Serial / Maritime

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M A R I T I M E A R B I T R A T I O N

A COMBINED PAPER

PART I.

Foreign Arbitration Agreement;

Domestic Arbitration Agreements;

Stay of Proceedings;

Conduct of Proceedings

By

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PART II.

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By

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MARITIME ARBITRATION

Introduction

Arbitration has been defined as the reference of a dispute or difference, between not less than two parties, for a determination, after hearing both sides in a judicial manner by a person or persons other than a Court of competent jurisdiction.

The use of arbitration procedures for the resolution of disputes with a commercial or maritime element is a well-developed practice overseas and there are substantial maritime arbitration centres in places such as London and New York.

This has come about partly as the result of the practice of merchants, ship owners and other businessmen to write into commercial contracts, charter agreements etc., arbitration clauses stipulating London, New York, or some other location as the designated place of arbitration.

There is no reason why there should not be a substantial amount of commercial or maritime arbitration conducted in Australia, but this is not the case. This may be due to the size of the economy but, it is submitted that it is really the result of the practice of businessmen who are unaware of the advantages of arbitration, and the failure of industry (except the building industry), to develop institutional arbitration facilities.

Arbitration in a maritime environment may arise in the context between shipowner and charterer, shipowner and cargo owner and the salvor, and shipowner and ship builder, and so on. Behind each of these respective parties stand the Underwriters who have subrogated rights, Protection and Indemnity Associations, etc.

The facilities for arbitration overseas comprise: national arbitral bodies, some of which are state-sponsored which conduct courts of arbitration; regional bodies; commercial associations (such as Chambers of Commerce) which conduct arbitration as a complimentary activity; commodity and trade associations. Examples of the latter are the Liverpool Cotton Exchange, New York Cotton Exchange, Bremen Cotton Exchange, London Corn and Trade Association, and the International Wool Textile Association. See Arbitration in International Trade — O'Keefe, Prosper Law Publications. Salvage agreements are subject to arbitration in Lloyd's Standard Form of Salvage Agreement. See British Shipping Laws, Vol.1. Admiralty Practice. Most arbitrations are conducted in cases of technical difficulty before non-lawyers but it is apparently the practice in London in the context of substantial maritime disputes involving difficult questions of law to have the parties represented by solicitors or counsel experienced at the Admiralty bar and before arbitrators who are likewise qualified.

In recent years there have been a number of developments on the international scene which have reinforced the

facilities and advantages of arbitration. These have had an impact on the legal environment in Australia.

Foreign Arbitration Agreements

One major development now reflected in Australia is the widespread international adoption of the United Nations Convention and the Recognition and Enforcement of Foreign Arbitral Awards. This Convention is, to a certain extent, misnamed because the Convention also encompasses the enforcement of international arbitration agreements, not only awards.

Australia is a signatory to the Convention and the Commonwealth has enacted the Arbitration (Foreign Awards and Agreements) Act (1974) (No.136 of 1974). This Act partly came into operation on the 9th December 1974 and the rest of the statute came into operation on the 24th June 1975, Gaz. 24, p.2.

The Act applies to the exclusion of any provision made by a law of a State or Territory other than Papua New Guinea with respect to the recognition of arbitration agreements and the enforcement of foreign awards being provisions that operate in whole or in part by reference to the Convention, but the Act does not affect the right of any person to enforce the foreign award otherwise than in pursuance of the Act. See s.12(1).

Where proceedings are instituted by a party to an arbitration agreement against another party and are pending in a Court and the proceedings involve the determination of a matter which, in pursuance of an arbitration agreement, is capable of settlement by arbitration then, upon application of that party, the Court (meaning any Court in Australia

including the Court of a State or Territory) may, upon conditions if any, as it thinks fit, stay proceedings or so much thereof as involves the determination of that matter and refer the parties to arbitration. See s.7(2). In addition, the Court may make interim or supplementary Orders in relation to any property for the purpose of preserving the rights of the parties. See s.7(3).

However, before this power can be invoked from the Court the following conditions must be fulfilled:

(a) the agreement must be valid and not "null and void, inoperative or incapable of being performed". (See s.7(5));

(b) the procedure of the arbitration is governed, whether by the express terms of the agreement or otherwise, by the law of a Convention country (see s.7(1)(a)) or;

(c) the procedure of the arbitration is governed whether by virtue of the express terms of the agreement or otherwise by the law of a country not being Australia, or a Convention country and the party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia, (see s.7(1)(b)) or;

(d) a party to the arbitration agreement is a government of a Convention country or a part of a Convention country or the government of a Territory of a Convention country being a

Territory to which a Convention extends, (see s.7(1)(c))or;

(e) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in the country that is a Convention country. (see s.7(1)(d)).

It should also be noted that s.11 of the Act provides that nothing in the Act affects the operation of s.9 of the Sea-Carriage of Goods Act (1924-1973) (CTH) The section provides:

"9(1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

9(2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect".

Thus the position under the Sea-Carriage of Goods Act (CTH) is preserved.

New Zealand and the various Australian States have all passed parallel legislation, but because of the effect of s.12 of the Commonwealth statute which has already

been referred to, the legislation of the Australian States would appear to be inoperative. There may be some problems of a Constitutional nature in relation to the Commonwealth statute namely, as to whether the Commonwealth has Constitutional power to legislate in relation to arbitration. This matter does not appear to have received judicial notice and if legislation was, for any reason, held to be unconstitutional, the various State Acts would give State Courts jurisdiction.
New Zealand is a signatory to the Convention.

In addition, the Commonwealth statute covers, as the name of the Convention denotes, the enforcement of arbitral awards, and this is discussed in Part II of this paper as it logically should be considered with matters relating to the enforcement of awards.

UNCITRAL Draft Rules on Arbitration

The second development on the international scene, and one which has not received statutory recognition in Australia, are the Rules for arbitration contained in a Report to the United Nations Commission on International Trade Law (UNCITRAL). (See 48 A.L.J., 269; 49 A.L.J., 290, and 50 A.L.J., 425).
The draft UNCITRAL Rules recognise that institutional arbitrators may not always be appropriate or practicable to meet the needs of a situation. These Rules draw heavily on the Rules of the International Chamber of Commerce (I.C.C.) for guidance and take into account

the objections of countries which find some of the I.C.C. Rules unacceptable. These objections in general relate to matters of procedure and problems of enforcement.

It is envisaged that if a number of commercial nations were to adopt a uniform set of Rules, the evolution of standardised arbitral procedures and, hence, the settlement of disputes would become more simple and effective.

It should be noted that these Rules do not require any implementing legislation by the government, as their force will come from being embodied in the contract by agreement of the parties.

Australian and New Zealand Arbitrations

The regime of law governing domestic arbitration that exists in the several States and Territories of Australia and in New Zealand differs but certain generalities appear.

It is not possible in the scope of one paper to canvass in a comparative law exercise all of the nine relevant jurisdictions. Therefore, this paper discusses as a model, the New South Wales position and, in so doing, highlights the type of considerations which are relevant in the other Australian jurisdictions and in New Zealand.

Arbitration by consent originates in an agreement of reference. These fall into two categories: common law submissions which may be oral (or in writing) and arbitration agreements under the Arbitration Act 1902-1972 (N.S.W.) (which now covers agreements in writing).

In practice, arbitration in maritime and associated commercial environments arise out of written agreements of reference to submit present or future differences to arbitration. The arbitration clause may stipulate the place of the arbitration, the arbitrator and the procedures governing arbitration by reference to some institution or procedural rules. The arbitration agreement may also stipulate the law to govern the dispute.

If the arbitration agreement makes specific provisions as to these matters then in general the agreement overrides the legislation which would otherwise imply certain conditions. The main concern is to questions such as:

What is the proper law governing the agreement?
Is the proper law governing the agreement the same as the law governing the procedures of arbitration?
Is the arbitration clause valid?
What is the time within which the arbitration must be commenced?
Does it cover the dispute?
It may also be that there are several documents, and the particular arbitration clause is one incorporated

by reference from another document, and the question then arises as to whether the arbitration document has been properly incorporated so as to govern the situation.

Incorporation of Arbitration Clauses

There is for example a small but nonetheless important body of law on the incorporation of arbitration clauses into Bills of Lading from charterparty documents. Scrutton on Charterparties, 18th Ed. p.66:

"An arbitration clause in a charterparty will be incorporated into a Bill of Lading if either:

(a) there are specific words of incorporation in the Bill and the arbitration clause is so worded as to make sense in the context of the Bill (fn.69) and the clause does not conflict with the express terms of the Bill,
or

(b) there are general words of incorporation in the Bill and the arbitration clause, or some other provision in the charter makes it clear that the clause is to govern disputes under the Bill as well as under the Charter (fn.70).

In all other cases, the arbitration clause is not incorporated into the Bill (fn.71)".

See The Annefield (1971) p.168 at p.186; The Merak (1965) p.223; Thomas v. Portsea (1912) A.C.1; The Njegos (1936) p.90; The Phonizen (1966) 1 Lloyd's Rep. 150; Weir v. Pirie (1898) 3 Com.Cas., 263; Clink v. Hickie Bormann (1898) 3 Com.Cas., 275.

Another principal consideration is the determination of how the rights and obligations of the parties are governed; that is, by which system of law the parties have agreed or intended the dispute should be resolved.

This issue may be simply answered by the clause itself if the clause stipulates the particular place of arbitration and the provision of specified arbitration rules. Where the parties have agreed that differences are to be settled by arbitration in a certain country, then the clear inference is that they intended the law of that country to apply but, before drawing that inference, all the relevant circumstances must be considered. It would be true to say that there is a strong presumption favouring the law of the country nominated by the clause. However, this presumption can be rebutted. See Compagnie d' Armement Maritime S.A. v. Compagnie Tunisienne d' Navigation S.A. (1971) A.C. 572 at 609; (1970) 3 All E.R., 71 at 96; H.L. per Lord Diplock.

It follows therefore that the procedure in an arbitration may be governed by one legal system whilst the substantive obligations of the contract may be governed by another. See James Miller and Partners Limited v. Whitworth Street Estates (Manchester) Limited (1970) A.C. 583; (1970) 1 All E.R., 796; H.L., and Compagnie d' Armement Maritime S.A. v. Compagnie Tunisienne d' Navigation S.A. (supra.).

Scott & Avery and Atlantic Shipping Clauses

Another important question to consider at the outset is the operation of an arbitration agreement which contains "Scott v. Avery" or "Atlantic Shipping" type clauses. So long as the clause only requires certain conditions precedent or subsequent in order to constitute the right of action, it may not be construed

as a condition attempting to oust the jurisdiction of the Court. Thus a clause which provides the making of the award is to be considered a condition precedent to any right of action in respect of any of the matters agreed to be referred is valid, and the existence of such a condition quite apart from the right to apply for a stay of proceedings, which is discussed later in this paper, constitutes a defence to any proceedings brought before the publication of the award. Such a clause however does not postpone the running of any period of limitation. It should be noted therefore in this context that a stipulation making arbitration a condition precedent to the right to sue may be waived by conduct.

An arbitration agreement which contains an "Atlantic Shipping" clause barring all claims unless the claim is put forward in writing and an arbitrator appointed within a limited period is binding. The time limit so imposed can be very short and, in some jurisdictions, provision is made for the parties to apply to the Court to extend the time so as to avoid undue hardship and to achieve justice. This however is not the case in New South Wales or the case in most Australian States. In New South Wales regard should be had to the provisions of the Commercial Transactions (Miscellaneous Provisions) Act (1974), (No.105 of 1974) which provides in s.6 thereof an amendment to s.19 of the Life, Fire and Marine Insurance Act (1902):

"A provision in a contract of insurance or other contract or agreement, being a provision with respect to the submission to arbitration of any matter arising out of the contract of insurance, does not bind the insured except where the provision is contained in the contract or agreement entered into after a difference or dispute has arisen between the insurer and the insured, providing for the submission to arbitration of that difference or dispute".

Of course, this provision means that for most purposes in a maritime context, "Atlantic Shipping" and Scott v. Avery type clauses are still questions of important consideration.

Limitation Act (1969) (N.S.W.)

Consideration should also be given to the effect of the Limitation Act 1969 (N.S.W.) because that Act provides that the right to proceed to arbitration is to be treated in the same way as a cause of action would be treated if the proceedings were in a Court of law.

Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required to be referred until an award is made under the agreement or the happening of some other event in or relating to the arbitration, or does not accrue at all, the cause of action nevertheless accrues for the purposes of the application of Part II, Division 2 of the Limitation Act 1969 (N.S.W.) to an arbitration under the provisions on the date on which it would accrue but for that term. See s.71.

The Act applies to provisions of an agreement to submit present or future differences to arbitration whether an

arbitrator is named or not, and to the provisions of any Act etc. permitting the determination of any matter by arbitration.

Leaving aside the possible application of contractual time bars such as "Atlantic Shipping" clauses, it may be that the arbitration clause is included in a Bill of Lading or by incorporation from another document to which the Hague Rules apply, in which event the provisions of Article 3 r.6 which provides inter alia:

> "In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless the suit is brought within one, or after delivery of the goods or the date when the goods should have been delivered"

will apply.

It has been held that the words "suit" in that context includes arbitration. See The Merak (1964) 2 Lloyd's Report, 527.

If the Hague Rules do not apply to the situation then the provisions of the Limitation Act (1969) (N.S-W.) s.14 and s.70(1) apply to prescribe a period of six years running from the date on which the cause of action accrues being a cause of action founded on a contract.

Ambit of Arbitration Agreement

Prior to moving to the procedural aspects of arbitration, it is also necessary to consider the scope of the agreement or clause and to ensure that the dispute comes within

its ambit. Unless future disputes are expressely mentioned, reference does not include differences which arose after the arbitration agreement was made, but a general reference to say "all disputes" is adequate to cover future disputes. It is also possible to encompass in the clause matters not strictly arising out of the contract but intimately connected or concerned with it and a clause including a reference "all disputes from time to time arising out of or under this contract" will have this effect. It has been held for instance that a dispute as to general average contribution is a dispute arising under a charterparty and is subject to an arbitration clause in it. See The Astrea (1971) 1 Lloyd's Report 494.

Terms of Arbitration implied by statute

Assuming that the arbitration clause does apply to the dispute at hand then a number of terms will be implied into the clause by statute (assuming the clause does not make provision to the contrary). These are matters which strictly apply to the actual running of the arbitration and are discussed hereafter.

Stay of Proceedings

Initially it may be that the other party to the dispute has instituted proceedings in Court in which event the immediate consideration for the party seeking to enforce the arbitration clause will be to obtain an order from the Court staying the proceedings instituted.

Pursuant to the Arbitration Act (1902) (N.S.W.) s.6, if any party to a submission or any person claiming through him or under him commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceeding may, at any time before delivering any pleadings or taking any other steps in the proceedings, other than appearing in the proceedings, apply to that Court to stay the proceedings. The Act further provides that if the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and the Court is also satisfied that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, then it may make an order staying the proceedings. This is the position common to New Zealand, all Australian States and Territories. This power to grant a stay is in addition to that power given to State and Territory Supreme Courts in Australia by s.7 of the Arbitration (Foreign Awards and Agreements) Act (1974) (No.136 of 1974) which was referred to earlier in this paper in relation to the enforcement of foreign arbitration agreements.

It should be commented at this point that a reference to a foreign Court is treated as an ordinary submission to arbitration for the purpose of the exercise of the jurisdiction of the Court to stay action in respect of

the same subject matter. See Hanessian v. Lloyd Triestino 68 W.N. (N.S.W.), 98; Blackman & Co.(S.A.) v. Oliver Davey Glass Co. Pty. Ltd. (1966) V.R. 570; F.C., Huddart Parker Ltd. v. The Ship Mill Hill, 81 C.L.R., 508.

The above cases were, of course, decided before the enactment of the Arbitration (Foreign Awards and Agreements) Act, but are still relevant in view of the provisions of s.12(2) of the Act in relation to the recognition of foreign arbitration agreements and the enforcement of foreign awards which do not refer to a Convention country or come within the ambit or s.7(1) which was recited previously in this paper.

In order that a stay may be granted by the Court, however, certain conditions must be fulfilled. These are: (a) that there is a valid arbitration agreement covering the question in dispute; (b) that the applicant for a stay is entitled to rely on the arbitration agreement; (c) that the party seeking the stay has taken no step in the proceedings after appearance; (d) that the applicant seeking the stay is ready and willing to arbitrate, and (e) that there is no sufficient reason to refuse a stay. Thus the actions of the party seeking to enforce the arbitration agreement upon being met with resistance from the other party to the dispute are quite important because it is possible by one's conduct to waive the right to arbitration.

The onus is on the applicant to show that the conditions stipulated by s.7(2) have been fulfilled. See Thomson v. Tasmanian Fire Insurance Co., 11 V.L.R., 54;

Eaton v. Eaton (1950) V.L.R., 233; Gisborne Harbour Board v. Spencer (1961) N.Z.L.R., 204; Hill v. Taupo County Commr. (1964) N.Z.L.R., 348.

It is a fair comment to say that there is a presumption in favour of holding the parties to an agreement to arbitrate, and if statutory conditions are fulfilled then the onus shifts to the party seeking to litigate to show why the matter should not be referred to arbitration. See Eaton v. Eaton (supra); Hill v. Taupo County Commr. (supra); A.E.Goodwin Ltd. v. Stephenson & Watt Pty. Ltd. (1967) 2 N.S.W.R., 637.

A stay for instance will be granted if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as a repudiation of the contract by one party, accepted by the other, or by frustration of the contract. See Halsbury 4th Ed. Vol.2, para.561 (fn.2).

In contrast, if the point in dispute is whether the contract containing the clause was entered into at all or was void ab initio, illegal, or is subject to some vitiating element and the clause does not apply, a stay will be refused. The onus upon the parties seeking to arbitrate is active and not passive because once litigation has been instituted the arbitrator can not proceed against the plaintiff with the arbitration because an award made in such circumstances is invalid.

It is therefore mandatory on the party relying on the arbitration agreement to apply for the stay, and only if he is successful can the arbitration award then be enforced. See Doleman v. Osset Corporation (1912) 3 K.B., 257, C.A.

For the purposes of the present discussion let us assume now that both parties are seeking to arbitrate, or that the Court has granted a stay in relation to litigation, and the matter of next immediate concern is to commence the arbitration and to prosecute it to award stage.

As to the commencement of the arbitration, the Limitation Act (1969) (N.S.W.) s.72(1) provides that where the provisions for arbitration require or commit a party to the arbitration to give notice in writing to the other party:

(i) requiring the other party to appoint or concur in appointing an arbitrator, or

(ii) requiring the other party to submit or concur in submitting a difference or matter of a person named or designated in the provisions for arbitration as arbitrator,

the arbitration is commenced between the parties on the date on which the notice is given.

Similar provisions apply where a party to the arbitration takes a step required or permitted by the provisions for arbitration for the parties of bringing on the

matter, and gives to the other party notice in writing of the taking of the step.

Of course, if the arbitration agreement requires the parties to comply with institutional rules then those rules apply to the conduct of the arbitration. An example of such a comprehensive set of rules is the rules of the International Chamber of Commerce. Assuming however that there is no such reference to institutional arbitration, then one turns to the provisions of the Arbitration Act 1902 (N.S.W.) to determine the rules governing the arbitration.

It is at this point that provisions implied in the submission by statute are of relevance. If no other mode of reference is provided, the reference is before a single arbitrator. (See s.5 and the Second Schedule (a)).

If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award (Second Schedule (b)).

Where there has been a failure to appoint an arbitrator then any party may serve the other parties, or the arbitrators as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator. See s.7. This may be done in the following cases;
(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do

not, after differences have arisen, concur in the appointment of an arbitrator; (b) if an appointed arbitrator refuses to act, or is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy; (c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, and (d) where an appointed umpire or third arbitrator refuses to act or is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties or arbitrators do not supply the vacancy. If the appointment is not made within seven clear days after service of the notice, the Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who have the like powers to act in the reference and make an award as if he had been appointed by consent of all the parties. See s.7.

Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention, the party who appointed an arbitrator who refuses to act, or is incapable of acting or dies, may appoint a new arbitrator in his place. Similarly, if on such reference one party fails to appoint an arbitrator either originally or by way of substitution for seven clear days after receipt of the notice, then

the arbitrator that has been appointed by the other party may act as sole arbitrator in the reference, and his award is binding on both parties as if he had been appointed by consent.

The Court may, however, set aside any appointment made in pursuance of the section. There is no need for an arbitrator to formally accept his appointment before formally sitting and making an award, and his entering on the reference constitutes sufficient acceptance by him. See Cox v. Johnson, 14 S.R. (N.S.W.) 240.

Where an arbitration agreement provides for the appointment of an arbitrator by each of two or more parties, three separate conditions must be fulfilled before any appointment is valid. Firstly, the arbitrator must be notified of the appointment. Secondly, he must consent to act, and thirdly, his name and the fact of his appointment must be communicated to the other party. A provision that is implied by the Act is that all witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath. See Second Schedule, r.(g). In addition, the parties to the reference and all persons claiming through them respectively are required, subject to any legal objection, to submit to be examined by the arbitrators or umpire on oath in relation to the matters in dispute, and produce all books, deeds, papers, writings, documents etc. within their possession or powers respectively

which may be required or called for. See Second Schedule r.(f). In addition, it is possible to apply to the Court to order the issue of a subpoena, either to give evidence or for the production of documents. See s.10. It is at this point that there is quite marked departure as to the position in New South Wales and the majority of the Australian States as against the position in Queensland and New Zealand. In the latter jurisdictions the Court has substantial interlocutory powers which enable it to make orders for the conduct of proceedings which are in addition to those of the arbitrator or umpire.

But in all jurisdictions, the general powers referred to above give the arbitrator or umpire power to order pleadings, discovery of documents, interrogatories, inspection of documents, amendments generally and, subject to any legal objection, to do anything which he may decide or require to do for the purpose of ascertaining facts or law in order that he may decide to dispute. See Halsbury, 4th Ed., Vol.2, para.597. In New South Wales and the majority of the Australian States (although the position is different in New Zealand) the arbitrator does not have power to make an interim award unless by consent of the parties. See Davis and Brown's Arbitration (No.2) (1957) V.R., 127. The arbitrator may, for his own purpose, consult experts on questions arising in the course of a reference. Thus, it is possible for an arbitrator with technical skills to say, consult a lawyer on the law, although this should be done with the knowledge

and consent of the parties, but this is not mandatory.

Where an arbitrator or umpire misconducts himself, the Court has power to remove him. See Arbitration Act (1902) (N.S.W.) s.13(1). The Court would not remove an arbitrator for technical misconduct such as the assumption of excess authority due to his failure to appreciate the meaning and effect of relevant statutory provisions. See Riesenberg v. Weinberg (1959) S.R., N.S.W., 106. Unreasonable delay, however, does constitute misconduct for which he may be removed. Where the arbitration agreement does not stipulate the time within which an award must be made, then the Act requires that the arbitrators shall make their award in writing, within three months after entering on the reference or, after having been called upon to act by notice in writing from any party to the submissions or on or before any later date to which the arbitrators by any writing signed by them may, from time to time, enlarge the time for making the award. See Second Schedule r.(c). Similar provisions apply to umpires. All of the above is always subject to the overriding power of the Court to enlarge the time for making an award pursuant to s.11 of the Act.

One of the most important powers of an arbitrator or umpire is to state a case for the opinion of the Court on any question of law arising in the course of a reference, and this is discussed in the second half of this paper. Finally, the award made by the

arbitrator or umpire is final and binding on the parties and persons claiming under them respectively. Most of the arbitration that is conducted does not, at any stage, come for judicial consideration by the Courts. Such cases as have been reported tend to be firstly those in which a party is out of time under the arbitration agreement and, secondly, those cases in which one party has sought to litigate whereas the other party seeks to restrain the proceedings and desires arbitration, or those cases in which there has been misconduct on the part of the arbitrator, or some defect in the award.

The largest body of case law, however, is concerned with the stating of cases, or involves questions of the scope and effect of an award and the jurisdiction for the remission and setting aside of awards.

It may be observed from a short perusal of the statutory provisions that the actual commencement and conduct of the arbitration itself is comparatively simple and the subject of comprehensive legislation. The main issues of concern in the initial stages of arbitration are: the enforcement of the agreement to arbitrate and the possibility of having to apply to the Court for a stay of proceedings; whether the arbitration clause is properly incorporated into the contract; the application of contractual or statutory time bars, and choice of law questions.

BRIAN J. CAMILLERI.

12th October,
1978.

SYDNEY.

R E F E R E N C E S

TO PART I

1. Article "INTERNATIONAL ARBITRATION : ARBITRATION (FOREIGN AWARDS AND AGREEMENTS) ACT 1974 (Cth.); A.M.D'ALOISIO, Australian Business Law Review, Vol.5, No.4.

2. HALSBURY'S LAWS OF ENGLAND, 4th Edition, Volume 2

3. Commentary on HALSBURY'S LAWS OF ENGLAND, Vol.A "AUSTRALIA AND NEW ZEALAND"

4. ARBITRATION IN INTERNATIONAL TRADE, O'Keefe

5. CHITTY ON CONTRACTS — GENERAL PRINCIPLES, Twenty-Fourth Edition, para. 871-895

6. HUDSON'S BUILDING & ENGINEERING CONTRACTS Tenth Edition, I.N.Duncan Wallace

7. RUSSEL ON ARBITRATION, Stevens. Eighteenth Edition, Anthony Walton, Q.C.

8. THE AUSTRALIAN DIGEST, Vol. 1, Second Edition

9. CASEBOOK ON ARBITRATION LAW — John PARRIS George GODWIN

10. THE LAW OF ARBITRATION, William H. Gill Second Edition.

11. THE LAW AND PRACTICE OF ARBITRATION — John PARRIS George GODWIN

12. BRITISH SEPPING LAWS ADMIRALTY PRACTICE, Vol. 1

PART II

THE AWARD

To the parties to the arbitration and to the Courts the most important commercial and legal document is the award: As Devlin, J. pointed out in his masterly judgment in Christopher Brown v. Osterreichischer Wald Besitz (1954) 1 Q.B. 8 the court requires nothing more when asked to act than proof of the contract which contains the submission, that the dispute arose within the terms of the submission, that the arbitrators were properly and duly appointed, and that an award has been made, and of course failure to comply with the direction in that award.

In this part of the paper I propose to deal firstly with the substantial and formal aspects of making the award and the powers the arbitrator has to give directions to the parties. The next problem is the enforcement of the award by the courts. Finally there is the question of control of the arbitration by the courts, not only of the reference itself but of the award once it is made, with one or two ancillary matters.

What must the arbitrator do to make a proper award?

There is firstly the question of principle, then form and the related question of the directions which the arbitrator may give and finally enforcement.

To be valid the rule is that an award must be a final and complete determination of all the issues in dispute submitted for arbitration. The test is, has the arbitrator completed all his duties and become as it is said functus officio? The leading case is Cogstad v. Newsum (1921) 2 A.C. 528 and is a good example of the principle. A shipowner withdrew a ship from a time charter which as the umpire found he was justified in so doing, subject to a set off in damages. The umpire made an award drafted in the form of a case stated,

and clause 21 read:-

> "The question for the opinion of the Court is whether upon the true construction of the charter party and the facts as stated by me the decisions at which I have arrived are correct in point of law. If they are correct, my award is to stand, but if incorrect in any particulars, I desire that the award be referred back to me for re-assessment of the damages in accordance with the decision of the Court".

Differing with the opinion of Scrutton, L.J. in the Court of Appeal the House of Lords held by a majority that this was not a final award because the umpire had not exhausted his duties. If the award were referred back he would still have to assess damages on the alternative basis. Accordingly it was a consultative case only and no appeal lay from the judge of the Supreme Court who had ruled on the matter. It is of course possible to make an award in the alternative expressed in a final form e.g. "If the court decides A, then I award so and so, if the court decides B, then I award so and so".

Another way of expressing this is to say that an award must be final, certain, possible and consistent.

Finality. If all thematters submitted are decided except one, such as costs, or any question of fact, or an order effectuating directions, then the award is a complete nullity. However the issue must have been specifically raised. This will be done by pleading the points of claim and defence properly as the following case shows.

In a dispute arising under a charter party for damages for increasing the cost of discharge the charterers failed to take the point before the arbitrators that the shipowners should have repaired the unloading gear before discharge began. Held that the point could not be raised before the court, and the award of the umpire was final and valid. Tatem Steam v. Anglo-Canadian Shipping (1935) 53 L.L.R. 101

An award is not prevented from being final because each issue is not separately dealt with. It is enough

if there is a decision on each question, which is then taken into account in a general award (Kidman v. Commonwealth 23 S.R. (N.S.W.) 320),but he must decide the issues submitted.

Certainty. Technical expressions are not necessary but the arbitrator must be clear in his adjudication for he decides rights for all time (Eardley v. Steer (1835) 4 Dowl. 423). However if it is doubtful that the question submitted has been decided or how it is decided the award will be set aside for uncertainty.

In a recent case the award was expressed as follows - "We award.....that the goods shall be invoiced on the certified gross Bill of Lading weights viz: 2,000 packages, 105,000 kilos, and 4,000 packages, 210,000 kilos". Held, that the award was void in that the claim had been for money and that it ought to have been in those terms. Warren-Handels v. Intergraan (1967) 2 L.L.R. 82 at p.98.

It is also said that the award must be possible so that it can be enforced, and consistent but this is merely an aspect of uncertainty. For instance an arbitrator cannot say "I think the defendant is innocent" and then award against him. Ames v. Milward (1818) 8 Taunt. 637.

At this stage it might be noted that Australian arbitrators do not have the same power to make an interim award as their New Zealand or English counterparts except in Queensland. This is a more recent innovation and means for example interim measures can be directed or that an arbitrator can make an award relating to liability without deciding on quantum. Thus the decision in Cogstad v. Newsum (supra) would have been valid as an interim award. This seems a gap in our legislation.

To compound the omission the Arbitration (Foreign Awards Enforcement) Act (1973) of N.S.W. defines "award" as including interim awards so that a foreign interim award could be enforced in the State though it could not be made there.

Form of the award.

The arbitration statutes do not lay down any form in which the award should be expressed and the common law rule is simply that it is a matter for the parties to decide. If the submission states that the award is to be in writing then the award will not be valid unless in writing. In a New Zealand case the award was made in writing but not signed by the arbitrators. Held, that the award was good as it was in accordance with the submission Re Hammond (1964) N.Z.L.R. 976. In most cases the arbitrators will sign the award and have their signatures attested. They make two copies and give one to the party who takes up the reward and other to the other party on request. They must publish the award if required by the submission.

In drafting the award they may consult legal opinion. (Many London arbitrators do seek assistance in this way). To be valid an award however need not be a complicated document. It need not contain recitals of the facts or the issues in dispute. But is is advisable because if the issues arise again the award will be a complete defence.

The award is also a very important document to the arbitrator. He may retain it by way of lien against payment of his fees, a course of conduct approved by the court.

THE DIRECTIONS WHICH AN ARBITRATOR CAN GIVE.

The various arbitration statutes have not affected the common law rule that the arbitrator has such power to give directions in his award as the parties confer upon him by their submission.

Where the submission does not state what these powers are the arbitrator has an implied power to direct payments of moneys and the time at which they are to be paid. Even this power is subject to such limits as the general law. He cannot direct a trespass or a forgery of a deed. (Bac. Ab Arb. E4)

Interest.

The Australian position regarding the power of arbitrators to award interest is unclear at present. There is no equivalent to S.20 of the U.K. Act conferring power on arbitrators to award interest from the time of the award. Furthermore the authority of Chandris v. Isbrandsen-Moller (1951) 1 K.B. 240 in which the English Court of Appeal overruled an earlier decision and held that there was an implied power to award interest at common law is in doubt (see Australian Commentary to Halsbury). However recently Meares, J. in a case stated has held that a submission includes an "implied agreement" to award interest. This would appear to do away with the need for an equivalent to S.20. Jacobs, J.A. (as he then was) has said in Evans v. Pool Equipment (1972) 2 N.S.W.L.R. 410 at p. 416 that Chandris v. Isbrandsen-Moller is authority for an award of interest up to the date of the award but not after in the absence of a special term in the submission. The matter is now on appeal from Meares, J. before the N.S.W. Court of Appeal and judgment is expected shortly (Atkinson-Leyton v. G.I.O. 7th July, 1978). Commercial convenience argues in favour of Meares, J. more imaginative approach.

Special Powers

Without special powers referred to in the submission he cannot for example direct payment to himself as stakeholder, or make directions concerning property or personal liberty, or rectify the contract. And in order to determine rights

for the future, e.g. by declaration, he must have a special power.

The words that are usually used in the arbitration clause to confer these special powers in the form of a wide discretion are "that the arbitrator shall have power to determine what he shall think fit to be done by the parties respecting the matters in dispute".

COSTS. The Arbitration Act Schedule II (i) confers a power upon the arbitrator to award the costs of the reference (including all the expenses incurred by the parties in the course of the whole inquiry) and the costs of the award (which include the arbitrator's fees, and the costs of stating a case). Any term in the arbitration clause apportioning the costs will be invalid as inconsistent with the statute. The Court will not review the direction as to costs except on the basis that it is "unjudicial" that is it is so unreasonable that no reasonable arbitrator could have made it. See on these principles in general Devlin, J. in Smeaton Hanscombe v. Sassoon (1953) 2 A.E.R. 1588.

Specific Performance

Apart from Queensland and New Zealand there is no equivalent of S.15 of the U.K. Statute conferring a statutory right on arbitrators to decree specific performance. As few maritime contracts will ever be specifically enforced this is no cause for concern: see especially Attica Sea Carriers v. Poseidon where the Court of Appeal refused a decree of specific performance on a charter party.

EFFECT OF THE AWARD

In old but still familiar language Holt, C.J. said that "The submission is an actual mutual promise to perform the award of the arbitrators" (Purslow v. Baily (1705) 2 Ld. Raym. 1039). Accordingly there arises upon the making of the award a contractual duty to perform the award breach

which gives rise to the usual remedies (infra).

Other consequences which flow from this include the rule that a valid award is final and conclusive upon all the matters referred (Ayscough v. Sheed (1924) 19 L.L.R. 104 & Sch. II (h)). Further having exhausted his duties the arbitrator may not seek to reopen or recall the case: he can only alter it if it is remitted to him by the court. The exception to this is the provision in the Act that the arbitrator may correct "any clerical mistake or error" without remission: S.9 (b). The Court cannot amend or alter the award, it can only set it aside or remit, however a jurisdiction under the English Supreme Court Rules to declare the rights of the parties where an award is expressed in ambiguous terms (R.S.C. Ord. 15 & 16). It does appear however from an old case that there may be an equity to reopen the award, for example for an account of a matter which the arbitrators omitted to assess (Spencer v. Spencer (1828) 2 Y & J. 249). This would now be dealt with by remission.

ENFORCEMENT.

The Arbitration Act provides a simple and effective method of enforcement where the award has not been performed. Where by summons before the master leave of the court is obtained the award may be entered and enforced as though it were a judgment of the court: S.14 (1) (Arbitration Act (N.S.W.))

In certain cases the award will not be enforced as a judgment and the applicant is left to the alternative course of action on the award at law. This will be the case where S.14 (1) does not apply, because there is no written arbitration agreement (See S.3); or because no question of liability is involved but simply one of assessment of damage; (Re Walker (1884) 50 L.T. 207); or where validity of the award is not clear (Margulies v. Dafris (1958) 1 W.L.R. 398). The cause of action may be for damages in contract, or for a

declaration that the award is binding. It appears that the courts will specifically enforce an agreement to perform an award much more readily than other contracts (Wood v. Griffith (1818) 1 Wills Ch. 34).

Foreign Awards

An award for example between an Australian charterer and an American shipowner arbitrated in London may be enforced in the Australian courts at common law by action unless there is something more to be done under the law governing the Arbitration i.e. English law (Norske Atlas Insurance v. London General Insurance (1927) 28 W.L.R. 104). The making of the contract, jurisdiction and the making of a valid award must be pleaded and proved by the party seeking to enforce.

Foreign awards may also be enforced under the New York Protocol of 1958 now acceded to by N.S.W. Queensland and South Australia. New Zealand has signed the original 1923 Geneva Protocol (which is to the same effect). The foreign award is enforceable by virtue of S.5 (1) of the Arbitration (Foreign Awards & Agreements) Act (1973) and S.14 (1) of the Arbitration Act. It is "binding for all purposes on the parties to the arbitration agreement under which it was made". There are however a number of conditions of enforceability in particular the award must be valid under the laws of the Convention country; the arbitrators must have been properly appointed and must not have exceeded their jurisdiction; the award must be complete. Finally the award must be capable of enforcement in the State and not contrary to the public policy of the State: S.5 (6).

As the editor of Russel (18th Ed.) points out the requirements at common law appear to be no more onerous than those under the Act (ibid. at p.340).

ENFORCEMENT IN A FOREIGN CURRENCY: A NEW DEVELOPMENT.

In Australia and New Zealand it is generally assumed

that a court can only award damages and enforce judgment in Australian or New Zealand dollars. Although we live in a world of fluctuating exchange rates the parties in international trade must take the risk of any movement themselves.

In the United Kingdom Lord Denning has been leading an attack on the old rule contained in the Havannah Railways Case (1961) A.C. 100). The first sortie was in the field of mercantile arbitration. In Jugoslavenska Oceanska v. Castle Investments (1974) 1 Q.B. 292 the C.A. affirmed the rule in The Teh Hu (1970) P.106 (Japanese valuers of a Panamaman vessel) that arbitrators can and should make their award in whichever of the two currencies would produce "the most appropriate and just result". In Schorsh Meier v. Hennim 1975 (Lloyds Rep.) the C.A. held that the old rule did not apply where the Court would decree specific performance of the contract, the currency of account being a foreign currency (reliance was placed on Beswick v. Beswick (1961) Ch. 538 and Art. 106 of the E.E.C. Treaty).

The House of Lords affirmed the rule in Miliangos v. George Frank 1975 3 W.L.R. 758. Lord Wilberforce said that Court procedure should not be allowed to defeat what was "the substance of the obligation" and accordingly the Lords upheld court orders for the execution of a debt arising under a contract governed by Swiss law in the sterling equivalent of Swiss francs at the time of execution and not when cause of action arose. (Sterling had almost halved in value against the Swiss franc). The issue does not appear to have been canvassed in Australia but it is submitted that support for the above principles can be found in the judgment of Dixon, J. in Goldsborough Mort v. Hall (1949) 78 C.L.R. at 0.34 and in Bonython v. Commonwealth (1951) A.C. 201. The most obvious application is in

demurrage calculations. It has also been suggested in relation to sale contracts that an action in damages should succeed (Liblung, 97 L.Q.R. 212).

The Mareva Injunction.

Maritime law has also been in the forefront of another important area of reform. In order to effectuate proceedings before arbitrators not only within the jurisdiction of the court but also in foreign jurisdictions the courts have issued interlocutory injunctions preventing the removal of assets from the jurisdictions pending the making of the award in order that enforcement if necessary, is not rendered vain or futile.

This is a startling development.

The Siskinawas the only ship belonging to a Panamanian company managed by Greeks from Piraeus and was insured in London. The ship was chartered to Italian Charterers to carry general cargo to Arabia but when the cargo owners refused to pay freight to the ship owners (having already paid it to the charterers) the owners diverted the ship from Suez to Cyprus and offloaded the goods onto a wharf where they deteriorated. On its next voyage the ship sank. Pending litigation in Italy the cargo owners sought to restrain the owners from removing the insurance moneys (their only asset) from England. The C.A. was prepared to grant the interlocutory injunction but was reversed by the H.L. because the cargo owners had no legal or equitable interest in the insurance moneys. The Siskina (1977) 3 A.E.R. 803. However the C.A. decision in Mareva v. International Bulk-carriers (1975) 2 Lloyds Rep. 509 still stands as affirmed in Rasu Maritima (1977) 3 W.L.R. 518 C.A. The court said that if there was a real danger that a debtor might dispose of his assets so as to defeat the debt before judgment the court would intervene "to prevent a grave

injustice". In the light of Australian Firth Industries v. Polygas (1977) R.P.C. 213 these cases must be in doubt.

One can only cite Lord Denning M.R. in The Siskina: "To the timorous souls I would say in the words of William Cowper:

> "Ye fearful saints fresh courage take
> The clouds ye so much dread
> Are big with mercy, and shall break
> In blessings on your head".

Instead of'saints' read 'judges' instead of 'mercy' read 'justice', and you will find a good way to law reform".

CONTROL BY THE COURTS

In spite of these innovations commercial men, and especially it seems those in the maritime field, seek to avoid lawyers if at all possibld. Arbitration of disputes for this reason alone is therefore attractive. More importantly it offers secrecy and informality with the obvious savings in time and costs. However as Mr. Patrick Neill one of the leading Arbitration counsel in London has said the institution of the case stated makes secrecy an illusion and the inability of arbitrators to resolve issues of law makes informality often most undesirable. The theme of this part of the paper curtly put might be that although you can escape lawyers you cannot escape the law. As Professor Wade has shown it is this principle of legality that is the basis of the court's control of inferior public tribunals. Intriguingly as Devlin, J. points out in the Christopher Brown case (1954) 1QB8 although the prerogative writs do not run to private domestic tribunals the same principles apply under the guise of contract.

The main ways in which the court controls the arbitration, apart from staying the proceedings, is by the removal of the arbitrators, by deciding questions of law on a case stated during the course of the reference,

and by setting aside theaward or remitting it for further reference once it is made.

REVOCATION OF THE ARBITRATOR'S AUTHORITY. The parties may always agree mutually to revoke the reference at any stage. Where the arbitrator has "misconducted" himself the Court has power to revoke his authority on the application of one of the parties under S.13 (1) of the N.S.W. Act. What amounts to misconduct for these purposes is not entirely clear. It probably includes the situation where the arbitrator has not prosecuted the reference within the time scheme laid down by Schedule II (three months or as extended). However the court can only reappoint an arbitrator where the parties have been able to agree (S.7).

Alternatively a party may seek leave to revoke the whole arbitration under S.4 and it seems that this power will be exercised only if this is the most convenient and just method of resolving the matters in dispute The Ithaka (1939) 3 A.E.R.630. Where a party has waived the irregularity the court will not intervene on his (see below) behalf.

CONTROL DURING THE COURSE OF THE REFERENCE: CASE STATED

Any award which involves a question of law such as the construction of a contract of the scope and validity of an arbitration clause, makes itself vulnerable to the court's jurisdiction to decide matters of law. The case stated is a procedure now formalised under the Arbitration Acts whereby the arbitrator seeks the opinion of the court on a consultative basis on a question of law. This can be done on the initiative of the arbitrator alone, or by a notice to the arbitrator from one of the parties. The arbitrator need not observe this request but he must give the party time to seek a court order directing him to state the case. The procedure may also be initiated by the court itself.

The case stated should normally set out all the findings of fact necessary to decide thepoint submitted to it. And where the question involved concerns the arbitrator's jurisdiction on an issue the case stated should also show how the point arose. Facts not evidence should be recited so that documents ought not be appended. Having stated the facts . the question of law should then be formulated. It is a simple procedure and can save much time if properly used. On the other hand where the arbitration concerns a number of technical legal issues it is often the case that time and costs would be saved by litigation in the first place taking advantage of the expedited commercial procedures (see per Donaldson, J. in Aruna Mills v.Ohanrajmal 1968 (Lloyd's Rep. 304 at p.312).

APPEAL

Unless the submission provides for appeal then the arbitrator's award is final (see Shedule II (h)). Quite often however provision is made for the appointment of two arbitrators, one from each side, with further provision for the appointment of an umpire should the arbitrators fail to agree (this latter provision is now implied into a submission by statute - Schedule II (b)). In proceedings before the umpire the party's solicitor may well conduct the matter but more often the arbitrators will change roles and put the contentions on behalf of the party appointing them, a procedure of which the courts have now taken judicial notice - (per Diplock, J. in Wessanan's v. Isaac Modiano 1960 1 W.L.R. 1243 at p. 1246).

Often an international sale or a marine policy will contain the standard arbitration clause of the large associations such as the Cattle Food Trades Association of London or Lloyds. These will provide for appeal to

Board of Appeal of experts in that trade supplied by the association. Other examples are the International Chamber of Commerce clauses and the new UNCITRAL clauses. The decision of the Board of Appeal then becomes the final award.

IMPEACHING THE AWARD

The parallel between the principles applied by the court in controlling administrative tribunals and controlling mercantile arbitrations has already been adverted to. Accordingly the principles on which the court will impeach the award can be stated reasonably clearly and they are, want of jurisdiction or authority, error of law on the face of the award and any procedural wrong involving excess of jurisdiction such as breach of natural justice or any procedural failure as laid down in the submission. The picture is complicated by the statutory power to set aside for "misconduct", a word which has been construed technically and the statutory discretion to remit. However if the principles are clear, the problem as has been said often enough, is putting them into practice.

(1) Want of Jurisdiction

Where a party can show that the arbitrator did not have the authority to make the award then it is void and unenforceable for lack of jurisdiction. This objection can be taken as a defence to an action on the award or to enforce it under S.14 (1) or by seeking a declaration that the award is unenforceable. Examples of an award bad on this ground, include an award by the arbitrator on a matter not submitted to him, Porter v. Parker (1921) 55 I.L.T. 206; an award as to costs outside the terms of the submission. Boodle v. Davies (1835) 3A & E 200; an unwarranted direction in the award, Price v. Peflin 8 L.J.Q.B. 198; an award regulating payment of sums due in the future the submission being confined to present differences re Morphett (1845)

14 L.J.Q.B. 259; Evans v. Pool Equipment (1972) 2 N.S.W.L.R. 410. Less obvious examples are where the award is made under an illegal contract; or where the arbitrator's authority has been revoked but he makes the award in any event; or where the contract in which the arbitration clause is contained ceases to be binding; or more obviously where time has run.

An interesting recent example occurred in a case where Indain f.o.b. buyers of urea from Italian sellers were also charterers and held bills of lading signed by the ship incorporating the charter party terms. A dispute arose as to short delivery and the shipowner claimed that as the bill of lading contract governed the relationship between the parties the arbitration was time barred under the Hague Rules as being outside the twelve month limitation. Held that the charter party governed and the normal six years limitation period applied: The Dunelmia (1969(2 Lloyd's Rep. 476.

Arbitrators cannot decide finally whether or not they have jurisdiction unless that is the specific question in dispute on the submission but they may decide it as a preliminary issue: per Devlin, J. in the Christopher Brown case (supra). Want of jurisdiction is also "misconduct" for the purposes of setting aside.

(2) Error of Law

Where there is an error of law on the face of the award the court will set aside the award or remit it for further reference. Obvious examples include misconstruction of a contract or a statute, or the wrongful admission of evidence (Melbourne Harbour Trust v. Hancock 29 C.L.R. 570).

Where the error does not appear on the face of the award (which does not include affidavits verifying) then the court accepts the award as final.

An arbitrator categorically dismissed a counterclaim without giving reasons. Held, there was no error apparent on the face of the record regarding the alleged failure to apply the rules relating to damages and the award should stand: Demolition & Construction v. Kent River Board (1963) 2 Lloyd's Rep. 7.

If the submission refers a distinct and specific question of law or if the arbitrator is appointed to decide, inter alia, a distinct and specific question of law his decision on such a question cannot be reviewed on the gound that an error of law appears on the face of the record: Europa Oil (N.Z.) v. Auckland Regional Authority (1968) N.Z.L.R. 991. On the issue submitted the award is final but it may be impeached on other grounds.

(3) Procedural Irregularities

At law a procedural irregularity involves an excess of jurisdiction and it may provide a good defence to an action on the award unless it has been waived (see below). However the court prefers not to invalidate the award on this ground and in its discretion will remit the matter if that is appropriate (see below).

REMISSION AND SETTING ASIDE

Each of the various Arbitration Acts confers a discretion on the courts to set the award aside on the ground of misconduct (S.12) (2), N.S.W. Act) or to remit it for further reference.

(1) Remission

The power to remit is a discretionary power and may be exercised in limine upon a consultative case or where a final award has been made. The usual reason for remitting is to correct the award in some particular where setting aside or the ordering of a new hearing is not warranted.

The grounds upon which the court will exercise its discretion have been stated in Montgomery Jones v. Liebenthal (1898) 78 L.T. 406 as follows:

(1) Award bad on its face: e.g. where the award was not sufficiently certain: Margulies Bros v. Dafnis (1958) 1 W.L.R. 398; or there has been some error of law on the face of the award.

(2) Where the arbitrator has admitted a mistake - in these cases the court will generally remit the award. However this rule will not be applied where the mistake goes to the consequences of a decision for example in that the consequences were more farreaching or less onerous than the arbitrator thought when making the award: Allen v. Greenslade (1875) 33 L.T. 567. This would be to defeat the principle of finality. The analogy is with rectification of an agreement.

(3) Misconduct - in its technical sense and not necessarily denoting moral turpitude. Misconduct justifying remission does not appear to mean the same as "misconduct" in S.13 (2) justifying setting aside. It does not appear to involve want of jurisdiction. Furthermore it is not any misconduct upon which the court will act. "If the court is satisfied that there may have been - not must have been - a substantial miscarriage of justice that would be sufficient to justify the setting aside or remitting of the award, unless those resisting the setting aside or remission could show that no other award could properly have been arrived at, notwithstanding the irregularity"

(per McNair, J. in Rotheray v. Carlosi Bedarida 1961 1 Lloyd's Rep. 222 at p.224). Examples of misconduct leading to remission are overcharging by the arbitrator, or where the arbitrator proceeded to make an award in the absence of one of the parties without definitely notifying him that he should lodge points of Defence.

(4) Discovery of fresh evidence - this ground is analogous to the powerof the court to grant a new trial in similar circumstances and to admit fresh evidence on appeal.

Where a seller sought to tender a ship's manifest as fresh evidence to prove the correct date of bills of lading the court refused to remit on the ground that the manifest could not conclusively prove the date N.V. Meyer v. Aune (1939) 55 T.L.R. 876.

(5) The above categories are not exhaustive and in a proper case the court will remit for a reason outside them, per Devlin, J. in Universal Cargo Carriers v. Citati (1957) 1 W.L.R. 979.

(2) Setting Aside.

Misconduct which justifies the court setting aside the award (under S.12 (3) N.S.W. Act) is generally more culpable but for similar sort of reason as remission. Again the court is exercising a discretion. In one case the court refused to set aside although there was a clear error on the face of the award because the party had not sought to clarify the matter by way of case stated when he might have done so per Cockburn C.J. in London Dock Co. v. Shadwell (1862) 7 L.T. 381. Misconduct warranting setting aside also includes want of jurisdiction.

SEVERANCE

Where part of an award is bad and it is separable from the rest and does not affect the good part, the good part may be allowed to stand and the void part rejected. It also seems that there may be remission of the bad part for a partial rehearing Eastcheap Dried Fruit v. N.V. Gebroeder (1962) Lloyd's Rep. 283

WAIVER

A party may be estopped from complaining about an irregularity if he has full knowledge of the wrong and has taken some decisive step in relation to it showing that he does not intend to take the point (see Spencer Bower & Turner on Estoppel 2nd Ed. 1966, p. 308). Thus the appointment of an arbitrator which is had for lack of interest may be waived by a party continuing on the refererence.But the waiver must be clear. Where a submission required that an umpire be a "commercial man" the fact that the arbitrators went ahead and argued the matter before an umpire who was a lawyer could not raise an estoppel against one of the parties: Rahcassi Shipping v. Blue Star Line 1969 1 Q.B. 173. Contrast The Elizabeth H (1962) 1 Lloyd's Rep. 172 where a party agreed to litigate in London although the arbitration clause called for arbitration in New York. The court held that there had been a variation of the contract.

CRITICISM

There are a number of useful criticisms one could make of the present law but there are two main general points. The first already adverted to in Part I of this paper is the comparative lack of experience outside a few small areas in this field. The most important issue here is whether maritime businessmen should litigate or arbitrate. At least this much can be said, where there is a so-called "technical arbitration" involving a number of legal issues

litigation has many advantages both in time and costs (see e.g. Commercial Causes jurisdiction in N.S.W.).This point is reinforced by the lack of any power to appoint a judge arbitrator (except in the County Court in Victoria) who can deal with all questions. On the other hand where there is a "quality arbitration" involving assessment of damage arbitration is obviously preferable. In the "mixed arbitration" other considerations may weigh with the parties, such as secrecy and informality.

The second major criticism is the perennial problem of lack of uniformity. Queensland and New Zealand have the most up-to-date legislation. For instance interim awards may be granted, the award of interest is within the power of the arbitrators and the court has greater powers in the appointment and removal of arbitrators than in the other States. In three States the New York Protocol has not been acceded to. Merchantmen in the various international trades become impatient with the lack of flexibility which this implies and in this area imformity of legislation is more desirable than in others.

P. E. KING.

12th October, 1978.

SYDNEY.

REFERENCES

TO PART II

1. ARBITRAGE INTERNATIONAL COMMERCIAL
Pieter Sanders, La Haye, 1965.

2. ARBITRATION, Russell (18th Ed.,
Anthony Walton, ed.) Stevens, 1970.

3. ENGLISH AND EMPIRE DIGEST

4. THE EXPORT TRADE, Clive M.Schmutthoff
(6th Ed.) Stevens, 1975.

5. HALSBURY'S LAWS (Australian and New
Zealand Commentary) (4th Ed.) Vol. 1.

6. LAW OF CONTRACT G. H. Treitel (5th Ed.)
Stevens, 1975

7. MARINE CARGO CLAIMS (2nd Ed.) Tetley, 1978.

8. MERCANTILE LAW IN AUSTRALIA (4th Ed.)
Rogers and Voumard, Butterworths, 1962.

9. SCRUTTON ON CHARTERPARTIES (18th Ed,
Sir Alan Mocatta, ed.) Sweet and Maxwell, 1974.

10. UNCITRAL, Arbitation Rules, E.77, V.6
(G. A. Resolution, December 1976).