Resilience and Reinvention: Dispute Resolution During a Crisis and Beyond

Her Excellency The Honourable Margaret Beazley AC QC*

In opening the conference of the Regional Arbitral Institutes Forum held in Sydney in November 2016, hosted by the Resolution Institute, the Honourable Robert McDougall entitledhis address: 'Arbitration: past, present and future.'[1] In his customary efficient way, he divided his allotted time equally to each of these aspects.

Now, five years later, it would be idiosyncratic, at best, to open a conference such as this, again hosted by the Resolution Institute, with reference to the history of arbitration, or indeed to the history of any of the various modes of alternative disputeresolution ('ADR'). ADR, in all its forms, is too well entrenchedand highly professionalised in today's dispute landscape. ADRhas, as the conference topics demonstrate, infiltrated all areas oflegal activity, from family law to energy and resources law, fromIP to employment law, from restorative justice to commercial disputes and more.

It would also be churlish, five years on from that conference and given that the 2020 Australian Arbitration Report tells us that 'arbitration in Australia is thriving, and that Australian corporates and practitioners are increasingly turning to arbitration'[2] to explore the comparative advantages and disadvantages of arbitration over the judicial system, or whether and how other forms of dispute resolution best operate in litigation and dispute processes. Those discussions have been had many times.

The reality, indeed, the truism, is that all forms of ADR play an important part in the dispute landscape, and modes of dispute resolution are variously parallel, complementary or a precursor to other processes. None is entirely independent from the others and the scope played by each is, and undoubtedly will continue to be, fluid. Whatever form of dispute resolution in which you as a practitioner engage, and regardless of whether you are a lawyer, your role is underpinned by knowledge-based expertise and professionalism.

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* Originally delivered on 15 July 2021 as the 'Governor's Welcome' for the Resolution Institute's 2021 International Virtual Conference. The address has been slightly amended for publication.

1 Robert McDougall, 'Opening address to the RAIF Arbitration Conference' (Regional Arbitral Institutes Forum Arbitration Conference, 25 November 2016).

2 Australian Centre for International Commercial Arbitration, *2020 Australian Arbitration Report* (Report, 9 March 2021) available at <https://acica.org.au/wp-content/uploads/2021/03/ACICA-FTI-Consulting-2020-Australian-Arbitration-Report-9-March-2021.pdf> 4.

In opening this prestigious conference, rather than trespassing on any of the topics on offer over the next two days, I have decided to discuss three matters which, amongst many,demonstrate what 'good practice' entails and the depth and breadth of knowledge required of the ADR practitioner in today's competitive environment. Each of the matters emanatesfrom the arbitral sphere, and the lawyer/judge in me led me straight to the case law. I am not apologetic about that. Judicial decisions, after all, are authoritative, binding and have precedential value.

The first matter relates to enforcement of arbitral awards in our local courts. The case law tells us that this should be a relativelystraightforward matter. However, it is surprising how many contestable issues arise in respect of enforcement for curial determination and how many hapless attempts are made to challenge an arbitral award. I say hapless attempts because, as Martin J pointed out in *Venetian Nominees Pty Ltd v Weatherford Australia Pty Ltd,* '[l]osing [an arbitration] does not equate to procedural unfairness'.[3]

Justice Martin was even more caustic in the opening paragraph of hisjudgment, referring to the farcical position where challenges were made to awards which had no hope of success. As he said,such challenges undermined the legislative policy of having a 'quick, relatively inexpensive and final medium for private dispute resolutions'.[4] He warned that punitive costs sanctions would be considered in such cases.

Those comments were made in the context of a local arbitration.Nonetheless they are relevant to the conduct of ADR generally. As I used to say to practitioners in the context of appeals, the well of the courtroom is not the 'lawyers' playground'. The costs, financial and emotional, of legal disputes are too high for practitioners to be part of any such game playing.

A second matter relates to contract clauses requiring parties 'to negotiate in good faith' before instituting proceedings. I raise this issue because it serves to emphasise that although various dispute processes differ and call for different skills, what does not change is the need to understand the underlying legal principles involved in the particular dispute, including developments in other jurisdictions.

In the recent decision of the High Court of Hong Kong in *C v D,*[5] it was held that it was for the arbitral tribunal to determine whether a pre-condition to arbitration had been satisfied. In the language of that decision, it was a matter of evidence and not jurisdiction. The point I seek to make is that it should never be lost sight of that ADR is not an alternative to applying your legal knowledge.

3 [2021] WASC 137, [85].
4 Ibid, [1].
5 [2021] HKCFI 1474.

The third matter relates to conflicts of interest. Participants in this conference will be well familiar with the IBA Guidelines andthe decision of the UK Supreme Court in *Halliburton*[6] relating toconflicts of interest and bias. The recent decision in *Newcastle United Football Company Ltd v The Football Association Premier League Limited*[7] supports the robustness of the bias rule in favourof non-recusal. Whilst the Court considered that the arbitrator, subject to an application to recuse himself, should not have written to the respondent as to its attitude as to whether he should do so, the Court found that was an error of judgment.

The arbitrator's position was admittedly ameliorated by the fact that the respondent immediately forwarded the arbitrator's correspondence to the other party and the arbitrator quickly accepted that the other party should be informed of the communication. However, one might ask how the arbitrator could ever have put himself in that position.

I have raised this matter because my sense is that conflicts of interest are not always well understood. Whether that comes from over-confidence or a blinkered view of the propriety of one's conduct, I am not sure. However, the experienced and careful practitioner should have a 'sense' of a potential conflict and stop and ask themself: how would each of the parties react to my conduct? Does this seem right?

This conference is an opportunity to explore the features of ADRin its many aspects, its appropriateness and its adaptability, particularly in times of crisis. Like many court cases, engaging in the ADR process will sometimes be routine. On other occasions it will be intellectually and strategically challenging and therefore exciting, as only lawyers can understand thatterm! Regardless of whether the case is routine or challenging, every case requires your expert preparation.

I trust that the matters I have briefly raised will also leave you with a sense of pride in the professionalism and expertise that the world of alternative dispute resolution calls for.

6 *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.
7 [2021] EWHC 349.