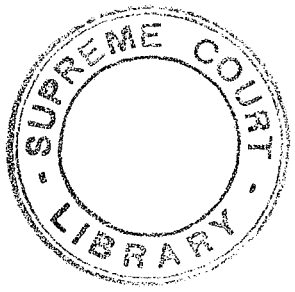
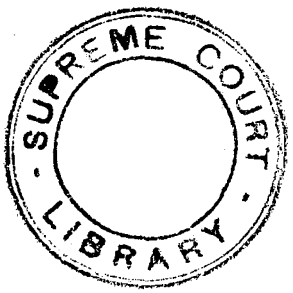
ARBITRABILITY

ROGERS J





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Arbitrability

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*Justice Andrew Rogers**

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In the last decade, at least in the industrialised countries, courts adhering to the common law system, have enlarged the permissible field of arbitrability beyond all recognition. The Supreme Court of the United States has led the field. Is the world of arbitration putting at risk the adherence of a large part of its constituency, particularly in the developing world? Where
166 is the line to be drawn? Do we have it right?

Arbitrability of a dispute may come into question at two different stages of the dispute resolution process and may fall for determination in accordance with two or more systems. The first stage is at the commencement of the process. A national court may be asked to stay curial proceedings, instituted in apparent contravention of an arbitration agreement. A stay may be refused on the ground that, according to the relevant national legal system, the dispute is not susceptible of determination by arbitration. Alternatively, at that point a national court may be asked to affirm, by some appropriate declaration, or order, the enforceability of an arbitration clause. The other point where the question may arise is at the enforcement stage. Then, the question may arise in one, or more, countries where the award may be sought to be enforced, whether recognition should be refused on the ground that the subject matter of the dispute was not capable of settlement by arbitration 'under the law of that country'.[1] Self-evidently, at the present time, it is possible that the various national legal systems invoked may return different answers.

The restrictions on arbitrability rest on twin concepts imposed by the courts. First, it is accepted that certain disputes, by reason of their very character, fall to be determined by the courts and are inappropriate for arbitral decision. Second, is the requirement that disputes be determined in accordance with certain mandatory obligations of the municipal law.

The two concepts are related in that a principal reason for requiring determination by the courts was the perception that only a court could correctly interpret public law, particularly a statute, relating to the dispute and give effect to it in accordance with the wishes of the national Parliament.

As Professor Park put it:

> The central theme in nonarbitrability cases is a concern that society will be injured by arbitration of public law claims. Courts express a fear that public law issues are

> too complicated for arbitrators; that arbitration proceedings are too informal; or that arbitrators are like foxes guarding the chicken coop, with a pro-business bias that will lead to under-enforcement of laws designed to protect the public. Lack of appeal on the merits of arbitral awards in the United States makes arbitration seem to some as a 'black hole' to which rights are sent and never heard from again.[2]

The sea-change in the approach to arbitrability in the United States is marked by the statement that:

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.[3]

The burden lies on the party so claiming to show that Congress intended to preclude a waiver of a judicial forum.[4]

The Court in *Mitsubishi* explained that such an intention may be discovered not just in the text of the legislation, and its history, but also in an 'inherent conflict' between arbitration and the underlying purpose of the legislation. Bearing in mind that this approach to arbitrability had not come into full flower until 1985 it is hardly a source of surprise that, mostly, a clear manifestation of such Congressional intent cannot be found. It may be a harbinger of the future that, in the more recent *Older Workers Benefit Protection Act*, Congress provided in terms that an individual may not waive any right or claim under the Act, including presumably a curial determination, unless the waiver was 'knowing and voluntary'. Specific requirements had to be met to satisfy that condition.

The claims in *Mitsubishi* included alleged breaches of securities and anti-trust legislation. It had long been thought that these were areas which would be jealously guarded as the preserve of the courts, both because of their highly complex and technical nature and also because of their extreme importance to the economy of the state.[5] Notwithstanding the vigorous dissent of three members of the Court, a majority of five judges considered that, in international transactions at least, the call of the arbitration provision must prevail. In *Dean Witter Reynolds Inc* v *Lamar Byrd* (1985)[6] Justice White filed a concurring opinion in which he seemed to suggest that even in domestic arbitration the same view might well be taken. This anticipation was realised by the decision of the Supreme Court in *McMahon*. Mr and Mrs McMahon were customers of Shearson, a brokerage firm. They signed customer agreements which included arbitration clauses. They brought action in the Federal District Court alleging violations of the *Securities Exchange Act* and the *Racketeer Influenced and Corrupt Organizations Act* (RICO) as well as fraud and breach of fiduciary duties. Shearson sought to compel arbitration of all the complaints, the subject of the court proceedings. The Court of Appeals held that public policy considerations made it inappropriate to apply the provisions of the *Arbitration Act* to RICO suits. It distinguished the reasoning in *Mitsubishi*

concerning the arbitrability of anti-trust claims on the ground that the transactions which gave rise to that dispute were international business transactions. In relation to the claim under the securities legislation the Court of Appeals relied on the decision of the Supreme Court in *Wilko* v *Swan* (1953).[7] In *Wilko* the court held that the *Securities Act* forbade waiver of the right to a judicial determination because 'Arbitration lacks the certainty of a suit at law under the Act to enforce (the Customer's) rights'. The right to select a judicial forum was thought by the court in *Wilko* to be a particularly valuable feature of the *Securities Act*. In *McMahon* the Supreme Court reversed the decision of the Court of Appeals with respect to the RICO claim and by majority as to the securities legislation claim as well. The judges so held on the basis that there was no inherent conflict between arbitration and the statutes' underlying purposes. The judgment of the Court was delivered by Justice O'Connor who summarised the competing interests:

> The other reason advanced by the McMahons for finding waiver of their #10(b) rights is that arbitration does 'weaken their ability to recover under the [Exchange] Act'. That is the heart of the Court's decision in *Wilko* and respondents urge that we should follow its reasoning. *Wilko* listed several grounds why, in the Court's view, the 'effectiveness [of the Act's provisions] in application is lessened in arbitration'. First, the *Wilko* Court believed that arbitration proceedings were not suited to cases requiring 'subjective findings on the purpose and knowledge of an alleged violator'. *Wilko* also was concerned that arbitrators must make legal determinations 'without judicial instruction on the law', and that an arbitration award 'may be made without explanation of [the arbitrator's] reasons and without a complete record of their proceedings'. Finally *Wilko* noted that the 'power to vacate an award is limited', and that 'interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation'. *Wilko* concluded that in view of these drawbacks to arbitration, #12(2) claims 'require[d] the exercise of judicial direction to fairly assure their effectiveness' ....[8]
>
> Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognised that arbitral tribunals are readily capable of handling the factual and legal complexities of anti-trust claims, notwithstanding the absence of judicial instruction and supervision.[9] Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.[10] Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute[11] (declining to assume that arbitration will not be resolved in accordance with statutory law, but reserving consideration of 'effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court').

This reservation in *Mitsubishi* appears to have been overlooked somewhat. It has been argued by commentators that the supposed protection is limited in a very significant respect. The opportunity for review is all well and good assuming that the claimant succeeds and obtains an award which it then seeks to enforce. However, where the claimant is unsuccessful in an international arbitration, held outside the country, there will be no opportunity for the national court to consider whether the claimant's failure was due to the arbitrator's neglect to apply, or to apply correctly, the anti-trust provisions. With due respect for that view what the court had in contemplation was the possible resumption or, I suppose, institution of curial proceedings, if it could be demonstrated that the arbitrator failed to give effect to the relevant public law. This last statement, of course, begs the question: What is the standard by which the court is to determine the issue of alleged failure?

This dicta in *Mitsubishi* has come to be known as the 'second look doctrine'. As Professor Park pointed out:

> It is uncertain if the second look involves a broad examination of whether the arbitrator properly applied the law, or merely involves a mechanical examination of whether the arbitrator in fact considered the American statute.
>
> *Mitsubishi* thus exacts a problematic price for arbitrability of anti-trust matters. Judicial review of the contents of awards, at least for their conformity with public policy, is the cost for letting the dispute go to arbitration.
>
> In a situation like *Mitsubishi* the arbitrator is in a bind. If a contract includes a choice of law clause explicitly selecting the legal system of a country whose competition law fundamentally differs from that of the enforcement forum, the arbitrator, mindful of Justice Blackmun's caveat, may nevertheless decide the anti-trust claims according to United States law. This departure from the parties' express choice of Swiss law might increase the award's chances of enforcement in the United States, but could open the door to a challenge of the award outside the United States not once, but twice. First, the loser in an arbitration in which the Sherman Act was applied could be expected to seek annulment of the award where rendered, on the theory that the arbitrator decided inconsistently with his mission, which is a ground for review in most major arbitral centres. Annulment would make the award more difficult to enforce throughout the world, because the New York Convention permits refusal of recognition to awards set aside in the country where made.
>
> Departure from the parties' chosen law also might result in a challenge to enforcement of the award against assets outside the jurisdiction in which the award is rendered. Article V (1)(c) of the New York Convention permits the refusal of enforcement to awards when arbitrators decide matters not submitted to them, which is not a totally unreasonable characterisation of an adjudication of Sherman Act claims under a Swiss governing law clause.

> Because the mandatory national norms of the enforcement forum, often called *lois de police*, arguably may apply notwithstanding the parties' choice of law clause, the arbitrator could be required to choose whether to give effect to the will of the parties, or to respect the imperative rules of a country with a vital interest in the subject of dispute. Such an interest might exist in matters such as competition law, currency controls, trade boycott, environmental protection and bribery. Even if compatible with the policy of the place of arbitration, an award might run afoul of the mandatory public law of the place of performance, thus giving rise to a refusal of recognition of the award under article V(2) of the New York Convention'.[12] (emphasis added)

The concern expressed by Professor Park was put much more strongly by Professor Carbonneau, who argues that the majority must have contemplated 'a form of merits review'.[13] On that assumption he claims that the safeguard constitutes a retrograde step and draws attention to the effort it took in England to narrow the scope of judicial review in arbitration. Professor Carbonneau concedes that the Mitsubishi Court specified that the substantive review remain 'minimal' and proceeded to lend some definition to this, ascertaining whether 'the tribunal took cognizance of the anti-trust claims and actually decided them'. Even Professor Lowenfeld, an otherwise strong supporter of the majority opinion, is not wholly convinced by the Court's approach on this point.[14] In *McMahon*, apparently untroubled by such concerns, the Court repeated the view that 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute'.[15]

It will be appreciated of course that many of the difficulties to which Professor Park refers arise from the fact that in *Mitsubishi* the parties had expressly chosen Swiss law as the applicable law.[16] Presumably the rationale for this was that Mitsubishi Motors Corporation was a Japanese corporation owned by Chrysler International SA, a Swiss corporation and Mitsubishi Heavy Industries Inc of Japan.

It is not clear to what extent the second-look doctrine is bound up with the statement by the Supreme Court in *Wilko* v *Swan*[17] that an arbitrator's 'manifest disregard of the law' in rendering an award could constitute a non-statutory ground for vacating an arbitration award. The only authoritative guidance to be had as to the scope of this defence at present, is in the opinion in *Merrill Lynch, Pierce Fenner & Smith* v *Bobker* (1986) where the Second Circuit said:

> ... [a]lthough the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well-established deference to arbitration as a

> favoured method of settling disputes when agreed to by the parties. Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.[18]

There is authority in US District Court decisions that the doctrine is not available to resist enforcement of awards under the *New York Convention*.[19] In '*Manifest Disregard of the Law in International Commercial Arbitration*' (1990),[20] the author concludes:

> To the extent that manifest disregard of the law might be used to impose American law and public policy on parties to international commercial contracts, it undermines the purpose of the Convention. Where this is the case, the ground has no place in international arbitrations. However, where manifest disregard of the law is limited to violations of international public policy, it could play an important role in judicial review of international arbitrations.[21]

There is another interesting aspect of the decision in *McMahon* that has not received a great deal of attention. One of the reasons given by the majority for accepting arbitration procedures as appropriate was that the Securities and Exchange Commission has power to abrogate, add to and delete from any rule if it finds such change necessary or appropriate to further the objectives of the Act. As the Court said:

> In short the Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.[22]

As a logical follow on to *McMahon*, the US Supreme Court, in *de Quijas* v *Shearson/American Express Inc*[23] finally overruled its previous decision in *Wilko* and held that pre-dispute agreements to arbitrate disputes arising under the *Securities Act* were enforceable. The reversal of *Wilko* was another important milestone in the march to supremacy of the *Federal Arbitration Act*. In *de Quijas*, Justice Kennedy, for the majority, said:[24]

> Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that para 14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers. *Wilko* identified two different kinds of provisions in the Securities Act that would advance this objective. Some are

substantive, such as placing on the seller the burden of proving lack of scienter when a buyer alleges fraud.[25] Others are procedural. The specific procedural improvements highlighted in *Wilko* are the statute's broad venue provisions in the federal courts; the existence of nationwide service of process in the federal courts; the extinction of the amount-in-controversy requirement that had applied to fraud suits when they were brought in federal courts under diversity jurisdiction rather than as a federal cause of action; and the grant of concurrent jurisdiction in the state and federal courts without possibility of removal.[26]

There is no sound basis for construing the prohibition in para 14 on waiving 'compliance with any provision' of the Securities Act to apply to these procedural provisions. Although the first three measures do facilitate suits by buyers of securities, the grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive those protections by filing suit in state court without possibility of removal to federal court. These measures, moreover, are present in other federal statutes which have not been interpreted to prohibit enforcement of pre-dispute agreements to arbitrate.

The latest expression of opinion is in *Gilmer* v *Interstate/Johnson Lane Corporation*.[27] The court held that a claim under the *Age Discrimination in Employment Act* could be subjected to compulsory arbitration. The majority opinion accepted that the Act was designed not only to provide relief to individuals but as well 'to further important social policies.' In this respect the Act stood on the same footing as the *Sherman Act*, the *Securities Exchange Acts*, and RICO. Nonetheless the majority was unable to discern the Congressional intent necessary to displace the obligation to arbitrate. In the present state of authority, in the United States, it is difficult to think of any field which is foreclosed to arbitration.

The common law approach was probably taken to its extreme in *Attorney General of New Zealand* v *Mobil Oil New Zealand Ltd.*[28] The New Zealand Attorney General sought a declaration from the High Court that an agreement, which had been entered into in 1982, conflicted in its operation with the *Commerce Act* as amended in 1986. The claim was that the agreement had the effect of substantially lessening competition in the relevant market. The agreement contained a provision, in Article VII, whereby any dispute arising from a matter contained in the agreement was to be submitted to resolution by arbitration by the International Centre for Settlement of Investment Disputes (ICSID). The trial judge was asked to refuse, in the exercise of his discretion, to make an order for a stay. That discretion was provided for by the 1979 New Zealand statute which brought into operation in New Zealand the ICSID Convention. It seems to me that an extremely strong case was made out for the grant of a stay. It was pointed out that the public-policy objective of the *Commerce Act* was to promote competition in markets in New Zealand. The High Court had the significant and indeed exclusive jurisdiction to formulate the policy for the future. In order to enable it to discharge this function with a proper appreciation of New Zealand commercial

life, the Court was required to sit with additional lay members with experience in industry, commerce, economics, law or accountancy. Furthermore, while ICSID was able to determine, as a matter of law, the applicability of the section of the Act to the agreement, the Judge took the view that it was not able to make an order by way of injunction, or any order varying the particular covenants between the parties, as the Court was able to do. The Judge said:

> For my part I see this as a very serious disadvantage to both parties if it comes about, because the Commerce Act 1986 is a comprehensive code for the resolution of such disputes when they arise. But I cannot forecast the likely outcome of these proceedings in a way which would enable me to conclude that the mutual disadvantages of proceedings with international arbitration are such that they should influence my discretion in the face of an application for stay. One must assume that the defendants have considered the flexibility, or lack of it, which the Centre may demonstrate once seized of this matter. Indeed, it may be that it will consider it appropriate to decline jurisdiction.[29] (emphasis added)

As will be seen, in the light of the decision in Australia, to which I will shortly come, the conclusion that ICSID arbitrators could not exercise the powers of the High Court may not have been as clear cut as the parties and the Court seemed to think. The difference between the *Mitsubishi* case and the New Zealand application was self-evident. Nonetheless, in what, if I may be permitted to say so, was a most carefully crafted judgment, Heron J, after referring to the US decisions, said:

> Such expressions are of course expressions of United States judicial policy towards international investments and contracts. I think such principles are appropriate even in this small country as international trade and commercial relationships are of critical importance. In holding the Crown to its agreement I see no reason for departing from those principles of international commercial comity, and in my view, they accurately reflect the attitude that New Zealand courts should take to international arbitration provisions of this kind.[30]

The decision was a robust affirmation of the primacy of the arbitral procedure, bearing in mind that, at the time when the arbitration clause was incorporated in the agreement, the *Commerce Act* was in a substantially different form. It is difficult to envisage a type of dispute that could more closely impact on the economic life of the country. The Parliament went to some pains to establish a specialist tribunal with extraordinary powers for determination of disputes of this kind. Yet that was insufficient to ensure a hearing before that tribunal.

It is instructive perhaps to mention some of the subsequent history of the dispute. The Centre did not, as the Judge thought possible, decline to exercise jurisdiction. It appointed Sir Graham Speight, a highly respected retired judge of the New Zealand High Court, as

arbitrator. No doubt the appointment of a New Zealander recognised the difficulties that would have been encountered by a foreigner in resolving a dispute so intimately involved with the commercial life of New Zealand. At the same time, the other party to the dispute may have been entitled to feel a degree of surprise at the first that the arbitrator after all possessed the attributes of nationality, training and lack of specialist expertise in economics that the ICSID Convention was designed to avoid. When all was said and done, and with the greatest of respect to the Arbitrator, the defendant got a New Zealand judge, albeit a retired one, but was deprived of the specialist assistance for which the Act called. One may be permitted to ask whether any procedural advantage the arbitral procedure provided was sufficient to outweigh the absence of the specialist lay members of the tribunal and the restricted range of remedies which, in the Judge's opinion, the Arbitrator was able to provide.

The question in *IBM Australia Ltd* v *National Distribution Services Pty Ltd*[31] was whether claims for relief made pursuant to sections 52 and 87 of the *Trade Practices Act* 1974 (Cth) fell within the terms of an arbitration clause in the agreement entered into by the parties. The agreement called for the supply by IBM of its Systems Integration Services. A computer specialist was appointed as Arbitrator because most of the complaints related to adequacy of the service provided by IBM. As the passage quoted from Kirby P makes clear, the remedies available under the Act, range from awarding damages, through rectification of the agreement and injunction to holding the agreement, in whole, or in part, void *ab initio*. Although it was not argued that it was against public policy to submit such claims to arbitration, the argument that, on its proper construction, the clause did not clothe the arbitrator with power under the Act was supported by reference to the width and nature of the remedies which could be afforded pursuant to section 87 of the Act. As Kirby P said:

> The appellant asked rhetorically whether it should really be imputed to the parties that they envisaged that the arbitrator should have a power to declare the contract void *ab initio* from which his own jurisdiction derived? Could it really be suggested that the arbitrator should have a power of injunction, whether limited to the particular parties or to officers of those parties, at least in the absence of an express conferral of such power in the agreement? Could it be contended that there should be read into the arbitration clause an intention of the parties that the arbitrator should enjoy such wide power as the Trade Practices Act confers upon courts? Originally those powers were confined to the Federal Court of Australia exercising an exclusive jurisdiction. Since 1986, the jurisdiction to exercise such powers has been conferred concurrently upon State courts exercising federal jurisdiction. But those courts are part of the constitutional machinery of the Commonwealth. They have such wide powers (so it was argued) because they are courts constituted by people trained in the law and versed in the traditional respect for liberties which our law safeguards. The notion that the parties to the present agreement should be taken to have agreed that such powers were conferred upon a then still undetermined arbitrator was one which the appellant argued was so unlikely that it should not be the construction preferred by the Court.

> Not only did the appellant point to the width of some of the powers themselves. It also pointed out that the very width of some of the powers contemplated (for example, an order varying the contract or an order for the supply of services) was so fundamentally inconsistent with the other express terms of the agreement itself that it would not be a construction put on clause 9. In particular, the appellant referred to those provisions of the opening words of the agreement and clauses 5, 7, 10(b) and 10(e) as showed an endeavour to confine the parties to limited damages and to rights defined within the four walls of the agreement....
>
> If the arbitrator, armed with the 'authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter' were persuaded to provide relief of a particular kind (such as injunction) any such order as the arbitrator purportedly made could only be enforced, as a judgment or order of the Court, after judgment is entered in the terms of the award. But that might only be done 'by leave of the Court'. It might be expected that the Court, in considering whether or not to grant such leave, would have regard to the nature of the relief given in the arbitrator's award.
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> The appellant urged that the very width of the relief available under the Trade Practices Act was an argument against imputing to the parties the intention to provide all of the relief of the kind afforded to courts by that Act. It is sufficient to answer this argument by saying that the holding in *Government Insurance Office of New South Wales* v *Atkinson-Leighton* contemplates that the very purpose of a reference to arbitration will frequently be to confer on the arbitrator the powers which would be enjoyed, even by statute only, by the court of law of competent jurisdiction that would otherwise hear the case.[32] (emphasis added)

I may perhaps be pardoned if I dwell on this decision for a minute. First, the statement in the penultimate paragraph quoted may be an Australian echo of the second-look doctrine. In the light of comments made by another member of Court, Handley JA, to the effect that the Arbitrator could not declare the whole of the agreement void *ab initio*, because that would destroy the Arbitrator's very jurisdiction, Kirby P may not have been intending to refer to anything more than that problem, which is still unresolved in Australian law. If he meant anything more, then, with very great respect, the suggestion would be out of line with today's accepted approach to the enforcement of awards.

Second, and more important, is the statement in the last paragraph. The decision referred to is by the High Court of Australia, the ultimate court of appeal for Australia. The question before the Court was whether an arbitrator had power to award interest. In holding that the Arbitrator had that power, members of the majority spoke in terms of complete generality. Thus Stephen J said:

> The principle to be extracted from this line of authority is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable and the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. Subject to certain exceptions, principally related to forms of equitable relief which are of no present relevance, and which reflect the private, and necessarily evanescent status of arbitrators, a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction.[33] (emphasis added)

According to Mason J, with whom Murphy J agreed, the real question is:

> Whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter. In the United States, it is accepted that the parties to an arbitration are free to clothe the arbitrator with such powers as they may deem it proper to confer, provided that they do not violate any rule of law. There it has been held that the parties may authorise the arbitrator to grant equitable relief, even including relief by way of injunction.[34]

When the question of an arbitrator's power to award interest came up in England in *President of India* v *La Pintada Compania Navigacion*, Lord Brandon, who delivered the principal speech in the House of Lords, said:

> Where the parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance, in all respects, with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise. It is on this basis that it was held by the Court of Appeal in *Chandris* v *Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 that, although s3 (1) of the Act of 1934, by its terms, empowered only courts of record to include interest in sums for which judgment was given for damages or debt, arbitrators were nevertheless empowered, by the agreement of reference, to apply English law, including so much of that law as is to be found in s3 (1) of the Act of 1934.[35]

In *IBM* Kirby P applied *Atkinson* with evident reluctance. However the High Court refused special leave to appeal from the decision.

Handley JA was prepared to take a rather more broad approach:

> I can see no basis for excluding claims arising under statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction. For example, the *Contracts Review Act* 1980, the *Frustrated Contracts Act* 1978 or the *Insurance*

> *Contracts Act* 1984 (Cth). Once this position is reached there is no basis, in my opinion, for excluding claims arising under the *Trade Practices Act* 1974 (Cth). An arbitrator who is authorised by the submission to determine controversies or claims under that Act must also be able to exercise the powers which are conferred by that Act on courts of general jurisdiction, provided those powers are appropriate.[36] (emphasis added)

It remains for another day to determine what should be the attitude of the Australian courts where the dispute involves the anti-competitive provisions of the *Trade Practices Act* rather than the consumer protection provisions in section 52. In relation to the former category of case the Federal Court of Australia has exclusive jurisdiction to the exclusion of the entire State court system. It may be that it is to that type of provision to which the reservation of Handley JA was directed.

A somewhat similar question came before the United States Court of Appeals for the 7th Circuit in *The Saturday Evening Post Company* v *Rumbleseat Press Inc.*[37] As will be seen, in a judgment delivered by Judge Posner, the Court considered the question in the light of sound judicial case management rather than as a matter of construction. The Saturday Evening Post had granted Rumbleseat an exclusive licence to manufacture porcelain dolls. After the licence was cancelled Rumbleseat continued to make the dolls, which the Post claimed was an infringement of its copyright. The dispute went to arbitration and an award was duly delivered. The Post moved the District Court under the Federal Arbitration Code to confirm the award. The Court did so. One of the issues for determination before the Court of Appeal was whether the validity of a copyright was arbitrable. This question had been left open in *Kamakazi Music Corporation* v *Robbins Music Corporation.*[38] Rumbleseat's main argument against arbitrability was that Congress's decision to give the Federal courts exclusive jurisdiction of copyright actions implicitly precluded arbitration of disputes over the validity of a copyright. The court said:

> This is a non sequitur. The dispute that the Post wanted to arbitrate was a dispute over compliance with a copyright licensing agreement; and, as we have seen, state courts have jurisdiction over such disputes — indeed, federal courts can acquire jurisdiction over them only by virtue of diversity or pendent jurisdiction. And, if in the course of a lawsuit in state court over a licensing agreement an issue of patent or copyright law arises, the state court is empowered to decide it. ... It is also supported by the principle that although federal courts have been held to have exclusive jurisdiction over cases arising under the federal antitrust laws, state courts are allowed to decide federal antitrust defences to suits properly brought in those courts under state law. It is also supported by the practical consideration that if the state court is not allowed to decide federal defences the litigation will be split up in an uneconomical fashion....
>
> It does not follow as the night the day that an arbitrator should also be allowed to decide the issue of validity. But it does follow that an argument against his being

> allowed to do so cannot be based on the exclusivity of federal copyright jurisdiction. That exclusivity just isn't engaged by a suit over a breach of a copyright licence.
>
> At argument we pressed counsel for Rumbleseat to give us a practical reason why arbitrators should not be allowed to decide issues of validity that arise in copyright licence suits. He was unable to do so, and we can think of none ourselves. It is true that a copyright is a form of monopoly, so a decision erroneously upholding the validity of a copyright might have the effect of continuing an unlawful monopoly in force. But there is no reason to think that arbitrators are more likely to err in copyright cases than state or federal judges are; the Supreme Court recently rejected such an argument in holding that the arbitration of antitrust claims arising out of international transactions is not contrary to public policy....
>
> The question is not whether the parties to a suit for copyright infringement may decide to refer the dispute to arbitration — no-one doubts they may; it is whether the arbitration of a dispute arising from a copyright licence must be interrupted if the licensee challenges the validity of the copyright. If so, this would toss a monkey wrench into an important means of resolving contractual disputes over intellectual property. We hold that federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute.[39]

Decisions of the kind of which *Mobil Oil New Zealand* is probably an extreme example have earned particularly strong criticism from Professor Sornarajah of Singapore:

> Developing states are also likely to have stronger views on arbitrability. Thus, an Indian court has held that a dispute arising from an international agreement for the transfer of technology is not arbitrable under Indian law because such agreements implicate national economic policies. Likewise, 'exploitation agreements and concessions' which are facilely included in the Model Law definition of commercial agreements are subject to the doctrine of permanent sovereignty over natural resources, a doctrine which, whatever its validity in international law may be, is constitutionally enshrined in many countries. Such countries may not lightly accept the notion in the Model Law that these agreements could be removed from the public law sphere by a mere commercial contract.[40]

The Professor has expressed his views in a more expanded form elsewhere.[41] The premise from which he starts must command universal acceptance. He says that a legal system 'may override the will of the parties to arbitrate a dispute where the settlement of the dispute affects interests other than those of the parties or implicates values other than those that concern only the parties'.[42] It is where he goes from that statement that enlivens debate. Accepting as a truism that many public interest laws are intended to protect the weaker party, he asserts that 'the aim of such protection will be frustrated if disputes involving such laws can be resolved

by private procedures.' He cites an article by Professor Park in support of this statement. More importantly, from the statement that a state may, if it so wishes, overrule the will of the parties to arbitrate the argument advances to 'arbitration is possible only of disputes that exclusively involve the interests of the two parties involved.' The last mentioned proposition has a number of assumptions about the arbitral process and arbitrators as its sub stratum. It is important for the future health of arbitrators that such assumptions be confronted.

It is appropriate to point out that it is not only developing countries that are uncomfortable with the developments in the common law countries. The civil law approach is much more restrained. For example, in 1987, the German Federal Supreme Court held that, according to the German Stock Exchange Law, the German plaintiff's transactions with the German subsidiary of Merrill Lynch were not binding on him and therefore he could not, as a matter of public policy, conclude a binding arbitration clause in relation to them. Therefore, the Court found that an agreement to arbitrate before a foreign tribunal and to apply foreign law to the dispute was invalid. Moreover in complete contrast to *Mitsubishi*, the Court took the view that it would not be appropriate to allow the arbitral proceedings to go forward under New York law and then have the plaintiff object to enforcement of a possible award in Germany as a violation of German public policy. The certainty that under New York law the German statute would not apply made it useless for the arbitration to be allowed to go forward.[43]

I delivered the initial judgment in *IBM* which was affirmed by the Court of Appeal. I remain of the view that international trade and investment require that a wide interpretation be given to arbitrability. That will have an inevitable effect on arbitrability in domestic arbitration. That having been said, the rule of law and respect for the supremacy of Parliament will mean that the boundaries clearly drawn by the national Parliament may narrow or widen the boundaries in a given field in accordance with Parliament's assessment of national, social and economic needs. Indeed so much is recognised by every decision from *Mitsubishi* onwards. Unfortunately Parliaments have not kept pace with developing judicial thought in the area, and in the result, the Courts have been left in uncontested possession of the field. It is too early to judge whether the courts have drawn boundaries wisely. Of one thing there can be no doubt. As a result of today's approach to arbitrability there are many problems which will require resolution by the courts. The continued health of arbitration will depend on the sensitivity to the views of others with which that task is undertaken.

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ENDNOTES

1 *New York Convention* Art V (2)(a).

2 WW Park, 'National Law and Commercial Justice; Safeguarding Procedural Integrity in International Arbitration' (1989) 63 *Tul L Review* 647.

3 *Mitsubishi Motors Corp* v *Soler Chrysler Plymouth Inc* (1985) 473 US 614.

4 *Shearson/American Express Inc* v *McMahon* (1987) 482 US 220, 227.

5 Compare *American Safety Equipment Corp* v *J P Maguire & Co* 391 F 2d 821 (2 CA 1968).

6 470 US 213.

7 *Wilko* v *Swan* (1953) 346 US 427.

8 *Supra* n 4, pp 231–32.

9 See *Mitsubishi* 633–634.

10 *Ibid* 628.

11 *Ibid* 636–637.

12 Park, *op cit* n 2.

13 TE Carbonneau, 'Mitsubishi, the folly of Quixotic Internationalism' (1986) 2 *Arb Int* 116.

14 AF Lowenfeld, 'The Mitsubishi Case; Another View' (1986) 2 *Arb Int* 178.

15 *Supra* n 4 232.

16 *Compare* Lowenfeld *op cit* n 14 p 88.

17 *Supra* n 7 436.

18 *Merrill Lynch, Pierce Fenner & Smith* v *Bobker* (1986) 808 F 2d 930.

19 *Brandeis Intsel Ltd* v *Calabrian Chemicals Corp* 656 F Supp 160 (SDNY

1987); *American Constructions* v *Mechanized Constructions of Pakistan* 659 F Supp 426 (SDNY) affd per curiam 828 F 2d 117 (3 CA 1987); *Carte Blanche (Singapore) Pte Ltd* v *Carte Blanch International Ltd* 683 F Supp 945 (SDNY 1988).

20 28 *Col. Jnl of Transnational Law* 449 (l de la Houssaye).

21 *Ibid,* p 472.

22 *Supra* n 4 pp 233–34.

23 *de Quijas v Shearson/American Express Inc* (1989) 490 US 477.

24 *Ibid,* p 534.

25 *See supra* n 7 p 431, 98 L Ed 168, 74 Ct 182, citing 15 USC para 771(2) [15 USCS para 771(2)].

26 *Ibid,* para 77v(a) [15 USCS para 77v(a)].

27 *Gilmer* v *Interstate/Johnson Lane Corporation* (1991) 500 US; S.Ct 1647.

28 *Attorney General of New Zealand* v *Mobil Oil New Zealand Ltd* [1989] 2 NZLR 649.

29 *Ibid,* p 666.

30 *Ibid,* p 668.

31 *IBM Australia Ltd* v *National Distribution Services Pty Ltd* (1991) 100 ALR 361; 27 NSWLR 466.

32 *Ibid,* ALR p 371; NSWLR p 477.

33 *Government Insurance Office of New South Wales* v *Atkinson-Leighton Joint Venture* (1982) 146 CLR 206 p 235.

34 *Ibid,* p 246.

35 *President of India* v *La Pintada Compania Navigacion* [1985] 1 AC 104 p 119.

36 *Supra* n 31, ALR 381; NSWLR p 487.

37 *The Saturday Evening Post Company* v *Rumbleseat Press Inc* (1987) 816 F 2nd 1191.

38 *Kamakazi Music Corporation* v *Robbins Music Corporation* (1982) 684 F 2nd 228, 231.

39 *Supra* n 37 p 1198.

40 Sornarajah, 'The UNICITRAL Model Law; A Third World Viewpoint' (1989) 6 *J Int Arb* 7.

41 Sornarajah, *International Commercial Arbitration* (1990).

42 *Ibid,* p 163.

43 *Compare* Kunner, 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany under the New York Convention' (1990) 7 *J Int Arb* 71, 76.