

ARBITRATION CLAUSES IN SOUTH AUSTRALIA

“There is no doubt of the general principle which was argued at your Lordships’ bar, that parties cannot by contract oust the ordinary courts of their jurisdiction.”—*Scott v. Avery* (1855-1856) 5 H.L.C. 811, at 845 *et seq.*, *per* Lord Cranworth L.C.

1. Introduction: a General Principle of Public Policy and its Application to Arbitration Agreements; Some Basic Distinctions

Contracting parties cannot validly agree that the courts shall have no jurisdiction over disputes which may arise between them. This principle is fundamental to the law of contract and is of long standing. It goes back at least to Elizabethan days¹. The principle has a good deal of real “bite” in certain typical instances. It has, for example, been held in many cases that a wife’s promise not to apply to the courts for maintenance to be paid by her husband, a promise frequently found in separation agreements, is legally not effective².

Had the judges chosen to do so, they could undoubtedly have declared all arbitration clauses in contracts to be incompatible with the rule against ousting jurisdiction. However, this has not been done. Although that rule is certainly applicable to arbitration clauses³ the courts have in fact applied it as cautiously and as narrowly as possible, leaving it “in a very attenuated condition so far as actions of contract are concerned”⁴.

In practice one encounters an almost limitless variety of arbitration clauses, to say nothing of all the manifold valuation and certification clauses which may, in particular cases, be very difficult to distinguish from arbitration clauses⁵. It has proved useful to distinguish a few major types of arbitration clauses. The most significant categories were set out with characteristic clarity by Lord Wright in *Heyman v. Darwins, Ltd.*⁶

One distinction is that between an arbitration clause which relates to future disputes and “a special agreement to arbitrate on a particular dispute which has already arisen on some matter, such as contract, tort, trust, or family arrangement”⁷. This distinction was reflected in the original legislative definition of “submission” in s.27 of the Arbitration Act, 1891 (S.A.) as

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1. “There is a saying of Lord Coke, which is the original foundation of this doctrine: it is this, ‘If a man makes a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea; notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without a plea.’”—*Scott v. Avery, id.*, at 853, *per* Lord Campbell.
2. *E.g. Brooks v. Burns Philp Trustee Co. Ltd.* (1969) 121 C.L.R. 432.
3. See, for example, *S.A. Railways Commissioner v. Egan* (1973) 47 A.L.J.R. 140 at 141, *per* Menzies J.
4. Brooking, *Building contracts* (1974) at 158.
5. The decisive differentiating criterion appears to be that arbitration is intended to settle some prospective or existing difference or dispute, whilst valuation and certification are merely methods for determining the extent of rights to be created under a contract—see *Halsbury’s Laws of England* (4th ed., 1973) vol. 2, at 257.
6. [1942] A.C. 356, at 376 *et seq.*
7. *Ibid.*

“a written agreement to submit present or future differences to arbitration”⁸. Recent South Australian legislation has given very great prominence to this distinction⁹.

A further important distinction drawn by Lord Wright in *Heyman v. Darwins, Ltd.*¹⁰ is that between a simple mutual undertaking to refer to arbitration certain specified differences which may arise from a contract (often called a “bare” arbitration clause), and a clause which provides “that there is to be no right of action save on the award of an arbitrator” (commonly referred to as a “*Scott v. Avery* clause”). The difference may be illustrated with clauses contained in many building and engineering contracts.

Clause 48 of C.A. 24.1 (the Standard General Conditions of Contract for Civil Engineering Works) contains a bare arbitration clause:

“If any question, difference or dispute whatsoever arise . . . between the Principal and the Contractor or the Engineer and the Contractor upon or in relation or in connection with the Contract including the construction thereof, which cannot be resolved by the contracting parties to their mutual satisfaction, such question, difference or dispute shall be and is hereby referred to arbitration as hereunder stated, and for such purpose either party may, as soon as reasonably practicable, by notice in writing to the other party . . . call for the point or points at issue to be submitted for settlement by arbitration”¹¹.

Edition 5b of the Lump Sum Contract of the Royal Australian Institute of Architects and the Master Builders’ Federation of Australia Inc. contains a *Scott v. Avery* clause. The relevant provisions are very long and complicated; the following version has been very greatly simplified by extensive deletions:

“32(a) In the event of any dispute or difference arising [under the contract] between the Proprietor . . . and the Builder . . . either party shall give to the other notice in writing by certified mail of such dispute or difference. At the expiration of 7 days from the date of receipt of such notice . . . such dispute or difference (unless settled) shall be and is hereby referred to . . . arbitration . . .”.

(d) The award made by the Arbitrator . . . shall be final and binding on both the Builder and the Proprietor and neither party shall be entitled to commence or maintain any action upon the dispute or difference until such matter has been referred or determined as hereinbefore provided and then only for the amount of relief to which the Arbitrator . . . by his . . . award finds either party is entitled . . .”

It is clause 32(d) which turns this arbitration agreement into one of the *Scott v. Avery* type, for it makes the accrual of a right of action dependent upon an arbitrator’s award being made.

2.1 Bare Arbitration Clauses

The objective of a bare arbitration clause is to remove the jurisdiction of the courts over a dispute and to substitute that of a private arbitrator. As

8. That definition was amended in 1974 to read, in part: “‘submission’ means a valid written agreement to submit a claim, difference or dispute to arbitration . . .”: see Arbitration Act Amendment Act, 1974.

9. See, *infra*, section 2.4 of this article.

10. *Supra*, n.6.

11. Quoted by Brooking, *op. cit.*, at 159 *et seq.*

already explained, this could not be done validly at common law. However, the judges did not infer from the principle against ousting jurisdiction that arbitration clauses were void or illegal: such clauses simply failed to attain their objective. The parties were quite free to comply with such clauses by submitting their dispute to the named arbitrator, and an award made by the arbitrator was regarded as having been made with the parties' authority and, therefore, as being binding upon them. From this it followed that, once the award had been made, the courts could not re-open the original dispute; their only remaining function was that of enforcing the award. Where the contract purported to bind a party to submit to arbitration, a refusal to do so (e.g. the bringing of an immediate action in the courts) was a breach of contract for which damages could be recovered¹².

The main reason why all this did not amount to complete practical recognition of arbitration clauses was that the courts insisted on one important limitation: even where the parties had promised to go to arbitration they remained quite free to countermand the arbitrator's authority in breach of the promise at any time prior to the actual making of the award. Accordingly, either party could desert the arbitration proceedings whenever he wanted and seek his remedy in the courts instead.

It was one of the chief features of the South Australian Arbitration Act, enacted in 1891¹³, that this freedom to desert arbitration was taken away. Section 1 of the Act made submissions irrevocable in principle¹⁴. Henceforth a party who had allowed arbitration proceedings to commence could no longer disrupt such proceedings by a simple withdrawal. If he thought it appropriate, the arbitrator could continue and make an award, binding upon the party who had withdrawn as well as upon the other.

At common law there had been no way of enforcing a simple arbitration clause specifically or effectively. Although the bringing of a direct action in the court had constituted a breach of the arbitration clause for which damages could have been recovered, such damages had been very hard to establish. Section 3 of the Arbitration Act of 1891 brought relief by giving the courts a discretion to stay the proceedings where a plaintiff had brought an immediate action in disregard of an arbitration clause¹⁵.

2.2 Scott v. Avery Clauses

Even before these statutory reforms had first been introduced in England¹⁶ ingenious lawyers had invented a deadly new type of arbitration clause which

12. The evolution of these principles is well explained by the High Court in *Dobbs v. National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643.

13. The Act was almost identical with the English Arbitration Act of 1889.

14. "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a Judge thereof, and shall have the same effect in all respects as if it had been made an order of court."

15. "3. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time, before taking any step in the proceedings, apply to that court to stay the proceedings: and that court, or a Judge or special magistrate thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

16. The judicial power to stay proceedings because of the existence of an arbitration clause was first created by s.11 of the English Common Law Procedure Act of 1854.

was intended to overcome, and did in fact overcome, the major weaknesses from which simple arbitration clauses suffered. This new clause was declared valid by the House of Lords in *Scott v. Avery*¹⁷ and has become famous under that name.

The legal logic which led to the acceptance of this clause can best be appreciated if one first adverts briefly to another well-known decision of the House of Lords: *Rose & Frank Co. v. J. R. Crompton & Bros. Ltd.*¹⁸ The parties in that case had concluded what was, to all intents and purposes, an ordinary commercial agency agreement, but the agreement contained the following clause: "This arrangement is not entered into . . . as a formal or legal agreement . . . it is only a definite expression and record of the purpose and intention of the parties concerned to which they honourably pledge themselves." Although this clause purported to prevent the courts from intervening in a dispute between the parties, the House of Lords nevertheless considered it perfectly valid, since it was merely an exercise, by the parties, of their right either to make a legally binding contract or to refrain from doing so and, instead, to confine themselves to the making of a "gentlemen's agreement"¹⁹.

If parties are free to agree that a commercial contract is not to give rise to any legal relations at all, then they must, *a fortiori*, also be able to postpone such legal relations until certain agreed conditions have been met. The contract in *Scott v. Avery* fell into this category. Scott had insured his ship "Alexander", valued at £2,400, with Avery against loss at sea. The ship was lost and Scott brought an action on the policy. Avery relied on the following clause (which had not been complied with):

" . . . no member . . . shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining the decision of such arbitrators . . . is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit"²⁰.

The case eventually went to the House of Lords. Scott's counsel argued that the controversial clause was "in itself illegal, as ousting the jurisdiction of the courts of law"²¹. Avery's counsel countered this as follows:

"There is no principle of law which prevents a man from agreeing to pay to another the sum which a third shall declare to be the fair value of goods sold, nor any which prevents a similar agreement as to the compensation to be paid for doing or not doing a particular act . . . [This is] . . . an absolute covenant to pay the sum which certain persons are to declare to be the amount of the loss"²².

The House of Lords sought the advice of the English judges and some of these were sceptical of the clause. Crompton J. pointed out that such clauses, if upheld, "would effectually take away the jurisdiction of the legal tribunals . . ."²³. However, the House of Lords accepted the logic of the defendant's

17. (1855-1856) 5 H.L.C. 811.

18. [1925] A.C. 445.

19. Such an agreement has been defined as "an arrangement which is not quite an agreement concluded by parties who are not quite gentlemen".

20. (1855-1856) 5 H.L.C. 811, at 813 *et seq.*

21. *Ibid.*, at 815.

22. *Ibid.*, at 819 *et seq.*

23. *Ibid.*, at 835.

argument and declared the arbitration clause legally effective. That view has been endorsed by the High Court of Australia²⁴.

Even before the Act of 1891, *Scott v. Avery* clauses succeeded where bare arbitration clauses failed; they blocked direct access to the courts, since, prior to the making of an award, there was simply no cause of action to enforce. These clauses were thus almost completely effective in barring the courts from adjudicating the true issues between the parties, leaving for them only the very limited task of ordering and enforcing payment of whatever sum of money the arbitrator might have declared to be payable. The circumstances in which the common law was willing to grant relief against such clauses were narrow and exceptional²⁵.

2.3 *Scott v. Avery* Clauses Under the Arbitration Act

The Act of 1891 catered fairly satisfactorily for bare arbitration clauses, but, curiously, the statutory language did not make it clear whether and in what way it was also meant to apply to *Scott v. Avery* clauses. One suspects that the applicability at least of some of the provisions of the Act must often simply have been taken for granted. Surprisingly the difficulties involved in seeking to apply the Act to *Scott v. Avery* clauses have not been explored in very great depth by the courts.

Brooking discusses a recent unreported Victorian case, *582 St. Kilda Road Pty. Ltd. v. Campbell* (1971), which was concerned with the applicability of s.1 of the Act (or, more exactly, of its Victorian equivalent) to *Scott v. Avery* clauses²⁶. An action for damages for breach of a building agreement was brought by a proprietor against a builder in the Victorian Supreme Court. The agreement contained the following *Scott v. Avery* type arbitration clause:

“. . . neither party shall be entitled to commence or maintain any action upon the dispute or difference until such matter has been referred or determined as hereinbefore provided and then only for the amount of relief to which the Arbitrator, Arbitrators or Umpire by his or their award finds either party is entitled . . .”.

This placed a seemingly insurmountable obstacle in the plaintiff's way, since there had been no arbitration and since there was therefore clearly no cause of action. The plaintiff tried to overcome the difficulty by insisting that the *Scott v. Avery* clause was a “submission” within s.1, which, according to the statutory definition²⁷ meant “a written agreement to submit present or future differences to arbitration”, and that the *Scott v. Avery* clause was therefore not binding if the court gave leave for its unilateral revocation. On the basis

24. “It is not possible for a contract to create rights and at the same time to deny . . . the right to invoke the jurisdiction of the Courts to enforce them . . . Parties may . . . make the acquisition of rights under the contract depend upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him.”—*Dobbs v. National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643 at 652, *per Rich, Dixon, Evatt and McTiernan JJ.*

25. A *Scott v. Avery* clause can be overcome by establishing that the defendant has waived it—see Brooking, *op. cit.*, at 161; that the defendant has repudiated the whole agreement—see *Jureidini v. National British Insurance Co.* [1915] A.C. 499; or that the arbitrator has disqualified himself from acting by not behaving with the impartiality which is required of him—see *Hickman v. Roberts* [1913] A.C. 229.

26. *Op. cit.*, at 161 *et seq.*

27. *Supra*, at n.8.

of this perfectly plausible argument, the plaintiff read into s.1 of the Act a judicial power to dispense with *Scott v. Avery* clauses. Lush J. rejected this interpretation, holding that s.1 did not extend to *Scott v. Avery* clauses.

If this judgment reflects the law in South Australia, then any *Scott v. Avery* clauses which may have survived the Arbitration Act Amendment Act, 1974²⁸ would still be just as deadly here and as immune from judicial intervention as they ever were. This would be unfortunate, since judicial discretionary power to dispense with such clauses is very desirable. That was the conclusion to which the English McKinnon Committee came in 1927²⁹ and the law in England was amended accordingly in 1934³⁰. In 1969 the South Australian Law Reform Committee recommended to the then L.C.L. Government that a wholly revamped Arbitration Act be enacted. The draft Act proposed by the Committee contained a provision identical with s.25(4) of the English Act. It was probably because of the change of government at that time that those recommendations were never implemented.

This English provision has inspired some similar legislation in Australia. For example, in 1973 the Queensland Parliament enacted a new Arbitration Act which resolves the *Scott v. Avery* problem in an elegant and appropriate manner. Section 10(1) of that Act contains the customary "power to stay proceedings" clause which is almost identical with s.3 of the South Australian Act³¹. That provision is linked with the following subsection:

"(2) The powers conferred by subsection (1) shall be exercised to the same extent and in the same manner in cases where there is a provision (whether in an agreement to arbitrate or otherwise) that an award under an agreement to arbitrate shall be a condition precedent to the bringing of an action with respect to any matter to which such agreement applies, as in cases where there is no such provision and such provision shall be read only as an agreement to arbitrate and shall not prevent any cause of action from accruing before arbitration and subject to any order made under subsection (1) shall not affect the institution, prosecution or defence of any action or counterclaim."

The legal effect of this is virtually to eliminate *Scott v. Avery* clauses from agreements or, in appropriate cases, to convert them into simple arbitration agreements. This ensures that *Scott v. Avery* clauses have the same legal effect as do bare arbitration clauses.

2.4 Recent South Australian Legislation Affecting Arbitration

Legislative reforms in South Australia have, on the whole, followed a more radical path. In the name of consumer protection the South Australian Parliament has made a determined effort to attack and curtail arbitration clauses as such, whether they be of the *Scott v. Avery* or the simple variety.

The legislative attack on arbitration began in a small way in the context of hire-purchase agreements. The Hire Purchase Agreements Act, 1960 (S.A.),

28. See *infra*, sections 2.4 and 2.5.

29. Report of the Committee on the Law of Arbitration, printed March 1927 (Cmd. 2817), s.36.

30. See now Arbitration Act, 1950 (U.K.), s.25(4), which gives the courts power to "order that the provision making an award a condition precedent to the bringing of an action shall . . . cease to have effect as regards that dispute".

31. *Supra*, n.15.

s.22(2), (3), and s.23 struck at arbitration clauses in contracts of insurance which were typically associated with hire-purchase contracts³². Simple arbitration and *Scott v. Avery* clauses, as well as any other limits imposed upon contractual rights by reference to arbitration or to arbitration awards in insurance contracts, were declared invalid, except insofar as they related to differences or disputes which had already arisen. The direct effect of these sections was to preserve the rights of the insured rather than have them placed at the mercy of an arbitrator likely to be biased in favour of the insurer (more often than not a significant provider of revenue for the arbitrator). However, the legislature probably regarded it as even more important to counteract an indirect effect of arbitration clauses: arbitration proceedings are private and therefore very popular with insurance companies who fear the adverse publicity which often emanates from court proceedings to which the media have fairly open access.

Section 24 of the Builders Licensing Act, 1967 (S.A.) extended the policy embodied in the Hire Purchase Agreements Act to arbitration clauses in building contracts "relating to . . . building work in the construction of any dwellinghouse or any building designed for residential flats or residential units", provided that the total cost of construction does not exceed \$20,000. Arbitration clauses relating to "any matter or dispute" concerning such work are declared of "no force or effect" unless ratified in writing by the parties after the matter or dispute has arisen. Such clauses are therefore neither void nor valid but are kept in a state of suspended animation until after ratification which must await the occurrence of an actual dispute. The section has been neither repealed nor amended. Inflation must by now have deprived it of some of its practical significance.

In 1974 the Dunstan Government introduced a Bill³³ which sought to extend the policy embodied in these earlier Acts to all forms of commercial arbitration. In its original form the Bill was very sweeping: it purported to strike down all anticipatory arbitration clauses. In his second reading speech the Attorney-General criticized *Scott v. Avery* clauses for making arbitration "which is expensive and is conducted in private"³⁴ completely unavoidable. Mr. King (now Mr. Justice King) singled out *Scott v. Avery* clauses in insurance contracts as being particularly oppressive:

" . . . in many contracts of insurance a person is compelled to resort to arbitration before he can sue on the policy. This is an additional and unnecessary expense to him. It severely curtails his rights where things go wrong in the arbitration. It gives the company the advantage of sheltering behind the privacy of arbitration and thereby escaping the adverse publicity of a court action."

The actual wording of the Bill was neither confined to insurance contracts nor to *Scott v. Avery* clauses. Section 24a(1), which the Bill sought to introduce into the Arbitration Act, and which was in fact enacted without amendment, applied to bare as well as to *Scott v. Avery* clauses and to arbitration in any industry. It read as follows:

"(1) Subject to subsection (2) of this section, any provision of an agreement—

32. These sections have been superseded by the almost identical s.42(2) and (3) of the Consumer Transactions Act, 1972.

33. No. 24 of 1974.

34. [1974] *Parliamentary Debates* (S.A.), at 501.

- (a) requiring differences or disputes arising out of the agreement, or any other agreement, to be referred to arbitration;
 - (b) providing that no action shall be maintainable in respect of a claim, difference or dispute unless the claim, difference or dispute has been referred to arbitration, or an award in arbitration proceedings has first been obtained;
 - (c) providing that arbitration is a condition precedent to any right of action;
 - or
 - (d) otherwise imposing by reference to arbitration or to an award made in arbitration proceedings, any limitation on the right of any person to bring or maintain an action,
- shall be void."

The Bill passed the House of Assembly with the support of the opposition³⁵. At that stage it provided for only one exception to the general principle of voidness contained in s.24a(1) and that exception also eventually became law as S.24a(2)(b):

"An agreement to submit to arbitration a claim, difference or dispute where the circumstances on which the claim is based have occurred, or the difference or dispute has arisen, before the agreement is made, shall not be rendered void by the provisions of sub-section (1) of this section."

The distinction drawn by Lord Wright³⁶ between anticipatory and *ex post facto* arbitration agreements has thus become of major significance in South Australian law. The latter type of agreement is bound to be of some importance, but it seems possible that practical instances of it will be small in number. Many parties who would have been willing to subscribe to anticipatory arbitration agreements will be too bellicose "after the horse has bolted" to incline towards any kind of compromise. Others may be of so calm a disposition that they will favour the settling of the whole dispute without reference to an arbitrator. It remains to be seen how many will choose the middle path of arbitration.

Had the Bill been enacted without amendment, much of this article would have been a mere exercise in legal history. However, in the Legislative Council, Mr. DeGaris refused to treat the Bill as an unadulterated emanation of public policy, although his own party in the lower house had apparently regarded it as such³⁷. He insisted that even anticipatory arbitration clauses had some advantages in some industries and referred particularly to the building industry. According to information given to him, \$130,000,000 worth of houses had been built through the Housing Industry Association in 1973, and there had been arbitrations in relation to fifty such projects or about 1% of the houses built. Mr. DeGaris voiced the view that the proceedings in those cases had been quicker and less costly than they would have been had they taken place in the courts. He also pointed out that the technical expertise of the architects or engineers who had acted in these cases would have been very helpful to the proper conduct of the proceedings. He summed up his views as follows: "As the Bill stands, there is some possibility . . . that we may be throwing away a

35. See the speech by Dr. Eastick—[1974] *Parliamentary Debates* (S.A.) at 748.

36. *Supra*, at n.7.

37. [1974] *Parliamentary Debates* (S.A.), at 748.

process of some value to the community"³⁸. It was due to his initiative that a further exception to the general rule of invalidity was inserted and became the new s.24a(2)(a):

"An agreement (a) to submit to arbitration a claim, difference or dispute arising out of an agreement for the performance of major building work; . . . shall not be rendered void by the provisions of subsection (1) of this section."

This important subsection gives rise to difficult problems of interpretation. Before turning to these problems, a further amendment, made before the Arbitration Act Amendment Act, 1974 became law on 24th October, 1974³⁹, should be briefly noted. Section 24a(4) reads as follows:

"This section does not apply to—

- (a) an agreement entered into before the commencement of the Arbitration Act Amendment Act, 1974;
- or
- (b) a submission in respect of a claim, difference or dispute of a kind that is not justiciable by a court."

The first part of this subsection ensures that s.24a(1) does not have a retrospective operation which would interfere with vested rights. The second part is intended to apply to arrangements such as that in *Rose & Frank Co. v. J. R. Crompton & Bros. Ltd.*⁴⁰ which are not intended to give rise to legal relations of any sort. Arrangements which are presumed to be in this category, even in the absence of an express "gentlemen's agreement" clause in the contract, are those which are predominantly of a social, domestic or political nature⁴¹.

2.5 Section 24a of the Arbitration Act: Problems of Interpretation

The DeGaris amendment raises problems of varying degrees of intricacy. The first and most obvious point is that the provision preserves arbitration clauses only if they in some way relate to "building work". Section 24a(3) defines "building work" as having "the meaning assigned to that expression by the Building Act, 1970-1971". That Act defines "building work" in s.6 as

"work in the nature of

- (a) the erection, construction, underpinning, alteration of, addition to, or demolition of, any building or structure;
- (b) the making of any excavation, or filling for, or incidental to, the erection, construction, underpinning, alteration of, addition to, or demolition of, any building or structure;
- or
- (c) any other work that may be prescribed, but does not include work of a kind declared by regulation not to be building work for the purposes of this Act."

The power contained in this provision to exclude certain work from the definition and to include other work in it has been used fairly extensively.

38. [1974] *Parliamentary Debates* (S.A.), at 913.

39. S.A. *Government Gazette*, 24th October, 1974, at 2758.

40. See *supra*, n.18.

41. See Lucke, "The intention to create legal relations" (1970) 3 *Adelaide Law Review* 419.

Regulation 8.1 of the Regulations under the Building Act, 1970-1971, made with effect from 12th April, 1973, specifies certain work in relation to "outbuildings in which human activity is secondary" and to certain "non-loadbearing" poles and masts as not constituting building work⁴². Regulation 8.2 (amended on 26th April, 1974) specifies certain work in relation to swimming pools, stables, cellars, tunnels and many other structures as constituting building work⁴³.

Not all "building work" in the various senses just outlined falls within the ambit of s.24a(2)(a). The subsection is expressly confined to "major" building work. S.24a(3) defines "major building work" in a curious way. No positive definition is given, nor is it defined, as one might expect, by contrast with "minor building work". S.24a(3) says that "major building work" is "any building work except domestic building work". "Domestic building work", in turn, is defined, not just by reference to the nature of the work, but also, in keeping with the aim of protecting the consumer of modest means, by reference to its value:

"'domestic building work' means work in relation to a dwelling house or proposed dwelling house or the curtilage⁴⁴ of a dwelling house or proposed dwelling house but does not include any such building work where the consideration for which it is to be performed exceeds in amount or value fifty thousand dollars."

Thus, s.24a(2)(a) does not preserve arbitration clauses from the invalidating effect of s.24a(1) if they relate to residential accommodation to be built at \$50,000 or less. The "consideration" clause in the definition raises a few problems, but none which the courts will find difficult to resolve. For example, the expressed consideration may be \$49,000, but a rise and fall clause may make it morally certain that the final price will exceed \$50,000. A court would probably view such work as "major building work".

Care must be taken to avoid the fallacy of regarding the \$50,000 limit as the sole criterion. The building of an extension to a factory, for example, would be "major building work", even if the agreed price were only \$2,000.

Were it not for s.24a(2)(a), anticipatory arbitration clauses relating to all building work, major as well as domestic, would be struck down by s.24a(1). Whether a particular arbitration clause is saved from this fate by s.24a(2)(a) depends not only upon the meaning of "major building work", but also upon the proper interpretation of all the other parts of the subsection. For example, an arbitration clause is within the ambit of the subsection only if it relates to a "claim, difference or dispute arising out of an agreement for the performance of major building work". The words "arising out of" are familiar, for they are often used in arbitration clauses. A disputed assertion that the agreement had been broken would be a dispute "arising out of the agreement"; a quarrel about the question whether the contract had been validly concluded would not be⁴⁵, any more than a damages claim would, if it alleged that fraudulent

42. *S.A. Government Gazette*, 12th April, 1973, at 1474.

43. *Ibid.*: see also *S.A. Government Gazette*, 26th April, 1974, at 1551.

44. "Curtilage" has been defined, with the quaintness which is characteristic of the older common law, as "a little garden, yard, field, or piece of void ground lying near and belonging to the messuage, a little croft, or court, or place of easement, to put cattle in for a time, or to lay in wood, coal, or timber, or such other things necessary for household."—*Pilbrow v. Vestry of St. Leonard, Shoreditch*, [1895] 1 Q.B. 433, at 443, *per* Rigby L.J., quoting from *Stroud's Judicial Dictionary*.

45. See *Russell on Arbitration* (18th ed., 1970) at 69 *et seq.*

misrepresentation had induced the making of the contract⁴⁶. There is no reason to doubt that the words "arising out of" as they occur in the subsection would be given the same meaning. This has curious, though probably not very important, practical consequences⁴⁷.

Much more difficult and important problems of interpretation arise from the phrase "an agreement to submit to arbitration a claim, difference or dispute". *Prima facie* "agreement" seems to be a reference to a complete contract rather than a reference only to a mere part of it such as a single provision or set of provisions. If one notices the careful reference in s.24a(1) to "any provision of an agreement", one might be inclined to infer that s.24a(2)(a) only applies to contracts which have the submission to arbitration as their sole content and objective. Such a construction would not greatly detract from the efficacy of s.24a(2)(b), since *ex post facto* arbitration agreements will normally be concerned with nothing other than the submission to arbitration. However, it would emasculate s.24a(2)(a) completely, since it is typical for anticipatory arbitration clauses that they do not stand on their own, but are incorporated in wider agreements. To ensure that s.24a(2)(a) has the intended effect, "agreement" will therefore have to be construed as including a reference to a provision or provisions of an agreement. The reason for this difficulty is not far to seek: in the original Bill introduced by the Government, s.24a(2)(b) stood alone and the DeGaris amendment [the present clause (a)] was inserted later. Little wonder that the result is not as perfect as it might be⁴⁸.

Assuming that "agreement" includes "provision of an agreement", there can be no doubt that a bare arbitration clause in a contract constitutes "an agreement to submit to arbitration" within the meaning of s.24a(2)(a). It is therefore not rendered void by s.24a(1). It is a question of much greater difficulty whether *Scott v. Avery* clauses are also sheltered by s.24a(2)(a). Provisions as described in s.24a(1)(c)⁴⁹ and in s.24a(1)(b)⁵⁰ are of the *Scott v. Avery* type; they could be regarded as exclusively concerned with the substantive legal consequences of arbitration, once it has taken place, rather than with the creation of mutual obligations to submit to arbitration. On this basis one could argue that they are not "agreements to submit to arbitration".

There is not a great deal of authority relevant to this problem of interpretation. As already observed, the courts have not explored the status of *Scott v. Avery* clauses under the Arbitration Act in any depth. However, some useful inferences can be drawn from a line of English and Australian cases. In *Dennehy v. Bellamy*⁵¹ the plaintiff sued for an indemnity on the basis of an insurance contract which said, *inter alia*, that the defendants (the under-

46. *Monro v. Bognor U.C.* [1915] 3 K.B. 167.

47. An agreement to refer disputes of this type to arbitration would be invalid under s.24a(1).

48. The parliamentary genesis of a statutory provision is not relevant to its interpretation, since the courts are not allowed to take cognizance of parliamentary debates and of other parliamentary materials for purposes of construction—see Pearce, *Statutory interpretation in Australia* (1974) at 46 *et seq.*

49. ". . . any provision of an agreement . . . (c) providing that arbitration is a condition precedent to any right of action."

50. ". . . any provision of an agreement . . . (b) providing that no action shall be maintainable in respect of a claim, difference or dispute unless the claim, difference or dispute has been referred to arbitration, or an award in arbitration proceedings has first been obtained." There is no difference of substance between this clause and s.24a(1)(c)—see *Russell on Arbitration, op. cit.*, at 57.

51. [1938] 2 All E.R. 262.

writers) were liable only to the extent found by an arbitrator to be due. The defendants applied to have the action stayed, relying upon the English equivalent of s.3 of the Arbitration Act⁵². Wrottesley J. ordered that the action be stayed, taking the view that further proceedings would be pointless, since there had been no arbitration and since, in view of the *Scott v. Avery* clause, the plaintiff could not possibly succeed⁵³.

The Court of Appeal agreed with that approach to the problem. Greer L.J. stated⁵⁴:

“The promise to indemnify was not a mere promise to indemnify, but a promise to indemnify to this extent—by paying the sum which should be found by an arbitrator to be due . . . it would have been perfectly useless to anybody to allow the action to go on, because the action must necessarily fail, inasmuch as the plaintiff in the action was not in a position to prove that the condition precedent to his liability had in fact been performed.”

Slesser L.J. explained⁵⁵ that by staying the action the court was really acting in the plaintiff's best interest:

“. . . in all probability, the plaintiff would have been defeated in his action at common law, and would be more likely to suffer injustice by proceeding at common law than he would by proceeding by arbitration.”

This decision of the Court of Appeal has been followed in Australia⁵⁶. It is not necessary in the present context to explore the merits or demerits of the action taken by the Court in *Dennehy v. Bellamy*⁵⁷. Instead we must focus attention upon an unexpressed assumption concerning s.3 of the Arbitration Act (or of the English equivalent thereof). That provision was applied by the Court of Appeal; it follows that the Court must have regarded the defendant, who had applied for a stay of proceedings, as a “party to a submission”, i.e. (according to the statutory definition⁵⁸) as a party to a “written agreement to submit present or future differences to arbitration”. It seems to follow that a *Scott v. Avery* clause, like a bare arbitration clause, is “an agreement to submit to arbitration” within s.24a(2)(a) of the Arbitration Act. This conclusion must be given some chance of judicial acceptance, since it has a good deal of *prima facie* plausibility⁵⁹. However, when all relevant circumstances are taken into account, another view seems ultimately more convincing.

In practice the problem is bound to arise in relation to specific arbitration clauses rather than at the fairly general level at which it has been discussed hitherto. It will therefore be more realistic to focus attention upon some specific and typical arbitration clause, clause 32 of Edition 5b being a suitable

52. *Supra*, n.15.

53. [1938] 2 All E.R. 262, at 264. The only circumstances in which a court might allow the proceedings to continue are probably those outlined *supra*, n.25.

54. *Ibid.*

55. *Id.*, at 266.

56. See *Wadsley v. City Mutual Life Assurance Society Ltd.* [1971] V.R. 140; Brooking, *op. cit.*, at 159.

57. A stay of proceedings seems unsatisfactory from the defendant's point of view when he could, without much difficulty, defeat the plaintiff's action altogether—see Brooking, *op. cit.*, at 159.

58. *Supra*, at n.8.

59. Two academic colleagues whom the writer has consulted have tended after some discussion and reflection, to favour this view.

instance⁶⁰. It is an important feature of that clause that it consists of a number of distinctly separate subclauses: cl. 32(a) contains an agreement to submit future differences to arbitration (if it stood on its own, it would in fact constitute a perfectly self-sufficient *bare* arbitration clause); cl. 32(b) is solely concerned with the separate issue of security for costs whilst cl. 32(c) is intended to satisfy a special legal requirement which exists in Queensland. Finally, the *Scott v. Avery* type provision which makes the arbitrator's award a condition precedent to substantive rights under the contract is contained in cl. 32(d). Cl. 32 of Edition 5b bears out part of Lord Wright's observation in *Heyman v. Darwin's Ltd.*⁶¹ that the "condition precedent" type of arbitration clause may appear in contracts "either instead of, or along with⁶², a clause submitting differences and disputes to arbitration". Before examining the way in which s.24a(2)(a) of the Arbitration Act applies to a provision such as cl. 32, it seems helpful to determine the exact bearing which s.24a(1) would have upon it if s.24a(2)(a) did not exist or were clearly not applicable (e.g. because the contract concerned domestic building work). There cannot be any reasonable doubt that "any provision of an agreement" must be read as potentially applicable to subclauses as well as to complete clauses, otherwise the operation of s.24a(1) could be evaded by the simple device of embodying arbitration clauses in subclauses of the contract. Once this is conceded there can be no doubt that subclauses 32(a) and 32(d) are struck down separately, the former by s.24a(1)(a), the latter by s.24a(1)(b). It might be difficult to come to this conclusion if cl. 32(a) and cl. 32(d) were closely interrelated and incapable of standing on their own. However, it seems that at least cl. 32(d) is inherently severable: cl. 32(a) could operate without cl. 32(d) if the latter happened to be void⁶³. If s.24a(1) strikes the two subclauses down separately, it would be incongruous for s.24a(2)(a) to insist on treating them as one composite whole for the purpose of sheltering them from avoidance. It seems more appropriate for the test embodied in s.24a(2)(a) to be applied separately to the two subclauses. Cl. 32(a) clearly constitutes "an agreement to submit to arbitration", but cl. 32(d) on its own can hardly be so described. Rather, it is a provision purporting to make the accrual of substantive rights under the contract dependent upon arbitration as a condition precedent. It follows that cl. 32(d) is not covered by s.24a(2)(a) and is therefore void in accordance with s.24a(1)(b).

This interpretation has the advantage of bringing South Australian law into line with jurisdictions such as the United Kingdom or Queensland which have introduced legislation to curtail the use of *Scott v. Avery* clauses⁶⁴. It means that clauses such as cl. 32(d) of Edition 5b are void in South Australia even where they relate to major building work.

It will be remembered that Lord Wright suggested in *Heyman v. Darwin's Ltd.*⁶⁵ that *Scott v. Avery* clauses occur unaccompanied by any express provision binding the parties to refer their differences to arbitration. If a clause such as cl. 32(d) of Edition 5b were to appear unaccompanied by an agreement to submit, as contained in cl. 32(a), it seems not at all unlikely that the courts would find such an agreement to submit implied, in accordance with the general principle that a court will read implications into a contract to the

60. *Supra*, at 245.

61. *Supra*, n.6.

62. Italics added.

63. See *Chitty on Contracts* (23rd ed., 1968) vol. 1, at 444 *et seq.*

64. *Supra*, at 10 *et seq.*

65. *Supra*, n.6.

extent that this is necessary to give the contract business efficacy⁶⁶. A *Scott v. Avery* clause carrying such an implication might well be regarded as "an agreement to submit to arbitration" within s.24a(2)(a). However, this problem is probably not worth pursuing since conditions precedent of this type (i.e. unaccompanied by an express agreement to submit) must be extremely rare.

2.6 The Arbitration (Foreign Awards and Agreements) Act, 1974 (C/W)

In 1958 the United Nations Conference on International Commercial Arbitration adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁶⁷. Australia acceded to that Convention on 26th March, 1975. The Arbitration (Foreign Awards and Agreements) Act, 1974 (C/W) which was passed to give effect to the Convention was proclaimed on 24th June, 1975. As Commonwealth law this Act prevails over inconsistent State law and renders it invalid to the extent of the inconsistency⁶⁸. Thus, it must be regarded as superseding s.24a of the Arbitration Act (S.A.) to the extent that the Commonwealth Act is inconsistent with it. Certain parts of s.7 of the Commonwealth Act may well affect the operation of s.24a:

"(1) Where . . .

- (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country⁶⁹ or the Government of a territory of a Convention country, being a territory to which the Convention extends; or
 - (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country, this section applies to the agreement.
- (2) Subject to this Act, where—
- (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
 - (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration,

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter."

In a recent contribution to the *Law Society Bulletin*⁷⁰ it was suggested that s.24a of the Arbitration Act would not render void any arbitration agreement covered by s.7 of the Commonwealth Act. This result would undoubtedly be within the spirit of the Convention. On the other hand, the unimpeded

66. See Lucke, "Ad hoc implications in written contracts" (1973) 5 *Adelaide Law Review* 32.

67. U.N.T.S. Vol. 330, p.3. The text is also reproduced as a Schedule to the Arbitration (Foreign Awards and Agreements) Act, 1974. By September 1975, 48 States, including France, Italy, Japan, the Philippines, Thailand, U.S.S.R., U.S.A. and West and East Germany, had ratified or acceded to the Convention.

68. Commonwealth Constitution, s.109.

69. "Convention country" is defined in s.3 as "a country (other than Australia) that is a Contracting State within the meaning of the Convention".

70. July, 1975, at 4.

operation of s.24a may well be preserved by s.7(5) of the Commonwealth Act which reads as follows:

“A court shall not make an order under sub-section (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.”

A detailed examination of the Commonwealth Act is beyond the scope of this article. Suffice it to note that the South Australian Arbitration Act must now be read against the background provided by the Arbitration Convention and the Commonwealth Act which has sought to give effect to the Convention in Australia.

3. Conclusion

Many South Australian Acts are little more than copies, with or without minor alterations, of English statutes. In the last few years however, South Australia has become very adventurous and has introduced a good deal of pioneering legislation, particularly in the field of consumer protection. Section 24a of the Arbitration Act, 1891-1974 is such an independent South Australian venture: an anti-arbitration measure, intended to ensure that substantive rights do not suffer at the hands of private arbitrators. The new section does not make arbitration illegal, but it restores the freedom of parties to anticipatory arbitration clauses to opt out of the arbitral process when a dispute or difference has actually arisen.

Architects and builders in South Australia will not, perhaps, be very greatly affected by this new enactment, since it seems probable that most of the arbitration in which they become involved relates to “major building work” and is therefore, within the limits which have been explored, immune from s.24a(1). Other anticipatory arbitration clauses, however, are now void and the question arises whether and to what extent this will curtail commercial arbitration in practice. If the existence of s.24a of the Arbitration Act were a matter of common knowledge, arbitration would, for reasons which have already been explained⁷¹, be resorted to less frequently than it has been in the past. It seems likely, however, that many people will fail to appreciate that the anticipatory arbitration agreement to which they have subscribed does not bind them and will in fact submit to arbitration by complying with the clause despite its voidness. If this should happen frequently it is a matter of some practical importance to inquire whether such a *de facto* submission can be withdrawn freely at any time or whether it is irrevocable. The acquiescence which lies in any form of co-operation with the arbitral process could, without much difficulty, be construed as an independent “agreement to submit to arbitration” within the meaning of s.24a(2)(b) of the Arbitration Act. Although such an interpretation of the parties’ conduct would imply the requisite authority for the arbitrator to proceed, it would not in itself make that authority irrevocable. Rather, under common law principles, the authority could be withdrawn by either party at any time prior to the actual making of the award⁷². To become irrevocable the agreement would have to amount to a “submission” within the meaning of s.1 of the Arbitration Act. The difficulty with so regarding it stems from the definition of “submission” in s.27 as “a valid written agreement to submit a claim difference or dispute to arbitration . . .”: the acts of acquiescence or *de facto* compliance which we are

71. *Supra*, at 251.

72. *Supra*, at 246.

examining are not necessarily in writing. Thus, it is at least arguable that a party who complies with a void arbitration clause has a *locus poenitentiae* up to the making of the award.

Commercial arbitration, the settling of private disputes without the assistance of the legal process, is a fact of life which the law has come to tolerate. Nevertheless, it has been found necessary to assert some degree of legal control as a safeguard against abuses. Examples of this are s.9 of the Arbitration Act which empowers the courts to remove arbitrators for misconduct and s.20 which enables the courts to direct the arbitrator to submit relevant questions of law for authoritative judicial decision. Section 24a of the Arbitration Act has added yet further legal complexities to the body of law concerned with what, paradoxically, is essentially a non-legal process.