ARBITRATORS AND THE COURTS

by The Hon. Mr. Justice Ormiston, a Judge of the Supreme Court of Victoria

Text of a paper delivered at the Institute's National Conference in Hong Kong, September, 1986.

The paper I was originally asked to present was intended to be a survey of the laws relating to uniform arbitration in Australia. Aside from being chary of describing the law in any other jurisdiction than that with which I am familiar, I felt there has been too much legislative change for me to speak usefully about other jurisdictions which may have introduced or may be contemplating new arbitration laws. So I have restricted the scope of the present paper to "Arbitrators and the Courts", in an attempt to cover some of the major changes effected by the Commercial Arbitration Acts of Victoria, New South Wales, and, I believe, Western Australia and the Northern Territory which have altered the Courts' powers to deal with arbitrations and arbitrators (other than the matters which are to be dealt with by other speakers), and then to deal with some other changes effected which are designed to enable arbitrators to be used more frequently as referees in court actions in Victoria.

My hope is that I can emphasise the desire of the Courts (at least in my state, but I believe elsewhere also) to co-operate with arbitrators, so that our roles can be seen as complementary: in the first case, where the parties wish to employ arbitrators, the Courts may provide advisory services as to the law and a means of enforcement of awards; in the second, where parties choose to use the Courts, arbitrators may be employed as referees to resolve factual issues to which their expertise is especially suited. So I shall concentrate on five topics:

(1) Determination of questions of law arising in the course of an arbitration;
(2) Payment-In procedures;
(3) Applications to dismiss for want of prosecution;
(4) Court enforcement of arbitral awards;
(5) Appointment by courts of special referees.

There are several other provisions which give the Court specific powers, which I cannot analyse today. They include the specific powers relating to misconduct to be discussed later today by Mr. O'Keefe, Q.C., the power to make interlocutory orders to make effective directions given by the arbitrator during the course of an arbitration (under s.47), to extend times fixed by or under the Act or by the arbitration agreement (under s.48), and to stay certain court proceedings when the matter is the subject of an arbitration agreement: see s.53. It should be noted, however, that clauses commonly called *Scott v. Avery* clauses, with certain exceptions, have been rendered largely ineffective by s.55.

(1) Questions of Law

I shall take first the Courts' power

to determine a question of law arising in the course of the arbitration. Section 39 of the Commercial Arbitration Act 1984, substantially the same in effect in both Victoria and New South Wales, has replaced the special case procedure which had applied for many years in both jurisdictions. It is almost an exact reproduction of s.2 of the Arbitration Act 1979 (U.K.), which was passed because the special case had been seen as productive of inordinate delays and interference in arbitrations in England. Not all agreed with that view, as Sir Michael Mustill and Stewart Boyd asserted in their work "The Law and Practice of Commercial Arbitration in England" (1982) that the number of disputes which reached the High Court in England was only about 20 to 30 a year (p.406n.). Certainly they were rare enough in Victoria, but there were comparatively few true commercial arbitrations in that state. However, special case proceedings in all jurisdictions had been overwhelmed by technicalities and so a new procedure ought to be welcomed.

However, what has been substituted, designed originally in England to discourage the taking of points of law to the Courts, has a number of complexities of its own. In the first place, the court's jurisdiction is, not surprisingly, confined to questions of law "arising in the course of the arbitration". What is a question of law is not always easy to determine, especially for non-lawyers, although it is obvious enough that the court's discretion to hear these questions would not be exercised in cases of doubt. I cannot spend time defining what are and are not questions of law, but a useful comparative catalogue of "findings of fact", "mixed conclusions of fact and law" and "conclusions of law" appears at pp. 707-709 of Mustill and Boyd's recent work.

The real difficulty facing an arbitrator or party wishing to ask the Court to resolve a question of law is the need to obtain agreement from all parties or to satisfy certain difficult criteria set by s.39.

Two situations should be distinguished. The first is relatively simple. Where an artibrator has persuaded all parties that a particular question of law has arisin in the course of the arbitration, or where all the parties themselves agree without the concurrence of the arbitrator, that a question of law has arisen, then one of the parties may apply to the Court to have the question determined. It is unlikely problems will arise here, except that all should have agreed to a question formally and carefully worked out in a form which can be presented to the Court.

The second situation arises when an arbitrator has persuaded one of the parties that such a question has arisen, or one of the parties has satisifed the arbitrator who has formally consented to putting the question to the Court, then a party may apply to the Court, but he must also satisfy certain further criteria before it can be heard. In this case it must also be demonstrated:

(i) That the determination of the question "might produce substantial savings in costs". By reason of the use of the word "might", it would appear that these savings need only be shown as a reasonable possibility.

(ii) In addition, it must be shown that the question of law is one in respect of which leave to appeal "would be likely to be granted" under s.38(4)(b). Now the relevant criteria for appeals will be analysed by Mr Justice Smart. However, although it is clear that

one of the tests, being that posed by s.38(5)(a), is relevant to this section, namely, whether the determination of the question could substantially affect the rights of one or more of the parties, it is not the sole criterion. One of the other criteria for appeals adopted in England for reasons, is clearly not applicable, namely whether a prima facie case of error has been made out: cf. Lord Diplocks' speech in The Nema [1982] A.C. 724, which has recently been criticised in the N.S.W. Court of Appeal: *Qantas Airways Ltd. v. Joseland* (unreported 7th May 1986 at pp. 7-8). Some criticism has been made of this convoluted reference to the appeal test by Mustill and Boyd in their work at pp. 579-581 and a specific example was given by Lloyd, J. in *The Vasso* [1983] 1 W.L.R. 838. There the questions were directed to the arbitrator's power to give leave to inspect the subject property, which he said was highly unlikely to be raised or allowed to be raised on appeal (at p. 843). The test Lloyd, J. employed was whether the questions raised matters of interest and importance. However, in an earlier decision, *Babanaft International Co. S.A. v. Avant Petroleum Inc.* [1982] 1 W.L.R. 871 at p. 882, Donaldson, L.J. for the Court of Appeal saw that the power ought not to be used where it would create an unacceptable delay in an arbitration, though he was primarily concerned with appeals from court decisions on questions of law.

Although I see the difficulty in the language of s.39(2)(b), as to when "leave to appeal would be likely to be granted", I am not convinced that it should be given anything other than a common-sense interpretation. Factors relevant to appeals alone, such as a need to show a "prima facie case of error", are simply not relevant here. The Court should be primarily concerned that what is raised is a true question of law, and that, either

(1) it raises an issue which is not a "one-off" issue, e.g. where the contractual clause in question is not uncommon or the issue is likely to arise again in similar disputes; or
(2) the answer to the question will bring to an end, or substantially reduce, the arbitration, at least if answered in one particular way.

(iii) Thirdly, it must appear that there is *no* operative exclusion agreement between the parties. It is not appropriate here to examine all the complexities of section 40 and 41 of the Commercial Arbitration Act, but I note that these exclusion agreements are ineffective in relation to what are called "domestic arbitration agreements", certainly the most common in Victoria, unless the exclusion agreement has been reached by the parties *after* the commencement of the arbitration.

So you can see that the agreement of an arbitrator to a question of law being referred to the Court does not have the automatic result that the question will be decided by the Court, as it did with the former special case. Some care will need to be exercised by arbitrators to avoid the possibility that one party will dress up a question of fact as a question of law and so delay the arbitration for no good purpose. It would be desirable for arbitrators to

insist that the question of law be formally prepared by the party or parties who wish it to be referred. Although the marginal note to s.39, describing the questions as "preliminary" points of law, is misleading, frequently they will arise before the arbitration has proceeded very far and often before any evidence has been heard. So it will be necessary that the document states not only the question of law with precision, but also any necessary facts, whether found by the arbitrator or admitted by the parties. Mustill and Boyd suggest (at p. 578) that the document (which they call "Request for determination of the Court of a question of law") should also include any assumed facts and a summary of the opposing contentions. I am not sure about either of these. In particular, I am not sure that "assumed facts" can ever found a question of law, unless they be confined to allegations in the Points of Claim or Points of Defence. Then, it may be possible to raise a question before the facts have finally been established, as upon a pleading summons, if proof would be time-consuming or expensive before the question is answered. The matter will have to be resolved in due course, for courts have habitually discouraged hypothetical disputes.

Now I come to some practical matters which will vary from jurisdiction to jurisdiction. Donaldson, L.J. referred to the purpose of the procedure in *Babanaft International Co. v. Avant Petroluem Inc.* (at p. 882) as enabling "colloquially, the arbitrator or the parties (to) nip down the road to pick the brains of one of Her Majesty's judges, and, thus enlightened, resume the arbitration". I hope that that kind of service may be provided, but it is necessary to remember that every jurisdiction has its own rules and listing procedures. The procedure in Victoria is by short form Originating Summons under Chapter II O. 24 of the Rules and next year I expect it will be by Originating Motion. At present there is a significant difference between what can be achieved with a question arising in a true "commercial" arbitration than with one arising in a building or engineering arbitration. The Building List is not yet designed to deal with urgent applications and has a judge sitting on a monthly basis to hear directions applications, but not on a regular basis to hear substantive disputes. The Commercial List, on the other hand, now (1986) has three judges sitting throughout the year, with minor exceptions, and conducts directions hearings regularly every Friday and, in emergencies, on other occasions. (I believe the New South Wales Commercial List has worked for some time on a similar basis). In Victoria no application under section 39 has to my knowledge (and that of the Judge in charge of the List) yet been made in the Commercial List, but there is no reason to believe, if the point is short and truly urgent, that it would not be heard very quickly, even though the application itself is technically separate from the ultimate hearing: cf. *Babanaft International Co. v. Avant Petroleum Inc.* (at p. 882). In other cases, the application will have to be brought in the Practice Court, and although two judges sit there regularly, I cannot speak for my colleagues by saying what they will necessarily do to expedite the hearing. Nor can I speak of the practice in other states, except that I have no doubt that in New South Wales the Commercial List would deal expeditiously with questions of law properly brought within its jurisdiction.

Finally I mention, but do not

explore, the limited right of appeal given from a court decision on a question of law. The provisions in Victoria under subsections (3) and (4) of s.39 are very restrictive, but in New South Wales are dealt with in a much more general way by amendment to the Supreme Court Act. In England, relying on provisions almost identical to those operating in Victoria, Donaldson, L.J. said in *Babanaft International Co. v. Avant Petroleum Inc.* (p. 882) that the power was exceptional and would not be exercised where it caused an unacceptable interruption to an arbitration.

(2) **Payment in Procedures**

One of the perennial problems in arbitrations has been the difficulty of making an effective offer of compromise. In court proceedings, the penalty of costs is often a practical deterrent to dubious or inflated claims. A well judged payment into court frequently brings to an end an exaggerated claim. There has never been anything to prevent offers being made in arbitrations, but the problems of open offers and the implicit admission of liability contained therein have frequently discouraged people from taking that course. The effect of sealed offers has been uncertain.

The new Act addresses these problems and by sub-s.(5) of s.34, it is provided that, where a sum of money has been paid into court in accordance with Rules of Court in satisfaction of a claim to which an arbitration agreement applies, the arbitrator shall take into account both the fact that the money was paid into court and the amount of the payment in exercising this discretion as to costs. Pursuant to that section and s.61(b) of the Victorian Act and s.62(b) of the New South Wales Act, Rules of Court have been made which appear in Order 24 of Chapter II of the Victorian Supreme Court Rules and in Division 2 Part 72A of the New South Wales Supreme Court Rules. Some criticism has been made of the scope of the new provisions in the Act in Sharkey and Dorter on Commercial Arbitration at pp. 261-263 and, although in Victoria a radically new procedure for the making of offers of compromise by any party to ordinary court actions will come into operation on the 1st January 1987 as Order 26 of the new General Rules of Procedure, those provisions are not capable of adaptation to arbitrations because of the language of the relevant sections of the Commercial Arbitration Act.

I shall, however, briefly mention the procedure which is presently to be found in Rules 9 to 13 of Order 24 of Chapter II of the Victorian Rules, as the method of making, and the effect of, payments into court which may not be entirely familiar to many arbitrators. I mention first that the Rules and s.34(5) of the Act only apply where the claim is one pursuant to an arbitration agreement as defined in the Act, which is confined to written agreements to refer disputes to arbitration. Secondly, I shall confine what I say to the Victorian procedure since I am not familiar with the New South Wales Rules, which appears in Pt. 72A rules 11 to 20 thereof.

A party to an arbitration agreement may pay into court of sum of money in satisfaction of a claim the subject of that agreement. One further payment may be made without leave increasing the sum paid in. More importantly, the person paying the sum into court must give notice in Form 3 of the schedule to order 24 and is required to state in the notice not only what sum is paid in, but whether liability is admitted or

denied. Notice must be served on the other parties to the arbitration and each recipient is obliged within three days to give written acknowledgment of its receipt. In certain cases, the payment in need not be in money, but may be effected by the lodging of a bond from certain insurers or from a corporation approved by the Supreme Court Prothonotary.

Where money is paid into court the claimant may accept the sum in satisfaction of his claim within fourteen days after receipt of the notice, and, when there has been a second payment, he may accept it within fourteen days after receipt of notice of the second payment. The Prothonotary will pay out the moneys in court only where the parties consent or where he is satisfied by affidavit that the money has been accepted. If the whole of the money in court is not taken out pursuant to Rule, being the Rule relating to acceptance of moneys paid in, the money in court shall not be paid out except in satisfaction of the claim and pursuant to a certificate of the arbitrator. In my opinion, it is the duty of an arbitrator to give such a certificate in appropriate circumstances when it is asked for. However, unless the matter is drawn to the arbitrator's attention, he will ordinarily under these Rules have no knowledge of the payment in, because by Rule 12 of Order 24 no statement of the fact that money has been paid into court shall be inserted in any pleadings in the arbitration, and no communication of the fact shall be made to the arbitrator until all questions of liability and quantum have been decided. This is analogous to the procedure in trials at court where neither the judge nor a jury is informed of a payment in before or during the trial.

I come then to the consequences so far as costs are concerned. If a claimant accepts a payment into court, he is entitled, after four days from the payment out and unless the arbitrator directs otherwise, to have the court tax his costs incurred up to the time of payment into court and in due course sign judgment for those taxed costs. This does not prevent the arbitrator taking over the question of costs if he thinks it appropriate, but it is convenient for those cases where the arbitration has not really got under way, for the Taxing Master is very experienced in taxing all kinds of legal costs, litigious and otherwise. If the sum paid in is not taken out at the appropriate time, then there are no express rules of Court but some fairly elaborate rules of practice as to the consequences. The most obvious case is where the respondent to the claim has admitted liability and pays into court a sum more than sufficient to pay the claimant's claim. In that case, the ordinary rule of practice, which I believe arbitrators should adopt, is to award the successful claimant only those costs referable to the time when the sum was paid into court. If the payment in is insufficient, then ordinarily it will be entirely irrelevant to the question of costs of the arbitration. I am afraid I do not have time to deal with those questions which arise when there is a denial of liability but a payment in of a sufficient sum.

If there has been no acceptance, then it is the arbitrator's duty to resolve the incidence of costs as between the parties. However, he is no longer required in every case to fix the quantum of those costs, as he is entitled under sub-s.(2) of s.34 to require the parties to have the costs taxed in the Court. Indeed, unless he taxes or settles those costs, all costs of arbitrations are to be taxed in the Court and under Rule 13 of Order 24 the general provisions of the

Supreme Court Rules as to costs with appropriate modifications apply to the costs of an arbitration, including the fees and expenses of the arbitrator. I would add that in those rare cases where the parties refuse to pay the fees and expenses of an arbitrator, the court is now under s.35 entitled to make orders which will enable the arbitrator's fees to be taxed in the court and to impose appropriate conditions as to the payment of those fees as a condition to the delivery of the award.

(3) Dismissal for Want of Prosecution

Next I come to a problem which has only become of significance in recent years, that is, of undue delay by claimants in the prosecution of their claims before arbitrators. Under the general law, it was a question which had to be resolved according to the ordinary rules of contract, dependent as they were on the application of rules relating to implied terms and to the technical rules relating to frustration. Arbitrators will no doubt be familiar with the complicated litigation which led to the two House of Lords cases known as *The Bremer Vulkan* (1981) A.C. 909 and *Paal Wilson & Co. a/s v. Blumenthal* (1983) 1 A.C. 854. Fortunately the new Commercial Arbitration Act, by s.46, implies a term in every arbitration agreement that it shall be the duty of the claimant to exercise due diligence in the prosecution of his claim. It will not, however, be for the arbitrator to resolve questions of excessive delay, commonly called want of prosecution in court proceedings, for if there is undue delay either a party to the dispute or the arbitrator himself may apply to the court for an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings. As the arbitrator himself may apply to the Court, it is important for arbitrators to realise that the Court will not act unless the conditions of sub-s.(3) are made out, namely, unless the court is satisfied that the delay has been intentional and contumelious *or*, alternatively, that there has been inordinate and inexcusable delay by the claimants, and that that delay will give rise to a substantial risk that there will not be a fair trial of the issues in the arbitration, or will otherwise cause serious prejudice to the other parties to the arbitration.

(4) Enforcement of Award

It is when one comes to enforcement that a critical difference between the powers of courts and arbitrators can be most clearly discerned. A voluntary arbitration between solvent commercial organizations will rarely lead to difficulties, but there are a number of awards where the unsuccessful party is unwilling or unable to comply with the award.

The procedures to enforce an award in the courts, and so to use the benefits of the various writs of execution, are in general terms the same as before the passing of the Commercial Arbitration Act, but there have been some subtle changes. I shall not examine the procedure of bringing an action upon an award, which is fundamentally contractual in nature and has been unchanged by the recent legislation. It remains a backstop in cases where the summary procedure is an uncertain remedy. Nor shall I deal with the specific rules applicable to international arbitral awards.

The summary application for leave to enforce an award pursuant to section 33 remains substantially the same as before, but it has the added consequence, taken from legislation passed in England long ago (1934)

that, where leave is given, an actual judgment may be entered in terms of the award. It was thought previously that all ordinary methods of execution were available upon leave being granted to enforce an award, but the right to obtain judgment enables that judgment to be enforced as a foreign judgment and to be used as proof of a money judgment in bankruptcy proceedings. Since I am addressing a gathering of arbitrators I shall not describe the form and method of entry of judgment, but in Victoria it may be made ex parte application supported by affidavit, unless the Court directs that a Summons be issued: see r.8 of O.24 of Chapter II of the Rules of the Supreme Court. What is important, still, so far as the arbitrator is concerned, is that this award should be drawn in a form which enables enforcement as a judgment. No doubt it is often convenient to make conditional awards or awards which answer specific questions. Of course, it is for the party to formulate the award he seeks, in a form which will enable easy enforcement if it is not complied with. Nevertheless, arbitrators should be wary of drawing awards in elaborate form which do not directly require a party to do some specified act or pay a stated sum. If, for practical reasons, an arbitrator wishes to do that, and there might be a need to enforce some part of the award, it would be better to make an interim award and later make a final award in specific terms. You must remember that an award in declaratory form will not be enforced under section 33: cf. *Margulies Bros Ltd. v. Dafnis Thomaidis & Co.* [1958] 1 W.L.R. 398; *Albeck v. A.B.Y. Cecil Co. Pty. Ltd.* [1965] V.R. 342 at pp. 357-359.

(5) **Arbitrators as Referees**

I now move to a matter not dealt with in the Commercial Arbitration Act, but which for many years appeared in the Arbitration Acts of Victoria and New South Wales, namely, the power of the Court to appoint a person as special referee to determine any question arising in the course of an action, or to try the whole action. The history of such powers is complicated, but there is little doubt that the role played by a special referee is, and has always been, different from that of an arbitrator, although persons accustomed to act as arbitrators are almost invariably appointed special referees in Australia. With greater scientific specialisation, the need to appoint special referees is likely to increase and their use may well contribute to the more efficient resolution of complex litigation brought in the Courts.

I can make only a few points about the role of special referees in this paper. The first is that their powers are far more circumscribed than those of arbitrators, especially when one compares the provisions in the new Commercial Arbitration Acts. There has been a tendency in the past, perhaps caused by the infrequency of such appointments, for special referees to assume wider powers than have been delegated. A person accepting appointment as referee should request the parties to have their powers worked out with care, although ordinarily there is very little difficulty in having the powers varied as and when necessary.

Secondly, it is rare for the whole dispute in a court case to be referred to a special referee, and it is much more common for particular issues or questions to be referred for inquiry and answer. After all, if the parties wished the whole matter to be decided by arbitration they could have agreed on an arbitrator in the first place. The enthusiasm to

appoint special referees has varied from time to time and from jurisdiction to jurisdiction. In Victoria, the last reported case, *Taylor & Sons Pty. Ltd. v. Brival Pty. Ltd.* [1982] V.R. 762, a directions hearing in the Building Cases List, exhibits less enthusiasm for the appointment of referees than presently exists, particularly in the Commercial List in my State.

Thirdly, in Victoria the power of review of the referee's findings has recently has extended, by the incidental repeal of the former sections 14, 15 and 16 of the Arbitration Act 1958 and by an amendment to the Supreme Court Act allowing the matter of appointment of referees to be controlled by Rules of Court. (cf. Pt. 72 of New South Wales Supreme Court Rules). In particular Order 36 rules 36-44 of the Rules of the Supreme Court (and Order 50 of the revised General Rules of Procedure to operate from 1st January 1987), permits the Court to adopt or decline to adopt the referee's report as it sees fit. In this sense the special referee is more accurately to be described as a delegate of the Court, although he is no longer described for this purpose as "an officer of the Court." The difficulties examined in great detail by Brooking, J. in *Nichols v. Stamer* [1980] V.R. 479, no longer will occur. Much of the detailed law relating to these references appeared in the 11th edition (1923) of Russell on Arbitration, an invaluable discussion which covered pp. 514 to 605 of that work. Not all of that learning is useless, but there has been time to refer to only some of the more important changes.

Fourthly, the power to "raise" a question is now explicitly given by the Victorian Rules to the Court, as well as to parties and persons having an interest. Rule 37 of O.36 also gives the Court power to refer any question of fact to a referee for him either to decide that question or to give his opinion in relation to it. Wide powers may be given to a referee but the order shall state the question, shall direct the referee to make a written report with reasons to the Court, and *may* direct that the referee give such further information in his report as the Court requires. This power may be used to direct a formal trial of the question or to direct a less formal inquiry. In turn, the referee is given a power to submit any question, including a question of law, which arises on the reference.

Finally, it is clear that the curious provision (s.15(2) of the Arbitration Act 1958 (Vic)) that certain reports and awards of referees be treated as equivalent to the award of a jury has been abandoned. No report of a referee will be final and it will be capable of review and variation by the Court. That will make it essential that referees give their reasons and confine what they say in their reports to the questions referred to them. Where technical questions of fact are resolved, it is unlikely that reports will be reviewed, but if a referee embarks on any legal issue then the new procedure allows any error to be cured.

I trust that the new procedure will enable the Court to take advantage of the expertise of the growing list of qualified arbitrators graded by this Institute to an extent which the complexities of the old procedure discouraged. ■