

“WHERE THE KINGS WRIT DOES NOT RUN”

The Origins and Effect of the Arbitration Act 1979

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In the five years before the passage in the United Kingdom of the Arbitration Act 1979, the availability of the stated case procedures in arbitration proceedings drew mounting criticism. The 1979 Act radically modified the English approach to questions of law in arbitration proceedings. The Australian jurisdictions, however, retain stated case procedures drawn from earlier English statutes. This article aims to trace the development of stated case procedures in the United Kingdom, to examine the factors which led to the 1979 Act and to examine the approach of the courts to the new Act.

By 1979, various statutes had spawned three different forms of stated case, all or any of which might arise in an arbitration proceeding. In order of historical development these were the final award in the form of a case stated, the consultative stated case, and the interim award in the form of a stated case. In an arbitration proceeding the parties have chosen a private forum to resolve their dispute. Why then should so many opportunities to resort to the courts have developed? In theory, the answer was that arbitrators should, like judges of first instance, decide issues of fact and resolve disputes within a fixed set of legal rules. Arbitrators, however, are not usually trained lawyers. The stated case procedures gave arbitrators the opportunity to obtain an authoritative ruling on uncertain issues of law which might arise in the course of, or at the conclusion of an arbitration. In reality, however, arbitrators sought to make their final awards court proof by simply not giving reasons, while the motive of parties resorting to the interlocutory stated cases often was simply to delay and frustrate the progress of proceedings. With this background, we can turn to our central enquiries:

A. DEVELOPMENT OF STATED CASE PROCEDURES IN THE UNITED KINGDOM

1. The Common Law Procedure Act 1854 — Award as a Case Stated

The Common Law Procedure Act 1854¹ included in its reforms several important provisions on arbitration. In particular, s. 5 gave arbitrators the power, if they should think fit, to state an award in the form of a special case for the opinion of the court.

Although the case stated procedure only became statutory in 1854, the practice of reserving questions of law for the court where the arbitration was under a reference in a cause at law was already established. In its *Report on Commercial Arbitration*² the N.S.W. Law Reform Commission suggests that the practice under the general law was probably

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1. 17 & 18 Vic. c. 125.

2. (1976) L.R.C. 27.

used only in references in causes rather than cases where the submission to arbitration was by consent and out of court. 'We have found no reference to the practice before 1837.'³ However, *Richardson v. Nourse*⁴ decided in 1819 is one case of a submission out of court where there is clear indication in the judgement that the arbitrator could have taken equivalent steps to secure the court's ruling on a point of law if he chose and if the parties so desired. In any event, the more immediate derivation of s. 5 in the 1854 Act lay elsewhere. The provisions of this Act were borrowed from the system of stating a case from Quarter Sessions.⁵

2. The Arbitration Act of 1889 — the Consultative Special Case

The consolidating Arbitration Act of 1889⁶ also introduced a new form of special case on a question of law — the consultative special case. By s. 19 an arbitrator might at any stage of the proceedings under a reference state as a special case for the opinion of the court any question of law which arose in the course of a reference. Further, the court was given an independent power to direct the statement of a case. Originally this advisory process under s. 19 was not appellable. This was the point at issue in *C. T. Cogstad & Co. v. Newsum*.⁷ In that case the arbitrator made an award but added a clause stating that the award was dependent upon certain points of construction, that the award should stand if the court accepted those points but if not should be remitted. The House of Lords held by majority that since the arbitrator had not exhausted his functions the award could not be regarded as a final award, but should be regarded as a consultative case under s. 19 and hence the appeal process to the Court of Appeal and the House of Lords was not available.

In considering that decision, however, account must now be taken of the interim award process introduced in 1934 and discussed subsequently. Further s. 21(3) of the 1950 Arbitration Act provided that an appeal might lie on a consultative case with the leave of the High Court or the Court of Appeal.

The High Court of Australia considered the consultative case procedure in *Minister for Works for W.A. v. Civil & Civic Pty. Ltd.*⁸ The relevant Western Australian legislation allowed an appeal on a consultative case to the State Full Court. The appellant Minister sought special leave to appeal to the High Court. The High Court majority (Barwick C.J., Kitto, Taylor & Owen JJ.) held that special leave was unavailable. The Chief Justice pointed out that the opinion of the court on a consultative case was not binding on the arbitrator or the parties to the arbitration even though it might be misconduct on the part of the arbitrator to refuse, without proper reason, to give effect to that opinion when making his award. For that reason, the opinion of the court was not a judgement, decree, order or sentence under s. 73 of the Australian Constitution nor could it be a judgement under s. 35 of the *Judiciary Act* 1903.

It is perhaps the limited availability of appeals plus the opportunity which this procedure affords subsequently to make a final award not itself in the case stated form (therefore not automatically referred to the court) which prompted Donaldson J. in *Tradax v. Andre*⁹ to describe the consultative case procedure as lesser known but potentially more useful than the award in the form of a case stated. (He himself did not explain this comment). This procedure has also been described as 'useful' by Kerr J., because in his view: 'important

3. *Ibid.* at 159.

4. (1815) 6 *Taunt.* 251.

5. See C. Staughton, 'Arbitration Act 1979 — A Pragmatic Compromise' (1979) 129 *N.L.J.* 920.

6. 52 & 53 *Vic. c.* 49.

7. [1921] 2 *A.C.* 528.

8. (1967) 116 *C.L.R.* 273.

9. [1975] 2 *Lloyd's Rep.* 516.

questions of law which arise in pending arbitrations, the determination of which one way or the other might produce substantial savings of costs and time, can be referred . . . to the court for decision, but without providing any means of delay or abuse'.¹⁰

Consider though the arbitration in *Peter Lind & Co. Ltd. v. Constable Hart & Co. Ltd.*¹¹ This was a building contract dispute. The arbitrators had first stated a consultative case on questions of construction which had been dealt with at first instance and then on appeal. They were then asked to state their award in the form of a special case on the issue of repudiation. The arbitrators refused and yet another application went to the court where Mustill J. held that the award should be so stated as a special case.

By then there had been one determination by the arbitrators, two by the court at first instance and one by the Court of Appeal. Still to come was the award as a stated case with at least one consequential reference to the court and one or two possible appeals behind that.

3. The Arbitration Act 1934 — Interim Award in the Form of a Special Case

The Arbitration Act, 1934 introduced a third form of special case procedure. This Act provided for the making of interim awards, which might be stated in the form of a special case.

After 1934, the distinction relied upon by the House of Lords in *Cogstad & Co. v. Newsum* — that the arbitrator had not finally awarded on all issues — could not be the discrimen between final awards and consultative cases. The distinctive feature of the consultative case had now to be that the arbitrator had not made any award at all.¹² The interim award would be marked out by the fact that the arbitrator had awarded in some respect but not finally on all matters before him, as in *Cogstad & Co. v. Newsum* itself. The final award would be one in which the arbitrator had awarded exhaustively on all matters before him, though such an award might be in the form of a stated case.

In *Wilhandel N.V. v. Tucker & Cross Ltd.*¹³ Kerr J. expressed dissatisfaction with an arbitrator who made an interim award when he was in fact asked to make an award in the form of a special case. The interim award, he said, did not answer the questions of law raised in the arbitration in any way and it did not make provision for the event of the claimants succeeding. Consequently it inevitably had to go back to the arbitrator, which may not have been necessary if the arbitrator had made his final view clear, albeit in the form of a case stated.

4. The Arbitration Act 1950

The accumulated statutes on arbitration were consolidated by the Arbitration Act, 1950.¹⁴ Section 21 dealt with the stated case procedure. This provision permitted appeals by leave on consultative cases and also permitted appeals on interim awards.

In *Compania Commercial Y Naviera San Martin S.A. v. China NFTTC (The Constanza M)*¹⁵ Lloyd J. considered the status of appeals on interim awards under s. 21 of the 1950 Act. In that case he had initially sought to impose a condition of payment into court upon a purported grant of leave to appeal against his decision upholding an umpire's interim award. After argument, he conceded that the appeal in the case of an interim award lay as of right; leave was unnecessary and hence he could not impose any such condition upon an appeal.

10. M. Kerr, 'The Arbitration Act 1979' (1980) 43 *M.L.R.* 45 at 51-52.

11. [1979] 2 *Lloyd's Rep.* 248.

12. See also Barwick C.J. in (1967) 119 *C.L.R.* 273 at 276.

13. [1976] 1 *Lloyd's Rep.* 341.

14. 14 *Geo.* 6 c. 27.

15. [1980] 1 *Lloyds L.R.* 505

The 1889 Act had allowed the parties to contract out of the possibility of having an award stated as a special case. Section 7 of that Act ran, so far as relevant:

‘The arbitrators or umpire acting under a submission shall, *unless the submission expresses a contrary intention*, have power . . .

(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court . . .’ (emphasis added)

Importantly the proviso in italics was dropped from s. 21 in 1950 with the result that the parties could not contract out of any of the forms of stated case.¹⁶

5. The Courts and the Stated Case Procedures

No aspect of the English system of arbitration has attracted more comment than the stated case procedure and most of it has been unfavourable. The central difficulties which emerged from the stated case procedure were these:

(a) No ‘Contracting Out’ of any of the forms of Stated Case

In *Czarnikow v. Roth Schmidt & Co.*¹⁷ the parties entered into a sugar contract which provided for arbitration but incorporated the following: ‘Neither [party] shall require, nor shall they apply to the Court to require, any arbitrators to state in the form of a special case for the opinion of the court any question of law arising in the reference, but such questions of law shall be determined in the arbitration in manner herein directed.’

In the opinion of all the judges of the Court of Appeal this clause was void as against public policy. By this time the Court now had power to compel a consultative stated case if the arbitrator refused a request so to do (s. 19 of the Arbitration Act 1889) and the judges saw the clause in question as ousting this statutory jurisdiction. Atkin L.J. said: ‘If an agreement to oust the common law jurisdiction of the court is invalid every reason appears to me to exist for holding that an agreement to oust the court of this statutory jurisdiction is invalid. There must be no *Alsatia* in England where the King’s writ does not run.’¹⁸ Although said in a procedural context, this graphic metaphor seems to have done a great deal to enshrine the notion that arbitrators must strictly apply the law.¹⁹

The parties were not therefore competent to contract out of the special case procedure, or at least the consultative special case procedure although it was at that time possible for the parties to agree that a final award should not take the form of a case stated, having regard to the provisions of s. 7 of the 1889 Act. However, the ‘contracting out’ proviso in s. 7 was dropped in s. 21 of the 1950 Act and thereafter the parties were not able to contract out of any of the available forms of special case.²⁰

(b) Applying ‘in the Dark’

The legislation necessitated that a party who required a special case make his application to the arbitrator before the arbitrator made his award.²¹ A related difficulty was that it was therefore necessary to formulate the questions of law for the court before it was known what view the arbitrator took of the facts. In *Ismail v. Polish Ocean Lines*²² Ormerod L.J. said that this was ‘like aiming at a moving object in the dark’. In that case, counsel who requested the special case had the mortification of seeing his client largely succeed before the arbitrator and then lose in the Court of Appeal on the point of law which counsel had formulated before the award was made. Apart from those procedural criticisms the *Ismail*

16. See *Orion Cia. Espanola de Seguros v. Belfort Maats* [1962] 2 Lloyd’s Rep. 257 at 263.

17. [1922] 2 K.B. 478.

18. *Ibid.* at 491, see also per Scrutton L.J. at 488-489 and Bankes L.J. at 485-486. A previous Court of Appeal had questioned the validity of such a provision in *Re Montgomery Jones & Co.* (1898) 78 L.T.R. 406.

19. See e.g. Q.L.R.C. No. 4 at 12 and (1982) 12 Q.L.S.J. 219.

20. See e.g. *supra* n.16 esp at 263.

21. So held by Smith L.J. in *supra* n.18 at 408.

22. [1976] 1 Q.B. 893 at 905.

Case contained a significant expression of the Court's approach to questions put to it under the case stated procedure.

As Ormerod L.J. saw it, the case stated procedure was evolving into a general form of appeal on law from the arbitrators to the court. Earlier cases suggested that on the hearing of a special case a judge is not entitled to alter the question of law stated for the decision of the court. All of the judges in the Court of Appeal deprecated the practice of raising narrowly framed and elaborate points of law for the court's opinion.²³ Ormerod L.J. found this reminiscent of special pleading. He said: 'The court should decline to allow itself to be too rigidly confined to such questions and should itself adopt a broad and realistic approach to the legal problems arising from the findings of fact in the special case'.

(c) The Stated Case as a Delaying Tactic

Originally the arbitrator had an entire discretion whether to state his award in the form of a special case. That discretion still existed after 1889; though now controlled by the court which in turn had an ultimate discretion to order a special case.

In *Halfdan Grieg & Co. A/S v. Sterling Coal Corporation (The Lysland)*²⁴ the Arbitrators refused to award in the form of a special case. At first instance, Kerr J., an experienced judge in this field, upheld the arbitrators and formulated some principles which, if ultimately accepted, might have gone far to restrain the use of this procedure although Kerr J. disavowed an intention to achieve this end. In his view there had first to be a substantial question of law which a party bona fide desired to raise by way of special case. But beyond that the court had a residual discretion whether or not in all the circumstances to direct an award in the form of a special case. Without attempting to be exhaustive on the point, he listed seven factors which might influence the exercise of that discretion. These were:

- (i) qualifications and experience of the arbitrator,
- (ii) where there was a question of construction, whether a technical term of an industry was involved,
- (iii) whether recourse to legal materials would be helpful or necessary on the point,
- (iv) the general importance of the question,
- (v) the importance of the dispute,
- (vi) the consequences of delay if the special case procedure were to be adopted and also the question of previous undue delay, especially by the applicant,
- (vii) whether the arbitrators had indicated that they were likely to go wrong on a point of law or had behaved unjudicially.²⁵

The Court of Appeal reversed Kerr J's. decision. Lord Denning M.R. said that the factors which should weigh in the court's decision to require a case stated were:

- (a) there had to be a real and substantial point of law open to serious argument and appropriate for decision by a court,
- (b) the point should be clear cut and capable of being accurately stated as a point of law and not a matter of fact dressed up,
- (c) the point should be of such importance that the resolution of it was necessary for the proper determination of the case.

If those factors were satisfied the arbitrator should state a case.²⁶

Developments since *The Lysland* have shown that the difference of real significance between these two views lay in the commercial question — the effect of delay. It was on the weight which Kerr J. gave to this factor that he was resolutely opposed by the Court of

23. *Ibid.* Lord Denning M.R. at 901-902, Ormerod L.J. at 905-906 and Shaw L.J. at 908-909.

24. [1973] 1 Q.B. 843.

25. *Ibid.* at 850-851.

26. *Ibid.* at 862.

Appeal. However, once the availability of the special case procedure was firmly tied to strictly legal questions it became difficult to defeat an application for a special case.

In *Granvias Oceanicas Armadora S.A. v. Jibsen Trading Co. (The Kavo Peiratis)*²⁷ Kerr J. was explicit about the unsatisfactory consequences he saw flowing from the Court of Appeal decision in *The Lysland*. *The Kavo Peiratis* concerned inter alia, a claim to a cargo lien at Zanzibar. As Kerr J. said, the availability of such a lien must be a question of fact, or a mixture of fact and foreign law which is in itself a question of fact. The ship charterers, who were resisting a claim to \$114,000 demurrage, requested a case stated on this point and its relation to certain provisions of the charter and a bill of lading. The arbitrators finding that no such lien existed would have meant that no factual basis for a case stated existed. Accordingly they were most reluctant to state a case but did so.

Kerr J. began his judgement with a broadside at the appeal court in the earlier case:

There are nowadays many complaints that our special case procedure in commercial arbitrations is being abused. Special cases used to be the exception, but they are becoming the rule and increasingly frequent as a means of delaying the speedy resolution of commercial disputes . . . Again and again they [arbitrators] find and this Court finds, that in these times of economic difficulty respondents with weak cases use the decision of the Court of Appeal in [*The Lysland*] merely as a means of gaining time in order to postpone a final award against them.²⁸

He went on to point out that it was no answer to this problem to say that arbitrators could always refuse to state a special case because that also is ultimately a matter in the control of the Court and summonses in those cases might take some months to deal with.²⁹ He held that there was nothing in this trumped up special case and as a parting shot awarded costs against the charterers on a common fund basis.

Lloyd J. looked at *The Lysland* again in *The Food Corporation of India v. Carras (Hellas) Ltd. (The Dione)*.³⁰ That case concerned stevedoring work at Buenos Aires and arose out of the collapse of the Argentinian peso. On one view of part of the relevant claim ship's charterers would have had to pay \$800 U.S. On another view \$25 U.S. depending on whether the award was in Argentinian pesos or U.S. Dollars. The arbitrators awarded \$800 against the charterers. They refused either to state their award as a special case or to defer their award so as to allow an application that the court order an award in this form.

Lloyd J. held that the refusal to allow time for the application to the court was technically misconduct. However, in the first place he said that the point was not one of law so as to justify a special case.

Secondly, even if it were conceded that the point was one of law the small amount coupled with the inevitable delay would have justified refusal of a special case. On at least the first of these points Lloyd J. considered that his approach was sanctioned by the Court of Appeal in *The Lysland*.³¹ Lloyd J. did not specifically refer to passages in the judgements in *The Lysland* but he may have had this in mind:

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.³²

27. [1977] 2 Lloyd's Rep. 344.

28. *Ibid.* at 349.

29. Further: 'The Court has no right to find the facts unless the arbitrator or the parties state a case', [i.e. the court will not exercise this discretion of its own volition] per Lord Goddard C.J. in *R.S. Hartley Ltd. v. Provincial Insurance Co. Ltd.* [1957] 1 Lloyd's Rep. 121.

30. [1980] 2 Lloyd's Rep. 577.

31. *Ibid.* at 589.

32. *Supra* n.24 at 862, per Lord Denning M.R.

The arbitration in *Peter Lind & Co. Ltd. v. Constable Hart & Co. Ltd.* also led to further consideration of *The Lysland*.

Mustill J. said that such an application gave rise to two issues; first whether the process of arriving at a decision will involve the arbitrator in a question of law, second the question of the exercise of the court's discretion. It was the first issue which principally arose in the instant case.

There were passages in *The Lysland* which might be taken to mean that a question of law must necessarily be involved in the arbitrator's decision, but in his view *The Lysland* did not go so far. Since the parties have as a rule no advance knowledge of the arbitrator's view of the facts it cannot be said with certainty that a question of law will arise on the facts as found. The test he put forward was whether the question of law could be said to be a 'live issue' when the arbitrator is asked to state a case. Moreover, the requirement in *The Lysland* that the issue of law be clear-cut did not mean that the party applying had to state with complete precision what issues would fall to the court. All that was required was that the issue be so stated as to satisfy the court that a genuine issue of law was involved. In his view disputed questions of repudiation inevitably satisfied these tests.³³ He therefore granted the application.

The decision in *Antco Shipping Ltd. v. Seabridge Shipping Ltd. (The Furness Bridge)*³⁴ preceded by only a fortnight the passage of the Arbitration Act 1979, which abandoned the case stated procedure. The case concerned the charter of a supertanker. The charterers repudiated and were inevitably liable, quantum being the central issue. At the arbitration proceedings it appeared that the charterer's liability for \$475,000 could not be disputed but a further \$70,000 was in dispute. At that point the charterers asked that the award be stated in the form of a special case. The arbitrators announced that they would not award in the form of a special case unless the charterers obtained a direction to that effect from the court or unless the charterers paid \$475,000 into a special account in which event a special case would be stated without an order. The charterers then applied for an unconditional order that the arbitrators make their award in the form of a special case.

At first instance and in the Court of Appeal the approach taken by the arbitrators was upheld. Donaldson J. held that he would make an order for a special case, but on condition that the charterers made the payment of \$475,000. The Court of Appeal held that both the arbitrators and the Court had power to agree to a special case but subject to such conditions as they might severally think fit. The bases for those discretions were in each case to be found in ss. 21 and 28 of the Arbitration Act 1950. All the judges in the Court of Appeal referred to these two sections as possible heads of power. Lord Denning M.R. and Lawton L.J. were inclined to find sufficient authority in s. 21 but also relied on s. 28. Lane L.J. found it unnecessary to rely on s. 21 and thought that s. 28 standing alone was amply wide enough to cover the actions both of the arbitrators and the judge of first instance.³⁵

For the charterers it was argued that *The Lysland* guidelines had been satisfied and therefore the award of special case should be unconditional. Lord Denning put his answer quite straightly. In laying down those guidelines, 'We did not have in mind at all a case such as the present, where the arbitrators find that a certain sum is undoubtedly and indisputably due'. Lane L.J. took a similar view of that case.³⁶

The more interesting observations are those of Lawton L.J. He approved the observations of Kerr J. in *The Kavo Peiratis* and said:

33. *Supra* n.11 at 253.

34. [1979] 2 Lloyd's Rep. 267.

35. *Ibid.* at 272.

36. *Ibid.* per Lord Denning M.R. at 269 and Lane L.J. at 272.

The excessive use of remedies often brings about a reaction by both Parliament and the courts . . . In recent years there has been an excessive use of the powers give by section 21 of the Arbitration Act 1950 to to have an award stated in the form of a special case. At the present time there is a bill before Parliament which to some extent restrains the use of this power. Meantime this appeal affords an opportunity to consider whether under the existing law arbitrators and the High Court can ensure that the power is not used in a manner which may bring about injustice.³⁷

In that respect Lawton L.J.'s judgement is set in a wider framework than the other reasons given in the Court of Appeal.

Previously in *The Lysland*, Lord Denning had deprecated attempts to limit the special case procedure for commercial reasons but in *The Furness Bridge* Lawton L.J. recognized that the liberal use of the case stated procedure was commercially motivated and had to be looked at in that light. Accordingly he took a narrow view of *The Lysland*. That case was concerned with the tests which had to be satisfied before a special case could be heard. It had nothing to do with the terms upon which such a special case might be granted, so that the court's discretion was not at all fettered by *The Lysland*. However, the discretion had to be exercised cautiously. The present case was clearly appropriate for a conditional order, but even when there was a dispute as to whether any sum was due there might be exceptional circumstances which would justify the making of a conditional award or a conditional order.³⁸

In noting this case, Enid Marshall observes that, had it not been for the radical removal of the special case by the Arbitration Act 1979, *The Furness Bridge* could have been regarded as a marked advance in the law of arbitration.³⁹ The 1979 legislation has not so far been adopted in Australia and accordingly the potential departure from previous practice which *The Furness Bridge* represents is a real possibility here. If the case is confined to the relatively narrow compass in which Lord Denning and Lane L.J. saw it, the principle which it represents is really unexceptionable. However, if the wider views of Lawton L.J. are accepted then there is the opportunity for courts and arbitrators to make special case awards conditional where the point goes to the whole claim. It is purely a matter of speculation in what circumstances such an award or order might arise, but the nearest analogy which occurs to the writer is the case of conditional leave to defend on an application for summary judgment.

Leave to defend is usually given conditional upon giving security for costs or upon payment into court only in cases where the defence is dubious or possibly a sham. It is only where the defence is suspect that such payment conditions are imposed.⁴⁰ The circumstances are not entirely apposite, of course, but the case which invokes such conditions will be one which lies on the borderline of an arguable point of law and some mere point trumped up in order to delay payment. The alternative would be something like the approach to the grant of injunctive relief, under which the party claiming the special case would have to show reasonable prospects of success on the point of law which he wishes to argue. However, it is submitted that this is the very point at issue in *The Lysland*. So long as *The Lysland* is accepted as correct the party seeking an unconditional case stated would not need to go to the last suggested lengths.

As final points, the decision in *The Furness Bridge* revealed possibilities in s. 28 and a breadth of operation for that section which previous editions of *Russell* did not

37. *Ibid.* at 270.

38. *Ibid.* at 271.

39. [1980] J.B.L. at 46-47.

40. See *Fieldrank Ltd. v. Stein* [1961] 1 W.L.R. 1287; *Ionian Bank Ltd. v. Couvreur* [1969] 1 W.L.R. 781; and Cairns B.C., *Australian Civil Procedure* (1981) at 314.

suspect.⁴¹ Since then, however, in *Glafki Shipping Co. S.A. v. Pinios Shipping Co. (The Maira)*⁴² the Court of Appeal declined to apply *The Furness Bridge*, holding that the applicant for a special case was not indulging in delaying tactics. The Court of Appeal again emphasized that it would be a most exceptional case, where the whole sum in dispute was ordered to be paid in.

B. THE UNITED KINGDOM ARBITRATION ACT 1979

(1) Origins of the 1979 Act

The enactment of the Arbitration Act 1979 was a business decision. A widespread view held that the case stated procedure discouraged parties to international arbitrations from choosing London as a forum. Estimates put the consequential loss of invisible earnings from the British economy as high as 500 million pounds per annum.⁴³

Traditionally London had been the forum for three kinds of arbitration:

- (a) those under form contracts in commodity markets;
- (b) maritime arbitrations;
- (c) insurance arbitrations.

However, practitioners in the field observed that a new and major form of arbitration business was avoiding London as a forum and instead choosing I.C.C. arbitrations with Paris as the likely venue. These were international arbitrations over development projects, often with foreign governments as parties. Moreover English lawyers perceived in this trend a danger to the historical dominance which London had achieved in other areas of arbitration.⁴⁴

Sir Michael Kerr, writing in the *Modern Law Review*,⁴⁵ thought that two principles of English law had created these problems. One was the insistence of the English courts on a supervisory jurisdiction over all arbitrations which chose a London forum. He considered that overseas parties often did not wish to accept the jurisdiction of English courts as distinct from accepting England as an arbitration forum. Secondly, he reaffirmed a view which he had stated judicially,⁴⁶ that the decision in *The Lysland* made it too easy for parties who sought to delay payment to do so via the case stated process.

In March 1978, Lord Diplock gave the Fourth Alexander Lecture to the Chartered Institute of Arbitrators. He made a strong call for reform, which included four proposals:

- (a) the case stated procedure should be converted to a right of appeal;
- (b) that appeal should be limited to questions of law and then only by consent of the parties or with the leave of the court;
- (c) the court should have powers to impose conditions upon the grant of leave;
- (d) the right to subsequent appeals should be restricted.

He also recognized the significance of the international arbitration problem, but anticipated grave difficulty in defining the proceedings in which contracting out of the courts jurisdiction might be permitted.⁴⁷

41. A. Walton (Ed.), *Russell on Arbitration*, (1979), at xvii and references to s. 28 there given.

42. *The Times* 8 October 1981.

43. *The Economist*, 11 August 1979 at 94.

44. See generally Lord Hacking, 'The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979' (1980) 14 *Int.Lawyer* 95.

45. See Kerr, 'The Arbitration Act, 1979' *supra* n.10. His earlier suggestions for reform appear in his article 'Modern Trends in Commercial Law and Practice' (1978) 41 *M.L.R.* 1 at 22-23, suggestions judicially endorsed by Donaldson J. in *Tradax v. Andre & Cie*, *The Times*, 3 March, 1978.

46. See *The Kavo Peiratis* *supra* n.27 at 349.

47. See Lord Diplock, 'The Case Stated - Its Use and Abuse' (1978) 44 *Arbitration* 107.

Pressure for change came as well from other quarters. The Lord Chancellor had established as an official committee the Commercial Court Committee whose task it was and is to report to the Lord Chancellor on matters affecting the service which the Commercial Court provides to the business community. In 1978, there was also born an unofficial body, the London Arbitration Group. Both organizations took a special interest in the problems which had evolved in arbitration and they undertook discussions, the result of which was the Report of the Commercial Court Committee on Reforms to Arbitration Law.⁴⁸

Littman says that the Committee Report represents a synthesis of the views of the Commercial Court Committee (whose members were suspicious of entire abolition of the courts supervisory jurisdiction as exercised through the stated case) and those of the London Arbitration Group (who were anxious that the special case be abolished in international arbitrations).⁴⁹

Generally, so far as the case stated procedure went, the report took the approach advocated by Lord Diplock, but it also laid stress on the contracting out question and then offered a number of changes. These were:

- (a) a general right to contract out of appeals once a dispute had arisen and been referred to arbitration;
- (b) a right to contract out before dispute in the case of international, or as the report prefers, 'non domestic' arbitrations.

In the case of domestic arbitrations contracting out before dispute was not favoured, with one reservation. The report proposed that for an initial period of three years, domestic 'special category contracts' for commodity sales, maritime and insurance contracts should be subject to the established rule against contracting out, but that the position should then be reviewed.

The commercial significance of these proposals was thought to be so great that special arrangements were made for the passage of implementing legislation.⁵⁰

(2) The Arbitration Act 1979

The reduction of the report proposals to statutory form proved difficult. Even a protagonist of the Bill has described its provisions as 'painfully complicated' as a result of the compromises which were necessary to ensure its passage.⁵¹

Sections 1 to 4 are the provisions relevant to the present enquiry. It is no easy thing to state their substance both shortly and with accuracy. Subject to that, those sections have these features:

Section 1 repeals s. 21 of the 1950 Act. This abolishes all forms of case stated procedure under that section. The section also takes away the courts jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award. The reference to error of fact is presumably from an abundance of caution since there is no instance of an award being set aside for error of fact on its face.⁵²

Section 1 proceeds to establish a mode of appeal on questions of law. On the determination of such an appeal the High Court may confirm, vary or set aside the award or may remit it for reconsideration by the arbitrator. In aid of that process the court may require the arbitrator to state the reasons for the award in sufficient detail to enable the court to consider any questions of law to which it gives rise.

48. Cmnd. 7284 (1978).

49. See M. Littman, 'England Reconsiders "The Stated Case"' (1979) 13 *Int. Lawyer* 253 at 257-258.

50. These arrangements are described by Lord Hacking in 'The "Stated Case" Abolished' *supra* n.44 at 95, 96.

51. *Ibid.* at 96 and 102-103.

52. J. Steyn, 'Arbitration and the Courts' (1980) 35 *Arb.Jnl.* 9 at 12 note 25.

The power in the court to require reasons is contingent upon the applicant satisfying the court either that before the award was made the arbitrator had notice that a reasoned award was required or that there was some special reason why no such notice was given. Staughton criticises this particular provision as creating a dilemma like that in *Ismail v. Polish Ocean Lines*⁵³ in that the party must decide whether or not reasons will be required before he knows what the award is.⁵⁴ However, the two situations are not truly comparable. Under the 1979 provision what in effect happens is that the party gets an option by which in practical terms, the award may be appellable or it may not. It seems entirely right that the parties should make this choice before they know the result.

This particular provision was inserted as an amendment to the draft Bill after 'a powerful lobby by arbitrators, with the support of Lord Diplock and the Master of the Rolls'.⁵⁵ The fear was that an arbitrator might otherwise be required to explain his award months after a decision had been made.

The Court of Appeal gave some guidance on what would amount to adequate reasons in *Westzucker GmbH v. Bunge GmbH*.⁵⁶ Donaldson L.J., with whom Stephenson and Shaw L.J.J. agreed, said that arbitrators should give their reasons at the earliest possible time after the hearing. No particular form of award was required and arbitrators were not expected to analyse the law. A reasoned award only required that the arbitrator explain the facts as he had found them, particularly with respect to controverted issues, and thence explain how he had reached the conclusions embodied in the award.⁵⁷

The entire right to appeal to the High Court under s. 1 is further controlled in that this right only arises where all parties to the reference consent or where the court itself gives leave. Further, s. 1 allows the High Court to give that leave only where it considers that, in all the circumstances, the question of law could substantially affect the rights of one of the parties. Further, that leave may be subject to such conditions as the court considers appropriate and by an amendment effected by s. 148 of the Supreme Court Act 1981, the decision of the High Court to grant or refuse leave to appeal the arbitral award itself cannot be taken up to the Court of Appeal without the prior leave of the High Court.⁵⁸ Over and above all these things, s. 3 of the Act denies the Court power either to grant leave to appeal or to require reasons of the arbitrator where there exists a valid 'exclusion agreement' — a concept discussed subsequently.

The result, of course, heavily circumscribes the right of appeal from an arbitral award. The Act does not rest there. It then restricts appeal from the High Court to the Court of Appeal in that no such appeal lies unless (a) the High Court certifies that the question of law is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal and (b) either the High Court or the Court of Appeal itself gives leave. This is a unique circumscription of the rights of a losing party in the High Court.

Section 2 retains a consultative case procedure equivalent to that formerly available under s. 21. The difference lies in the restrictions which surround the use of the new procedure. Under s. 2 if a point of law arises during the reference, a party may apply to the court for its determination, but must satisfy these conditions:

- (a) either the arbitrator or all other parties to the reference must consent;
- (b) the court must satisfy itself that the determination of the question might produce substantial savings in costs to the parties;

53. *Supra* n.22.

54. See Staughton, 'Arbitration Act 1979 — A Pragmatic Compromise' *supra* n.5 at 922.

55. *Ibid.* See also [1979] *J.B.L.* at 153, and *H.L. Deb.* Vol. 397, col. 1203.

56. *The Times*, 19 May 1981; [1981] *Com. L.R.* 179.

57. *Ibid.* and see also [1982] *J.B.L.* 118.

58. Arbitration Act 1979 ss.1(6A) and 2(2A), reversing the C.A. view in *The Nema* [1980] 2 *Lloyds L.R.* 339.

- (c) the question of law is one in respect of which leave to appeal under s. 1 would be likely to be given; i.e., in effect, it must be a question which could substantially affect the rights of one of the parties;
- (d) there must not be in existence a valid 'exclusion agreement' which precludes the bringing of such a consultative application.

Moreover, further appeal from the High Court is circumscribed in the same way as appeals under s. 1.

Section 2 in the Bill originally presented to Parliament had provided that the arbitrator should bring such consultative applications on his own initiative. The Bill was amended after Lord Diplock pointed out that such provision would be a dead letter as the costs of the application would then fall upon the arbitrator.⁵⁹

Opinion on the merit of s. 2 sharply diverges. Sir Michael Kerr thought that it is unlikely that the provision will be frequently invoked, but when it is it will be likely to be highly beneficial. He considered that there will not be the same opportunity for delay or abuse as existed under the old procedure.⁶⁰ Smedresman roundly criticises the section: 'It is little exaggeration to state that this section practically reinstates the special case procedure . . . the reaction of a typical arbitrator will be to refer the matter to the courts rather than risk even the suggestion of misconduct.' He goes on to say that the statutory test for acceptance of an application is neither stringent nor particularly clear and that the question of cost savings will usually be incapable of close prediction.⁶¹

Sections 3 and 4 deal with the thorny problem of exclusion agreements. Initially the sponsors of the Act intended that arbitration agreements of an international character, especially those which commentators describe as 'one-off' agreements⁶² should not be subject to the jurisdiction of the English courts unless the parties so wished. The final solution went further than that and is expressed in complex terms.

By s. 3(5) contracting out is never permitted where the arbitration is directed by statute. Subject to that, the following are the general principles which the 1979 Act sets up:

Section 3 establishes the concept of an 'exclusion agreement'. Such an agreement is one by which the parties to an award have agreed to exclude the right of appeal under s. 1. The effect of a valid exclusion agreement is that no appeal lies under s. 1 nor may the parties bring a consultative application under s. 2.

Section 3(3)(b) allows for the continued application of an exclusion agreement even in the face of an allegation of fraud. This followed a suggestion that in the United States such allegations are commonly made so as to defeat arbitral jurisdiction.

The combined effect of ss. 3(b) and 4(1) is that an exclusion agreement entered into after the commencement of the arbitration is always valid.

The further effect of ss. 3 and 4 is to make exclusion agreements concluded before the commencement of the arbitration valid except in two cases. These are:

- (a) 'domestic arbitration agreements', and
- (b) 'special category'⁶³ disputes.

A domestic arbitration agreement is one which does not provide for arbitration outside the U.K. and to which each of the parties is neither an individual resident outside the U.K.

59. *H.L. Deb.* Vol. 397 col. 1212 and see [1979] *J.B.L.* 153.

60. Kerr, 'The Arbitration Act, 1979' *supra* n.10 at 52.

61. (1980) 11 *Jnl. Maritime Law* 319 at 328.

62. See e.g. A. Malekin, 'Judicial Review of Arbitration Awards after *The Nema*' (1981) 131 *N.L.J.* 1302; C. Lewis, 'Leave to Appeal under the Arbitration Act 1979' (1982) 2 *Lloyd's Mar. & Com. Law Qlty* 271; and Shenoit (1982) 17 *Tex Int. Law Jnl.* 258.

63. The expression 'special category' does not appear in the Act, but has been used as convenient shorthand by commentators. See e.g. Steyn, 'Arbitration and the Courts' *supra* n.52 and Smedresman *supra* n.61.

nor a corporation established or controlled in a jurisdiction outside the U.K. The definition is drawn from the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, adopted in the U.K. by the Arbitration Act 1975.⁶⁴

The report of the Commercial Court Committee indicates that the reason for prohibiting contracting out before dispute in the domestic case was the belief that such clauses would be used in contracts of adhesion to the detriment of the weaker party. Hence the need for entrenched judicial control.⁶⁵ This echoes views expressed long before in the *Czarnikow* case.⁶⁶

'Special category' disputes are those covered by s. 4 of the Act. Section 4(1) prohibits contracting out prior to the commencement of the arbitration where the dispute relates to:

- (a) a question or claim within the Admiralty jurisdiction, i.e., in effect, a shipping dispute;
- (b) a dispute arising out of a contract of insurance;
- (c) a dispute arising out of a 'commodity contract', in turn defined as a contract for the sale of goods regularly dealt with on a commodity market in England or Wales and which is the subject of specification by order of the Secretary of State.⁶⁷

The reason for retaining a substantial judicial control over these arbitrations is that in such cases arbitrations normally take place under standard form contracts. The parties are generally of equal bargaining power and the arbitrators are usually professionals. However, the Commercial Court Committee was concerned that there might grow up a body of unsupervised English arbitration law whose principles were not those of the ordinary commercial law. The Committee also reported that there was no evidence in these fields of any general desire to contract out of judicial review.⁶⁸

Nonetheless, the parties to a special category dispute may exclude judicial review once the arbitration commences. Further, s. 4 was regarded as of experimental character. Accordingly, s. 4(3) gives the Secretary of State the unusual power to declare by order that the restrictions on special category disputes shall cease entirely or shall cease as to particular classes.

A final exception to the operation of s. 4 is the contract governed by a foreign law. Although s. 4 applies where the parties are foreign but the dispute is a special category one to be resolved under English law, it exempts contracts governed by a foreign law irrespective of the nationality or residence of the parties. This provision was inserted to make it clear that, for instance, shipping or commodity contracts governed expressly by American law could validly be made the subject of exclusion agreements.⁶⁹ However, it has unexpectedly created 'the Bermuda hole'.⁷⁰ Parties who initially wish to exclude judicial review simply arrange to contract subject to the laws of Bermuda or Hong Kong (whose commercial laws are essentially the same as those of England) and thereby claim the right, pursuant to s. 4 to make valid exclusion agreements.

Smedresman sees the drafting of the section as inadequate: 'Most international commercial arrangements contain one or more insurance, maritime or commodity aspects.

64. Section 1(4).

65. *Supra* n.48, Para 47.

66. See *supra* n. 17 at 491, per Atkin L.J. Cf. also *A.C. Robertson Pty. Ltd. v. Costa Brava Investments Pty. Ltd.* (1963) 63 S.R. (N.S.W.) 152 at 166-167 per McClemens J.

67. Statutory Instrument 1979 — 754 (Arbitration (Commodity Contracts)) Order 1979 contains the relevant specifications.

68. *Supra* n.48, para 48 and see Kerr, 'The Arbitration Act, 1979' *supra* n.10 at 48 and Lord Hacking, 'The "Stated Case" Abolished' *supra* n.44 at 98.

69. Kerr, 'The Arbitration Act, 1979' *supra* n.10 at 55.

70. *Ibid.* and see Steyn in 'Arbitration and the Courts' *supra* n.52 at 14 and Staughton, 'Arbitration Act 1979 — A Pragmatic Compromise' *supra* n. 5 at 922.

The courts are likely to be occupied with determining when the mere presence of one or more of those elements, even if not predominant, will bring a transaction within section 4.'

His other principal criticism is that it is precisely in the areas of the special category disputes that the abuses of the case stated procedure had become most evident.⁷¹

Smedresman's criticisms of the drafting are apt, but on the exclusion clause question, no doubt those who framed the Act saw the restrictions on the appeal and consultative application procedures as sufficient protection.⁷² Their concern for uniform construction of standard documents is commercially sensible.

Finally, an overall view reveals that the system of appeals and exclusions established by the 1979 Act works on a basis of 'contracting out' rather than 'contracting in'. Presumably the task of defining a class of international contracts for which the exclusion of court supervision should be automatic defeated the draftsmen.⁷³

C. THE APPROACH OF THE COURTS TO THE 1979 ACT

The cases since 1979 fall under three heads:

1. The effect of ss. 1(5) and 1(6) as to reasons for awards;
2. Leave under s. 1 to appeal from an arbitral award;
3. Leave under s. 2 to appeal to the Court of Appeal from the High Court's determination of a consultative application.

At the date of writing there seem to have been no decisions on the exclusion agreement provisions of ss. 3 and 4.

1. The effect of sections 1(5) and 1(6) as to reasons for awards

Previous reference has been made to the Court of Appeal decision in *Westzucker GmbH v. Bunge GmbH*,⁷⁴ where Donaldson L.J. gave guidelines on adequate reasons.

In *Mondial Trading Co. v. Gill & Duffus*⁷⁵ one point in the applicant's case was that the arbitrators had made a factual finding not supported by evidence.

Goff J. conceded that the question whether there was any evidence at all to support the finding was a question of law, but the buyer's difficulty was that the reasons for the award as they stood did not deal with the point. The buyer therefore asked the court to use its powers under s. 1(5) to require the arbitrator to give further reasons.

Goff J. rejected this application on three bases:

- (a) It was a matter on which the arbitrator could have drawn an inference based on his knowledge of the trade;
- (b) Although a question of law, it was of a sort 'which the courts have always been most reluctant to permit to be raised upon a review of the arbitration award';
- (c) The buyer did not ask for a reasoned award. 'If no such request is made by the party and the evidence is not so set out by the arbitrator, the Court will generally decline to make an order under section 1(5)'.⁷⁶

By contrast, in *The 'Oinoussian Virtue'*⁷⁷ Goff J. held that the fact that an arbitrator gives reasons without being asked or ordered so to do is not any ground for refusing leave to appeal under s. 1.

71. *Supra* n.61 at 330-331.

72. See per Lord Diplock in *Pioneer Shipping Co. Ltd. v. B.T.P. Tioxide Ltd. (The Nema)* [1982] A.C. 724 at 738.

73. *Supra* n.61 at 331.

74. *Supra* n.56.

75. [1980] 2 Lloyd's Rep. 376.

76. *Ibid.* at 379.

77. *Schiffahrtsagentur v. Virtue (The 'Oinoussian Virtue')* [1981] 1 Lloyd's Rep. 533. Goff J's. decision was disapproved in other respects by the House of Lords in *The Nema supra* n.72.

In *Hayn Roman & Co. v. Cominter (U.K.) Ltd. (No. 1)*⁷⁸ there was a bona fide misunderstanding between the solicitor for one party and the secretary of the body which provided the arbitrators as to whether reasons were wanted. Goff J. held that this amounted to 'special reason' under s. 1(6)(b). He said that it was not necessary that one party mislead the other. Circumstances such as these, or, for example, where the notice requiring reasons was lost in the post, would suffice.

Subsequently the same case came back to Goff J.⁷⁹ The applicant complained that it had put three submissions to the arbitrators. These had all been rejected, but the published reasons did not explain why. Goff J. ordered that the arbitrators give further reasons. The applicant was entitled to know why its contentions were rejected. Donaldson L.J. had foreshadowed precisely such an approach in his *Westzucker* guidelines. More recently, in *Interbulk Ltd. v. Aiden Shipping Co.Ltd.*⁸⁰ Lloyd J. held that the power to order reasons neither requires nor even allows the court to order that the arbitrators set out the evidence on which they have based their reasons.

In that case it was also submitted that the reasons for one of the awards there in issue were contradictory and obscure. Lloyd J. held that this absence of clarity did not in itself give rise to a question of law. The proper approach in that respect was not to give leave to appeal, but to order that the arbitrators give further reasons.

2. Leave under section I to appeal from an arbitral award.

The cases fall conveniently into two groups the dividing line between which is the House of Lords decision in *The Nema*.⁸¹

The problem in all of them is this. Section 1(4) prevents the High Court from granting leave to appeal from an award unless the question of law could substantially affect the rights of a party. Does it follow, conversely, that when a party does show that the award involves such a question he should usually or automatically get leave to appeal?

In *Mondial Trading Co. v. Gill & Duffus*⁸² Goff J. took a cautious line. He emphasized that the existence of a question of law does not by itself exhaust the discretion. It merely creates the threshold for its exercise. He thought that in the first few cases the court would be pragmatic in its approach. Further, the court had power to impose conditions upon the grant of leave. Having regard to the applicant's prospects of success, he made leave conditional upon payment in of certain amounts awarded. Since the applicant was out of the jurisdiction and had no assets within it, he made leave further conditional upon security for the respondent's costs.

From this initially cautious beginning, in a series of subsequent decisions Goff J. moved to the view that a party who did show a relevant substantial point of law should get leave as a matter of course. The cases are his first instance decisions in *The Nema*,⁸³ *The Oinoussian Virtue*⁸⁴ and *The Wenjiang*.⁸⁵ Indeed he reiterated these views in *The Oinoussian Virtue* although the Court of Appeal which meanwhile dealt with *The Nema*⁸⁶ had indicated that leave should be given only if the arbitrator had evidently misdirected himself on a relevant point of law or his decision went beyond one which a reasonable arbitrator could have reached.

78. [1981] Com. L.R. 239.

79. *Hayn Roman & Co. v. Cominter (U.K.) Ltd. (No. 2)* [1982] Com. L.R. 168.

80. [1983] Com. L.R. 143.

81. *Supra* n.72.

82. *Supra* n.75.

83. [1980] 1 Lloyd's Rep. 519 (Note).

84. *Supra* n.77.

85. *International Sea Tankers Inc. v. Hemisphere Shipping Co. (The Wenjiang)* [1981] Com.L.R. 159.

86. *Supra* n.58.

The House of Lords, when it decided *The Nema* strongly affirmed the Court of Appeal approach. Lord Diplock, with the concurrence of all the Law Lords, delivered the principal judgement. The issues he identified were the rival merits of finality and meticulous legal accuracy. The approach taken by Goff J. would reinstate *The Lysland* principles, which had served to promote the requirement of legal accuracy whereas Lord Diplock discerned the Act's intention as favouring finality in awards.⁸⁷ In general Lord Diplock preferred the stricter requirements put forward in the Court of Appeal: either that the arbitrator had clearly misdirected himself in law or the decision was one that no reasonable arbitrator could reach.⁸⁸

This judgement in effect laid down guidelines for the exercise of a statutorily given discretion and it is not surprising that Lord Diplock could not point to one clear misconstruction of the Act by Goff J. Rather Lord Diplock's judgement rests on inference drawn from a number of provisions in the Act. He emphasized that the discretion in s. 1(3)(b) is, by reference to s. 1(4), a discretion to *refuse* leave as much as to grant it. The elements in the statute which he saw as favouring the policy of finality were:

- (a) If not by leave, then an appeal can only be with the consent of all parties — s. 1(3);
- (b) The negative and barring character of s. 1(4);
- (c) The stringent conditions on further appeals — s. 1(7);
- (d) The reversal of the policy embodied in the Czarnikow case — s. 3;
- (e) Although a right of appeal is preserved in standard category disputes, that right is still subject to leave of the court — s. 4.

From these bases, Lord Diplock laid down more precise approaches to four classes of dispute. Firstly, the question of law might involve construction of a one-off clause. In that case the judge should do no more than examine the award itself to see whether it is obviously wrong. Unless he can satisfy himself on that point by those means alone he should not grant leave. Secondly, the question might involve construction of a standard-form contract. Then the judge must first satisfy himself that the question may substantially affect one of the parties. Further, he should consider whether the question is of general importance so that a decision on it would add to the clarity of the general law. Even then he should not grant leave unless there is a strong *prima facie* case of arbitral error. Thirdly, the events themselves might be peculiar, one-off, and in these circumstances, even where they arose under a standard contract, the first category principles should apply. Fourthly, there might happen an event which affects not only the particular contract, but also a great many other transactions. (Lord Diplock gave as examples the closing of the Suez Canal, trade embargoes and the war between Iraq and Iran.) In those cases where uniformity was desirable and where a decision might allow other pending disputes to be resolved, then leave should be given if the judge thought that the award was not right as opposed to obviously wrong.⁸⁹

Commentators have said that this is not construction of a statute but judicial legislation.⁹⁰ The writer agrees.

The attempt in *The Nema* to lay down these guidelines was merely a qualified success. In a number of cases leave has been given or refused without special hesitation or difficulty;⁹¹ however, but one series of cases calls for examination.

In *Italmare Shipping Co. v. Ocean Tanker Co. Inc. (The Rio Sun)*⁹² Goff J. granted leave to appeal from an award where questions of waiver arose under a standard form charter party. The Court of Appeal held he was right to do so. In so holding, however, Lord

87. See generally *supra* n.72 at 739, 740.

88. *Ibid.* at 742.

89. *Supra* n.72. The relevant passages appear at 742-744.

90. Malekin, 'Judicial Review of Arbitration Awards After *The Nema*' *supra* n.62 at 1303, and Lewis, 'Leave to Appeal under the Arbitration Act 1979' *supra* n.62 at 273.

Denning M.R. said that he accepted *The Nema* guidelines, but 'They are not barriers. You can step over guidelines without causing any harm . . . so let each case depend on its own circumstances'.⁹³ This rather points back to an individual judicial discretion, but what seems more important is that Lord Denning held that the appeal was rightly permitted because this charter party and the clause in issue were in common use and the waiver argument occurred repeatedly. Moreover, he thought that the arbitrator's decision was *ex facie* wrong.⁹⁴ Griffiths L.J., who delivered the other judgement, also indicated that the decision would fit the 'obviously wrong' category.

In short, despite Lord Denning's qualifying remarks *The Rio Sun* fits into *The Nema* guidelines. However, *The Rio Sun* caused Parker J. some confusion in *B.V.S.S.A. v. Kerman Shipping Co. S.A. (The Kerman)*.⁹⁵ Parker J. referred to the passage cited above from *The Rio Sun*, but indicated that in his view the proper conduct of a one-off application would be to hear argument on the aspects of the award which might be legally wrong and to make a decision after that. He thought that where after argument the court reached a provisional view that the arbitrator was wrong, leave should be given even in a one-off case.⁹⁶ In the end result, this did not matter since Parker J., on the contrary, thought that the arbitrator was right and refused leave.

The evident difficulty was on the question of argument. How closely should the court look at the award and what amount of argument should be permitted on its legal niceties? In *The Wenjiang* Lord Denning said that *The Nema* guidelines had become 'a little twisted up. So I will try and disentangle them'.⁹⁷ As the writer understands the judgement in *The Wenjiang*, Lord Denning indicated that the judge should begin by looking at the award itself to determine whether it is an award of a one-off kind. If so, he will look for some obvious error of law. It will be counsel's task to point out the obvious so far as error of law goes, to establish the category of dispute — one off or otherwise, and to persuade the judge how far the point affects the parties. However, the court should not entertain argument which seeks to expose possible but not evident flaws in the award. In *The Kerman* Parker J. was evidently troubled by a possible inference from Lord Diplock's speech that counsel should have nothing to put in a one-off case situation.⁹⁸ It is submitted that Lord Denning's comments in *The Wenjiang* are directed at this aspect of *The Kerman* and ought therefore to be seen as a procedural rather than substantive gloss on *The Nema*. The decision of Bingham J. in *The Prosperity* appears to support the views here advanced.⁹⁹

In *The Wenjiang* itself the question was whether a charterparty had been frustrated by the Iraq-Iran war and if so, at what time. The Court of Appeal observed that there were about sixty ships in a position like the 'Wenjiang' and the case therefore fell easily within Lord

91. The cases other than those discussed in the text are conveniently collected in the Commercial Law Reports:
The Evimeria [1981] Com L.R. 273 (Staughton J. — Leave refused)
The Nikos A [1981] Com. L.R. 276 (Lloyd J. — Leave refused).
The Eastern Saga [1982] Com. L.R. 151 (Mustill J. — Leave refused).
Moran v. Lloyds [1982] Com. L.R. 258 (Lloyds J. — Leave refused — Affirmed (C.A.) in [1983] Com. L.R. 132).
Cavalier Engineering Ltd. v. Randall Electronics Ltd. [1983] Com. L.R. 37 (Leggatt J. — Leave refused).
The Anangel Friendship [1983] Com. L.R. 139 (Leggatt J. — Leave granted).

92. [1982] 1 W.L.R. 158.
93. *Ibid.* at 162.
94. *Ibid.* at 163-165.
95. [1982] 1 W.L.R. 166.
96. *Ibid.* at 171.
97. [1982] 2 All E.R. 437 at 440.
98. See [1982] 1 W.L.R. 166 at 170.
99. [1982] Com. L.R. 66.

Diplock's fourth category. Was it ingenuous that the outbreak of this war had been one of Lord Diplock's fourth category examples?

Apart from *The Wenjiang* series, there are two recent cases which add something to the literature. In *Bulk Oil A.G. v. Sun International Ltd.*¹⁰⁰ it was argued that governmental policy relevant to the award might conflict with E.E.C. law. Bingham J. allowed leave to appeal. It was the duty of the national court to observe E.E.C. law and in those circumstances the court should more readily grant leave than it would under the *Nema* guidelines. In *Interbulk Ltd. v. Aiden Shipping Co.Ltd.*¹⁰¹ Lloyd J. held that there was nothing in the 1979 Act which allowed leave to appeal where an arbitrator was wrong, even obviously wrong, in fact.

3. Leave under Section 2 to appeal to the Court of Appeal from the High Court's determination of a Consultative Application

The case in point here is *Babanaft International Co. v. Avant Petroleum Inc. (The Oltenia)*.¹⁰² This was an application to the Court of Appeal under s. 2(3) of the 1979 Act for leave to appeal from a determination of Bingham J.¹⁰³ on a point of law given pursuant to s. 2(1).

Pursuant to s. 3(b) Bingham J. had certified that the point in question, which was construction of a charterparty, was of general importance, but himself refused leave as he felt the proper construction of the document was beyond doubt.

The Court of Appeal in turn refused leave. The applicant argued that by seeking a consultative decision the parties had demonstrated their concern that the arbitrators' award should be strictly correct in point of law. In rejecting that view, Donaldson L.J. considered *The Nema* guidelines. He held that if the Court of Appeal were to adopt any different approach by comparison with s. 1(7), it would be to take a more stringent view of leave under s. 2(3). Whereas under s. 1 the parties could agree to go to the Court, they had no such absolute right here because of s. 2(2). On a consultative application the court had to consider the inherent merit and importance of the point before it dealt with the matter. On these premises, Donaldson L.J. concluded that the Court of Appeal should be reluctant to go further into the merits. Given that this is in effect an interlocutory process, the writer agrees with this attitude.

D. CONCLUSION

By a process which culminated in the decision in *Czarnikow v. Roth Schmidt & Co.*,¹⁰⁴ the English courts placed increasing emphasis on the application of legal principles to arbitration. The supervisory jurisdiction of the courts came more and more to resemble an appellate process. The stated case procedures were critical to these developments.

The Arbitration Act 1979 came as a rapidly developed compromise between adherence to principle and economic factors. The 1979 legislation now frankly recognizes the appellate role that the courts had come to exercise but attempts in various ways to restrain the use to be made of such jurisdiction.

The last Australian legislation before the United Kingdom Act of 1979 was the Queensland *Arbitration Act* 1973. As might be expected under the influence of the pre-1979 English Law such innovations as the Queensland Act contained were, if anything, directed

100. [1983] Com.L.R. 66.

101. *Supra* n.80.

102. [1982] Com.L.R. 104.

103. Bingham J's decision is reported at [1982] 1 Lloyd's Rep. 448.

104. *Supra* n.17.

towards an even wider supervisory role for the courts than that which existed in the United Kingdom prior to 1979. For example, the Queensland legislation goes to the drastic length of making an award which is devoid of reasons, in effect, voidable since the arbitrator is guilty of misconduct.¹⁰⁵ As an award unsupported by reasons might very well be a sound one, the English solution in the 1979 Act, which allows the court to order reasons, is a sounder one.

The complexities of the appeal process and the exclusion agreement provisions of the 1979 Act call for more caution. These complexities are the direct result of compromise between established and experienced interest groups in the United Kingdom. Moreover, in the field of international trade general adoption of the UNCITRAL model law on arbitration may diminish the significance of domestic legislation like the 1979 Act. Consequently, it may well be premature now, and, in the long run, unnecessary for Australian jurisdictions to adopt the provisions of the 1979 Act.

On the other hand, the radical aspect of the 1979 legislation was its abandonment of the notion that the courts should promote a uniformly applicable system of commercial law in all contracts subject to English arbitration.

In that respect one Australian jurisdiction may be about to take a yet more radical step away from common law tradition. Clause 22(2) of the Victorian *Commercial Arbitration Bill* provides that, if the parties so agree in writing, the arbitrator may determine any question that arises for determination in the course of proceedings by reference to considerations of general justice and fairness. Should the Bill pass in this form Victoria may become Australia's Alsatia.

105. Sections 4, 24 and 32.