THE PERCEPTION OF THE COURTS TO THE ROLE OF ARBITRATION IN DISPUTE RESOLUTION PROCESS

By The Honourable Mr. Justice Lander, Supreme Court of South Australia.

Text of an address to Members of the South Australian Chapter and their guests in Adelaide, June 1995

I am not sure why it is that I have been asked to speak to you today. I was informed that the guest speakers are frequently Judges of either the Supreme or Federal Courts and I suppose I have been asked more likely for my novelty value.

Your Chairman told me that it was a matter for me to determine what topic was appropriate, but that I might like to address some remarks to the perception of the Courts to the role of arbitration in the dispute resolution process.

Having regard to my experience as a member of the Court I ought to be able to deal with that subject with indecent brevity.

I was also told that the various addresses over the years have varied from anecdotal, to amusing, and essentially irrelevant, to the serious stuff of the Institute's business.

I am sure that most of what I say will be essentially irrelevant but I offer the following remarks

Aristotle had a perception of arbitration, and in particular, its place with litigation. He said this:

> "It is equitable to be patient under wrong [not to retaliate]; to be willing that a difference shall be settled by discussion rather than by force; to agree to arbitration rather than go to court – for the umpire in an arbitration looks to equity, whereas the juryman sees only the law. Indeed, arbitration was devised to the end that equity might have full sway." – ARISTOTLE, *The Rhetoric of Aristotle*, Bk I, ch. 13.

So also Abraham Lincoln in comparing the two systems of litigation and arbitration said this:

> "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. " – Abraham Lincoln, *Notes for a Law Lecture -July 1, 1850, in Complete Works of Abraham Lincoln.*

There you have two of the wisest men who would prefer the system of arbitration to that of litigation, and indeed, one of those very wise men suggesting to legal practitioners that rather than involve themselves either in litigation or arbitration, they ought to be peacemakers.

It ought to be immediately observed that Abraham Lincoln's assassin was not a lawyer, but an actor: if indeed there is any difference.

I wish to make a statement by way of explanation before moving to the

subject of the address. I believe that whichever system is in place, whether you call it litigation, arbitration, or alternative dispute resolution, the system only exists for one purpose, that is, to deliver justice to those who have submitted themselves to the system.

The State is, of course, obliged to provide a system for the resolution of disputes between itself and its citizens and disputes between citizens and other citizens. It has done that by the litigation process. There can be no doubt that the *raison d'etre* for the existence of that system is the delivery of justice so that each of its citizens, whether he or she is dealing with the State or whether he or she is dealing with another citizen can be assured that that citizen will receive a just result according to the system of law provided for by the State.

The litigation system has been recognized for a very long time as being imperfect. It has suffered for a long period of time from a number of imperfections, including delay, expense, being excessively technical and being unable to adapt to the demands of more modern disputes.

As a result of those imperfections and for other reasons, including convenience, private persons have agreed between themselves to submit themselves to arbitration. Apart from the imperfections I have mentioned, there have been two other particular reasons that have given rise to arbitration proceedings. The first is, of course, the expertise that an arbitrator rather than a judicial officer might have, and secondly, the more simplified procedures that can be adapted by agreement rather than by imposition of the litigation process.

Whilst the law has always recognized the right of parties to agree to submit themselves to the decision of an umpire, apart from the Court itself, the Courts have been very jealous to safeguard the supremacy that the Courts enjoy by reason of the fact that the Courts enjoy the confidence of the democratically elected Parliament and therefore, presumably, though perhaps unwittingly, the confidence of the general public.

It is clear, however, over the long period of time that the-two systems have acted in parallel, but not in conjunction with each other, and that there has been a tension between the two systems.

There has been an undoubted jealousy on the part of the Courts of the arbitral process. Nowhere is that more evident than in the decision of *Scott v Avery* (1856) 5 HL CAS 811, where the Court was very quick to interfere with any suggestion that parties could oust the jurisdiction of the Court, and held that any agreement to do so would be contrary to public policy.

One can readily understand that in 1994 that a Court might come to a conclusion that an agreement could be contrary to public policy because of perhaps the unequal bargaining position of two contracting parties. The Court, in the last 15 or so years, has more readily understood the economic disadvantages that some parties suffer from in contracting with other parties and have sought to redress that imbalance.

That was not the case, of course, in 1856 when the Courts had no regard whatsoever to the economic imbalances existing between contracting parties, and indeed, competing parties. The Courts claimed that all parties

before the Courts were equal and therefore disavowed any intention or attempt to redress the socio-economic imbalances existing between parties. The rationale, therefore, for the *Scott v Avery* decision is not because of the perception by the Courts of social and economic inequality. The rationale for the decision is, I think, perhaps better understood as purely a protection against the possible erosion of the judicial power. Shortly stated, it may be self-interest.

The Courts, however, have ever since been very jealous of their position and have been very conscious of the fact that they have an obligation, not expressed by Parliament, but understood by the Courts themselves to control the arbitration process by the use of the common law.

A heresy has recently developed. It is now suggested that the Courts not only ought to be answerable to the parties, if indeed they ever were, but the Courts have an obligation to answer generally to the public, and more particularly, to Parliament. Thirty years ago it would have been considered to be near the end of civilization as we know it to suggest that the independence of the judiciary could be compromised in such a way as to suggest that the judiciary, collectively, ought to be answerable generally to the public, and through the public, the Parliament. But it is now the case.

The requirement for that answerability arose out of a perception that the litigation process was unable to deal expeditiously, inexpensively, and indeed, as a result of both of those, may I say it, fairly, with those who submitted themselves to it.

A number of persons reached the conclusion that the litigation process was far too cumbersome, far too expensive and far too uncertain to commit very large sums of money in the certain hope, or even hopeful expectation of a favourable result.

There probably are a number of reasons why there was something of a lack of confidence that developed amongst the public in the litigation process, but those reasons included the process itself, those that administered the process and those that participated in the process. Those that administered the process are, of course, the Judges, and those that participated in the process are the lawyers.

Having now pointed to the shortcomings of the litigation process, I turn to the process of which you are mainly the participants.

It seems to me that if parties had a dispute and were dissatisfied with the litigation process, it was obvious that the parties would turn to the arbitration process for the purpose of the determination of their differences. This is especially so, I would have thought, in relation to commercial disputes.

The fact of the matter is that they have not. The arbitration process has been perceived, I think, as having similar shortcomings to the litigation process. Insofar as lawyers participate in it, they are held in the same regard as those who participate in the litigation process. Insofar as the procedures are concerned, the perception is that the procedures in arbitration are not much less cumbersome than the procedures in the litigation process. Moreover, the commercial world, I think, considers that

the arbitration procedure has a further shortcoming in as much as not only does it have the same cumbersome qualities that perhaps the litigation procedure has, but as well, it is subject to the review by the litigation process itself.

Moreover, arbitration proceedings have not been attractive because of the difficulties in the parties coming to an agreement as to the matters of dispute which ought to be submitted to arbitration. That again may be a failing of the participants more than anything else, in that the lawyers are not able to agree amongst themselves, the proper machinery for the submission to arbitration.

Lastly, if I may be so bold, the arbitrators are seen and perceived to have a weakness. The arbitrators' initial strength was their very expertise. Their expertise now is still seen as a strength, but in some cases their lack of knowledge of the law is seen as a weakness. Those who are skilled only in the law and have no particular expertise outside the law, seem to be no more than judicial officers.

Therefore, it seems that the very strength of the arbitration process, namely, expertise, is its weakness, and where the arbitral process has attempted to provide against that weakness by the training of lawyers to be arbitrators, the reaction of those in the commercial world is, 'Well, why should I pay for the umpire, rather than get the free umpire who is available under the litigation process?'.

Whilst the litigation process and the arbitration process stand parallel, but don't join hands, then it seems to me that the perception of commercial people of both of the processes, will remain.

You will all probably be familiar with the report of the Law Reform Commission of New South Wales on Commercial Arbitration, of 1976. In that report it was said:

> "Commercial arbitration today has many drawbacks. For some of these the law is to blame. Many other drawbacks, however, are the result of a failure to appreciate what cases are fit for arbitration and what cases are not; a failure to draw arbitration agreements with sufficient skill and forethought; the difficulty of finding men to act as arbitrators who combine the qualities of knowledge of the law and practice of arbitration, expert knowledge of the subject matter of the difference, and a judicial temperament; and failure to prepare and conduct cases before arbitrators with due efficiency."

The end result of that is that since the middle of the 1980s, the perception of both of the procedures, which on the one hand I represent, and on the other hand, you represent, is that the procedures have failed to adapt to the type of dispute that presently arises between commercial parties.

Both systems, therefore, run the risk of becoming irrelevant, unless each of the systems is modified to suit the late twentieth and early twenty-first century.

This has been demonstrated, I think, by the rise in the last few years of alternative dispute resolution, which is really no more than mediation.

This system has become so much more popular because it is cheap, speedy and is usually presided over by someone with a good deal of energy who is directing his endeavours to obtain a commercial settlement of a

matter that needs to be settled so that the parties might go about their business.

It is not bogged down in what the commercial world sees as the irrelevancy of litigation and arbitration procedures such as discovery, inspection, interlocutory process, and the like. The mediator is simply attempting to get to a simple commercial resolution after first obtaining a feel for the dispute, rather than burying himself completely in that dispute.

If mediation is done promptly and expeditiously, then it is in the innocent party's best interests either to pay money, or to suffer a lesser payment of money to get the matter settled and out of the way.

The advantage of alternative dispute resolution appears to be that the parties are prepared to put aside the legal niceties of an appropriate submission of a case to an arbitrator, put aside the interlocutory process, put aside the discovery process in an endeavour to simply arrive at a quick and commercial resolution.

In the light of that experience, it seems to me that it is incumbent upon those in the litigation and arbitration processes to work more closely together for the purpose of providing a better service for those who wish to use the service.

Having said that, clearly, those who are employed in the litigation process, having ensured that it has achieved the paramountcy over arbitration, must take the steps to ensure that what I say should happen, does happen.

Section 67 of the Supreme Court Act provides for the appointment of an official referee or arbitrator, and when so appointed, pursuant to a reference, that person shall be deemed to be an officer of the Court and subject to the rules of Court.

There is, therefore, always available to the Court, the power to appoint an arbitrator, or a referee, or whatever, for the purpose of deciding any reference that the Court may give to that person.

The Court has also been empowered under s.68 of the Supreme Court Act to have all the powers that are conferred on a Court by the Commercial Arbitration Act in relation to the appointment of arbitrators and the conduct and proceedings under that Act.

The Court also has power, of course, under s.71 of the Supreme Court Act to call in to aid the use of assessors.

It seems to me that what I say is not going to be particularly attractive to those arbitrators who are simply trained as lawyers, that there are undeniably cases where the special expertise of persons not being lawyers would be of use to the Courts. The power exists for the Courts to use those persons, which use, if appropriate, would be for the benefit of litigants generally.

I was going to say that there has been a reluctance on the part of the Courts to use referees and arbitrators, notwithstanding the power, but that may be to understate the position. I have never had a case where there has been any suggestion by any party, and that includes any party whom I have

represented, for the appointment of a referee or an arbitrator. That may be so because I have not been involved in litigation which demands such an appointment, or it may be because it has never occurred to me before today. In this company I prefer to think that it is the first of those matters.

I should say something about the District Court Rules because that Court now deals with most of the trial work in this State. That is another matter I could speak on. The District Court Act provides for trials by arbitrators. Section 33 of the District Court Act provides that the Court may refer an action or any issues arising in an action for trial by an arbitrator who may be either appointed by the parties or by the Court. When appointed the arbitrator becomes an officer of the Court and may exercise such of the powers that the Court delegates to the arbitrator. When the arbitrator makes his award the Court will adopt it unless good reason is shown to the contrary. The Court has passed Rules to facilitate the use of the powers given by s.33.

There is no doubt that the legislative power exists and the subordinate legislation either does exist or can be brought into existence so as to provide a complete interaction between the litigation and arbitration processes. The question is the will of the parties to bring that about.

There is, however, in practice, no point in simply referring individual matters to arbitrators unless those arbitrators have specific or particular expertise for the hearing of that matter, and unless both the litigation and the arbitration processes modernize their procedures.

I think there must be a recognition that the current procedures are too cumbersome and too expensive for modern-day litigation. The procedures must be modified so as to allow for the real matter in dispute to be litigated or arbitrated, and disposed of more readily and cheaply than presently provided for.

That requires, as I say, substantial amendments to procedures, but also requires a greater deal of energy on the part of the Judge and the arbitrator. It seems to me that the days are past when a Judge can understand that litigation is there for the purpose of his amusement. The late Dr Bray said, "The Courts are here for the convenience of the litigants. The litigants are not here for the convenience of the Courts." The Courts, and so are arbitrators, are a service industry. They have to give a service and unless that service is delivered at an appropriate price and manner, then the service it offers will cease to become relevant.

To that end I think, and I am only putting it in its broadest sense, there will need to be in the near future, some very substantial reconsideration of the role of Courts, arbitrators and those generally engaged in the service of giving justice.

In answer to the question of the judicial perception of the role of arbitration, can I say, and this is only my perception, that the arbitration process seems to have many of the inconveniences that presently attach to the litigation process, most of which inconveniences, I would have to accept, have been delivered to it by judicial officers.