

Arbitration: past, present and future

Opening address to the RAIF Arbitration Conference, 25 November 2016

Sydney, NSW

Robert McDougall¹

Introduction

- 1 The concept of arbitration embodies, at its core, two elements. First, it is consensual: for example, the parties to a contract agree to settle their disputes by arbitration rather than by litigation². Second, it is intended to be final³. The second element is shared with the resolution of disputes through litigation. The first is not.
- 2 The consensual nature of arbitration is both a strength and a weakness. It is a strength, because it enables the parties to a contract to decide for themselves the mechanism by which any disputes that they may have will be resolved. It is a weakness, because an award in favour of a claimant will require the assistance of the courts for its enforcement.
- 3 Like any human endeavour, arbitration must respond to external forces. In this address, I shall look at the historical evolution of arbitration and the way it now operates in conjunction with the courts. I shall then turn to the need for

¹ A Judge of the Supreme Court of New South Wales; Adjunct Professor, Faculty of Law, University of Technology, Sydney. The views expressed in this paper are my own, not necessarily those of my colleagues or of the Court.

² Sometimes it may be a little difficult to identify the contract, as is shown by the decision of the Court of Appeal in *Raguz v Sullivan* (2000) 50 NSWLR 236.

³ As to finality, see s 39(2) of the *International Arbitration Act 1974* (Cth).

evolution by considering some challenges that arbitration must overcome if it is to continue as a viable method of dispute resolution.

The past

- 4 Arbitration has a long history⁴. Submission to arbitration was a feature of the laws of several of the city states of ancient Greece. It was also used by the city states themselves to settle border (and other) disputes. However, many commentators see the European origins of the modern system of arbitration in medieval trade fairs. Merchants attending those fairs who had disputes with one another would not submit themselves to the Royal Courts or to the local courts. Instead, they would go to a panel of several merchants chosen from among those attending the fair. Those merchants were familiar with the market place, knew the customs and practices of the market participants, and were able to resolve disputes promptly, cheaply and with sufficient “justice” to satisfy the disputants.
- 5 Later in the Middle Ages, trade guilds emerged in England and in Europe. They were combinations of people practicing particular trades who banded together for various purposes (including, it must be said, purposes that would today be regarded as anticompetitive and undesirable). Many trade guilds had their own internal dispute resolution processes which required parties, being members of the guild, to submit their dispute to the arbitration of their fellows, not to decision in the Royal or other courts.
- 6 Thus, arbitration grew as an alternative to dispute resolution through the courts. In its origins, arbitration was seen as quick, cheap, and sufficiently just to be acceptable. The Royal Courts of the time could not be said to possess the first two attributes. It is doubtful whether the local courts (administered by the Lord of the Manor or some other local magnate) possessed any of them.

⁴ In what follows, I shall draw freely (indeed shamelessly) and without further citation on an article by Sir Ninan Stephen (a former Justice of the High Court of Australia, and Governor General of the Commonwealth) “*Yf by theyre good dyscretions*” (1991) 26(7) Australian Law News 42.

7 In England, the development of arbitration was treated with considerable hostility on the part of the courts. Although the Royal Courts sought to justify their hostility by high-blown rhetoric, the reality is that it was based on more commercial, even sordid, motives. The speech of Lord Campbell in the great case of *Scott v Avery*⁵ shows why. His Lordship said:

My Lords, I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration. Now, I wish to speak with great respect of my predecessors the judges; but I must just let your Lordships into the secret of that tendency. My Lords, there is no disguising the fact, that as formerly the emoluments of the judges depended mainly or almost entirely upon fees, and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil. Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law.

8 Lord Campbell was a Scotsman, and no doubt spoke with insight and from the heart. However, the secret into which he let his colleagues must have been regarded as somewhat scandalous, because the version of his Lordship's speech appearing in the authorised report⁶ does not contain the passage that I have just set out.

9 Of course, by the time *Scott v Avery* was decided in 1856, there had been legislative enactments seeking to assist the parties to an arbitration agreement to perform their agreement. The *Civil Procedure Act 1833*⁷ provided that parties who had submitted to arbitration could not revoke their decision except by leave of a court. Twenty-one years later, the *Common Law Procedure Act 1854*⁸ formalised arbitration processes and introduced innovations such as the stated case and compulsory reference to arbitration. Thirty-three years after *Scott v Avery* was decided, the *Arbitration Act 1889*⁹ gave courts the power to enforce arbitration agreements, and to support the arbitral process.

⁵ *Scott v Avery* (1856) 28 LT OS 207 at 211

⁶ *Scott v Avery* [1856] 5 HL Cas 811 at 853.

⁷ 3 & 4 Wm 4, c 42.

⁸ 17 & 18 Vict, c 125.

⁹ 52 & 53 Vict, c 49.

10 Thus, by the end of the 19th century, arbitration had become a legitimate alternative to litigation, and one that the courts were required to support, rather than free to suppress.

The present

11 We have reached the stage, early in the 21st Century, where arbitration appears to be alive and well; indeed, flourishing. As regional and global trade develop, there is scope for arbitration to develop with them. Regional interest in arbitration is at a high level, as is attested by the presence of representatives of so many regional Associations and Institutions at this conference.

12 The growth of regional International Arbitration Centres is a relatively recent phenomenon. Whether it serves an existing market, or leads to the cultivation of new markets, or perhaps does both these things (or indeed others), is something that I will leave to you to ponder. What it does mean is that there is available, around the globe, an increasing body of skilled arbitrators, to whom resort may be had.

13 At the international level, the UNCITRAL Model Law has helped to bring procedural certainty to international and domestic arbitration. Complementary domestic legislation has ensured that the courts can play their part in assisting parties who have chosen arbitration as their preferred method of dispute resolution to enjoy the benefit of their contract.

14 In Australia, the adoption of the Model Law at the national¹⁰ and state¹¹ levels ensures that the courts have the legislative authority to facilitate the work of arbitrators. Equally importantly, the adoption of the Model Law sends a clear signal to courts that it is desirable that they should exercise that authority consistently with the objectives to be found, expressly or impliedly, in the domestic enactments of the Model Law. My own experience, confirmed by

¹⁰ *International Arbitration Act 1974 (Cth)*.

¹¹ E.g. *Commercial Arbitration Act 2010 (NSW)*.

research material provided to me by Professor Luke Nottage (for whose assistance I am grateful), suggests that the courts are playing their part¹².

- 15 Nonetheless, arbitration does face challenges: challenges of cost, and challenges of efficiency among them. It also, I think, faces challenges from the revitalised commercial courts both in Australia and elsewhere around the world. I propose to look at some of those challenges in the next section of this address.

The future

- 16 One of the proclaimed virtues of arbitration was that it was swift and cheap. Thus, it was seen as an attractive alternative to the traditionally slow and expensive processes of litigation. However, it seems to me, arbitration and litigation have tended to converge, in more ways than one.
- 17 First, as commercial courts have sought to simplify and streamline their processes, arbitration has become more complex, more technical, and less informal. At one stage, it appeared, the only residual benefit of arbitration (apart from allowing parties to a contract to “de-select” the courts of a legal system that might otherwise have had jurisdiction, if they thought that those courts might not be capable of resolving a dispute in an effective, just and independent way) was privacy. Traditionally (and I’m speaking in particular of countries that share the common law heritage), justice is done in public. Traditionally, arbitrations are conducted in private.
- 18 I am conscious that Commercial Arbitration Centres recognise the need to avoid arbitration being, or becoming, a cumbersome, procedurally complex process. For example, the Australian Centre for International Commercial Arbitration has produced Arbitration Rules this year which seek to streamline and expedite arbitral processes¹³. The expedited procedures available in

¹² Hu and Nottage, *The International Arbitration Act matters in Australia: where to litigate and why (not)*, Sydney Law School Legal Studies Research Paper No. 16/94, November 2016; <http://ssrn.com/abstract=20862256> (viewed 18 November 2016).

¹³ See Holmes, Nottage and Tang, *The 2016 rules of the Australian Centre for International Commercial Arbitration: towards further “cultural reform”*; Sydney Law School Legal Studies Research

“small” arbitrations (those involving less than \$5 million) are very welcome; and I note that there are similar processes available in other regional centres.

- 19 Regardless, I am not certain that speed is of itself a particular advantage offered by arbitration, compared to litigation. Speaking as a judge with over 13 years’ service in the Commercial List of the Supreme Court of this State, I can say with some confidence that the Court is able to offer parties to a dispute an intensively case-managed progress towards a speedy trial and resolution. It has not been uncommon over the years (and is not uncommon now) for substantial complex disputes to be case managed to a hearing, and resolved (at the trial level), within 6 to 9 months. I doubt that arbitration can offer any greater expedition in disputes of equal complexity.
- 20 There is some anecdotal evidence that arbitrators may be concerned not to press parties too firmly with adherence to procedural directions; too willing to allow extensions of procedural timetables whenever a party requests one. If there is such a tendency, it may reflect the fact that arbitrators make their living from conducting arbitrations, and cannot conduct arbitrations unless they are appointed to act as arbitrators. Thus, it could be thought, arbitrators have a disincentive to case-manage aggressively, and to pull recalcitrant parties into line. I can assure you that the Commercial List judges of my Court over the years (and I’m speaking of my time at the bar, as well as my time on the Court) have felt no such constraints.
- 21 Again, the apparently increasing complexity of arbitration procedures has been reflected in an increase in costs. In those circumstances, even leaving aside the fact that the courts provide an infrastructure to litigants at a cost which certainly does not reflect its full cost, I am by no means certain that arbitration offers any cost advantage over litigation (at least, in a specialist commercial court).

- 22 Arbitrators must deal with those challenges. I note that the topics for discussion in the course of this conference include innovation in arbitration (and a sharing of regional experiences) and controlling costs in arbitration.
- 23 Yet another challenge comes from the ever-proliferating array of dispute resolution mechanisms. This is not the place (nor have I the time) to look at the numerous forms of ADR that exist today. The point I wish to make is that practices such as mediation – to name but one – are not merely alternatives to litigation; they are alternatives to arbitration as well. Thus, another of the challenges faced by arbitration is the need to demonstrate its continuing efficacy as a valid, effective and economical selection from the large menu of ADR processes available to disputants.
- 24 I have no doubt that arbitrators will respond to the challenges that they face, which are by no means limited to those that I have outlined. I have no doubt that conferences such as this one are a very valuable means of helping both individual arbitrators and Associations and Institutes of arbitrators to ensure that their procedures are as flexible as possible, and as best adapted as they may be to the identification and resolution, as quickly and cheaply as is consistent with a just outcome, of the real issues in dispute.
- 25 It is a pleasure to give the opening address for this conference. I wish you an enjoyable and stimulating time.