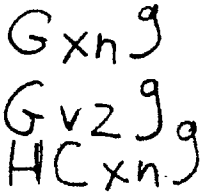
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EUROPEAN COMMUNITY LAW

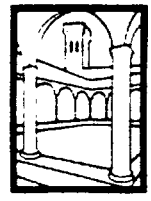
AND

MODERN TRENDS

IN

THE LAW OF ARBITRATION

Bernard O'Connor



EUROPEAN UNIVERSITY INSTITUTE

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INTRODUCTION

Arbitration is becoming more and more popular as a means of settling disputes among the business community. Its growth as an institution has paralleled the growth in trade since the second world war. It is well suited to modern trade; it is in most cases quick, private and cheap; it gives a good service; it avoids rules of procedure associated with courts of law which were not developed principally for business; arbitral rules of procedure can be adapted quickly to changing needs.

Arbitrators themselves can be appointed from among the ranks of traders rather than lawyers; they are often more expert in the subject matter of the dispute; they can be more responsive to the needs of the parties; they speak the same language. Arbitration can cope more effectively with long-term and repeat contracts. The antagonism which develops in courts of law is often absent from arbitration tribunals. It is popular and becoming more so.

This trend towards arbitration is reflected in the policies of the main trading states. Arbitration was chosen as the means of settling the disputes which arose between the U.S.A and its subjects and Iran after the fall of the Shah. Disputes arising out of trade between the U.S.S.R. and the U.S.A. are, by agreement, to be settled by arbitration in Stockholm. Now general courts of arbitration with their own rules of procedure have been established to supplement the trade-specific courts which grew up around particular commercial practices.

This trend is also reflected in legislation. France, the State of New York, the Canton of Vaud, Sweden and England, to name but a few, have all passed laws in the recent past to facilitate this growth. International Conventions have been adopted to facilitate the transfrontier movement and enforcement of arbitral awards. Review of arbitration by the courts has been restricted. It has even been suggested that arbitration is becoming 'unbound' from state jurisdictions and that we are witnessing the development of a new Lex Mercatoria.

The growth in arbitration has not been without its problems. It has given rise to questions of the arbitrability of different

branches of the law; the question of the separability of arbitration clauses; to questions of the jurisdiction of the arbitrator and kompetenz-kompetenz. It has raised the spector of public policy and the enforcement of mandatory law by the state. Finally, it raises the fundamental question of the relationship between arbitration itself and courts of law.

It is in the light of, and in response to, these developments that this paper has been written. It examines one aspect of the legal and practical problems which have arisen.

The Court of Justice of the European Communities in its decision Nordsee held that an arbitrator, whose jurisdiction was based on a private contract, could not make a direct appeal to it for the purposes of obtaining a decision on the proper interpretation of Community law. It held, rather, that the proper approach to it was through the intermediary of the courts of the Member States. The decision has given rise to much criticism and raises questions both with regard to community law and the law of arbitration.

In an attempt to deal with these problems this paper will examine the attitude of the Commission of the European Community toward arbitration. Secondly it will discuss the case law of the Court of Justice and the Nordsee decision.

The second part of the paper is an examination of the English law of arbitration. Through the examination of this law it is hoped that light will be shed on the obiter element in the Nordsee decision. Reference will be made to the laws of other States where this aids the analysis.

The aspect of Community law with which the paper is most concerned is that of the competition law of the EEC. This law is mandatory and has shared competence and is a useful tool in the analysis.

The Commission

The Commission of the European Communities is more concerned with maintaining European Community Law and especially competition law than it is with arbitration as such. Nowhere does it condemn arbitration, so long as it is not used as a means of circumventing competition law.

By virtue of Article 9(c) of Regulation 17/62, it is the Commission, subject to the review of its decisions by the Court of Justice, which shall have sole power to declare Article 85 (1) EEC inapplicable persuant to Article 85 (3) EEC.

Article 8 of the same regulation (17/62) which is concerned with the duration and recovaction of decisions under 85 (3) provides inter alia that:

- A decision may, on application, be renewed if the requirements of Article 85 (3) of the Treaty continue to be satisfied;
- The Commission may revoke or amend its decision or prohibit specified acts of the parties.

The combined effect of these two subsections is that the Commission can attach conditions to the granting of an exemption under 85 (3) and can monitor the performance of the conditions as a prelude to the granting of a renewal or the revocation of the exemption.

With respect to arbitration, the Commission has on a number of occasions (1) made it a condition for the granting of the exemption that the parties notify it of any arbitral award arising out of the exempted contract.
This practice has received the approval of the Court of Justice, in the case 17/74 Transocean Marine Paint (2) which held that,

> "Since Article 85 (3) constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article 85 (1), the Commission must be in a position at any moment to check whether the conditions justifying the exemption are still present."

Criticism has been expressed against this practice, particularly by the I.C.C. in the April 4, 1984 report of the joint working party on Arbitration and Competition. They point out that the practice reveals a suspicion on the part of the Commission towards arbitration and that furthermore, it is an invasion of privacy to require parties to notify the Commission of any awards. It might lead to the disclosure of business secrets but it cannot affect the validity of the award which is enforceable as soon as it is made.

With respect, these arguments do not stand close scrutiny. They are more suited to a critique of competition law as a whole rather than the details of its operation. Invasion of privacy and the protection of business secrets are both factors to be considered when deciding whether or not to notify [3] the Commission of a contract which might infringe the competition rules. The problem of the validity of the award is of a more general nature, and surely no different from the status of an award which might be subject to challenge in national courts of law.

In 1979 the Commission published a draft regulation [4] which provided for the institutionalization of this system. The draft regulation related to block exemptions for certain patent licencing agreements and with regard to arbitration provided:

> "Where disputes as to the interpretation or operation of one of the provisions or measures listed in Articles 1 and 3 are settled by Arbitration, the contacting parties are required to communicate the terms of the award forthwith to the Commission, together with the licensing agreement."

Article 9 of the draft required that any award submitted under Article 4 should state the reasons on which it was based. According to the preamble the purpose of Article 4 of the draft Regulation was to prevent the breach of competition law which forms 'part of the Community's public policy'.

When the Regulation was adopted (5) Article 4 was omitted. There had been protests from international arbitration bodies but it is thought that the principle reason for the omission was that it would be unfair to the contracting parties. The object of the Regulation was to limit the necessity to notify the Commission of contracts, by providing for a block exemption in the field of patent licensing. It seemed illogical then to require notification of awards made in respect of contracts which were, by definition, exempt. Furthermore, it was argued that, the obligation to notify would be used as a delaying tactic by a loosing party to the arbitration, and finally that it would break the essential privacy of arbitration. This final argument is all the more valid as there is no original obligation to notify.

Article 220 EEC

Finally, before examining the attitude of the Court of Justice to arbitration mention should be made of;

Article 220 of the EEC Treaty which provides that:

> "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals;
> - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The Brussels Convention of Sept. 27 1968, as amended, on jurisdiction and enforcement of judgments in civil and commercial

matters and having as its base Article 220 EEC did not extend to arbitration. It was felt unnecessary in view of the fact that all Member States had signed the 1958 New York Convention on the recognition and enforcement of foreign arbitration awards and that it would be useless duplication.

Further arbitration was excluded from the Rome Convention of June 19, 1980 on the Law applicable to contractual relations as it was felt that it was a complex matter and should be dealt with separately. There have as yet been no developments in this area.

The dispute settlement centre of the International Energy Agency

The attitude of the Commission to arbitration can further be seen in relation to the International Energy Agency.

This body arose out of the desire for common action among European States in case of oil supply shortages (including all Member States except France). The scheme, administered by the International Energy Agency, implies the cooperation between oil companies who thus run the risk of their actions being incompatible with the EEC competition rules. A dispute settlement centre was established as an international tribunal to settle disputes which might arise between the oil companies and/or the participating states. The dispute settlement centre is of interest in that it reveals the attitude of the Commission to arbitration in general. It should be remembered that this body was established under public law and not the private agreement between parties yet the Commission was concerned that it would not be a vehicle for the avoidance of the competition rules. The last sentence of Article XI of the Charter of the Dispute Settlement Centre adopted on July 23 1980 provides:

> "Recognition and enforcement of an award may be refused if the award is contrary to the public policy of the State in which recognition or enforcement is sought, including the law of the

> European Communities in so far as it forms part of the public policy of that state, being a Member State of the European Communities."

To this the Commission, in its tenth competition policy Report (1980) added:

> "Article XI and the Commission's statement (that Member States must ensure that the awards of the dispute settlement centre are in conformity with European law) are of considerable importance. They express firstly that arbitration, even if set up under public law or under international law, remains subject to applicable Community law. Furthermore they reflect the Commission's view that the competition rules of the treaty are public policy within the meaning of the New York Convention (2) and should be so recognized by the national laws of Member States of the Community. Awards contrary to Community Law cannot therefore be legally implemented."

The Commission is not opposed to arbitration. It is only concerned that the law is applied.

The Court of Justice of the European Communities.

The case law of the Court of Justice on questions relating to arbitration have given rise to most debate in the field of arbitration and Community law. Most questions (6) have arisen with regard to the status of arbitration tribunals in relation to Article 177 EEC procedure.

Without examining the primary question of the admissability of the case under the Article 177 EEC procedure, the Court has given preliminary rulings at the request of a wide range of tribunals. Only those cases in which relevant rulings have been made will be considered.

The Vaasen Case

Case 61/65 Vaasen [7] was the first case where the Court had to consider the meaning of the phrase, "Court or tribunal of a Member State", in the second paragraph of Article 177. The Scheidsgerecht (Arbitration Tribunal) requested the interpretation of several provisions of Council Regulation N° 3 on the free movement of persons. The Court first examined the status of the Scheidsgerecht. It had been established under the bye-laws of the Beautenfonds, a body set up under Dutch law, to administer certain matters regarding social security in the mining industry. The Court found that it was a tribunal for the purposes of Article 177 EEC. A number of distinguishing factors were established to characterize the tribunal as a 'Court or tribunal' of a member state. They were:

- a. The Schiedsgerecht is properly constituted under Netherlands law.

- b. The rules of the Schiedsgerecht must be approved by not only the Minister for Mining but also the Minister for Social Affairs.

- c. The Minister is obliged to appoint the members and chairman of the tribunal and lay down its rules of procedure.

- d. It is a permanent body following an adversarial procedure as in ordinary courts of law.

- e. It must decide in accordance with rules of law.

- f. Those to whom the regulations apply are bound to take their disputes to the Scheidsgerecht as the proper judicial body.

The Court then proceeded to examine the substance of the case which need not concern us here.

The Broekmeulen Case

The criteria established in Vaasen were followed and expanded in the case of Broekmeulen (8).
This case concerned a physician of Dutch nationality who obtained his medical degree from the University of Leuven in Belgium and wished to practice in the Netherlands. On the strength of the Belgian diploma the Dutch Minister for Health, applying Council Directive 75/362 on the mutual recognition of diplomas in medicine authorized him to practice in the Netherlands. To practice as a general practitioner he applied for registration with the Society for the Promotion of Medicine, a private body under Dutch law of which membership was necessary for the purpose of Dutch national health insurance law. His application was refused, so he appealed. The appeal committee of the Society sought a preliminary ruling from the Court of Justice on the interpretation of Council Directives 75/362 and 75/363, as there was doubt as to their application. The ground upon which the Society refused admission was that the Directives were to be applied to nationals of other Member State but not to Dutch nationals with foreign diplomas.

The Appeals Committee did not, itself, ask whether it was, or was not, entitled to request a ruling; yet the Court examined the question of its own motion. It admitted the request for a preliminary ruling, establishing the Appeals Committee as 'court or tribunal of a Member State' for the purposes of Article 177 EEC.

The Court adopted the Vaasen criteria and added an important criterion namely the "significant degree of involvement of the Netherlands public authorities" (9). This addition was made necessary by the fact that the Huisarts Registratie Commissie is a private society whose rules provide for internal legal remedies. The Court took a functional approach:

> "If, under the legal system of a Member State, the task of implementing such (Directives of the Council) provisions is

> assigned to a professional body acting under a degree of governmental supervision, and if that body, in conjunction with the public authorities concerned, creates appeals procedures which may affect the exercise of rights granted by Community Law, it is imperative, in order to ensure the proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings" (10).

It appears from this that the extent of governmental involvement with, and supervision of, the private association as well as the vindication of a Community right were central to the Court's reasoning. How then would the Court react to a request from an arbitrator whose authority rested solely on a private contract? This situation was first discussed in Nordsee. Before discussing the case it is worth noting that it is the only instance in Community law where such an arbitrator has felt obliged to request a preliminary ruling from the Court of Justice.

The Nordsee Case

Case 102/81 Nordsee (11) concerned an agreement between two groups of German shipowners to pool aid received, by any one of them, from the European Agricultural Guidance and Guarantee Fund, for the building of thirteen fishery factory ships. The contract further provided that, any dispute arising out of the agreement should be decided by a sole arbitrator to be appointed by the Bremen Chamber of Commerce. The arbitration award was to be final and the arbitration clause excluded any recourse to courts of law. The Chamber of Commerce appointed the president of the Hanseatic Court of Appeal to act as sole arbitrator when the parties failed to agree. He was immediately faced with the compatability and validity of the agreement with regard to Community Law. While the Regulations in question (12) did not specificaly prohibit pooling agreements, they were clearly against the spirit of the Regulations

in that they were a means to by-pass the discretion of the Commission.

The first question asked by the arbitrator concerned his own authority to make such a request. This question provoked three Member States and the Commission to submit observations to the Court. Essentially, the United Kingdom and Italy opposed the authority of private arbitrators to request a ruling, whereas Denmark though opposed in principle, "considered that such a request should be entertained in certain circumstances". The Commission supported the right on the grounds that the tribunal was bound to apply the law; was also bound by national rules of procedure; was considered under national law as a body charged with the settlement of disputes. The Court however rejected the right saying:

> " It is true, as the arbitrator noted in his question, that there are certain similarities between the activities of the arbitration tribunal in question and those of an ordinary court or tribunal in as much as the arbitration is provided for within the framework of the law, the arbitrator must decide according to law and his award has, as between the parties, the force of res judicata, and may be enforceable if leave to issue execution is obtained. However these characteristics are not sufficient to give the arbitrator the status of a 'court or tribunal of a Member State' within the meaning of Article 177 of the Treaty." (13)

The Court tries at all times to distinguish this case from those of Vaasen and Broekmeulen in justifying its denial:

> "The first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case it appears that the

parties were under no obligation, whether in law or in fact to refer their disputes to arbitration (14).

In Broekmeulen it had been noted by the Court, that even though a legal right of appeal existed from decisions of the appeals committee, this right had never been exercised. There was thus, in practice, no choice of forum. The Court of Justice went on to say:

"The second point to be noted is that the German public authorities are not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in proceedings before the arbitrator..."

"It follows from these considerations that the link between the arbitration procedure in this instance and the organization of legal remedies though the courts in the Member States in question is not sufficiently close for the arbitrator to be considered as a 'court or tribunal of a Member State' within the meaning of Article 177."

Most difficulty with the Nordsee judgment has centered around recited 14 where the Court attempted to reasert one of the basic objectives of Article 177, namely that:

"As the Court has confirmed in its judgment of 6 October 1981 Broekmeulen, Case 246/80, Community Law must be observed in its entirely throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact that if questions of community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award - which may be more or

> less extensive depending on the circumstances - and which they may be required to effect in case of an appeal or an objection in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legistation."

Critical appraisal of the judgement

The Nordsee decision has given rise to considerable debate most of which has been critical. It must be said at the outset that the judgment is legally very unsatisfactory but on a practical level, both from the point of view of the arbitrator and of the Court of Justice, the decision forms part of a long line of compromises in the relationship between Courts of Law and arbitration tribunals. The compromise is not without its difficulties. The reasoning in Nordsee is short and though it has been denied (15), it would appear to hide significant policy considerations.

Firstly, Nordsee established that while all the criteria of Vaasen and Broekmeulen must be met, certain requirements are more important. The involvement of the public authorities and the mandatory competence of the tribunal appear essential.

The Court based its conclusions partly on the ground that,

> "From the facts of the case it appears that the parties were under no obligation, whether in law or in fact, to refer to arbiration."

It is hard to establish what the distinction is between the legal or factual obligation to refer. The Court seems to infer that an arbitration tribunal cannot be regarded as a 'court or tribunal' where there is no obligation to refer to arbitration outside that of the orginal agreement. Mark Friend (16) suggests that:

> "The absence of choice in the matter of whether to refer a dispute to arbitration might well indicate that the tribunal in question is a court or tribunal of a Member State (as was the case in Vaasen) but the existence of such a choice should not lead one to the opposite conclusion. Even if a contract contains no arbitration clause it does not necessarily follow that any dispute arising thereunder will fall to be litigated by the courts, for the parties may well settle out of Court"

Secondly, on the question of the public authorities' involvement, it would appear that the Court denies, without discussing the point, the jurisdictional theory of arbitration. As the Commission stressed in its submission,

> "The juditial powers of the arbitration tribunal, as an organ entrusted with the administration of justice, are rooted in the juditial system itself, which recognises it and authorises it to give legally binding decisions in disputes. The parties do not create the possiblity of arbitration, they make use of it" (17).

This argument suggests that there is a significant degree of involvement by the state authorities even in private arbitration; the State facilitates private contract and provides rules and regulations for the proper functioning of that branch of the law. Ultimately it provides for sanctions whereby a party, having freely undertaken obligations within the law of contract, neglects or refuses to fulfill them. Contract law and thus arbitration could not function without the authority of the State.

As opposed to this is the argument of the U.K. Government that:

> "The arbitrator does not examine his function or his jurisdiction on behalf of the State, and is therefore not an organ of the State."

It is hard to see the distinction created by the words 'on behalf of' or 'of' the State unless one is to come down to the simple question of remuneration. More likely this argument is as a prelude to the following point made by the U.K. Government that the clear meaning of the words in Article 177 'court or tribunal of a Member State'

> "implies the existence of a close link between the adjudicatory body in question and the system of legal remedies in the Member State concerned" (18).

Surely, this is a very difficult point to argue and is a very fine line to draw in practice. In fact, the effort of government is often to establish the separatedness of modern administrative tribunals from the organs of government, so as to ensure their fairness and independence. Finally, it seems odd that it was the U.K. Government which emphasised this point in its submission, as it is clear that the theory of English arbitration law accepts the jurisdictional approach to the subject.

One must also ask to what extent the Court of Justice was influenced by the submission of the U.K. Government that

> "Arbitrators are subject to the 'ordre publique' of the legal systems within which they operate."

Thus, it reasons, questions of Community Law will always be under the control of national courts and by implication the Court of Justice. This submission pointed the way to the compromise solution adopted by the Court.

Another submission which may well have weighed heavily with the Court is the view of Advocate General Reischl where he suggests that allowing the reference would burden the Court of Justice with:

> "A work load the extent of which it would be difficult to estimate if it were to be thus diverted from its own work to deal with private disputes often of very minor significance, involving some aspect of Community Law" (19).

As Mark Friend has suggested, arguments based on the grounds of administrative convenience are often not an adequate substitute for logical or legal reasoning (20).

It can also be questioned whether in practice this would be true. In the near 30 years of Article 177 EEC, there has only been one instance of a private arbitrator considering it necessary to refer a question to the Court of Justice. One must presume that others had considered the possibility but rejected it.

The administrative difficulties forseen by a flood of references has also been provided for. The Single European Act has paved the way for a new Court of First Instance which could be used to exercise a function in this area.

The purpose of the Article 177 procedure is to ensure and facilitate the uniform interpretation and application of the EEC Treaty. In the case in question the arbitrator was dealing with a novel point of law which had not been considered by the Court and the Court refused jurisdiction to determine the point. How can the objectives of Article 177 be achieved if every opportunity is not taken to claim jurisdiction and give authoritative rulings whenever possible? Bebr (21) and other commentators consider this to be the principle failing in the Nordsee case. Whereas the Court has chosen to be bold and expansive before, it has now reacted conservatively. This arguement is questionable.

In 30 years of Community Law the system has developed and matured and is no longer a new system of law. Doctrines of direct effect and supremacy are now fully accepted and even practical

difficulties with the Acte Claire doctrine seem to have been resolved in the last number of years.

In Cilfit, Case 283/81 ECR [22], the Court stated that the obligation to refer a matter to the Court of Justice is based on cooperation:

> "Established with a view to ensuring the proper application and uniform interpretation of Community Law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law and the Court of Justice. The third paragraph of Article 177 seeks to prevent the occurance within the Community of divergences in juditial decisions on question of Community law".

Despite this fact that the Court went on to establish a certain measure of freedom of action for national courts on questions of Community Law is stated that:

> "If the correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved"

Then a national court of final instance is not obliged to refer.

Thus, it can be seen that the Court of Justice is entering a mature phase where it is no longer concerned with establishing its own authority over question of Community Law. Having established its authority the Court can relax on the question of proper application of that law; should divergent practices arise the Court of Justice can, in a suitable case, lay down the correct interpretation to be followed by all courts which must apply that interpretation. Such is the system in both England and Ireland.

In Italy, the question of supremacy of Community Law would appear to be resolved, for all intents and purposes, by the decision of

the Constitutional Court in Granital [23] although the Court still adopts a dualist approach.

In France, it would appear also that the 'Cour de Cassation' has, by its decision of 10th December 1985, Arrêt n° 1096 P Roquette Frères, accepted the authority of the Court of Justice on questions of Community law and gone a long way to bringing the 'Cour d'Appel' into line.

These cases show the willingness of the national courts of final instance to accept the authority of the Court of Justice in questions of Community Law. This now having been established the Court of Justice can move into its mature phase. As Community Law becomes more established and as there is a growing and better awarness of its contents, lower courts should be encouraged, where faced with questions of Community law, to be more active in its interpretation and application. The Court of Justice has always emphasised the cooperation necessary between national courts and the Court of Justice in the application of Community Law. This cooperation should now be advanced by the national or lower courts becoming more bold in the interpretation of Community Law even where the Court of Justice has not ruled on the point. This is a conception of the application of Community Law which fits well with the relationship between arbitration and courts of Law.

An arbitrator, as will be seen later, is obliged in England to apply Community Law. To apply it properly, he may well have to determine novel points which have not been considered by the Court of Justice. As he cannot refer questions on the law to the Court of Justice and secondly, as his access to national Courts might be restricted, the arbitrator will be under an obligation to interpret and apply Community Law to the best of his ability. His opinion may differ ultimately from that of the Court of Justice but that does not lessen his obligation to interpret and apply the law.

The Obiter Dicta of Nordsee

That part of the judgment which has caused greatest difficulty among the commentators is the obligation imposed on arbitrators to apply the law and the supervision of this application through the national courts and ultimatly the Court of Justice. This obligation is to be controlled by the normal supervisory functions of national courts over private arbitration. The Court of Justice said:

> "It is for the national courts or tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain the interpretation or an assessment of the validity of provisons of Community Law which they may need to apply when exercising such auxiliary or supervisory functions" (24).

Three situations are envisaged in which national courts would be called upon to assist or control arbitration tribunals and awards. Either, in the context of the collaboration where courts assist arbitrators in certain procedural matters and to interpret the law applicable; or when objections are made to the issue of an exequator; or under any other method which might be available in national law.

The extent of judicial control over arbitral tribunals at the three stages which the Court outlines varies considerably from Member State to Member State, and in some jurisdictions can be excluded completely. Questions of public policy are raised. This is a concept notoriously difficult to define and certainly different in each jurisdiction even if there is unanimity among the Member States that an award will not be enforced if it is in violation of public policy.

Before examining the exact powers the courts of the U.K. have in assisting arbitration tribunals and reviewing arbitral awards a number of general comments can be made.

Bebr and others have argued that leaving the question of access to the Court of Justice to national law is a diminution of Community Law and runs counter to the promotion of the uniformity of that body of law throughout the Community. While it might be true that access to the Court of justice will vary from Member State to Member State, it should be asked whether this is in fact a problem for Community Law or is it a practical response by the Court to the existence of a series of dual systems of law.

The relegation to national law of problems concerned with Community Law is nothing new to the administration of that law. On the question of appeals of the decision to refer by a lower court there is a wide variety of different situations in the Member States. That the Court of Justice has allowed this situation to come about has been critized as not been within the spirit of Article 177 (25), but it could be said that this solution though slightly inelegant, is fully acceptable within the idea of the cooperation between the two systems. The Court of Justice has adapted, in a sensible manner, to the situation by accepting that it is seized of matter until such time as it hears otherwise from the referring national court. It is clear that in this 'lacuna' regional variations of interpretation could develop, but one wonders whether this is incompatable with the Community system of law as it develops.

The argument, that a national court, when reviewing arbitration procedures, might not be properly seized of the matter in order to be able to refer a question to the Court of Justice, is even less compelling. This argument has been based on cases where the Court of Justice has refused jurisdiction, to entertain a reference, because the Court felt that it was an abuse of the Article 177 procedure (26).

> "As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty, it is for the national court, which is alone in having

> a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, to appreciate with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give a judgment" (27).

In the light of this dicta, it is argued that it might be incorrect for a national judge to refer a question to the Court of Justice under the terms of Article 177 EEC, where the request for a referral comes from another tribunal and where that other tribunal might ultimately decide the issue. It is also doubted whether a judge who is called upon to grant an exequator on an arbitral award is deciding an issue.

Both these arguments fail by weight of logic alone. The issue that a judge decides upon when granting an exequator is whether or not he considers the award to be proper in all its procedural and legal aspects and whether it conforms with public policy. He decides to lend the full weight of the law to the award, an action which most certainly must be considered a decision for the purposes of Article 177 of the Treaty.

Whenever the request to refer comes from an arbitration tribunal (if and where that is possible) the judge can and does exercise his discretion on whether or not to refer the question. The concept of questions of law being decided by one body and questions of fact being determined by another is common to all systems of law within the Community. The situation here is no different. The referring judge is assisting the Court of Justice in its determination on the question of law and leaving it to the arbitrator to apply the law to the facts of the case. It is the very system of Article 177 itself.

Finally, a number of practical considerations have also been raised by the judgment in Nordsee.

Firstly, it is argued, that as arbitration awards are not published they are of little concern to the development of Community Law: that allowing a reference from an arbitrator will have little effect in the national jurisdictions. These arguments tend to overlook the fact that the preliminary ruling itself is published. Further there seems little difference between the decision of an arbitrator and that of the lower courts whose judgment are most often not published even where the case has given rise to a preliminary ruling.

Secondly, that private arbitration is, of its nature, required to be secretive, quick and inexpensive and that allowing an arbitrator the right to refer introduces both publicity and delay. But the Nordsee decision would appear to facilitate these stated aims of arbitration. Unfortunately, the delay and cost of the proposed route of access would be more than if a direct right of reference and were to be allowed. But here one must balance the advantages the decision provides for speed, secrecy, low cost and certainty as against the few cases which would take the long route from arbitrator through the national courts to the Court of Justice.

Thirdly, the Court of Justice might well have taken the opinion of Advocate General Reischl into account where he argued that granting the right to refer could turn the preliminary ruling procedures into an advisory opinion of mere academic interest (28). This argument overlooks the inherent right of the Court of Justice to refuse jurisdiction when it considers that the Article 177 procedure is being abused.

Finally, there has been much debate concerning the structure of Article 177 and its adaptability to arbitration. It is argued that if the right was granted, then arbitrators would be obliged to refer, as they are in effect 'courts or tribunals' of last instance for the purposes of Article 177 (3) EEC. If one adopts the jurisdictional approach to arbitration this is not necessarily

true as the authority of the arbitrator rests ultimately on the sanction of the courts. By following this argument there will always be access to the courts and thus an appeal to a court of higher instance such that arbitration tribunals would not be obliged to refer questions to the Court of Justice. The contrary argument is that the right of appeal from decisions of arbitrators is being restricted in all Member States, such that in practice, and in most cases, the tribunal is the forum of final instance. A solution is not readily available to this conundrum. By denying the right the Court of Justice has rightly avoided the issue. Both positions raise difficulties and no compromise solution could have been legally elegant. It is for this reason and for the fact that Nordsee enhances the status of arbitration, rather than reduces it, that this premilinary ruling is to be welcomed.

UNITED KINGDOM LAW

Historically, arbitration enjoyed a fluctuating fortune in English law. In earlier times it enjoyed a status similar to that in the rest of Europe. International traders travelling between markets all over Europe required a system of dispute resolution based on custom and practice and allowing for speedy resolutions. Traditionally, disputes were settled on the last day of trading before the merchants moved off to the new market. English law recognised these needs. The Chancellor said in 1475 in the Star Chamber (29):

> "This dispute is brought by an alien merchant, who has come to conduct his case here, and he ought not to be held to await trial by 12 men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the speed of merchants."

By the 19th century the relationship between courts of law and arbitration tribunals was not so cosy. Judges had no fixed salary and depended for their fees on the litigants and thus were in direct competition with arbitrators. The courts, with inherent jurisdiction, held that on public policy grounds their jurisdiction was not ousted by the presence of an arbitration clause in a contract. Litigants could choose and were in practice encouraged to bring their disputes before the courts.

The famous 'Scott v Avery Case'(30) signalled the end of this naked conflict. Here, the courts recognized the validity of a provision to the effect that where there was an arbitration clause in a contract, a resolution of the dispute by arbitration was a condition precedent to the jurisdiction of the court. Despite setbacks, this approach has been maintained and culminated in the 1979 Arbitration Act which restricts, to a large extent, the jurisdiction of the courts over arbitration tribunals even on questions of law. It can now be safely stated that the public

policy of the English Courts is to encourage the autonomy of arbitration and to enhance its effectiveness by means of reducing the external control on its functioning.

The Arbitration Act of 1979

The Arbitration Act of 1979 replaced the procedure of judicial review of arbitration tribunals and awards with a new regime.

It is clear from the Parliamentary reports of the debate on the introduction of the new Bill that the old system was not satisfactory to the business community nor for professionals involved in arbitration. One Member of the House of Lords estimated that the potential for abuse under the old system, namely, the commencement of court proceeding solely for the purpose of delay and the consequent uncertainty that this gave rise to meant a loss to the national economy of £ 500 millions U.K., per annum. It was also foreseen that the Act should facilitate the development of English commercial law.

The 'old system' under the Arbitration Act of 1950 provided for:

- 1. The requirement that, if one of the parties to a dispute so requested, the arbitrator was obliged to state a case to the courts on a question of law. If he refused the court could order him to do so. The parties were not entitled by prior agreement to exclude this right. This was known as the special case or consultative case procedure and still applies to arbitrations commenced before August 1979;

- 2. The jurisdiction to set aside an award for error appearing on the face. This was a cumbersome procedure for a number of reasons. The court could only set aside the award, or not, and if it did so the arbitrator would be required to commence his procedure anew. The court could only review matters which appeared on the face. As English law does not require an

arbitrator to state his reasons, the practice developed of excluding from 'the face' of the award elements which would make it susceptible to review. It also caused problems for the enforcement of English awards in countries where public policy required an arbitrator to state his reasons (31).

The 'new system' under Sections 1 and 2 of the Arbitration Act 1979, sets out a comprehensive system for the judicial review of all aspects of arbitration, replacing the special case procedure and the setting aside or remission of awards for error of law or of fact on their face. The 'new system' provides for an element of supervision by the courts by means of an appeals procedure which attempts to avoid the disadvantages of the special case procedure by permitting appeals only with leave of the Court; and furthermore, by permitting exclusion agreements under section 3 of the Act, whereby the parties can validly agree prior to the dispute to exclude judicial review where the arbiration is non-domestic, and in all cases after the commencement of the arbitration.

Even where no valid exclusion agreement exists, there is no automatic right of appeal on questions of law. Appeals may only be brought with the consent of all the parties or with leave of the court.
The question of leave to appeal to the High Court on questions of law is essentially the same for sections 1 and 2 of the 1979 Arbitration Act.

The material provisions of the Arbitration Act 1979 are as follows:

S.1 (2) "Subject to subsection (3) below, an appeal shall lie to the Hight Court on any question of law arising out of the award made on an arbitration agreement; and on the determination of such an appeal the High Court may by order:

- (a) Confirm, vary or set aside the award; or,

- (b) Remit the award to the reconsideration of the arbitrator or umpire together with the court's opinion on the question of law which was the subject of the appeal;

and where the award is remitted under paragraph (b) above the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

(3) An appeal under this section may be brought by any of the parties to the reference:

- (a) With the consent of all the other parties to the reference; or,

- (b) Subject to section 3 below (dealing with exclusion agreements), with the leave of the court.

(4) The High Court shall not grant leave under subsection (3) (b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

(6A) [Added by Supreme Court Act 1981, s. 148 (2)] Unless the High Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the High Court:

- (a) To grant or refuse leave under subsection (3) (b).

(7) No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless

- (a) The High Court or the Court of Appeal gives leave; and

- (b) It is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

It has been said (32) that the Act was introduced as a remedy for previous difficulties but that sufficient attention was not paid as to how the new appeals system would work in practice.

The Case Law under the 1979 Act

Subsequent to the passing to the Act it became clear that:

> "More thought should have been given to this aspect of the new procedure" (33).

It is exactly this element of the new procedure which has most relevance to the route of access from arbitration tribunals to the Court of Justice.

The question of the leave to appeal requirement was first considered by the House of Lords in the Nema (34). In the leading judgment Lord Diplock attempted to fill the gaps in Section 1 (3) (b) and indicate the principles to be applied by the courts in the exercising of their discretion as to whether to grant leave to appeal. The principle consideration be considered was the weighing of the:

- "The rival merits of finality and meticulous legal accuracy"

He said that there are:

- "Several indications in the Act itself of a Parliamentary intention to give effect to the turn of the side in favour of

> finality in arbitral awards (particularly in domestic arbitrations), at any rate where this does not involve exposing arbitrators to a temptation to depart from settled principles of law" (35).

Support for this view was to be found in sections 3 and 4 of the Act which provide for exclusion agreements, it seemed:

> "Quite evident that the Parliamentary intention evinced by section 4 in maintaining, for the time being, a prohibition on pre-dispute exclusion agreements only was to facilitate the continued performance by the courts of their useful function of preserving, in the light of changes in technology and commercial practices adopted in various trades, the comprehensiveness and certainty of English law as to the legal obligations assumed by parties to commercial contracts of the classes listed, and particularly those expressed in standard terms: it was not Parliament intention to encourage appeals from arbitration's awards even under those classes of contracts where such appeal would not fulfill this purpose" (36).

Lord Diplock saw two central elements in the new Act. That there should be a move towards finality of arbitral awards and that the principle reason for the retention of an appeals system was to enhance English commercial law.

In the light of these principles Lord Diplock laid down a number of guidelines to be followed by the Commercial Court judge in deciding whether or not to grant leave to appeal.

(i) Leave should never be granted unless the judge considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially effect the rights of one or more of the parties to the arbitration agreement (37).

(ii) Where the question of law involved is a 'one off' clause that is to say, a clause which is not found in standard form or in widely used mercantile contracts, the application of which to the particular facts of the case is an issue in the arbitration, leave to appeal should not normally be given unless it is apparent to the judge, upon a mere persual of the reasoned award itself, without the benefit of advesarial argument that the meaning ascribed to the clause by the arbitrator is obviously wrong.

(iii) If on a mere perusal of the award without the benefit of adversarial argument, it appears to the judge that it is possible that argument might persuade him, despite his first impression to the contrary, that the arbitrator might be right he should refuse leave to appeal.

In the period after the Nema, a number of reported cases dealt with the implementation of these guidelines. The judges of the Commercial Court were unsure as to the binding effect of guidelines in English law. Individual judges applied them differently. Lord Denning M.R. in the Court of Appeal (38) went as far as to say:

- "The judge has in law a complete discretion. Useful as guidelines often are, nevertheless it must be remembered that they are only guidelines. They are not barriers. You can step over guidelines without causing them any harm. You can move them, if need be, to suit the occasion. So let each case depend on its circumstances" (39).

The practice also developed in the commercial courts of lengthy hearings lasting up to two or three days in chambers with the parties making detailed arguments backwards and forwards. This did not facilitate the finality of awards or the effectiveness of the new system.

The matter came before the House of Lords for the second time in the Antaios [40]. Again the leading judgment was by Lord Diplock. He was at pains to reemphasise the Nema guidelines and saw no reasons for departing from them although:

> - "Like all guidelines as to how juditial discretion should be exercised they were not intended to be all embracing or immutable, but subject to adaptation to match changes in practice when these occur or to refinement to meet problems of kinds not forseen".

It is worth quoting his observations in full:

> - "My Lords, I think that your Lordships should take this opportunity of affirming that the guidelines given in the Nema that even in a case that turns on the construction of a standard term, 'leave should not be given, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction', applies even though there may be dicta in other reported cases at first instance which suggest that upon some question of the construction of that standard term there may be among commercial judges two schools of thought. I am confining myself to conflicting dicta not decisions. If there are conflicting decisions, the judge should give leave to appeal to the High Court, and whatever judge hears the appeal should in accordance with the decision that he favours give leave to appeal from his decision to the Court of Appeal with the appropriate certificate under Section 1 (7) as to the general public importance of the question to which it relates; for only thus can be attained that desirable degree of certainty in English commercial law which section 1 (4) of the Act of 1979 was designed to preserve."

Lord Diplock also said that the consideration of whether leave to appeal to the High Court was to be given by the judge should be a

summary matter, involving a consideration of the award and only a brief, ten minute oral argument by counsel. The judge should then give his decision without giving reasons, in the same way as leave to appeal is dealt with in the House of Lords. The respected Lord summed up the procedure as follows:

> "All the judge has to decide on the application is: First is this dispute on the one hand, about a 'one-off' clause or event, or, on the other hand, about a standard term or event which is a common occurance in the trade or the commercial activity concerned? If it is the former, he must then consider: whether the arbitrator was in the judge's view so obviously wrong as to preclude the possiblity that he might be right; if it is the latter, he must then consider whether a strong prima facie case has been made out that the arbitrator was wrong. Unless the answer he would give to the question appropriate to the type of case is ... "Yes", he should refuse leave to appeal" (41).

It cannot now be said that the practice of the High Court in relation to the leave to appeal provisions is any clearer. Different standards apply in different types of situations e.g. a 'one-off' clause or event or a standard form contract clause. Nor is the situation likely to become much clearer. Commercial court judges should not give reasons for their decisions to refuse or grant leave so case law will not develop. Nor is there a requirement to review the reasons for the granting of leave. Furthermore a different judge could be assigned to hear the merits of the case from the judge who heard the preliminary application.

Section 1 (5) of the 1979 Act provides that the arbitrator may be required to give reasons for his award, only if an appeal is to be brought on a question of law. What is not clear in this section is whether reasons can be required so as to enable the judge to determine whether or not leave should be granted at all (42). Such an interpretation would further reduce the scope of legal review.

The difficulties that arise though, are mainly theoretical. In practice questions of appeal will be delt with quickly and in private complementing those aspects of arbitration. An appeal will not lie in the majority of cases where the law has been applied in a proper manner and will lie to determine difficult questions of law or to resolve conflicting dicta.

Exclusion Agreements

The 1979 Act, for the first time, allowed for the inclusion of Exclusion Agreements in a contract. This further distances the Arbitration tribunal from the Courts.

A valid exclusion agreement operates so as to oust the right of appeal [43] on questions of law arising in the course of the arbitration procedure and on questions of fraud.

- Section 3 (1) provides:
- Subject to the following provisions of this section and section 4 below.

- (a) The High Court shall not, under S 1.(3)(b) above grant leave to appeal with respect to a question of law arising out of an award and

- (b) the High Court shall not under S. 1.(5)(b) above grant leave to make an application with respect to an award on

- (c) no application may be made under S. 2(1)(a) above with respect to a question law.

If the parties to the reference in question have entered into an agreement in writing (in this section refered to as an exclusion agreement) which excludes the right of appeal under S.1. above in relation to that award or in a case falling within paragraph (c) above, in relation to an award to which the determination of the question of law is material.

S 3(4) Except as provided by subsection 1 above, sections 1 and 2 above shall have effect notwithstanding anything in any agreement purporting to

- (a) Prohibit or restrict access to the High Court; or

- (b) to restrict the jurisdiction of the Court; or

- (c) to prohibit or restrict the making of a reasoned award.

Thus, it can be seen that the validity of the exclusion agreement depends on a) the nature of the arbitration, b) the nationality of the parties, c) the nature of the substantive contract which is the substance of the reference and d) the stage at which the exclusion agreement is made.

An exclusion agreement is always valid if made after the commencement of the procedure and for non domestic [44] arbitration where made in writing prior to the proceedings.

Finally, it should be noted that the Commercial Court Committee [45], in a working paper, pointed out that after consulting practitioners in the field of arbitration that the new system was satisfactory. It said:

> - "The system introduced by the 1979 Act was acknowledged to be a compromise between the demands of finality and the need to maintain some control over the determination of disputes according to law. The general opinion appears to be that the balance has been struck in a satisfactory manner. We have not detected any body of opinion which favours the restoration of the unfettered right of appeal, and there is little support for the view that the right of appeal should be completely abolished, at least in the absence of a fundamental appraisal of English Arbitral procedure."

The combination of these two elements of the 1979 Act, namely the legality of exclusion agreements and the reduced right of appeal on questions of law, has given rise to concern among some commentators as to the efficiency of the dicta element of the Court of Justice's ruling in Nordsee that the proper approach to it is not directly from the arbitrator himself but through national courts exercising their supervisory jurisdictions over arbitration tribunals. Is this a fair criticism of the Nordsee approach? Do practical barriers to access exist in English law?

Initially, it would seem from this review of the English law that practical barriers to access to the Court of Justice do in fact exist. Even where no valid exclusion agreement exists, and here it must be remembered that S. 3(4) does not allow for the complete ousting of the jurisdiction of the High Court, an appeal can only be made where all parties agree or with the leave of the Court itself.

But the new Act has not in any way diminished the duty to apply the law. It will be shown later that where there is such a duty and the arbitrator acts in disregard of it, avenues of access to the courts will be opened up.

Bulk Oil

In the recent case of Bulk Oil [46] the question of leave to appeal on a question of European Law was raised. The case involved a contract to sell a large amount of North Sea crude oil to Bulk Oil. The contract provided that the destination was free but should be in line with the exporting countrys policy. At the time of loading, it became clear that the intended destination was Israel and Sun, the sellers, refused to load on the grounds that it was contrary to the U.K. government policy. The dispute which arose was refered to arbitration. Bulk claimed that U.K. policy was void under EEC law in that it was contrary to the EEC-Israel

association agreement. The arbitrator held for Sun arguing that the export of oil to Israel was contrary to government policy, that this policy was not in conflict with the EEC-Israel association agreement and thus there was no breach of contract.

Leave to appeal to the High Court and leave to appeal from his own decision was granted by Bingham J. The Court of Appeal, Ackner and O'Connor LJJ. held that although the control of arbitration proceedings in the Member States of the EEC was left to national systems of law, it was the duty of the courts, in their role as supervisors of arbitration proceedings, to ensure the observance of EEC Law. As an arbitrator cannot himself refer questions of law to the Court of Justice under the Article 177 procedure it is appropriate for the judge to grant leave to appeal to the High Court as a first step towards seeking a reference to the European Court of Justice.

What the Court did not address was the question whether leave should be given in all cases dealing with questions of Community Law. Ackner LJ noted that Bingham J had not ruled on this point but the judge indicated in which way he would like to see the law develop stating:

> "Clearly the point which it raises must be capable of serious argument and not admit of only one possible answer or be covered by a Community authority precisely on the point."

Secondly, Ackner LJ noted that Bingham J was perfectly entitled not to follow the Nema guidelines as they did not cater for the type of case before them. Bingham J based his decision to grant leave on seven factors which were enumerated by Ackner LJ in his judgment. They are:

- 1. The point was an entirely new one on which there was no authority.

- 2. It was a question of potentially very great importance, not only to the State of Israel, but to any country not falling within the group formed by the International Energy Agency, the Member States of the Community except France.

- 3. It was accordingly important that authoritative guidance be given and there would remain none without the grant of leave.

- 4. That the point was capable of serious argument.

- 5. That it involved potentially a very large sum of money (....)

- 6. It involved a complex question of Community Law, upon which the view which both he and the arbitrator had formed could well be wrong.

- 7. That if the point was decided in the buyer's favour then, for the reasons given by the arbitrator, the sellers would have been in breach of contract in failing to load the vessel with the declared destination in Israel and the buyers would have succeeded in the arbitration.

The judge did not say that all seven factors must be taken into account when deciding to grant leave but that Bingham J had been entitled to take them into account and that, cumulatively, they justified his granting leave. Point 5 would seem to be the only point which would not necessarily arise in most disputes where a question of Community law is at issue. Point 7 could well be reformulated as the question could the right of the parties be substantially effected. All in all, they appear to be useful guidelines for the granting of leave to appeal where questions of Community law are at issue.

Residual power of the Courts to intervene in Arbitral proceedings.

The limitation of the right of appeal can give rise to problems. Difficulties arise where the arbitrator wishes to determine a case according to this own norms of justice rather than the law. A second difficulty could be a situation where various arbitrators decide the same question differently. It seems clear from English law that there is nothing that can be done in this second case (47). But the situation is different with regard to the duty to apply the law. In their book 'The Law and Practice of Commercial Arbitration in England', Mustill and Boyd deal with this problem (48).

To determine the first question the authors return to the principles of English arbitration. They consider the fact that there is a duty to apply substantive law but not proceedural law.

> "The obligation to follow the law, or the limited extent of the arbitrator's mandate, or however else one expresses the idea that the award should conform with the law comes from the fact that the arbitrator's function is to decide the rights created by the substantive contract. The proceedural powers of the arbitrator, on the other hand, are derived from the agreement to arbitrate, not the substantive agreement; and although the arbitration agreement may expressly, or by implication, call for compliance with legal proceedural norms, equally well it may not. The matter is one of construction, which has nothing to do with the obligations and powers which belong to the arbitrator at the moment when he comes to make his decision" (49).

In addition, they feel that nothing can be read into the 1979 Act that the legislator, by reducing the two existing mandatory methods of juditial review and creating another, intended to do away with the previous obligation to comply with the law. The power of control by the courts has not been abolished only altered. The right to include exclusion agreements is not necessarily an expression of the desire of the parties that the

arbitrator decides according to his own rights especially where the contract contains an express choice of law clause.

It is hard to disagree with Mustill and Boyd's analysis. The duty to apply the law remains despite the reduced control by the courts of that application. But the content of this law can vary considerably. The parties have the right to have their disputes determined according to a foreign law or according to a mixture of laws while still acting within the framework of the law. The only exception to this is where the expressed intention of the parties comes into conflict with public policy or with mandatory law.

In the working paper of the Commercial Court Subcommittee on Arbitration there was no support for the statutory recognition of the institution of amiable composition. Nor was there support for the statutory validation of clauses empowering the arbitrator to decide according to equity and good conscience. But if one accepts arbitrators are obliged to apply the law then the question arises as to how the courts are going to enforce this obligation, given the new policy of both the courts and the legislature to restrict access to the Courts. Mustill and Boyd consider that there are a number of possible avenues of approach [50] which could lead to a remedy, the most fruitful being a) that the award is void or voidable for want of jurisdiction and b) that a deliberate disregard by the arbitrator of the terms of his mandate amounts to misconduct, permitting the removal of the arbitrator and the setting aside of the award.

In relation to the first point a), they argue, quite simply, that the difference between arbitration and 'courts or tribunals' is that the former is not exercising non consensual powers over the rights of citizens. The arbitrator looses his jurisdiction once he goes outside the bounds of the agreement. As mentioned above, the agreement can alter the arbitrator's duties but it cannot take him outside the law. This argument is further strengthened when the subject matter of the dispute is one where mandatory Community law

is at issue. Also, the argument reflects the basic theory that there are limits to what can be done by a private contract.

With regard to point b), the misconduct of the Arbitrator, it must first be pointed out that it is not misconduct to make a mistake on a question of fact or of law (51); Mistill and Boyd argue that this approach would yield little unless one approached the matter from the point of view as to why the error took place. If the error was gross it might be possible to show it to be an instance of bad faith. They continue:

> "Once the motives of the arbitrator became open to question, there would be the possibility of treating a studied decision by the arbitrator to disregard his obligation to apply the law as an instance of bad faith, and this would make an attack on the award much easier to mount. Perhaps English law will develop a doctrine similar to that of 'manifest disregard' which is tentatively beleived to exist in the law of the United States" (60).

Both possibilities will require a creative action on the part of the juditiary for them to become established.

A more established route of access to the courts is that of the equitable relief of injunction.

The Bremer Vulkan (61) concerned the question whether any form of relief was available where the claimant, in an arbitration procedure, had delayed so long in the persuit of the arbitration that a fair trial of the issues was no longer possible. In a wide ranging judgement the House of Lords delt with various possible forms of relief. The court rejected the notion that it had jurisdiction by way of judicial review or that it had an inherent supervisory power at common law. In the leading judgment Lord Diplock said:

> "For the moment I confine myself to rejecting the notion that the High Court has a general supervisory power over the

> conduct of arbitrations more extensive than those that are conferred upon it by the Arbitration Acts."

What the court did consider possible was relief by way of injunction, though it did not grant it in the instant case. Nor did the court outline the circumstances in which it should be granted. What does seem clear is that an injunction will be granted if it is required in order to protect legal or equitable rights. An arbitration tribunal which proceeds in clear disregard of the law would thus be open to examination and control by the courts. It has yet to be established what a clear disregard of the law would entail but it is suggested that wilfull disregard of mandatory provisions of Community Law having direct effect would come within the grounds for review by way of injunction.

Public Policy

The question of public policy raises itself in two distinct areas. Firstly, in relation to the arbitrability of EEC law, especially competition law; and secondly, in relation to question of access to the High Court.

Taking the second problem first it is clear that the problem of access to the Court will not arise where one party to the arbitration is seeking to enforce the award. The court hearing the issue is seized of the matter and, if it sees fit, can refer a question of Community Law to the Court of Justice under the Article 177 procedure. If it is not clear on the face of the award that an issue of Community Law is involved the court can, under the provisions of the 1979 Act, remit the award to the arbitrator for him to state his reasons for the award. This will bring to light any difficulties which the unreasoned award might hide. But the problem of access to court remains for the period prior to the making of an award.

It has been argued by Samuel [62] that the concept of public policy should be a ground, and the only ground, for an appeal to

the courts on questions of law during the course of the arbitration. He argues that it would be breach of public policy to allow the arbitration to proceed in disregard of mandatory law. He also argues that this would provide a unitary method for review of arbitration by the courts both prior to and after the making of the award. This would be especially relevant to questions of Community law.

Support for this view is found in Mushill and Boyd [63], where they maintain that:

> "It appears that any point of EEC law which is in the realm of public policy or 'ordre publique' may be raised by way of a defence to proceedings to enforce the award, and if it impugns the validity of the arbitration agreement, by way of the procedures to test the arbitrators jurisdiction".

These remarks, though, are prefaced by the idea that the concept of public policy would only come into play where the parties have not availed of the procedures available under the 1950 and 1979 Arbitration Acts. As has been illustrated, these procedure have been severely restricted but the question remains as to whether or not it is necessary to introduce the notoriously difficult and imprecise principles of public policy as the sole remedy.

By virtue of the European Communities Act 1972, the laws of the Communities have been incorporated into the law of England. The treaties of the Communities and the existing and future acts adopted by the institutions of those Communities are binding on the state and become part of the domestic law. It is mandatory law. As such remedies will lie to enforce it.

If breach of public policy is accepted as the principle criterion for access to court then a further problem arises. Which court should determine the content of the public policy? Should the

Court of Justice deal only with the policy of Community Law and the national court be responsible for policy on access to courts? Furthermore, could a double standard of policy arise leading to one policy for access to court on questions of community law and another for questions of national law. It is clear that the system of division of powers between the Court of Justice and the national courts allows for such dual standards and the consequent differences between the Member States but it seems unnecessary to introduce the question as routes of access do already exist.

Public policy in the field of arbitration is traditionally a shield rather than a sword. It is a ground for the refusal of courts to enforce a national award or a foreign award under the New York Convention on the Enforcement of Foreign Arbitral Awards of 1958. Public policy is to be used as a defence of public morals and the law of the land. The public policy of the English courts is now against the giving of access to court on any question of law. In a recent case (63) Mr. Justice Leggatt said:

> "True it is that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency. Since public policy has now changed its stance I see no reason to adopt an approach, which might well have been appropriate before it had done so."

This shift in policy is also seen in the words of Lord Diplock in the Nema:

> "My Lords, in weighing the rival merits of finality and meticulous legal accuracy there are, in my view, several indications in the Act itself of a Parliamentary intention to give effect to the turn of the tide in favour of finality."

This change in public policy, away from the giving of access to court in favour of finality of awards and commercial expediency is clear from the nature of the 1979 Arbitration Act itself.

What Samuel is suggesting is that where access to the courts has be limited by virtue of 1979 Act a different public policy should allow access to assist the arbitrator in his determination of questions of Community Law. To create a policy sub-rule whereby, when a question of Community Law arises, access could be given even where there is a valid exclusion clause, would seem to contort the notion of policy beyond its limits. As the arbitrator is bound to apply the law he is bound to interpret it as best he can. If he goes so far as to disregard the law a remedy will lie.

The question of Public Policy arises more properly in relation to the arbitrability of Community Law and especially competition law. Before examining the question of arbitrability of competition law it is worth noting that although the debate on the relationship between Community Law and arbitration has mainly concerned questions of competition law, this is not the only area where difficulties will arise. The Nordsee case itself was not concerned with article 85 or 86 EEC but a Regulation providing for the distribution of funds. The German tribunal was concerned that the pooling arrangement was void by virtue of this Regulation. In this respect the difficulties that the arbitrator found himself in would be similar to that of an arbitrator faced with possibly illegal or void contracts by virtue of Articles 85 and 86 EEC.

Arbitrability of Competition Law

It is the national courts, in the absence of clear authority from the Court of Justice, which must determine whether the competition law of the Communities is arbitrable.

In England, the question has not arisen directly in the case law but in the area of restraint of trade it was held in 1960 Birtley

District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (N° 2) (64) that a contract which is unreasonably in restraint of trade will be invalid and if it contains an arbitration clause, that clause will fall with the contract. But where a contract simply provides for the settlement of disputes by arbitration in a specific area of trade and it is the award and not the contract which creates the restraint and the award is not obviously illegal or unreasonable or ex-facie turpis the award is binding.

It is clear that certain matters are incapable of settlement by means of arbitration as there are areas of law for which a unitary standard is required. It cannot be said that trade in general is such an area and in this regard competition rules are merely an issue to be taken into account when interpreting trade contracts.

It is also clear though, that arbitration could not be a means of determining whether a contract fell within articles 85 (3) EEC as jurisdiction in this matter rests exclusively with the Commission. But there seems to be no reason why an arbitrator could not determine whether or not a contract came within one of the block exemptions or that the contract was not illegal as being in breach of the competition rules.

Arbitrability of Competition law in other jurisdictions

While there has been an increasing doctrinal dispute as to the existance or not of an international public policy it is still national courts who interpret and apply public policy. This concept is by its very nature national and is used by national courts to defend a distinctive feature of a particular national system. It is thus useful to examine how other national jurisdictions have approached the question of arbitrability of competition or anti-trust law.

The United State of America

In the United States, anti-trust matters are governed at Federal level. Traditionally, the courts have considered that the primacy of the function of anti-trust law was such that it was not arbitrable. This traditional approach still holds in relation to domestic arbitrations but was altered fundamentally in relation to international commercial arbitration.

The original doctrine is that of American Safety (64) and has been summarised in the U.S. Court of Appeals 1st Circuit as follows. This court argued that anti-trust law could not be arbitrable for four reasons.

"The reasoning is fourfold:

- (1) Governance of the realm of anti-trust law, so vital to the successful functioning of a free economy, is delegated by statute to both government and private parties, the latter being given special incentive to supplement the efforts of the former, the work of both being equally the grist of judicial decisions.

- (2) The strong possibility that contracts which generate anti-trust disputes may be contracts of adhesion militates against automatic forum determination by contract.

- (3) Anti-trust issues are - an understatement - complicated and the evidence extensive and diverse; and we may add, the economic data subject to rigorous analysis dictated by a growing and increasingly sophisticated jurisprudence, with the subject correspondingly ill adapted to the strengths of the arbitral process, i.e. expedition, minimal requirements of written rationale, simplicity, resort to concepts of common sense and simple equity.

- (4) The notion, suggestive of the proposition that issues of war and peace are too important to be vested in the generals, that decisions as to anti-trust regulation of business are too important to be lodged in arbitrators chosen from the business community particularly those from a foreign community that has had no experience with or exposure to our law and values" (65).

The Court of Appeal in that case found the American Safety doctrine compelling, especially in the light of the mandatory character of the Sherman Act.
The Supreme Court, on the other hand, rejected this approach and chose, instead, to follow the path laid out in Scherk v Alberto Culver which had held that disputes arising under the Securities Act of 1933 (another mandatory statute) were arbitrable. The Court said that with respect to international transactions:

- "Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and the sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties agreement to arbitrate the dispute" (66).

In extending the Scherk approach to anti-trust matters the Court went on to say:

- "The Bremen and Scherk establish a strong presumption in favour of enforcement of freely negotiated contractual choice of forum provisions. Here, as in Scherk, that presumption is reinforced by the emphatic federal policy in favour of arbitral dispute resolution. And, at least, since this Nations accession in 1979 to the (New York) Convention ... and the implementation of the Convention in the same year by amendment of the federal Arbitration Act, that federal policy applies with special force in the field of international commerce. Thus we must weigh the concerns of American Safety (for the

non arbitrability of anti-trust matters) against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice for forum clauses.

This latter argument would not sound strange in an English Court of law especially since the adoption of the 1979 Act. Furthermore the U.S. Supreme Court uses arguments, as those used in the completely different legal environment of the General Federal Court.

- "Having permitted the arbitration to go forward the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed. The (New York) Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country'. While the efficacy of the arbitral process requires that substanctive review of the award enforcement stage remain minimal, it would not require intensive inquiry to ascertain that the tribunal took... of the anti-trust claims and actually decided them".

Federal Republic of Germany

In the Federal Republic of Germany the arbitrability of anti-trust matters is expressly codified. § 91 of the German Anti-trust Act (GwB) provides that arbitration agreements or clauses, with regard to future disputes on contracts covered by the GWB, are void, unless they grant each party the right to start court proceedings instead of arbitration in any given case. This still leaves a wide scope for arbitration should the parties require it. Further arbitration agreements on disputes which have already arisen are binding so as to restrict the option of going to Court.

In practice, there is very little objection to the granting of jurisdiction to the arbitrator as this is seen as damaging the party's reputation with a particular trade branch. With regard to international arbitration it has been argued (67) that these restrictions do not apply to arbitrations covered by the Geneva Protocol of 1923 and Convention of 1927, the New York Convention of 1958 or the Geneva Convention of 1961,

> "since these do not permit a distrinction on arbitrability of future disputes on the one hand and existing disputes on the other" (68).

§ 91 GWB provides for a separate regime for export cartels which has been interpreted so as to grant general arbitrability for all such contracts which do not affect the German market.

§ 98 paragraph II GWB excludes from the scope of the GWB all contracts which do not have effects on the German market; in other words, there is no limit to arbitrability in these contracts.

Despite these extensive statutory provisions, the German courts have been generally more restrictive in their operation. They have constantly held that the major rules of anti-trust law are part of German public policy and have used this to examine the legal and factual substance of awards when they have been sought to be enforced or set aside.

Community Law

The problem of the arbitrability of community law was first raised and discussed on the theoretical level in the 2nd ICCA Conference in Rotterdam. The report of the conference stated that:

> "Subject to the exclusive jurisdiction granted to the Community Authorities it falls to the arbitrators seized of

disputes involving Community Law, to verify their authority and to decide on the merits of Community public policy under the control of appropriate authorities" (69).

Practice of arbitrators in the anticeding years has not made the position any clearer. A Dutch arbitrator has refused arbitrability (70) whereas others have accepted arbitrability, but without giving reasons.

Community institutions retain either exclusive jurisdiction in questions of the application of Art. 85 (3) or final jurisdiction on the interpretation and validity of the Treaties and the acts of the institutions. This does not necessarily mean that once an issue arises that touches on community law that the arbitrator must declare his lack of jurisdiction.

The comparative elements of this thesis must be approached with caution as the English law on Arbitration is in many respects fundamentally different from the other Member States (except of course Ireland). Comparison with the United States is most difficult as an essential element in the Supreme Courts reasoning seems to be that the structure of the Sherman Act is such that it requires the participation of individual members of the business community by providing for triple damages. This is not the situation in the Member States but it could be argued that individual involvement does arise by virtue of the direct effect of Articles 85 and 86 EEC and the fact that damages in tort may be available to third parties who suffer damage as a result of their breach.

Illegality of the Contract and Separability

The problems which arise from the division of competences, between the Commission and the national authorities, especially the courts, in determining whether a contract is or is not void, and exemptions under Article 85 (3) are strictly outside the scope of this paper but certain issues must be mentioned.

As an arbitrator in England is bound to apply the law, similar problems will arise for both the arbitrator and the national courts. By analogy with the decision BRT v SABAM (71) it would be up to the arbitrator to make his own decision on the question without making reference to the national court or the Court of Justice.

Where a difference between the arbitrator and the national court does arise, is on the question of jurisdiction.

The question of illegality of the contract raises another point. Halsbury 4th. edn Vol. 2 para. 503 states that disputes arising out of an illegal contract cannot be refered to arbitration. Mustill and Boyd suggest that an arbitrator has no power to determine a dispute arising from an illegal contract or one that is void 'ab initio', not because the substance of the contract is incapable of settlement by arbitration but because the arbitration clause itself falls with the contract.

> "Where the arbitration agreement itself is unaffected by illegality, the arbitrator can and must rule on any question of illegality" (72).

Where the contract is void 'ab initio' the arbitrator has no jurisdiction. But does an Arbitrator faced with a contract, which is possibly void by virtue of Article 85 EEC, retain jurisdiction? One can either consider that the arbitration clause falls with the contract and thus the arbitrator has no jurisdiction, or one can examine the extent to which the arbitration clause stands so as to give jurisdiction to the arbitrator.

In La Technique Minière v Machinenbau (73) the Court of Justice held that it was only those clauses of a contract which infringe Art 85 which are void. The other clauses stand and whether sufficient remains to be enforced is a question of national law.

It would appear from the Bremer Vulkan Case [74] that an arbitration clause is severable under English law. This would allow the arbitrator to rule that the contract is void due to infringement of the EEC competition rules or alternatively that it is not and continue to rule on the merits of the case.

A further question arises as to whether or not an arbitrator should stay proceedings and seek the opinion of the Commission on the question of validity. This process might take years and ultimately end in a comfort letter rather than a Decision. It is well known that the status of comfort letters gives rise to difficulties among national courts let alone arbitrators. A national court is not bound by a comfort letter but it should take it into account when deciding of a matter. Presumably the same would be true for arbitration tribunals which are obliged to apply the law.

The problem of the extent to which the arbitrator may determine his own jurisdiction was raised by the Subcommittee on Arbitration mentioned above and it is clear that there was a varied response to their questionaire on the matter. The answers reflected the theoretical discussions which have developed in this area but the Committee itself was only concerned with the practical aspect of the question, namely, should there be a statutory recognition of an arbitral power which would enable him to make binding decisions as to the existence or the extent of his jurisdiction. Supporters of the view that such a new statutory power should be enacted felt that the advantages to be gained by virtue of the reduction in the delay necessary in having a question of jurisdiction determined by the court, would outweigh any other disadvantages.

It is submitted that the sub committee is correct in this approach. A statutory provision granting such jurisdiction would have to be very carefully worded indeed and would seem to anticipate not only a widening of the gap between arbitration as an institution and courts of law but also a fundamental shift in

the nature of arbitration as based on the law of contract. Contract demands the scope to operate freely, but within the framework of the law. Without this framework and the State institutions to enforce it there can be no contract. This is equally true of the arbitration clauses contained in contracts. This is not to say that procedures cannot be developed to facilitate speedy, cheap and private arbitrations but if these procedures lose their anchor in the law the results will be unenforceable.

Finally there were those who submitted that the arbitrator should have the right to determine his own jurisidiction but that such decision be subject to appeal. Thus the sub committee felt would be the worst of both worlds but it is clear from the report that there was no substantial support for the idea.

CONCLUSIONS

The regulation of business activities is a series of compromises between flexibility and legal certainty which are both necessary for the carrying on of economic activities. The law of arbitration must be aware of this compromise in its development. It is the thesis of this paper that both the Arbitration Act of 1979 and the decision of the Court of Justice in Nordsee support this compromise and make a healthy contribution to the development of arbitration law.

The Nordsee decision only deals with this duality obliquely. The Court of Justice has distanced itself from arbitration by not allowing the right of referral under Article 177 EEC, thus allowing for an element of finality in their awards. It has held that arbitrators must apply the law. Should they require assistance in the interpretation of the law they must do so thought the intermediary of the national courts. In this way arbitration can contribute to the development of Community Law but is free to deal with the vast majority of cases with speed and in secrecy.

It is hard to believe that the Court of Justice was not aware of the practical and legal difficulties which would arise in the different Member States with regard to the normal supervisory powers of the national courts; nor that it was unaware of the developing trends in the law and practice of arbitration. Yet it chose not to deal with the conceptual issues involved. It is for this reason that the judgment is disappointing. The Court of Justice has given vague guidelines without stating the policy behind them or examining their consequences.

It is arguable that it was not necessary for the Court of Justice to do so as the judgment in Nordsee does in fact promote the dual aims of the law of arbitration. But this argument falls when the difficulties that the national courts will face are considered. It

has not been made clear whether leave to appeal, where it exists, must be granted by national courts whenever a question of Community Law arises. The national court might feal obliged to allow leave to appeal on questions of Community Law where, if the question was one of national law, it would not. Differing standards might develop for national and Community Law. Furthermore, different standards might develop within the different Member States. This would be unfortunate for both the law of arbitration and the creation of a common market. International trade arbitration is faced more and more with the reality of the EEC as a trading block. The attitude of this block towards arbitration should be made more clear. The Common Market of Europe should not allow different principles and practices to develop in different parts of it.

The English courts have been more open in their reasoning when faced with the new developments in the law of arbitration. Lord Diplock has delt clearly with the aims of the new policy. Arbitrators must apply the law as laid down in Statute and by the courts but that they are allowed a certain flexibility in the interpretation. The Court of Justice on the other hand has not made it clear whether this flexibility exists with regard to Community Law.

It has been seen that the Commission is more concerned in its statements with the proper application of competition law than with arbitration as such. But in the Nordsee submission it went further, taking a very positive view of the subject. It was argued that the arbitrator should have the right to refer questions on the interpretation of Community Law. From this it can be inferred that the Commission sees nothing wrong with arbitrators dealing with questions of Community Law. Community Law in general is thus arbitrable. There seems no logical reason for excluding competition law from this general licence.

If this scope for interpretation by arbitrators of the law exists in relation to Community Law the laws of England will provide for

effective access to the Court of Justice through the national courts where difficult questions of interpretation arise. This can be done either under the appeals procedures under the 1979 Act as interpreted or the Common law remedies that have been outlined in this paper.

On this point then the laws of England and the law of the Community can be seen to be in harmony. A margin for interpretation is allowed to the Arbitrator but he must apply the law. If he does not do so an appeal will lie.

If this is the situation in other Member States, and further work will be required on this point, the Court of Justice could, in a future judgment, be more open and give clearer guidelines on the interpretation and application of Community Law with regard to arbitration.

One final point should be made with respect to the uniformity of Community competition law in the Member States. This point has relevance both to access to the Court of Justice and the proper application of Articles 85 and 86 EEC.

A common element in the laws of the Member States is that by virtue of the Court of Justices ruling in SABAM Articles 85 and 86 EEC have direct effect. They give rights to individuals which can be invoked before the national courts. In a recent study, as yet unpublished, the Commission undertook an examination of the consequences of the breach of these Articles. It would appear from the report, prepared by Professor Germer from Aarhus university, that in most Member States damages will be available on a remedy for loss caused by breach of the competition rules. It also appears that an injunction will lie to restrain such breach.

It can be argued, as a consequence, that where breach is not a result of the actions of the parties to a contract or a trade practice but is a result of an arbitral award which has changed

the contractual relationship between the parties, the action for breach of Articles 85 and 86 EEC will also lie.

By means of such an action to enforce the rights under the competition law access to the Court of Justice will be opened.

It can also be seen as a means of ensuring the proper application of that law. An arbitrator, without here discussing the question of his own liability, will not want to leave the parties to a dispute before him open to the risk of an action by third parties for damages for breach of Articles 85 or 86 EEC. He will certainly do his best to apply the law.

The trend in the modern law of arbitration to allow arbitrators a certain flexibility in interpreting the law is not one that should be seen as giving rise to great difficulties. Rather it should be encouraged as a means of giving the law's consumers a more immediate legal remedy without the anxiety that the decision will be overturned.

It might also be seen as a means of overcoming the long delays that often occur before th highest courts have the opportunity of deciding a question of law, which to the arbitrator is clear, but which still requires that highest court's approval.

1 Transocean O.J. 1967 n° L. 163/10
Henkel/Colgate O.J. 1971 N° L 14/14
Transocean 11 O.J. 1973 N° L 19/18
Kabell metall / Luchaire O.J. 1975 N° L 222/34
CEC/WEJR O.J. 1977 n° L 327/26
Campari O.J. 1978 n° L 70/69
Euro O.J. 1979 n° L 11/
Rockwell/Weco O.J. 1983 N° L 224/

2 Transocean Marine Paint v the Commission (1974) E.C.R. 1063 point 16

3 See Article 4 Reg 17/62

4 O.J. 1979 N° C 58/12

5 Commission Regulation (EEC) N° 2349/84 of July 23 1984

6 Except cases under the Lomé II Convention Article 132

7 Preliminary Ruling N° 61/65 Vaasen v Beambtenfonds voor het Mijnbedrijf (1966) ECR 280

8 Preliminary Ruling N° 246/80 Broekmeulen v Huisarts Registratie Comissie (1981) E.C.R. 2311

9 ibid. at p. 2326

10 ibid. at p. 2327

11 Preliminary Ruling N° 102/81 Nordsee Deutsche Hochseefischeren v Rederei Mond (1982) ECR 1095

12 Council Regulation 729/70 EEC and Council Regulation 2722/72 EEC

13 Nordsee op. cit. recital 10 at p. 1110

14 ibid. recital 11 at p. 1110

15 Judge Pescatore speaking at the Colloquim on the Cooperation between the Court and national courts, Luxembourg 1985

16 Mark Friend, The Law Quarterly Review Vol 99, July 1983 356 & 358

17 Nordsee op. cit. at 1105

18 ibid. at p. 1102

19 ibid. at p. 1122

20 Friend, op cit at 358

21 Gerhard Bebr: Arbitration tribunals and Article 177 of the EEC Treaty C.M.L. Rev. 1985 at. 489

22 Case 283/81 Srl CILFIT and Lanificio di Gavardo Spa v Ministry of Health. ECR (1982) at 3415.

23 S.P.A. Granital v Administrazione delle Finanze Devision N° 170 of June 8 1984 and more recently by B.E.C.A. S.P.A. v Administrazione della Finanze Devision N° 113 of April 23 1985.

24 Nordsee, Recital 15 at 1111.

25 See David O'Keefe: Appeals against an order to refer under Article 177 of the Treaty. European Law Review April 1984 at 87.

26 See Mattheus v Doego (1978) JCR 2203 Case 93/78 Foglio v Novello Case 104/79 ...
See generally Bebr: The existence of a genuine dispute. 17 C.M.L. Rev. 1980 525

27 Preliminary ruling N° 53/79 Dauriani (1980) ECR 273 at 281

28 Nordsee op.cit. at p.1122

29 J.B. 13 Edward IV, f 96,, quoted by Potter, Historial Introduction to English Law and its Institutions, 2nd edn (1943) p.160

30 Scott v Avery (1853) 25 L.J. Ex. 308

31 Such as in the Federal Republic of Germany

32 Adam Samuel: The 1979 Arbitration Act - juditial Review of Arbitration Awards on the merits in England. Journal of International Arbitration Vol. 2 1985 N°4

33 Sir John Donaldson: Commercial Arbitration - 1979 and after. (1983) Current Legal Problems 1

34 Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema) (1982) A.C. 724

35 ibid. at pp. 739-740

36 ibid. at p. 741

37 S. 1 (4) 1979 Act

38 Italware Shipping Co. v Ocean Tanker Co. Inc. (The Rio Sun) (1982) I W.L.R. 158

39 ibid. p. 162

40 Antaios Compania Naviera SA v Salen Redercerna AB (The Antaios) (1984) 3 W.L.R. 592

41 ibid. p. 206

42 The commercial Court Committee Sub-committee on Arbitration recommends that this sub section should be made more clear in any future arbitration legislation to allow for orders to be made in this first situation

43 S.3 (1) 1979 Act

44 S.3 (7) defines a domestic (as opposed to a non domestic) arbitration agreement as:
... an arbitration agreement which does not provide, expressly or by implication, for arbitration in a state other than the United Kingdom and to which neither
a. an individual who is a national of, or habitually resident in, any state other than the United Kingdom, nor
b. a body corporate which is incorporated in, or whose cnetral management or control is exercised in, any state other than the United Kingdom

45 The Commercial Court Committee Sub-Committee on Arbitration Publication of the 1st February 1985 and available from the Dept. of Trade and Industry, London

46 Bulk Oil (Zug) Ag v Sun International Ltd (1984) 1 All ER 386

47 See Pearlman v Keepers and Governors of Harrow School 1979 Q.B.56

48 The Law and Practice of Commercial Arbitration in England. Sir M. Mustill and S. Boyd. London, 1982 Butterworths.

49 Mustill and Boyd: pp. 595-6

50 Mustill and Boyd: p. 597

51 See Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd (1912) A.C. 673

60 Mustill and Boyd: op. cit. note 32, at p.53.

61 Bremer Vulkan Schifflaa und Maschinen fabrik v South India Shipping Corporation Ltd (1987) A.C. 909

62 Adam Samuel: The 1979 Arbitration Act - Judicial Reviw of Arbitration Award on the Merits in England. Journal of International Arbitration. Vol. 2 1985

63 Arab African Energy Corp. v Olieproducten Nederland B.V. (1983) & Lloyd's L.R. 419.

64 Birtley District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Tld (N°2) (1960) 2QB1

64 American Safety Equipment Corp. v J.P. Maguire and Co. 391 F.2d 821 at 826.

65 Mitsubishi Motor Corp. v Soler Chrysler - Plymouth Inc. (1983) 7223 F.2d 155.

66 Mitsubishi 105 Supreme Court Reporter p. 3346.

67 Mezer, Rabel Z 29 (1965) 244; Greuinger, Die Genfer Alkommen von 1923 und 1927 uber die internationale private Schieldsgerichtsbarkeit, 1957 9 quoted by that Heinz Böckstiegel in his report 'Public Policy and Arbitrability to the International Council for Commercial Arbitrability to the International Council for Commercial Arbitration Conference in New York May 6-9 1986.

68 ibid. p. 33.

69 Revue de l'Arbitrage 1966 (Special) 62

70 Award of 22 July 1964 - Arbitrale Rechtspraak N° 524 p 240.

71 Case 127/73, Belgische Radio en Televisie v SABAM (1974) ECR 51.

72 Mustill and Boyd: p. 118.

73 (1966) ECR 235

74 Op. cit. note 61.