Old but not Obsolete

The Chartered Institute of Arbitrators (Australia) Ltd Centenary Gala Dinner

Chief Justice Robert French AC

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The Chartered Institute of Arbitrators in 2015 has demonstrated a capacity for celebration of its centenary on a global scale — celebrations which embrace reflections on the past, present and future of arbitration and consensual dispute resolution generally. The demonstration of that celebratory capacity reflects the Institute's world-wide membership and international network of branches and its standing as a leading contributor to education, scholarship, standard setting and law reform.

The story of the Institute over the last 100 years since its modest beginnings in London in 1915 is one of remarkable achievement. I thank the Institute and its officers for the opportunity to recognise that achievement on this occasion and, in particular, to recognise the work of the Australian Branch and its officers and members.

I tried to find some concise expression of a theme for this evening's remarks which, mercifully for all of us, precedes the main course and so, despite its threatening designation on the program as a 'Keynote Address' must be brief. The expression of a theme eventually presented itself in the words of Arnold Schwarzenegger. In his most recent *Terminator* film, made 30 years after the first of the franchise, he justified his continuing usefulness as an apparently aging, early model robotic hit man from the future with the heavily accented assertion that 'I may be old but I am not obsolete'. Taking those words completely out of context they can be translated into a very fine understatement of the present condition of the Institute.

The Institute is old, not so much by the nominal measure of 100 years, but by the time compressed standards of the last 50 years or so in which more and more change seems to have happened in less and less time, change with which the Institute has been fully engaged. The profile of its activities responding to that dynamic environment indicates that obsolescence is not on its agenda.

The Institute began its existence when the future, which is our present, was probably beyond the most extravagant imaginings of the most prescient people of the time. Yet events were happening then which were to set in motion changes of a social, political and technological character affecting international relations, the functions and subject matters of international law, the nature, speed and complexity of trade and commerce, and the movement of peoples, information and ideas around the globe.

In 1915, the world was in the grip of a murderous conflict. That war to end all wars laid the foundations for the Second World War. Both saw the emergence of international endeavours to manage tensions and to resolve disputes between nations. The developing international order was paralleled by the creation of conventions and treaties, protocols, model laws and common form instruments responding in a variety of ways to the requirements of an increasingly global market for goods and services, information and ideas.

1915 was also the year in which Albert Einstein wrote the field equations for his general theory of relativity which, together with the theory of special relativity enunciated ten years earlier, changed not only our understanding of reality but created a theoretical framework for the development of new technologies of great promise and great danger.

Less heralded than Einstein, H C Emery, a London solicitor, founded the Institute of Arbitrators on 1 March 1915. He brought together a multi-disciplinary group, a consulting

engineer, Lord Headley as the first President, six architects, two quantity surveyors, two surveyors, a civil engineer, a mechanical and electrical engineer and an accountant, who formed the first council. The principal aim of the Institute was to 'raise the status of a professional arbitrator to a distinct and recognised position among the learned professions' by means of the 'study of the law and practice of arbitration'.[1]

Arbitration as a means of dispute resolution was well established and had a long history at that time. Sixty six years earlier, Francis Russell, had published a Treatise on the Power and Duty of an Arbitrator and the Law of Submissions and Awards which evolved into *Russell on Arbitration*, now in its 24th edition. Other texts had been published in the later part of the 19th century. Nevertheless, according to one chronicler of the Institute's first century, Julio Betancourt:

> Although the utility of arbitration had long been recognised and, to some degree well documented — particularly in England — everything seems to suggest that, before 1915, there was almost a complete absence of systematic study of this discipline, not only in England but also in the United States.[2]

Nor was there any serious endeavour to train arbitrators or practitioners in the field.

The legal establishment did not trust the process, perhaps seeing it as a threat to its representational monopolies and those of the courts in dispute resolution. Chief Justice Sundaresh Menon of Singapore, in a speech given at the Institute's centenary conference in Singapore in September, quoted a letter to the Times published in August 1892 — the author was anonymous, but suspected of being a judge — in which the practice of arbitration was described thus:

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1 Chartered Institute of Arbitrators, History, Chartered Institute of Arbitrators www.ciarb.org/about/history.

2 Julio Cesar Betancourt, 'The Chartered Institute of Arbitrators (1915–2015): The First 100 Years' (2015) 81 *International Journal of Arbitration, Mediation and Dispute Management* (forthcoming).

> the hazardous and mysterious chances of arbitration, in which some arbitrator, who knows as much about the law as he does about theology – – decides intricate questions of law and fact by applying 'a rough and ready moral consciousness'.[3]

The reputation of arbitration as a dispute resolution process in Australia in the late 19th century was probably not enhanced by the experience of our first Prime Minister, Edmond Barton, also a founding member of the High Court. In 1896 when a Queen's Counsel and a member of the New South Wales Parliament, he agreed to appointment as an arbitrator in a railway line construction dispute which was estimated to last six months. Two years, 55 banks and cuttings, and 70 bridges and box drains later when the arbitration wound up, he found he had to answer allegations by his political opponents that he had deliberately lengthened the hearing.

The Chartered Institute was founded to address concerns about the quality of the arbitral process and the standards of competency of those participating in it. Its history since its foundation has been well documented and a comprehensive account with thoughtful reflections about its future — almost a kind of strategic concept plan — appears in the centennial lecture 'Looking Back — Moving Forward' given by Professor Doug Jones in May this year.[4] It is not necessary to retrace that history in any detail but it may be appropriate to offer some observations about the place of arbitration today and its future.

It is a mechanism applicable to a hugely diverse class of matters — encompassing all manner of disputes from consumer transactions to land use questions, construction contracts, resource development and exploitation, and major financial dealings. All of these matters may be the subject of arbitration within a single national legal system and readily enforced by the laws of that system.

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3 Chief Justice Sundaresh Menon, 'Standards in need of bearers: Encouraging reform from within' (Speech given at Chartered Institute of Arbitrators: Singapore Centenary Conference, Singapore, 3 September 2015) quoting Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James, 2015) 58–9.

4 Doug Jones, 'Looking Back – Moving Forward' (Speech given at CIArb Centennial Lecture, Kuala Lumpar, 7 May 2015) 2.

The century since the founding of the Institute has seen what Betancourt has called 'the adaptation, modernisation and internationalisation' of arbitration. That internationalisation can be tracked through the Geneva Protocol on Arbitration Clauses of 1923, the New York Convention of 1958, the Washington Convention of 1965, the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law of 1985. Recent history has also give rise to what Betancourt has called the 'wide-spread institutionalisation of other dispute resolution mechanisms, alternative to judicial determination of disputes' — examples being the European Code of Conduct for Mediators and Directives within the European Union covering mediation, alternative dispute resolution and online dispute resolution. The Institute has responded to those developments by extending its programs to cover all forms of consensual non-judicial dispute resolution.

The relationship between arbitration and the courts has shifted significantly over the last century. Writing on that topic for the Institute of Arbitrators in 1992, I observed that in times not so far past, the arbitrator was seen in some circles as a dubious below stairs figure providing a second rate system of backyard justice and requiring close curial supervision.[5] Before 1979 in England and 1984 in Australia, the arbitrator was subject to frequent judicial lashings and had only to stumble, however innocently, to be branded with the stigma of a very broadly defined concept of 'misconduct'. Typically lapsing into extravagant metaphor, I observed that after the *Arbitration Act 1979* in England and the *Uniform Commercial Arbitration Acts* introduced into the Australian States in 1984 and 1985, the arbitrator had cast off the shackles of the stated case and rubbed off the tarnish of error on the face of the record. I noted also that Justice Foster in *QH Tours Ltd v Ship Design and Management (Aust)*[6] held that an arbitrator could declare void ab initio the contract containing the very arbitration clause from which he or she derived authority. This ability to remove the premise of his or her own appointment in my view put the arbitrator into the same league as Arnold Schwarzenegger in the first *Terminator* film. Sent back in time by robots warring with humanity to eliminate the mother of the leader of the human resistance before she could give birth, his task was to eliminate the premise upon which he was sent. I remember trying to

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5 Chief Justice French, 'Arbitration: The Courts Perspective' ((1993) *Australian Dispute Resolution Journal* 279.

6 (1991) 33 FCR 227.

explain the logical difficulties of the plot to my children at the time but they dismissed it with the same facility as did Foster J in *QH Tours Ltd*.

More recently, in upholding the validity of the provisions for the enforcement of arbitrations under Part 3 of the *International Arbitration Act 1974*, the High Court has drawn important distinctions between the exercise of judicial power and the exercise of the arbitral function.[7] The latter converts existing rights and duties, the subject of dispute, into enforceable rights and duties flowing from the award. The Court emphasised the consensual foundation of arbitration. Four of the Justices in a joint judgment quoted what the Court had said in the *CFMEU case* in 2001[8] that judicial power is a power exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment binding of its own force. An arbitrator's powers on the other hand depend on the agreement of the parties and the award is not binding of its own force. Its effect depends on the law which operates with respect to it. Another important distinction between arbitration and the judicial process was made by the former Commonwealth Attorney-General Robert McClelland, when introducing amendments to the *International Arbitration Act* in 2010. He said:

> Arbitrators need to stop thinking about themselves as common law judges without robes and start thinking of themselves as service providers. Similarly, courts need to respect this essential aspect of arbitration.[9]

Despite those distinctions, arbitration and alternative dispute resolution processes do not inhabit a private law silo. They impact on the public interest in a variety of ways. Fair and efficient dispute resolution based on an accurate appreciation of the factual and legal issues can reduce transaction costs and delays associated with commercial activity and, to that extent, benefit the public interest. Some arbitrations at the national and international level, although conducted between private parties, may have significant wider public interest

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7 *TLC Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court* (2013) 251 CLR 533 (Hayne, Crennan, Kiefel and Bell JJ).

8 *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645, 658.

9 Luke Nottage and Richard Garnett, *International Arbitration in Australia* (Federation Press, 2010) 16.

impacts. To take a simple example, a licensing dispute in relation to intellectual property may have implications for the price of goods or services supplied to consumers. Arbitration provisions inserted into consumer transactions between large scale service providers and a large number of small consumers which preclude access to the courts, where disputes arise, may attract questions about whether they are truly consensual in character and the balance of advantage and disadvantage which they create between provider and consumer. Public policy is never far away from such situations.

The Institute is no doubt well aware that it operates in a field in which public policy concerns can lead to statutory interventions from time to time. While arbitration has taken a very prominent place in global markets for goods and services, it should never be forgotten that 'all politics is local'. The Institute's accumulated experience in the 100 years of its existence would suggest that it is attuned to the various political, social and cultural environments in which arbitration and alternative dispute resolution must operate.

There is a prophecy in the Acts of the Apostles 'your young men will see visions and your old men will dream dreams'. There are in some writings about arbitration visions or dreams of a kind of transcendent autonomous future. Transcendence is a popular theme in some science fiction writing — it usually involves a sufficiently advanced intelligent species holding hands metaphorically and ascending to a higher plane of existence, shaking off earthly fetters. It is a future for the human race suggested in the writings of the Jesuit philosopher, Teilhard de Chardin, in the 1950s. Some writings about the future of arbitration imagine a state in which it transcends domestic and international legal regimes and operates within an entirely autonomous body of law. Sceptics of these Utopian dreams dismiss them as resting upon some kind of ideological distinction between the private and public sphere which is not tenable. Much as I enjoy science fiction, I am with the earth bound. It seems to me that the future of arbitration is inextricably bound up with national and international legal regimes. Of course, another centenary may prove me quite wrong. Even without the promise of transcendence, the Institute has much to look forward to in serving not only the interests of its many members, but through them the greater public interest.

Once again, I congratulate it upon its centenary. I will not be around for the next, but it is likely to be interesting.