

# The 2009 AMTAC Address

## MORE LAWYERS BUT LESS LAW: MARITIME ARBITRATION IN THE 21ST CENTURY

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### 1 Introduction

Maritime arbitration is increasingly dominated by lawyers, both as arbitrators and in argument before the arbitral tribunal. At the same time, judicial review of arbitral awards is becoming increasingly restricted. That leads to greater autonomy for the arbitral tribunal but also less scope for the development of precedent in judicial decisions. Finding the right balance between autonomy and reviewability is an important but difficult task for a country that seeks to establish itself as being hospitable to arbitration. On the one hand, the parties to an arbitration generally favour finality of result and are uneasy at the prospect of arbitration being merely the first step in a protracted dispute resolution process that goes on to be fought out in court. On the other hand, there must be some scope for judicial review of what the arbitral tribunal does in order to maintain the integrity of the arbitral process. In the home of the two main centres of maritime arbitration, London and New York, the law is in some degree of flux in relation to finding the right point of balance between autonomy and reviewability. In Australia, there has as yet been little opportunity to test the relevant statutory provisions.

Section 2 of this paper is concerned with the increasing involvement of lawyers in maritime arbitration. Section 3 is concerned with the restriction of judicial review of arbitral awards. The combined effect of these two phenomena is the rather paradoxical situation alluded to in the title of the paper. There may be more lawyers involved in maritime arbitration but the end result may be less law, in the sense of judicially created precedent that can be applied by future courts and arbitral tribunals.

### 2 More Lawyers

The 2008 William Tetley Maritime Law Lecture at the Tulane Maritime Law Center was delivered by Bruce Harris, a full-time maritime and commercial arbitrator in London and former President of the London Maritime Arbitration Association (LMAA). Mr Harris has enormous experience as an arbitrator: he has been appointed as arbitrator more than 8,000 times and is signatory to more than 2,000 arbitral awards. He does not, however, have formal legal training and he is not admitted to practice as a barrister or solicitor. In his Tetley Lecture, Mr. Harris noted that in that respect, he is something of a dying breed. Speaking of the LMAA, of which he has long been a member, Mr Harris said:<sup>1</sup>

Even once the LMAA was formed, in 1960, its membership was almost entirely made up of brokers and others directly involved in day-to-day shipping activities. Nowadays, though, all that has changed. Today's maritime arbitrators – or at least those who do the majority of the work in London – are mainly people (sadly only men, in fact) who have a legal background. A couple have worked in law firms, at least one has practised as a barrister, and a number have worked in P&I Clubs, usually after obtaining a practising certificate as a lawyer.

This is a phenomenon that is often the subject of complaint. There are not, we are told, enough truly commercial arbitrators: we need more people from the industry, not lawyers.

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Editorial. Note: This address is also available at the AMTAC website (<http://www.acica.org.au/amtac.html>) and appears here with the kind permission of both the author and AMTAC. MLAANZ is a foundation member of AMTAC.

<sup>1</sup> Bruce Harris, 'Maritime Arbitration in the US and the UK, Past Present and Future: The View from London' (Paper presented at the Tulane Maritime Law Center at Tulane University Law School, New Orleans, 4 March 2008) 6.

If maritime arbitration in London is perceived as being the domain of lawyerly interpretation, maritime arbitration in New York is still seen as being the domain of ‘truly commercial’ arbitration. That is because membership of the Society of Maritime Arbitrators (SMA) is confined to commercial people, recognised as leaders in their respective sectors of the industry, who have held a responsible commercial position for at least ten years.<sup>2</sup> Maritime lawyers, no matter how experienced, cannot become SMA members unless they also have the requisite ten years of senior experience in some sector of the shipping industry. The ‘truly commercial’ nature of New York maritime arbitration is jealously guarded. In *WK Webster & Co v American President Lines Ltd*,<sup>3</sup> the losing party in a New York maritime arbitration resisted confirmation of the arbitral award on the ground that one of the arbitrators was not a ‘commercial man’ as required by the arbitration agreement, because he was an attorney. The SMA participated as *amicus curiae*, supporting the argument that an attorney could not be a ‘commercial man’. The US Court of Appeals for the Second Circuit ultimately confirmed the award but only because the attorney had spent most of his career on the commercial side of the maritime industry. If he had obtained his commercial experience solely as a practicing member of the legal profession, he would not have qualified to act as an arbitrator.<sup>4</sup>

Because so much of the American shipping industry has moved off-shore to tax havens and flags of convenience, the ‘commercial people’ restriction on membership of the SMA means that there is a dwindling, aging pool of maritime arbitrators in New York. There are presently 72 members of the SMA.<sup>5</sup> Of those 72, only one is under 50 years of age and 35, almost half of the pool, are over 70 years of age. Eleven (15.27% of the pool) are over 80 years of age. One obvious consequence of this is that the number of maritime arbitrations in New York has been going down as New York loses business to London. In his Tetley Lecture, Bruce Harris observed:<sup>6</sup>

In the past ten years or so, however, New York’s maritime arbitration practice has dwindled very substantially, such that there is now no real question that London has at least half and probably three-quarters – or more - of all the maritime arbitration that takes place in the world.

In other words, maritime arbitration is migrating from the ‘truly commercial’ arbitrators of New York to the lawyerly arbitrators of London.

Where do Australia and New Zealand stand in comparison? Of the 26 people on the Panel of Arbitrators of the Maritime Law Association of Australia and New Zealand, 23 have legal qualifications.<sup>7</sup> Only five have the kind of industry experience that would qualify for membership of the SMA in New York.<sup>8</sup> In short, Australia and New Zealand are more like London in this respect than New York.

Not surprisingly, the increase in the proportion of lawyers sitting as arbitrators has led to a concomitant increase in the number of lawyers appearing before arbitral tribunals. Again, Bruce Harris’s Tetley Lecture marked the shift:<sup>9</sup>

[N]owadays, solicitors on behalf of the parties handle most London maritime arbitrations, and those solicitors often employ barristers in addition. That, I believe, has come about partly because of the increasing complexity of the matters...But it is also because at some point in, I think, the 1970s, shipowners and charterers and their brokers decided not to replace a whole generation of internal insurance and claims managers who had, until that time, run the majority of arbitrations on behalf of their principals. And at around the same time, the P&I Clubs who had also been assisting shipowners in particular by running some arbitrations for them, started to farm work out to solicitors. The result was that lawyers became involved in almost every case.

In summary, it should be clear that maritime arbitration in two main centers of London and New York is increasingly the domain of lawyers, as it would be in Australia and New Zealand.

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<sup>2</sup> Society of Maritime Arbitrators, *Maritime Arbitration in New York* <<http://www.smany.org/sma/about2.html>> at 7 April 2010.

<sup>3</sup> 32 F 3d 665 (2<sup>nd</sup> Cir, 1994); 1995 AMC 134 (2d Cir, 1994).

<sup>4</sup> *Ibid.*, 32 F 3d 665, 668 (2<sup>nd</sup> Cir, 1994); 1995 AMC 134, 139 (2d Cir, 1994).

<sup>5</sup> Society of Maritime Arbitrators, *Roster of Members 2009-2010* <<http://www.smany.org/sma/members.html>> at 7 April 2010.

<sup>6</sup> Harris, above n 1, 10.

<sup>7</sup> Maritime Law Association of Australia and New Zealand, *MLAANZ Panel of Arbitrators*

<[http://www.mlaanz.org/Uploads/docs/Panel\\_of\\_MLAANZ\\_Arbitrators\\_17.02.2010.pdf](http://www.mlaanz.org/Uploads/docs/Panel_of_MLAANZ_Arbitrators_17.02.2010.pdf)> at 7 April 2010.

<sup>8</sup> Two of whom, like the attorney-arbitrator in *WK Webster & Co v American President Lines Ltd*, 32 F 3d 665 (2<sup>nd</sup> Cir, 1994); 1995 AMC 134 (2d Cir 1994), also have legal qualifications.

<sup>9</sup> Harris, above n 1, 8.

### 3 Less law - Restricting judicial review of errors of law

Obviously, the presence of more lawyers in maritime arbitration means that there will be more legal argument before the arbitral tribunal and awards will increasingly be based on interpretation of the law. Of course, arbitral awards have no precedential effect. Precedent can only come from courts. As a result, the availability of judicial review becomes a pressing question, particularly judicial review for errors of law. Unless at least some cases can find their way to court for judicial review, there will be no possibility of correcting errors of law and no possibility of developing and honing legal principles that do have precedential effect. In London, there is presently some concern that judicial review has been restricted to such an extent that the development of English commercial law is being stifled. In New York, judicial review of arbitral awards for errors of law is extremely difficult to obtain. Indeed, according to some interpretations of a recent Supreme Court decision, it is non-existent. That has led to the very thing now feared in London, namely the stifling of development of areas of maritime law in which disputes are commonly arbitrated. I shall argue that in Australia, the possibility of judicial review for error of law in an international maritime arbitration is non-existent.

#### 3.1 London

Judicial review of arbitral awards in the UK has passed through three stages. Under the *Arbitration Act 1950* (UK), s 21, there was virtually unlimited right to appeal to court on points of law by making a Special Case to the Commercial Court on any issue of law. That was changed by the *Arbitration Act 1979* (UK) s 1(3)(b), which made judicial review much more difficult to obtain. Review became discretionary and was only available with leave of the court. The criteria for review were not set out in the statute but were established by the decision of the House of Lords in *BTP Tioxide Ltd v Pioneer Shipping Ltd ('The Nema')*.<sup>10</sup> The procedure for review remained much the same when the *Arbitration Act 1996* (UK) was passed, but the *Nema*-like criteria were included in the statute. The procedure for appeal on a point of law is now contained in s 69 and the relevant criteria are that 'on the basis of the findings of fact in the award: (i) the decision of the tribunal on the question is obviously wrong; or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt'.<sup>11</sup>

The 1996 version of appeal on a point of law has been narrowly interpreted. Because appeal is only available if the decision is questionable 'on the basis of the findings of fact in the award', it has been held that there can be no appeal to court on the arbitral tribunal's findings of fact nor that the evidence did not support the tribunal's findings of fact.<sup>12</sup> The 'obviously wrong' standard is a higher hurdle to jump than mere error. In *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*,<sup>13</sup> Akenhead J said:

To be 'obviously wrong', the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily 'obviously' so.

A judge's decision to refuse leave to appeal cannot itself be appealed unless the judge considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.<sup>14</sup> In *CGU International Insurance PLC v AstraZeneca Insurance Co Ltd*,<sup>15</sup> the Court of Appeal held that the Court of Appeal cannot itself give leave to appeal unless there was unfairness in the *process* by which the judge came to the decision about leave. In other words, the Court of Appeal cannot give leave to appeal simply because it disagrees with the first instance judge about whether the question is one of general importance.

As I have already noted, there is some concern in the UK that the restriction on judicial review of arbitral awards has gone too far. The Commercial Court Users' Committee asked Lord Mance to chair a Working Group to review the

<sup>10</sup> [1981] 2 Lloyd's Rep 239 (House of Lords).

<sup>11</sup> *Arbitration Act 1996* (UK) c 23, ss 69(3)(c)(i),(ii). The court must also decide that it is just and proper in the circumstances for the court to determine the question: s 69(3)(d).

<sup>12</sup> *Demco Investments & Commercial SA v Se Banken Forsakring Holding Aktiebolag* [2005] 2 Lloyd's Rep 650.

<sup>13</sup> [2008] 1 Lloyd's Rep 608, 614.

<sup>14</sup> *Arbitration Act 1996* (UK) c 23, s 69(8).

<sup>15</sup> [2007] 1 Lloyd's Rep 142.

impact of the *Arbitration Act 1996* (UK) s 69 and, in particular, whether there is any case for making access to court easier in the limited area of maritime law. In May 2009, the Committee issued its First Interim Report, which contained a statistical analysis of the number of cases that underwent judicial review in each of the three eras described above.<sup>16</sup> The First Interim Report shows that in 1978, the last year of the first era, 300 Special Cases were set down for hearing in the Commercial Court. The Committee estimated that probably about 175 of them were from maritime awards, although there were no reliable statistics. In the ten-year period between 1968 and 1978, 107 Special Cases from maritime awards were reported in Lloyd's Law Reports. Fifty-seven of the reported Special Cases went up to the Court of Appeal and 10 to the House of Lords. In other words, the old system produced a healthy flow of precedent-creating judicial review. In contrast, in 1990, during the second era, there were 39 applications for judicial review of maritime awards, which amounted to 58% of the total of 67 applications for review of arbitral awards under s 69. In 2008, in the third era, there were 41 applications for judicial review of maritime awards, which amounted to 72% of the total of 57 applications for review of arbitral awards under s 69. Significantly, leave to appeal was granted in only 14 of them. Only six challenges were successful.

The First Interim Report shows quite how dramatic the change has been in London. Three hundred cases in 1978 may well have been too many but the very existence of Lord Mance's Committee is testament to the concern that 14 cases in 2008 were too few. Delivering the Cedric Barclay Memorial Lecture at the 15<sup>th</sup> International Congress of Maritime Arbitrators (ICMA XV) in 2004, Robert Finch, then Lord Mayor of London, delivered a plea for more appeals to be allowed through the net of s 69, saying:<sup>17</sup> '[T]he present day restrictive system of appeals from arbitration is having a stultifying effect on the development of English commercial law and there is a danger that if this situation persists it may do long-term damage.'

It must be said that that concern is not universally shared in London. Nevertheless, if one looks to the situation in the United States, one can see clear evidence of the atrophying effect that restricted judicial review can have on development of maritime law.

### 3.2 New York

Judicial review of arbitral awards is very difficult to achieve in the United States. The grounds upon which an arbitral award can be vacated are set out in the Federal Arbitration Act, 9 USC § 10. It is a limited list of procedural irregularities, such as fraud, corruption, evident partiality, the arbitrators exceeding their powers, etc. There is no mention of review for mistakes of law. However, judicial decisions did create another ground for review, known as 'manifest disregard of the law'. In 2008, in *Hall Street Associates LLC v Mattel Inc* ('Hall Street'),<sup>18</sup> the Supreme Court of the United States held that the parties cannot agree to expand the list of grounds for vacatur set out in 9 USC § 10.<sup>19</sup> Because 'manifest disregard' is not on the list in 9 USC § 10, some circuit courts of appeal have held that *Hall Street* has produced the result that manifest disregard of the law does not constitute an independent, non-statutory ground for vacating awards under the *Federal Arbitration Act* (FAA). That is the position adopted by the Fifth, Eighth and Eleventh Circuits.<sup>20</sup> In contrast, the First, Second, Sixth and Ninth Circuits have applied the 'manifest disregard' standard after *Hall Street*.<sup>21</sup> The inclusion of the Second Circuit on the latter list is significant for purposes of maritime arbitration because New York City is in the Second Circuit. Thus, for the time being at least, 'manifest disregard' lives on as a ground for reviewing maritime arbitration awards in New York.

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<sup>16</sup> V V Veeder QC and Amy Sander, *Lord Mance's Advisory Committee on Section 69 of the Arbitration Act 1996: First Interim Report on the Workings of Section 69 of the 1996 Act in Regard to Maritime Arbitrations in London Before the Commercial and Admiralty Court* (2009) The London Maritime Arbitrators Association

<<http://www.lmaa.org.uk/uploads/documents/First%20Interim%20Report%20Mance%2024%2005%202009.pdf>> at 7 April 2010.

<sup>17</sup> Robert Finch, *A Collection of the Cedric Barclay Lectures: ICMA X-ICMA XV* (Singapore International Arbitration Centre, 2006) 111.

<sup>18</sup> 552 US 576 (2008); 128 S Ct 1396; 2008 AMC 1058 (9<sup>th</sup> Cir, 2008).

<sup>19</sup> The French Cour de Cassation has held the same in relation to arbitration in France under the Code Civil: see *Société Buzichelli v Hennion*, reported in 1995 *Revue d'arbitrage* 263, comment by P Level. In contrast, in *Royal & Sunalliance Insurance PLC v BAE Systems (Operations) Ltd* [2008] 1 Lloyd's Rep 712, it was held that the *Arbitration Act 1996* (UK) does permit the parties to expand the grounds for review.

<sup>20</sup> *Citigroup Global Mkts Inc v Bacon*, 562 F 3d 349 (5<sup>th</sup> Cir, 2009); *Crawford Group Inc v Holekamp*, 543 F 3d 971 (8<sup>th</sup> Cir, 2008); *Sterling Heights LLC v American Multi-Cinema Inc*, 579 F 3d 1268 (11<sup>th</sup> Cir, 2009).

<sup>21</sup> *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico v Union Internacional de Trabajadores de la Industria de Automoviles*, 559 F 3d 44 (1<sup>st</sup> Cir, 2009); *Stolt-Nielsen SA v AnimalFeeds International Corp.*, 548 F 3d 85 (2<sup>nd</sup> Cir, 2008); *Coffee Beanery Ltd v WW LLC*, 300 Fed Appx 415 (6<sup>th</sup> Cir, 2008); *Comedy Club Inc v Improv West Assocs*, 553 F 3d 1277 (9<sup>th</sup> Cir, 2009).

However, the post-*Hall Street* Second Circuit decision that applied the ‘manifest disregard’ standard has been appealed to the Supreme Court of the United States.<sup>22</sup> At the time of writing, the Supreme Court had not decided the case. Some believe that the appeal will give the Supreme Court the opportunity of resolving the circuit split and ruling definitively on whether ‘manifest disregard’ is a ground for vacatur. I doubt that myself, because the questions on which the Supreme Court granted *certiorari* (equivalent to leave to appeal) did not include whether ‘manifest disregard’ is a ground for review.<sup>23</sup> Whether or not the Supreme Court resolves that question on this occasion, it must surely do so soon because the circuit split on that question after *Hall Street* already covers most of the circuits in the country.

Thus, there is a real prospect that ‘manifest disregard’ will soon no longer be a ground for vacatur of maritime arbitration awards in New York. Despite the view taken by the First, Second, Sixth and Ninth Circuits, the straws in the wind in *Hall Street* make the Court’s opinion fairly clear. The majority said:<sup>24</sup>

[T]he text compels a reading of the §§ 10 and 11 categories as exclusive.<sup>25</sup> To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally.

Even if ‘manifest disregard’ has survived *Hall Street*, it is a very narrow ground for review of an arbitral award. Manifest disregard can be found where an arbitrator understood and correctly stated the law but proceeded to ignore it,<sup>26</sup> or where the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.<sup>27</sup> Significantly, manifest disregard requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law.<sup>28</sup> Thus, the ‘manifest disregard’ standard (if it exists at all) produces an oddly inverted basis for judicial intervention. The more difficult the legal question considered by the arbitrators, the less likely it is that there can be judicial review because any mistake that they make would amount to ‘mere error in the law’ not ‘manifest disregard of the law’. Judicial review is only available when the law is clear and well established but has been ignored. Thus, there is no scope at all for the courts to expand and develop the law when considering an application for vacatur of an arbitral award.

The result has been an almost complete atrophy of US maritime law in relation to charterparties because almost all charterparty disputes go to arbitration rather than litigation. For example, there has been a circuit split for nearly 20 years about whether a safe port/safe berth provision in a charterparty imposes an absolute obligation on the charterer to nominate a safe port or berth, or merely an obligation to exercise due diligence. The Second Circuit held the former in 1974,<sup>29</sup> the Fifth Circuit held the latter in 1991.<sup>30</sup> There has been no further development of the law since then, despite the practical importance of the question. Safe port or safe berth cases in the United States generally go to arbitration and stay there.<sup>31</sup> Similarly (and coincidentally), 1991 was also the last time that a federal court reviewed an arbitral award about whether notice of readiness had validly been given under a voyage charter, another question frequently considered by maritime arbitrators and one that has been considered over and over again by English courts. The decision went unreported.<sup>32</sup>

In summary, it can be said that the United States is an example of the stultifying effect feared by Robert Finch in his Cedric Barclay Memorial Lecture. The extreme narrowness of American judicial review for errors of law has meant there has never been a steady flow of cases coming up from arbitration and allowing the courts to hone the principles of charterparty law in the way that their counterparts in the UK have done over the years.

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<sup>22</sup> *Stolt-Nielsen SA v AnimalFeeds International Corp*, 129 S Ct 2793 (2009), 2009 AMC 2999 (2009), granting *certiorari* – ie, leave to appeal.

<sup>23</sup> The petition for *certiorari* can be read on Westlaw at 2009 WL 797583

<sup>24</sup> 552 US 576, 586 (2008).

<sup>25</sup> 9 USC § 11 deals with modification of the award for such reasons as miscalculation of figures or imperfections of form.

<sup>26</sup> *Siegel v Titan Industrial Corp*, 779 F 2d 891, 893 (2<sup>nd</sup> Cir, 1985).

<sup>27</sup> *Merrill Lynch, Pierce, Fenner & Smith Inc v Bobker*, 808 F 2d 930, 933-4 (2<sup>nd</sup> Cir, 1986).

<sup>28</sup> *Collins v D R Horton Inc*, 505 F 3d 874, 879 (9<sup>th</sup> Cir, 2007); *Bosack v Soward*, 586 F 3d 1096, 1104 (9<sup>th</sup> Cir, 2009).

<sup>29</sup> *Venore Transportation Co v Oswego Shipping Corp*, 498 F 2d 469 (2<sup>nd</sup> Cir, 1974); 1974 AMC 827 (2<sup>nd</sup> Cir, 1974).

<sup>30</sup> *Orduna v Zen-Noh Grain Corp*, 913 F 2d 1149, (5<sup>th</sup> Cir, 1991); AMC 346 (5<sup>th</sup> Cir, 1991).

<sup>31</sup> Not surprisingly, New York arbitrators generally follow the Second Circuit position. See, eg, *In the Matter of the Arbitration between T Klaveness Shipping A/S and Dufenco International Steel Trading*, SMA Award No 3686, April 18, 2001. SMA decisions are available on the Lexis database.

<sup>32</sup> *Jamaica Commodity Trading Co Ltd v Connell Rice & Sugar Co Inc*, 1991 WL 123962 (SDNY, 1991).

### 3.3 Australia

Australia has adopted the *UNCITRAL Model Law on International Commercial Arbitration*.<sup>33</sup> Article 34(1) of the Model Law states that recourse to a court against an arbitral award may be made only by an application for setting aside. The grounds for setting aside are listed in Article 34(2). They are very similar to the grounds upon which recognition and enforcement of foreign arbitral awards may be refused under Article V of the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*, to which Australia is also party.<sup>34</sup> The grounds for setting aside are concerned mostly with procedural irregularities, such as one of the parties being under an incapacity, or a lack of notice of appointment of an arbitrator, etc. With one possible exception that will be considered shortly, there is no mention of error of law as a ground for setting aside.

Before we go on to consider whether an arbitral award can be set aside under the UNCITRAL Model Law for error of law, we must first make a detour to consider the decision of Giles CJ Comm D in *American Diagnostica Ltd v Gradipore Ltd*.<sup>35</sup> In that case, Giles CJ held that the *Commercial Arbitration Act 1984* (NSW) applies to international commercial arbitrations, notwithstanding the fact that the *International Arbitration Act 1974* (Cth) specifically deals with international arbitrations. Section 21 of the *International Arbitration Act 1974* (Cth) provides that the UNCITRAL Model Law does not apply if the parties to an arbitration agreement have agreed that the dispute between them should be settled otherwise than in accordance with the Model Law. Giles CJ held that the parties' agreement that their arbitration should be governed by the UNCITRAL Arbitration Rules was sufficient to exclude the UNCITRAL Model Law by operation of s 21.<sup>36</sup>

If *American Diagnostica* is right on this point, then the UNCITRAL Model Law will almost never apply to international commercial arbitrations in Australia. Any time the parties agree to use a set of arbitration rules, they would thereby exclude the whole of the Model Law, including the provisions about setting aside awards. With respect, that cannot be correct. It seems unlikely that that was what the Commonwealth Parliament intended when it enacted s 21. The Model Law would apply only when the parties chose to apply it or when they failed to choose any arbitral rules at all.

Furthermore, as a purely textual matter, Giles CJ's interpretation of the effect of s 21 cannot be supported. Section 21 provides:

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

If the parties agree to use a particular set of arbitration rules, then they have undoubtedly agreed that the dispute between them should be settled in accordance with those rules rather than by the procedures set out in the UNCITRAL Model Law. What should be excluded as a result are those parts of the Model Law that deal with the conduct of the arbitration, namely Chapters IV, V and VI. Chapter VII, which deals with recourse against the award, is not concerned with 'the settlement of [the] dispute' between the parties, so it is not excluded by s 21. The UNCITRAL Arbitration Rules, which the parties in *American Diagnostica* had agreed to use, say nothing about grounds for setting aside the award. No arbitration rules do, because by definition setting aside is something that must be done by a judicial authority exercising jurisdiction conferred upon it by the law of the country in which it sits.<sup>37</sup> When an award is made by the arbitral tribunal, the dispute between the parties has been settled in the manner that the parties agreed on. If one of the parties goes to court seeking to have that award set aside, there is a new dispute about a different question, namely whether the award should be vacated. The parties made no agreement that *that* dispute should not be settled in accordance with the Model Law, so the Model Law should be applied because it has not been excluded for the purposes of s 21.

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<sup>33</sup> *International Arbitration Act 1974* (Cth), s 16, sch 2.

<sup>34</sup> *International Arbitration Act 1974* (Cth), s 8, sch 1.

<sup>35</sup> (1998) 44 NSWLR 312.

<sup>36</sup> *Ibid*, 323.

<sup>37</sup> Some institutional arbitration rules provide for review of the award by an entity that is part of the arbitration institution, such as the ICC's International Court of Arbitration, or the London Court of International Arbitration. This is not the kind of 'court' review to which I refer. That process of internal review is agreed upon by the parties. External review by a judicial authority in a setting aside application is not.

If Article 34 of the Model Law is not excluded by operation of s 21 simply by reason of the parties' agreement to use arbitration rules, then it clearly states an exclusive list of grounds for setting aside. Article 34(2) provides that 'An arbitral award may be set aside...only if...' one of the listed grounds is present. The UNCITRAL Secretariat itself wrote of Article 34 that it creates 'an exclusive list of limited grounds'.<sup>38</sup> That is significant in this context because the International Arbitration Act 1974 (Cth), s 17(1)(a) permits recourse to UNCITRAL documents when interpreting the UNCITRAL Model Law. Thus, notwithstanding *American Diagnostica*, there seems to be no room for concurrent operation of the state Commercial Arbitration Acts.

The only one of the Article 34 grounds for setting aside that might apply to an error of law by the arbitral tribunal is that in Article 34(2)(b)(ii), namely that 'the award is in conflict with the public policy of this State'. ('State' is here used in the international law sense, meaning country.) Courts in several countries have held that Article 34(2)(b)(ii) does *not* authorise setting aside for error of law. Speaking of the equivalent provision in the *New York Convention*, Article V(2)(b),<sup>39</sup> the US Court of Appeals for the Second Circuit said in *Parsons & Whittemore Overseas Co Inc v Société Generale de L'Industrie du Papier ('RAKTA')*,<sup>40</sup> that an award offends against US public policy only if it 'would violate [our] most basic notions of morality and justice'. Referring to that test in the context of Article 34 of the UNCITRAL Model Law, the Ontario Court of Appeal said in *Corporacion Transnacional de Inversiones SA v STET International SpA*.<sup>41</sup>

Accordingly, to succeed on this ground the Awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the Awards are contrary to the essential morality of Ontario.

Similarly, Chan Sek Keong CJ of the Singapore Court of Appeal said in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*:<sup>42</sup>

'[W]e are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.'

Similarly, in *Downer-Hill Joint Venture v Government of Fiji*,<sup>43</sup> Wild and Durie JJ of the New Zealand Court of Appeal said:

I would not have regarded any failure by the arbitrator to apply clause 2.2 of the head contract in the present case as even approaching the level required to establish a conflict with the public policy of New Zealand as that phrase is used in Article 34(2)(b)(ii). The enforcement of an award containing an error of that nature would certainly not shock the conscience.

On the other hand, in *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd*,<sup>44</sup> the Supreme Court of India held that an error of law by an arbitral panel amounting to 'patent illegality' was contrary to public policy of India for the purposes of UNCITRAL Model Law Art 34. This is definitely the minority view, though.

In summary, it can be said that if Article 34 of the UNCITRAL Model Law provides the exclusive grounds for setting aside an international commercial arbitral award, which I believe to be the case, then there cannot be review for error of law unless Australian courts side with the Supreme Court of India against the US Court of Appeals for the Second Circuit, the Ontario Court of Appeal, the Singapore Court of Appeal and the New Zealand Court of Appeal. If *American Diagnostica* is right about the concurrent operation of the state Commercial Arbitration Acts, then parties to an international commercial arbitration in Australia may appeal a question of law to the relevant state Supreme Court, with leave of the court, if there is a 'manifest error of law on the face of the award' or 'strong

<sup>38</sup> UNCITRAL Secretariat Note (A/CN.9/309), found at (1988) 19 *UNCITRAL Yearbook* 117, 122 para [42].

<sup>39</sup> This provision authorises a court to refuse to recognise or enforce a foreign arbitral award. Article 34 of the UNCITRAL Model Law authorises a court to set aside an award made in Australia on identical grounds.

<sup>40</sup> 508 F 2d 969, 974 (2<sup>nd</sup> Cir, 1974).

<sup>41</sup> (1999) 45 OR (3d) 183 (Lax J); affirmed (2000) 49 OR (3d) 414 (Ontario Court of Appeal).

<sup>42</sup> [2007] 1 SLR 597, 621.

<sup>43</sup> [2005] 1 NZLR 554, [80], quoting Randerson J in *Downer Connect Ltd v Pot Hole People Ltd* [2004] (Unreported, Randerson J, 19 May 2004).

<sup>44</sup> (2003) 5 SCC 705.

evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law'.<sup>45</sup> That would leave the door open for at least some development of commercial law, including maritime law, but it is questionable whether the court's decision was correct about the operation of the *International Arbitration Act 1974* (Cth), s 21.

#### 4 Conclusion

The autonomy of arbitral proceedings is an important feature, one that is emphasised by the UNCITRAL Model Law. If the parties have chosen arbitration, then in the ordinary course of things their dispute should be settled only by the arbitral tribunal without review by a court. Having made their bed with arbitration, the parties must lie in it. Of course, the more complete the autonomy of the arbitral process and the more difficult it is to get judicial review by a court, the more important it is to have well qualified arbitrators. From a lawyer's perspective, the trend towards having more lawyers involved in maritime arbitrations would seem therefore to be a good thing, because all those lawyers should be more likely to produce a legally sound or defensible result. They must have some law to apply, though. Restricting judicial review can stultify the development of the law in areas where disputes are typically arbitrated, as the experience in the United States shows. Arbitral autonomy can come at a price that may be too high, as some in London are now worriedly thinking about maritime arbitration. Finding the right balance between arbitral autonomy and judicial review is a delicate task, particularly for any country that does not already have a developed body of maritime jurisprudence. No such body of jurisprudence will develop in a country that keeps some kinds of maritime dispute locked in arbitral proceedings, as the United States does with charterparty disputes. As my title suggests, the trend in the early part of the 21<sup>st</sup> Century has been towards more lawyers, but less law. Let us hope that we do not reach the position where there are too many lawyers and not enough law.<sup>46</sup>

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<sup>45</sup> *Commercial Arbitration Act 1984* (all states) s 38(5)(b).

<sup>46</sup> **Post script:** This paper was written before the Supreme Court had decided the appeal of *Stolt-Nielsen SA v AnimalFeeds International Corp.* The Supreme Court recently confirmed the author's prediction that the Court would say nothing about 'manifest disregard'.