Cost-effective arbitration: the commercial way to justice

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I am going to talk about cost-effective arbitration and I have called it the commercial way to justice. Much of what I am going to say is taken from an introductory lecture to the Chartered Institute's Diploma Summer School. The theory before the practice.

Much of the debate about arbitration would lead the uninitiated to believe that it was a particularly esoteric province of the law. I, in common with a number of the members of both our institutions do not profess law. Perhaps we are those whom Kipling had in mind when he spoke of "lesser breeds without the law".

Yet there is a logic to our involvement. Some method in the madness. At an abstracted level, perhaps arbitration has nothing to do with law at all. That is an assertion which I have developed more fully and put into place in what follows.

It is not merely an abstracted theoretical matter, however. Much of the cost and delay in modern arbitration results from seeking to reproduce, in what is essentially a private commercial forum, the procedures and practices of Courts of Law. The essential feature of Court procedure is that it must be dictated by the public role of the Court. There must be a facility for public observation, an open Court, a public record or at least a means for reporting. The procedure itself must be transparent, not merely to the parties, but to the public, to legal commentators and to the press. Much procedure, even today, is governed by the traditional role of the jury and by the requirement to identify and separate fact and law, a distinction at once difficult and, I would submit, artificial.

We live in a world dominated by law. We confuse the role of the State, in regulating behaviour, with our own wants and desires. If we do not like something, we say, "There ought to be a law against it"; if we favour a course of action we say, "They ought to be made to do that by law".

Isn't that an odd way for people to think?

Well, most of what we have in mind when we make comments of that kind is either Criminal or Administrative Law. I am not now concerned about those areas, important though they are. And incidentally, those areas are ones for which the Courts are necessary and for which there can be no true alternative.

For my part, however, I will take you back to basics. To wipe the slate clean, creating what engineers call a *tabula rasa*. And I want to address the question as to why the legal system should be involved in commercial matters at all.

Most of us are used to the idea that the State should step in to deal with our private relationships. There is a body of law about contracts, relationships that come about by agreement; there is a body of law about other obligations which arise independently of agreements. To a greater or lesser degree, whatever our quarrel with our neighbour, the power of the State can be brought to bear on the rights and wrongs of it.

That is really rather surprising, that the State should step in, to deal with a private quarrel, whenever we ask. In history, that was not always so. My examples are drawn from English Law, but I suggest that the root concepts are little different around the world. In English Law, for example, quite complex legal fictions had to be developed to enable the Courts to deal with private relationships. Land always was a matter for the Crown, but before you could invoke the power of the King and his judges in any other context, you had to answer the first question: "Why should we intervene in your private affairs?", or, in modern words, which you may recognise, "What's in it for us?"

Broadly speaking, there were two ways to answer that question. If the matter were one within the scope of an ecclesiastical court, then it would suffice to allege that it was a matter of conscience; the clergy had responsibility for the care of your soul. Your own conscience had to be quite clear before you could take that line with any safety. The secular ploy, if I may call it that, was to protest that, because of your neighbour's failure to comply with his bargain, you were unable, or less able, to pay your taxes. That idea would engage the King's attention rather forcefully. It was the origin of the writ of *quominus* and provided the essential link between your private contract and the more or less enlightened self-interest of the Court.

I said there were two ways. In fact, there was another aspect of policy which could motivate the Court and the Crown to assist an allegedly injured party. It springs from the principle of the King's peace. If an injured party were to have no recourse available, then the only remaining choice would be self-help, retaliation, or seizure of the goods, or of money, by private force. Clearly, as society became more regulated, self-help became less acceptable, for obvious reasons, at least one of which has come down to us as a guiding principle in rugby football: "Get your retaliation in first".

The validity of this policy is illustrated rather well in those countries where gambling of one kind or another is permitted but where gambling debts cannot be enforced at law. Two choices are open to the creditor. One is to "warn off" the offending debtor, which is a relatively civilised method used in horse racing. As to other methods of enforcing gambling debts, my lack of knowledge of the Sicilian dialect may have hindered my study of that branch of Alternative Dispute Resolution.

I have used English Law for the purposes of illustration. In other countries the Roman tradition remained in place and the principles of the Law of Obligations developed along rather different lines, but essentially with the same consequences, at least in general terms.

I have looked at the basis for the law's intervention in private affairs, albeit in a fairly superficial way, to demonstrate that it is by no means a natural phenomenon. Moreover, there is an additional problem about the intervention of the law which arises as soon as you start to consider commerce and private relationships across national boundaries. Recognition.

The sad fact is that States do not, as a general rule, recognise and enforce the decisions of foreign Courts in private matters. There are some exceptions to that general rule. Some States have reciprocal treaties with others, there are some matters, usually

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rather restricted, with which Courts will deal in the context of the comity of nations, and increasingly, there are arrangements with free trade areas. Nevertheless, States do not generally enforce foreign judgments. Arguably, therefore, in private international commerce, there is no law.

Let me repeat that, because it is a surprising conclusion: in private international commerce, there is no law.

You could hardly have a slate cleaner than that. Fortunately, however, that is only half the picture. For the rest of the picture, I will ask you to think about the necessary fundamentals of human social behaviour, how they apply to commerce and, in particular, how they apply to international commerce, because, although Australia is a large country, it is very much an international player. The Pacific Rim is developing as a commercial community and is part of the wider world. We eat Macadamia nuts in the UK and somebody has to bring them in.

As I say, I will talk about human behaviour. Then I will take you back to the firmer ground of law. Then I will look at some of the practical implications – how arbitration can work more effectively, what can be done about the perceived abuses within arbitral practice which need to be weeded out.

Now, commerce is an aspect of social intercourse which has real benefits for the individuals who trade with one another and generally for society as a whole. It is the way in which skills, abilities and goods become available for the common weal. The prime means for social intercourse, facilitating commerce, is language. Language is essentially structured by definitions. At the fundamental level, those definitions are held in common by most, if not all peoples.

I exclude, for this purpose, those islands, beloved of philosophers, where one tribe tells only the truth and the other tells only lies. Truth or lie notwithstanding, I suggest to you that an exchange of words (or of signs or symbols or, for that matter, of actions) between persons engaging in commerce has the purpose of defining the commerce between them. If that purposive proposition is unattractive, then I suggest that, to make sense of their commerce, their exchange must be taken to have the effect of defining the commerce between them.

I have a peach, you have an apple. I give you my peach, you give me your apple. That is a commercial transaction, perhaps without words. You bite the peach and the transaction is no longer reversible. Offer and acceptance in the raw, followed by a conversion of goods. The actions define the commerce.

Of course commerce is more sophisticated than that. It exists at higher level of abstraction, a level which depends upon the promise.

Now, the promise is at the root of commercial transactions of all kinds. It is also the basis for intervention at law. Law enforces promises, but promises are not a creation of law. The principle *pacta sunt servanda* is a definition, an identity, a simple truism if you like. In mathematical terms *pactum* = *servandum*: the two words are simply the same in every respect. It is not law that makes a pact into something to be performed. Now, of course, logical consequences flow and law will follow those consequences and enforce them. Nevertheless, law is the creation of society, not society the creation of law. Law is a servant of the people: the people are not servants of the law. At least, if and insofar as the people may be servants of the law, it is because they are servants one of the other.

To return to the promise, you will see that it is fundamental to the whole conduct of commerce. A promise is a fact. Save only for such restriction of the right to make and enforce promises as may be accepted as a matter of common principle or may have become the subject of legislation or other legal sanction in individual jurisdictions, it is a commonplace that commercial promises are effective and will be enforced by systems of law worldwide. As I have said, there is a practical difficulty in taking the decision of a State Court outside its own borders, but that is only a practical difficulty, not something that detracts from the universal nature of the promise.

I said that a promise is a fact. Of course it is, but a complex contract may import all kinds of agreements, including a choice of law. I will maintain that such choices are also a fact, rather than law.

Now, if that is right, it casts a new light upon the so-called *lex mercatoria*, the law merchant, which creates so much excitement among international lawyers, particularly those involved in arbitration. If, as I say, my proposition is right, it isn't law at all. That is what the traditional lawyers say. What I suggest, however, is that, although it may not be the law, the custom and practice of merchants is fact. Difficult fully to prove at times, an evidential problem, but in fact, capable of being proved by the evidence of practitioners. Philosophically indistinguishable, in that sense, from foreign law.

I would like now to turn to one class of promise that is so universally recognised that it transcends, in effect, the limitations of national jurisdiction. It is at once an ethical promise which puts commerce on a higher footing and a practical promise which makes possible free commerce between nations. A promise, moreover, which has created an entirely distinct and separate jurisprudence, or more correctly, perhaps, pseudo-jurisprudence of its own, more complete and arguably more just, within the limited scope of its application, than any national jurisprudence.

Let me go back to the fruit. I have a peach, I would like an apple. I promise to give you my peach, you promise to give me your apple, but only of the peach is ripe and not rotten. We look at the peach and we cannot agree. We decide to ask a friend about the peach and agree to do as he says. That is another level of promise. We promise one another that we will comply with a friend's decision. In doing so, we relinquish a measure of personal freedom. We do not elevate the friend beyond us. We do not cloak him in a gown, we do not put a cap or a wig upon his head, still less a crown. We merely say to each other that we will abide by what he says.

Incidentally, if neither of us likes what he says, we can agree to ignore it. Save where the State or others have a direct interest in it, the parties to a promise may release each other by consent whenever they please.

It is that promise that is the basis of private arbitration. You will find that much debate about arbitration takes place in what appears to be a legal context. If my submission is correct, then arbitration does not have its basis in law but in a much more fundamental principle of human society.

Law has relevance, however, for a number of sound reasons.

First, perhaps, is that in a complex society, it may be assumed that commercial transactions take place in what may be called a climate of law, so that common legal principles, at least, may be taken to have been in the contemplation of the parties to any promise and thus to form a part of the promise.

Secondly, if the promise to abide by the outcome of an arbitral reference is not honoured, then a Court may be asked to enforce it: in those circumstances it would be surprising if the Court did not expect the decision it is asked to enforce to be one

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which it can countenance, even if it is not one the Court itself would have made.

Thirdly, law in general, and commercial law in particular, has developed largely to recognise bargains and reasonable expectations between parties so that it is more than likely that the private decisions made by an arbitral tribunal will be at one with the decisions that an appropriate Court would have made. One may summarise all that by saying that a contract between parties is to be taken as according to the appropriate law, so that an arbitral tribunal will be bound by that law, even if its methods of proceeding are not the same as those of the Court.

Apart from procedure, the other principle differences between arbitration and the Court are first that, because the arbitral tribunal is private and created only for the purposes of the immediate reference, it does not make new law, does not interpret law for the purposes of others and therefore has only the concerns of the disputing parties in its mind. The second principal and often more important difference is that the arbitral tribunal is not concerned with the interests of the State.

If commercial arbitration is a private affair, and if the principles underlying it are philosophical, rather than legal principles, then how is it of practical value? You and I may ask for an honest man to decide between us, but what if one or the other reneges on the agreement? Honest men do not have armies.

Essentially there are two methods of enforcement. One is purely commercial. In many trades, there are associations whose practise is to publish the names of those who fail to comply with the decision of an arbitral tribunal. That may put an end to the credit of the trader so identified. It may put an end to his ability to trade. It is a draconian sanction. Like many sanctions, to invoke it brings no satisfaction to the injured party, but it creates a powerful incentive for compliance.

The second method of enforcement is through the Courts. Almost every nation recognises the promise to arbitrate and, subject usually to various local conditions, will enforce the decision of an arbitral tribunal. It is when the Courts are asked to assist in an international matter, however, that the full rationale and advantage of arbitration can be seen. That is because there exists a mechanism whereby the decision of a foreign arbitral tribunal may be recognised and enforced almost anywhere in the world. I ought to emphasise that. Unlike the judgement of a national Court, the award of an arbitral tribunal may be enforced almost anywhere in the world.

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The mechanism for recognition and enforcement of foreign awards is the *New York Convention* of 1958. Even England and Wales, possibly the most chauvinist of nations in the value set on their national law, adopted the Convention in 1975, (which was swift by English standards). You will hear more about the *New York Convention*, but I ask you to view it as a Convention based upon the ethical principle of the promise, of *pacta sund servanda*, rather than upon law, which I say it transcends.

It is this almost universal international recognition, which is subject to a very limited control, combined with the moral and ethical principles that I have outlined, that makes international commercial arbitration the inevitable method of choice for determining issues in international commerce. The secondary advantages, such as efficiency and confidentiality, are just that, as is the advantage of selecting a tribunal having familiarity with the issues or with the trade. The vital feature of international commercial arbitration is that it is recognised by the law in almost every country, but free of the influence of any State. In its limited area, it brings us as close to the ideal of justice as we are likely to get.

Whether I am right in my somewhat free-thinking concept of the arbitral process, which is essentially an expression of the so-called 'promissory' or 'radical' hypothesis of arbitration, or whether my jurist friends are more correct in their presentation of arbitration as a kind of licensed extension of the Court into the private sector, the 'jurisprudential' hypothesis is now of little other than academic interest. For all practical purposes, the *New York Convention* ties them firmly together, as do the various forms of legislation by which arbitration is linked to the legal systems of the nations. In addition, whatever else may be said about it the UNCITRAL Model Law provides a very fair and practical guide as to those aspects of laws applicable to arbitration which are commonly held.

There is, therefore, a basis for our study which is practical and need not depend upon our philosophical approach (although there may be times when a return to first principles provides a new light upon an immediate problem.

My purpose has been to set in motion some trains of thought which you may find relevant to the current practice of arbitration. The first, then, was the universal nature of the promise and the special importance of a promise to abide by the decision of a tribunal of your own making. Another is about the implications of arbitration as a practical choice and as a necessary choice in the international context. I believe that there is nothing essentially different, no fundamental distinction between the international and the domestic approach, although, of course, individual nation states, and states within federal: nation states, may have their own levels of sophistication in such law as is mandatory in its effect. It is my fervent belief that, in studying arbitration, it is necessary to study the international implications, which are simpler in many ways, before turning to the national scene.

Before looking at some practical aspects, now might be as good a time as any to remind you of the definition of arbitration in the *Shorter Oxford English Dictionary*:

Arbitration 1. Uncontrolled decision 1651. 2. The settlement of a matter at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision 1634.

Well, I know that there is at least one learned judge in England who would suggest that the first was a fairly good definition. With great respect (another well known saying among engineers) I do not agree with him and I want to concentrate on the second definition, the definition of arbitration as we understand it. The definition makes clear and efficient use of language. All is there.

> **The settlement of a matter at issue by one to whom the parties agree top refer their claims in order to obtain an equitable decision.**

No mention of the Court, no mention of the legal system, no mention of rebuttals, rejoinders, surrebuttals and surrejoinders, no *duplicat*, no *replicat*, no mention of any *White Book, Green Book, Code de Procedure Civile*, rules or any of the paraphernalia which gives us so much opportunity to waste time and employ ourselves at the expense of the hapless and often unwitting parties.

I go further, looking at the definition in the context of English Law: What does equitable mean? What of equity? Well, there are definitions in the *Shorter Oxford*

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English Dictionary:

equitable *a* 1646 1. Characterised by equity or fairness:: now *rarely* of persons. 2. Pertaining to the department of jurisprudence called Equity: valid in equity as distinct from law 1720.

equity 1. *gen.* The quality of being equal or fair: impartiality: even-handed dealing. 2. That which is fair and right. *rarely* in pl. 3. *Jurispr.* The recourse to general principles of justice (=L., *naturalis aquitas*) to correct or supplement the ordinary law 1574. 4. In England, Ireland and U.S., a system of law existing side by side with the common and statute law (together called 'law' in a narrower sense), and superseding these, where they conflict with it. Also *transf.* of analogous systems.

Then there are definitions relating to rights and to equity shares, with which we are not concerned.

The fourth meaning can, I suggest, be discarded, although I should say that the lexicographers list of countries is by no means exhaustive. Certainly there was once a system of Equity, operating in parallel with the courts of the Common Law. Although the Judicature Acts of 1873 to 1875 sought to fuse only the administration of law and equity, they did more than that. Inexorably, the flexibility of equity was lost as more and more discretionary powers of the Court came to be the subject of rules, the so-called 'rules of equity', now interpreted in the more or less formulaic manner that has come to exemplify English Law, and indeed other common law, in action. The present position is very largely one in which the flexible concept of equity could be said to have been subsumed into law, and indeed, tamed by the Court. If I were to argue the extreme, I would say that there is no longer any independent concept and practice of equity within the English legal system. Sir George Jessel, M.R., were he alive today could say again as he said in the nineteenth century, "This Court is not, as I have often said, a Court of conscience, but a Court of law." (Re *National Funds Assurance Co* (1878), 10 Ch D. 118 at p. 128) Interestingly and halfway around the world, Oliver Wendell Holmes said much the same. Perhaps to may be to silence a 'bleeding heart' advocate, I do not know, but Holmes said, "This is a great Court of Law, young man, not a Court of Justice." And we have remembered that.

How sad that is. These were great men, great jurists, but no equity means no justice. That is why people need something else. Law is no longer predictable. Decisions are capricious and the expense intolerable. Why should the parties to a private dispute pay for the development of the law? There must be a way for parties in dispute to solve their differences fore themselves. That is what arbitration is. It is a means for parties to determine their differences for themselves. They do that by agreeing to appoint someone of their choice to determine their differences on their behalf. The arbitrator makes the decision they cannot make, but, and I repeat myself, he makes it on their behalf.

Now let us put the concepts together. I have demonstrated that arbitration is no more, but certainly no less than the carrying into effect of a promise between the parties, a contractual process like any other. I have argued that law, for the purposes of an agreement between the parties, may be looked upon as fact. I haven't yet made the point that all law must be taken as foreign by practitioners in other professions, such as myself, however qualified. Nor have I gone on to express the implication that such practitioners will analyse law, not as lawyers inspired by the mystery of the law, but as logicians, analysing and investigating assertions of law in precisely the same manner as are analysed and investigated assertions of fact. I have demonstrated that equity must be the dominant feature of arbitration, because that is what the definition requires, and I now argue that the equity which concerns the arbitrator is that between the two parties to the reference, no one else. The arbitrator has no special duty to the community at large, or to the legal system. He has to comply with mandatory rules of law, but that, as they say, is it.

The practical result is quite simply that the arbitrator must forget any idea of pretending to be a Court or anything like it. We have arbitrators who wait for everyone to assemble then expect them to stand up when the arbitrator comes in. I dare say they would parade holding a nosegay and with a clerk, a tipstaff and a mace carrier if the opportunity offered. It is not that kind of affair. There used to be an offence, on the high seas, of improper aggrandisement. It was committed by merchant ships and others who wore the ensign of warships without authority. It is committed by arbitrators every day and ought to stop. We will not recover the moral high ground, and we will not recover the practical benefits of arbitration until it does. An arbitrator may be a master of his procedure, but that's all he is master of. The parties are his employers and the arbitrator their servant. That's it and all about it. It's a job of work. An honour, certainly, but primarily a job of work.

Well, I don't know if you were counting, but it looks like 4,833 words with nothing cost effective about it. By now you must be wondering why you came.

It gets worse. I am not going top give you any special cost-cutting rules. No ingenious techniques.

What I do say now, however, is that we have established a sound philosophical and jurisprudential basis for approaching the problem of arbitral expense and delay. And the first consequence of all this is that there is no need to approach arbitration as if it were a process at law. We have seen that it is not.

So how do we approach it? In my view, the first step you need to take is that of choosing your arbitrator. If it is to be a sole arbitrator, then for heaven's sake suspend your quarrelling long enough to agree upon someone you can trust. It is nonsense to sulk in your tents until some well-meaning institution dips its hand into the lucky bag and makes a choice for you. You may get a reasonably sound arbitrator. I hope you do, but you won't get the best one.

Suppose you can't agree because one of you thinks the dispute is about concrete and the other thinks it is about a legal matter of interpretation. Neither the lawyers nor the engineers in arbitration are fools. Of an engineer with no other qualifications can be appointed a temporary judge, I am quite sure that a lawyer can learn about concrete. The parties will certainly want to tell him. Trust is the key, trust and common sense. Why people throw away the best cost-saving card they have by abandoning the opportunity of appointing an arbitrator chosen between them I shall never know.

If there is to be a three man tribunal, get together with your opponent. Say to him, "If you agree, we will appoint a technical man, you appoint a lawyer and we have the bases covered. They can find their own chairman." Better than that, see if, between you, you can appoint your 'dream team'. Three skilled specialists whom you trust and who will work together to solve your problem.. That is what arbitrators do, they solve your problem. Let the Court worry about the rest of the world and the development of the law. Who needs it?

Next, if the case warrants it, have a preliminary meeting at which the real protagonists are present, and invite them to discuss the likely issues. Let them tell the arbitrator their troubles, informally, to enable him or her to get a handle on

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Membership renewals are due....

The Law Society of the Northern Territory members are reminded that membership of the Society for the 1997/98 year is due as of 1 July 1997.

Membership of the Law Society is available to any person whose name appears on the Supreme Court of the Northern Territory Roll of Legal Practitioners. Membership costs $120 per annum and includes the Law Council of Australia capitation fee.

Members receive the Society's publication *Balance* and the Law Council of Australia's publication *The Australian Lawyer*.

Law Society membership entitles practitioners to take advantage of a range of discounts through the member services packages, beginning with discounted Qantas airfares and cheaper petrol via the BP Fuelcard Scheme and leading through a variety of other commodities and services.

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the dispute. Formal preliminary meetings are a waste of time if all that happens is that an Order for Directions is made with the usual trimmings. A computer could do that. Time and again, I have found that an informative preliminary meeting results in a settlement.

Use the preliminary meeting to discuss what is really in issue, how it is to be proved and whether witnesses or documents are the key. In particular, look for issues that are likely to be critical. Very often, if one or two issues can be determined, the parties will be able to go on from there and settle the rest.

An arbitration is not an action at law by another name. That makes a difference. Provided that every step is agreed, that step is in line with Natural Justice, it need not comply with the practice of the Court. Of course it will be subject to mandatory rules of law, but they are few and, in most jurisdictions, fairly straight forward. They are procedural niceties, such as a need formally to enter the award on a Court register or roll, but they do not affect the procedure itself.

So there will be no need to draw witnesses through all the background and cross examine them on every point. Even if a witness has to be heard, his or her statement can stand as evidence-in-chief, taken as read. It is possible to ask for questions to be put in writing. It is possible, and particularly convenient with technically complex questions, to conduct all or part of a hearing as an informal discussion with experts. It is possible to conduct all or part of a hearing by teleconferencing or videoconferencing.

If I have failed to give you a specific blueprint for cost efficient arbitration, it is because the one skill an arbitrator must have, in my view, is skill in designing an optimum procedure or set of procedures to deal with the immediate case. Undoubtedly that will vary from example to example, but the arbitrator, and the professionals who work with him, must concentrate on the need for a specifically tailored procedure, within such mandatory rules of law as may be on the one hand, but having regard to the fundamentally commercial nature of the arbitration agreement and its logical implications on the other. If they achieve that balance, then a cost effective arbitration will result. And it will be what the parties deserve to have.

The Judge has all the honour and panoply that go with his office. He or she is a high officer of the State, worthy of every respect and entitled to every deference. That must be right.

Nevertheless, I suggest to you that there is no higher honour, in the field of international commerce, than that of being freely selected by professional colleagues or commercial parties to determine issues between them and to make the decisions they cannot make. No higher honour and no more fascinating area of study, no matter what our profession.