Changing attitudes in the common law's response to international commercial arbitratrion

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9 March 1999
Swiss-Grand Hotel, Bondi Beach

Keynote address at international conference on international commercial arbitration

1998 was a vintage year for international arbitration. It was the 75th Anniversary of the International Court of Arbitration and it saw the promulgation of the 1998 ICC Rules of Arbitration. The new Rules reflect the dramatic changes in the practice of international commercial arbitration that have occurred since the early days after the Court was established in 1923. In the beginning most users requested conciliation under the ICC Rules and lawyers did not participate either as arbitrators or as counsel. With the growing sophistication of business and international law, preference shifted towards arbitration and the involvement of lawyers.

Not everyone would regard greater involvement of lawyers as an unmitigated blessing. For certain types of dispute resolution, lawyers can be counter-productive unless they have had intensive re-education. However, the significance and complexity of issues thrown up by international commercial disputes means that the presence of lawyers is as inevitable as it is beneficial.

The 1998 ICC Rules of Arbitration are the product of a felicitous collaboration between the International Court of Arbitration and the Commission on International Arbitration. This guaranteed input from practitioners in the field and from the members of a Court who are responsible for applying the Rules. The Rules have been well received by the community of those involved with international commercial arbitration. I hope to explain why they are also of great interest to the community of those involved in more traditional forms of litigation.

Those of us with common law background are the inheritors of a long tradition of distrust of arbitration, both national and international. Sometimes this distrust

stemmed from perceived deficiencies of the arbitral process, such as its expense, lack of finality and difficulties of enforcement of awards. Sometimes there was resentment about aspects of arbitration which (to some at least) are its beneficial hallmarks. For example, arbitral procedures offer flexibility and confidentiality. Antagonism also stemmed from the would-be monopolists' desire for exclusive control of a particular field. Arbitration threatened the barrister's exclusive right of audience. It questioned the relevance of many of the common law's technical mysteries. It disputed the common law's fixation with the administration of justice in public.

Now the common law was always prepared to debate the advantages of these points of distinction. But winning an argument on the topic would not guarantee keeping the work. The users were and are capable of making their own judgement in the field of commercial disputes.

The law's opposition to arbitration also stemmed from less worthy perspectives. The desire for exclusive control will often have an economic motive not far below the surface. With arbitration, it was not just the barristers whose livelihood was threatened. In the famous case of *Scott v. Avery*, the British House of Lords settled the validity of arbitration agreements that made an award a condition precedent to any right of action under a contract. This decision, announced in 1856, ended much judicial conflict and judicial opposition that was shrouded in technicality and arcane learning. However, the canny Scot Lord Campbell lifted the curtain on judicial opposition:

> "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 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."

This frank self-revelation must have caused quite a stir, which is probably the reason why it does not appear in later, revised reports of the decision.[1]

In the case of international commercial arbitration, opposition from common lawyers sometimes also stemmed from ignorance of legal systems outside our own ken (especially civilian systems). Fear of the unknown will often produce distrust and opposition.

Across the world there has in the last two decades been a major shift towards acceptance of international arbitration. Distrust has shifted to understanding and

[1] Contrast 28 LT 207 at 211 and 5 HLC 811 at 853 where the passage has been replaced with "It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction".

support. This shift is a response to improvements in the regime of international commercial arbitration. The finality of awards in international arbitration has been enhanced. And effective mechanisms have been devised for worldwide enforcement. The trend has been greatly assisted by the growth and sophistication of arbitration institutions across the world. A critical turning point was the New York Convention of 1958 which has done much to make arbitral awards in international commercial arbitration 'readily transportable' in the sense of being enforceable in every Convention State. It has truly been recognised that:

> "Enforcement of arbitral awards is the justification of all international commercial arbitration: and the role of international conventions is directed to this end. The heart of the [1958 New York] Convention is the specification of limited grounds on which recognition and enforcement of an award may be refused. That the arbitrator has misinterpreted facts or law is not a defence to enforcement. The Court's scrutiny is strictly limited to ascertaining whether the award gives rise to a possible refusal of enforcement on one of the narrow grounds mentioned in Art V, and the process of scrutiny does not involve an evaluation of the arbitrator's findings."[2]

A simple statistic demonstrates the growing popularity of international arbitration. In 1990 the ICC case load passed the 7000 mark. Of this total, it took 55 years for the first 3500 cases to be filed, but only 12 years in regard to the second 3500 cases to be registered.[3]

A historical breakthrough in ICC arbitrations occurred in 1996. In that year, for the first time in the Court's existence, the number of parties from western Europe represented less than 50% of those involved in ICC arbitrations. The published statistics for that and the following year confirm a very significant increase in the participation of parties from southern and eastern Asia in international commercial arbitration.

This international conference in Sydney reflects the significance of international commercial arbitration in southern and eastern Asia and Australasia. I understand that there are delegates here from the People's Republic of China (including Hong Kong), India, Malaysia, New Zealand, the Philippines and Singapore as well as, of course, many Australian delegates. And we are truly honoured to have the attendance of Dr Robert Briner, the Chairman of the ICC Court of Arbitration and Mr Paul Gelinas, Chairman of the International Arbitration Commission.

Parallel developments showing greater acceptance of arbitration have occurred within national judicial systems. It is no longer self-evident that arbitration is more expensive than litigation, at least in a jurisdiction such as New South Wales where many commercial and non-commercial disputes are referred out by courts to processes of compulsory inquiry by referees and arbitrators. This involves

[2] Fali S. Nariman, President ICCA in Preface to *Yearbook – Commercial Arbitration*, vol. XXII – 1997 pp. xxi-xxii.

[3] See (1990) 5 *Mealey's International Arbitration Reports* 15.

considerably greater cost to the parties. The very fact that these methods of inquiry do not produce the finality of an arbitral award stemming from a voluntary submission to arbitration only serves to emphasise why consensual arbitration is worth a second look in modern times.

The courts too have softened their hostility to arbitration. Within Australia, the Commercial Arbitration Acts of the States and Territories have emphasised the finality of awards. And judges have been faithful to the spirit of their reforms by sympathetic interpretation of the requirement that a challenger must demonstrate:

(i) a manifest error of law on the face of the award; or
(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.[4]

A leading exponent of this new respect for arbitral awards was the former Chief Judge of the Commercial Division of the Supreme Court of New South Wales, now the Honourable Andrew Rogers, QC, one of the speakers at this forum and a well-known international arbitrator. It is interesting to note that the leading case in which this view was expounded by His Honour and the New South Wales Court of Appeal was an unsuccessful challenge to an arbitral award made by the Honourable Sir Laurence Street, who likewise would need no introduction in an assembly like this.[5]

I have touched on the reasons why it is obvious that professional and judicial attitudes to arbitration locally have influenced attitudes to international commercial arbitration. The converse is also true. These attitudes of mutual recognition and respect have seen increased borrowing by one system of the advantages perceived in the other. Thus we have two living organisms, themselves related symbiotically.

This conference offers a wealth of speakers and opportunities for delegates to explore the opportunities and problem areas of international commercial arbitration. I would like to stay with my theme of the common law's responses to arbitration and how, in modern times, the two systems feed each other.

Reading the 1998 ICC Rules of Arbitration it struck me that there are areas where the judges might borrow from ICC initiatives.

Article 24 fixes six-month time limit for the Arbitral Tribunal to render its award, unless the Court extends the limit pursuant to a "respond request" from the Tribunal or on its own initiative. The critical point is that the time runs from the settling of the Terms of Reference – not from the hearing date, or the date when the proceedings are closed. This holistic approach reflects good sense and the

[4] See e.g. *Commercial Arbitration Act* 1984 (NSW) s.38(5).
[5] See *Promenade Investments Pty Ltd v. State of New South Wales* (1991) 26 NSWLR 184 and, on appeal, 26 NSWLR 203.

influence of civilian systems which are not fixated with the common law's idea that proceedings start on the day of trial and finish when the last submission of counsel is made. The adversary system further contributes to a division of responsibility for the ongoing progress of a case. Now attitudes have changed in recent times, with judicial case management and the like, but we have a long way to go. As you will all be aware, delay in the delivery of civil and criminal justice is a topic of intense public debate.

Many reforms address the central problem of justice delayed, justice denied. Yet all of these measures attack delay at specific stages of the litigious process, or target specific players, including the judges themselves. What is refreshing about Article 24 is its recognition that the litigants are only concerned with what I can call 'start to finish' delay. They don't care whether the fault lies with the lawyer, the judge or the system as a whole. Indeed, the litigant probably suspects, with good reason, that shifting the blame from one player to another assists all to slip through the net. Article 24 places responsibility collectively on all players to ensure that the case moves to its conclusion within a controlled time limit. And it focuses on the end product.

My second point of interest is Article 32. A recurring theme of conferences and literature in recent years has been the excessive duration of conventional arbitration proceedings. This has led to growing interest in the means of conducting ICC arbitrations on an expedited, or 'fast-track' basis. The 1998 Rules do not contain any provisions on this subject, partly because they already contain relatively stringent time limits. It was also the view of most of the members of the Working Party and most of the ICC National Committees, that parties wishing to conduct arbitrations on an even more accelerated basis than that provided for in the Rules should fashion procedures appropriate for each individual case. Thus, the Rules include a new provision (Article 32) intended to make it clear that the parties may agree to shorten the various time limits in the Rules. I am aware of a recent international arbitration in Vancouver involving Australian interests that was conducted on a 'stopwatch' basis. A fixed hearing time was divided between the parties leaving each free to use its share as it wished. The time could be allocated among the examination or cross-examination of witnesses and in opening and closing addresses, as the party chose. But when the time was up, it was up.

It is the bane of modern commercial litigation that the parties often lose control of the case. The hearing stretches out endlessly and time and cost budgets get constantly revised upwards. Massive pressure descends upon a litigant to abandon or compromise its perceived rights. Exhaustion or fear of bankruptcy drive litigants to mediation, rather than a genuine desire to seek reconciliation. To my experience there have been shocking cases where the costs generated in litigation exceeded the amount in issue by a large factor. This is absurd and intolerable.

Why can't our judicial system take a leaf out of the ICC's book? Why shouldn't we offer litigants the option of something equivalent to a stopwatch trial coupled with a commitment by the Court to deliver judgement within a fixed time? If that commitment led to restricting the right to challenge the judgement, as presently exists with an arbitral award, then so be it. This is not the rationing of justice, because the parties would choose to conduct their cases according to this fast-track system.

One of the options presented by arbitration is that of having a person who is not a legal expert participate in decision-making. Sometimes it is the advantage of allowing a legal expert to function with more flexibility and despatch than a judge. As with a jury, no one would expect the arbitrator to bring the straitjackets of legal reasoning to the task. But as with a jury, experience teaches substantial justice can be delivered by means other than the exquisite intricacies of a stately litigious saraband. As with a jury, a decision may come more quickly.

Lying behind the lawyers' reluctance to contemplate such a radical break with the past is the belief that meticulous attention to procedure and the discipline of producing a closely reasoned judgement is the surest way to approximate the unattainable goal of perfect justice. This is almost an article of faith. Now please don't get me wrong. I am not urging the abandonment of fair procedure, logical rigour and reasoned and reasonable decision-making. And reasons (or at least one set of reasons) are necessary for appellate courts whose function includes exposition of legal principle. But I venture to suggest that the jury is still out in determining whether prolonged cogitation and lengthy exposition of reasons makes for a more accurate verdict on a yes-no issue by a judge at first instance. The main impetus for requiring reasons is the existence of a right of appeal on factual and legal grounds. Without reasons this right would be rendered largely nugatory. But where no such appeal exists – as with a jury's verdict – then we should at the very least count the cost of the delay inherent in the giving of detailed reasons. Justice Michael Kirby has recently spoken on the topic of 'Judging: Reflections on the Moment of Decision'.[6] He notes that it is surprising that so little has been written about the moment of judicial decision, especially at the trial level.

Psychiatrists and legal realists would probably offer a different analysis to that of defenders of the judicial system who believe in its capacity for sustained analytical and logical thought in matters touching the credibility of witnesses or choices between the testimony of technical experts. But I venture to think that all would agree that delay can harm sound decision-making and that many cases are truly decided by reference to the heart, which according to Pascal has its reasons that reason does not know.

[6] Paper given at Charles Sturt University, Fifth National Conference on Reasoning and Decision-Making, 4 December 1998.

In the recent summer vacation I was able to watch *Judge Judy* on television. For those of you unfamiliar with this engaging programme, its star is a savvy and opinionated lady who is a retired judge. She conducts a hearing of sorts in relation to disputes that have a personal interest slant. Although masquerading as judicial proceedings, what really takes place is a public arbitration in which the litigants have apparently signed away many of their rights, including the right to counsel and the right to complain of gratuitous defamation of character. The hearing is brief, the dull parts are edited out and there are convenient breaks to allow the running of advertisements.

I am not suggesting that this is a forecast of the court of arbitration of the future. But there is one aspect of Judge Judy's technique that fascinates me. Her catch phrase is "I have heard enough". With this imperious statement all further evidence and argument is cut short and the case moves to finality. If judges and arbitrators were completely honest and if litigants and lawyers were completely percipient and trusting, they would acknowledge that there comes a time in many proceedings where it would be wonderful to have the power to bring down the curtain in this manner. Lord Campbell, of whom I have already spoken, tried to do this once. In some personal reminiscences, Sergeant Ballantine described how, wearied out by the prolixity of an eminent and imperturbable counsel, and having exhausted his usual phrases of disgust, he got up from his seat and marched up and down the Bench, casting at intervals the most furious glances at the offender. At last "folding his arms across his face, he leant, as if in absolute despair, against the wall, presenting a not inconsiderable amount of back surface to the audience".[7]

Perhaps the next draft of the ICC Rules might include a provision which allows the totally frustrated arbitrator some capacity to vent spleen in a formal demonstrative act such as adopted by Lord Campbell. Perhaps too there should be a Judge Judy clause, enabling the arbitrator to say 'I have heard enough'. But with or without such changes, the common law will continue to borrow gratefully from those involved in international commercial arbitration.

[7] Quoted in Atlay, *The Victorian Chancellors*, vol. II, p.201.