Is (international commercial) arbitration ADR?

By Luke Nottage*

In the last issue of this journal, Sylvia Emmett examined the Bar's role in Alternative Dispute Resolution, noting *New South Wales Barristers' Rule 17A* (in effect since January 2000) which requires barristers to advise on 'alternatives to fully-contested adjudication', and remarking that ADR 'has become the general term for processes by which disputes are resolved outside the court system'.[1] Consistently with this expansive definition of ADR, she helpfully reviewed developments such as

- compulsory court-annexed mediation under sec 110K *Supreme Court Act* 1970 (NSW), in effect since August 2000; [2]
- sec 27 of the *Commercial Arbitration Act 1984* (NSW), whereby parties may allow an arbitrator to act as mediator, while observing the rules of natural justice (and therefore not meeting independently with parties to help promote a mediated settlement, should that person wish to revert to the role of arbitrator);[3]
- multi-tiered dispute resolution agreements;[4]
- dispute resolution by 'regulatory bodies', such as mediation or arbitration regarding use of chemicals in compounds, conducted by the National Registration Authority; and 'electronic ADR'.[5]

By contrast, at a recent conference in Japan, an Australian lawyer who is currently President of LEADR (Lawyers Expert in ADR), argued that ADR is restricted to 'interest-based resolution of disputes by agreement without any element of third party determination … of legal rights', thus excluding arbitration processes.[6] This lead to surprise and consternation among other speakers and commentators from the Asia-Pacific region, as we had explicitly or impliedly adopted the more expansive view and discussed developments in arbitration law and practice. On further reflection, the latter view appears to be more appropriate.

A useful starting point is to return to Sylvia Emmett's article, where she gives as another example of dispute resolution conducted outside the courts, by 'regulatory bodies', the procedures developed by the World Intellectual Property Organisation (WIPO). She observes that WIPO 'manages disputes arising from the regulation and registration of internet domain names by way of binding arbitrations that are often conducted on the papers only and thereby are significantly more cost effective'.[7] In fact, the procedures of WIPO's Arbitration and Mediation Center developed to further the Uniform Domain Name Dispute Resolution Policy (UDRP) have much less binding force than most international commercial arbitration procedures. First, a party complaining about another's illegitimate and bad faith registration of certain types of domain names ('cyber-squatting') is not bound to bring the case before WIPO; that party may instead bring the case directly to a Court having jurisdiction. Only the other party (the cyber-squatter) is bound to go through the WIPO procedure, under its contract (incorporating the UDRP) with the registrar company which granted it the domain name. The WIPO procedure provides more limited remedies (transfer or cancellation of the domain name at issue) than most courts (which would normally also be able to award and enforce damages against the cyber-squatter). Secondly, the order rendered by the panel which WIPO appoints to decide whether there has been illegitimate registration can be 'appealed' to an appropriate court by either party, but only within 30 days.

For these two reasons, one WIPO Center official calls the procedures 'administrative'.[8] Yet they can still be characterised as 'arbitration'. The High Court of Australia, for example, had no difficulty in finding that an 'arbitration agreement' extended to 'an agreement whereby the parties are obliged, if an election is made, particular event occurs, step is taken or condition is satisfied (whether by either or both parties), to have their disputes referred to arbitration'.[9] Secondly, particularly in the Anglo-Commonwealth law tradition, arbitration has traditionally been subjected to considerable supervision by courts, even allowing reviews of arbitrator's decisions on the ground of an error in substantive law. This has not made it any less 'arbitration'; nor has the more recent tendency to restrict the grounds for court interference in an arbitral award made it any more so.[10] The key is that there be *some* element of binding force in the decision rendered by the 'arbitrator' for the parties.[11] That does occur under the WIPO procedures, albeit to a limited extent, because the WIPO order will prevail if neither party brings the complaint anew before the appropriate court in a timely fashion.

Developing this perspective, international commercial arbitration in its more conventional manifestations, following its re-emergence from the 1950s and 1960s – initially to resolve large infrastructure development disputes involving multinational companies and newly-independent states, in particular; later in disputes involving commercial partiesxii – should also be seen as an important form of ADR. It has important affinities with more consensual forms (such as mediation), rather than being conceptually distinct, as suggested recently by the President of LEADR. First, the success of the UNCITRAL Model Law on International Commercial Arbitration, promulgated by the United Nations in 1985 as a template for domestic legislation, has reinforced the tendency to restrict the powers of courts to overturn arbitral awards, a trend initiated by the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards. In the many jurisdictions which have adopted the Model Law in updating their international arbitration regimes (like Australia in 1990), as in many of those which have drawn more loosely on it (like England in 1996), and in jurisdictions which are expected to follow the Model Law soon (like Japan, next year), the award cannot be challenged for error of substantive law.[13] Even where the curial law of the arbitration proceedings allows for this sort of challenge, the realities of international commercial arbitration have created considerable scope for arbitrators to not strictly apply legal rules to resolve the dispute between the parties. International arbitrators will often sit in neutral countries and have to apply

* Barrister and Senior Lecturer, University of Sydney Law Faculty. An expanded version of this article is available from the author (luken@law.usyd.edu.au) or the New South Wales Bar Association Library.

substantive law which they are not qualified in or are less familiar with. They also have considerable leeway in selecting the applicable law, under conflict of laws rules or the like.[14] Taken to an extreme, the arbitrators may choose to apply the 'new *lex mercatoria*'. A recent empirical study demonstrates that this practice is pervasive, albeit usually to supplement international instruments or domestic law rather than to supplant those rules,[15] and despite the 'new, new *lex mercatoria*' – in the guise, for example, of quite precise UNIDROIT Principles of International Commercial Contracts – arguably representing a partial formalisation of the still evolving norms of trans-border contracting.[16] Finally, even more so than in domestic arbitration, international arbitrators will be aware that the parties have deliberately opted out of the national court system, where there are broader public interests in deciding cases strictly in accordance with a clear corpus of legal norms.[17]

If international arbitrators, in law or in practice, have a very broad margin of discretion as to whether or not to apply strict rules of law to resolve a dispute, the central issue becomes whether they do so nonetheless, and for what reasons. No doubt it depends firstly on the circumstances of the case, and in particular the type of dispute, as they try to envisage what sort of approach the particular parties (or even most parties in such circumstances) would generally want. Parties may be content with quicker, yet sometimes more 'rough justice' when the stakes are low,[18] or the business environment is growing rapidly (as in the People's Republic of China over the last decade). Other parties may well prefer certainty and predictability, arguably better promoted by stricter application of bright-line rules,[19] when they are well-advised, experienced and large companies dealing in certain types of transactions, such as charterparties. Even here, however, there may be differences in local markets and legal worlds.[20] Arbitrators – more than judges, whose reputations (and certainly remuneration) are not so dependent on meeting the expectations of particular parties and their communities – need to be careful not to be dogmatic, but rather draw for example on a growing body of empirical work comparing practices and expectations in contractual relationships.[21] A second consideration may be the general reputation a particular arbitrator wants to develop or maintain: as someone who prefers a stricter application of narrow legal rules, or someone willing to adopt a more expansive approach. This factor also seems to be important in the debate world-wide as to whether or not, and to what degree or under which safeguards, an arbitrator should actively encourage settlement.[22]

Taking this more expansive view of arbitration, as a variable and sometime overlapping part of a broad spectrum of ADR processes...

Thus, in low-value cross-border disputes involving transactions where bright-line rules are not readily applied, in expanding markets where developing long-term relationships is important, we might expect parties to select arbitrators known to take a less strict approach to determining and applying legal rules, and to prefer a pro-active role in encouraging early settlement.[23]i Further, if the curial law of the arbitration provides limited grounds for having an award reviewed by the courts, attempts by the arbitrators to encourage a mediated settlement may have even more persuasive force than those by judges, since a recalcitrant party can ignore similar attempts by judges if an appeal can be brought against adverse judgments.[24] Thus, some arbitration processes and resulting awards may become very much like 'interest-based resolution of disputes by agreement', with little or any 'element of third party determination … of legal rights', which the President of LEADR suggests distinguish ADR.[25] In other words, at least certain types of international commercial arbitration may become so informal as to merge with some mediation processes, especially the more 'evaluative' processes, rather than the more 'facilitative' ones (where the third party tends to just paraphrase what each side says, more to defuse emotions and ensure surface understanding of issues and perceptions).

Taking this more expansive view of arbitration, as a variable and sometime overlapping part of a broad spectrum of ADR processes, then allows us to map how certain types of arbitration processes are evolving, to examine how these may influence the overall 'world' of arbitration, and even to note parallels or contrasts with developments in other parts of the spectrum (such as mediation). For example, empirical studies added to more anecdotal evidence of a gradual formalisation of international commercial arbitration over the 1970s and 1980s, partly due to the growing involvement of international law firms.[26] Yet the 1990s have seen significant counter-reactions, including revisions of arbitration laws and (more importantly) institutional rules to expedite proceedings, arguably underpinned by the emergence of many novel forms of arbitration in its broader sense, such as domain name dispute resolution procedures, cyber-arbitration, arbitration in financial transactions,[27] sports arbitration,[28] and resolution of disputes about dormant bank accounts in Switzerland.[29] Somewhat ironically, moreover, there has been a significant and ongoing 'professionalisation' of mediation, for example through the expansion of organisations such as LEADR and recent attempts to standardise certification,[30] which could result in significant formalisation of these originally very informal processes. In addition, there has been an upsurge in the use of court-annexed mediation in the Asia-Pacific region, which aims of course at consensual resolution by parties, but occurs – to greater or lesser degrees – in the shadow of formal judicial court adjudication.

These are issues examined in new courses at the University of Sydney Law Faculty, and to be explored further in its Continuing Legal Education seminar on 'Arbitration and ADR in Australasia' on 12 June. They are also related to the theme of the inaugural Clayton Utz International Arbitration Lecture co-hosted by the Faculty, to be delivered by Lord Mustill on 11 June in the Banco Court.[31] To set the stage for such broader debates, and better to ensure that barristers in New South Wales are able to fulfill their new duty under Rule 17A, arbitration should be (re-)situated as an important part of ADR, although not necessarily its centerpiece.

1 Sylvia Emmett 'The Bar in mediation and ADR' *Bar News* [Summer 2001/2002] 25 at 25

2 See also David Spencer 'Mandatory mediation in New South Wales: Further obsrevations' [August 2001] *Australasian Dispute Resolution Journal* 141; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427

3 See Michael Redfern 'The mediation provisions of section 27 of the Commercial Arbitration Acts' [August 2001] *Australasian Dispute Resolution Journal* 195.

4 See also Michael Pryles 'Multi-tiered dispute resolution clauses' 18(2) *Journal of International Arbitration* (2001) 159; *Computershare Ltd v Perpetual Registrars Ltd (No 2) (Computershare)* [2000] VSC 233

5 See also Roger Alford 'The virtual world and the arbitration world' 18(4) *Journal of International Arbitration* (2001) 449

6 Gerald Raftesath 'Alternative dispute resolution in Australia', paper presented at

the international symposium on civil and commercial law: ADR in Asian and Pacific countries – Now and in the future, hosted by the International Civil and Commercial Law Foundation and Japan's Ministry of Justice, Osaka, 15 February 2002, at 3

7 Above note 1 at 25-26. It resolves disputes under generic Top Level Domains ('gTLDs' such as .com, .net, and the new ones like .info), and under country-code TLDs ('ccTLDs' such as .tv for Tuvalu, and several other states in the Pacific) when nominated by that country. See <http://arbiter.wipo.int/center/index.html>

8 Tsutomu Takahashi 'The WIPO Internet domain name online dispute resolution experience', paper presented to the Ministry of Justice Legal Research and Training Institute course, Osaka, 20 February 2002

9 *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 at 323 (Toohey and Gummow JJ)

10 Cf Justice Keith Mason 'Changing Attitudes in the common law's response to international commercial arbitration' 18/2 *The Arbitrator* (1999) 73

11 Gabrielle Kaufmann-Kohler & Henry Peter 'Formula 1 racing and arbitration: The FIA tailor-made system for fast track dispute resolution' 17(2) *Arbitration International* (2001) 173.

12 Luke Nottage 'The vicissitudes of transnational commercial arbitration and the *lex mercatoria*: A view from the periphery' 16 *Arbitration International* (2000) 53 at 59.

13 Respectively, compare art 34 of Schedule 2 of the *International Arbitration Act 1974* (Cth) and the list of 34 other model law jurisdictions at <http://www.uncitral.org/english/status/status-e.htm>; sec 69 of the English *Arbitration Act* 1996); and 'Arbitration Law Reform Underway' [February 2002] 13 *JCA Newsletter* 7.

14 Pierre Mayer 'Reflections on the international arbitrator's duty to apply the law (The 2000 Freshfields Lecture)' 17(3) *Arbitration International* (2001) 235 at 240-1.

15 Klaus Peter Berger (ed) *The Practice of Transnational Law* (Kluwer Law International, The Hague et al, 2001); reviewed by Luke Nottage in 19 *Journal of International Arbitration* (forthcoming, 2002).

16 Nottage, above note 12 at 60. Compare Yves Fortier 'New trends in governing law: The new, new *lex mercatoria*, or, back to the future' 16 I*CSID Review* (2001) 10

17 Mayer, above note 14 at 237.

18 Compare eg Alford, above note 5.

19 Mayer, above note 14 at 243.

20 Compare eg *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd's LR 583 *(The Junior K)* and *Great Circle Lines v Matheson* (1982) 681 F 2d 121 (2d Cir).

21 See eg Luke Nottage, 'Planning and renegotiating long-term contracts in New Zealand and Japan: An interim report on an empirical research project' [1997] *New Zealand Law Review* 482

22 So, for instance, if parties want a Japanese arbitrator who actively encourages settlement, they could select Emeritus Professor and ICC Court Vice-President Toshio Sawada, who has signalled a preference in this regard (see for example *'ADR to wa – 'Chusai' to 'Chotei' no Kisochishiki [What is ADR? Basic Knowledge about 'Arbitration' and 'Mediation']*' <http://www.adr.gr.jp/columns/index.html>). If they want someone who is cautious about this role, they could select Professor Yasuhei Taniguchi, now a Judge on the Appellate Body of the WTO ('Settlement in International Commercial Arbitration' [1999] 4 *JCA Newsletter* <http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/newslist.html>).

23 In other situations, stricter approaches may be expected and provided. Compare eg Stephanie Keer & Richard Naimark 'Arbitrators do not 'split the baby': Empirical evidence from International Business Arbitrations' 18(5) *Journal of International Arbitration* (2001) 573

24 This point struck the author when advising a New Zealand defendant in a case recently before a Japanese court. Following the German law tradition, Japanese judges have long encouraged settlement in civil proceedings. Yet despite the proceedings unfolding in a manner unfavourable to the Japanese side in this case, the plaintiff expressed no inclination to engage in either negotiation or mediation, and has appealed the case despite the first-instance court only awarding one percent of the amount claimed. If the matter had been subjected to arbitration and proceedings had developed in a like manner, with no possibility of appeal for error of law (which is the situation even under current arbitration legislation in Japan), the plaintiff might have adopted a more conciliatory stance.

25 Above note 6.

26 Nottage, above note 12 at 62-4.

27 Christopher Style & Stuart Dutson, 'Arbitration, international commerce, and international finance: Safety first' 1(1) *International Trade and Business Law Bulletin* (2000) 55-57

28 Robert Glasson 'Appeals from the Court of Arbitration for Sport: *Angela Raguz v Rebecca Sullivan & Ors* [2000] NSWCA 240' [Summer 2000/2001] *Bar News* 20-21; Kaufmann-Kohler & Peter, above note 11

29 Thomas Buergenthal, 'Arbitrating entitlements to dormant bank accounts' 15/2 *ICSID Review* (2000) 301

30 See for example National Alternative Dispute Resolution Advisory Council (NASDAC), *The Development of standards for ADR: Discussion paper* (Canberra ACT, 2000)

31 For further details see the author's website at <http://www.law.usyd.edu.au/~luken/arbitration.htm>