The Cedric Barclay Memorial Lecture 1999

SOME CONCERNS ARISING FROM THE ENFORCEMENT OF ARBITRATION CLAUSES IN BILLS OF LADING

The Honourable Justice Bradley Harle Giles*

INTRODUCTION

I am honoured to be asked to deliver this address in memory of Cedric Barclay. I did not know Mr Barclay personally but from all accounts, and the material I have read, he can truly be described as a great maritime arbitrator.

He would certainly appear to have been a man of extraordinary all round talent who served maritime arbitration with distinction for many years. I have read that the reported references to his awards in the Law Reports, in a period of fifteen years, numbered 139, with as many as fifteen in judgments by Lord Denning – a real testimony to his quality and popularity as arbitrator.

Cedric Barclay had the unique qualities of wit and wisdom necessary to dispense justice in any forum. He also had "hands on" experience of the shipping business and founded a shipping line.

I cannot claim this pedigree but I have practised in the maritime area for my whole profession life and having moved from the cut and thrust of the Bar, I now find real challenge and attraction deciding the increasing number of maritime cases which are coming before our courts.

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* Justice of the High Court of New Zealand. This paper was delivered at the XIIIth Meeting of the International Congress of Maritime Arbitrators (ICMA), held in Auckland in March 1999, shortly before Justice Giles' death. The author acknowledged the contribution made to this paper by Paul David and Julian Long.

ARBITRATION IN THE ASCENDANT

As we survey the scene at the end of the twentieth century, private justice in the form of arbitration and mediation is very much in the ascendant. The worldwide trend, whether in legislation, or in the general approach of the courts, is to support arbitration by limiting challenges to awards and holding parties to the promise to arbitrate which they have made in their contract.

Arbitral centres around the world are acutely conscious of the need to offer fair, streamlined process, and efficient procedures to justify the faith placed in them by courts and legislatures.

While uniformity of approach is a long way off, many countries have now adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration, which will enhance the course of certainty and quality in arbitration.

New Zealand, by way of example, has followed this trend and passed legislation in the form of the Arbitration Act 1996 which has the effect of strengthening arbitration's standing. Times have changed. Not long ago arbitration law was arcane and the courts often not particularly supportive. Now the wheel has, or may be turning.

The international developments are extremely positive. It is a great advantage to the international maritime community that we have such a focus on arbitration and efficient resolution of disputes.

SOME CONCERNS

However, I entertain some concerns at the way in which the passion for arbitration, and the drive to enforce arbitration clauses, may lead to an approach which favours enforcement of bill of lading arbitration clauses against third parties in all circumstances, without necessarily analysing and drawing a distinction between the way in which the third party is to be bound.

In the case of assignment of a bill of lading where the assignee has the ability to ascertain the terms of the bill, and to discover the

existence of an arbitration clause, it is difficult to say that the assignee should not be bound.

It is harder to justify binding a third party to a bill of lading, where by virtue of sub-bailment principles a shipper finds that his freight forwarder has contracted ocean carriage on a bill of lading which includes an arbitration clause.

In this kind of case, it is unlikely in the extreme that the shipper has even heard of, let alone understood, the concept of authority and sub-bailment, and it can be said that there is no, or much less opportunity for the shipper to know in advance the proposed carriage terms.

Recent dicta, particularly those of Lord Goff in *The Mahkutai*,[1] suggest a willingness on the part of the Courts to move towards a general approach supporting the binding nature of bill of lading terms on the grounds of commercial pragmatism rather than established technical exceptions to privity.

Such a general approach, while commercialy sensible, raises the same concerns in relation to third parties if it is to be applied to bill of lading arbitration clauses.

This trend may serve the greater good of streamlining maritime dispute resolution. However, it may present the danger that, in some cases, third parties may find themselves bound by arbitration provisions and denied access to the courts without having had any real input to the agreement to arbitrate.

An influencing factor in all this is the cost of achieving justice for the parties. The dollars are a real issue to a small trader at the bottom of the South Pacific who may have to arbitrate in a distant expensive arbitral forum. They are also significant for an owner in the context of the cost of resolution in different jurisdictions as opposed to a streamlined process in one centre under its bill of lading clause.

I believe that the problems can be overcome with a little flexibility and foresight. First let us survey the positive developments in arbitration.

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1 [1996] AC 650 (PC).

THE INTERNATIONAL TRENDS

The trends are well established. You may be familiar with the general increase in international dispute resolution, much of it by way of arbitration. I understand that large firms in major centres around the world have teams of lawyers (often with a significant Kiwi component) devoted to this work. They are specially trained and experienced in international arbitration in any of the major centres that deal with this work.

International Agreements

Arbitration is a particularly popular method of resolving international disputes in large scale projects. Large and complicated international investment projects, international banking agreements, any number of large scale construction agreements, all regularly provide for resolution in an arbitral forum.

More and more we see academics writing of a new *lex mercatoria*[2] (although this concept is something of an elusive will-o'-the-wisp) as the choice of law clauses in these international agreements are denationalised.[3] Arbitration is often seen as one of the only ways, in fact, in which these agreements can be put into effect. Arbitration has the necessary flexibility to deal with the dispute in the manner agreed by the commercial parties.

The arbitral resolution of disputes has been treated as a viable and sensitive alternative to long court lists, and the expensive court resolution of disputes in most jurisdictions. Increasingly court rules encourage and facilitate ADR and arbitration. I should say that the case

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[2] See eg Lando "The *Lex Mercatoria* in International Arbitration" (1985) 34 ICLQ 747; Goode "Usage and its Reception in International Commercial Arbitration" (1997) 46 ICLQ 1.

[3] In the dispute over the Channel Tunnel, this sort of choice of law was met with no surprise in the House of Lords: *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd* [1993] AC 334.

management of disputes in the courts is now offering more streamlined and efficient court adjudication of disputes.[4]

The promotion and recognition of arbitration is, however, based on the concept of agreement between parties. In any consideration of arbitration by the courts or legislature, special prominence has traditionally been given to the fact that the parties have agreed to the bypassing of courts in favour of their chosen arbitrator or arbitrators.

Arbitration clauses are upheld because the parties to them have freely accepted the benefits that arbitration can bring. The parties have accepted any limits that may apply in their chosen alternative forum. This supportive approach is present in the New Zealand cases as it will no doubt be in most jurisdictions of the world.[5]

Enforcement of Awards

Hand in hand with the increasing popularity of arbitration, has come a recognition that the end product of any arbitral process must be efficient enforcement procedures. So internationally we see the increased acceptance of the UNCITRAL Model Law, and acceptance of the New York Convention on the Recognition and Enforcement of Arbitral Awards. In short, we have increasing international uniformity of procedural approach, and also in relation to the enforcement of awards.

Some countries have embraced these developments with more willingness than others. Some Civil Law countries, for instance, make the enforcement of an award based on "no law" possible.[6] Others show more restraint, and include wider grounds for non-recognition of

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4 Case management has long been the vogue in the United States, and has been adopted in the Australian States, certain registries in New Zealand (where the project is still in its pilot phases), and is the centrepiece of the recent English procedural reforms following the recommendation of the Lord Woolf's Report, *Access to Justice* (1996).

5 *Baltimar Aps Ltd* v *Nalder & Biddle Ltd* [1994] 3 NZLR 129 (CA).

6 Art 1496(1), French Code of Civil Procedure. See the discussion of the *Fougerolle* and the *Norsolor* cases in Goldman "The Applicable Law: General Principles of Law" in Lew (ed) *The* Lex Mercatoria *in Contemporary Problems in International Arbitration* (1987).

judgments. New Zealand, as might be expected, sits somewhere in the middle of this spectrum.[7]

Like many small trading nations, New Zealand has been active in accepting international conventions. Often, our size and political system makes for rapid acceptance of international agreements. I suspect that our size also sometimes means that we cannot play a full international part in every area of the law. On occasions decisions about whether or not to enter into international agreements are made for us, when our major trading partners choose to adopt conventions.[8] Overall, I think our record of activity in this area is one to be proud of.

As I have noted, like many other countries, New Zealand now embraces and enshrines the arbitral settlement of disputes. The New Zealand Arbitration Act 1996 provides for mandatory stays of proceedings when an international arbitration clause has been agreed between the parties.[9] In even the simplest disputes, where a local resolution may well be easy and affordable, parties are held to their agreement to arbitrate, often when this involves an arbitration on the other side of the world.

Overall, I find these developments particularly encouraging. With many arbitral centres committed to ever more streamlined and economic process, the goal of dispensing justice rapidly and efficiently for the maritime community is much more likely to be met.

THE ENFORCEMENT OF ARBITRATION CLAUSES IN THE MARITIME CONTEXT

In the context of maritime law, arbitration has long been favoured as a method of dispute resolution. Most shipping contracts contain some

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7 New Zealand's recently enacted Arbitration Act 1996 generally follows the UNCITRAL Model Law, and specifies only limited grounds for refusal of recognition and enforcement: Sch 1, cls 35, 36.

8 For example, the Australian move to ratify and enact the Vienna Sales Convention resulted in a hasty Law Commission Report and enactment of legislation in New Zealand: the Sale of Goods (United Nations Convention) Act 1994 (which came into force on 1 October 1995). Contrast the dilemma that England appears to be in over whether or not to adopt the Convention.

9 Arbitration Act 1996, Sch 1, cl 8.

form of arbitration clause usually agreeing to arbitrate any dispute arising under the contract in one of the major centres such as London, New York or Paris. Bills of lading are, as we are all aware, at the centre of the international carriage of goods. Those documents often contain an arbitration or exclusive jurisdiction clause.

For this audience I do not need to give a seminar on the nature of bills of lading. Suffice to say that a bill of lading has unique features which, by their nature, push at the boundaries of the doctrine of privity of contract. Legislation, in the form of the various Bills of Lading Acts[10] to provide for the legal effectiveness of bills of lading came after merchants had used bills of lading for centuries in a manner which did not follow basic contractual principles but worked in the commercial sense.

The role of the bill of lading and its central position in regulating rights and obligations in the international carriage of goods has seen courts around the world adopting various methods to enforce the rights and obligations contained in the bill of lading by and against third parties. Initially the cases were about exceptions and immunities. The cases have recently extended to terms like exclusive jurisdiction clauses. The same arguments for the enforceability of arbitration clauses have been made before New Zealand courts.

Over the years we have seen the development of various exceptions to privity of contract:

- the *Brand* v *Liverpool* contract, the implied contract which can arise when a party takes delivery under the bill of lading;

- the *Himalaya* cases, which allow third parties like stevedores to have the benefit of bill of lading exceptions and immunities; and

- latterly the sub-bailment on terms cases, which impose the terms and conditions of the bill of lading on parties who have been held to consent to subsequent bailments of goods.

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10 See the Bill of Lading Act 1855 (UK) and the Mercantile Law Act 1908, Part II (NZ).

I should also note the more difficult *Elder Dempster* decision which has found new life in the current environment, and may allow a party who is not party to the bill of lading to rely on its terms and conditions on a bailment argument.

As I have said, recent decisions seem to be moving away from a strict contractual analysis to one based on the holding and possession of goods on terms contained in a bill of lading. Agreements are being more readily inferred from a party's conduct in accepting goods covered by a bill.

All the exceptions push at the confines of privity of contract. They bind parties to terms and conditions, and are driven, I would suggest, by the commercial considerations which provide the impulse to make bill of lading provisions binding as widely as possible.

There now appears to be a more general and open movement towards accepting that in the context of a maritime venture, obligations and rights should be binding for reasons of commercial policy, rather than requiring parties to invoke particular legal exceptions to privity. The Courts have not gone that far as yet, and technicalities still decide the cases, but the trend, I would suggest, is clear.

In the recent decision of *The Mahkutai*,[11] we have the most general statement of these developments from the Privy Council yet. In Lord Goff's opinion:[12]

> Though these solutions [ie devices to overcome the doctrine of privity] are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case it will fall to be considered whether the Courts should take what may legitimately be perceived to be the final, perhaps inevitable step in this development, and recognise in these cases a fully fledged exception to the doctrine of privity, thus escaping from all the technicalities with which Courts are now faced in English law.

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[11] *Supra*, n 1.

[12] *Ibid*, 665A-B. There is an interesting comment on the case, and in particular these dicta on privity, in Phang and Sing "On Himalaya Clauses, Bailments, Choice of Law, and Jurisdiction – Recent Privy Council Perspectives from The Mahkutai" (1996) 10 Journal of Contract Law 212, 220-221.

It has to be acknowledged that the focus of *The Makhutai* is a jurisdiction clause. However, the principles involved seem equally, if not more, applicable to an arbitration clause.

At present, the enforcement of bill of lading clauses is constrained by technical legal argument which seems certain to promote uncertainty, and further legal cost and expense. I think it very likely that the technical construction arguments that succeeded *in The Makhutai* could well be addressed by carriers reframing their Himalaya clauses.

The answer propounded by Lord Goff, of a general broad exception, has commercial attraction, and it seems certain that it will be pressed upon the Courts around the Common Law world. Such an approach would remove the technical limits on sub-bailment arguments which are exemplified in *The Pioneer Container*.

A generalised approach of the kind put forward by Lord Goff may catch a wide range of parties, ranging from those who have "bought" the bill of lading, to those who are faced with the bill of lading terms although they do not claim under the particular bill on which a carrier seeks to rely.

I am inclined to support the application of a general principle which sees parties bound by reasonable bill of lading terms where they are seeking to take the benefit of the bill of lading, but any general commercially based exception to privity will naturally be invoked more widely than that.[13]

There now seems a reasonable prospect that the argument will be made that all reasonable bill of lading terms including an arbitration clause[14] should bind any party with an interest in the maritime venture. This, notwithstanding that these parties stand outside the contractual framework, that they do not fall within any established exception in the

13 We will no doubt see more applications before our courts of the kind made in *The Contship America* [1992] 1 NZLR 425, and the *Trackweld* case.

14 What is a reasonable bill of lading term might be expected, of course, to change over time.

cases, and they are not within any legislation governing the transferability of the bill of lading.[15]

As I observed in the introductory section to this address, there is, I believe, a need to be aware of the fact that if the exceptions keep expanding, and a general approach is adopted, then we may see arbitration clauses enforced against third parties who cannot be said to have truly consented to arbitration, particularly the sub-bailment category. The issue is whether that is satisfactory or whether the overall interests of justice require more flexibility and discretion.

Of course, the consequences of being "caught" by an arbitration clause, in countries that have adopted the New York Convention, will often be a mandatory stay of proceedings. The party so prevented cannot then pursue a claim before its national courts.

This is an area in which care needs to be taken. Courts and legislatures may well find the general commercial arguments in favour of enforcing bill of lading terms seductive, but we must be careful to consider the rights of individual claimants to have access to Courts.[16]

I propose to illustrate my concerns on a practical level by referring to a New Zealand case where the carrier sought to stay a claim brought in the New Zealand courts in favour of London arbitration. Such cases may well be reasonably common around the world, although it would appear that they are not frequently litigated.

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15 Several academic writers have picked up this theme. See eg Curtin "Arbitrating Maritime Cargo Disputes – Future Problems and Considerations" [1997] LMCLQ 31.

16 I am not the first to express such thoughts. There is currently a developing line of cases that see courts recognise the arbitrability of trade practice disputes. The trouble that these disputes invariably have is that the arbitration and choice of law clause (choosing, say, English law) where a New Zealand Fair Trading Act/Commerce Act claim arises (the rough equivalent of the Australian Trade Practices Act) depends on the forum being willing and able to apply domestic statutes that generally contain mandatory public policy requirements. See *Hi-Fert* v *Kuikiang Maritime Carriers Inc* (1998) 159 ALR 142. It is often in this area that trenchant reluctance to let the arbitration agreement have its way surfaces. See eg the strong dissent by Justices Stevens and Brennan in the US Supreme Court in *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth Inc* 473 US 614, 665-666 (1985): "The Court's repeated incantation of the high ideals of 'international' arbitration creates the impression that this case involves the fate of an institution designed to implement a formula for world peace."

A SMALL CASE IN NEW ZEALAND – *TRACKWELD*[17]

Facts

The plaintiff purchased two log loaders from a Finnish firm. It arranged for a freight forwarding company, Netfreight, to carry the cargo. Netfreight issued a bill of lading to the plaintiff. The bill authorised sub-contracting of the carriage. The log loaders went from Helsinki to Hamburg. They were then transhipped for the voyage to New Zealand. The carrier responsible from Hamburg to Auckland issued its own bill of lading which contained an arbitration clause providing for London arbitration.

The log loaders arrived in Auckland damaged and the plaintiff wished to pursue a claim of some $36,000 in the New Zealand District Courts. The plaintiff had never signed bills of lading but fell within the definition of "merchant" in the bills and took delivery under the bills of lading, and sued, in part, under them.

The carrier protested jurisdiction and said that there should be a mandatory stay of New Zealand proceedings because of the arbitration clause in the bill. The plaintiff had sued under an old provision (now repealed) which allowed it to sue an agent of the carrier in New Zealand. This added complexity to the situation, but need not concern us in this discussion. The District Court judge in an understatement described the whole area as "somewhat complicated".

District Court Decision

The Court held that the bill of lading was sufficient to be an agreement in writing so as to fall within the Arbitration (Foreign Agreements and Awards) Act 1982 which provided for a mandatory stay in accordance with the New York Convention. The plaintiff was bound by the clause, the Court held, by reason of *The Pioneer Container* principles.

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17 [1995] DCR 607. Upheld on appeal, Unreported, High Court, Auckland HC 136/95, Robertson J, 7 May 1996.

The result was a mandatory stay in favour of London arbitration for a relatively small claim which the plaintiff would have wished to pursue in New Zealand. The Court found that on *forum conveniens* principles the claim would have been dealt with in New Zealand, although evidence was presented concerning the efficiency of LMAA rules and procedures.

High Court Appeal

The plaintiff appealed to the High Court. The appeal was dismissed. The only issue taken on appeal was whether the bill of lading was an arbitration agreement within the terms of the Arbitration (Foreign Agreements and Awards) Act 1982.[18]

The submission made by the New Zealand plaintiff was that the requirement for an "agreement in writing" require a true agreement in the sense that the parties had to have turned their mind to the clause and decided that they wanted to have the dispute settled by arbitration rather than having a contract imposed on it. Certainly the New Zealand receiver would not appear to have done this; it had simply consented to the initial carrier sub-contracting the carriage to the ocean carrier.

This argument was not accepted by the Judge, who adopted an approach driven by both policy and commercial pragmatism and said:[19]

> Any reluctance there may have been about settling disputes by arbitration is now something of the past … . In my view the resort to arbitration is not to be considered as something anologous to a contract of adhesion, nor in any way as comparable to an exclusion clause. It is a common and desirable part of contemporary dispute resolution procedures.

CONSEQUENCES

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18 It should be noted that there are differing views on what constitutes an "agreement in writing" for the purposes of the Convention. This was considered in the District Court decision in *Trackweld* at 614-615. The New Zealand Arbitration Act 1996, which repeals the Arbitration (Foreign Agreements and Awards) Act 1982, dispenses with this requirement, defining an arbitration agreement in wider terms: Arbitration Act 1996, s 2.

19 *Trackweld* (HC), *supra* n 17, 4.

While this case was one in which the plaintiff sought to sue under the bill of lading and at the same time avoid some of its terms, it does illustrate what can happen if a broad approach to the binding nature of bill of lading clauses is adopted, and this approach is then extended to arbitration clauses.

In this sort of case, a third party can have a legitimate complaint that it has been deprived of its rights to sue in the courts without having really turned its mind to any agreement to arbitrate.

I immediately acknowledge the strong policy arguments in favour of efficient arbitration which allows the carrier to streamline the resolution of disputes arising from its operations. These arguments are articulated in both *The Makhutai* and *The Pioneer Container*.

But a case like *Trackweld* raises real issues of concern. One of the reasons for concern is the now developing absolute approach of the Common Law courts and national legislatures to arbitration agreements. This is driven by the international conventions. In a situation in which a party is found to be bound by a clause there is simply no choice for the court in New Zealand[20] but to stay the proceeding. This approach has to be contrasted with the approach to forum conveniens and exclusive jurisdiction clauses[21] where discretion in differing measures is available to the courts.

DISCRETION

On a *forum conveniens* challenge the judge is left with a large measure of discretion. Some might say too much! A wide range of factors may be considered to determine what is the most appropriate forum for the resolution of the dispute in the interests of the parties and in the overall interests of justice.

Only rarely, when all is said and done, is this decision actually a difficult one to make. I make the comment that, despite the House of Lord's repeated pleas for these disputes to be resolved at first instance

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20 And in many other jurisdictions too.

21 See Peel "Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws" [1998] LMCLQ 182.

in a short time frame,[22] we still see huge, costly disputes, not addressing the real issues in dispute, but focusing on where the real issues will be resolved.[23]

Where there is an exclusive jurisdiction clause there is still a measure of discretion although the court has a lot less flexibility. This may have been narrowed by *The Mahkutai*. But the decision whether to stay or not, whilst ultimately one for judicial discretion, requires a particularly compelling case to justify the court overriding the party's agreement. This is especially so when one party may well be seeking to breach one clause of the agreement, at the same time as relying upon the rest of the agreement as the basis for its claim. Nonetheless, in the appropriate case, the clause may be held to be inapplicable where there are telling factors in favour of another jurisdiction.

Arbitration clauses are treated differently. Under the modern approach, the breach of such a clause is considered to be something special because of the approach adopted through international conventions. A stay is mandatory, regardless of other factors. The court has no discretion as to the order it must make, as long as the arbitration clause is not null and void.

So, in summary, the trends to enforce bill of lading clauses against the parties to the maritime venture; to interpret bills of lading as "agreements in writing" under the conventions; and to grant a mandatory stay in these cases in favour of arbitration, are generally very positive trends.

However, when these factors operate cumulatively and are applied to a claim by a party who can legitimately claim to be distant from any agreement to arbitrate, we may need to pause and address the broader question of the overall interests of justice.

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22 *Spiliada* v *Cansulex* [1987] AC 460.

23 Some view these sorts of preliminary disputes as promoting settlement, and thus being beneficial overall. I would question this conclusion. Developments in international conventions worldwide (see eg the Brussels and Lugano Conventions affecting the European Union nations) favour a set of rules that in theory should enable a party to choose the court that has jurisdiction. The approach shies away from judicial discretion: see comparison of the common law and Convention approaches drawn by the House of Lords in *Airbus Industrie GIE* v *Patel* [1998] 2 WLR 686.

Although this situation has not yet been reached in many jurisdictions, it is a problem that is better considered now.

THE WAY AHEAD

Having raised these concerns I confess that I am not sure about solutions. Perhaps there is really nothing to worry about because the trading world of the future will make place and geography of any dispute resolution process irrelevant.

In the future, an arbitration service, like many other services no doubt, will be capable of being dispensed anywhere in the world using the Internet and email and other telecommunications wizardry. Clauses may well be rephrased to reflect this, thereby removing unreasonable expense.

However, this world is not with us yet. Of course, current arbitration clauses still stipulate the place of arbitration and may create pressure on the plaintiff with a small claim and limited resources distant from the stipulated arbitration centre.

As I see it, there are three possible solutions to address these sorts of issues. One involves giving more discretion to the courts. One involves protective measures through legislation. The third, perhaps the preferable option, lies in more practical/pragmatic approaches.

A Judicial Approach

Overcoming the potential for injustice, at the moment, rests in the hands of the arbitrators and those who make and publicise the arbitration rules. Courts have effectively been given no role in jurisdictions like New Zealand, as they lack any form of discretion, and must stay proceedings.

From a judge's perspective, one of the solutions might be for the legislature to reconfer some appropriately constrained discretionary power in the area of arbitration clauses.

There are conceivably situations where an absolute approach to enforcing the arbitration clause simply will not achieve the best results.

A court-vested discretion may not be a bad thing, especially when it is constrained through the empowering statute, and the courts are given guidance on how the discretion should be exercised.

In the case of the log loaders, what would be wrong with the court (assuming it is properly seized of the proceeding) ordering the parties to arbitrate, and requiring evidence that this is happening for the stay to continue to be effective?

This mechanism would ensure that the dispute does actually get resolved one way or the other, and if arbitration is not pursued by one party, the court could resume its jurisdiction over the proceeding. If the plaintiff does not want to arbitrate, the court can dismiss the proceeding. If the costs are too great, both parties might be directed to take steps to simplify the procedure, or agree to an abridged arbitration, or leave the court with a discretion to proceed in some other way.

I accept that court intervention may not be attractive, given the protracted nature of forum conveniens arguments, and runs contrary to the international conventions on arbitration that domestic laws are adopting.

However, we should bear in mind that there already are national laws that exempt certain types of dispute from arbitration and show that arbitration is not seen to be appropriate in all cases.

In some cases (notably consumer type agreements, and insurance arrangements) New Zealand and other jurisdictions recognise that arbitration may not serve the interests of the party that is being held to the clause.

Significantly, in these cases, a protective approach is adopted where the clause may have been imposed on a party in unjust circumstances, or where the party has not expressly cnsented to the removal of its rights to have access to the courts in this way.[24]

This exactly the area where concerns arise in realtion to clauses in bills of lading. But again it may not be possible to have this type of legislation in the context of the international carriage of goods. Who, for instance, is a "consumer" where most parties are insured?

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24 The international conventions generally recognise, and enable reservations or national law-driven exceptions on this basis.

Mandatory Legislative Approach

In marine cargo disputes, some jurisdictions have taken steps to cut down arbitration clauses, insofar as they restrict or limit the jurisdiction of the court for inward shipments.[25] New Zealand has historically adopted a similar approach, at least to bills of lading, but this has been removed in relation to arbitration clauses, given the international conventions.[26]

This nationalistic focus recognises some of the interests that importers have in their local court procedures, and arguably places the third party receiver in a position of disproportionate strength. I believe it favours the receiver too much, and devalues arbitration, but somehow a balance needs to be struck.

There is a real tension here between parochialism and globalisation and internationalisation. An absolute approach does not provide the answer. A balance between the competing factors needs to be achieved. In legislation that balance is elusive and legislative attempts seem destined to lead to complex disputes about whether an arbitration clause is caught by the legislation.[27]

Certainly, though, if the arbitration agreement is the result of true consensus, there should be no issue with the courts enforcing a stay, and requiring the parties to honour the agreement.

PRACTICAL/PRAGMATIC SOLUTIONS?

If bill of lading clauses are to become more wide ranging in their effect, drawing more and more parties into particular dispute resolution for a,

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25 Carriage of Goods by Sea Act 1991 (Cth).

26 The now repealed Sea Carriage of Goods Act 1940 included sections similar in scope and effect to the Australian legislation's provisions. These were first adopted in 1968. An exemption was made in 1985 for submission to arbitration in jurisdictions that were party to the same international arbitration protocol. This shift in focus, to allowing seemingly acceptable international regimes to be enforced (on what is effectively a comity basis) has been taken a step further with the Maritime Transport Act 1994.

27 See eg *Hi-Fert*, *supra* n 16.

the responsibility must lie with arbitral centres to justify the faith that is shown in arbitration as a mechanism for quick and efficient resolution of disputes.[28]

I would like to think that these concerns will be addressed by practical means because there is a great deal of commercial attraction in upholding the general binding nature of bills of lading on all involved in the maritime venture.

This might ultimately see complicated disputes such as *The Pioneer Container* and *The Mahkutai* removed from the courts because the reasonableness of the obligation under arbitration clauses is universally accepted. Disputes will be about the matters truly in dispute rather than the venue of the dispute.

One solution is for major centres to offer more practical solutions which can be seen by the consumers as the equivalent of a hearing in their own jurisdiction. A great deal has been achieved in this context so far.

The concerns of small claimants will be addressed practically by promoting and embracing the developing international common law of commercial contracts, and by increasing the accessibility, affordability, speed, consistency of approach and procedure, and uniformity of private international law.

Developments on both the substantive and procedural fronts need to take place so that parties to small disputes have access to the arbitral fora to which they are agreeing. As usual, though, it is not enough for this to just happen, it must be known to be happening. Publicity, and openness of judgments, and decisions on these topics are fundamental to the development of a globally uniform law in these areas.

It has been said before, but there needs to be some accommodation between confidentiality and publicity if a stronger body of Common Law international arbitration practice is to be built and established. Only in this way will acceptance of the arbitral process increase.

The ideal, obviously unrealistic solution would surely be to have one global set of rules applicable in any jurisdiction with that rule-

[28] Eg the LMAA FALCA clauses that do not appear to have been highly promoted or used.

making body having branches in every major commercial centre. Then arbitrations might be held anywhere. There could be one bill of lading clause and one process which could be uniformly delivered throughout the world as an alternative to court resolution. Like all other pleas for comity, this is, no doubt, a vain hope.

I hope that I have provided some food for thought. It is most appropriate that this subject should be discussed before an audience as knowledgeable as the present. I leave it to you to ponder upon, in the hope that you might have been sufficiently stimulated by the topic to reflect upon the issues and develop a workable solution within your own jurisdictions.