning or refer it to another authority. The International Law Commission proposals<sup>56</sup> provided that where it was impossible to resubmit the award it should be referred to the International Court.

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54. See Wetter, *supra* n.6, vol.4. These rules are incorporated in the London Court of Arbitration rules.

55. *Supra* n.4. See Wetter, *supra* n.6, vol.4.

56. *Supra* n.52, Art.33.



Public international law seems for the most part to accept that interpretation is only permissible where a prior agreement allows it, either an existing treaty or an ad hoc agreement after delivery of the award.<sup>57</sup> There is however some support for the view that the interpretative power inheres in the tribunal. The United Nations Administrative Tribunal proceeded on this basis in one case, despite the lack of an interpretation clause in its statute.<sup>58</sup>

In domestic law, as noted, there is usually no specific power to interpret granted to the arbitrator. But the possibility exists of a court either declaring what the award means or remitting it for this purpose to the tribunal pursuant to the Arbitration Act.

Under the Declaratory Judgments Act 1908 the High Court can make declaratory orders determining any question as to the construction or validity of an agreement.<sup>59</sup> Whether "construction of the agreement" includes an interpretation of the award is perhaps unclear; the award is the result of an agreement and may fairly be said to be imbued with consent since both parties have agreed to be bound by it.<sup>60</sup>

### 3. Revision

Where the challenge to the award cannot properly be characterised as interpretation it may fall within a right of revision. This means of recourse is confined to situations where new facts arise; that is, facts which were not known to the tribunal or the applicant and which could

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57. See e.g. the award in the Euratom Tax Liability case (1966) 18 U.N.R.I.A.A.497, 514.

58. Crawford v Sec. - Gen. of the U.N., quoted in W.N. Reisman Nullity and Revision (Yale U.P. New Haven, 1971) 193.

59. Sections 2 and 3.

60. See I. Zamir The Declaratory Judgment (Stevens, London, 1962) 169.



not reasonably have been known. Generally the right depends on the new evidence being a decisive factor in the proceedings; errors of law are consequently unable to be corrected under this heading.

The general principle of res judicata operates to bar revision unless the agreement permits it. Express provision for revision originated in public international law. The first example is found in a general arbitration treaty 1898,<sup>61</sup> and rights of revision were included in the Hague Conventions of the following year and 1907. The possibility of an implied right of revision was recognised by the Permanent Court of International Justice<sup>62</sup> and exercised by two arbitral tribunals, in 1933<sup>63</sup> and 1941.<sup>64</sup>

Scope for revision is found in some domestic jurisdictions. Wetter cites<sup>65</sup> the Zurich Procedural Code as affording the right and imposing restrictions on it. But in this case the request is made to a court, not the arbitrator. Similarly in common law jurisdictions there is generally no right in the arbitrator to revise an award on the basis of new facts, since his decision is final and binding. Any modification to the award must be sought through the court, by means of an application to remit. An agreement to give the arbitrator power to reconsider the award on the basis of new facts is probably valid, but he

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61. Italo - Argentine Permanent Treaty of Arbitration, 186 C.T.S.378.

62. Saint Naoum Monastery case [1924] P.C.I.J. Ser.B. No.9., pp.21-22.

63. Lehigh Valley Railroad Co. v Germany (1933) 8. I.L.R.480, 484.

64. Trail Smelter Arbitration (U.S. v Canada) (1941) 9 I.L.R. 315, 326.

65. Supra n.6, vol.2, 495 (Art.293)



cannot reserve to himself the power to decide matters after delivering his award, unless it is an interim award.<sup>66</sup>

It will be seen that as a general rule arbitrators are powerless to modify their decisions, and court processes must be invoked. Where the arbiter does possess the relevant powers it is as a result of a statutory grant. Possibly the parties can supply the authority, but this may conflict with the demand of the courts that awards be final before execution will be ordered. In practice rights of modification do not seem to be given by the parties, unless indirectly by the incorporation of a set of institutional rules. The more important the power of alteration, the less likely it is to be granted at the outset, for reasons of finality. But where authority is granted its limits will be determined by the court.

Powers of self-correction are, unsurprisingly, more common in public international law, because there is no central authority to perform the function: if such powers were not available one party might enjoy the unfair advantages stemming from an undoubted slip. Whether the authority must be expressly furnished by the parties or arises from the very nature of a tribunal is unclear. If the latter, it raises the interesting question in the domestic area of the relationship to the courts' powers to those of the tribunal. It is to the courts' principal methods of controlling the award that the discussion will now turn.

#### 4. Consultation

Although at first sight a means of consulting the court connotes support rather than control, the special case

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66. Arbitration Act 1908, s.4 and Sch.2, cl.11.



stated procedure as it has developed in many Commonwealth countries constitutes a major device for supervising arbitral awards. The method was developed in England during the nineteenth century by judges of Quarter Sessions, who would make findings of fact in the form of a special case and request the Queen's Bench to remit the case with its opinion on the law.<sup>67</sup> The procedure was adopted for arbitrators by the Common Law Procedure Act 1954, and is now applicable also to many administrative tribunals.<sup>68</sup>

The special case procedure is strengthened by the right of a party to apply to the court to direct the arbitrator to state a case; and by the fact that refusal to allow the party an opportunity to make such an application constitutes "misconduct" for which the award can be set aside.<sup>69</sup> Moreover the right to a case stated is entrenched.<sup>70</sup> The device therefore represents a considerable limitation on the arbiter's freedom to decide questions of law finally. It will be seen later that this rationale influences the court in deciding whether a question of law should go to arbitration even initially. The courts view favourably the argument that legal issues should be decided by judges. It is relevant however to note that often eminent lawyers or retired judges (or even sitting judges in England<sup>71</sup>) are chosen to arbitrate questions of law. And apart from questions of qualification the court

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67. See Lord Diplock, *supra* n.27, 152.

68. Commissions of Inquiry Act 1908, s.10.

69. Re Fischel and Mann [1919] 2 K.B.431.

70. Czarnikow v Roth, Schmidt & Co., *supra* n.26.

71. Administration of Justice Act 1970 (U.K.) s.4.



will not review for error of law an award on a question of law specifically referred.<sup>72</sup> In this event the parties' preference prevails over the principle of suitability, but the cases demonstrate the difficulty of formulating a specific reference of a legal question.

If the arbitrator refuses a party's request to state a case in what circumstances will the court compel him to do so? The section in the Act confers the bare power without any indication as to the manner of its exercise. In The Lysland<sup>73</sup> the English Court of Appeal enunciated several principles:

"The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law ... [It] should be clear cut and capable of being accurately stated as a point of law - as distinct from the dressing up of a matter of fact as if it were a point of law. [It] should be of such importance that the resolution of it is necessary for the proper determination of the case."

If these requisites are fulfilled then the arbitrator should state a case; and if he declines the court will make him do so. The Lysland was a case of construction of a charter party. Kerr J. in the High Court had refused to direct a special case since he considered the question involved was well within the experience and ability of the arbitrator. He regarded the decision to order a case as discretionary, not as of right, and listed several factors to be taken into account. These are, with respect, preferable to Lord Denning's in the Court of Appeal because of their specificity. They include the qualifications of the

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72. F.R. Absalom v Great Western (London) Garden Village Society Ltd [1933] A.C.592; Re an Arbitration, Roke and Stevens [1951] N.Z.L.R.375.

73. Supra n.18.



arbitrator, the general importance of the point involved, the sum in contention, the consequences of delay caused by the special case procedure, and the likelihood of the arbitrator going wrong in law or in his procedure.<sup>74</sup>

The broader criteria set out by the Court of Appeal did in fact produce a large number of applications for cases stated. It was said that parties to arbitrations apprehensive of the award going against them would request that a case be stated in order to delay enforcement of their obligations;<sup>75</sup> and despite Lord Denning's strictures against abuse of the method in The Lysland the request would often be granted. For this reason among others the case stated procedure has now been replaced in England and some Commonwealth jurisdictions by a system of appeals from awards<sup>76</sup> (as to which see below) and determination of preliminary points of law. The latter resembles the former consultative case but is qualified by the necessity to obtain the leave of the court, which will be refused unless the resolution of the legal point might save the parties substantial costs and could substantially affect the rights of the parties.<sup>77</sup>

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74. Ibid. 851

75. Report on Arbitration, supra n.28, para.

76. Arbitration Act 1979 (U.K.); Arbitration Amendment Act 1980 (Sing.); Arbitration Ordinance 1980 (H.K.).

77. Arbitration Act 1979 (U.K.) S.2(2).



5. Appeal International law there have been only a few cases

a. General arbitral proceedings to the International Court

Where the award (or proceedings) is attacked in a court of justice there are generally two possibilities, appeal and review. The distinction between them is reasonably well defined in common law systems; that is, they differ as to the source of the power, and as to what can be reviewed. In other systems only the latter characteristic is important. In any system however appeal from an arbitral award is rare, for the obvious reason that awards are intended to be final both as to law and fact. "Appeal" implies a re-examination of the issues in the arbitration, and theoretically extends to both law and fact. However, most appellate bodies do not involve themselves in finding facts since that function is felt to be more appropriate to the court of first instance which sees all the witnesses and hears other evidence. Nevertheless inferences from primary facts found by a lower body are quite freely drawn, and the appellate court hearing a general appeal has power to depart from a finding of fact if it cannot see the justification for it.

Appeal rights may be given by the parties, either to another privately created body (for example, an appeal board or executive committee of a trade association) or to a court. Secondly they may be granted by the legislature, as in some civil law countries.<sup>78</sup> The parties might be free to exclude the exercise of these rights by contract, or the appeal may be avoidable.

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78. See E.J. Cohn "Commercial Arbitration and the Rule of Law: A Comparative Guide" (1941) 4 U.T.L.J.1; and see n.76 supra.



In international law there have been only a few cases of appeal from arbitral proceedings to the International Court. There are however several examples to be found in the treaty series of appellate recourse to a court. Some of these are framed in a restricted manner (which perhaps qualifies them as review procedures) such as appeals as to jurisdiction.<sup>79</sup> But there are also more extensive rights including entitlement to a full appeal.<sup>80</sup> One such right was invoked in the Peter Pazmany University<sup>81</sup> case decided by the Permanent Court of International Justice in 1933. That was an appeal from one of the Mixed Arbitral Tribunals established after World War I to deal with claims arising between persons of different States from the reorganisation of territory after the war. The Hungarian University claimed ownership of land transferred to Czechoslovakia following the war. The Arbitral Commission found for the claimant and the Czech government appealed to the Permanent Court. The appeal was formulated in several ways, including arguments: that the Arbitral Tribunal lacked jurisdiction; that its decision was a nullity; that its decision should be modified; and that the Tribunal had exercised its jurisdiction on wrong principles. The Permanent Court recognised its own jurisdiction as a court of appeal, but

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79. E.g. Art.15 of the Young Plan Treaty: 104 L.N.T.S. 243, 253, Art 31 of the Agreement on German External Debts (1953) 333 U.N. T.S.3.

80. E.g. Treaty of Trianon (1930) 121 L.N.T.S.192.

81. Peter Pazmany University v Czechoslovakia [1933] P.C.I.J. Ser A/B No. 61



felt it unnecessary to explore the problems associated with the question of the nature of its powers. It further declined to consider objections made by the Czech government relating to the procedure adopted before the Tribunal. They were not included in "questions of jurisdiction or merits".<sup>82</sup> The Court then dealt fully with Czechoslovakia's claims, embarking on a length review of the facts (including evidence not submitted to the Tribunal) after consulting the parties' written and oral submissions. Finally the Court decided against the Czech appeal, which finding "coincides with the operative clause of the judgment given by the Mixed Arbitral Tribunal".<sup>83</sup> In a second case, decided in 1936,<sup>84</sup> the Permanent Court made a similar detailed examination of the facts and treaty provisions before deciding that it did not have jurisdiction to hear the appeal.

These appeals from international arbitral awards are exceptional. The International Court of the inter-war period took a vigorous approach in reviewing the detail of the cases as part of its role to decide "questions of merits", but was careful not to take up issues which had not been submitted to it; and expressly not the task of supervising the conduct of the lower tribunal.

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82. Ibid, 17-18.

83. Ibid, 44.

84. Pajs, Czaky, Esterhazy Case [1936] P.C.I.J. Ser. A/B No.68



b. Recent Developments

As already mentioned, several Commonwealth countries have adopted a system of appeals on points of law from arbitral awards (and others may follow). This procedure is to be distinguished from rights of review because, though confined to legal questions, the appeal can decide on the merits of the award's handling of such questions. Review, on the other hand, typically denotes determining the validity of the award by considering whether the arbitrator exceeded his powers by making a vitiating error.

The changes are underlain by a deeply entrenched attitude held by common law judges towards arbitrations. It is relevant to note that the changes were mooted by judges extrajudicially,<sup>85</sup> and developed further in a report recommending alterations,<sup>86</sup> and a Bill which eventually became the Arbitration Act 1979. In these preparations it was always stressed that the principles laid down in Czenikow v Roth Schmidt & Co.<sup>87</sup> were still valuable; but that circumstances had changed in the fifty years since that case. Thus the concept of judicial supervision of arbitrators which was necessary to ensure they complied with the law, and which had contributed greatly to the development of commercial law by the courts, should be preserved. The essential change was that it be cut down in extent. That is, recourse to the courts should still be allowed but through the filtering device of leave to appeal.

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85. By, for example, Lord Diplock, supra n.27, and Donaldson J.: see Russell on Arbitration, supra n.15 at viii.

86. Supra n.28

87. Supra n.26



The immediate reasons for the changes were two-fold: first, that the case stated procedure was being abused for the purposes of delaying the enforcement of obligations under the award. Secondly, it was felt that foreign governments were resisting the insertion of London arbitration clauses in large contracts to which they were parties, for the reason that English judicial review of awards was too extensive. This was estimated to be costing the British economy large sums in invisible earnings. An extra measure introduced for this particular purpose was a provision allowing parties to some types of contract to agree to exclude appeals on law from the award altogether.<sup>88</sup> Many parties nevertheless still cannot exclude the appeal unless they do so after the dispute arises. So, while recognising that important custom would be lost to English arbitrators if review was not cut back, the legislation seeks to preserve it in some of the commonest types of case submitted to arbitration in London, namely, maritime, insurance and commodity contracts, and all contracts involving only English parties. In each of these however, review can be ousted after the dispute has arisen, by consent. This last exception may well prove little-used, since it is likely that when a disagreement occurs at least one party will assess his chances of success as smaller under the arbitrator's exclusive jurisdiction.

In sum, although the emphasis has been shifted back more to the freedom of arbitrators, this results from a quantitative approach rather than one based on autonomy

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88. Arbitration Act 1979 (U.K.), s.3: see Part II B supra.



inherent in arbitration itself. The mechanism for bringing the arbitration before the court is the granting of leave to appeal from the award. This is given only where the High Court:<sup>89</sup>

"... 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 parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate."

This provision has already been considered in several important cases. In the first case to reach the House of Lords, Lord Diplock set out principles on which the discretion of the court to grant leave to appeal was to be applied. In this case, The Nema,<sup>90</sup> as charterparty on a standard form provided for the charterers' use of the ship for seven consecutive voyages. A strike at a port prevented loading after the completion of one trip. The owners and charterers then added to the contract, permitting the owners to rehire the ship for one intermediate voyage while the strike continued. The charterparty was also extended for another seven voyages. At the end of the intermediate voyage the charterers wished the Nema to return but the owners relet her for another trip. The dispute went to arbitration, and the arbitrator found the whole contract to be frustrated. The charterers then sought leave to appeal. Robert Goff J. gave leave (and later allowed the appeal, varying the award). His decision was reversed by the Court of Appeal and the Law Lords confirmed the reversal. Their Lordships criticised the attitude of some High Court judges

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89. Ibid, s.1(4).

90. Pioneer Shipping v B.T.P. Tioxide Ltd [1982] A.C.724.



who considered that if the criterion given in the section (namely, "substantially affects the rights of one or more parties") was met, leave should be given. This was a threshold requirement, held the Lords, and the court retained a discretion to refuse leave. Lord Diplock (with the agreement of all the other members of the House) developed a classification system for granting leave. It depended on whether the term of the contract in issue was standard form or a "one-off" clause. It further turned on the events surrounding the contract - whether they were "one-off" or likely to recur or, if the last-mentioned possibility was inapplicable, whether a court decision would be likely to add to the clarity and certainty of English law, and there was a strong prima facie case that the arbitrator was in error. The decision to grant leave or not, said his Lordship, should be taken on a bare reading of the award, and leave only given if the judge thought the arbitrator clearly wrong and if he (the judge) thought he could be persuaded that the arbitrator was right. Further, "wrong" meant that the arbitrator had misdirected himself in law or had come to a decision which no reasonable arbitrator could have come to. Several comments may be made in relation to these principles. First, most of Lord Diplock's speech was obiter, as seems to be recognised by the Court of Appeal.<sup>91</sup> Secondly it is not necessarily possible to deal with an application for leave merely on a perusal of the award, because the procedure is by originating motion in open court. And the judge will almost always think

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91. Italmare Shipping Co. v Ocean Tanker Co Inc. (The Rio Sun) [1982] 1 All E.R.517.



it is possible that he can be persuaded that he arbitrator is right.<sup>92</sup> Thirdly, is there always a clear difference between a one-off clause and a standard form contract?<sup>93</sup> Moreover the opinion of the Lords places an elaborate gloss on section 1(4) of the 1979 Act, which ex facie is straight forward. It is true that Lord Diplock spelled out from the scheme of the Act a legislative policy in favour of finality of awards. One indication, for example, was the further restriction on leave to appeal to the Court of Appeal which can only be granted in cases of questions of law of general public importance;<sup>94</sup> on the other hand this requirement is conspicuously absent from the High Court stage with which the Nema decision dealt. A policy of finality is consonant with the basic concept of arbitration; however the existence of a right of appeal on the substance of the legal aspects of the award is itself unimical to that basic idea. The way in which The Nema interprets the appeal right is perhaps both too restrictive and too selective in terms of the legislation.

Later cases have characterised Lord Diplock's principles as guidelines only: "you can step over guidelines without causing any harm. You can move them, if need be, to suit the occasion".<sup>95</sup> In The Emmanuel Colocotronis<sup>96</sup> the issue for arbitration was whether the parties were bound to arbitrate on the main contract. The

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92. B.V.S. S.A. v Kerma Shipping Co. S.A. (The Kerman) [1982] 1 All E.R.616.

93. See Astro Valiente Compania Naviera S.A. v Pakistan Ministry of Food and Agriculture (The Emmanuel Colocotronis) [1982] 1 All E.R.578, 581. And in A.R.A. v Codelfa [1981] 2 N.Z.L.R. 300, 305 there was no evidence to distinguish the two.

94. Arbitration Act 1979 (U.K.), s.1(7).

95. The Rio Sun, supra n.91 per Lord Denning

96. Supra n.93



latter was held to be in standard form, in which case The Nema indicated a strong prima facie case was necessary. The judge could not say that such a standard had been made out that the arbitrator was wrong, nor even a strong possibility but he granted leave anyway. There was a substantial question of law fairly arguable on both sides. The decision also possibly came within the "clarity and certainty of English law" bracket of Lord Diplock's dicta. And in Bulk Oil v Sun International<sup>97</sup> where again the arbitrator was not plainly in error nor could a strong case be established to that effect, Staughton J. agreed that in some circumstances The Nema could be departed from. In that case there was no standard form contract, but there might have been similar clauses in other oil agreements. Moreover the issues involved European Community law, which argued in favour of letting the courts deal with them. Leave to appeal was granted.

In summary, the English legislation recognises explicitly what the courts had been permitting in effect, namely an appeal on a point of law from an arbitral award. The statute was founded in part on the perceived abuse of the previous system and partly in concern for the British economy. These may well be justifiable reasons for the reform, but it should be recognised that the basic principle of judicial control of arbitral awards is preserved, subject to the right of parties to certain types of parties to exclude it. The limits of the appeal are defined not by the seriousness of the irregularity alleged but by a filtering

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97. [1983] 1 Lloyd's Rep.655.



device in the legislation. The need for leave to appeal, has been read by some judges as granting the courts a wide discretion which nevertheless is to be confined within judicially imposed bounds. But there is not full agreement over these limits, and other judges prefer to retain review over a wider class of cases (which admittedly seems consistent with the statute). The continuing litigation over the scope of the appeal will be valuable for legislatures in countries considering amendment of their arbitration laws on the United Kingdom model.<sup>98</sup>

6. Review

Review denotes the consideration by a court of an award which is challenged for essential errors of law or procedure. It is thus more constrained than a right of appeal which can be as wide as the grantor decides. One special feature of review of importance in common law systems is that the historical source of the power was claimed by the courts, rather than depending on statute or the parties' contract. This is unremarkable in terms of English-derived administrative law, since the High Court exercises a centuries-old supervisory jurisdiction over inferior tribunals, originally confined to lower courts of law but extended to administrative tribunals. But a supervisory power over private bodies whose function is to settle disputes is less securely established. For example the power over inferior courts depends on the prerogative

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98. See the suggestions of Thorp J. in Kenneth Williams & Sons Ltd. v Martelli [1980] 2 N.Z.L.R.596 and Chilwell J. in Re Wellington High School and Jeeves Construction Ltd. [1981] N.Z. Recent Law 88.



orders to control them; such orders were said to issue<sup>99</sup>

"[W]henever any body of persons having legal authority to determine questions affecting the rights of subjects ... act in excess of their legal authority ..."

"Legal authority" in this dictum refers only to statutory powers, not to contractual authority; thus the prerogative orders did not lie to arbitrators except in the particular case of compulsory statutory arbitration.<sup>100</sup>

But the courts of common law claimed a power of review over arbitrators on legal questions from early last century,<sup>101</sup> and had statutory powers to review for "corruption or undue means" even before them.<sup>102</sup>

Other legal systems also provide for review of arbitration proceedings. There the difference between review and appeal lies not in the source of the power (generally statutory) but rather in its scope. In all systems irregularities in the process or award susceptible to review must go to the very root of the decision, so that it can be said that there is no award. This principle, clear enough as a matter of theory, encounters difficulties in its application: what types of errors are so serious as to nullify the award, and how are they established?

#### 7. Enforcement

The last potential point of intersection between the arbitral process and the courts is proceedings for the enforcement of the award. Plainly the parties can agree to execute the decision of the arbitrator themselves without

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99. R. v Electricity Commissioners [1924] 1 K.B. 171, 205.

100. R. v National Joint Council for the Craft of Dental Technicians, Ex P. Neate [1953] 1 Q.B. 704. And in relation to the statutory procedures in N.Z. see Kenneth Williams, supra n.98.

101. Kent v Elstob [1802] 3 East 18; 102 E.R. 502.

102. Arbitration Act 1698 (U.K.), 9 Will. III, c.15.



the necessity of a court order, and ideally this would happen. They have, after all, voluntarily undertaken to do so by the fact of recourse to a decider whose award is to be "binding". If the award relates only to the obligations of each side and not to the manner of execution then an agreement, either as part of the original contract or ad hoc after delivery of the award, could be entered to deal with the practicalities.<sup>103</sup>

But where the losing party rejects the award the arbitrator has no power to force him to adhere to it. Theoretically if the arbitration agreement provided that the award granted proprietary rights on the lines of the arbiter's decision then the general law of property would permit some form of self-help. But an award per se does not operate in English and New Zealand law as a transfer of property.<sup>104</sup> Thus in practice the legal authority of the State must be invoked to compel a recalcitrant loser to meet his obligations.

Where, as in public international law, there is no fully effective central authority with coercive powers awards are ultimately unable to be enforced against a dissenting party. Some new agreement will be necessary to bring about the lawful and peaceful execution of the decision. A recent illustration is the arbitral proceedings between Argentina and Chile over disputed territory in the Beagle Channel. Argentina refused to accept the award, claiming it to be a nullity.<sup>105</sup> Since the limited right of appeal did not provide for this objection the Argentine government refused to submit to enforcement.

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103. E.g. in public international law, the Rann of Kutch case: see Wetter (1971) 65 A.J.I.L.346.

104. Russell, supra n.15, 382



Even if there had been a right of recourse the Argentinians might still have ignored the final decision for the reason that international law still lacks a comprehensive system of effective and legitimate enforcement measures.

In municipal law (which also governs arbitrations between foreign parties, i.e., "transnational" arbitrations) mechanisms are provided to test the validity of an award, though to varying degrees in different systems. And once confirmed (if necessary) measures exist for executing the award. The two forms of involvement are linked in that the State may retain the right not to enforce if the State's standards of legal correctness are not met.

#### E. Grounds

The last of the variable factors relevant to the court-arbitration relationship is the reasons for which a court will interfere with the private proceedings. It is intended to deal with these later, principally in the context of control of awards, but the main grounds can be briefly considered here.

An arbitrator's powers arise from contract, and now also from statute. He is not the source of his own authority. Thus where he acts outside the limits of his powers the courts - whether in a common law system or otherwise - will intervene. But ultra vires acts can arise in different shapes. For instance the arbitrator may have been disqualified from the outset; or he may purport to exercise a power he is not entitled to use.

Fraud is a ground for upsetting an award. This is scarcely surprising since fraud has a vitiating effect in



many areas of the law. Even if arbitration was regarded as wholly contractual the presence of fraud would at least render the award voidable. Fraud in a judgement would go farther, even if the litigants were inclined to accept the result.

Improper conduct not amounting to fraud may also be sufficient to invalidate the award. In English-derived arbitration statutes the concept of "misconduct" justifies intervention. But what is misconduct in a judge is not necessarily reprehensible in an arbitrator; again the problem lies chiefly in applying the principle. Moreover the courts of common law countries decided early that the notion of misconduct can be expanded to include acts or omissions which carry with them no opprobrium but depart from standards of procedure. Other States have laws which expressly recognise procedural faults, especially if grave, as sufficient to overturn the award.

Errors which do not fall into the preceding classes are in New Zealand law corrigible as part of an inherent jurisdiction. This applies especially to mistakes of law but factual errors are also sometimes reviewable. Other legal systems deny such powers over arbitration. It is not easy to see a clear difference between arbitration and adjudication where both sorts of mistake can be appealed to the courts.

For the purposes of comparison it is interesting to consider the grounds for vacating awards under the United States Arbitration Act.<sup>106</sup> They are:

- (a) where the award was procured by corruption, fraud or undue means

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106. Supra n.50. s.10.



- (b) where there was evident partiality or corruption in the arbitrators ...
- (c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.
- (d) where the arbitrators exceeded the powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.

And the New York legislation<sup>107</sup> is to a similar effect with four exceptions. First, whereas a federal court "may" vacate the award on one of the above grounds, a New York judge "must" do so if a ground is made out. Second, the irregularity must have prejudiced the rights of a party. Third, in the place of paragraph (c) above the State law provides for invalidation for failure to observe the procedure set out in the statute, unless the irregularity was waived. Lastly, if a party had no notice of the arbitration he can upset the award on the basis that a valid agreement had not been made or complied with.

So far as the grounds of review in New Zealand and cognate systems are concerned it is necessary to survey the case law. One authority classifies them in five ways:<sup>108</sup>

- (a) where the award is bad on its face

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107. N.Y. Civil Practice Law and Rules 1963, Art.75, s.7511.

108. Russell, supra n.15, 429 citing Montgomery, Jones & Co. v Liebenthal & Co. (1898) 78 L.T.406.



- III (b) where there had been an admitted mistake and the arbitrator himself asks that the matter be remitted
- (c) where there has been misconduct on the part of the arbitrator<sup>109</sup>
- (d) where fresh evidence has been discovered after the making of the award
- (e) where there is a possibility of an inadvertent injustice being done (although the validity of this ground is more arguable)

108. *Russell*, *supra* n.11, 1.

109. Arbitration Clauses (Foreign) and the Arbitration (Foreign Awards) Act 1923; Arbitration (Foreign Agreements and Awards) Act 1962: this Act is intended eventually to supersede the 1923 one, but until the latter is not deemed part of the principal Act. The Arbitration (International Investment Disputes) Act 1979 deals with a specialised class of I.C.D.I.R. arbitrations.

109. Which may lead to a substantial miscarriage of justice (perhaps): see *Wilson v Glover* [1969] N.Z.L.R. 365; cf. *Re Brien and Brien* [1910] 2 I.R. 84, 89.



### III AN ARBITRATION STATUTE - COURT'S AND ARBITRATOR'S POWERS

#### A. The Arbitration Act 1908 - Introduction

The Arbitration Act is an old statute. It was first enacted in New Zealand in 1890, one year after the English Act on which it was modelled, as were most of the arbitration statutes passed by the then colonial Parliaments. The English Act of 1889 was mainly declaratory of earlier statutes and the common law,<sup>110</sup> which entails the continuing relevance of old case law. The history of the statute also explains some of its terminology which is antiquated and even obscure. Moreover the language is not always consistent as between the principal Act and its amendments. There are few of the latter: the only one of major significance in domestic arbitrations is that of 1938, itself based on an English amendment in 1934. While the English Act was consolidated and its language updated in 1950, the New Zealand Act suffers from the piecemeal nature of both the original drafting and its legislative history. On the other hand the clear links between the Arbitration Acts of Commonwealth jurisdictions yield the benefits of cross-fertilisation. There have also been Acts dealing with the increasingly important subject of recognition and enforcement of foreign awards.<sup>111</sup>

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110. Russell, supra n.15, 3.

111. Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933; Arbitration (Foreign Agreements and Awards) Act 1982: this Act is intended eventually to supersede the 1933 one, but unlike the latter is not deemed part of the principal Act. The Arbitration (International Investment Disputes) Act 1979 deals with the specialised subject of I.C.S.I.D. arbitrations.



The scope of the statute is not clearly set out. Essentially the provisions apply to a "submission" which means:

"a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, or under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some person named in the agreement."

Thus there must be an agreement in writing. A parol submission is therefore prima facie outside the scope of the statutory provisions. But on further examination this may not be the position. While many sections refer to "submissions" others purportedly apply generally or otherwise. For example section 11 states: "In all cases of reference to arbitration ..." Section 12 merely refers to "an arbitrator or umpire". The literal result is that a court can remit or set aside any award though the arbitration agreement was made orally, but it cannot summarily enforce such an award. Some sections<sup>112</sup> mention both "references" and "submissions". The intention seems to be to distinguish the contract allowing for arbitration from the particular case where the contract is invoked. It is not always clear in the context however whether the "reference" must be consequent on a submission. Another problem is the usage of the verbs "refer" and "submit" to denote the same thing.<sup>113</sup> The inconsistency may be explained by the history of the Act.

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112. E.g. principal Act, s.6; Amendment Act, ss.5-10.

113. Cf. principal Act, s.2 and Amendment Act, ss.16-18.



In any event the use of "submission" is misleading since it masks two sorts of arbitration agreements. Other legal systems distinguish between a compromissory clause - an agreement to submit future disputes - and a compromis - a contract to refer a dispute which has already arisen. In some countries - as in the common law - only the latter are enforceable. The definition of "submission" makes both lawful and subject to the Act. But a parol submission is governed by the common law<sup>114</sup> and cannot include future disagreements. Nor do oral arbitrations enjoy the benefit of those sections in the Act (including all the useful powers of the 1938 Amendment) which are not declaratory of the Common Law.

A submission need not however be a formal document. So long as the agreement is evidenced by writing the Act will be invoked; an exchange of letters, for instance, will suffice. It is not necessary for the parties to sign the agreement.

A feature of the definition unique to New Zealand is the second limb beginning after "or not". This was inserted in 1906<sup>115</sup> in order to bring written agreements for valuation within the terms of the Act. Valuers and others who do not necessarily decide "differences" between parties were thus clothed with arbitrators' powers, and also subjected to the requirements of a fair procedure<sup>116</sup> (although the latter is equally imposed by the common law). In other jurisdictions decisionmakers such as valuers will only be treated as arbitrators if the agreement so

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114. Re Davis and Brown's Arbitration (No. 2) [1957] V.R.127.

115. Arbitration Act Amendment Act 1906, s.2.

116. Hamill v Wellington Diocesan Bd. of Trustees [1927] G.L.R.197.



implies.<sup>117</sup> A consequence of the New Zealand position is that there need not, in terms of the Act, be a dispute; any "question or matter" can be referred.

These issues relate to how to avail oneself of the statutory provisions. The converse question is, if there is a submission, can the Act be excluded? Some sections contain the clear formula, "unless the submission expresses a contrary intention". Arguably, therefore, all other provisions cannot be contracted out of. The Czarnikow<sup>118</sup> case furnishes a supporting example. But there are indications otherwise in some of the cases. For instance in Attorney-General v Offshore Mining Ltd<sup>119</sup> although the contract fell within the definition of a submission it provided for the parties to agree separately to employ the statutory method of enforcement contained in section 13. They had not so agreed and the Court of Appeal held that they were not entitled to the benefit of the section. And in Re Wilson and Eastern Counties Navigation and Transport Co.<sup>120</sup> the Divisional Court held that the judge's power to appoint an arbitrator under the equivalent of section 6(b) was not exercisable where the submission provided to the contrary. On the other hand, in Hunt v Wilson<sup>120a</sup> Cooke J. said "I would accept the contention ... that if the provision for a decision by valuers was a submission within the meaning of the Arbitration Act 1908 - as I think it was - the clause cannot exclude the Court's powers."

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117. Re Carus-Wilson and Green (1886) 18 Q.B.D.7.

118. *Supra* n.26

119. [1983] B.C.L.177.

120. [1892] 1 Q.B.81.

120a. [1978] 2 N.Z.L.R.261, 275.



The reasoning underlying Czarnikow v Roth, Schmidt Co. is that attempts to oust the jurisdiction of the court are void as against public policy. Although, as seen above, this principle has been legislatively modified in respect of some English arbitrations, there has been no reform in this country. Even in England, only the right of appeal can be excluded and not, for instance, the power to remove for misconduct. It is therefore probable that sections which confer on the court a power to control the arbitrator or award would be held to be entrenched. Indeed these sections do not, in general, expressly depend on there being a "submission"; thus they probably apply to all arbitrations. But where the court's powers to assist<sup>121</sup> are in question the Czarnikow reasoning does not apply so strongly; they are not provisions "of paramount importance in the interests of the public".<sup>122</sup> Consequently it may be possible to exclude particular sections by agreement.

#### B. Arbitrator's Powers

The Act does not deal extensively with the powers of the arbitrator. This accords with the origin of his authority, which is contractual. The scope of his powers is therefore to be determined by the agreement. But the legislation does imply basic provisions as to procedure and the remedies available; these may be excluded by the contract.<sup>123</sup> Perhaps the most important is the term that the parties "shall ... submit to be examined ... on oath in relation to the matters in dispute and shall ... produce ... all books, documents [etc] as may be required ... and do all

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121. E.g. 1938 Amendment, s.10(1) and 1st Sch.

122. See per Atkin L.J., supra n.37 and text.

123. Act, s.4 and 1st Sch.



such other things as during the proceedings on the reference the arbitrators ... may require". This clause appears to supply broad powers to the arbiter in relation to the conduct of the hearing. But as has recently become apparent there are no sanctions to be called in aid of the arbitrator's directions. To enforce the parties' obligations thus necessitates an application to a judge, which itself may be ineffective.

There is no right in the Act for the arbitrator to summon witnesses or require the production of evidence; these are reserved for the court. Other relevant matters are also not dealt with - such as what rules of evidence apply, whether a reasoned decision is required and if so, whether it must be in writing. The Act cannot, pace the learned editor of Russell on Arbitration, be described as a code.<sup>124</sup>

### C. Court's Powers

#### 1. Powers of preclusion

The court can under the Act, prevent an arbitration from beginning in two ways. First, by virtue of section 1 the submission is irrevocable unless the leave of the court is obtained; grant of leave thus precludes the proceedings. Secondly where an action is commenced in respect of a matter to which an arbitration clause applies, the defendant to the action can seek to have the court proceedings stayed. In both these cases the judge has a discretion to preclude the arbitration; the principles on which the powers will be used are dealt with elsewhere in this paper.<sup>125</sup>

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124. *Supra* n.15, 2.

125. Part IV, *infra*.



## 2. Powers of support

The court may help to establish the arbitration by appointing an arbitrator if the parties fail to agree on one, or if he fails to act and the parties do not supply the vacancy. However where, as is quite common, the agreement provides for an independent third party to designate the arbiter the court cannot act if that person fails to make the appointment.<sup>126</sup>

Subpoenas may be issued by the court under sections 9 and 19; under the former provision the order will be made on the application of a party, whereas section 19 appears to allow the arbitrator to apply for the writ. A sheaf of important powers exercisable by the court was added in 1938.<sup>127</sup> These include orders as to: security for costs; discovery and interrogatories; the preservation or sale of goods which are the subject matter of the reference; inspection of property (and entry on to land for this purpose); and interim injunctions. The court may enlarge the time stipulated for making the award. But if the arbitrator or umpire is acting dilatorily then he can be removed, and he will not be entitled to be paid for his services<sup>128</sup> - though, oddly, if he is removed for other reason he is entitled to remuneration.

## 3. Powers of control

There are four principal means which the court can employ, on application of a party, to control or review the proceedings and the award. Section 11 of the 1938 Amendment

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126. National Enterprises v Racal Communications [1975] Ch.397.

127. *Supra* n.121.

128. 1938 Amendment, s.8(1) and (2).



Act concerns the special case stated which has been mentioned above. The arbitrator may state a case of his own motion, or it can be directed by the court. The whole award can be stated, or only a question of law arising in the course of a reference. The judge's decision on the case is subject to appeal, but leave must be obtained before appealing a decision on a preliminary question of law. In either type of stated case - the whole award or the "consultative case" - only questions of law can be decided by the court. A consultative case is probably only that, and the arbitrator is not strictly bound to accept the court's advice, but he may be impeached for misconduct if he rejects it. Secondly, section 11 of the principal Act empowers the court to "remit the matters referred, or any of them, to the reconsideration of the arbitrators". The power is thus not confined to remitting an award. No indication is given as to how the power shall be exercised. Guidance is found in the case of the third power, that of setting the award aside, which section 12(2) permits where an arbitrator has misconducted himself or the proceedings. Notwithstanding this difference in formulation the two powers are held to be exercisable on the same grounds. Moreover the grounds are not restricted, as section 12(2) suggests, to misconduct.<sup>130</sup>

The fourth major power is removal of the arbitrator. This right is also expressed to be available for misconduct. But it appears that the power will be

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129. Re Knight and Tabernacle Building Society [1892] 2 Q.B. 613 (though the N.Z. Act reads a "case for the decision [not "opinion"] of the Court")

130. *Supra* n.108 and text.



sparingly exercised compared with the right to set aside for misconduct.<sup>131</sup> Such an approach is understandable given the more draconian nature of the power to remove. There are ancillary powers to appoint new arbiters in substitution for those removed; a judge can even order that the submission cease to have effect in this event.<sup>132</sup>

The primary power to award costs rests with the arbitrator; but where he omits to deal with the matter the court may direct him to decide the question. Taxation of his fees is also under the court's jurisdiction.<sup>133</sup>

#### 4. Powers of enforcement

Awards are enforceable by action at common law. This procedure is somewhat cumbersome, and the statute has accordingly established a method of summary enforcement. Section 13 of the principal Act provides:

"An award on a submission may, be leave if the Court, be enforced in the same manner as a judgment or order to the same effect.  
and section 12 of the 1938 Amendment Act:

Where leave is given under Section 13 of the principal Act to enforce an award in the same manner as a judgment or order, judgment may be entered in terms of the award."

The first of these does not actually give the award the status of a judgment.<sup>134</sup> Consequently any relief to which an actual judgement is a prerequisite cannot be granted under section 13. The practical difficulties

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131. Russell, supra n.15, 167

132. 1938 Amendment, s.5(2)(b).

133. Ibid, ss.14-15.

134. Cf. s.1: "A submission ... shall have the same effect in all respects as if made an order of Court". And cf.s.14(2).



entailed by this led to the passage of the second provision which permits, for instance, the making of bankruptcy orders. A further effect is that an action on the award is precluded once judgment is entered in terms of the award. Before this section was enacted a party who had successfully sought leave under section 13 could also bring an action, and, in some cases, had to.<sup>135</sup>

The legislation also deals with powers to enforce awards rendered in a foreign country. The main international treaty on this matter is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.<sup>136</sup> The New York Convention was adopted by New Zealand in 1982 and now awards to which it applies are "enforceable ... either by action or in the same manner as an award under the Arbitration Act 1908." However to enforce (or rely on) an award it must meet certain standards. Foreign awards which are not "Convention Awards" do not fall within the ambit of the 1982 Act. They may nevertheless come under the earlier similar legislation<sup>137</sup> or else under the law concerning enforcement of foreign judgments.<sup>138</sup> There also exists the possibility that foreign awards are enforceable in the same way as any domestic ones, quite apart from the Convention legislation. If the award is fully enforceable in its country of origin it seems that it can be executed in New Zealand pursuant to an action.<sup>139</sup> The English courts have also stated that

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135. China Steam Navigation Co. v Van Laun (1905) 22 T.L.R.26.

136. *Supra* n.111.

137. *Ibid.* (Act of 1933)

138. Reciprocal Enforcement of Judgments Act 1934.

139. Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd. (1927) 28 Ll.L.Rep.104.



foreign awards can be enforced under provisions corresponding to section 13 (and section 12 of the Amendment). The statute implementing the New York Convention saves the possibility of enforcing Convention awards under procedures apart from that Act.<sup>140</sup>

The Arbitration (International Investment Disputes) Act 1979 regulates the enforcement of awards given under the I.C.S.I.D. Convention.

#### 5. Miscellaneous

The possibility of compulsory arbitrations under statute was mentioned earlier. Section 25 of the main Act and section 20 of the 1938 Amendment provide that while the provisions of the particular statute prevail, the Arbitration Act also applies to statutory arbitrations.<sup>140a</sup>

In fact the application is typically also provided for in the particular statute .

There is also a right in the judge to refer matters to arbitration,<sup>141</sup> in some cases without the consent of the parties. By section 14 he can refer matters to a referee, whose report he may adopt in whole or in part (but not modify). Further, under section 15 technical questions, matters of account or, with the litigants' consent, any other question can be submitted to an arbitrator of the parties' choosing - or to an officer of the court. Interestingly, such an arbitrator appears not to be bound by

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<sup>140</sup>. Arbitration (Foreign Agreements and Awards) Act 1982, s.8.

<sup>140a</sup>. Although certain provisions are expressly or impliedly excluded from statutory arbitrations: 1938 Amendment, s.20; Russell, supra n.15, 11-12.

<sup>141</sup>. Sections 14-15. The Court of Appeal has similar powers (s.18) as do District Courts: District Courts Act 1947, s.61.



the bulk of the provisions of the Act itself.<sup>142</sup> There is no "submission"; the arbitrator is deemed to be an officer of the court "and shall have all such authority, and shall conduct the reference in such manner, as is prescribed by rules of Court, and, subject thereto, as the Court directs". It is uncertain whether a referee under section 14 is caught either by these latter words or by the rest of the provisions of the Act (there being no "submission"). There is no question as to the court's powers in relation to references under its own order: section 17 grants it the usual authority it enjoys on voluntary submissions. And

last, where the parties' agreement is overridden by the proceedings. It will be noticed that even on the level of terminology the conflict between the contractual and the juridical view is apparent. Some, at least of these categories could also be described in terms of want of jurisdiction. The first three are examples of this, while the latter two classes result in practice in lack of jurisdiction. But the answer to the question "contract or jurisdiction?" is less important here because where there is said to be no power to proceed at all, courts will intervene in either case. Thus in theory the court is not exercising any unusual powers in relation to first three; it is merely declaring the legal position. As to classes four and five the court's role is more active; these are the discretionary powers conferred by the statute.

But if the court's authority is reasonably clear, the question throughout remains as to the arbitrator's power to rule on his jurisdiction. By way of clarification the term

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142. Though he would be if the reference was from a District Court: Arbitration Act 1980, s.20; Turner v Mardell (1983) 6 T.C.L. 31/5.



#### IV COURTS PRECLUDING ARBITRATION

##### A. Introduction

The ordinary judicial forum is often used to prevent an arbitration from commencing or proceeding. There are five ways in which this can be done, which can be summarised as follows. First, where there is no agreement to arbitrate. Second, where an agreement is rescinded by the conduct of the parties or by an external event. Third, where a valid contract exists but it is not validly invoked. Fourth, where the agreement is revoked by the court. And last, where the parties' agreement is overridden by the proceedings. It will be noticed that even on the level of terminology the conflict between the contractual and the juridical view is apparent. Some, at least of these categories could also be described in terms of want of jurisdiction. The first three are examples of this, while the latter two classes result in practice in lack of jurisdiction. But the answer to the question "contract or jurisdiction?" is less important here because where there is said to be no power to proceed at all, courts will intervene in either case. Thus in theory the court is not exercising any unusual powers in relation to first three; it is merely declaring the legal position. As to classes four and five the court's role is more active; these are the discretionary powers conferred by the statute.

But if the court's authority is reasonably clear, the question throughout remains as to the arbitrator's power to rule on his jurisdiction. By way of clarification the term "jurisdiction" in this Part denotes the threshold point of



authority. Errors in the proceedings or award which allegedly go to jurisdiction (in the wider sense) are considered below.<sup>143</sup>

B. No Agreement

Where there is an arbitration clause contained within the substantive contract, providing, for instance, that "disputes arising out of or under this contract shall be referred to arbitration", it might be contended that there is no contract and therefore no obligation to submit disagreements. The grounds for arguing that no contract existed include the contention that there was no consensus ad idem,<sup>144</sup> or that there was no intention to create legal relations. In some situations where the parties to an arrangement wish to preserve a fluidity and amicability in their dealings, it might be argued that their agreements, whether or not bearing any semblance of formality, are not intended to bind them legally. (It will be recalled that parole agreements can still lead to arbitrations, though many of the statutory provisions will not apply.) Agreements within a family present an example. A desire for flexibility could also be a factor in commercial and industrial relationships. Parties sometimes expressly disclaim the intention to create legal relations<sup>145</sup> - an

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143. Part V infra.

144. Caerleon Tinplate Co. v Hughes (1891) 60 L.J.Q.B. 640; Anglo Newfoundland Development Co. v The King [1920] 2.K.B.214.

145. Rose & Frank Co. v J.R. Compton & Bros Ltd [1925] A.C.445. In the Orion case (supra n.38) it was said that since arbitrators must decide according to law, a clause purporting to allow a decision on the basis of equity implied that there was no contract because legal relations were not intended to be affected. But see Eagle Star Insurance Co. v Yuval Insurance Co. [1978] 1 Lloyd's Rep.357.



arbitration clause in such a contract may well be unenforceable.

A further possibility is that the contract containing the agreement to arbitrate is either void or unenforceable. For example the contract may be a nullity because it is illegal, or it might be voidable for having been induced by fraudulent misrepresentations.

If the arbitration clause is dependent on the main contract for its existence then it is clear that the invalidity of the principal agreement avoids the clause. In the leading case of Heyman v Darwins Ltd.<sup>146</sup> Lord MacMillan agreed that if the contract was void the arbitration clause fell with it:<sup>147</sup>

"If there has never been a contract at all, there has never been as part of it an agreement to arbitrate."

This leads into the next category, namely, where the contract, though originally valid, has been ended.

### C. Agreement Terminated

In Heyman v Darwins Ltd. the appellants alleged that the respondents had by their conduct repudiated the agreement, and they sought damages in consequence. The respondents countered with the argument that the arbitration clause in the main contract was still on foot and accordingly the action should be stayed. The House of Lords held that the repudiation alleged did not deprive the arbitrator or of his jurisdiction to decide the issue. Lord MacMillan said:<sup>148</sup>

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146. [1942] A.C.356.

147. Ibid, 372.

148. Ibid, 373-374.



"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses ... [t]he arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be decided by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts.<sup>149</sup>

In consequence of these distinctions, his Lordship considered that repudiation<sup>150</sup>

"does not abrogate the contract ... The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Lord Wright said:<sup>151</sup>

"It is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court. All this may be said of every agreement to arbitrate, even though not a separate bargain, but one incorporated in the general contract."

Thus if it is argued that the main contract is repudiated, the arbitration clause subsists. The House of Lords thought that the position was the same where the allegation was frustration of the main contract. In so

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149. This sentence is an interesting instance of the "jurisdictional" rules being seen in a contractual light - the reverse is more common.

150. *Supra* n.146, 374.

151. *Ibid*, 377.



doing they did not follow a Privy Council decision<sup>152</sup> to the contrary; the House's view has recently been preferred by the High Court of Australia.<sup>153</sup>

But what is the position where the attack is made on the arbitration clause itself, considered as an independent contract? The issue arose in a series of English decisions where although the point was relatively unimportant - whether an arbitration can be prevented from proceeding on the ground of the claimant's delay - the whole nature of the arbitral process came under scrutiny.

The case of Bremer Vulkan Schiffbau v South India Shipping Corporation<sup>154</sup> involved an agreement under which the appellant contracted to build ships for the respondent. The agreement was entered into in 1964. Defects in the vessels discovered after delivery caused the respondents to complain to the shipbuilders, and led eventually to the former issuing a notice of intention to refer to arbitration in 1971. An arbitrator was appointed in 1972, but no application was even made to him for directions. Points of claim were not delivered till 1976. In 1977 the shipbuilders applied to the High Court for an injunction to restrain proceeding with the arbitration, or alternatively a declaration that the arbitrator had power to dismiss the claim for want of prosecution, on principles analogous to those exercised by courts in litigation.

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152. Hirji Mulji v Cheong Yue Steamship Co. [1926] A.C.497.

153. Codelfa Construction Pty. Ltd. v State Rail Authority of N.S.W. (1982) 41 A.L.R.367.

154. [1981] A.C.909.



Although the lower courts held unanimously that the claim could be prevented from proceeding, the House of Lords by a bare majority decided that no grounds existed for halting the arbitration. For the majority Lord Diplock dealt first with the argument, accepted by Donaldson J. and Lord Denning,<sup>155</sup> that the High Court had inherent power to dismiss a claim for want of prosecution. This argument failed, according to Lord Diplock, due to the fundamental difference between arbitrators and High Court judges. The analogy was false because, although the procedure in the two types of proceedings was often similar, it need not be so; the court was constrained by its rules, whereas an arbitration could be conducted in a variety of ways, even dispensing with a hearing. And more importantly, the source of the arbiter's jurisdiction differed in each case. A court was invested with a constitutional function by the state; submission to its jurisdiction was mandatory for a defendant once a plaintiff had initiated the process, and thus the court required the power to prevent its procedures being "misused in such a way as to diminish its capability of arriving at a just decision of the dispute".

On the other hand Lords Scarman and Fraser (who each agreed with the other's opinion) emphasised the similarities of the judicial and arbitral processes. Both were adversarial in nature, which suggested that a defendant should not be obliged to act against his own interests by applying to advance the arbitration when the claimant had been guilty of delay. Furthermore Lord Scarman had a

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155. Roskill L.J. preferred to base his decision on the ground that there was an implied obligation on the claimant to proceed expeditiously: *ibid.* 954. Cumming-Bruce L.J. supported both analyses: *ibid.*, 961.



more fundamental objection; he disagreed that arbitration was a purely contractual phenomenon and saw it as imbued with judicial elements - the principle that parties to an arbitration agreement take it with all its faults "is not of universal application. It has not yet achieved such supremacy as totally to oust the power of the High Court to remedy or prevent an injustice in the arbitration process".<sup>156</sup> In the result his Lordship would have held that the High Court's power extended to granting an injunction against the arbitration proceeding, because there had been ordinate and inexcusable delay, not due to the defendant, which seriously prejudiced the prospect of a fair arbitration.

Both Lord Diplock and the minority Law Lords also considered the problem from a contractual point of view. In fact, because of his attitude on the first point, contractual principles were the only ones seen as available by Lord Diplock. Thus he considered whether, on such principles, an injunction could be granted. All the Law Lords agreed that an injunction would only issue to protect a legal or equitable right. The main ground alleged was repudiation, as evinced by the respondent's conduct in not prosecuting his claim. However repudiation is negated by fault on the party seeking to rely on it. Since Lord Diplock construed the arbitration agreement as imposing a mutual duty on both parties to pursue the arbitration, the appellant shipbuilder was at fault in failing to apply jointly with the respondent to the arbitrator for directions.

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156. Ibid, 996.



The Court of Appeal and the minority in the House of Lords thought that there was no "mutual" obligation, merely one incumbent on the claimant, and therefore the doctrine of repudiatory breach was available to the respondent. In the end, then, the result sought by the minority could be reached in either way: "whether the denial be viewed as a denial of natural justice or a fundamental breach of contract, it constitutes a legal injury from which the court may grant relief by injunction ..." <sup>157</sup> As a matter of contract Lord Scarman put his decision on the basis of a legal right to be free from frustrating delay, breach of which found an action in damages. <sup>158</sup> Lord Fraser formulated it as an equitable right not to be harassed by arbitration proceedings which cannot lead to a fair trial. <sup>159</sup>

What all the judges (except Donaldson J.) agreed on was that an arbitrator not did himself have power to dismiss the claim for want of prosecution. <sup>160</sup> This is clearly supportable, since his powers rest on the foundation of contract and statute - if neither is the source of such a power he cannot usurp it. It is right to note however that the English Arbitration Act 1979 is said to have widened the powers of an arbitrator to deal with the problem illustrated by the facts of Bremer Vulkan. <sup>161</sup>

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157. Ibid, 1000 per Lord Scarman.

158. Ibid, 998-999.

159. Ibid, 993

160. E.g. Lord Diplock, *ibid.* 987; Lord Scarman, 1001.

161. Section 5 allows an arbitrator to apply to the High Court for an order "to proceed with the reference in default of appearance ... in like manner as a judge ... might continue with proceedings ..." However "proceeding with the reference" may not meet the difficulty, at least not in the expeditious way a dismissal for non-prosecution would.



The decision of the House of Lords did not pass uncriticised, either by the commentators<sup>162</sup> or by lower courts in the English hierarchy. Lord Denning M.R., for example, was able to describe Lord Diplock's concept of a mutual obligation as obiter and erroneous and Kerr L.J., claimed the decision had been received "with the greatest concern".<sup>163</sup> Bremer Vulkan was a case where six views (of experienced commercial judges) were subordinated to three, expressed in one opinion only. A more fundamental criticism, however, was the prospect of long-dormant arbitrations being revived, where facts had been forgotten and witnesses or arbitrators lost track of. In such circumstances it is doubtful whether a fair trial of the issues was possible. It is questionable how realistic is the implication of a term that both parties are under an obligation to keep the arbitration alive, based merely on the contractual nature of arbitration. In many cases of commercial contracts, it has been suggested, arbitration clauses are inserted almost reflexively at the end of drawn-out negotiations.<sup>164</sup> If a dispute does arise but the claimant neglects to prosecute his claim why should the respondent be under a duty to assist him? The latter will be obliged to submit in accordance with his undertaking in the arbitration clause, but there is a distinction between an active and a passive duty. Since in most arbitrations

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162. E.g. P. Matthews "The Sleeping and the Dead" [1982] L.M.C. L.Q.401.

163. Paal Wilson & Co. v Partenreederei Hannah Blumenthal (The Hannah Blumenthal) [1982] 3 W.L.R.49, 58, 67.

164. Lord Hacking "A New Competition - Rivals for the Centres of Arbitration" [1979] L.M.C.L.Q.435.



the proceedings are adversarial it does not seem reasonable to require the respondent to stimulate the claimant into action.

Nevertheless in The Hannah Blumenthal<sup>165</sup> the House of Lords affirmed Bremer Vulkan, albeit as much on the basis of precedent as on its merits.<sup>166</sup> The consequence is that delay by the claimant must amount to a breach of contract before the respondent is entitled to an injunction restraining further proceedings. Such a breach will not however take the form of repudiation since the "fault" of the respondent will preclude him from alleging repudiation.

The contract can be discharged by frustration. For example Lord Diplock in Bremer Vulkan characterised bias of the arbitrator as a form of frustration.<sup>167</sup> But frustration is not available if either of the parties are at fault; and since in the case of delay one of the parties is usually culpable, it is unlikely that this basis will succeed in achieving an injunction in many cases.

A third ground for staying the arbitration by injunction is where both parties have expressly or impliedly agreed to abandon the agreement. If abandonment can be spelled out of the parties' conduct, including circumstances of delay, there is the possibility of avoiding an

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165. *Supra* n.163, 1149, H.L.

166. Even this might not have settled the matter, at least in New Zealand: see the remarks of Cooke J. in Moyes & Groves Ltd v Radiation N.Z. Ltd [1981] 1.N.Z.L.R.368, 371.

167. *Supra* n.154, 981.



unsatisfactory trial. But this defence failed in The Hannah Blumenthal, although there the House of Lords approved the Court of Appeal's decision in The Splendid Sun<sup>168</sup> preventing the arbitration on the basis of abandonment.

D. No Dispute Within Agreement

An arbitration agreement is not validly invoked if there is no dispute within it. To determine this the actual agreement must be looked at. Further, as noted, in New Zealand there need not be a "dispute" if the second limb of the definition of "submission" is invoked. Any question or matter, such as a valuation, can be referred. But this aside, what powers do the court and the arbitrator have when it is said that no difference exists between the parties which is covered by the agreement?

In Bremer Vulkan Lord Diplock said<sup>169</sup> that whether or not a dispute existed was a matter for the arbitrator, and no injunction would be granted. It was said in North London Railway Co. v Great Northern Railway Co.<sup>170</sup> that the High Court had no power to grant an injunction to restrain an arbitration in a matter beyond the agreement to refer "although such arbitration may be futile and vexatious". The minority in Bremer Vulkan doubted the validity of these last words, which it claimed were not part of the ratio. It seems clear that an arbitrator is entitled at least to make a preliminary ruling on the matter. The court will nevertheless regard itself as the final arbiter on the matter. It might refuse to stay an action brought in spite

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168. André & Cie. S.A. v Marine Transocean Ltd. [1981] Q.B.694.

169. *Supra* n.154, 981.

170. (1883) 11 Q.B.D.30. But see Sisson v Oates (1894) 10 T.L.R.392.



of an arbitration clause - and indeed it has no jurisdiction to stay the Court proceedings if there is no "matter agreed to be referred".<sup>171</sup> Alternatively a declaration can be granted if the whole or part of the matters in contention are found to be outside the submission. This in Government of Gibraltar v Kenney<sup>172</sup> a standard arbitration clause was inserted in a contract of service. After the work had been done disputes arose and Mr Kenney submitted points of claim to the arbitrator, including one for payment on a quantum meruit and another for compensation under the frustrated contracts legislation. The plaintiff applied for a declaration that these claims did not arise out of the contract. The judge held that he had jurisdiction to make such a declaration<sup>173</sup> (although it was refused on the merits of the case). A similar result could have been reached if the plaintiff had brought an action at law and then resisted the defendant's motion for a stay; but of course here the plaintiff was not the claimant in the arbitration.

#### E. Revocation of Agreement

Section 3 of the Arbitration Act reads in part:

"A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court ..."

This section cured (in relation to "submissions") the defect of the common law which allowed either party to

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171. Arbitration Act 1908, s.5(1); Nova (Jersey) Knit Ltd. v Kamgarn Spinnerei GmbH [1977] 1 W.L.R.713, H.L. See infra.

172. [1956] 2 Q.B.410.

173. Ibid, 421. See too The Phonizien [1966] 1 Lloyd's Rep. 150, where a declaration was granted.



revoke an agreement to refer future disputes, in the sense of refusing to proceed with it - though such party would be liable for damages.<sup>174</sup> It has been held that, since a submission at common law was irrevocable in the sense of being a breach of contract, section 1 actually refers to revocation of the arbitration's authority<sup>175</sup>; and the modernised language of the English Act reflects this. But in practice there is no difference because in both cases the arbitrator's jurisdiction has been withdrawn.

The provision plainly is aimed at unilateral revocation; the parties can at any time agree not to proceed with the arbitration. Where only one party wishes to avoid the arbitral proceedings however he must apply to the court.

With two exceptions no indication is given in the statute as to the principles on which the court will grant leave. The exceptions, added in 1938,<sup>176</sup> deal with the cases of alleged partiality of the arbitrator and allegations of fraud against parties. The second provision may be evidence of a legislative intention that questions of fraud should not be dealt with in the privacy of an arbitral hearing but rather in open court. But apart from these the power is open-ended on its face. Nevertheless the general attitude of the courts is that it should be used only sparingly and to avoid a substantial miscarriage of justice.<sup>177</sup> As distinct from the three categories

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174. Re Smith & Service and Nelson & Sons (1880) 25 Q.B.D.545.

175. Ibid, 550.

176. Arbitration Amendment Act 1938, s.16(1) and (2).

177. Russell, supra n.15, 162.



previously discussed,<sup>178</sup> revocation of the submission is a direct interference with the contractual rights of the parties; it does not merely purport to declare them. Where, therefore, a party contends that there is no contract, or no dispute within it, a remedy other than section 3 must be used. On the other hand there may be some overlap with the other statutory remedies. For instance, misconduct of the arbitrator will found an application for revocation as well as one for the removal of the arbitrator, or for the setting aside of the award. This also illustrates the point that revocation is available at any time before or during the arbitral proceedings.

#### F. Agreement Overriden by Other Proceedings

##### 1. Introduction

The final method of precluding the arbitration is by permitting an action at law on disputes which are covered by the arbitration clause. Like the preceding category it constitutes a denial of the parties contractual rights and obligations. Historically this is justified by the courts for the reason that, where the two principles of the sanctity of the court's jurisdiction and the sanctity of contract are in conflict, the former must prevail. Thus before the middle of the last century any action brought in breach of an arbitration contract would automatically be allowed to proceed; to give effect to the clause would oust the jurisdiction of the court. But in 1854 Parliament intervened in favour of contracting parties. By the Common Law Procedure Act<sup>179</sup> the judges were granted a discretion

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178. Though see n.167 supra and text.

179. (U.K.) 17 & 18 Vic., c.125, s.11.



to stay the proceeding of the action where there was an arbitration agreement and there was "no sufficient reason" why the matter should not be referred under it.

Essentially the same provision exists in New Zealand today as section 5 of the Act. The power to grant or refuse a stay of court proceedings is an important and much used one. The section contains a mixture of the power and the grounds for invoking it, although the latter are left very vague. Thus the power can be used to enforce the true state of the parties common law relationship - for example if there is no valid contract a stay will be refused. Alternatively even where a valid submission exists the court has a statutory discretion to refuse to give effect to it. Thus the section bestrides the broad distinction made between the first three and last two categories discussed in this Part of the paper.<sup>180</sup>

## 2. Grounds

The onus is initially on the party seeking to go to arbitration to prove that the clause is valid and covers the dispute.<sup>181</sup> He must also not have taken any step in the action, such as filing a defence, and must be willing to arbitrate. Once this is shown the onus switches to the plaintiff in the action to demonstrate why it should not be stayed.<sup>182</sup> If he cannot show "sufficient reason" then the judge may (not "must") stay the court proceedings. The power is thus very wide on its face. In the extensive variety of circumstances in which stays are sought it is difficult to ascertain how stringently the courts enforce

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180. See Part IV A, *supra*.

181. Gisborne Harbour Board v Spencer [1961] N.Z.L.R.204.

182. Heyman v Darwins Ltd, *supra* n.146, 388.



the burden of showing a absence of sufficient reason not to arbitrate. This principle was emphasised in the case of Fakes v Taylor Woodrow Ltd.<sup>183</sup> but there the stay was refused and the trial proceeded. The plaintiff in the action was suing because he could not afford to pursue his claim in an arbitration as legal aid was not available for arbitral proceedings. The defendants moved for a stay; their reason was conceded to be that:<sup>184</sup>

"they thought the action was ill-founded and the quickest way to stop it was to stay the action - believing that Mr Fakes had no money to take it to arbitration. That would make Taylor Woodrow judges in their own cause."

"The majority of the English Court of Appeal took a poor view of arbitration in these circumstances.

"It is bad enough for a poor man to be faced with an arbitration clause, usually in a printed form which he has never read. It is much worse if the courts then insist that he is to go off to arbitration where there is no legal aid."

The Master of the Rolls also found that the plaintiff's poverty - he was insolvent - was caused by the defendant's breach of the main contract; it would amount to a denial of justice if the arbitration was to be compelled.

Legislative guidance on the principles to be employed in granting or refusing a stay of proceedings are sparse. However, as with the power to revoke the submission, allegations of want of impartiality against the arbiter and of fraud against a party, are relevant. Thus subsections (1) and (3) of section 16 of the 1983 Amendment Act envisage an application for a stay where there is a charge of bias against an arbitrator under a contract to refer

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183. [1973] Q.B.436.

184. Ibid, 443.



future disputes. These provisions interfered with the parties' acknowledged common law right to waive by consent any suggestion of disqualifying interest present in the arbitrator - as, for example, where he has a professional relationship with one of the parties. But where their agreement is one to submit an existing dispute - a compromis - the parties are free to relinquish their right an arbiter untainted by any suggestion of partiality.<sup>185</sup>

In addition to the specific statutory provisions concerning charges against the arbitrator or parties personally, there are situations where the courts will exercise their general power to stay because of allegations of improper conduct. The rationale for these cases is probably the same as that underlying the special statutory rules. That is, courts are a more appropriate forum for such charges, since they sit in public and, for that reason (among others), command more of the public confidence. So a party whose character or conduct is impugned should have the opportunity of openly clearing his name. Thus in Green v Howell<sup>186</sup> Buckley L.J., referring to an earlier case at first instance, said:

"the second ground was that in as much as there was a question between the partners whether the partner giving the notice had acted in good faith, that was a charge which ought to be dealt with by a Court of justice and not by an arbitrator. That, of course, was a perfectly good ground."

Misconduct on the part of the arbitrator during the proceedings is also a ground for refusing to stay court

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185. See Canterbury Pipe Lines Ltd. v Att.-Gen. [1961] N.Z.L.R.785, 791.

186. [1910] 1 Ch.495.



proceedings.<sup>187</sup> However misconduct is generally dealt with under another statutory provision.

Delay in applying to the court has been held in England to be a reason for the judge to decline to grant a stay. The period of time between the start of the action was eighteen months; however the case was also one where the applicability of the arbitration clause was not made out.<sup>188</sup>

The nature of the question to be decided may also influence the judge's decision. As seen above, where there are allegations of fraud or improper conduct the court considers them best suited for ordinary judicial proceedings, especially if the accused person desires this.<sup>189</sup> Another example is where the dispute involves a question of law. This goes to the basic tension between the arbitral and judicial processes. Where issues of law are involved the argument that the need for specialist expertise requires the withdrawal of the disagreement from the courts is weaker. But the principle remains that contracting parties are entitled to refer legal questions; moreover, it may be very difficult to separate the factual from the legal. The construction of documents, a matter of law, is involved in many (perhaps most) arbitrations. What point would there be in inserting clauses providing for arbitration of "any disputes arising out of or under this contract" if such disputes were to be diverted to the courts? The reality

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187. Russell, supra n.15, 201.

188. The Elizabeth H [1962] 1 Lloyd's Rep.172.

189. E.g. Eagle v N.I.M.U. Insurance Co. [1967] N.Z.L.R.698.



probably is that many questions of law are in fact dealt with to the parties' satisfaction by legal or lay arbitrators, and the courts never get the chance to pronounce on them. The legal correctness of the decision is often not the most important factor for the parties.

However if a court is seised of the matter the legal nature of the dispute will be held a relevant consideration. The judge might have to decide the question in any event: it may be "absolutely useless to stay the action because it will only come back to the court on a case stated".<sup>190</sup>

Where the agreement provides for arbitration in an overseas country the court's power to stay proceedings derives from a different source. The main statute in this regard is the Arbitration (Foreign Agreements and Awards) Act 1982,<sup>191</sup> implementing the New York Convention. Section 4 provides that where there is a relevant arbitration agreement and one party commences legal proceedings "in respect of any matter in dispute between the parties which the parties have agreed to refer" then, on application,

"the Court shall, unless the arbitration is null and void, inoperative or incapable of being performed, make an order staying the proceedings.-

This section differs from the stay of proceedings provision in the 1908 Act in several ways. The court "shall" stay the action where the agreement is to arbitrate

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190. Bristol Corp. v Aird & Co. [1913] A.C. 241, 262.

191. *Supra* n.111. The corresponding section in the 1933 Act was repealed in 1982.



in a foreign country. Secondly the grounds for refusing a stay are specified in the statute rather than expressed as a general ground to be determined in each case. Thirdly the grounds are limited to radical faults in the agreement itself - nullity, ineffectiveness and incapability of performance. And fourthly the applicant for a stay is not barred by having taken a step in the court proceedings.<sup>192</sup> The sum of the differences is that a party who contracts to arbitrate overseas is more likely to have his agreement respected by New Zealand courts than a party to a domestic arbitration agreement. Much of the judicial discretion has been removed as a result of the interposition of international law.

In some jurisdictions the grounds for refusing a stay are limited even in domestic arbitrations. Thus the United States Arbitration Act<sup>193</sup> provides that the court:

"upon being satisfied that the issue involved in such suit ... is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until the arbitration has been had, ... providing the applicant ... is not in default in proceeding with such application."

### 3. Comment

To return to section 5 of the 1908 Act, the opacity of its drafting can be seen as highlighting a more basic question: why is the arbitration contract not specifically enforceable? Once a valid agreement has been shown, should not the issue be one of enforcing it rather than discussing whether or not an action should be stayed? A submission is

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192. This condition has been carried over in the corresponding English legislation implementing the New York Convention: Arbitration Act 1975 (U.K.), s.1(1).

193. Supra n.50, s.3.



not specifically enforceable in equity,<sup>194</sup> nor is there a section in the Act providing for such enforcement. It has been said that effectively specific performance is available by means of the statute;<sup>195</sup> but the emphasis of the section is otherwise.

A contrast may be made with three other legal systems: domestic, private international and public international. In the State of New York the legislation<sup>196</sup> is framed in terms of allowing a stay of the arbitration only on the grounds that a valid agreement was not made or complied with, or the claim is time-barred. The New York Convention itself is drafted in similar terms: "the court ... shall ... refer the parties to arbitration, unless it finds that the said agreement is null and void [etc.]". But when translated into New Zealand legislation, as seen above, there is a subtle difference in emphasis.

On the level of public international law the question is also one of enforceability. In the Ambatielos case<sup>197</sup> Greece sought an order from the International Court to the effect that the United Kingdom was obliged to go to arbitration over an alleged injury to a Greek national. The arbitral tribunal had jurisdiction over "all claims based on a [a treaty of 1886]". The court held that the issue was whether the Greek arguments were sufficiently plausible to conclude that the claim in question was based on the treaty.

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194. Doleman & Sons v Ossett Corp. [1912] 3 K.B.257.

195. *Supra* n.149 and text.

196. *Supra* n.107, s.3.

197. [1953] I.C.J.Rep.10.



There had to be more than a remote connection but an unassailable legal basis did not have to be shown. It was enough that the question was arguable. The court decided on this basis that the Greek contention was valid and thus the claim should go to arbitration.

judicial intervention to prevent the establishment of the arbitration in order to prevent it proceeding. (The converse question of enforcement of the agreement was also raised). Once the arbitrator has embarked on the hearing however the issues become somewhat different, even if there is an overlap in the remedies for each situation. In the instances now to be considered it is assumed that the arbitration agreement is valid and subsisting. It therefore becomes more difficult for the court intervening in the proceedings or reviewing the award to justify its action on contractual principles. The grounds for interference increasingly approximate to those commonly employed in the supervision of inferior tribunals and courts of law established by the state.<sup>198</sup> On the other hand judicial intercession can be seen as deriving its authority from the concept of vires - the body being reviewed has to observe the limits of its authority, whether such limits are imposed by statute or contract. This is the basis on which, if at all, review is generally explained.<sup>199</sup>

Two further points can be made, one from each side of the argument. First, the vires concept, though readily understandable and acceptable to the courts, seems to depend on a relatively legalistic perception. If the arbitration

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198. Contrast, for example, the terminology used in the headings to Parts IV and V. of this paper.

199. See e.g. Lord Diplock's speech in *Essex-Young*, supra p.134 (though relating to pre-arbitration proceedings, the concepts are similar).



## V COURTS CONTROLLING ARBITRATION

### A. Introduction

The foregoing discussion was concerned mainly with judicial intervention at or before the establishment of the arbitration in order to prevent it proceeding. (The converse question of enforcement of the agreement was also raised). Once the arbitrator has embarked on the hearing however the issues become somewhat different, even if there is an overlap in the remedies for each situation. In the instances now to be considered it is assumed that the arbitration agreement is valid and subsisting. It therefore becomes more difficult for the court intervening in the proceedings or reviewing the award to justify its action on contractual principles. The grounds for interference increasingly approximate to those commonly employed in the supervision of inferior tribunals and courts of law established by the state.<sup>198</sup> On the other hand judicial intercession can be seen as deriving its authority from the concept of vires - the body being reviewed has to observe the limits of its authority, whether such limits are imposed by statute or contract. This is the basis on which, if at all, review is generally explained.<sup>199</sup>

Two further points can be made, one from each side of the argument. First, the vires concept, though readily understandable and acceptable to the courts, seems to depend on a relatively legalistic perception. If the arbitration

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198. Contrast, for example, the terminology used in the headings in Parts IV and V. of this paper.

199. See e.g. Lord Diplock's speech in Bremer Vulkan, supra n.154 (though relating to pre-arbitration proceedings, the concepts are similar).



is viewed more simply as two individuals making use of their rights of self-determination to reach a decision, via an agreed third person with delegated power to bind them, then it becomes hard to see what the court can attach itself to. The whole process is quite outside the legal system. The public international sphere is the best illustration of the argument, since there is no judicial institution with the right to interfere unless the parties have granted such a right.

The second point is that judicial control even in common law legal systems is not necessarily an example of courts arrogating to themselves the power to intervene in private arrangements. Arbitration has been regulated by statute in England for almost three centuries,<sup>200</sup> and the existence of the Arbitration Act demonstrates a legislative intention that a measure of control be exercised over private arbiters of disputes by the ordinary tribunals of the state. Nevertheless insofar as the scope of the controlling jurisdiction is left undefined by the Act, the courts exercise considerable powers.

## B. Errors Concerning Jurisdiction

### 1. Arbitrator's power

A preliminary question is whether the arbitrator has the power to decide, either provisionally or finally, as to his own jurisdiction. Plainly there must be power to do the first of these; otherwise, any challenge to his authority would incapacitate him from acting further. The power extends even to determining the existence of the contract.

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200. Arbitration Act 1698, supra n.102



In Brown v Osterreichischer Waldbesitzer<sup>201</sup> the defendants in an action on an award claimed that the contract was not binding since the parties had never been ad idem, and thus the arbitrator had no power to act. Devlin J. rejected this argument:<sup>202</sup>

"It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some other court which has power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either course. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties - because that they cannot do - but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not."

As indicated in this passage the judge did not consider that the arbitrator had final jurisdiction on the matter. This was confirmed by the English Court of Appeal in Dalmia Dairy Industries v National Bank of Pakistan.<sup>203</sup> The contract there incorporated the arbitration rules of the International Chamber of Commerce - which expressly permitted the arbitrator to decide on his own jurisdiction

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201. [1954] 1 Q.B.8.

202. Ibid, 12-13.

203. [1978] 2 Lloyd's Rep. 223, 283.



finally. The court, disapproving the judge at first instance, said that Indian law, which was the applicable law,<sup>204</sup> would not allow effect to be given to such a clause so as to allow an arbitrator finally to determine his own jurisdiction.

Professor Schmitthoff has suggested<sup>205</sup> that the English Arbitration Act 1979 would overturn this decision by permitting exclusion of judicial review of awards, the I.C.C. clause constituting an exclusion agreement. It might be said, however, that if the arbitrator wrongly decides that he has jurisdiction then the whole proceedings are a nullity and there is thus no "award" and no appeal from it<sup>206</sup> - the 1979 Act abolishes review of awards, substituting rights of appeal on points of law.<sup>207</sup> But this argument tends to approach logical extremes: if the arbitration is a nullity then, even before the 1979 Act, there would have been nothing capable of being set aside; and an action for a declaration of nullity or resisting enforcement would have been the only available remedies.<sup>208</sup> Disregarding this type of argument, it is submitted that, as Schmitthoff acknowledges, the courts would be

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204. And which was held to be the same as English law on the point.

205. *Supra* n.31, 24.

206. See *R. v Jones (Gwyn)* [1969] 2 Q.B.33.

207. Despite the marginal note to s.1 of the Act referring to "Judicial review of arbitration awards".

208. *Oil Products Trading Co. v Société de Gestion d'Entreprises Coloniales* (1934) 150 L.T.475.



unlikely to decide that they could not ultimately define the arbitrator's jurisdiction. An analogy with administrative law demonstrates that jurisdictional questions cannot easily be insulated against review. And in New Zealand there is no equivalent of the English Act of 1979; the Czarnikow<sup>209</sup> principle would still apply.

In the law of nations the rule is different. Unless a right of recourse to another judicial body is granted by the parties, international tribunals are judges of their own jurisdiction. Thus article 36(6) of the Statute of the International Court of Justice provides for the court itself to settle disputes on its jurisdiction in any particular matter before it.

Interestingly the model Rules on Arbitral Procedure<sup>209a</sup> adopted by the International Law Commission are to the same effect. Article 9 reads:

"The arbitral tribunal, which is the judge of its own competence, has the power to interpret the compromis and the other instruments on which that competence is based."

But the rules do provide for recourse to the International Court on some matters, including revision of the award on the basis of new evidence.

## 2. Disqualification

The arbitrator may be, or may become, disqualified to act. This can arise in a number of ways. For instance it is quite common in arbitrations of business disputes for the clause to stipulate arbitration by "commercial men" and not lawyers. Alternatively it might specify a barrister as

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209. Supra n.26

209a. Wetter, supra n.52.



arbitrator. If this condition is not fulfilled there is no authority to act. Thus in Jungheim Hopkins & Co. v Foukelman<sup>210</sup> the person appointed as arbitrator had to be a member of a particular trade association; the requirement was not met. The court declared the award void for lack of jurisdiction. An appointment might be invalid for breaching a formal requisite of the process, such as failing to name the arbiter within a specified time, or a condition imposed by the law. Thus it has been held that the appointment of an umpire by the two arbitrators cannot be done by lot: there must be an exercise of judgment.<sup>211</sup>

The arbitrator may be disqualified by reason of bias. Or he might purport to act after the submission has been revoked or an order for his removal made. In these cases too he clearly is unable to act. In many of these examples objection can be taken when or before he acts. But if the disqualification does not become known until after the award has been rendered, the only avenue of attack is against the decision itself. There may nevertheless be objections to this sort of challenge, based on alleged waiver of defects or another form of estoppel.

### 3. Failure to exercise jurisdiction

The arbiter occasionally fails to act. If the failure is blatant, for example by not attending at the hearing, then the statute allows the parties or the court to appoint another.<sup>212</sup> Moreover a dilatory arbitrator can be removed by the court.<sup>213</sup>

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210. [1909]2 K.B.948.

211. Pescod v Pescod (1887)58 L.T.76. But they may ballot from a panel properly selected.

212. Section 7

213. 1938 Amendment Act, s.8



The refusal or failure to act more often occurs during the course of the hearing. Again there are a variety of possibilities. The arbitrator must genuinely participate in the hearing and the decision. In a recent case<sup>214</sup> one of a panel of three arbitrators left the country during the course of the hearing, leaving a blank award form with his signature. Although section 6(2) of the 1938 Amendment Act permits a majority award, Parker J. held that all the arbitrators had to take part in the decision. The absence of the third arbitrator should have been remedied by a new appointment or an adjournment. Since the award had nonetheless been delivered it would have been set aside, had there not been a waiver of the objection.

Nor can an arbitrator, a fortiori, delegate his decision to someone who is not an arbitrator in the dispute, without the parties' consent. The maxim delegatus non potest delegare applies, as in the law of agency and administrative law, to the office of arbitrator. But there is some flexibility in the principle; while a particular arbitrator may have been chosen for his expertise in a particular trade there may be a variety of issues remitted for his decision, and he cannot be assumed to be expert in all of them. A plain example is a legal question arising in the course of the hearing before a lay arbitrator. The consultative case procedure is available but the parties may not desire to use it. Can an arbitrator seek advice from a lawyer? The general principle appears to permit the reception of such advice, and also of other professional

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214. European Grain & Shipping Ltd. v R. Johnston [1982] 1 Lloyd's Rep.414; affirmed [1983] 2 W.L.R.241, C.A.



people, so long as the arbitrator independently exercises his judgment on the dispute. So in a case where the umpire made an award subject to the opinion of his attorney on certain legal questions the decision was set aside as being in reality the attorney's.<sup>215</sup> In a New Zealand case, Re Moore and MacGregor,<sup>216</sup> Turner J. remitted an award where the arbitrator had made up his mind but consulted a solicitor who assisted him to put his thoughts in writing - moreover it was one of the parties' solicitor.

The arbitrator also fails to exercise his discretion if he does not adjudicate on matters referred to him. Such a failure might be deliberate or an omission - An example of the former is Heine v King<sup>217</sup> where one of the pivotal questions for decision was whether the defendant was responsible for an omission by its clerk. The arbitrator expressly declined to make a finding on this point and the award was set aside and the arbitrator removed.<sup>218</sup> The failure to decide might also take the form of reserving questions for later determination. The arbitrator in Re Tandy and Tandy<sup>219</sup> had done this; in addition he claimed the right to appoint counsel to settle future disputes, which was clearly an invalid delegation:

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215. Ellison v Bray (1864) 9 L.T. 730.

216. [1959] N.Z.L.R. 78

217. [1983] B.C.L. 651

218. Although removal was not apparently sought by the plaintiff.

219. (1841) 5 Jur. 726.



the award was bad. A case decided by the Exchequer Chamber<sup>220</sup> concerned an arbitration to determine compensation for the action of the London Metropolitan Board of Works in removing the Duke of Buccleuch's causeway into the river Thames. The umpire had awarded a sum for, inter alia, depreciation in the value of the duke's premises.

Blackburn J. said:

"Accordingly it still remains open to a party to plead to an award any matter which shows that the arbitrator has not pursued his authority; either, in cases where he is required to make a final determination on all matters, by not determining some matter brought before him which he ought to determine ..."

But the courts sometimes emphasise that, since many arbitrators are not legally trained, their awards will not be scrutinised to ensure that every point raised before them is dealt with separately. "If, on a fair interpretation of an award it is to be presumed that the claim has been taken into consideration" the award will be upheld. This statement was made in a case<sup>222</sup> where the award referred to the neglect by lessees of "certain matters of general maintenance". The judge was prepared to infer that all the claims submitted had been decided on by the umpire.

Finally it is possible that the arbitrator expressly refuses to make an award. In one case where this happened it was said that the whole reference was abortive and an action in the court was permitted to proceed.<sup>223</sup>

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220. Duke of Buccleuch v Metropolitan Board of Works (1870) L.R.5 Ex.221 (reversed at (1872) L.R.5 H.L. 418 but not on this point).

221. *Ibid.*, 230.

222. Mackintosh v Castle Land Co. [1943] 1 N.Z.L.R. 194

223. Weir v Guardian Fire & Life Assurance Co. (1902) 4 G.L.R.440.



#### 4. Excess of Jurisdiction

The award can decide on matters which have not been referred. Clearly the arbitrator must have in his mind what the parties are in disagreement over, and he cannot go beyond those matters. In Falkingham v Victorian Railways Commissioner<sup>224</sup> the arbitration clause provided for reference of certain types of dispute only. In an action on the award, the respondent in the arbitration (the Commissioner) alleged that the arbitrators had awarded on matters not referable under the contract. The Privy Council said :

"Their Lordships agree that if a lump sum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum matters were taken into account which the arbitrators had no jurisdiction to consider, the award is bad."

But, similarly to the case of alleged failure to exercise jurisdiction, it was necessary for the arbitrators to state expressly that they had not looked at irrelevant matters. They had been fully apprised of the limits of their jurisdiction, so that any disregard of its bounds must have been intentional, had not been pleaded.

In public international law also excess of jurisdiction constitutes a ground of invalidity of awards. There is one case in the jurisprudence of the International Court of Justice, that of the Arbitral Award Made by the King of Spain<sup>225</sup> in a boundary dispute between Honduras and Nicaragua. The court decided the substance of the case on the basis of preclusion (estoppel); but it went on to hold that allegations of, inter alia, exces de pouvoir had

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224. [1900] A.C.452. See also Re Riverton Borough and N.Z.Dreadnought Gas Co. [1916] N.Z.L.R.601.

225. [1960] I.C.J. Rep.192.



not been established. The King made an award in 1906 under a treaty prescribing the basic methods to be used in defining the frontier. Nicaragua alleged that he had failed to observe these fundamental principles, and also that he had exercised a power vested not in the arbitration but in another body involved in the delineation process, the mixed boundary commission. The court read the treaty provisions rather broadly, saying that they were intended to be only a guide, and for both the participants in the boundary definition.

The case shows a more liberal interpretation of the concept of excess of jurisdiction than the domestic law cases considered above. The court entertained arguments that the award was founded on wrong principles of law, though such contentions were not accepted. By contrast the domestic cases appear to employ a strict concept of jurisdiction. In Commonwealth countries the reason for this may be that errors of law can be quite easily corrected by more direct procedures, such as the case stated (in England an appeal on law) or by the power to review for error of law on the face of the award, considered further below. At the level of States however the procedure of bringing an award before a court is less well defined.<sup>226</sup> The King of Spain case was a claim of nullity brought in the general (contentious) jurisdiction of the International Court. To make findings upon mistakes of law would necessarily involve characterising them as errors going to the root of the award so as to nullify it.

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226. J.L. Brierly The Law of Nations (Waldock edn. Oxford, 1963) 350-351.



C. Procedural Errors and Misconduct

In virtually all systems of arbitration recourse to judicial authorities is permitted on the grounds of procedural irregularities. This is justified, whether the arbitral process is seen as basically contractual, where the procedure is set down in the terms of the agreement or provided for less directly; or whether it is viewed as a judicial process, deciding the legal rights of persons according to the rules of fairness. On the other hand, the content of a fair and impartial procedure is generally left vague, so that precisely what constitutes procedural error may not be defined in advance.

For example, in New Zealand the Arbitration Act provides for removal of the arbitrator or the quashing of his award for misconduct, either of the arbitrator, or of the proceedings. The word "misconduct"<sup>227</sup> itself is incapable of exact definition, and the courts tend to widen its meaning to include "technical" or "legal" misconduct, that is, irregularities which do not involve improper motives. The New Zealand Act also furnishes a more specific example of procedural fault, in the section dealing with due dispatch.<sup>228</sup> Why this aspect should be dealt with separately is not entirely clear. In part, it may be that failure to "enter in" the reference does not amount to misconduct of "the proceedings", but given the extended meaning of misconduct, failure to proceed expeditiously during the hearing appears to fall squarely within it. And

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227. 1927 Amendment Act, s.12. The actual word is "misconducted", though cognate statutes use the noun, which arguably has more approbrious connotations than the verb.

228. Ibid., s.8.



the provision goes on to state that an arbitrator removed for tardiness "shall not be entitled to receive any remuneration in respect of his services". This is somewhat draconian, in view of the possibility of arbitrators being ousted for more serious offences, such as fraud or prejudice; the court in such cases is powerless to deprive them of their fees. In fact, an arbitrator is entitled to a reasonable remuneration for his services which can be enforced by the court.<sup>229</sup>

Because of the breadth of the term "misconduct" as interpreted by the courts it is desirable to determine some principles on which the power will be used. This is also necessary because of the different remedies available, including remission, setting aside and removal. All of these are serious, especially the last, since it denies the parties the services of the person who they originally agreed should resolve their dispute.

It is clear that bias by predetermination constitutes misconduct.<sup>230</sup> So too would corruption, as in accepting bribes, or collusion with one party, or fraud in the proceedings. Where, however, morally improper conduct is not alleged other irregularities will be sufficient. A leading case is London Export Corporation v Jubilee Coffee Roasting Co.<sup>231</sup> where the contract provided an appeal from the award to the board of appeal of a trade association.

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229. 1908 Act, s.22.

230. But the parties can agree that the arbitrator be someone who is closely connected with a party, and this agreement will be upheld to the extent that it does not detract from s.16 of the 1938 Amendment. That section is concerned with stays of proceedings and revocation of submissions, but it is thought that if the action would have been stayed, a later challenge for misconduct will not succeed on this ground.

231. *Supra* n19.



When the appeal was heard the umpire (whose decision was being appealed, though in a de novo hearing) was present and stayed behind when the parties retired. This was apparently the custom of the association, although the appellant had protested against it. Diplock J. whose decision was affirmed on appeal<sup>232</sup> ruled that misconduct had been established. He first defined the circumstances when non-opprobrious misconduct would exist. Primarily a breach of the agreed rules of procedure would entitle the applicant to the setting aside of the decision. If no such rules existed, they could be implied, and the principles of natural justice would guide the court in this exercise. Secondly, failing breach of the express or implied procedure, the award could be set aside for being made contrary to public policy - an example of this being violation of natural justice. But Diplock J. went on to say that if there was an express term permitting the procedure attacked, the court "will not set aside the award except on grounds of public policy, which may include violation of the rules of natural justice ..."

So in each case the principles of natural justice are implied - in the first case, where the contract provides for the situation, as a minimum standard; in the second case, to fill the gaps in the procedure. Yet his Lordship further indicated that the parties were entitled, if they so wished, to expressly adopt a procedure that was unreasonable. But it may be queried whether a clause dispensing with natural justice would not be held to be unreasonable. So it is

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232. Ibid, 661, C.A.



unclear whether such a clause would be allowed to stand. The question was not resolved in the case itself, since the practice in question - the alleged trade custom - was held neither to be contrary to natural justice nor, however, to be permitted by the parties agreement. For the latter reason misconduct had been made out.

But in another case where in the course of lengthy proceedings the arbitrator asked the parties to invite him to give an interim award, to which they agreed, and also to undertake that neither would apply to the court on the ground of misconduct for irregular procedure, it was held that the parties could by agreement dispense with the requirements of natural justice.<sup>233</sup>

By way of comment, it might be noted that in administrative law the principles of natural justice vary in their content depending on the circumstances of the case.<sup>234</sup> It would appear that an even more flexible approach should be taken vis-a-vis arbitral tribunals, for two reasons. In the first place their procedure is typically less clearly set out and less standard. An administrative body is ordinarily constituted by an Act or regulations which also establish some procedural rules. The legislation is publicly available for consultation; the tribunal can be expected to build up a certain expertise in applying it. By contrast arbitral procedure, though

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233. Hughes v Ruthin Borough Council (1972) 222 E.G.163; [1972] C.L.Y.122, Ackner J.

234. See e.g. Daganayasi v Minister of Immigration [1980] 2 N.Z.L.R. 130, 141; Wiseman v Borneman [1971] A.C.297, 308.



basically similar, can vary in detail from case to case. Unless he operates under an institution's rules an arbitrator will not necessarily be familiar with these details; often he will be neither a lawyer nor a professional arbitrator.

The second, more fundamental reason goes to the parties' autonomy. Arguably they should be able to contract out of the rules of natural justice altogether if they so wish. The general trend of cases shows that this course is not approved by the judges and in many instances there are sound reasons for such an attitude. For instance, the protection of the weaker party is sometimes cited as a reason for both imposing and policing standards. But there is still room to argue that the required procedure should be less exacting, whether set out expressly in the contract or implied as a matter of law. Flexibility and informality are, it may be assumed, part of the reasons for attracting parties to arbitration in the first place.

Related to the possibility of opting out of natural justice is the question of waiver of procedural faults after they have occurred. In principle acquiescence in such defects with knowledge of them can operate to preclude a challenge to the award.<sup>235</sup> The waiver can be express or implied though what constitutes an implied waiver may give rise to some difficult questions. The aggrieved party might well want to continue with the proceedings; the safest course would then be to make it clear that this is without prejudice to raising the procedural objection later.

There are different ways of attempting to ensure that too-rigid standards contrary to the parties intention are

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235. Russell supra n.15, 475 et seq



not applied. The criteria for intervention can be left up to the court to decide; this is the position under the Arbitration Act where "misconduct" is the standard, a term sufficiently broad to grant a wide discretion to the judge not to intervene. But of course a broad power can be used to the opposite effect also. Alternatively specific grounds could be established, and interference confined strictly to these. In addition, the power to review for procedural error might be exercisable only if a party's rights have been prejudiced thereby. Or a clear distinction might be made in the statute between mandatory and directory rules. Further, a time limit could be imposed on applications for review.<sup>236</sup>

A final point of interest concerns the relationship of misconduct to errors of law rather than of procedure. Russell on Arbitration states that "[i]t is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law ...". But some of the cases are less categorical. For example in Re Jones and Carter's Arbitration<sup>237</sup> an Act directing arbitration on certain disputes provided that the High Court's powers in cases of misconduct should be exercised by a County Court. The English Court of Appeal said that although in most cases the High Court's jurisdiction to quash for error on the face was preserved, where the error was in the nature of misconduct the County Court alone had jurisdiction. Several New Zealand High

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236. Cf. the American legislation, Part II E supra.

237. [1922]2 Ch.599.



Court cases assimilate the two concepts. In F.M.I.A. v Parsons<sup>238</sup> the court rejected an argument that mistake of law could not be misconduct. Other decisions are less explicit but clearly proceed on the basis that error of law can constitute misconduct.<sup>239</sup>

These cases are probably explicable on the basis that the court, in reading the statute literally, thought that power to set aside was confined to misconduct. And since counsel had cited authorities where errors of law had been reviewed, the judges did not distinguish between the two concepts.

While the same results would have been reached on either analysis, the apparent confusion highlights the problems of parallel statutory and inherent jurisdictions, and of the inappropriate terminology used in the Act.

#### D. Errors of Law

It appears that in most legal systems an error made by an arbitration properly appointed and proceeding fairly will not be reviewed by a court. The fundamental reason for this is that the parties have delegated the power of decision to their chosen judge and they must accept his award for good or ill, provided that he has not exceeded his powers or abused his procedure. This proposition is of course subject to statutory incursion, but by and large legislatures do not provide for review of simple errors either of fact or law. The finality of the arbitrator's decision on those matters is inherent in the process, and to allow wide-ranging review would defeat the aims of arbitration.

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238. [1970] N.Z.L.R. 799, 800

239. N.Z. Insurance v Pihema [1967] N.Z.L.R.285; Heine v King, supra n.217.



But New Zealand law, in company with most other common law countries, provides for scrutiny of awards for errors of law, and possibly of fact, where the error appears on the face of the record. This power survives from the rules of common law and equity.<sup>241</sup> It is said to be an anomalous extension of the principle that an award which does not comply with the formal requirements of a valid award is bad and will be set aside.<sup>242</sup> In Hodgkinson v Fernie<sup>243</sup> the question of damages in an action was referred to arbitration, and the award later challenged for error of law. However there was nothing on the face to show the error and therefore the Court of Common Pleas rejected the claim. Williams J. said that the only exceptions to the rule that the award is binding were corruption, fraud "and one other, which, though it is to be regretted, is now, I think, firmly established, viz where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."<sup>244</sup> Despite similar expressions of regret, the jurisdiction has been invoked many times since then.<sup>245</sup>

However certain limitations on the power must be observed. First of all, the error must be on the face of the award. Thus if the arbitrator gives no reasons and the

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240. Russell, supra. n.15, 274 et seq.

241. W Holdsworth A History of English Law (Methuen, Sweet & Maxwell, London, 1964) vol.14, 201.

242. Russell, supra n.15, 437.

243. (1857)3 C.B. (N.S.) 189; 140 E.R.712.

244. Ibid, 202; 717.

245. E.g. British Westinghouse & Co. Ltd v Underground Electric Railways Co. of London [1912] A.C.673; Wellington City Council v National Bank of N.Z. Properties Ltd. [1970] N.Z.L.R.660.



dispositive section of the award is in order, there is no power to review. The practice arose in England for most commercial arbitrators to give no reasons for their decisions, or if they did, to deliver them at a separate time, sometimes expressly stating that they were not intended to be part of the award. Further the parties might have to undertake not to use the reasons in any challenge to the award.<sup>246</sup>

But where there is a note of the reasons delivered with the award, the question is whether they form part of its "face" so as to allow review. Various factors are relevant: whether the reasons are physically attached to the award, whether they are delivered at the same time, whether they are referred to in the formal award itself. Moreover if the dispute is on a contract and the contract is "incorporated" in and of the above ways, it too can be looked at to see if the award has misconstrued it. The rules relating to incorporation are technical<sup>247</sup> and, it is submitted, not calculated to produce results consistent with parties' expectations.

An interesting contrast may be made with administrative law where decisions can also be reviewed for error on the face. There a quite liberal approach is adopted to what constitutes the record. For instance it includes any document referred to in the primary documents; it can even include the transcript of an oral decision.<sup>248</sup>

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246. Commercial Court Committee, *supra* n.28, para.6

247. See 2 Halsbury's Laws (4 ed, Butterworths, London, 1973) para. 623, n.6.

248. R. v Knightsbridge Crown Court, Ex p. International Sporting Club [1982] Q.B.304,

316. See generally H.W.R. Wade Administrative Law (5 ed, O.U.P.,1982) 280-281.



In arbitration, on the other hand, what is comprised in "the record" is viewed more restrictively. In Max Cooper & Sons Pty. Ltd v University of New South Wales<sup>249</sup> the plaintiff entered a building contract with the university. In an arbitration between the two parties a question of law arose and was referred by special case to the Supreme Court. The court gave its opinion in favour of the university, but the Court of Appeal overturned this result, opining in favour of the builder. The case being remitted to the arbitrators, they found for the builder. Their award recited the question of law and the fact that the Court of Appeal's opinion was for the builder on that question. The university then applied to the Supreme Court to set the award aside. The judge held that the opinion (including the reasons) of the Court of Appeal did form part of the record, but that he was bound by the opinion. The university appealed to the Privy Council.

The claim was unmeritorious in that the appellants were seeking to upset the opinion on case stated of the Court of Appeal, where no appeal lay directly from that decision - in effect to review the decision of a superior court of law.<sup>250</sup> The Judicial Committee (through Lord Diplock) also noted that the power the university was seeking to invoke was historically anomalous and had been abolished in England. Further, that it was a discretion "which the court has no jurisdiction to refuse to exercise."<sup>251</sup>

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249. [1979] 2 N.S.W.L.R. 257

250. Review of such a court by the direct route of prerogative orders is impermissible at common law: Re Racal Communications Ltd. [1981] A.C.374.

251. *Supra* n.249, 261. But the error must be material: *ibid*, 262.



The Privy Council held that since the reviewability of the award depended on whether or not the error was incorporated, which was an artificial distinction, the court should lean in favour of a construction of the award which did not express the arbitrators' reasoning to attack. " [T]o make it vulnerable, what the error is must appear upon its face as a matter of actual exposition, not one of inference only".<sup>252</sup> The issue was an ordinary question of construction, where the test was the intention of the draftsman - and the arbitrator "can be presumed to know the vulnerability with which the award will be infected if he incorporates as part of it the legal reasoning or which it is based".

An Australian case<sup>253</sup> in which the court's opinion on case stated was held to be part of the award was distinguished on the ground that there the award had openly stated it was following the opinion. In the instant situation the award merely recited the fact of the consultative opinion being obtained - the arbitrators might not have followed it (this is with respect a very fine distinction).

Applying these principles, the award was found to lack any statement of grounds or incorporated document disclosing an error; the appeal was dismissed.

The decision is clearly based on a policy of finality in arbitral awards. In this respect the reference to the English Act of 1979 is noteworthy; have the basic legislative changes brought about in England appeared by

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252. *Idem.*

253. Tuta Products Pty. Ltd v Hutcherson Bros. Pty. Ltd (1972) 127 C.L.R.253.



some osmotic influence in the common law of New South Wales? One New Zealand judge has doubted the legitimacy of the method but held that he was bound by the plain intention of the Privy Council.<sup>254</sup> Viewed in terms of this basic policy (which Lord Diplock expressly outlined) the judgment is unlikely to have much significance in administrative law for the definition of "the face of the record".<sup>255</sup> But in the field of arbitration it is not without its difficulties of implementation. The majority of the New Zealand Court of Appeal<sup>256</sup> recently distinguished Max Cooper in a case<sup>257</sup> where the award was contained in a booklet along with the "reasons for award". Max Cooper, on the other hand, was a case of alleged incorporation by reference, though the dicta are more widely stated - the Privy Council said that an arbitrator could avoid incorporation by putting down his reasons on a different sheet of paper which "he makes it unequivocally clear" is not intended to form part of his award. The Court of Appeal said that this phrase suggested a disclaimer was an important factor. The absence of such a disavowal, (especially when one arbitrator was a Q.C.) coupled with the "physical and verbal unity" of award and reasons led to the conclusion that the reasons were intended to be part of the decision.

The upshot seems to be that while the intention of the arbitrator is the overall test, there is a distinction

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254. Thorp J. in Kenneth Williams, supra n.98, 605

255. The dictum of Thorp J. to this effect, it is submitted, is correct.

256. Including Sir Clifford Richmond, a member of the Judicial Committee in Max Cooper.

257. Manukau City Council v Fletcher Mainline Ltd. [1982]2 N.Z.L.R. 142.



between the "one document" cases (Max Cooper) and other situations. In the former the court will lean strongly against incorporation, unless the arbitrator's intention is clearly to the contrary. In the latter all the relevant circumstances, including physical annexation and "verbal unity" (which the Privy Council thought entirely neutral) are considered.<sup>258</sup>

The second limitation on the power to review for mistake of law on the face of the award is where a question of law has been specifically referred. In such a case the court will uphold the parties' wish that the arbiter finally decide the legal issues.<sup>259</sup> But a question has not been specifically referred if it arises in the course of determining the dispute. Often exactly what has been referred and whether it is a question of law arouses much difficulty. Moreover the distinction between a specific reference of a question of law and other references can be criticised. It may be purely fortuitous that the reference is phrased as a specific legal question. And why should reviewability depend on the distinction; it implies a prima facie obstacle to the disputants' submitting the questions of their choice to the final adjudication of a judge of their choice.

A brief comparison with the American position reveals a quite different approach. It was held from an early date that so long as the award was within the submission, was given as the honest and impartial decision of the

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258. See also Gold Coast City Council v Canterbury Pipe Lines (Aust). Pty. Ltd (1968)118 C.L.R.58; Pearl Marin v Pietro Cingolani (The General Valdes) [1982]1 Lloyd's Rep.17, C.A.

259. F.R. Absalom, supra n.72; Att-Gen. v Offshore Mining, supra n.119.



arbitrators and after and full and fair hearing it would not be set aside for error of law or fact.<sup>260</sup> The statutory grounds for vacating an award under the U.S. Arbitration Act were outlined above. Error of law was not among them. But judge-made law has created the doctrine of "manifest disregard of law", interpreting the excess of jurisdiction ground in the Act. In Wilko v Swann<sup>261</sup> a customer of a brokerage firm alleged a violation by the firm of the Federal Securities Act 1933. The plaintiff's contract with the firm stipulated that disputes should be arbitrated. The Supreme Court held that the arbitration could not be specifically enforced,<sup>262</sup> since the special remedies afforded by the Securities Act could not be waived. It further acknowledged that if the arbitration went ahead and was decided in manifest disregard of the law the award could be vacated. However the breach would have to be clear - the arbitrator's interpretation of the law, even if erroneous, was unreviewable unless it amounted to "manifest disregard".

Another case put it even more strongly<sup>263</sup> - that manifest disregard existed only where the arbitrator understood the law correctly but proceeded to disregard it. And a later decision upheld an award, although it was described by one judge as incorrect, baseless and irrational.<sup>264</sup>

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260. Burchell v Marsh 58 U.S.344 (1854)

261. 346 U.S.427 (1953)

262. The decision on this point was distinguished in Scherk v Alberto-Culver, supra, n.44.

263. San Martine v Saguenay Terminals Ltd 293 F.2d.796 (1961) C.A.th Circ.

264. I/S Staborg v National Metal Converters 500 F.2d.424 (1974) C.A. 2nd Circ.



E. Errors of Fact

If both mistakes of law and of fact are reviewable, what is the advantage of arbitration at all? A judge would have final jurisdiction on both aspects of the proceedings, much as he does from inferior courts. Nevertheless it is at least arguable that errors of fact on the face of the award are susceptible of review in this country.

It is necessary to distinguish between mistakes admitted by the arbitrator and unacknowledged alleged errors. In the first of these cases the award will generally be remitted to the arbitrator for correction; or it might be set aside though Russell doubts this.<sup>265</sup>

Where the mistake is not admitted the position is dubious. The statutory power to set aside for misconduct is inapplicable since mistake does not amount to misconduct.<sup>266</sup> Is there a common law power to set aside for mistake of fact? The United Kingdom Parliament appears to have assumed so in enacting the Arbitration Act 1979, section 1 of which reads in part:

"[T]he High Court shall not have jurisdiction to set aside or remit an award ... on the ground of errors of fact or law on the face of the award."

In Moran v Lloyd's<sup>267</sup> the Court of Appeal assumed that the emphasised words were not otiose. If that is so then review for errors of fact theoretically exists in New

265. *Supra.* n.15, 456.

266. But see *supra.*

267. [1983]2 W.L.R.672.



Zealand and other common law jurisdictions. However, Russell records no satisfactory examples of the power being invoked,<sup>268</sup> and there is good reason to restrict the common law power, admittedly anomalous, to mistakes of law.

#### F. Control at Enforcement Stage

Section 13 of the Act provides for leave to be given to enforce. On what principles will leave be granted, there being no statutory indications? The courts, at least until recently, have been somewhat grudging in the use of this section. Their attitude was governed for a long time by a dictum of Scrutton L.J. in Re Boks & Co,<sup>269</sup> where the losing party in the arbitration resisted enforcement on the ground that the original contract had been illegal. The Court of Appeal declined to grant leave to enforce, and Scrutton L.J. said:

"[T]his summary method of enforcing awards is only to be used in reasonably clear cases. It is not intended on the application for leave to enforce an award to try a complicated or disputed or difficult question of law. If it is not reasonably clear that the award should be enforced, the party seeking to enforce it must be left to his remedy by action ..."

It is worth remembering that if in fact the transaction was illegal (for lack of a statutory licence to trade in the particular product) then the whole contract and arbitration clause would have been void. Indeed this was presumably the basis on which an earlier application to set the award aside was refused: there was no valid submission and thus no

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268. *Supra* n.25, supplement to p.447.

269. [1919]1 K.B.491.



no award to be quashed.<sup>270</sup> Thus doubts as to the validity of the award were ones going to its very existence.

The case has been followed in New Zealand in Mackintosh v Castle Land Co.<sup>271</sup> which involved an arbitration of disputes concerning a lease. The defendant objected to leave being given because it alleged that the award was bad on its face for not having dealt with all the points submitted. The judge said:

"I think there can be little doubt that if an award is or may be uncertain or in some other way defective on its face then the present procedure is not appropriate."

However leave to enforce was granted.

A more recent decision of the English Court of Appeal is in conflict with these cases. The court in Middlemiss v Hartlepool Corporation<sup>272</sup> granted leave to enforce where the loser in the arbitration objected, inter alia, that the award contained an error of law. Lord Denning M.R. disapproved the Re Boks dictum, saying that:

"Scrutton L.J. went a good deal too far. He said ... "[the summary enforcement method] is only to be used in reasonably clear cases". I would put it just the opposite. I would say it is to be used in nearly all cases. Leave should be given to enforce the award as a judgment unless there is real ground for doubting the validity of the award."

Lord Denning's approach also differed from the Mackintosh case in another important respect. In neither case had the objector sought to set aside the award, either

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270. Ibid., 493. Though logically correct this point has given rise to obvious inconvenience and the procedure for challenging has been amended: see Russell, supra n.25, 423.

271. Supra n.222

272. [1972]1 W.L.R. 1643 (decided after MacKintosh).



in separate proceedings or at the same time as leave to enforce was applied for. The New Zealand court held that this did not preclude the claim of invalidity being argued. Inactivity could not "render valid an award which was invalid on its face".<sup>273</sup> If "invalidity" is intended to cover all errors on the face then the dictum appears to be too wide. The English Court of Appeal decided that, at least where the objection was one of error of law not amounting to illegality or some other form of nullity, the point should have been brought up on a case stated, as the award had been made in that form. The court did not mention the possibility of review for error on the face, but it is reasonable to suppose that, had that been the method of challenge, it too would not have been entertained. An award in the form of a case stated is by definition made before the arbitrator is functus officio; respondents would have even more time to consider applying under the inherent jurisdiction, since that can only be done after the award is delivered.

Thus if the Court of Appeal's attitude is followed in this country an application for leave to enforce will be granted unless there is a substantial doubt as to the validity of the award. The court did not in terms say that the doubt must go to the very existence of the award - that is, to resist it the award must be not merely challengeable but null - but this proposition is consistent with the case and with the Re Boks decision, and also with the facts though not the dicta in Mackintosh.

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273. *Supra* n.222, 197.



At this point there may be noted an interesting contrast between arbitrators and other types of tribunals. Where an administrative tribunal has acted in breach of the rules of natural justice its decision is usually said to be a nullity.<sup>274</sup> Breach of these rules ought logically to amount to grounds for resisting enforcement. But in Thorburn v Barnes<sup>275</sup> Willes J. said:

"If an arbitrator stood in the same position as an ordinary judge, the argument would be conclusive. But he does not ... Insufficiency or want of hearing must be urged as a ground for setting aside the award on motion, and cannot be set up as a bar to an action upon it."

This was evidently an action at common law before the Arbitration Act was passed, but the principle has been applied to applications for leave under the Act.<sup>276</sup> Thus breach of natural justice does not, in arbitration, mean there is no decision, merely an improper one;<sup>277</sup> and a motion to set aside is necessary.

If the award sought to be enforced in New Zealand was made overseas the grounds for refusal of execution are more clearly specified. Under the legislation ratifying the New York Convention the award "shall not be enforceable ... if the person against whom it is sought to enforce it"<sup>278</sup> proves one of a number of possibilities. These grounds, which paraphrase the text of the Convention in effect are:

- (1) incapacity of a party to the agreement when it was made

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274. E.g. Ridge v Baldwin [1964] A.C.40.

275. (1867) L.R.2 C.P. 384, 402.

276. E.g. Benedetti v Sasvary [1967] 2 N.S.W.R.792.

277. Bache v Billingham [1894]1 Q.B.107.

278. Supra n.111, 1982 Act, ss.5-7 "Enforcing" includes reference to "relying on" an award.



- (2) invalidity of the agreement under the law governing it
- (3) failure to notify the parties of the hearing or to allow a case to be presented<sup>279</sup>
- (4) where the award is made on a matter not submitted (though it is no basis for refusing enforcement that the award fails to deal with all questions submitted)<sup>280</sup>
- (5) improper constitution or procedure of the tribunal according to the parties' agreement (or failing such agreement, the law of the seat of arbitration).
- (6) the award is not yet binding on the parties, or has been set aside in the country of origin.

Furthermore the court "may" refuse enforcement:

- (7) if the matter is non-arbitrable under New Zealand law<sup>281</sup>
- (8) if enforcement is contrary to public policy.

Finally, while under both the Convention and the implementing Act there is a general obligation to enforce subject to the above exceptions, a slight difference between the texts is of interest. Under the New Zealand legislation, in a case where one of grounds (1) to (6) above is made out the award "shall" not be enforceable. Article V of the Convention is less restrictive:

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279. Cf. nn274-277 and text, supra.

280. Cf. the 1933 Act, supra n.11, s.6(2)(c). Under the 1982 Act if a matter not referred is dealt with but can be severed from the rest of the award the latter can be enforced: s.7(4).

281. See e.g. n.7 supra (arbitration clauses in insurance policies unenforceable against policy-holder - though not unlawful per se).



"1. Recognition and enforcement of the award may<sup>282</sup>  
be refused ... only [if one of the grounds is  
established]."

Thus, under the Convention, awards could theoretically be enforced even though one of the grounds has been established; in New Zealand this is not possible. To take an example: if an award rendered in Australia has been annulled by an Australian court it is "not enforceable" under the New Zealand legislation. Under the terms of the Convention itself, however, there would still be room for a court in which execution was sought to enforce it. Although this is unlikely to occur, it is possible that if the annulment was capricious, or if the nullifying court was acting *ultra vires*, then enforcement might yet be granted. It is noteworthy that the corresponding United Kingdom legislation is so framed as to leave this discretion with the court.<sup>283</sup>

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282. Cf. the French text 330 U.N.T.S.39, 41: "la reconnaissance et l'exécution .... ne seront refusées ... que si ..." which is therefore to the same effect.

283. *Supra* n.192, s.5(2)



## VI. CONCLUSION

### A. General

This paper has considered the relationship of arbitration to ordinary courts of law. Arbitration is a process which can be viewed in at least two ways: as an essentially contractual arrangement between two individuals to effect a resolution of their dispute; or as a judicial procedure subject to the basic requirements of the judicial process and to an overall supervision by the courts. Different aspects of these models are emphasised at various times and in different arenas. In all municipal jurisdictions legislatures regulate the arbitral process by subjecting it to rules and by granting the courts the power to enforce them. The extent of the control has been seen to vary markedly between different systems.

The perception of the process is also subject to change within a single system, as the recent legislative and judicial developments in England show.

It is worthwhile to recall some of the interests which are present in the arbitral - judicial relationship. A clear and strong factor is the freedom of the parties to contract, which entails also the principle of pacta sunt servanda. Arbitration is only possible (the special question of statutory or compulsory "arbitrations" aside) where a conscious decision is made to have recourse to it. Courts are generally willing to uphold the freedom to contract and the obligations erected by agreement. But the treatment of arbitration agreements and awards by courts also reflects competing interests, such as the maintenance of the rule of law. This leads, it is said, to the consequence that legal standards must be upheld in



arbitration awards while arbitral proceedings must comply with substantially the same basic rules of procedure as courts follow. Another interest in need of protection is that of the weaker party - this is recognised in a general way by the statutory powers granted the courts to control the process and occasionally in a specific context by legislative evisceration of arbitration clauses. The courts adopt a similar attitude - the protection of the commercially weak is a strong underlying factor of the principle enunciated in Czarnikow v Roth, Schmidt & Co.<sup>284</sup> The same idea can also be seen in traditional contractual terms: where there is no consent freely given the sanctity of contract is inapplicable. Finally the interest of the legal system in practice is important - this also cuts both ways. The use of arbitration brings benefits by saving the courts time and effort, and the taxpayers money. But it is also important that dispute settlement within arbitration be relatively efficient, and the courts and legislature have had to intervene to ensure this.

In public international law these interests are in the main applicable, but sometimes in modified form; there are other more complicated ones present too. For example it may be harder to define what is a legal question suitable for arbitral (or even judicial) decision. And though the rule of law is important at the level of relations between states, the principles of contract are even more important than in municipal systems. This is because organisation on the international plane necessarily takes the form of

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284. *Supra* n.26.



consensual agreement much more than of imposed determination of rights and obligations. The issue of reality of consent is nevertheless still relevant in international relations.

At this level also, procedural and legal rules are important. Admittedly their sources are different - they are contractual rather than laid down by a central authority. And it has been doubted that rules which are too refined and too often applicable, whatever the nature of the dispute, are acceptable to states.<sup>285</sup> The fate of the International Law Commission's draft rules of arbitral procedure is an example of this.<sup>286</sup> Nevertheless a more optimistic outlook is possible in relation to the use of arbitral procedures in individually negotiated agreements with a more limited scope than the I.L.C. draft.<sup>287</sup> At the same time there is some evidence of more flexible "arbitration-like" procedures being adopted by international judicial bodies<sup>288</sup>, which may indicate an increasing acceptance.

The methods of intervention of the arbitral process are an important aspect of the relationship governing the interests involved. Self-regulation, as noted, plays a potentially important role in international law - with a possible development into transnational law and the evolving "delocalisation" phenomenon. In the domestic law

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285. See e.g. C. de Visscher, *supra* n.5.

286. *Supra*. n.22

287. L.B. Sohn "The Role of Arbitration in Recent International Multilateral Treaties" (1983)23 Va.J.I.L.171.

288. Special chambers of the International Court of Justice can now be selected by litigants to hear their case - e.g. the Gulf of Maine case: see (1981) 20 I.L.M.1371.



of countries like New Zealand its function is more limited, in part perhaps because regulation is presently performed by courts. In terms of the contractual nature of arbitration the intervention in the process is sometimes said not to be justifiable - the parties having agreed to their contract should be held to it, even at the expense of errors of law. The American position approximates more closely to this attitude than do other English-derived systems. But as the paper has emphasised intervention takes several forms. The court may be asked to preclude the arbitration, or to compel it. It might be called on to support the proceedings by appointing an arbitrator, or by using its coercive powers to compel attendance, or production of evidence, or inspection of property. On the other hand it might control the reference by revoking the arbitrator's authority or setting aside the award. In some circumstances the court can decline to enforce an award even after the whole process has been completed. But if it does not, then the power of the state can be employed to enforce the decision whereas by itself might be practically meaningless.

At a certain level these methods can be seen as merging into one: the court is enforcing the parties true understanding. For instance by preventing the arbitration where there is no dispute, in effect the court is enforcing the true relationship between the disputants - no legal obligation has yet arisen which compels them to go to arbitration. Or by summoning witnesses the court can be regarded as assisting the effective resolution of the dispute in the manner selected by the parties. This analysis can not however be extended too far, unless the



parties are free to specifically exclude the powers granted the court by statute. As has been seen, in New Zealand they are not able to do so. Moreover the analysis depends on the assumption that disputants intend that their differences be resolved according to law. It is submitted that this is not always the case; the obligation of the arbitrator to come to a correct legal decision arises by operation of law, and is not always, perhaps not even usually, matched by the intention of the parties.

#### B. THE ACT

The main focus of this paper has not been to consider the difficulties the Arbitration Act 1908; several law reform bodies have performed this task on equivalent statutes.<sup>289</sup> Rather the Act has been discussed in terms of its relationship with the general law and the arbitrator's powers and duties. But it is appropriate to mention some of the issues raised and comment on them.

The scope of the legislation in relation to all arbitrations is unclear. Some provisions are clearly optional and their effect can be defeated by a contrary intention. Some sections have been held to apply despite an agreement to exclude them. Others are unclear. It would be preferable to state clearly, as does the legislation of a few jurisdictions,<sup>290</sup> which are mandatory and which are defeasible.

To do so does of course require decisions as to which sections should be able to be excluded, and on what conditions. The English Act of 1979 raises these questions;

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289. E.g. W. Aust. Law Reform Commission Report on Commercial Arbitration and Commercial Clauses (No. 18, 1974); N.S.W. Law Reform Commission Report on Commercial Arbitration (L.R.C.27, 1976)

290. E.g. Switzerland: see Wetter, *supra* n.6, vol.2, 413.



several New Zealand judges have suggested considering the enactment of a similar amendment in this country, if only to revive "the direct influence and relevance of the English case law. [This course] would also avoid the complexities which appear to me to be involved in the implementation of the Max Cooper decision ..."<sup>291</sup> But it is questionable whether the overall position would be ameliorated by substituting the complexities of The Nema<sup>292</sup> case. The English Act abolishes the case stated and replaces it with a system of appeals on points of law, for which leave must be sought. It further permits, in certain circumstances, the direct exclusion by agreement of the right of appeal. An alternative approach would be to restrict the grounds of review of an award, which would limit rather than expand the judge's discretion. Such a system has the merit of specifying clearly in advance the reasons for upsetting an award; in contrast the principles laid down in The Nema, it is suggested, are neither clear nor always capable of reasonably easy application. Moreover they are strictly speaking obiter dicta, albeit from a senior Law Lord. The system of enacting a number grounds of invalidity could change the existing law in this country by abolishing the jurisdiction to review for error on the face of the award. This power has almost from its inception been recognised as anomalous; it involves drawing sometimes casuistic distinctions between specific and non-specific references, and as to what constitutes the "face" of the award. And confusion between errors of law and misconduct

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291. Kenneth Williams v Martelli, supra n.98, 605.

292. Supra n.90.



sometimes occurs. It would be open for Parliament to enact that error of law can continue to be a ground of review, but considerable thought should be given before taking this step. The principles of the rule of law and of freedom of contract need to be weighed up. Possibly such a right of review could be hedged with qualifications, such as giving a right to exclude it (before or after a dispute has arisen), or creating a particular standard of gravity before the award can be invalidated - though this plainly invites its own problems. In any case limitations on the period in which a challenge can be made would contribute to the speed of the arbitral process.

Any system defining invalidating irregularities should reconsider the power to review for "misconduct". The term is now inappropriate to describe all procedural mistakes. Most systems of law provide for upsetting an award where the procedure has been defective in some respect. There are, however, degrees of irregularity, perhaps here even more so than in the case of error of law. Not all procedural faults will at present lead to invalidation, but it is submitted that clearer indications in the statute of the types of vitiating defect would help. They would remove the need for references to "technical" and "legal" misconduct.

Any opportunity taken to review the statute needs to be preceded by careful consideration of the nature of the arbitral process and its relationship to the rest of the legal system. Deeply ingrained beliefs about the rule of law suggest that arbitration ought to be regarded as another method of dispute resolution within the system and amenable



to the jurisdiction of the courts. Nevertheless the concept of the rule of law does not prevent some States from giving a freer hand to individual parties, at least where they compete on fairly equal terms, to have the disputes settled largely detached from the ordinary processes of the courts.

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