Is (international commercial) arbitration ADR?

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In the last issue of the journal of the NSW Bar Association, Sylvia Emmett examined the Bar's role in alternative dispute resolution (ADR), noting NSW 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 s 110K *Supreme Court Act 1970* (NSW), in effect since August 2000;[2]
- s 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]

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1 Emmett S 'The bar in mediation and ADR' (2001/2001) Summer *Bar News* 25 at 25.

2 See also Spencer D 'Mandatory mediation in New South Wales: further observations' (2001) August 12 *Australasian Dispute Resolution Journal* 141 (discussing *Morrow v Chinadotcom* [2000] NSWSC 209, cited by Emmett J); and Spencer D 'Application for mandatory mediation in NAB Litigation' (2001) November 12 *Australasian Dispute Resolution Journal* 218-224 (criticising Einstein J's approach in ordering mediation in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, perhaps 'the largest civil claim ever heard before an Australian court'). Compare for example Weston M 'Checks on participant conduct in compulsory ADR: reconciling the tension in the need for good faith participation, autonomy, and confidentiality' (2001) 76 *Indiana Law Journal* 591.

3 See generally Redfern M 'The mediation provisions of s 27 of the Commercial Arbitration Acts' (2001) August *Australasian Dispute Resolution Journal* 195. Compare 'Institute plans combined mediation–arbitration scheme', news release from the Chartered Institute of Arbitrators (Australian Branch) 11 February 2002; and Justice Sheahan T 'The Worker's Compensation Commission' (2002) March 92 *Bar Brief* 1 and 12.

- 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.[7]

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'.[8] In fact,

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4 See also Pryles M 'Multi-tiered dispute resolution clauses' (2001) 18(2) *Journal of International Arbitration* 159; Spencer D 'Uncertainty and ADR clauses: the Victorian view' (2001) 12 *Australasian Dispute Resolution Journal* 214-218 (contrasting NSW cases with *Computershare Ltd v Perpetual Registrars Ltd (No 2) (Computershare)* [2000] VSC 233, where the Supreme Court of Victoria found a clause to be sufficiently certain).

5 See also Alford R 'The virtual world and the arbitration world' (2001) 18(4) *Journal of International Arbitration* 449; and the Inter-Pacific Bar Association's latest initiative in using video-conferencing for international commercial arbitration, soon to be inaugurated through <www.i-cass.org>.

6 Raftesath G '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 See for example Sourdin T *Alternative Dispute Resolution* (LawBook Co, Pyrmont NSW, 2002) 2-3; Sander F 'The future of ADR' (2000) *Journal of Dispute Resolution* 3 (discussing mainly mediation, but also arbitration).

8 Emmett S 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 generally <arbiter.wipo.int/center/index.html>; and Helfer L and Dinwoodie G 'Designing non-national systems: the case of the uniform domain name dispute resolution policy' (2001) 43 *William & Mary Law Review* 141.

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). Second, 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'.[9] 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'.[10] Furthermore, 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.[11] The key is that there be *some* element of binding force in the decision rendered by the 'arbitrator' for the parties.[12] That does occur under the WIPO procedures, albeit to a limited extent, because the WIPO order will prevail if

9 Takahashi T '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.

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

11 Compare generally Justice Mason K 'Changing attitudes in the common law's response to international commercial arbitration' (1999) 18(2) *The Arbitrator* 73.

12 Kaufmann-Kohler G and Peter H 'Formula 1 racing and arbitration: the FIA tailor-made system for fast track dispute resolution' (2001) 17(2) *Arbitration International* 173 at 185 (comparing continental European law with *Walkinshaw & Ors v Diniz,* a still unreported judgment of Thomas J in the English Commercial Court, 19 May 1999).

neither party brings the complaint anew before the appropriate court in a timely fashion.[13]

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 parties[14] — 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

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13 Interestingly, less than 1 per cent of cases decided by the WIPO Center appears to have been subsequently brought before the courts. From December 1999 (when the UDRP came into effect) until 31 December 2001, the Center received around 3400 claims (60 per cent of all claims under the UDRP, as dispute resolution service providers other than WIPO have been accredited to provide a competing service); resolved around 3100, of which around 2500 were the subject of panel decisions (the rest were settled); but only 19 of these are known then to have been taken before courts. Compare Takahashi, above note 9. Although the cost of an 'appeal' may be an important factor, it seems reasonable to infer that parties (even the losers) are reasonably impressed by the neutrality and expertise of the WIPO Center and its panelists, and/or do not expect national courts to provide a significantly different result.

By contrast, the Japan Intellectual Property Arbitration Center <www.ip-adr.gr.jp/> has attracted only 13 cases since January 2000, involving disputes about the .jp ccTLD; resolved 10 (others were withdrawn); and found that four of these 10 were then brought before Japanese courts (interview conducted on 27 February 2002). Perhaps it has had more difficulty in establishing its reputation, and (losing) parties were uncertain about how Japanese courts might decide such cases and therefore were prepared to risk further action. One would expect fewer 'appeals' to Courts, but also fewer cases brought before this Center, now that the Supreme Court of Japan has confirmed the clear principles adopted by lower courts in Japan's first cybersquatting court case, *JACCS KK v Nihonkai Pakuto* (see the translation and brief analysis of judgment by the Toyama District Court, 12 December 2000, in Port K 'Japanese intellectual property law in translation: representative cases and commentary' (2001) 34 *Vanderbilt Journal of Transnational Law* 847 at 883-894). For the importance not of culture, but of clear rules in promoting settlement of civil disputes in at least some areas of Japanese law, see Ramseyer M and Nakazato M 'The rational litigant: settlement amounts and verdict rates in Japan' (1989) 17 *Journal of Legal Studies* 262.

It will be interesting to observe emerging patterns in Singapore, which has also just established ADR procedures for disputes concerning the .sg ccTLD. See generally Lovells *Intellectual Property, Information Technology, & Telecoms Newsletter* (2002) March 5 (available from <lloyd.parker@lovells.com>).

14 Nottage L 'The vicissitudes of transnational commercial arbitration and the *lex mercatoria*: a view from the periphery' (2000) 16 *Arbitration International* 53 at 59. See also Boeckstiegel K-H 'Settlement of disputes between parties from developing and industrial countries' (2000) 15(2) ICSID Rev 275.

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.[15] 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 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.[16] 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,[17] 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.[18] 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

15 Respectively, compare art 34 of Schedule 2 of the *International Arbitration Act 1974* (Cth) and the list of 34 other Model Law jurisdictions at <www.uncitral.org/english/status/status-e.htm> (others in the Asia Pacific region include Canada, Hong Kong and Macau, India, Korea, New Zealand, Sri Lanka, and California); s 69 of the English *Arbitration Act 1996* (UK) (available at <www.bailii.org/uk/legis/num_act/aa1996137/s69.html>); and 'Arbitration law reform underway' (2002) 13 *JCA Newsletter* 7.

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

17 Berger K P(ed) *The Practice of Transnational Law* (Kluwer Law International, The Hague et al, 2001); reviewed by Nottage L in 19(2) *Journal of International Arbitration* (forthcoming, 2002). See also the more detailed analysis of the study in Nottage L 'Practical and theoretical implications of the *lex mercatoria* for Japan: CENTRAL's empirical study on the use of transnational law' (2000) 4(2) *Vindabona Journal of International Commercial Law and Arbitration* 132.

18 Nottage above note 14 at 60. Compare Fortier Y 'New trends in governing law: the new, new *lex mercatoria*, or, back to the future' (2001) 16 ICSID Review 10; Berger K P *'Lex Mercatoria* online: The CENTRAL transnational law database at <www.tldb.de>*'* 18 *Arbitration International* (forthcoming, 2002).

with a clear corpus of legal norms.[19]

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,[20] or the business environment is growing rapidly (as in the People's Republic of China during the last decade). Other parties may well prefer certainty and predictability — arguably better promoted by stricter application of bright-line rules[21] — 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.[22] 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, to draw for example on a growing body of empirical work comparing practices and expectations in contractual relationships.[23] 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 worldwide as to whether or not, and to what degree or under which safeguards, an arbitrator should actively encourage settlement.[24]

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19 Mayer above note 16 at 237; Lalive P 'Irresponsibility in international commercial arbitration' (1999) 7 *Asia-Pacific Law Review* 161; Zumbansen P 'Piercing the legal veil: commercial arbitration and transnational and transnational law' 8(3) *European Law Journal* (forthcoming, 2002) s II.3.

20 Compare for example Alford, above note 5.

21 Mayer above note 16 at 243.

22 Compare for example the strict interpretation to the phrase 'subject to details' adopted by Steyn J (as he then was) in *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd's LR 583 (*The Junior K*), with that established by the Court of Appeals for New York in *Great Circle Lines v Matheson* (1982) 681 F 2d 121 (2d Cir).

23 See for example Nottage L '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.

24 So, for example, 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*'] <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

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.[25] 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.[26] 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.[27] In other words, at least certain types of international commercial arbitration may become so informal as to merge with some mediation processes.[28] The greatest overlap should be with the more 'evaluative' type of mediation, in which the mediator injects some measure of his or her appraisal of

('Settlement in International Commercial Arbitration' (1999) 4 *JCA Newsletter* <www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/newslist.html>); Tatsuya Nakamura, formerly in the Japan Commercial Arbitration Association ('Continuing misconceptions of international commercial arbitration in Japan' (2001) 18(6) *Journal of International Arbitration* 641-8); or, most obviously, Associate Professor Yoshihisa Hayakawa ('The distorted image of the Japanese system of international commercial arbitration' (1999) 5 *JCA Newsletter* 1).

25 In other situations, stricter approaches may be expected and provided. This may explain the statistical results summarised by Keer S and Naimark R 'Arbitrators do not 'split the baby': empirical evidence from international business arbitrations' (2001) 18(5) *Journal of International Arbitration* 573. Unfortunately, however, the authors provide no indication of the context (such as claim amount and type of transaction) of the 54 out of 85 questionnaire responses, from parties to American Arbitration Association cases over 1995-2000, used as their sample.

26 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 (see generally Rieko Nishikawa 'Judges and ADR in Japan' (2001) 18(3) *Journal of International Arbitration* 361-9). 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.

27 Raftesath above note 6.

28 Compare generally Wada Y 'Merging formality and informality in dispute resolution' (1997) 27 *Victoria University of Wellington Law Review* 45.

the arguments or issues raised — a type very likely to characterise most situations where the mediator is a legal professional,[29] or at least some forms of commercial disputes. There may be less overlap between arbitration and the more 'facilitative' type of mediation, perhaps now losing favour,[30] in which the third party tends to just paraphrase what each side says — often more to defuse emotions and ensure surface understanding of issues and perceptions. Yet it seems misleading to deny any possibility of overlap, and insist on a strict dichotomy between (all forms of) arbitration and (all forms of) mediation.

In fact, similar arguments have emerged among specialists mainly in mediation, regarding whether 'evaluative mediation' is an oxymoron, meaning that only 'facilitative mediation' deserves the name of 'mediation' — or indeed 'ADR'. An emerging consensus seems to be that it is inappropriate to adopt a dogmatic view, with such implications, but to be much more careful in identifying and describing the important features of a particular process. Some, for instance, suggest simply using the term 'mediation plus evaluation' to describe a process where the mediator plays the more active role.[31] Perceived advantages in distinguishing different processes in this more conciliatory fashion is that it will still be possible to 'educate' users and practitioners about the various options available within the broader rubric of mediation, and train or qualify practitioners about the sometimes very different techniques most used within those options.

Similar considerations impact on the central concern of this article: whether arbitration should be kept within or sharply distinguished from ADR.[32] It is probably true that many existing or potential users of arbitration and mediation remain unclear about the key difference in arbitration, namely some degree of binding determination by a third party. But they can be informed about this without possibly creating additional confusion by excluding arbitration from the rubric of ADR, especially if there is overlap with at least some forms of mediation, and if an important message still to be conveyed is that formal court processes typically involve a much more extreme form of binding adjudication and consequent loss of party control over proceedings. In addition, conceptualising arbitration as very distinct mediation may encourage an effective division of labour in teaching different skills useful for many variants of these two categories of processes. But it should also be possible, and more relevant to the reality

29 Guthrie C 'The lawyer's philosophical map and the disputant's perceptual map' (2001) 6 *Harvard Negotiation Law Review* 145.

30 Stempel J 'The inevitability of the eclectic: liberating ADR from ideology' (2000) *Journal of Dispute Resolution* 247 at 250.

31 Love L and Kovach K 'An eclectic array of processes, rather than one eclectic process' (2000) *Journal of Dispute Resolution* 296.

32 Compare also Sternlight J 'Is binding arbitration a form of ADR? An argument that the term 'ADR' has begun to outlive its usefulness' (2000) *Journal of Dispute Resolution* 97.

constituted by the existence of other variants within the categories as well as true hybrid processes, to teach (and assess for certification) a full range of skills and substantive knowledge. Academic and evolving professional rivalries will have to be transcended to exploit such potential.[33]

Adopting the more expansive view of arbitration, as a variable and sometimes overlapping part of a broad spectrum of ADR processes, also 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.[34] Yet the 1990s have seen some significant counter-reactions, including revisions of arbitration laws and (more importantly) institutional rules to expedite proceedings,[35] and developments in case law.[36] This counter-trend is 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,[37] sports arbitration,[38] and resolution of disputes about dormant

33 Compare for example Bourdieu P *Academic Discourse: Linguistic Misunderstanding and Professorial Power* Polity Press Cambridge 1994 (trans).

34 Nottage above note 14 at 62-4.

35 See for example Allen T 'Institutional rules' straitjacket or scaffold?' in Odams de Zylva M and Harrison R (eds) *International Commercial Arbitration: Developing Rules for the Next Millennium* Jordan Publishing Bristol 2000) p 51. See also the techniques for reducing costs in arbitration, enumerated in Li C 'Evaluating the various non-litigation processes for resolving disputes: the cost-effectiveness approach' (2001) 18(4) *Journal of International Arbitration* 435 at 436-9.

36 Compare for example Eimer M 'Contractual expansion of judicial review in the USA: *Bowen v Amoco Pipeline* — a change of direction?' (2001) 5(2) *Vindabona Journal of International Commercial Law and Arbitration* 313. In this case, 254 F 3d 925 (10th Cir 2001), the US Court of Appeals re-emphasised finality of arbitral proceedings by reversing a tendency to uphold parties' agreements to expand (beyond those listed in the Federal Arbitration Act) the grounds for review of awards. See also some high profile decisions by English courts, rejecting claims to remove arbitrators, discussed in Harrison J 'Arbitrators are easily challenged but hard to dismiss' (2001) March 20(1) *The Arbitrator and Mediator* 27.

37 Style C and Dutson S 'Arbitration, international commerce, and international finance: safety first' (2000) 1(1) *International Trade and Business Law Bulletin* 55-57.

38 Glasson R 'Appeals from the court of arbitration for sport: *Angela Raguz v Rebecca Sullivan & Ors* [2000] NSWCA 240' (2000/2001) Summer *Bar News* 20-21; Kaufmann-Kohler and Peter, above note 12. See also generally Buti A and Fridman S *Drugs, Sport and the Law* Scribblers Publishing 2001 pp 83-103.

bank accounts in Switzerland.[39] Somewhat ironically, 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, which could result in further significant formalisation of these originally very informal processes.[40] The more expansive view also brings readily into view an upsurge in the use of court-annexed mediation in the Asia-Pacific region. This, of course, aims at consensual resolution by parties, but occurs — to greater or lesser degrees — in the shadow of formal judicial court adjudication.[41]

In sum, while it is certainly very appropriate to reflect on what we mean by ADR now and in the near future, we will lose more than we gain by attempting to exclude arbitration from its ambit. The 'win-win solution' for mediators, arbitrators and indeed all forms of dispute resolution professionals, and the users of their processes, is surely to (re)situate arbitration as an important part of ADR, although not necessarily its centerpiece.[42] ⌘

39 Buergenthal T 'Arbitrating entitlements to dormant bank accounts' (2000) 15(2) ICSID Review 301-21.

40 See for example National Alternative Dispute Resolution Advisory Council (NADRAC) *The Development of Standards for ADR: Discussion Paper* (Canberra ACT 2000); and generally Hunter M 'International commercial dispute resolution in the 21st century: changes and challenges', Inaugural Victoria University of Wellington Foundation's Annual Dispute Resolution Lecture, delivered on 15 March 1999 in Wellington.

41 For Australia, see above notes 2 and 6. As yet still unpublished papers presented at the ADR symposium cited above (note 6) highlight significant developments over the 1990s in Korea, Thailand and especially in Singapore.

42 'Imperialistic' tendencies on the part of certain arbitration specialists may explain some criticism of attempts within the arbitration community to merge arbitration and mediation by prominent arbitrators such as Nariman F ('The challenging world of arbitration' (2001) 5(2) *Vindabona Journal of International Commercial Law and Arbitration* 229-32) and Hunter M ('The work of UNCITRAL on arbitration and conciliation' (book review) (2001) 5(2) *Vindabona Journal of International Commercial Law and Arbitration* 323-25). Equally, however, those specialising in mediation should not monopolise the province of ADR to the exclusion of arbitration.