

## Finality

The Hon AM Gleeson AC QC delivered the Sir Maurice Byers Lecture on 10 April 2013.

I am honoured to have been invited to deliver a lecture in this series instituted by the New South Wales Bar to commemorate one of Australia's finest advocates, and a notable leader of the bar. I have selected the subject of finality. This is not because it is an idea that is now weighing heavily on me on account of my advanced age. It is a policy rather than a principle, and its impact operates at the levels of judicial organization, and decision-making in particular cases or classes of case, and also of legislation and even court funding. It is interesting to know what to make of it.

At the level of legal principle, finality should be of special interest to barristers. The plurality judgment in the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid*<sup>1</sup> said, at [25], that the decision was based in substantial part on the place that an immunity of advocates from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power. I will return to that particular topic, but it is necessary first to examine what lawyers have in mind when they speak of finality.

Plainly the concept is relative rather than absolute, and it takes its meaning from its context. If it is useful as an idea that advances a process of reasoning, and is not merely an announcement of the effect of a conclusion that has been reached by another means, or a statement of a personal preference that it is hoped others will share, then it must have a content that can be analysed. If it is part of a balancing process, there must be some way of knowing what weight to give it. The best way to explain it is to describe it at work.

Speaking in the context of civil actions, and principles of abuse of process, *res judicata* and issue estoppel, Lord Bingham of Cornhill said, in *Johnson v Gore Wood and Co*<sup>2</sup>:

The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

That case was analysed by the House of Lords as one of alleged abuse of process, where, after a



claim by a company had been sued upon and then settled, a personal claim by a shareholder, based on substantially the same facts, was brought against the same defendant. The first claim had not gone to a hearing, so principles of *res judicata* (or as the English call it, cause of action estoppel) and issue estoppel were not directly engaged, but the matter was treated as raising a broader question of abuse of process.

Lord Bingham quoted with approval<sup>3</sup> an earlier Court of Appeal judgment in which it was said:<sup>4</sup>

The rule in *Henderson v Henderson*<sup>5</sup> . . . requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

The House of Lords said that the application of the rule requires 'a broad, merits-based judgment . . . focusing attention on the crucial question whether, in

all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it [an] issue which could have been raised before<sup>6</sup>.

In *Port of Melbourne Authority v Anshun Pty Ltd*<sup>7</sup> the High Court of Australia, in 1981, dealt with the case under the rubric of estoppel, based upon considerations of reasonableness.

What is of present interest is not the precise jurisprudential basis upon which the rule rests but the recognition, through a principle that extends beyond *res judicata* or issue estoppel, of a public and private interest in preventing parties from unreasonably or unfairly revisiting or amplifying a dispute after it should have been treated as resolved. As the facts of *Johnson v Gore Wood*, where the plaintiff in the second action was different from, but related to, the plaintiff in the first action, show, being twice vexed in the same matter is a somewhat open-ended concept.

An example of similar considerations at work is appellate practice concerning interference with concurrent findings of fact. There are recent discussions of this matter in the High Court<sup>8</sup>, but it is convenient to take what was said by Deane J in *Louth v Diprose*<sup>9</sup>, (referring in turn to what he had earlier said in *Waltons Stores Interstate Ltd v Maher*<sup>10</sup>), that it is well settled that a second appellate court should not, in the absence of special reasons such as plain injustice or clear error, disturb concurrent findings of fact made by a trial judge and an intermediate appellate court. He said, referring to the expense of litigation, that it is in the overall interests of the administration of justice and the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact where such concurrent findings have been made. Again, the qualification concerning 'special reasons' shows that the rule is not inflexible.

This rule of appellate practice had its origin in the Privy Council more than a century ago, but it is worth noting that the opportunity for attempted reversals of findings of fact has been magnified in recent times by the virtual disappearance of trial by jury in civil cases. The finality that attended jury verdicts is an aspect of civil litigation that is probably

unknown to many modern practitioners but it was a very important feature of the legal landscape in the past. If a civil jury were properly instructed, and there had been no other irregularity in the conduct of the trial, then the jury's verdict, being inscrutable, was for practical purposes immune from appellate interference unless it could be shown to be perverse. The bar for appellate review was set high.

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When trial is by jury, it is important to win at first instance. The abolition of most forms of civil jury trial has diminished the practical finality of the trial process. The trial has now become a hearing at first instance, with an implied promise of more to come until one party or the other has exhausted its available resources or its avenues of appeal. For several reasons, a reference to a litigant's 'day in court' rings hollow, unless day is given the same meaning as in the Book of Genesis. People who are perplexed by the expense, complexity and durability of the modern legal process may point to a number of causes, but the loss of the finality that accompanied trial by jury in civil cases is one of the most obvious. It is worth keeping in mind what was said, speaking of trials generally, in the joint reasons in the High Court in *Coulton v Holcombe*<sup>11</sup>: '[I]t is fundamental to the due administration of justice that issues between the parties are ordinarily settled at trial'. The tendency to treat a trial as the first round of a contest that will last until one side or the other exhausts its funds or available avenues of appeal was undoubtedly encouraged by the abolition of most civil jury trials, but there are other professional influences at work. Equity suits and commercial cases were rarely tried by jury, but what was said in *Coulton v Holcombe* applied to them also.

There has developed a body of jurisprudence about the approach a court of appeal should take to a trial judge's findings of fact, based in part upon the interest of finality and also upon considerations of rationality and fairness.

Appeals are creatures of statute, although there is judge-made law upon such matters as raising new points, introducing fresh evidence, and appellate review of discretionary judgments. The idea of a public and a private interest in finality plays an important part in much of that law. Initially, however, it is legislation, and therefore the application by parliament of public policy, that creates and marks the limits of the opportunity for appellate review of a decision made at trial. For example, the practical effect of federal and state legislation is that, in an ordinary civil case in the Supreme Court or District Court of New South Wales, there will be one appeal,

to a District Court judge. Evidence and arguments were taken afresh, although if the parties were content to rely on the evidence given before the magistrate they could do so. The judge's obligation was to consider the evidence and arguments and decide the matter for himself or herself. The reasons for decision of the magistrate were not being examined in a search for error; they were given such weight as the judge thought they deserved on their merits but it was the duty of the judge to re-try the case. One reason was that, for most of the twentieth century, magistrates did not have to be qualified as lawyers. The appeal was the first opportunity for the parties to have the case dealt with by a qualified lawyer. There are, regrettably, some practitioners who present arguments in the Court of Appeal and even the High Court as though all appeals are of that kind: nothing more or less than an opportunity for the loser to have another go.

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as of right, by way of rehearing (an expression that does not mean what a lay person would take it to mean<sup>12</sup>), and a further opportunity to go to a court of final resort but only if special leave to appeal is granted. This degree of finality involves, among other things, a conscious rationing of judicial resources. It is imposed on litigants because a second appeal is not regarded as a matter of entitlement, and the seven members of the nation's ultimate Court could not possibly deal with more than a small percentage of the cases litigants want to bring before them.

Whether the subject is judicial review of administrative decisions, or appellate review of judicial decisions, ultimately the nature and scope of the available review is determined by legislative policy, which in turn reflects a compromise between the desirability of correcting error or other injustice and the need for finality. The most comprehensive form of review or appeal is one in which a case is simply heard again. An example was the old Quarter Sessions appeal, which was a hearing de novo. A party aggrieved by a magistrate's decision could take the case on appeal

Some legislation provides for multiple appeals, because of a view that this is required by public policy. That is essentially a political judgment. For example, when an immigration appeal concerning a claim for refugee status by an asylum-seeker reaches the Full High Court, the issue of the application of the Refugees' Convention will often be at the fifth level of decision making, and if the appeal is allowed the matter is likely to be remitted for re-consideration. The opportunity which Australia provides for successive challenges by a person claiming to be a refugee to an unfavourable outcome is, by international standards, at least ample. This is rarely acknowledged in commentaries on our immigration laws.

The administration of criminal justice provides examples of differential treatment of finality. Here jury trial remains the standard method of dealing with serious charges. That imports its own degree of finality. An acquittal by a jury is generally conclusive. This is explained in terms of double jeopardy. Autrefois acquit is a plea which, if made

out, defeats a prosecution. For a number of reasons an acquittal may be regarded as erroneous. Later evidence, such as a confession, or information based on developments in technology, may suggest that an acquittal was unsound. In the case of some serious crimes this may lead to a demand to rectify the error. In *The Queen v Carroll*<sup>13</sup> a man was charged with murder and a jury found him guilty. His conviction was quashed after a successful appeal. Years later, after it was said that further evidence of his guilt had emerged, he was charged with perjury. The alleged perjury was his denial, on oath at his trial, that he had killed the victim. A plea of *autrefois acquit* was not available; he had never been acquitted of perjury. The High Court held that the perjury indictment was an abuse of process and should be stayed. In Australia, as in England, there has been a good deal of pressure in recent years to allow police and prosecution authorities to revisit cases of allegedly wrongful acquittal. It is not clear how it would be possible to distinguish in principle between some cases and others if this were allowed. It is impossible to formulate a legal rule tailored to fit only cases that cause a public outcry, and unjust to attempt it. In the present state of our law, acquittal of a criminal charge is attended by a high degree of finality. In the United States, civil actions for damages, with a lesser standard of proof, have been used even in the case of alleged murder. In Australia, the principle that a person is entitled to the full benefit of his or her acquittal may be invoked in answer to a later civil action, but individual circumstances may call for a careful analysis of exactly what the benefit amounts to.

Until the enactment of the *Criminal Appeal Act 1912*, there was little scope for challenging a conviction. That Act enabled appeals against conviction on specified grounds, including the broad ground of miscarriage of justice, but Rule 4 of the Criminal Appeal Rules attempted to confine the scope for raising on appeal points that were not taken at the trial. A practical issue with criminal appeals is that people who have been convicted often want to change their lawyers for an appeal. New lawyers may see the case differently. There may also be an attempt to blame the original result on some form of misjudgment or error of trial counsel. The rules about the reception of fresh or new evidence in civil

and criminal appeals, or raising new arguments, seek to find a balance between the interest of providing an appellate court with all the information necessary for a correct decision and the interest of efficiency and fairness. In an appeal, a just outcome is one that reflects the way the case was framed and conducted at first instance, or in an intermediate court. It reflects the fact that what is going on is an appeal, not a re-trial.

Many other examples could be given to demonstrate the proposition that our system of civil and criminal appeals, both in the legislation that creates and limits rights of appeals and in the judge-made law governing their conduct, reflects a judgment about the weight that ought to be given to the interest of finality as one element of our idea of justice. This in turn reflects the consideration that what we call justice according to law, and might also call justice as it can be delivered by a fair and efficient court system, is not a cosmic ideal. It is justice of a human and necessarily imperfect variety. And it is systematic.

It is essential to an appreciation of the interest of finality, and the weight to be given to it, that it be understood that we are concerned with a system of public administration of justice, which is heavily constrained by its own limitations. Civil justice is administered through an adversarial process, in which the parties and their lawyers frame the issues to be decided, and present the evidence and argument upon which the decision is to be based. The reasons why such a process may produce an outcome that is less than ideal are too many, and too obvious, to require explanation. Similarly, criminal justice is administered as a contest, and the capacity for the outcome to be affected by some form of accident, or mistake, a simple bad luck is plain. In either case, when we speak of miscarriage of justice our concept of justice is related to the process by which it is administered. An important part of the process involves control of the natural desire of a losing party to use every available means of overturning an adverse decision. Ill-considered criticisms of what is claimed to be a lack of concern, on the part of lawyers and the legal system, with truth commonly disregard the systematic nature of human justice, and the necessary limitations on the capacity to uncover in every case the ultimate

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reality. Courts base their decisions upon the issues raised by the parties to litigation and the evidence which the parties place before them. This high level of party autonomy may often dictate an outcome that would be different if other techniques were used. This may not be the way the recording angel goes about gathering information, but all forms of human justice have their own limitations, and it is idle to observe that decisions based on issues raised, and evidence advanced, by the parties to cases may not correspond to some form of ideal reality. They may not even correspond to the outcomes where different parties raise different issues or rely on different evidence. It is a commonplace of our justice system that this can occur, and that what is sometimes called the scandal of inconsistent decisions is shown, upon closer examination, to be no more than the consequence of the party autonomy referred to earlier. Subject to that, however, settling disputes or quelling controversies requires respect for finality.

In *The Ampthill Peerage*<sup>14</sup>, Lord Wilberforce said:

Any determination of disputable fact may, the law recognizes, be imperfect; the law aims at providing the best and safest conclusion compatible with human fallibility, and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry.

In the criminal area, a striking example of the collision between the interest of finality and the need to recognize, and where possible, remedy a miscarriage of justice is a case where, after rights of appeal have been exhausted or time for appeal has elapsed, there is evidence that a conviction was wrongful. In past times, the only available course was to invoke the prerogative of mercy; a pardon was an act of Executive clemency often done after a judicial inquiry. Pardoning a person for an offence which he did not commit was incongruous and likely to bring

less than full satisfaction to the beneficiary. Modern procedures are better tailored to the needs of justice in such a case. Most importantly, convictions can be quashed. It is in the context of alleged wrongful convictions for criminal offences that the law is least ready to treat the book as permanently closed.

*Rogers v The Queen*<sup>15</sup>, which concerned an attempt to tender, in later criminal proceedings on a different charge, a confessional statement that had been rejected as involuntary in earlier proceedings, is an example of an application of the concept of abuse of process in a case where issue estoppel would not run. Deane and Gaudron JJ said:

Clearly, the present case is not concerned with the plea of *autrefois acquit*, the unassailable nature of an acquittal or the need to avoid inconsistent verdicts. Nor is the case one which calls for any consideration of the rule against double jeopardy: the offences with which the accused is charged are distinct offences, unrelated to those on which he was indicted in 1989. The only question is whether the principle which ensures the incontrovertible character of judicial decisions precludes the tender of the records of interview as proposed by the prosecution.

That question was answered in the affirmative. That case appears to me to be a striking example of the use of the concept of abuse of process to achieve a form of finality.

In the civil area, a plain example of the law's preference for finality over an attempt at unattainable perfection is in the assessment of damages in a civil action. The general rule is that damages are awarded in the form of a lump sum on a once-for-all basis. There are obvious reasons why this method is likely to result in over-compensation or under-compensation in a particular case, if by those expressions is meant an assessment based upon assumptions or predictions that later turn out to be wrong.

In an ordinary action in tort for damages for personal injury, the damages awarded to a plaintiff with a substantial life expectancy are based upon

calculations of such items as loss of future earning capacity, cost of future care, and returns on money invested which may represent a prediction that is reasonable at the time but that is inconsistent with later events or circumstances. As a general rule, and subject to the limited possibility of introducing further evidence so long as the appeal process continues, we accept that as part of the system. The system itself is modified from time to time, but insofar as it provides for a lump sum award, it does not even attempt to ensure that, for example, when a plaintiff at last dies, he or she will be found to have been put in the same position financially as if the injury had not occurred. Achieving that sort of just compensation is not part of the system. Lord Wilberforce said, in *Mulholland v Mitchell*<sup>6</sup>, 'a successful plaintiff is awarded a lump sum which is fixed once and for all and it is not revised upwards or downwards in the light of subsequent developments'. Why not? It is commonplace for subsequent developments to falsify an assessment of damages if by that is meant to show that the plaintiff ultimately suffered greater or lesser harm than was the basis of the award. Moreover, since by 'subsequent developments' his Lordship meant developments subsequent to the legal process, it is self-evident that the assessment of damages may be affected by the random factor of the time taken by the litigation. That can be rationalized in terms of justice only on the basis that justice is a practical system and not a cosmic ideal.

In the New South Wales case of *Doherty v Liverpool Hospital*<sup>7</sup>, the Court of Appeal refused to admit, on appeal, evidence of the death of a man who had been injured at work in middle age and then, after trial and an award of damages, had died unexpectedly from another cause. His award of damages had been based on an assumption of normal life expectancy. The court pointed out that so much of what is involved in medical evidence about the future of an injured plaintiff consists of uncertain prognostication that it is probably the rule, rather than the exception, that something happens after a trial which, if it had occurred before the trial, would have altered the assessment of damages. The interest in finality in this context is not merely an influence; it is an integral part of the system by which a plaintiff's rights are determined.

The same can be said of awards of damages for

many breaches of contract. Especially in cases where there is a quantification of future financial loss over a long period, calculations are likely to be based on assumptions about exchange rates, rates of interest, prices, market conditions and all manner of expectations which are later found not to accord with what happens. Consider how the Global Financial Crisis of 2008 would have affected the assumptions that went into an award of damages for financial loss that was made in 2007. Yet because of the finality that is built into the system by which damages are assessed that kind of over-compensation or under-compensation is not treated as a form of injustice.

In a different context, a change in circumstances following a court order may be accepted as an occasion for intervention. In *Barder v Caluori*<sup>8</sup>, a husband had been ordered, in divorce proceedings, to transfer the matrimonial home to his wife. Soon afterwards, she killed the children of the marriage and committed suicide. The House of Lords held that a fundamental assumption on which the original order had been based had been invalidated and that the order should be set aside.

The contrast between that case and an assessment of lump sum damages in a contract or tort case illustrates the importance of context in determining the impact of finality.

To return to the subject of advocates' immunity, in *Giannarelli v Wraith*<sup>9</sup> and *D'Orta-Ekenaike* the High Court stressed the adverse consequences for the administration of justice that would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings. The judicial power is directed at quelling controversies, and it is part of the judicial system that controversies, once resolved, are not to be re-opened except in narrowly defined circumstances, the most obvious of which is the appellate process. In the English case that overturned advocates' immunity, *Arthur J S Hall v Simons*<sup>20</sup>, three members of the House of Lords would have retained the immunity in relation to criminal proceedings. The majority said that since a collateral challenge in civil proceedings to a criminal conviction was prima facie an abuse of process, no immunity was required.

More recently, English courts have swept away expert witness immunity<sup>21</sup>. It is difficult to imagine

a more fertile source of collateral challenges to the outcome of a civil or criminal case than a claim in negligence against a witness. Often, of course, there would be practical difficulties in proving causation, especially if the decision-maker, perhaps a judge or perhaps a group of jurors, could not be called to give evidence in the civil action. However, there may be cases in which, if negligence were shown, causation would be easy to infer.

In 2008 the Court of Appeal of New Zealand (where advocates immunity now does not exist) said<sup>22</sup>:

Those who give evidence to a court . . . enjoy immunity from suit. The purpose of this immunity is not to encourage dishonest or defamatory submissions or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation.

The difference between expert and non-expert witnesses is not always clear-cut, and non-expert witnesses may have as much capacity to cause harm through careless mistakes as experts. Some experts are paid to give evidence, but some are not. And if a non-expert witness is compensated reasonably for the time required by the case a contract may exist. It will be interesting to see how courts hold the line between witnesses who are immune from suit and those who are not.

So far, however, there is one matter on which judges are unanimous. Judges are immune from suit. I am sure this rule is sound. There is, however, one small cause for regret. If judges could be sued, the distinction between negligence and mere error of judgment would regain its proper place in the law of tort.

Another context in which the interest of finality has always been important, but in which its impact has varied, is that of commercial arbitration. An accurate understanding of this context is assisted by the decision of the High Court in *TCL Air Conditioner (Zhongshan) Co. Ltd v Judges of the Federal Court of Australia*<sup>23</sup> in February this year.

In order to put this matter into perspective, it is necessary to revisit, and it was necessary for the High Court to revisit, some basic principles. There is a tendency on the part of some lawyers, and perhaps even some judges, to regard litigation as the normal

method of dispute resolution, and the only method that is capable of giving appropriate recognition to the rule of law. In truth, civil litigation is not the normal method of resolving commercial disputes. The most common method of resolving commercial disputes is by agreement of the parties, without any outside intervention. Such agreements are usually based upon the parties' appreciation of their own interests, and bargaining strengths, which may or may not reflect their strict legal rights and obligations. An agreement to settle a dispute on that basis creates its own rights and obligations, which may replace the original contract in whole or in part. Sometimes a new agreement is reached between the parties with the assistance of outside intervention by a mediator or facilitator or some other third party who may or may not be a lawyer.

A long-standing technique for resolving commercial disputes is the process of arbitration which, once again, may or may not be aimed at an outcome that reflects the strict legal rights and obligations of the parties under their original contract. It is the cases that are aimed at such an outcome that are most likely to involve lawyers as advocates and as arbitrators, although when I first came into legal practice most arbitrators I appeared before were engineers or architects or builders. That was because at that time in New South Wales the typical arbitration concerned a dispute arising out of a building or construction contract. Courts did not relish building cases, and the system of referees that is now common as an adjunct to civil litigation in such matters had not been developed. London, at the same time, was a flourishing centre of commercial arbitration by lawyers, partly because insurance and shipping contracts written in London provided for arbitration there.

Commercial arbitration, both international and domestic, received a strong impetus from the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration). The Convention is implemented in Australia by the *International Arbitration Act 1974* (Cth). Over 140 states have adhered to it, and undertaken obligations to enforce foreign arbitral awards. This international enforcement regime gives arbitral awards much

more extensive recognition and enforceability than court judgments. Some of Australia's most important trading partners, who have perhaps understandable reservations about committing themselves to enforcing the decisions of foreign courts no matter where they are situated, have bound themselves to the recognition and enforcement of arbitral awards made in a contracting state.

Domestic legislation, in Australia and in comparable jurisdictions such as the United Kingdom and the United States, has historically supported arbitration in a variety of ways, including empowering courts to enforce arbitration agreements by restraining parties from litigating in breach of such agreements, to make orders to facilitate the arbitral process, and to enforce arbitral awards. Arbitration is a process which has its foundation in the agreement of the parties to a contract to submit a dispute to the decision of a third party. The process may be ad hoc, or it may be administered by an arbitral institution. It is normally governed by a body of rules identified in the agreement to arbitrate. By submitting their dispute to arbitration the parties confer on the arbitral tribunal power conclusively to determine it, and the award imposes new rights and obligations in substitution for those the subject of the dispute. The plurality in *TCL* said that the former rights of the parties are discharged by accord and satisfaction.

Arbitration statutes provide for judicial supervision of arbitrations. The capacity for judicial review of awards in international arbitrations has always been relatively limited. For example, the UNCITRAL Model Law, which has been picked up by the Commonwealth legislation in Australia, provides a much narrower scheme of curial intervention than, until recently, had been provided by state laws that were concerned mainly with domestic arbitration. Originally, the general rule was that an award was final and conclusive and could not be challenged on the ground that an arbitrator had made an error of fact or law. As the Privy Council pointed out in a 1979 New South Wales appeal, state legislation in Australia, and United Kingdom legislation, which provided for setting aside awards on the ground of error of law was historically exceptional. Their Lordships said<sup>24</sup>:

One of the principal attractions of arbitration as a means

of resolving disputes arising out of business transactions is the finality that can be obtained without publicity or unnecessary formality, by submitting the dispute to a decision maker of the parties own choice . . . England and other Commonwealth jurisdictions, including New South Wales, whose arbitration statutes have followed the English model are exceptional when compared with most other countries, in providing procedural means whereby the finality of an arbitrator's award may be upset, if it can be demonstrated to a court of law that his decision resulted from his applying faulty legal reasoning to the facts as he found them.

Because a question of contractual interpretation is regarded as a question of law, and because many commercial arbitrations involve such questions, if a court could be persuaded to take a view on interpretation different from an arbitrator, perhaps in a case where either view was fairly open, then the award would be found to have been based on an error of law. As a matter of public policy, the historically exceptional approach of permitting the setting aside of awards on such a ground was controversial.

The *New South Wales Commercial Arbitration Act 2010* has now substantially brought domestic arbitration in this state into line with international arbitration, and the Commonwealth legislation, by adopting the scheme of the UNCITRAL Model Law, and has gone a long way to restoring the finality that commercial arbitration was originally intended to have.

One of the features of international commercial arbitration that distinguishes it from commercial litigation, apart from the important matter of privacy, is that the parties are often seeking a neutral forum for the resolution of their disputes. Courts have had a good deal to say in recent years about the significance of identifying a natural forum for litigation. It is usually the home jurisdiction of one or other of the parties. That is exactly what many parties to international commercial transactions do not want. They may distrust, or at least not have complete confidence in, litigation in the home jurisdiction of the other party. They seek out, not a natural forum, but a neutral forum. Procedures for appointing arbitrators who are independent and impartial also reflect this emphasis on neutrality. In a typical case dealt with by the Singapore International Arbitration Centre, for example, the parties, the



arbitrators, and some or all of the lawyers, are likely to be from somewhere other than Singapore, and the contract out of which the dispute arises will have no connection with Singapore other than that it has been selected as the place of arbitration. The main reasons why parties to an international transaction may prefer arbitration to litigation are, first, privacy; secondly, the neutrality of the forum; thirdly, the capacity to choose their own decision-makers; fourthly, the regime of enforcement provided by the New York Convention and, fifthly, the comparative finality of the arbitral process.

When parties to an international transaction include an arbitration clause in their contract they sign up to a dispute resolution regime of comparative finality. Of course, after an award has been made, the loser's enthusiasm for finality is likely to diminish. The disputes are almost always about money, often in large amounts, and where money is concerned there are not many good losers. However, if an arbitral process is treated as if it merely adds one layer to the hierarchy of potential decision-making then the system is self-defeating. Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court. There could be a number of reasons for that. The policy of Commonwealth and New South Wales legislation is to help them achieve that objective. This is regarded, both here and abroad, as a means of encouraging and facilitating international trade.

The idea of justice according to law has a number of elements such as procedural and substantive fairness, reasonable access to independent and impartial courts, openness of process, and an absence of unnecessary cost and delay. Another element is reasonable finality. This reflects the public interest in a manageable system by which disputes, once raised, may be put to rest, and the private

interest in avoiding unfair vexation. Finality is closely related to accessibility. Without it, the system would collapse under its own weight. Some of the ways in which the system respects the interest of finality are clear-cut, such as the principles governing appellate review, the method of assessing damages in tort and contract cases, and the rules relating to *res judicata*, issue estoppel and double jeopardy. In some other respects, such as in the concept of abuse of process, the principles are more open-ended. Either way, finality has a powerful influence on the shape of the legal system and the content of legal principle.

### Endnotes

1. (2005) 223 CLR 1.
2. [2002] 2 AC 1 at 31.
3. [2002] 2 AC 1 at 27.
4. *Barrow v Bankside Agency Ltd* [1996] 1 SLR 257 at 260.
5. (1843) 3 Hare at 115, 67 ER at 319.
6. [2002] 2 AC 1 at 31.
7. [1981] HCA 45; (1981) 197 CLR 589.
8. *Eg. Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42.
9. [1992] HCA 61; (1992) 175 CLR 621.
10. (1988) 164 CLR at 434-435.
11. (1986) 162 CLR 1 at 7.
12. As to the difference between an appeal by way of re-hearing and a re-trial or hearing de novo see *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 208-209 per Windeyer J and *Builders Licensing Board v Sperway Constructions (Syd) Ltd* (1976) 135 CLR 616.
13. (2002) 213 CLR 635.
14. [1977] AC 547 at 569.
15. (1994) 181 CLR 251.
16. [1971] AC 666 at 680.
17. (1991) 22 NSWLR 284.
18. [1988] 1 AC 20.
19. (1988) 165 CLR 543.
20. [2002] 1 AC 615.
21. *Jones v Kaney* [2011] UKSC 13.
22. *New Zealand Defence Force v Berryman* [2008] NZCA 392.
23. [2013] HCA 5.
24. *Max Cooper & Sons v University of NSW* [1979] 2 NSWLR 257 at 260.