THE INTERFACE BETWEEN ARBITRATION AND THE COURTS

The Hon. Evan Prichard

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In the discussion paper published last year the Law Commission says: "A recurring theme in this paper is the tension between party autonomy and judicial intervention."

No doubt such tension exists; but it is also a fact that there is a symbiotic relationship between the Courts and the arbitration system. The two systems co-exist - and they do so to their mutual benefit.

Lord Donaldson M.R. said recently that "arbitrators and judges are partners in the business of dispensing justice".

Arbitrations would be wholly ineffective - and arbitrators an edentate species - if is were not for the fact that the High Court will enforce the awards of arbitrators as though they are judgments of the Court (Arbitration Act 1908 S.13 and Arbitration Amendment Act 1938 S.12). (It was held by the Court of Appeal in A.G. v. Offshore Mining Co Ltd (1983) NZLR 418 that in the case of an arbitration which did not expressly invoke the Arbitration Act, the successful party

must bring an action to enforce the award.)

Section 10 of the Arbitration Amendment Act 1938 enables the High Court to make orders for security for costs in arbitration proceedings and for the detention, preservation, interim custody or sale of any goods which are the subject matter of a reference to arbitration, and for the issue of injunctions and the appointment of receivers in arbitration proceedings. Section 19 of the Arbitration Act 1908 enables the Court to issue subpoenas to witnesses in arbitration proceedings.

And the Court will appoint arbitrators and umpires when the parties cannot agree on appointments (Arbitration Act 1908 S.6) or when arbitrations or umpires are removed by the Court (Arbitration Amendment Act 1938 S.8). The Court will, if necessary, fix the remuneration of an arbitrator (Arbitration Act 1908 S.22).

Importantly, the Court has a discretionary power to stay Court proceedings if one party to an arbitration agreement attempts to litigate a matter which is within the scope of an arbitration agreement (Arbitration Act 1908 S.5). Except for good reason, the Court will exercise its discretion so as to give effect to the agreement to arbitrate. In Bristol Corporation v. Aird (1913) AC241 Lord Moulton said:-

"... I think the Courts have acted quite rightly in requiring good reason to be shown why this part of a contract should not be strictly performed... Although the Court has a discretion there is a prima facie duty on the Court to give effect to an agreement to arbitrate."

The other side of the coin is that the Courts not infrequently make use of the arbitration system. Section 15 of the Arbitration Act 1908 empowers the Court to order that "the whole cause or matter or any questions arising therein" be tried before an arbitrator in cases where the dispute involves matters of account or requires a prolonged examination of documents or a scientific or local investigation. There is a corresponding provision in Sections 61 and 62A of the District Courts Act - although the District Court can make such an order only by consent. A reference to arbitration under order of the Court does not have the consensual elements of a reference by agreement; the reference is to be conducted according to the Rules of Court "and subject thereto as the Court directs". However, apart from a compulsory order under Section 15, Judges not infrequently persuade the parties to an action to agree to an arbitration - especially in those repellent cases which occasionally emerge in Court when badly drafted building contracts go wrong.

These machinery provisions form part of the interface between the Courts and the arbitration system. They are essential to the effectiveness of the system and contain no trace of the "tension" to which the Law Commission refers.

The tension lies in another area - the balance between party autonomy and judicial intervention.

In New Zealand the law affecting arbitrations is not codified. The Court retains, at common law, a residual supervisory jurisdiction over the conduct of arbitrations - and historically both the Judiciary and the legislature have long been inclined to the view that in the interests of justice the proceedings and awards of arbitrators must be subject to the supervision and scrutiny of the Courts - even though the parties themselves have chosen to refer their differences to their own appointees and agreed to be bound by the determinations of those appointees.

There used to be a district in London which was a legal sanctuary for debtors and a notorious hideout for all sorts of nefarious characters. The district, Whitefriars, was also known as "Alsatia". (It was abolished in 1697).

Czarnikow v. Roth Schmidt & Co (1922) 2 KB 498 was a case in which the English Court of Appeal had to consider an agreement which contained a provision that neither party

would make any application to the Court or require the arbitrators to state a case for the opinion of the Court. Holding that the provision was invalid as being contrary to public policy Lord Justice Scrutton said:-

> "... There must be no Alsatia in England where the King's writ does not run"

It is not clear from the judgment whether his Lordship intended to characterise all arbitrators as scoundrels such as those who used to hide out in "Alsatia". But it is possible.

Although the practice of agreeing to have recourse to private arbitrators as an alternative to the State Court systems has a long history, it was only late in the 17th Century that the English Courts would enforce voluntary arbitration agreements. The first English Arbitration Act was passed in 1698. It had the effect of making written submissions to arbitration enforceable by the Courts. Thereupon the Courts held that at common law they had an inherent power to set aside the awards of arbitrators whenever it appeared, on the face of an award, that the arbitral tribunal had proceeded on an erroneous understanding of the law. That inherent power still remains in effect in New Zealand.

At common law a contract which purports to preclude one or both parties from submitting questions of law to the Courts

is contrary to public policy and is, pro tanto, void.

Section 11 (1) (b) of the Illegal Contracts Act 1970 reads:-

> "11 (1) except as provided in Section 8 of this Act, nothing in this Act shall affect the law relating to:
>
> (a) ...
>
> (b) contracts or provisions in contracts which purport to oust the jurisdiction of any Court, whether that Court is a Court within the meaning of this Act or not."

Arbitration clauses, in the usual form do not offend that principle. In Lee v. Showmen's Guild of Great Britain (1952) 2 Q.B. 329, 342 Lord Denning said:-

> "Parties cannot by contract oust the ordinary courts from their jurisdiction... They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the Courts. If the parties should seek, by agreement, to take the law out of the hands of the Courts and put it into the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void."

It is to be noted here that although the Courts in New Zealand retain jurisdiction to set aside an award which discloses on its face that it is founded on a mistaken view of the law, the Court will not invoke that power when the issue submitted to arbitration is a pure question of law with no facts in dispute. (Europa Oil (NZ) Ltd v. Auckland Regional Authority (1968) NZLR 991, A.G. v. Offshore Mining Co Ltd (1983) NZLR 418.)

The presence of an arbitration clause in a contract does not provide a defence to an action on the contract - with the one exception of a "Scott v. Avery" clause. If one party to a contract containing the usual arbitration clause commences an action instead of going to arbitration, the action will proceed as though the arbitration clause does not exist - unless the Court exercises its discretionary power to stay the action. If a claimant begins arbitration proceedings and the other party later commences an action, any award by the arbitral tribunal will be wholly ineffective - again, unless the Court relinquishes jurisdiction by staying the action. Moreover, when a Court exercises its right (which is sometimes a duty) to renounce jurisdiction over a dispute which falls within an agreement to arbitrate, such renunciation is only provisional. Until a valid award is published the Court retains its underlying jurisdiction (see Mustill & Boyd on "Commercial Arbitration" P123).

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As to "Scott v. Avery" clauses: in Scott v. Avery (1856) 5 HLC 811 it was held that agreements to refer disputes to arbitration are not to be regarded as ousting the jurisdiction of the Court. And this applies even to a provision making it a condition precedent to the enforcement of any claim under the contract that the claimant take the matter to arbitration and obtain a favourable award. Such a provision does afford a defence to any action on the contract and might, at first sight, appear to be an ouster of the jurisdiction of the Court.

However there is no reason why the parties to a transaction should not agree that the transaction will not give rise to any obligation binding in law (Rose and Frank v. Crompton (1923) 2 KB 261, (1923) A.C. 443). It follows that there is no reason why the parties should not agree that no actionable obligation will arise unless upon the happening of a specified event - for example the obtaining of an arbitrator's award. That, anyhow, is how I understand the rationale of Scott v. Avery. Until the award is published there can be no obligation for the Court to enforce. After the award is published, however, the Court (in New Zealand) may set it aside on the ground that there is an error in law on the face of the award.

In the years - in fact centuries - following the English

Arbitration Act of 1698, the English legislation tightened the grip of the Courts upon the conduct of arbitrations. The Common Law Procedure Act, 1854, the Arbitration Act 1934 and the Arbitration Act 1950 had the effect of giving the Courts statutory powers which enabled the Judiciary to adjudicate on any point of law arising in the course of arbitration proceedings.

The English Common Law Procedure Act of 1854 introduced a procedure by which the arbitral tribunal could be directed to state a case on any preliminary point of law. The English Arbitration Act of 1934 empowered the Court to compel the abitral tribunal to state its award in the form of a special case.

These provisions enabled the Courts to intervene in arbitration proceedings much more extensively (and effectively) than the common law right to look at an award and to set it aside only if an error of law is apparent on the face of the document. The statutory powers meant that arbitration proceedings could be interrupted from time to time on application to the Court. And arbitrators, however reluctant, could be compelled to state for judicial decision special cases both on preliminary points of law and in their awards. That is how it was in England until 1979.

I have referred to the development of English Statute Law prior to 1979 because, up to that point, the New Zealand legislation followed the course set by England.

The new Zealand legislation contains provisions corresponding to the English legislation which was in force prior to 1979.

S.11 (1) of the New Zealand Arbitration Amendment Act 1938 provides that an arbitrator or umpire may, and shall if so directed by the Court state –

(a) Any question of law arising in the course of a reference, or

(b) An award or any part of an award –

in the form of a special case for the decision of the Court.

S.11 (2) provides that a special case may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

And, of course, the common law power to set aside awards which are manifestly erroneous in law still exists. There was a change of emphasis in English law with the passing of the English Arbitration Act 1979. This came about because of the delays experienced with the special case procedure, and followed the recommendation of the report of a Committee chaired by Lord Donaldson. Section 1 of the English

Arbitration Act 1979 says that the section of the 1950 Act providing for cases to be stated for the opinion of the High Court, shall cease to have effect and, further, that the High Court shall not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award. Instead there is a right of appeal, subject to the leave of the High Court, on questions of law, with power for the Court to order the arbitrator or umpire to give reasons for the award if it gives no reasons or only insufficient reasons. There is also provision in the 1979 Act for "exclusion agreements" excluding the right of appeal.

This, obviously, was an important change. It is not reflected in the law of New Zealand as it now stands. We have carried on for two decades under the system which prevailed in England before 1979.

What is exercising the Law commission at the present time is the question whether our legislation should give greater emphasis to party autonomy than it does at present and, if so, whether it should be based on a model law (the UNCITRAL model) which was adopted by the United Nations Commission in International Trade Law on 21 June 1985 or, alternatively, on the reforms of the English Arbitration Act of 1979 or on some other basis. The Law Commission has expressed a tentative preference for adopting the UNCITRAL model with possibly some minor modifications. The advantage of the UNCITRAL model is

that it has already been accepted by several countries in relation to international arbitrations.

Article 5 of the UNCITRAL model reads:

> "In matters governed by this Law, no Court shall intervene except where so provided in this Law."

Article 34 of the model says that recourse to a Court against an arbitral award may be made only by an application to set aside the award, and then only if:-

"(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters

submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State"

The UNCITRAL model was designed to apply to international arbitrations but in the view of the Law Commission its provisions might well be applied to all arbitrations, both domestic and international.

I must not leave this topic without referring to the judgments of the five judges who sat in the Court of Appeal in CBI New Zealand Limited v. Badger BV - a case which is a

landmark in the development of the law of this country as it affects international arbitrations - with a potential spin off in the direction of domestic arbitrations. The hearing was on 12 and 13 October 1988, the judgment was delivered on 8 December 1988.

Before the Court was an application by CBI to set aside an award of Sir Graham Speight, sitting as an Arbitrator, on the ground that there were errors of law on the face of the award. By consent the proceedings were removed from the High Court to the Court of Appeal.

This was not a domestic arbitration. It was a transnational - or international - arbitration. The parties had agreed, as one term of a major construction contract, that all disputes in connection with the contract should be settled by arbitration in New Zealand under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. They agreed also that their contract should be construed in accordance with the laws of New Zealand. It was accepted by both parties that New Zealand law governed the arbitration proceedings.

The ICC Rules contain provisions to the effect that "the arbitral award shall be final" and that the parties shall be "deemed to have waived their rights to any form of appeal in so far as such waiver can validly be made". Clearly, that was

void if the Czarnikow doctrine applied.

Each of the five judges - Cooke P and Richardson, McMullin, Bisson and Barker JJ - gave a separate judgment. They were unanimous in their conclusion that there are no public policy reasons which would justify the Court intervening, contrary to the original agreement of the parties, where it is alleged, in an international arbitration such as that before the Court, that there are errors of law on the face of the award.

it is not possible in a paper such as this to embark on a close analysis of the reasoning of each of the Judges. As might be expercted from the composition of the Court, they are masterly judgments, tracing the history of the residual common law jurisdiction to set aside awards for manifest errors of law, the principle, founded on public policy, that agreements purporting to oust that jurisdiction are void, and moving to modern developments in the field of international arbitrations.

As to Czarnikow, that case was distinguished on the basis that it related, not to the common law jurisdiction to set aside awards for manifest error in law, but to the statutory jurisdiction to require a case to be stated. Moreover, as Cooke P pointed out, Czarnikow must be of limited application because, clearly, there are methods, which are countenanced

by the Courts, whereby the common law jurisdiction can be excluded - for example if the parties agree to arbitrate a pure question of law (the Offshore Mining case), or agree that any reasons given by the Arbitrator shall not be part of the award, or that no reasons be given.

All judges considered that Czarnikow did not extend to an international arbitration under the ICC Rules and, further, that it would not be contrary to public policy to give effect to the provision in the ICC Rules as validly and effectively ousting the jurisdiction of the Court to review an award for error of law on the face of the award.

The judgments do not mention Section 11 (1) (b) of the Illegal Contracts Act. That provision has no bearing on the proposition advanced in CBI New Zealand v. Badger because the section says no more than that the Illegal Contracts Act is not to affect the Common Law relating to agreements purporting to oust the jurisdiction of the Courts. What the Court of Appeal has said in CBI is that in the context of an international arbitration the Common law, founded on public policy, does not preclude an agreement to oust the jurisdiction of the Court.

It has to be born in mind that CBI New Zealand v. Badger related to an international arbitration conducted under the rules of a recognised international arbitral organisation.

Whether the case opens the door to a successful attack on the sanctity of the Czarnikow principle in the context of domestic arbitrations in New Zealand remains to be seen – there are dicta in the judgment of Cooke P which suggest that Czarnikow has no foundation except a concept of public policy which is now outdated.

It is likely, however, that before an occasion arises to use CBI New Zealand v. Badger as a spring board for an attack on the Czarnikow doctrine in the domestic context, the whole matter will be resolved by legislation which will either abolish or severely restrict both the statutory provisions for cases stated and the common law jurisdiction of the Court to set aside awards on grounds of manifest error in law.