

THE SUPERVISORY JURISDICTION OF THE COURTS OVER DECISIONS OF LAW BY LAY TRIBUNALS

'WHO IS TO DECIDE THE LAW?'

By JOHN GOLDRING*

[Mr Goldring here outlines some of the problems involved in the increased use of non-judicial tribunals to resolve disputes. In particular, the role of the Courts in supervising the decisions of commercial arbitration tribunals is examined. The supervisory role of the Courts is seen as operating at three stages of the arbitration process. The author details the present nature and extent of court intervention at these stages to illustrate the problems involved in obtaining a satisfactory balance between the interests of the businessman and of the law in the resolution of commercial disputes.]

I INTRODUCTION

Between 1924 and 1974 the number of judges in the Australian Supreme Courts has increased substantially — in Victoria from seven (including an acting judge appointed *vice a judge on leave*) to twenty-one; and in New South Wales from nine to thirty-nine (including the members of the Court of Appeal). In the same period the number of High Court Judges in England (including members of the Court of Appeal) has increased from thirty-two to eighty-nine.

Even though some of the work of the courts may decrease with the introduction of no-fault liability for damage resulting from motor and other accidents, simplified divorce laws *etc.*, it is unlikely that the work of the courts will be greatly reduced. It is likely to continue to increase in geometrical progression. In this case it will be practically impossible to staff the courts.¹

The answer would seem to include not only the introduction of simplified procedures and further limitation of the monetary jurisdiction of the superior courts, but also of adjudication of issues by persons who are not judges. Already in two significant areas of social activity there is

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¹ For a general discussion of this subject see the address by the Chief Justice of N.S.W., Sir John Kerr, to the National Convention of Civil Liberties Councils in Sydney, October 1973, 'The Citizen's Right of Appeal'.

a tendency for disputes to be settled by more or less formal procedures, but outside the judicial system. These are the areas of commercial arbitration and administrative law. For differing reasons disputes are referred to individuals or groups of persons, who are not judges, and very often who are not lawyers. A combination of the desire to avoid expense and delay which seem to be necessary incidents of litigation, and the need for expertise on the part of the tribunal have increased the trend.

It is obvious that an accountant is best qualified to settle matters of accounting practise, and an engineer to decide whether a certain construction has been carried out in a proper way. The alternative would be examination in chief and cross examination by counsel (who have little or no knowledge of the technicalities involved) before an equally ignorant judge, of teams of 'expert witnesses' whose job is to exercise a technical skill not to sit around a court and to answer questions relating to his 'qualifications'. Everyone's time and money is wasted.

However, the tribunal, in order to decide the issue before it, may also have to interpret a document, a contract, a statute, or a by-law. This is a function for which an engineer is as unqualified as is counsel to decide on the appropriateness of a certain design in connection with a planning scheme.

It is desirable and necessary that experts should decide technical matters, and that many decisions of administrators should be reviewed by boards comprised of people with administrative and technical knowledge and experience. However, these boards may not be qualified to decide legal questions. In general, the courts have taken the attitude that only courts can finally decide questions of law.² The courts are comprised of judges whose training and skills fit them for this task. In addition, courts often express the view that the Common Law is noted for its uniformity, because it is administered in one system of courts. Lay and specialized bodies should not be permitted to go off at a tangent and create rules which are different from those of the main body of the law.

For example, in relation to the procedure whereby an arbitrator may state a special case for the opinion of the court, it has been said:

[t]he procedure by special case is a valuable safeguard, because without it there might grow up a system of arbitrators' law independent of, and divergent from, the law administered by the courts; and also, if different arbitrators took different views as to the meaning of a clause in a standard contract, there would be no means of obtaining an authoritative decision.³

The problem would therefore seem to be one of determining the extent to which lay tribunals are to be permitted to decide legal questions and

² See below, pp. 678-80.

³ *Per* Pearson L.J. (as he then was) in *Tersons Ltd v. Stevenage Development Corporation* [1965] 1 Q.B. 37, 55.

the means by which courts may, if at all, review such decisions, consistent with the efficient operation of on one hand, the court system, and, on the other the administration, trade and commerce.

This paper, in examining the problem, will concentrate on review of decisions of law made by commercial arbitration tribunals. The most significant decisions of the courts recently have been in this area, and only brief reference will be made to administrative law, partly because the area is one in which the principles seem to be fairly settled, and because extensive studies of this field exist already.⁴ However, there are obvious parallels between the two areas of law, and these may assist in reaching a solution to the problem.

The conclusions may throw light on a possible solution to the fundamental problem that of whether, in the tradition of the Common Law since the time of Coke, at least, the judges alone should continue to interpret the law, or whether the complexities of modern society require that the courts be freed, either totally, or to some extent of the task of deciding rules of law in certain areas, and that they should abandon this task to the laymen who comprise those tribunals, even though this may lead to a fragmentation of the legal system to some extent.

Perhaps it is unrealistic to assume that today there is a unified system of law. In the area of administration, tribunals, often lay tribunals, have been interpreting statutes and subordinate legislation for many years. The Workers Compensation Commission, and the Crown Employees Appeal Board in N.S.W. and the Australian Taxation Boards of Review and War Pensions Entitlement Tribunals are well-known examples. The Local Government Appeal Tribunal, which includes no lawyers amongst its members, was established recently in N.S.W. to assume some of the jurisdiction of the Land and Valuation Court.

Yet the Courts have always maintained the possibility of reviewing at least some of the decisions of these administrative tribunals: by use of the doctrine of jurisdictional fact; especially in cases where the legislature has enacted a provision purporting or attempting to oust the jurisdiction of the courts to grant relief by way of the prerogative writs,⁵ and by use of those writs, and the injunction and declaratory judgment in other cases. Where an inferior tribunal gives a written decision, or reasons for its

⁴ See, for example, deSmith, *Judicial Review of Administrative Action* (2nd ed. 1965) especially Chapters 3, 7 and 9. Whitmore, 'O! That Way Madness Lies: Judicial Review for Error of Law,' (1967) 2 *Federal Law Review* 159 (an article still of great importance, though written before the significant case of *Anisminic Ltd v. Foreign Compensation Commission* (see below) which is of great importance on the question of 'jurisdictional fact');

Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971) especially Chapters VIII and IX.

⁵ For instance, *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147; *Ex Parte Wurth; Re Tully* (1955) 55 S.R. (N.S.W.) 47.

decision, for example, the courts will issue *certiorari* or make a declaratory judgment when the 'record' of the inferior court discloses on its face an error of law.⁶

Similarly, in respect of commercial arbitration, courts have for a long time quashed or remitted the award of an arbitration whose award shows on its face an error of law.⁷

The existence of this jurisdiction is one which has obviously exercised the legislature, and is the reason for the enactment of 'privative provisions' such as those found in the statutes considered in *Anisminic Ltd v. Foreign Compensation Commission* and *Ex Parte Wurth; Re Tully*.⁸ However, logic seems behind the courts: and it is well established in law that a matter apparently of fact may be a question of law if the existence of a certain fact situation is a necessary condition for the application of a set of legal provisions. This is the 'jurisdictional fact' problem, and it merges with the question of whether a particular issue is one of fact or of law.⁹

In Commercial Arbitration, the basic rule is that although parties have freedom to bind themselves contractually to refer disputes to arbitration, so that the making of the award by the arbitrator is a condition precedent to the bringing of an action (*Scott v. Avery*¹⁰) they may not oust the jurisdiction of the courts entirely. And error of law by the arbitrator, if it is apparent on the face of the award, constitutes a ground upon which the award will be set aside if the matter is brought before the courts.¹¹

Perhaps because government is not so closely involved in commerce as it is in public administration, and therefore does not have such a strong interest in the speedy, informed settlement of differences by a non-judicial tribunal, and also because it may be difficult to achieve by statute, there is, in the law of Commercial Arbitration, nothing which resembles the 'privative' provisions so often found in the administrative law cases. The nearest thing is possibly the agreement of the parties that neither of them

⁶ *R. v. Northumberland Compensation Appeal Tribunal; Ex Parte Shaw* [1951] 1 K.B. 711, affirmed [1952] 1 K.B. 338.

⁷ *Hodgkinson v. Fernie* (1857) 3 C.B.N.S. 189.

⁸ *Supra*, n. 5.

⁹ See Whitmore, *loc. cit.* n. 4 *supra*.

¹⁰ 10 E.R. 1121.

¹¹ *Hodgkinson v. Fernie* n. 7 *supra*. See also *Re Jones and Carter's Arbitration* [1922] 2 Ch. 599, which was a case of statutory arbitration. Although at the time *Hodgkinson v. Fernie* was decided, there was legislation dealing with Arbitration, the Courts found they had an inherent jurisdiction to correct errors of law on the face of awards: and it was an extension of this jurisdiction which the Court found to enable them to issue *certiorari* to inferior tribunals where an error of law appeared on the face of the record. *Racecourse Betting Control Board v. Secretary for Air* [1944] Ch. 114, applied in *Shaw's* case n. 6 *supra*. In its 1973 Working Paper on Commercial Arbitration, the N.S.W. Law Reform Commission has recommended that review of awards for error on the face be abolished (para. 208) but in view of the historical development of the doctrine and the jealousy of the courts of their jurisdiction, extremely clear language would seem necessary.

shall challenge in any court by any means the award of the arbitrator. It is at least questionable that such an agreement is valid, as it would seem to constitute an ouster of the jurisdiction of the courts. However, if the parties refer to arbitration a matter which is solely a question of law, and that is the only matter which is referred to arbitration, then the courts will not set aside the award even if on its face, it contains what the court thinks to be an error of law. With respect, this seems to be anomalous, even though it may accord with the actual wishes of the parties, who may wish to dispose of the matter quickly and privately, and without the possibility of delay and expense which is necessarily involved in an appeal to a higher court.¹²

This matter has been considered by the N.S.W. Law Reform Commission in its 1973 Working Paper on Commercial Arbitration. This Working Paper in general, takes a view of commercial arbitration which, in my submission, is unreal in modern society. It assumes that freedom of contract is a meaningful concept in modern society (which I would deny) and that it is a concept to which the fullest possible effect should be given in the area of commercial arbitration. It follows from this that if the parties were to preclude recourse to, or review of the award by, the courts, no matter how wide the terms of this preclusion, they should be permitted by law to do so: in other words, the provision in the arbitration

¹² *Government of Kelantan v. Duff Development Co. Ltd* [1923] A.C. 395, per Viscount Cave L.C. at 409. See also *Re King and Duveen* [1913] 2 K.B. 32; *Wulff v. Dreyfus* (1917) 86 L.J.K.B. 1368. However, in such a case, if the error of law results from intentional disregard of the law by the arbitrator, there is misconduct and the court will be justified in setting aside the award under s. 13(2) of the Arbitration Act (N.S.W.) 1902, as amended, and equivalent provisions. See *Darlington Wagon Co. v. Harding* [1891] 1 Q.B. 245. *David Taylor & Son Ltd v. Barnett* [1953] 1 All E.R. 843. The N.S.W. Law Reform Commission has recommended that even where the matter referred to arbitration is a question of law, the court will have supervisory jurisdiction and will have the power to correct this by remitting the award to the arbitrator with a direction on law (Working Paper para. 238, Draft Bill s. 52(4)(c)). However, this section is subject to the remarks noted *infra* at n. 13. The use of '*Scott v. Avery* clauses' has worked injustice, and many criticisms have been made of the use of such clauses. For instance, it is reported that the South Australian Government is planning to introduce legislation to render such clauses ineffective so that the aggrieved party to a contract containing a *Scott v. Avery* clause would be free to approach the Courts directly. It is not quite certain from this report to what extent the South Australian Government intends to go but Sections 24 and 25 of the U.K. Arbitration Act 1950 gives to the Court power to order that a *Scott v. Avery* clause shall cease to have effect in certain cases. Such clauses are also ineffective in insurance policies in Victoria under Section 28 of the Instruments Act 1958 and also in certain policies of insurance of goods under hire purchase where the governing law is that of N.S.W. by virtue of Section 22(2) of the Hire Purchase Act 1960 (as amended). The Law Reform Commissions of Queensland recommended following the United Kingdom provision and the legislature has done so in Sections 32 and 33 of the 1973 Act. The Law Reform Commissions in South Australia and Western Australia have made similar recommendations. The A.C.T. Law Reform Commission has recommended that a *Scott v. Avery* clause be read only as an agreement to arbitrate, probably along lines followed in the English legislation, and in Part 2, Section 2 of its Working Paper on Commercial Arbitration the N.S.W. Law Reform Commission has recommended that such clauses be void in the case of 'Contracts of Adhesion' and that the English provisions should be followed in other cases.

agreement to this effect would by statute be deemed not to be an ouster of jurisdiction. It remains to be seen whether this recommendation will be adopted by the legislature, and if it is, whether or not the courts will find some means of maintaining the possibility of judicial review.

II THE SUPERVISORY JURISDICTION OF THE COURTS IN RESPECT OF COMMERCIAL ARBITRATION.¹⁴

(a) BACKGROUND—OBSERVANCE OF LEGAL RULES

The courts exercise their power of supervision over arbitrators in a number of ways. For the purposes of this paper, 'Arbitration' will be taken to refer only to commercial arbitration, under the Arbitration acts — and reference will be made here to the Victorian Arbitration Act 1958. (The N.S.W. Arbitration Act 1902 is in virtually identical terms.) This was an Act based on the English Act of 1889. Most of the basic principles embodied in the Act are still to be found in the more recent English Arbitration Act of 1950 (which has been followed to a great extent in the Queensland legislation of 1973). However, the 1950 Act does contain a number of provisions which differ significantly from, and build upon, the provisions of the earlier legislation.

Virtually all arbitration of a commercial type takes place under the provisions of this Act; no reference will be made in this paper to the various kinds of statutory arbitration that may be found in Australia, particularly industrial arbitration and arbitration under the various statutes relating to local government. This type of arbitration more properly falls under the heading of Administrative Law, as it is an instance of the government delegating the determination of certain issues to a non-judicial body for determination; it is not the result of a *contractual* agreement by the parties to refer the matters to a tribunal of that type.

The courts supervise the conduct of arbitration under the Arbitration Act principally at three stages of the proceedings. First, they may prevent an agreement of the parties to refer a dispute to arbitration from being put into effect, by refusing a stay of proceedings which, under section 5 of the Act, the court may grant to the other party to the arbitration agreement where the party commences proceedings in breach of the agreement

¹³ The Commission, in its Working Paper, has taken the view that if the parties choose to do so, they may by their agreement exclude the supervisory jurisdiction of the court. They may wish to do so because they wish that their differences or disputes — submitted to arbitration — be decided finally and swiftly without publicity and expense. See the Working Paper, paras 208, 248. Draft bill *e.g.* ss. 44, 52(8).

¹⁴ See for a rather general introduction to this subject Schmitthoff 'Arbitration, The Supervisory Jurisdiction of the Courts' [1967] *Journal of Business Law* 318, also appearing as 'The Supervisory Jurisdiction of the English Courts' in P. Sanders ed., *International Arbitration: Liber Amicorum for Martin Domke* (1967); *Russell on Arbitration* (18th ed. by Walton, 1970); Chaps. 6, 10, 11 and especially 15; *Halsbury's Laws of England* (4th ed.), Vol. 2, paras. 543-60; 599-602; 517-623.

to refer matters in dispute to arbitration. Secondly, under sections 8(6) and 19 of the Act the arbitrators may state a special case on a point of law for the opinion of the court at any stage in the proceedings, or state the award in the form of a special case either of their own motion or on the request of one or more of the parties. Section 19 provides that the court may require that the arbitrator or arbitrators do so. Thirdly, the court may review the award made by the arbitrator on an application to set it aside under section 12, on proceedings to enforce the award, or in proceedings for a declaration or injunction which challenges the award.

Before considering each of these circumstances in detail, it is worth noting that it is the law that the arbitration must be conducted in accordance with the rules of law.¹⁵ In certain other systems of law, parties are permitted to refer their disputes to a third party to be settled by him according to the principles of 'equity and good conscience' (*ex aequo et bono*)¹⁶ but this is not the case in English law. Where a clause in an arbitration agreement provided:

The Arbitrators and Umpire are relieved from all judicial formalities and may abstain from following the strict rules of law. They shall settle any dispute under this Agreement according to an equitable rather than a strictly legal interpretation of its terms . . .¹⁷

the court held that nevertheless the arbitrators were bound to observe the laws of England. Megaw J. said:

it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognisable system of law, which primarily and normally would be the law of England, and they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles, which, of course, does not mean 'equity' in the legal sense of the word at all.¹⁸

It is perhaps worthy of note that in this case neither of the parties were English in any sense, and the dispute involved reinsurance particularly of Canadian policies.

The requirement that the courts apply the Common Law would not seem to preclude the application of the Rules of Equity, which for this purpose are to be taken as part of the Common Law.¹⁹

¹⁵ The leading statement to this effect is that of Scrutton L.J. in *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478, 487-8.

¹⁶ See articles by Scheuner and Sohn in Sanders, n. 14 *supra*. These articles relate particularly to the use of the term in international law; but similar concepts are embodied in the law of a number of States having roman-based legal systems.

¹⁷ *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekering* [1962] 2 Ll.L.R. 257.

¹⁸ *Orion* case, n. 17 *supra* at 264, applying *dicta* of the Court of Appeal, and particularly of Scrutton L.J. in *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478.

¹⁹ *Rolls & Co. Ltd v. J. Alastair McGregor & Co. Pty Ltd* (unreported 24/10/73, S.C. of South Australia).

Given that the courts in common law countries are obliged to apply the common law, it follows that there may be a requirement of public policy that the courts should intervene to ensure that that body of rules which comprises the common law should be maintained as a unity interpreted and applied by the same system of courts.²⁰ This is a jurisdiction which seems to have been inherent, and only recently have the courts articulated the reasons in the manner adopted by Pearson L.J.²¹ However, it is the basis of the whole system of precedent in English law, and the courts have for a long time stated that they will intervene to ensure that inferior tribunals decide 'regularly and according to law'²² in addition to deciding only matters within their proper jurisdiction.

(b) REFUSAL TO GRANT A STAY OF PROCEEDINGS PENDING ARBITRATION

The policy of the courts has been that if the parties agree that their differences should be settled by a third person, then one of those parties, in breach of that agreement, will not be permitted to bring an action in the courts arising from any difference. However, while the parties may agree that the making of an award by an arbitrator is a condition precedent to the bringing of an action in the courts²³ they cannot completely oust the jurisdiction of the courts. The policy of the courts is now enacted as section 5 of the Arbitration Act. This provides that so long as the party seeking the stay has not taken any steps in the litigation, other than entering an appearance, and provided 'that the Court or a Judge is satisfied that there is no sufficient reason why the matter should not be referred [to arbitration] in accordance with the submission' and proceedings may be stayed.²⁴ The wording of the section indicates that there are circumstances in which a stay will be refused.²⁵

²⁰ See the statement of Pearson L.J. at n. 3 *supra*. See also the reasoning of the courts in *Shaw's* case n. 6 *supra*.

²¹ N. 3 *supra*.

²² In *R. v. Bolton* (1841) 1 Q.B. 66; 113 E.R. 1054. Lord Denman C.J. used this expression, in addition to remarks he made relating to the jurisdiction of inferior tribunals.

²³ *Scott v. Avery* (n. 10 *supra*).

²⁴ *Heyman v. Darwins Ltd* [1942] A.C. 356 deals with the question of staying proceedings. See especially *per* Lord Macmillan at 373.

²⁵ These reasons include cases where there are reasonable grounds for believing that the arbitrator will act improperly (see *Bristol Corporation v. John Aird & Co.* [1913] A.C. 241, 258) or where the arbitration necessarily involves the determination of an issue as to whether one of the parties is guilty of fraud, as this is a matter which ought to be decided in open court: *Carter v. Merewether* (1898) 15 W.N. (N.S.W.) 95; *Church v. Gibson* (1902) 2 S.R. (N.S.W.) (Eq.) 207; *Radio Publicity (Universal) Ltd v. Cie. Luxembourgeoise de Radiodifusion* [1936] 2 All E.R. 721; *Radford v. Hair* [1971] Ch. 758. The Court of Appeal has recently decided that where a plaintiff can get legal aid to bring an action, but cannot be legally aided in arbitration proceedings so that to grant a stay is likely to deprive him of any rights, then a stay will be refused; *Fakes v. Taylor Woodrow Construction Ltd* [1973] 2 W.L.R. 161. A stay may also be refused where the matter raises a foreign element that might be more conveniently determined in a foreign tribunal see *The Fehmarn* [1957] 1 W.L.R. 815, though this is always a matter for the court's discretion.

In general, because the arbitrator has the power to state a case for the opinion of the court on a point of law and may be compelled to do so under section 19, the courts have generally taken the view that it is pointless to grant a stay because it is likely that the point will be referred back to the court.²⁶ However, a stay will normally be granted if any question of fact or matter involving technical expertise is involved, as these are matters more appropriate to the arbitral tribunal.²⁷ It is only when the matter is a 'pure' question of law that the court will refuse a stay; indeed, in such cases the courts have often said that arbitral tribunals are not appropriate forums for determining such issues.²⁸

The refusal to grant a stay ensures that it is the court, rather than the lay tribunal, which decides the issues.

(c) THE CASE STATED FOR THE OPINION OF THE COURT

It is the provision (contained for the purposes of this paper in section 19 of the Arbitration Act) that an arbitrator may state a case for the opinion of the court on a point of law, or may be directed to do so by a judge, that has given rise to the most recent case law on the supervisory jurisdiction of the courts, and has raised the issue of whether that is a proper jurisdiction for the courts to exercise. The particular cases will be examined later, but the general state of the law relating to the consultative stated case will be considered as part of the general survey of the law.

As pointed out earlier, it is common that an arbitrator is not a person trained in the law, though he may have other skills. It was for this reason that statutory provision was made to enable the arbitrator, if disturbed by a question of law, to obtain the opinion of the court; or for one of the parties to the arbitration, who might be dissatisfied with the decision of an arbitrator on a point of law, to request the arbitrator to do so, or, if the arbitrator refused to do so, to apply to the court for an order compelling him to state a case. The facts of the recent case of *Halfdan Grieg & Co. A/S v. Sterling Coal & Navigation Corp.*²⁹ provide an illustration of this. The case concerned an arbitration under a charter-party. The dispute involved the liability of the charterers. The events took place in 1964, but the arbitration did not commence until 1972. In the course of the arbitration, counsel for the owners requested that the arbitrators state their award in the form of a special case,³⁰ but the arbitrators refused to

²⁶ *Per* Evershed M.R. in *Martin v. Selsdon (No. 2)* (1950) 67 R.P.C. 64, 69, and see *Bristol Corporation v. John Aird & Co.* n. 25 *supra*.

²⁷ *Heyman v. Darwins Ltd* (n. 24 *supra*).

²⁸ See *Fairclough, Dodd & Jones Ltd v. J. H. Vantol Ltd* [1957] 1 W.L.R. 136, 137, 144; *Peter Cassidy Seed Co. Ltd v. Osuustukkukauppa I.L.* [1957] 1 W.L.R. 273, 279; *Re Phoenix Timber Co. Ltd's Application* [1958] 2 Q.B. 1, 5.

²⁹ [1973] 2 W.L.R. 904, reversing [1973] 2 W.L.R. 237. The decision at first instance is the subject of a note by Glover, 'Court or Arbitrator?' (1973) 123 *New Law Journal* 583.

³⁰ This procedure is possibly not available in N.S.W. Section 9 provides that an arbitrator, in the absence of agreement to the contrary, may state his award in the

do so, on the ground that even if the issue were a question of law, it was one which was more suitable for decision by a commercial arbitration tribunal than by a court of law, and its decision by the court would not warrant the additional delay and expense. The owners thereupon sought an order from the judge directing the arbitrators to state their award in the form of a special case for the opinion of the court. It was the decision of Kerr J., declining to make the order, which was unusual and took the course of the proceedings out of a very usual routine.

In Australia the opinion of the court is consultative only³¹ and even though the arbitrators act in complete good faith and follow the opinion of the court, a higher court may still find that they have made an error of law if the higher court differs from the court which was originally asked for an opinion.³²

It would seem that the arbitrator ought to state a case for the opinion of the court where a request is made by a party *bona fide* and on reasonable grounds.³³ Until 1973 it seemed clear that the arbitrator had a discretion whether or not he should state a case, and the court also had a discretion whether or not to order him to do so, even where the matter sought to be referred for opinion was a matter of pure law. This was considered by McLennan J. of the High Court of Ontario in 1960.³⁴ In considering a section of the Ontario Arbitration Act 1950 which permits an arbitrator to state a case for the opinion of the court and which requires that he should do so if directed to do so by the court, His Honour said:

Under this section a party to a reference is not entitled as of right to an order directing the arbitrators . . . to state a special case and whether or not such an order ought to be made is in the discretion of the Court and each must depend on its own facts and circumstances . . .³⁵

In that case the only question in dispute was one of law. Arbitrators were appointed by each side, and a judge of a lower court was appointed umpire. As a result His Honour said:

Some meaning must be attributed to the words 'arising in the course of the reference' as they appear in s. 26. The question of law in this case did not

form of a special case; but it gives no power to the Court to order him to do so. The Court's only power is to order the statement of a special case under s. 19, and presumably this does not empower the ordering of the *award* in the form of a special case.

³¹ *In re Knight and Tabernacle Permanent Building Society* [1892] 2 Q.B. 613; *Carr v. Wodonga Shire* (1924) 34 C.L.R. 234; *In re Pridham Holdings Limited v. Smorgon Consolidated Industries Pty Ltd* [1974] V.R. 231. The exception may be in Queensland as a result of the 1973 Act.

³² *Tuta Products Ltd v. Hutcherson Bros Pty Ltd* (1971-1972) 46 A.L.J.R. 119.

³³ *In re Pridham Holdings Ltd* (*supra*, n. 31); *Halfdan Grieg & Co. A/S v. Sterling Coal & Navigation Corporation* (*supra*, n. 29).

³⁴ *Re Canadian Line Materials Ltd* (1960) 22 D.L.R. (2d) 741 (Ontario High Court).

³⁵ *Ibid.*, 744.

arise in the course of the reference, for it is the whole reference. The effect of making the order asked, in substance if not in form, would be to put an end to the arbitration and substitute the Court for the forum agreed upon.³⁶

It would seem that the approach underlying this Canadian decision is the view that where parties have chosen by their agreement that differences between them should be settled by arbitration, rather than in the courts, their choice should be respected and enforced by the courts. Even if the arbitral tribunal does err in deciding a question of law the courts may well choose to intervene to correct the error.³⁷

These statements were criticized by Menhennit J. in *Re Pridham Holdings Ltd.*³⁸ His Honour found that they went further than was warranted by the authorities and were not necessary for the decision of the case. However, they are an example of an extreme of the judicial approach to this question where the parties have by agreement referred their disputes to arbitration. Perhaps the most extreme statement at the other end of the spectrum is that of Scrutton L.J. in *Czarnikow v. Roth, Schmidt & Co.*³⁹ His Lordship said:

the Courts, if one of these parties brings an action, never treats this [arbitration] agreement as conclusively preventing the Courts from hearing the dispute. They consider the merits of the case, including the fact of the agreement of the parties, and either stay the action or allow it to proceed according to the view they form of the best method of procedure; and they have always in my experience declined to fetter their discretion by laying down any fixed rules on which they will exercise it. If they allow the action to proceed they pay no further attention, and give no legal effect, to any further proceedings in the arbitration: *Doleman Sons v. Ossett Corporation*.⁴⁰ They do not allow the agreement of private parties to oust the jurisdiction of the King's Courts. Arbitrators, unless expressly otherwise authorised, have to apply the laws of England. When they are persons untrained in law, and especially when as in this case they allow persons trained in law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act that, not only may they ask the Courts for guidance and the solution of their legal problems in special cases stated at their own instance, but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of a party to the arbitration if the Courts think it proper. This is done in order that the Courts may insure the proper administration of the law by inferior tribunals. In my view to allow English citizens to exclude this safeguard for the administration of the law is contrary to public policy. There must be no *Alsatia* in England where the King's writ does not run.⁴¹

³⁶ *Ibid.*

³⁷ See *infra*, p. 687. The section of the Ontario Act considered by McLennan J. was wider than any Australian or English legislation, as it provides that an arbitrator may be required to give reasons for his findings of fact and law. This opens virtually unlimited areas for judicial review.

³⁸ [1974] V.R. 231 (n. 31, *supra*).

³⁹ [1922] 2 K.B. 478.

⁴⁰ [1912] 3 K.B. 257, 269.

⁴¹ [1922] 2 K.B. 478, 487-8.

This was a case where the court was considering an arbitration agreement which incorporated rules of an association providing that the parties would not ask for a case to be stated or apply for an order to that effect. The arbitrators refused to state a case, and further, refused to delay the issue of their award so that the party could apply to the courts for an order directing the statement of a special case. They were ordered to do so. The case will be considered below in relation to misconduct, but it does indicate the extreme view that the Courts, and only the Courts, should be judges of law.

This view is one which has caused regret to a number of judges, including, recently, the Chief Justice of Australia,⁴² who would, presumably, prefer to leave the parties to their free contractual choice.

Many arbitration clauses are contained in so-called 'standard form' contracts, such as insurance policies and standard building and finance contracts. In these cases the choice of arbitration as a means for the settlement of differences is, in fact, that of one party only. That party has often made the choice because the privacy of arbitration enables him to escape publicity; because the cost of arbitration, for which no legal aid is available, may be a bar to the pressing of claims, and because delaying tactics are more readily available in the case of arbitration than in proceedings before the courts.⁴³ Yet the judges who uphold the binding nature of an agreement embodying such a 'free choice' by the parties may be the same judges who are most vehement in preserving the exclusive jurisdiction of the courts to decide all questions of law.

It is clear from *Czarnikow v. Roth, Schmidt & Co.*⁴⁴ that where the parties in their arbitration agreement seek to exclude the possibility of judicial review of the award by precluding the arbitrator from stating a case on a point of law for the opinion of the court or by binding the parties not to apply for an order requiring the arbitrator to state a case, such a provision is void: an attempt in this way to oust the jurisdiction of the court is against public policy.

In *Rolls & Son (Produce) Ltd v. J. Alastair McGregor & Co. Pty Ltd*⁴⁵ Wells J. considered an agreement to arbitrate subject to the terms and conditions of the Arbitration Agreement of the International Wool Trade Organization, which provided, *inter alia*, (Rule 9) that the dispute would be referred to arbitrators; any request to them to state a case for

⁴² Barwick C.J. in *Tuta Products Pty Ltd v. Hutcherson Bros Pty Ltd* (*supra*, n. 32, 46 A.L.J.R. at 120).

⁴³ See N.S.W. Law Reform Commission, 1973 Working Paper in Commercial Arbitration, Part 2, Section 2; A.C.T. Law Reform Commission, 1973 Working Paper on Commercial Arbitration, Part III(4), 'Legal Aid in Arbitration'. The case of *Fakes v. Taylor Woodrow Constructions Ltd* [1973] 2 W.L.R. 161 is an outstanding example of this.

⁴⁴ [1922] 2 K.B. 478 (above, n. 15).

⁴⁵ Unreported, Supreme Court of South Australia, 24/10/73, Wells J.

the opinion of the court should be considered; if they decided not to refuse the request, they were to refer it to the National Committee, which also would have power to refuse the request; and if the Committee decided not to refuse the request, it was to refer the matter to a legal practitioner of its own choosing, and the answer given by that legal practitioner should be binding. Unlike the *Czarnikow* case,⁴⁶ there was no purported restriction on the rights of the parties to apply to the court for an order that the arbitrators should state a case.

Section 20 of the South Australian Arbitration Act, 1891-1934 provides, in terms similar to those of section 19 of the Victorian Act, that the arbitrator may at any time during the proceedings under a reference, and that if so directed by the court should state a case for the opinion of the court. Section 6 of the (South Australian) Act provides that 'unless the submission expresses a contrary opinion' the arbitrators should have power to state the whole or part of their award in the form of a special case for the opinion of the court. Wells J. held that the Rules were a sufficient 'contrary intention' so that section 6 had no application.

In the course of the arbitration a request was made for the statement of a special case. The arbitrators dealt with this in accordance with Rule 9, and decided to refuse the request. It was submitted that Rule 9 was void as contrary to public policy, and that on refusing the request, the arbitrators were guilty of 'technical' misconduct.

Wells J. found that section 20 was in no way restricted by the Rules: nor could it be. Any attempt to restrict it would be void. Even though a request by a party to state a case could not lead *directly* to the statement of a case, under section 20 either the arbitrators could state a case on their own initiative, or the party could obtain an order directing the statement of a case. His Honour emphasised that the arbitrators' power to state a case is discretionary; and that of the courts to order the statement of a case under section 20 of the S.A. Act is in the nature of a quasi-judicial discretion. It would not be exercised without good cause. Here the fact that the request was made conditional on the arbitrators making an award in favour of the party other than that making the request was indicative of the fact that there were grounds for treating the request as the arbitrators had in fact done.

What, then, are the circumstances in which an arbitrator should state a special case, or in which the courts should require him to do so? The most recent statement is that of Lord Denning M.R. in the *Halfdan Grieg* case:

[w]hen one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are

⁴⁶ *Supra*, nn. 15, 44.

on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites:

The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law: see *In Re Nuttall and Lynton and Barnstaple Railway Co.*⁴⁷—as distinct from a point which is dependent on the special expertise of the arbitrator or umpire: see *Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekeringe*.⁴⁸

The point of law should be clear cut and capable of being accurately stated as a point of law—as distinct from the dressing up of a matter of fact as if it were a point of law.

The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case—as distinct from a side issue of little importance.

If those three requisites are satisfied, the arbitrator or umpire should state a case. He should not be deterred from doing so by such suggestions as these: it may be suggested that a special case should be reserved for cases which are of general application (such as the construction of a standard form) or which would elucidate or add to the general principles of law (such as the doctrine of frustration or repudiation). I would not so limit the stating of a special case. In most cases the parties themselves are concerned, not with general principles, but with their particular dispute. If the case does involve a point of law which satisfies the requisites which I have mentioned, either of the parties should be enabled to have it decided by a judge of the High Court. When the parties agree to arbitrate, it is, by our law, on the assumption that a point of law can, in a proper case, be referred to the courts.

It may be suggested that if the point of law is only as to the construction of a particular document or of the words in it as—applied to the proved facts—then it should be left to the arbitrator or umpire. I do not agree. Most of the special cases are stated on points of construction. No one hitherto has thought that they should be refused on that ground.

It may be suggested that, if the point of law is only as to the proper inference, or the appropriate implication—to be drawn from the proved facts—then it should be left to the arbitrator or umpire. Again, I do not agree. Some of the most important awards have been of that kind, see, for instance, *In re Comptoir Commercial Anversois and Power, Son and Co.*⁴⁹

It may be suggested that if only a small sum is in dispute, a special case should be refused. Sometimes a small sum can involve big issues of much importance for the parties. In those cases a special case should be stated. But when the sum is so small as not to justify further time or money being spent on it, it should be refused.

Whilst setting out those guidelines, I would give a word of warning: the arbitrator or umpire should be watchful to see that the procedure by

⁴⁷ (1899) 82 L.T. 17.

⁴⁸ *Supra*, n. 17.

⁴⁹ [1920] 1 K.B. 868, 898.

special case is not abused. The *Commercial Court Users Conference Report*, over which Pearson J. presided in 1962⁵⁰ drew attention to abuses such as a special case on 'whether upon the facts found by the umpire his ultimate decision is correct'.⁵¹ That is why I have said that the point of law should be clear cut. Other abuses spring readily to mind. A party may seek to raise a point of law which is too plain for serious argument. Or he may seek to use it as a means of delaying the day when a final award is made against him. In all cases where the arbitrator or umpire is of opinion that the application is not raised *bona fide*, but for some ulterior motive, he should, of course, refuse it.⁵²

His Lordship then went on to decide whether the circumstances of the case required that the arbitrator state a special case for the opinion of the court. He decided that this was a situation where, in normal practice, the statement of a special case should be ordered, and would have been but for the matters of principle which had been considered by Kerr J.⁵³ Kerr J. had considered whether the circumstances had changed since Scrutton L.J. had delivered his judgment in *Czarnikow Ltd. v. Roth, Schmidt & Co.*⁵⁴ He found that they had; arbitrators were now far more accustomed to hearing counsel, particularly where the arbitration concerned points of law. Further, in the intervening 50 years, a close relationship had grown up between arbitrators in London and the Commercial Court. These factors led him to decide that in the circumstances the point which had arisen was one which the expertise of the arbitrators who had been appointed in the particular case qualified them to decide, even though they were not lawyers. Therefore he upheld the decision of the arbitrators that the statement of a special case for the opinion of the court was not, in the circumstances, justified, and refused to order them to state the case. However, in the view of Lord Denning M.R., the circumstances had not changed to the extent that Kerr J. had found, and he found that the matters of principle had not changed at all. The law was as it had always been, and the courts retained exactly the same freedom to require arbitrators to state a special case for the opinion of the court if the traditional conditions had been fulfilled. In reaching his conclusions, Kerr J. had relied on *dicta* of Megaw J. (as he then was) in the *Orion* case.⁵⁵ Yet Megaw L.J. was a member of the Court of Appeal in the *Halfdan Grieg* case, and both he and Scarman L.J. agreed with the Master of the Rolls. However, it could not be said that the view which Megaw J. expressed in the *Orion* case as to the discretion of arbitrators to state a case on a point of law for the opinion of the court has been overruled, merely that the discretion is not to be interpreted as widely as Kerr J. had interpreted

⁵⁰ Comd. 1616.

⁵¹ *Ibid.*, p. 21 A(b).

⁵² [1973] 2 W.L.R. 904, 908-9.

⁵³ [1973] 2 W.L.R. 237, especially 242-4.

⁵⁴ *Supra*, n. 41.

⁵⁵ *Supra*, n. 17.

it. This conclusion would also seem to follow from the decision of Menhennitt J. in *Re Pridham Holdings Ltd.*⁵⁶

In that case the arbitrator was a busy and experienced Melbourne silk. The dispute involved construction of a provision in a contract. One of the parties contended that in order to solve the dispute, and more particularly in order to make proper submissions to the arbitrator, it would require discovery and inspection of certain documents in the possession of the other party. The other party objected to discovering the documents, saying that if it did discover the documents and permit the applicant to inspect them, it would suffer damage, even if it were to succeed in the arbitration. The arbitrator ordered discovery. When asked to state a case for the opinion of the court as to whether or not he should order discovery he declined to do so, and gave his reasons, but, quite properly, as Menhennitt J. found,⁵⁷ adjourned the proceedings to permit the applicant to approach the court. Menhennitt J. had before him the decision of Kerr J. in *Halfdan Grieg*⁵⁸ but reached the same conclusion as did all the members of the Court of Appeal. He expressed the view that this was a case in which the views of the court on the point of law should be sought, especially as the decision would be of profound importance for the parties. Arguments were advanced that as the question was one of law, and as the arbitrator was a learned and experienced lawyer, he might decide the question of law quite properly, but in the view of the Judge, this was not a reason for failing to order a stated case. It might, however, be most influential if later there should be an application to set aside the award for error of law, as such an arbitrator's views on the law would naturally carry great weight with the court. The arbitrator was ordered to state a case for the opinion of the court.

It is reasonable to assume that on the basis of this decision, the law in Australia is the same as it is in England, despite the differences in the wording of the respective arbitration Acts. In *Carr v. Wodonga Shire*⁵⁹ the High Court stated that the power of the court to order the statement of a case was discretionary; in that case no rules were laid down as to the exercise of the discretion but it was referred to by Menhennitt J.⁶⁰ and would seem to indicate that the law in Australia is as in England, *i.e.* the discretion is a limited one.

⁵⁶ *Supra*, n. 33. See also *Rolls v. McGregor*, *supra*, n. 45.

⁵⁷ The conclusion is correct. As Menhennitt J. pointed out, Bankes L.J. in *General Rubber Co. Ltd v. Hessa Rubber Maatschappij* (1927) 28 L.I.L.R. 362, 363, indicated that this was the proper procedure where an arbitrator exercised his discretion not to state a special case; *Czarnikow Ltd v. Roth, Schmidt & Co.* (*supra*, n. 41) would indicate that, if the arbitrator refused to allow the party time to make application to the court for an order directing a stated case he would be guilty of misconduct.

⁵⁸ *Supra*, n. 29.

⁵⁹ (1924) 34 C.L.R. 234.

⁶⁰ *In Re Pridham Holdings Ltd* [1974] V.R. 231; *Rolls v. McGregor* (*supra*, n. 45).

(d) THE POWER TO SET ASIDE AN AWARD FOR MISCONDUCT

Section 12 of the Arbitration Act is as follows:

- (1) Where an arbitrator or umpire has misconducted himself the Court may remove him.
- (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

The making of an error of law by an arbitrator is not *per se* misconduct, unless it is connected in some way with fraud, bias, *etc.* However, it is noteworthy that if an arbitrator fails to state a case, and also refuses a party an opportunity to apply to the court to compel him (the arbitrator) to state a case for the opinion of the court on a point of law, he *is* guilty of misconduct, and any award he makes is liable to be set aside under this section. This follows from *Czarnikow Ltd v. Roth, Schmidt & Co.*,⁶¹ where such an instance occurred. The statement of Scrutton L.J., with whom the other members of the Court of Appeal agreed, indicates that the courts regard this section as yet another means of ensuring that in the course of the arbitration proceedings, should the parties so desire that the courts are to decide on issues of law, nothing will prevent the courts from so doing.

In *Rolls v. McGregor*, it was argued that the refusal of the arbitrators to state a case constituted misconduct within the meaning of section 9 (of the S.A. Act, corresponding to section 8(b)(c) of the Victorian Act) and this was sufficient to justify the court in setting the award aside. His Honour said:

[u]nless the arbitrators are shown to have acted upon a wrong principle, or to have taken into account irrelevant considerations or to have left out of account relevant considerations, the exercise of their discretion, on good faith . . . cannot be challenged . . . To constitute misconduct within the meaning of s. 9 a refusal to state a case upon request or invitation must, in my opinion, be linked with some other element of misfeasance, such as wilful refusal to grant an adjournment to enable an application to be made to the court under s. 20. Other kinds of misfeasance attributable to corruption, bad faith or bias could have the same consequence.⁶²

On this ground the refusal, which was made in good faith, was found not to be misconduct.

It is also misconduct if the arbitrator agrees to state a case for the opinion of the court on condition that a sum of money is paid to him on account of legal costs before he does so.⁶³

It would seem to be a misconduct for an arbitrator to refuse to state a special case upon a question of law arising in the course of a reference.⁶⁴

⁶¹ *Supra*, n. 15, and see the passage from the judgment of Scrutton L.J. at pp. 9, 10 above. See also *Re Palmer & Co. and Hosken & Co.* [1898] 1 Q.B. 131; *Buerger & Co. v. Barnett* (1920) 89 L.J.K.B. 161.

⁶² TAN 45.

⁶³ *Re Enoch and Zaretsky, Bock & Co.'s Arbitration* [1910] 1 K.B. 327.

(e) THE INHERENT JURISDICTION OF THE COURT TO SET ASIDE AWARDS FOR ERROR OF LAW APPARENT ON THEIR FACE.

This is a power exercisable by the courts in the case of both arbitral tribunals and other inferior tribunals. The origin is common, and indeed, when the doctrine was first applied to administrative tribunals⁶⁵ the courts referred to the cases which had been decided in respect of arbitral tribunals. The earliest recorded statement on the matter was that of Holt C.J. in *The Parish of Ricelip v. The Parish of Henden*,⁶⁶ but the doctrine was firmly stated with respect to arbitration in *Kent v. Elstob*,⁶⁷ where all the judges who sat assumed that where an arbitrator gives reasons for the making of his award, he does so in order to give to a dissatisfied party the opportunity of bringing the matter before the court. Lawrence J. goes so far as to say that it is not necessary that reasons be given for the courts to intervene to correct an error,⁶⁸ but this opinion has not become part of the law. Since *Hodgkinson v. Fernie*⁶⁹ it has not been questioned that this is part of the jurisdiction of the courts, though judges⁷⁰ and others⁷¹ have regretted that this is so. The main reason is that they consider that where parties express in an agreement a wish that differences should be referred to the decision of arbitrators their wish ought to be respected.

In *Rolls v. McGregor*⁷² where it was submitted that the arbitrators had made an error of law which was apparent on the face of the record, Wells J. said:

[w]ithin permitted limits, the parties have, by submitting to arbitration, the advantages of such a procedure and, provided ultimate resort to the Courts remains inviolate, a party who has obtained those advantages at one moment, is not encouraged, when arbitrators have decided against him, to try to controvert their decision by hunting for errors of law based upon nice distinctions and subtle reasoning. The Courts have insisted upon the fulfilment of certain conditions before they will embark on the sort of enquiry requested by Rolls. The alleged error of law must be material—that is, form an indispensable part of the reasoning that led to the making of the Award. If, therefore, two lines of reasoning are adopted by the arbitrators, and one is erroneous in law but the other not, the error will not justify a setting aside. The jurisdiction, moreover, is not lightly to be exercised, and, in particular, will not be exercised simply because the Award is expressed in clumsy or inappropriate language, or because legal terms of art have been misused. Finally, the error must appear in an Award or part of an Award that is reviewable.

⁶⁴ See *per Shearman J. in Buerger & Co. v. Barnett* (n. 61, above, 89 L.J.K.B. at 162). See also *Russell on Arbitration* (18th ed.) 389.

⁶⁵ *Racecourse Betting Control Board v. Secretary for Air* [1944] Ch. 114, n. 11 above; *R. v. Northumberland Compensation Appeal Tribunal: Ex Parte Shaw*, n. 6 *supra*.

⁶⁶ (1697) 5 Mod. Rep. 47; 87 E.R. 739.

⁶⁷ (1802) 3 East 18; 102 E.R. 502.

⁶⁸ *Ibid.* 21; 503.

⁶⁹ N. 7, *supra*.

⁷⁰ Barwick C.J., n. 40, *supra*.

⁷¹ Whitmore, n. 4, *supra*; N.S.W. Law Reform Commission, n. 11, above.

⁷² Above, n. 45.

This appears to be a correct statement of the general principles of law as to the discretionary nature of the power and the manner of its exercise;⁷³ and of the rule that the error must appear on the face of the record.⁷⁴

The courts give a wider interpretation of what constitutes the award than they do to the 'record' in administrative law cases where there is an application for *certiorari* to quash the decision of an inferior tribunal for error of law on the face of the record.⁷⁵

One exception to the rule, as mentioned above,⁷⁶ is that where the only question referred to the arbitrator is a question of law, the courts will not set aside the award, even where it appears that the decision is erroneous⁷⁷ unless there is some evidence that the arbitrator has proceeded illegally.⁷⁸ The reasoning behind this exception is not difficult to find; it is that which was stated by McLellan J. in *Re Canadian Line Materials Ltd.*⁷⁹ viz, that the parties have agreed that their disputes shall be settled by arbitration, to insist that the courts should decide the very question submitted by the parties is to frustrate their choice. However, while the courts are likely to give great weight to the opinion of an arbitrator who is a lawyer⁸⁰ or who has experience in the area⁸¹ it would seem that if a decision appears to them to be so wrong that the court considers that it would be unjust to allow it to stand, a way will be found to bring it within the exception to the rule. The authorities on this point, particularly *Absalom's case*⁸² were considered in detail in *Rolls v. McGregor*.⁸⁴

III ADMINISTRATIVE LAW

There is not much that can be said beyond the statements made in the introduction to this paper as to the state of administrative law. The legislature has seen fit (and, indeed, it is obviously necessary in a modern

⁷³ *Russell on Arbitration* (18th ed.) 350; *Gunter Henck v. Andre & Cie, S.A.* [1970] 1 L.L.R. 235, 238, per Mocatta J.

⁷⁴ *Gold Coast City Council v. Canterbury Pipe Lines (Aust.) Pty Ltd* (1968) 118 C.L.R. 58.

⁷⁵ E.g. *R. v. District Court of the Northern District of Queensland; Ex Parte Thompson* (1968) 42 A.L.J.R. 173.

⁷⁶ P. 675 above.

⁷⁷ *F. R. Absalom Ltd v. Great Western (London) Garden Village Society Ltd* [1933] A.C. 592; *Kelantan Government v. Duff Development Co.* [1923] A.C. 395; *Hodgkinson v. Fernie* (1857) 3 C.B. (N.S.) 189; *Parsons v. Brixham Fishing Smack Insurance Co. Ltd* (1918) 118 L.T. 600; *Re King and Duveen* [1913] 2 K.B. 32; *Rolls v. McGregor supra*, n. 45; *Melbourne Harbour Trust Commissioners v. Hancock* (1927) 39 C.L.R. 570.

⁷⁸ *Absalom's Case, Kelantan Case*, n. 77, above.

⁷⁹ N. 34 *supra*.

⁸⁰ *Re Pridham Holdings Ltd*, n. 31 *supra*.

⁸¹ *Haldan Greig & Co. A/S v. Sterling Coal Co.*, n. 29 *supra*, and cases referred to therein.

⁸² N. 77 *supra*.

⁸³ N. 77 *supra*.

⁸⁴ N. 19 *supra*.

society) to establish a vast body of 'regulatory law' administered by a number of bodies and tribunals. Some of the bodies and tribunals have discretionary powers; so long as they act within the power given them by the legislation under which they operate, their activities are regarded as legal.⁸⁵

Where an administrative body has a duty to determine the rights of persons, or to settle disputes, and only in those cases, (which the courts describe as a 'duty to act judicially') *certiorari* may be available to enable the courts to decide whether the administrative body or tribunal has acted correctly.⁸⁶ Normally they will be concerned to see that the tribunal has acted according to the rules of 'Natural Justice', and that it has not exceeded its powers or jurisdiction; but in the absence of a statutory method of appeal or review, whether or not limited to points of law, they will not normally be concerned with the substantive correctness of the decision.⁸⁷ The only exception would seem to be the power of the courts to ensure that bodies given a duty to decide matters do so according to law. In the cases of bodies having a duty to act judicially, the superior courts have had the power to quash a decision of such a body if in the record of that body there appears an error of law. The origins of this power have already been discussed,⁸⁸ and the reason why the courts have assumed this jurisdiction is the same as the reason they have assumed jurisdiction in the case of arbitral tribunals, *viz*, to ensure that the law remains uniform and predictable. It would seem that today, in addition to the traditional remedy of the prerogative writ of *certiorari*, an injunction or declaratory judgment will be available for the same end.⁸⁹ The declaratory judgment may be of particular importance, as in a number of cases the legislature has indicated that it wishes to preclude any inter-

⁸⁵ See Benjafield & Whitmore, n. 4 *supra*, especially 176-81. deSmith n. 14 *supra*. 96-130. The leading cases would seem to be, in Australia, *Parisiennne Basket Shoes Pty Ltd v. Whyte* (1938) 59 C.L.R. 369 where the court drew the distinction between the existence of jurisdiction and the manner of its existence. The courts are concerned with the former, but in the absence of an error of law apparent on the face of the record, not with the latter. In England the latest decision of major impact is *Anisminic Ltd v. Foreign Compensation Commission*, *supra*, n. 5, and the speeches delivered in that case leave open the possibility that 'jurisdiction' is a term which will be construed so liberally as to include such matters as the lay tribunal's proceeding contrary to the principles of 'natural justice' *etc*. It could be that this wide construction will not be adopted in Australia. Whitmore, n. 4 above, discusses the question of 'jurisdictional error', which is, in broad terms, also applicable to arbitral proceedings. If the arbitrators have no power under the arbitration agreement, or the reference, their award is a nullity in the same way as a decision of an administrative tribunal made without jurisdiction; see *e.g.* *Getreide-Import-G.m.b.H. v. Contimar S.A. Compania Industrial Commercial y Maritima* [1953] 1 W.L.R. 793.

⁸⁶ Benjafield & Whitmore, n. 4 *supra*, especially 182-6. The leading case is *Shaw's Case* n. 6 *supra*; the basis of that decision has not been questioned, though there have been differences as to what constitutes the 'record', upon the face of which the error must appear.

⁸⁷ Benjafield & Whitmore, n. 4 *supra*, Ch. 7; deSmith, n. 4 *supra*.

⁸⁸ *Shaw's Case*, n. 6 *supra*, and see p. 20 *supra*.

⁸⁹ *Anisminic Ltd v. Foreign Compensation Commission*, n. 5 *supra*.

ference by the courts in the matters which it has chosen to delegate to a tribunal completely separate from the judicial system.⁹⁰ Very often the 'privative' provision in the statute refers specifically to challenge by *certiorari*.⁹¹

Certiorari will go, notwithstanding an attempt to remove the decisions of the administrative body from the scrutiny of the court by a privative clause, if the body is found by the court to have acted without jurisdiction; and in certain other cases declaratory relief will also be available.

However, *certiorari* to quash a decision on the ground of error of law on the face of the record of the tribunal does not seem to affect the jurisdiction of the tribunal, and it would seem that in most cases such an error of law, unless it does go to the jurisdiction of the tribunal, will not enable an aggrieved party to obtain *certiorari* if there is, in the relevant legislation, an effective privative clause.

In other cases, then the courts may exercise the supervision over lay or non-judicial tribunals by way of *certiorari* if they can find an error which is apparent on the face of the record. There is a great deal of law as to what constitutes the record, and only the general principle discussed here.⁹²

IV THE CHOICE

Speaking in an arbitration case, Lord Halsbury once made the following statement:

I feel compelled to say that the arbitrators were wrong because of the observations which have been made during the argument that these arbitrators were commercial men familiar with contracts of this kind. Parties ought either to be content with their decisions and not come to a court of law or else be satisfied with a decision according to a law in a court of law.⁹³

In that case the arbitrators did not apply any fixed principles of law, and the award was set aside — after the expense and delay occasioned by litigation which went to the House of Lords. Perhaps the choice which is implicit in the statement above is not merely judicial frustration at having to be concerned with a matter which no one intended should be the concern of the courts, but could be interpreted as a wish for separation between the arbitral tribunals and the courts. If so, it would seem to be uncharacteristic of a leading jurist. Certainly it does not express the real question. Are the courts to decide the state of the law, or are they to recognize separate systems which apply rules, possibly at variance with the 'law of the land', but which also settle disputes according to a body of

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, and see *Ex Parte Wurth; Re Tully*, n. 5 *supra*.

⁹² See *Benjafield and Whitmore*, n. 4 above, at 182-3 and cases there cited.

⁹³ *Re Keighley, Maxted and Co. and Bryan, Durant and Co. (No. 2)* (1894) 70 L.T. 155, 156.

rules affording some predictability, if not certainty. Or will the rules established by or for those bodies become established and institutionalised so that they become 'law' as much as the body of rules administered by the judicial courts?

Perhaps businessmen do really want their disputes to be determined by non-judicial tribunals. The legislature has obviously, in some cases, made an attempt to ensure that lawyers and judges have as little as possible to do with the determination of certain issues. However, the trend seems to be (in the cases of 'commodity' arbitrations and maritime arbitrations in London, at least) that where an 'informal' or non-judicial tribunal is established, it develops a practice or set of rules or precedents. The history of the court of Chancery is perhaps the most notable case, but departmental tribunals, workers' compensation commissions, planning and land use tribunals, and bodies such as the London Corn Trade Association may be subject to the same sort of development by institutionalisation. The question then seems to be, should there be a multiplicity of rules, possibly embodying conflicting principles, or should there be an attempt to unify and rationalize all dispute-settlement so that the same basic principles apply? If the latter is the case, is it desirable to use the existing courts of law, which at least have had a thousand-odd years' experience in doing precisely this; or because of sheer pressure on the courts, will the courts be able to handle the task of maintaining and developing the single system of rules, especially when the amount of rule-making by government and other regulatory bodies is likely to increase geometrically?