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Retrospect and prospects of commercial ADR

Reflections on commercial dispute resolution

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Introduction

Modern means of communication and the liberalisation of international trade have transformed the world into a global marketplace. Businesses that participate in this market may opt to resolve their domestic or international commercial disputes by arbitration or mediation[2] as opposed to litigation (or adjudication). There is a growing awareness among lawyers and business people that litigation is not the only, and frequently not the best, method of resolving commercial disputes. Hence, ADR methods, which traditionally encompass all alternatives to litigation, including negotiation and conciliation, are receiving increasing recognition.[3]

This recognition of ADR as a viable alternative to litigation has manifested itself in Australia in the establishment of ADR organisations, for example LEADR, and the elaboration of ethical standards for the industry, notably by the Law Council of Australia and NADRAC. In addition, several institutions of higher education are offering courses in ADR, including the University of Technology, Sydney, Bond University, the University of Queensland, the University of Western Sydney, Latrobe University and the University of Notre Dame Australia.[4]

The popularity of ADR as a feasible alternative to litigation has been fuelled by a noticeable increase in the number of relevant publications, which undoubtedly enrich practitioners' understanding of relevant concepts and procedures. However, some of these publications may be regarded as historical relics, unable to serve today's ADR industry, especially if they were in print more than a decade ago. Hence, Maxwell J Fulton's book *Commercial Alternative Dispute Resolution*, published in 1989, probably no longer figures prominently in contemporary debates on ADR.[5] Nevertheless, this book can still assist lawyers and business people in their attempts to understand and evaluate ADR processes, especially mediation and arbitration, which Fulton compares with litigation. It is a practical guide, not only to the alternatives to litigation, but also to why those alternatives are pursued in the commercial sector.

Fulton describes arbitration and mediation as the 'main alternatives' to litigation.[6] In this context, the term 'alternative' is used loosely and superficially because any method that does not involve litigation must necessarily be an alternative to it. This article reflects on some of the key characteristics of mediation, arbitration and litigation to ascertain the extent to which Fulton's assumption that mediation and arbitration are alternatives to litigation is conceptually sound. It is useful to start this comparison with an overview of his book.

Fulton's *Commercial Alternative Dispute Resolution*

Fulton describes how delay, expense, uncertainty and stress are all common problems encountered in the litigation process. Often litigants grow to feel alienated from their own cause, lost in a system of rules they do not understand and in an

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expensive and seemingly interminable series of delays. In Chapter 6 of his text, entitled *The Effectiveness of Litigation in Resolving Disputes*, the author extensively discusses these issues. Particularly useful is his consideration of factual studies and surveys, in addition to authoritative opinion. While many would acknowledge that recovery of costs is often difficult, the statistics that in as many as 49 per cent of cases costs have not been collected after one year, and that in 37 per cent of cases costs have been written off completely, are still surprising.[7]

Some of the most interesting information comes from Fulton's own survey, which he calls the 'Top 200 Questionnaire'.[8] This questionnaire was sent by Fulton to each of the top 200 companies as identified by Ibis Business Information Pty Limited. The survey was criticised by Laurence Boulle in a review of Fulton's book[9] because it does not distinguish 'between the different "alternates", and it is not even indicated how many of the top 200 companies responded to the survey.'[10] Nevertheless, as Boulle admits, this survey is still useful as a crude indicator, capable of reinforcing conventional wisdom. The survey highlights the experience of the commercial sector with dispute resolution and reveals what business people expect from the legal system.

While Fulton's discussion of the effectiveness of litigation is informative, the principal object of his book is to educate the reader as to the various ADR methods. He includes arbitration among the ADR methods, even though it is a determinative rather than a facilitative process. Fulton's text concentrates on what he regards as the two fundamental forms of ADR: arbitration and mediation. It also offers a useful discussion of 'final-offer arbitration',[11] mini-trials and 'rent-a-judge' schemes.

In the main, the arguments put forward by Fulton in support of a greater use of ADR are compelling. He argues that, in many cases, the main risks associated with litigation, namely delay and cost, can be reduced significantly by the use of alternatives. Furthermore, less obvious benefits, such as the preservation of confidentiality and, particularly in the case of mediation, maintaining goodwill, can also be achieved through the alternative techniques. Fulton also points out that, through ADR, the disputants are able to maintain greater control over their own cause, and, in the case of successful mediation, its resolution.

Although Fulton is clearly in favour of an increased use, by legal professionals and business people, of ADR procedures, his treatment of the alternatives remains realistic. He discusses not only the potential advantages of the various ADR methods, but also their limitations. Thus, Fulton contends that 'arbitration' can become as involved as litigation, and he reminds readers that 'mediation' is, of course, only suitable where the disputants are willing to compromise. Even so, when ADR is effectively employed the benefits can be substantial.[12]

Fulton discusses 'arbitration' in Chapter 8 of his book and 'mediation' is considered in Chapter 10. He characterises mediation and arbitration as alternatives to litigation and he proceeds to discuss the differences and similarities between them.[13] However, his classification is not entirely satisfactory. While mediation as a facilitative process is undoubtedly a real alternative to litigation, arbitration may be appropriately classified as a determinative process (involving the making of *binding* decisions by arbitrators who base their decisions on law).[14] If so, arbitration replicates the basic characteristics of litigation and is largely opposed to mediation.

Hilary Astor and Christine Chinkin argue, in the first edition of their book *Dispute Resolution in Australia*, that it is 'doubtful if anything is to be achieved by adding to the debate about whether arbitration is, or is not, included within ADR.'[15] For them, this debate is an exercise in futility:

> It is the type of debate generated by attempts to define ADR by listing its key qualities. Exceptions to the listed qualities can always be found. Debates about the meaning of the descriptors can be generated. The dangers of falling into sterile pedantry are acute, whereas

> the rewards of this method of definition are not great.[16]

Although it may be true that 'this type of debate' has limited practical value, any attempt to clarify the essential characteristics of arbitration, litigation and mediation inevitably contributes to a conceptual understanding of the essential features of these methods. A review of Fulton's book offers a convenient opportunity to revisit this debate. Useful insights into the key characteristics of arbitration and mediation may be gained by a brief discussion of the perceived or real advantages and disadvantages of arbitration compared with mediation and litigation.

Advantages of arbitration and mediation compared with litigation

Fulton defines arbitration as follows:[17]

> When I refer to 'arbitration' I mean the private process whereby a private, disinterested person, called an arbitrator, chosen by the parties to a dispute (which dispute is justiciable in a court of civil jurisdiction):
>
> - acting in a judicial fashion, but without regard to legal technicalities;
> - applying either existing law or norms agreed by the parties; and
> - acting in accordance with equity, good conscience and the perceived merits of the dispute,
>
> makes an award to resolve the dispute.

Christian Bühring-Uhle rephrases this definition when he characterises arbitration as 'a private process for the binding resolution of a dispute through the decision of one or more private individuals selected by the parties to the dispute'.[18] Even a perfunctory review of these definitions reveals that arbitration, unlike mediation, is a dispute resolution process that provides for the imposition of a *binding* decision on the parties to a dispute. As such it is a determinative process that is aligned with litigation (or adjudication). But, unlike litigation, arbitration is based on the agreement of the parties.

Parties may incorporate an arbitration clause in their contract, or may submit their dispute to arbitration once it has arisen. Arbitration is a particularly useful dispute resolution process in international commercial disputes. The usefulness of arbitration stems from the fact that one of the problems with foreign litigation is that a court judgment cannot be enforced easily outside its jurisdiction. Arbitration offers an advantage compared to litigation and mediation because arbitral awards are recognised by signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention, 1958). This recognition 'makes enforcement in countries that are signatories to the convention perfunctory.'[19]

Unlike litigation, arbitration provides parties with an opportunity to resolve their dispute while maintaining confidentiality. As parties involved in an international (or domestic) commercial dispute may be reluctant to have their dispute settled in public, arbitration is a viable alternative to litigation to achieve a binding and confidential resolution to their dispute. In addition, arbitration offers parties the opportunity to have their claims settled by a neutral third party. Indeed, 'players in international commerce do not seem to have confidence in the complete neutrality of national courts towards foreign litigants and therefore have a strong desire to avoid having to stand trial in the other side's home court.'[20]

Party autonomy is also an important factor in the popularity of arbitration. In contrast to the jurisdiction of a court, an arbitrator's jurisdiction arises not only from nationally and internationally posited laws, but also from private contractual agreements. The principle of party autonomy is a cornerstone of domestic and international commerce, and parties have freedom to select the laws which will govern both their contract and any disputes arising from it.[21]

Arbitration tribunals offer several advantages compared with national courts. Typically, arbitration tribunals have only one case before them at any time and can therefore devote their full attention to the matter at hand. Tribunals also have the ability to adopt flexible and expeditious procedures. For example, parties may choose to restrict the arbitrator's powers or to allow the arbitrator to act as an *amiable compositeur*.[22] In accordance with s 38(1) of the *Arbitration Act 1996* (UK) '[t]he parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.'

This flexibility and the arbitral tribunal's ability to concentrate fully on the relevant dispute often enable speedy settlement of the dispute. The ability of parties to choose their own tribunal in the interests of neutrality, as well as the flexibility of the tribunal to hear a dispute without having to apply stringent procedures, also prevents forum shopping.

Many of the advantages that arbitration appears to have over litigation are also usually attributed to mediation.[23] These include

Unlike litigation, arbitration provides parties with an opportunity to resolve their dispute while maintaining confidentiality … In addition, arbitration offers parties the opportunity to have their claims settled by a neutral third party.

voluntariness, confidentiality, flexibility and party autonomy. Nevertheless, the differences between arbitration and mediation remain stark. In particular, mediation differs markedly from arbitration (and litigation) because mediators are basically facilitators who assist the parties in their endeavours to find a resolution to their disputes without, however, making binding decisions.[24] This view is reinforced by Fulton who states that mediators 'encourage communication, assist in the identification of areas of agreement and disagreement and work generally with the disputants to bring the parties to a resolution of their dispute but they do not impose solutions'.[25] Moreover, in mediations, the neutral facilitator, unlike an arbitrator, (1) does not have coercive authority and (2) 'aims to sow the seeds of doubt about the impregnability of each side's case and to leave each disputant with the impression that he or she is not entirely in the right.'[26] Most importantly, while arbitration focuses on a determination and resolution of past problems, 'the mediator's interest is in creating a structure for the parties' future relations.'[27]

Hence, it is not entirely capricious to consider arbitration as essentially a determinative process, which is closely aligned with litigation (or adjudication), whereas mediation is a facilitative process. Subject to the validity of this view, Fulton's characterisation of arbitration as essentially an ADR alternative to litigation is flawed, as indeed his own analysis indicates.

Disadvantages of arbitration and mediation compared with litigation

The rights of a party to appeal an arbitral award are limited. If a party is unhappy with the decision of the arbitral tribunal, it cannot take the matter further.[28] This is due to the fact that arbitration is based on the agreement of the parties and the jurisdiction of the arbitrator is derived from the arbitration agreement itself. The inability to appeal an arbitral award may prevent some parties from choosing arbitration. In general, arbitral awards can only be challenged in the court of the seat of the arbitration and the grounds are limited: lack of jurisdiction of the arbitral tribunal,[29] serious irregularity,[30] an *ultra petita* award (the arbitral panel awards more than has been asked for by the claimant), or an award contrary to public order.[31]

Contrary to popular opinion, arbitration may not necessarily be cheaper than litigation – indeed, the cost of arbitration may at times be higher. Judges are officers of the state and they exercise their jurisdiction in the interests of society. Costs in courts are usually limited to summons, listing, court fees and registration costs. Thus, while 'the public bears much of the cost of litigation, parties to arbitration do not receive a similar "free ride".'[32] However, lawyers' fees may be substantially less than in litigation, especially if the arbitration is conducted speedily.

An arbitral award does not usually bind third parties. However, parties who are not party to the original

Element	Arbitration	Conciliation/ Mediation/Negotiation
1. Enforceability of decision	YES	NO
2. Confidentiality	YES	YES
3. Neutrality of forum	YES	YES
4. Party autonomy	HIGH	VERY HIGH
5. Flexibility	HIGH	VERY HIGH
6. Speedy settlement	POSSIBLE	HIGHLY POSSIBLE
7. Settlement by experts	YES	YES
8. Binding decision	YES	NO
9. Professional costs	AS AWARDED	AT OPTION OF PARTIES

Table 1: Comparison of arbitration and other alternatives to litigation

arbitration clause may, at times, still assume the obligations deriving from the arbitration clause. For example, a holder of a bill of lading may be bound by an arbitration clause signed by the shipper and the carrier. Claims for third party intervention are only possible if all parties agree to multi-party arbitration or there is provision for joinder.

In contrast, if mediation is unsuccessful, the parties are free to pursue other alternatives, including litigation.[33] Astor and Chinkin refer to Australian and overseas research which indicates that mediation of commercial disputes offers substantial time and cost benefits when compared with arbitration or litigation.[34] Again, this indicates that mediation and arbitration are very different methods of dispute resolution. While possessing characteristics which distinguish them from litigation, they can hardly be lumped together under the banner of ADR, as Fulton attempts to do in his book.

A brief diagrammatic comparison of arbitration and other alternatives to litigation

The above analysis indicates that arbitration, unlike mediation, should not necessarily be regarded as a 'true' alternative to litigation (or adjudication). However, it is necessary in this context to be mindful of the possibility that any attempt at classifying dispute resolution methods may result in 'sterile pedantry'.[35] This danger is increased by the fact that arbitration, mediation and litigation are important, but not the only, dispute resolution methods in existence. In fact, there exists a rich tapestry of methods. Undoubtedly, an exhaustive review of these methods would contribute to conceptual clarifications, especially with regard to their basic characteristics or 'key qualities'. However, such a review is beyond the scope of this article. Nevertheless, it may be useful to provide a diagrammatic overview of arbitration compared with other processes, which from a conceptual point of view are alternatives to litigation. Table 1 above conveniently compares these forms of dispute resolution with regard to *some* key elements.

On balance, arbitration may be an attractive alternative to mediation, especially in cases where the parties seek a *binding* resolution of their dispute.

Conclusion

Although Fulton's book was published in 1989, it remains a valuable text because it succinctly reviews the already voluminous literature on ADR that existed until the time of its publication. In the intervening 15 years, numerous books and articles on ADR have been published and Fulton's analysis is no longer entirely novel. However, his book undoubtedly remains a useful companion for those involved in the development of alternatives to litigation. In particular, business people will benefit from a reading of this book because it is likely to facilitate their understanding of ADR.

The ultimate usefulness of 'dated' books on ADR may be measured by their ability to alert practising lawyers to the fact that making every possible legal point and the advancing every possible argument – characteristics usually associated with litigation and adjudication – are not necessarily in the best interests of their clients. ADR methods, especially mediation, when properly and expeditiously employed, may benefit a lawyer's clients commercially. The growing role of mediation in legal practice indicates that more and more lawyers and business people are keen to consider all the possible choices open to their clients. ●

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Endnotes

1. I acknowledge the encouragement received from Margaret Halsmith in the writing of this article.

2. Boulle L, *Mediation: Principles, Process, Practice*, Butterworths, Sydney, 1996, p 3: 'A decision making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision making and to assist the parties reach an outcome to which each of them can assent'.

3. Gerald Williams describes negotiation as the 'principal occupation of the lawyer': *Legal Negotiation and Settlement*, West Publishing Company, St Paul, 1983, p 1. On conciliation, see Lauchland K, 'ADR – A litigator's lament' (October 1990) *Queensland Law Society Journal* 373 at 376.

4. For information on the development of mediator credentials, see Boulle L, *Mediation – Skills and Techniques*, Butterworths, Sydney, 2001, pp 274-6.

5. Fulton M J *Commercial Alternative Dispute Resolution*, Law Book Company Limited, Sydney, 1989, pp 156 and xvii.

6. Above note 5, p 53.

7. Above note 5, p 44.

8. Above note 5, p 19.

9. (1990) 2 *Bond Law Review* 122.

10. Above note 9, p 122.

11. Fulton explains: 'Under this form of arbitration each party submits a final offer for settlement to a neutral adviser who is empowered to choose only one final offer or the other in accordance with (presumably) what he or she considers to be fair. No other set of outcomes is available to the arbitrator, he or she is not permitted to split the difference or to indulge in any other form of compromise': above note 5, p 70.

12. Above note 5, pp 88-89.

13. Above note 5, p 53.

14. Astor H and Chinkin C *Dispute Resolution in Australia* (2nd edn), LexisNexis Butterworths Australia, 2002, pp 89-90.

15. Astor H and Chinkin C *Dispute Resolution in Australia*, Butterworths, Sydney, 1992, p 68.

16. Above note 15, p 68.

17. Above note 5, p 55.

18. Bühring-Uhle C, *Arbitration and Mediation in International Business*, Kluwer International, The Hague, 1996, p 39.

19. Shaffer R, Earle B and Agusti F

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International Business Law and Its Environment, West Publishing Company, St Paul, 1990, p 231.

20. Above note 18, p 142.

21. *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; *Naviera Amazinica Peruana SA v Compania Internacional de Seguros Del Peru* [1988] 1 Lloyd's Rep 116.

22. See, for example, art 29(3) International Arbitration Rules, American Arbitration Association, which stipulates that '[t]he tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorised it to do so.'

23. Above note 14, pp 135-73.

24. Above note 4, p 1.

25. Above note 5, p 78. There are possibly as many definitions of 'mediation' as there are mediators. A useful definition is offered by Folberg J and Taylor A who define mediation 'as the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs': *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, Jossey-Bass, San Francisco, 1984, p 7.

26. Above note 5, p 79.

27. Above note 5, p 79.

28. Most arbitration rules stipulate that the award is final. See, for example, art 24 Rules of Arbitration of the International Chamber of Commerce; art 32.2, UNCITRAL Arbitration Rules.

29. See *Arbitration Act 1996* (UK) s 67.

30. *Arbitration Act 1996* (UK) s 68.

31. See Kolkey D M 'Attacking arbitral awards: Rights of appeal and review in international arbitrations' (1988) 22 *The International Lawyer* 693-715.

32. Murray J S, Rau A S, Sherman E F, *Processes of Dispute Resolution: The Role of Lawyers* (2nd edn, 1996), The Foundation Press, Inc, Westbury, New York, pp v-2.

33. Mediated agreements may be made binding by a court by agreement with the parties.

34. Above note 14, pp 52-61.

35. Above note 15, p 68.