THE JOHN KEAYS MEMORIAL LECTURE

REASONS FOR ARBITRAL AWARDS

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I HAVE been honoured by the invitation to deliver the John Keays Memorial Lecture. Mr. John Keays had a distinguished career as a consulting engineer and commercial arbitrator in Queensland. He was a foundation member of the Council of the Institute of Arbitrators Australia, and the first chairman of the Queensland Chapter of the Institute, and the great contribution which he made to the affairs of the Institute during its formative years was recognized by his election as an honorary Fellow in 1985, two months before his death. It has been suggested to me that I should speak about the writing of reasons for awards, a matter which, I have been told, is of some concern to the members of the Institute.

Speaking generally, it is no longer possible for arbitrators in Australia to act on the rather cynical advice given by Lord Mansfield to holders of judicial office in the eighteenth century. Lord Mansfield is supposed to have said:

> "Consider what you think justice requires and decide accordingly. But never give your reasons: for your judgment will probably be right but your reasons will certainly be wrong."

Until quite recently arbitrators were free to heed Lord Mansfield's warning, for at common law an arbitrator was not obliged to state the reasons on which the award was based and, if reasons were given, could ensure that they were not made part of the award, and could thus avoid the exercise of the jurisdiction of the courts to set aside awards for errors of law apparent on their face. The legislatures in Australia have gone further than those of other common law jurisdictions in reversing this rule. The *Commercial Arbitration Acts*,[1] which after lengthy discussion and consideration, were enacted during the years 1984 to 1986 in substantially uniform terms in all the States and Territories of Australia except Queensland, contain, as section 29(1), a provison as follows:

"Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall—
(a) make the award in writing;
(b) sign the award; and
(c) include in the award a statement of the reasons for making the award."

In Queensland the *Arbitration Act* 1973, although different from the uniform Acts in certain significant respects, requires the arbitrator or umpire to furnish to the parties contemporaneously with the award a written statement of the reasons for the award unless the parties, after the dispute has arisen and before the award is made, by written notification dispense with this requirement and such statement is taken to form part of the award (see section 24(1)). Thus the general rule throughout Australia now is that the arbitrator is bound to state, as part of the award, the reasons for making it.

Although it is no doubt true to say that not all arbitrators welcomed the additional burden of preparing reasons, or the prospect of having possible errors revealed and criticized by the courts, the rule that arbitrators were not obliged to give reasons could hardly be justified simply as a means of avoiding those unpalatable consequences. A more satisfying rationalization is that a requirement that arbitrators should explain their reasoning in every case might have tended to deprive the parties of some of those advantages which an arbitration is expected to provide;[2] it might have led to expense and delay and might have detracted from the finality of an award. In the debate that occurred before the uniform laws were enacted, there were strong differences of opinion betwen those who thought that there should be some means of ensuring that arbitrators applied the law correctly, and those who believed that it was more important to ensure that an award once made was final. In fact, the ability to challenge an award if an error of law appeared on its face, and the exercise by the courts of the power, first given by statute in England in 1889, to require the arbitrator to state an award in the form of a special case, had already impaired to some extent the finality of awards; and it had been said that the arbitral procedure, which was intended to resolve disputes with economy, celerity and finality had become protracted and fraught with uncertainty and technicality.[3] To remedy this situation, in the United Kingdom, the *Arbitration Act of 1979* was passed; that Act, to use the words of Lord Diplock,[4] revealed an "intention to give effect to the turn of the tide in favour of finality in arbitral awards . . . at any rate where this does not involve exposing arbitrators to a temptation to depart from 'settled principles of law'". The uniform *Commercial Arbitration Acts* in Australia reproduced those provisions of the *Arbitration Act of 1979* which restricted the power of the court to review the decisions of arbitrators. They declare that there is no jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award (section 38(1)) and instead provide that an appeal

shall lie to the Supreme Court "on any question of law arising out of an award" (section 38(2)), but only with the consent of the parties or with the leave of the court (section 38(4)). Such leave is not granted unless the determination of the question of law could substantially affect the right of one or more parties to the arbitration agreement (section 38(5)) nor if the parties have entered into an exclusion agreement—an agreement which excludes the right of appeal in relation to the award (section 40)), although there are certain cases in which an exclusion agreement has no effect (section 41). The House of Lords has held that judges should not lightly exercise the discretion to grant leave under the corresponding provisions of the *Arbitration Act* 1979 so that the intention of the Parliament to promote speedy finality in arbitral awards will not be frustrated.[5] However, the Australian legislation differs from that of the United Kingdom so far as the statement of reasons is concerned. The *Arbitration Act* 1979 gives the court power, on an application made with the consent of all parties or with the leave of the court, when it appears to the court that the award does not or does not sufficiently set out the reasons for the award, to order an arbitrator or umpire "to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought . . . to consider any question of law arising out of the award", but where an award is made without any reason being given, no such order is to be made unless before the award was made one of the parties gave notice requiring a reasoned award or unless there is some special reason why such a notice was not given (section 1(5), (6)). In contrast to this provision, which gives the court a limited discretion to order reasons to be given, the uniform Acts in Australia cast on the arbitrator an obligation to state the reasons for making the award unless the parties have otherwise agreed. That requirement appears to be opposed to the tendency of the provisions which indicate an intention to promote greater finality in arbitral awards, but in spite of this important difference it would seem that the Australian courts should approach the exercise of the discretion to grant leave to appeal in the same spirit as the courts in England.

I must digress for a moment to mention the position in Queensland. When I was at the bar the statutory provisions that governed arbitration in that State were a rescript of those enacted in England between 1698 and 1854. The more modern provisions of the *Arbitration Act of 1889* (U.K.) had not been re-enacted there, but in 1973, the legislature made a leap forward: the *Arbitration Act* of that year, which is still in force, was largely based on the United Kingdom *Arbitration Act of 1950,* but it departed from that model in that it required reasons to be given for awards; in this respect it was something of a pioneer in Australia. Reform of the law in Queensland stopped at that point, and the procedure under which awards may be set aside for error on their face remains available in that State; therefore the requirement that reasons be given appears

in the Queensland Act in a different context from that provided by the uniform laws. It follows that not everything that I shall have to say will be applicable to Queensland, but I nevertheless doubt whether there is likely to be held to be any significant difference between the law of Queensland and that of the rest of Australia so far as concerns the requirement to state the reasons for making an award.

It has been said that the power given to the court by the *Arbitration Act* 1979 (U.K.) to order an arbitrator to give reasons in sufficient detail to enable the court to consider any question of law arising out of the award is conferred in order that an appeal may be effective.[6] However, that is certainly not the only reason why an arbitrator may be ordered to give a reasoned award. The report presented by the Commercial Court Committee in 1978 (Comd. 7284) on which the Act of 1979 was based said (in par. 26): "The making of the award is, or should be, a rational process. Formulating and recording the reasons tends to accentuate its rationality." It is now well understood that it is desirable that arbitrators should give reasons for purposes other than the facilitation of appeals.[7] No doubt one object of the uniform Acts in Australia in requiring reasoned awards was to make it possible for parties to an arbitration to exercise the limited right of appeal which those Acts confer, but it is clear that that is not the only purpose of the requirement. For one thing, reasons must be given in every case, although an appeal can be brought only on a question of law. It is obvious enough that "arbitrations vary greatly in their character from major proceedings which are wholly indistinguishable from a heavy [Supreme] court action to disputes on the quality of commodities (the 'look sniff' arbitration)".[8] In Australia, reasons are required even in arbitrations of the latter kind that turn solely on a short question of fact. Moreover, if the parties to an arbitration agree in writing, the arbitrator may determine the question in issue "by reference to considerations of general justice and fairness" (section 22(2)). And, unless otherwise agreed in writing by the parties, an arbitrator is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as he or she thinks fit (section 19(3)). Even in arbitrations of those kinds an arbitrator must state the reasons for making the award. It is apparent that the intention of the legislation in requiring reasons to be given was not merely to facilitate appeals.

Another consideration that may have moved the legislatures to insist upon reasoned awards was the desire to establish rules suitable for international arbitrations and to ensure that awards would be enforceable in those countries which apply the civil law and require that awards be "motivated" (i.e. reasoned) if they are to be enforceable. The discussion which led to the enactment of the uniform laws were taking place at the same time as those which led to the adoption by the United Nations Commission on International Trade Law, of the model law, accepted

on 21st June, 1985, which requires that an award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award records a settlement in agreed terms (UNCITRAL Model Law, article 31; UNCITRAL Arbitration Rules, article 32(3)). However, if that was one of the purposes of the uniform laws in requiring arbitrators to give a reasoned award, it must surely have been only of minor significance, for a large proportion of the arbitrations conducted under those laws were likely to be of a purely domestic character.

The main purpose of the laws in requiring reasoned awards was, in my opinion, to improve the standard of arbitration in Australia generally and to give greater satisfaction to the parties who submitted their disputes to arbitration. I have already suggested that before the uniform Acts were passed arbitrations in Australia did not always prove to be more effective than litigation in avoiding formality, delay and expense. Indeed, I understand that the formation of this Institute was a result of the recognition of that fact and of the consequent desire of those concerned to raise the standard of arbitration in Australian to the highest possible level. Certainly the main object of the uniform laws was to encourage the use of arbitration as a means of resolving disputes without resorting to the courts. To give a reasoned award not only satisfies the natural desire of the losing party to know why the arbitrator rejected the arguments on which he relied, and helps to provide an assurance that the arbitrator gave proper consideration to the arguments and did not merely do palm tree justice; it also imposes on the arbitrator a useful discipline the exercise of which helps him or her to arrive at the correct result. Everyone who has written a judgment knows how the mental effort involved in preparing written reasons can aid the writer in his endeavour to achieve a full and precise understanding of the matters in issue, to ensure that no relevant consideration is overlooked and that no weight is given to irrelevant matters and to correct any false impressions that may have been gained in the course of the hearing. Carefully prepared written reasons may not only give the parties greater confidence in the result of the arbitration but may also improve the quality of the decision itself. The fact that the reasons are intended to serve these purposes is important in deciding upon the extent of the arbitrator's obligation to state the reasons for the award.

An arbitrator preparing reasons must remember at the outset that there are certain substantive requirements which any award must satisfy.[9] In particular, an award must deal with all the matters the subject of the reference and must adjudicate upon all of them finally and conclusively. The award must be certain, i.e. it must enable the parties to ascertain precisely what decision the arbitrator has reached. It must be in a form capable of being enforced.

Provided that these substantive requirements are satisfied, the reasons

need not be in any particular form unless of course the arbitration agreement requires it. There have been some statements in the English courts which provide guidance on this matter and these observations are helpful in Australia, notwithstanding the fact that the requirement of the English legislation, that the reasons shall be stated in sufficient detail to enable the court on appeal to consider any question of law arising out of the award, is narrower than that in the Australian legislation which places no qualification on the requirement that the reasons for making the award be stated. In one case[10] Lord Donaldson, as he has now become, emphasized the need for arbitrators to give their decision and the reasons for that decision at the earliest possible moment, and continued:[11]

> "No particular form of award is required. Certainly no-one wants a formal 'special case'. All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a reasoned award."

Lord Donaldson said that the arbitrators should begin by explaining briefly how the arbitration came about and should then tell the factual story as they saw it, and he continued:

> "Much would be common ground and would need no elaboration. But when the award comes to matters in controversy, it would be helpful if the arbitrators not only gave their view on what occurred, but also made it clear that they have considered any alternative version and have rejected it . . . The arbitrators should end with their conclusion as to the resulting rights and liabilities of the parties. There is nothing about this which is remotely technical, difficult or time-consuming . . . Much of the art of giving a judgment lies in telling a story logically, coherently and accurately . . . Where a 1979 Act award differs from a judgment is in the fact that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion, e.g. 'We regarded the conduct of the buyers, as we have described it, as constituting a repudiation of their obligations under the contract and the subsequent conduct of the sellers, also as discussed, as amounting to an acceptance of that repudiatory conduct putting an end to the contract.' . . . That is not to say that where arbitrators are content to set out their reasoning on questions of law in the same way as judges, that will be unwelcome to the courts. Far from it. The point which I am seeking to make is that a reasoned award . . . is not technical, it is not difficult to draw and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing."

The remarks of Lord Donaldson were adopted in a later case[12] by Bingham J. who said that "awards of arbitrators should not be scrutinized with an over-critical eye, and the court should not insist that every factual 't' is crossed and every argumentative 'i' is dotted." It may however be remarked that in each of these cases the learned judge, notwithstanding the emphasis on brevity and speed, considered that it would have been more helpful if the arbitrator had provided fuller reasons. It thus appears that it is necessary that an arbitrator in preparing reasons should balance

the need for completeness and care against the desirability of producing succinct reasons without delay.

The only general guidance that one can give regarding the formulation of reasons is that they must be comprehensive, in that they must reveal why the arbitrator reached the conclusion that he or she did reach on each question of fact or law that arises, and as succinct as is consistent with completeness and clarity. It goes without saying that the reasons should be internally consistent and that they should be clear, logical and rational. There are however no technical or legalistic requirements to be met, and if arbitration is to be an attractive alternative to litigation the preparation of reasons should not prevent the award from being made promptly.

When one seeks to give more particular guidance on this subject, it has to be remembered that, as I have already mentioned, arbitrations may differ very greatly in character. The reasons given by an arbitrator who has looked at a sample of merchandise to determine its quality will obviously be very different from those given in a case in which the arbitrators are experienced lawyers who are called on to consider the effect of difficult contractual provisions in a complex set of facts. Further, one should not attempt to persuade arbitrators to force their awards into any particular mould; they should express their reasons in whatever form seems to them most conducive to accuracy, clarity and completeness. However, subject to these warnings, it is possible to make some suggestions as to the manner in which reasons should be expressed, and a number of the textbooks on the subject[13] contain helpful advice as to the contents and structure of reasons.

It has never been necessary for an arbitrator to recite his authority, but although formal recitals are not necessary it may often prove convenient to refer, briefly, and preferably in narrative form, to the events which led to the making of the award—in particular to the relevant provisions (if any) of the contract under which the dispute arose, the arbitration agreeemnt, the manner in which the dispute arose, the method by which the arbitrator was appointed, what dispute was referred, what issues were formulated (if that was done) and what procedure was followed at the hearing (e.g. whether the evidence was written or oral, whether the arbitrator informed himself or herself in some way other than by evidence, and whether questions were determined by reference to considerations of general justice and fairness). It is not mandatory to include a narrative of that kind and it would be wise to omit it if it were thought likely to lead either to delay in the making of the award or to confusion or inconsistency within the award itself.

It is essential that the reasons should give an account of the relevant facts; this can often be done in the form of a narrative and in chronological order. In England the arbitrator need set out only those facts which are necessary for a decision on a question of law but in Australia it seems

that all facts which are relevant to the decision should be stated. As I have said, although an appeal is limited to questions of law, the reasons that must be stated are not limited to those that raise questions of law. The facts should be stated as briefly as possible, and not all the evidence need be stated. In Australia, as in England, findings of fact which raise no question of law are not open to review, but it may be necessary to refer to the evidence if the reasons for the arbitrator's decision on a disputed question of fact cannot otherwise be revealed. The reasons should show not only why the decision on those issues was reached. Sometimes that can be done simply by saying that the arbitrator accepted the evidence of a particular witness, perhaps in preference to that of another, or that the finding is supported by the documentary evidence but in some cases, such as where the finding depends on circumstantial evidence, it may be necessary to refer to the evidence to state the reason for the finding. Where a party has argued that a particular finding of fact should be made, and the arbitrator does not accept that argument, this should be expressly stated in the reasons to make it clear that the argument has not been overlooked, and the reason for the rejection of the argument should appear. If the arbitrator considers that a particular matter of fact upon which a party relies is not relevant, that also should be expressly stated, but where possible the arbitrator should make a finding as to the existence or non-existence of the fact in case a court takes a different view of its relevance.

Not all arbitrations will involve the decision of a question of law or a question of mixed law and fact. Where such a question does arise, it will be necessary to state what view the arbitrator takes on the question and how that conclusion was reached. Where arbitrators are chosen because of their legal knowledge and experience, it will usually be expected that their reasoning on questions of law will be set out much as the judgment of a judge might be but a lay arbitrator, whose expertise lies in other fields, will not be expected to make an elaborate analysis of the arguments and the authorities. However, a lay arbitrator may find that it is a help in reaching a decision, as well as a useful way of expressing the reasons, to summarize the respective submissions of the parties and then to say why one is preferred to the other.

To sum the matter up, the arbitrator is required to explain in the reasons which form part of the award why he or she reached the decision on which the award embodies. To do that it is necessary to state the relevant facts and to explain why each issue of fact was resolved in the way in which the arbitrator resolved it. It is further necessary to state what conclusion the arbitrator reached on each question of law or of mixed law and fact and how that conclusion was reached. All these things may be stated in the arbitrator's own words, and in the form and order that seems to the writer most convenient. No special knowledge or skill of a legal kind is necessary to prepare the reasons, although it no doubt

will help if the architect has a sense of relevance, a logical mind and a gift of clear expression as well as expertise in the subject matter of the dispute. However, it should be kept in mind that there is nothing technical about the process and that once an arbitrator has reached a rational conclusion the expression of the reasons that led him or her to that result should present no great difficulty.

In Queensland, the failure of an arbitrator to give reasons when they are required by the *Arbitration Act* 1973 will amount to misconduct for which the award may be set aside (see sections 4 (definitions of "imperfect execution of powers" and "misconduct"), 24 and 32(2)). Under the uniform laws, where an award is made otherwise than in writing (which of course should occur only if the parties had so agreed in writing) the arbitrator must, on request by a party within seven days after the making of the award, give to the party a statement in writing signed by the arbitrator of the date, the terms of the award and the reasons for making it (section 29(2)). This provision does not provide a remedy where the arbitrator makes an award in writing which contains no reasons, or which does not sufficiently set out the reasons. However, on general principles the law should provide a remedy for a failure by the arbitrator to comply with what appears to be a mandatory requirement of the uniform laws. It would seem that a failure to include any statement of reasons in an award would be regarded as misconduct with the consequence that the award might be set aside (section 42). If the award contained a statement of reasons which was inadequate to reveal the grounds for the decision, that also might be regarded technically as misconduct, and the question whether the statement complied with the requirements of the uniform laws might be regarded as a question of law arising out of the award on which an appeal could be brought,[14] although in that case leave to appeal would be necessary, and leave could not be granted unless the court considered that the determination of that question could substantially affect the rights of a party.

There have been times in the past when the disadvantages of arbitration often outweighed its advantages. During the last decade, however, it has become apparent that arbitration has a role of increased importance to play in the resolution of commercial disputes. A considerable increase in the volume of litigation has caused delays in the courts, notwithstanding continuing efforts to eliminate them. The facts that trials take longer, and that legal services cost more than in the past, have made civil proceedings prohibitively expensive for those litigants who are not wealthy or legally aided. In these circumstances parties naturally seek alternative procedures for resolving disputes. Provided that arbitation can achieve its aim of settling disputes relatively quickly and cheaply as well as efficiently, informally and privately, it is likely to be resorted to more frequently than in the past. The requirement that reasoned awards be given was designed to add to the attractions of the arbitration process.

The necessity to expound the reasons for the decision should not only improve the efficiency of arbitration in particular cases but should also enhance the confidence of the legal and commercial communities in arbitration generally. This confidence will be increased if, at the same time, the courts give effect to the policy of the uniform Acts and entertain appeals only in clear cases. These beneficial results will however not follow if arbitrators allow formality and technicality to intrude into their reasons or permit the necessity to give a reasoned award to become a cause for delay. The provisions of the uniform laws present a challenge to arbitrators which I hope will successfully be met.

FOOTNOTES

1 *Commercial Arbitration Act* 1984 (Vic.); *Commercial Arbitration Act* 1984 (N.S.W.); *Commercial Arbitration Act* 1985 (W.A.); *Commercial Arbitration Act* 1985 (N.T.); *Commercial Arbitration Act* 1986 (S.A.); *Commercial Arbitration Act* 1986 (Tas.); *Commercial Arbitration Act* 1986 (A.C.T.)

2 See, for example, Rodman, *Commercial Arbitration* (1984); West's Handbook Series, par. 21.5, and Domke, *Commercial Arbitration* (1984, 1987 Supp.) par. 29.06.

3 *Tuta Products Pty. Ltd.* v. *Hutcherson Bros. Pty. Ltd.* (1972), 127 C.L.R. 253, at p. 257.

4 *Pioneer Shipping Ltd.* v. *B.T.P. Tioxide Ltd. (The Nema),* [1982] A.C. 724, at pp. 739-740.

5 *The Nema, supra; Antaios Compania Naviera S.A.* v *Salen Rederierna A.B.*. [1985] A.C. 191.

6 *Russell on Arbitrationn,* 20th ed., p. 291.

7 Mustill and Boyd, *Commercial Arbitration* (1982), p. 542

8 *Bremer Vulkan Schiffban und Maschinenfabrik* v. *South Indian Shipping Corporation Ltd.*, [1981] A.C. 909, at p. 919.

9 Mustill and Boyd, *op. cit.*, p. 338.

10 *Bremer Handelsesellschaft m.b.H.* v. *Westzuckger G.m.b.H. (No. 2),* [1981] 2 Lloyd's Rep. 130, at pp. 132-133,

11 at p. 137.

12 *J. H. Rayner (Mincing Lane) Ltd.* v. *Shaler Trading Co.*, [1982] 1 Lloyd's Rep. 632, at p. 636.

13 See Mustill and Boyd, *op. cit.*, at pp. 552-3; Bernstein, *Handbook for Arbitration Practice* (1987), par. 18.52; Sharkey and Dorter: *Commercial Arbitration* (1986), pp. 249-250; Russell, *op. cit.*, p. 291.

14 Cf. In re *Poyser and Mills' Arbitration* [1966] 2 Q.B. 467, and *Universal Petroleum Ltd.* v. *Handels etc. G.m.b.H.*, [1987] 1 W.L.R. 1178, at pp. 1188-1192.