Commercial Arbitration Act, 1984

New South Wales and Victoria divide. Has the Court inherent power?

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THE *Commercial Arbitration Act*, 1984 commenced on 1 April, 1985 in Victoria and on 1 May, 1985 in New South Wales. Since then a considerable number of judgments have been handed down. Unfortunately these States have divided on the question of the degree of court interference permissible in the conduct of arbitrations.

The present position in Victoria in this regard is spelt out in *Karenlee Nominees Pty. Ltd. and Sheralex Nominees Pty. Ltd. V Robert Salzer Constructions Pty. Ltd.*, a judgment handed down by Mr Justice Crockett on 19 May, 1987. Refer Recent Case note at page . After reviewing the position in England, New South Wales and Victoria in regard to the criteria to be employed to govern the exercise of the discretion in judicial review of awards, His Honour stated:

> 'I am of opinion that '*The Nema*' principles should be applied in this State unless it can affirmatively be said that the case is not fit for their application. I would respectfully adopt what Bingham, J. said in '*The T.L.F. Prosperity*' [1982] 1 Lloyd's Rep. 617 at 625, namely—
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> > "The philosophy of the new Act clearly is that the election of parties to have their disputes resolved by arbitration should be respected in the sense that awards should not be scrutinised with an over-critical eye and that the Courts should exercise restraint . . . in seising themselves of legal questions."'

His Honour referred to two cases determined by Nathan, J. Namely *Papaefstathiou V Zafir* (10 November, 1986) and *Muirfield Properties P/L V Hansen & Yucken P/L* (7 November, 1986) where His Honour adopted without reservation '*The Nema*' principles as being applicable to the interpretation of the Victoria legislation. He so concluded because he considered the obvious purpose of s. 38 was to bring finality to arbitral awards by not only limiting appeals to questions of law but even then, permitting them to go forward only in circumscribed circumstances. Mr Justice Crockett thought that conclusion was in substance correct.

The present position in New South Wales is different. There the Court of Appeal in *Qantas Airways Ltd. V Joseland & Gilling & Anor* (7 May, 1986) 1986 6 N.S.W. L.R. 327 at 333 said in a joint judgment, after quoting the relevant passages from the speech of Lord Diplock in '*The Nema*';

> 'We are not convinced that the statements of Lord Diplock, based as they are on a different background, are appliable to s. 38 of our Act. The matters to which Lord Diplock refers are important factors in determining whether leave should be given. But the exercise of the discretion

> conferred by s. 38 does not depend on whether the claimant has made out a strong prima facie case or fulfilled the other requirements to which his Lordship refers. It is a discretion to be exercised after considering all the circumstances of the case.'

Hopefully the divergence which has developed between the two States will be closed by the High Court in the not too distant future.

There is another development which has arisen in New South Wales. In *The Commissioner for Main Roads V Leighton Contractors Pty. Ltd. & Ors* (4 July, 1986), the Court held that it could make a declaration under s. 75 of the *Supreme Court Act* (which section relates to declaratory relief) and order the arbitrators to consider the matter in question according to law. Sub-s. 22(1) provides that unless otherwise agreed in writing by the parties, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

The matter in question was whether the arbitrators had properly exercised their discretion under s. 20 when refusing to grant the Commissioner leave to be represented by a duly qualified legal practitioner. It was submitted that in the absence of cause shown under s. 44, it was not open to the Court to review the arbitrators' decision under s. 20. The Court agreed that there was no general right of appeal. Yet the Court declared that the purported decision of the arbitrators was of no effect. Presumably the Court considered it has inherent power to make such a declaration as it gave no authority for having such jurisdiction.

The same Court took the same approach in *Triden Contractors Pty. Ltd. V Belvistar Pty. Ltd.* (30 September, 1986) in respect to s. 65 of the *Supreme Court Act* (which section relates to order to fulfil duty) as it did to s. 75 of the Act. The Court said (obiter) that 'provided the applicant is personally interested in the fulfilment of the duty, the Court is empowered to make the order. . . . It is a wide power limited only by the Court's discretion'.

But has the Court an inherent power to supervise private arbitrations?

The old Acts provided that 'A submission . . . shall have the same effect in all respects as if it had been made an order of Court'. This meant that the submission was to have effect as if it had been made an order of the Court under previous law (*In re Smith & Service and Nelson & Sons* (1890)).

As pointed out in L.R.C.27:

> 'The scheme of the provision that a submission have effect as if made a rule of court is defective in that it required reference to repealed Acts and to a mass of inaccessible case-law. We proposed in our working paper that new legislation should abandon the scheme. This was a course already taken in England by the Arbitration Act 1950.' (para 3.7)

Even if such provisions in old Acts (based on the English 1889 Act) brought references by consent out of Court under the direct and continuous supervision of the Court and so allowed the Court to exercise its inherent power of control, it no longer exists from that source as those Acts have been repealed with the introduction of *Commercial Arbitration Acts/Ordinance.*

Following the House of Lords judgments in *Bremer Vulkan* (1981) and in *Paal Wilson, 'The Hannah Blumenthal'* (1982), it appears to be firmly established in

England that the Court has no general jurisdiction at common law to supervise the conduct of a private reference to arbitration and that the supervisory jurisdiction derives exclusively from the *Arbitration Acts* 1950 and 1979. (*Turriff V Richards & Wallington* (Mustill J) 18 BLR21).

It will be interesting to follow the development of the law here in Australia in this regard. If the decision in *Main Roads* (supra) is followed, it could have far reaching consequences. Arbitrators' decisions will be even more prone to attack than they were under the old stated case procedure, with even greater potential for delay.

Appeals — Uniform Arbitration Act

THE appeal provisions of our Uniform Arbitration Act are based upon the 1979 English Arbitration Act. The following comments of Sir John Donaldson MR upon the 1979 English Act in *Aden Refinery Co. Ltd.* v. *Ugland Management Co.* [1986] 3 ALL ER 737 at 739 are therefore of considerable interest. Sir John was Chairman of the Commercial Court Committee which published the report on arbitration which is referred to in the extract from the judgment.

'In July 1978 the Commercial Court Committee published the Report on Arbitration (Cmnd 7284) recommending radical reforms in the law relating to arbitration. These recommendations included the abolition of the right of appeal by way of an award in the form of a special case, which had spawned a vast number of appeals and wholly unacceptable delays in resolving commercial disputes, and of the power to set aside an award for error of fact or law on its face. Instead it recommended a system of judicial review based on reasoned awards, such review being subject to first obtaining the leave of the High Court and any appeal from the High Court to the Court of Appeal being subject to further restrictions. Thus the need for speed and finality, which is so essential in commerce and which arbitration is traditionally intended to provide, could be married to the equally essential continued development of English commercial law. Parliament approved in principle and the result is the Arbitration Act 1979.

With some prescience the committee foresaw that there would be a need for successive amendments to the law of arbitration. The rules and procedures governing arbitration are a living thing which inevitably require statutory amendment from time to time in the light of experience and changing conditions. Accordingly, the committee recommended the establishment of an 'Arbitration Rules Committee' with a view to relieving Parliament of the need frequently to consider detailed amendments to the current Arbitration Acts. Unfortunately this recommendation was rejected on the grounds that it was constitutionally improper for subordinate legislation to be used to amend primary legislation. If this is indeed a constitutional principle, the presence of the Hallmarking Act 1973 on the statute book is somewhat surprising. This empowers the Secretary of State by statutory instrument to apply the Act to metals other than gold, silver and platinum and in so doing to include provisions 'applying, extending, excluding or amending, or repealing or revoking, with or without savings, any provisions of this Act or an instrument under this Act'. An analogous power in the 1979 Act might have obviated the need for a great deal of judicial effort, regarded by some as more legislative than adjudicative, and the idea of a specialist body with legislative powers seems worth reviving.'