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CHAPTER 12

THE COMMERCIAL WAY TO JUSTICE

International Commercial Arbitration, the chosen basis of the annual Willem Vis Moot, is arguably not *au fond* a process at law. It is quite simply the performance of an agreement between two parties to have a chosen third party hear and determine some difference between them.

In an ideal world, this discussion would stop there. Often, it does. There is a long history of commercial men taking disputes to the doyen of the appropriate trade and asking him¹ to make the decision they cannot agree upon. They could either agree to abide by and act upon that decision, or they could agree that it would be an advisory decision to guide them in the subsequent conduct of their mutual affairs. The agreement to a binding decision was known in England as an Arbitration Bond of which more later.

For a jurist, the concept of arbitration, and that of adjudication for that matter, has always seemed an anomaly. For judgement in a disputed matter to be delivered by someone who has no intrinsic authority, being neither a Judge nor any other officer of the State, seems to be contrary to principle: a kind of anarchy.

Moreover, one salient consequential difficulty cannot be avoided. If decisions, formal judgements upon disputed issues, are to be handed down by persons having neither authority nor qualification, other than that the disputing parties

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¹ It was almost always *him*, although there was a famous example in which a wife of the Holy Prophet Mohammed^(pbuh) decided a dispute between two warring tribes.

have made a choice, those decisions cannot be of any use to the world at large. Those decisions may be useful to the disputing parties; they cannot stand as precedent because they have no place in the structure of public jurisprudence.

That said, there is developing a practice of citing arbitral decisions in argument, as if they were authorities. In part, that is assisted by the practice of printing arbitral awards from the International Chamber of Commerce (ICC).² There is some logical, but not legal, basis in the practice: The decisions of one wise man or group of wise men, in one matter may have a degree of persuasive authority in another, even if there is no relation between the two matters. However, circumstances alter cases and any link between one arbitration and another should be approached with care. Certainly, in a Law examination, citing an arbitral decision as authority is likely to lose marks!

An arbitration can often look like a proceeding in Court. There is one person or a panel of three (or rarely more) hearing more or less formal submissions, evidence and argument. Witnesses are presented and questioned sometimes by advocates, sometimes by the tribunal aided by the advocates. In some jurisdictions evidence may be given on oath. Written submissions are usually provided to outline each party's case and it has become customary to call these 'pleadings'. Although in historical time traders and experts used to act both as arbitrators and as the representatives of the parties, lawyers have come to dominate in both roles. In some specialised markets the tradition of the judgement of one's peers still holds sway, but most ordinary commercial arbitration is now conducted according to a simulacrum of the Court procedure of the State.

But arbitration, with adjudication, mediation and other private means of dealing with differences, is a form of Alternative Dispute Resolution (ADR). If that is right, then it ought to be a genuine alternative, not a poor imitation of the Court with less formal dress.

To understand better what an alternative might be and how best to approach the study of ADR as a means of achieving the satisfactory resolution of disputes, this paper sets out to analyse the intentions, or rather the presumed intentions, of the Parties who agree to arbitrate and choose the person or persons to assist them.

² It should be noted that the ICC itself is at best quasi governmental and the *soi-disant* Court consists of persons appointed by national associations rather than by governments. Decisions are not made by the Court but by individual Tribunals selected by the Parties or on their behalf by the Court *acting administratively*.

The suggestion is that such an approach will facilitate more appropriate conduct of arbitral and allied proceedings.

Any attempt at analysis should start with a definition. In recent years there have been definitions of a kind in various jurisdictions but, in the English language, the definitive statement of the meaning of Arbitration is to be found in the Oxford English Dictionary (OED).³ It is often said that *adjudication* is necessarily different from the judicial approach whereas *arbitration* is bound by it. The plain English meanings of the two words convey the reverse impression, and a look at the historical references in the Dictionary online will enable the reader to appreciate the distinction, such as it is.

This account will return to Adjudication later. The Willem Vis Moot is concerned with International Arbitration and it is to Arbitration that we shall turn first. The definition of Arbitration which the writer proposes to use is the second meaning, which is the one practitioners will recognise: ‘The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision’. For completeness one should read that definition in conjunction with the definition of an arbitration bond originally from Blackstone in 1768: ‘Arbitration-bond: a bond entered into by two or more parties to abide by the decision of an arbitrator’.

If there is one single word that must determine the way in which arbitration requires to be conducted at the hearing, if there is to be a hearing, and during all the preliminary and subsequent elements of the process, it is the word ‘equitable’. It is that word that the writer invites the reader to consider.

One must be careful; nothing in the plain language definition we have been examining suggests that ‘equitable’ is to be treated as a legal term of art.⁴ The right place to seek a meaning is an ordinary dictionary. The OED gives ‘that is in accordance with equity; fair, just, reasonable’. Those words are not legal terms of art. Fair, just and reasonable are terms which the man in the street can recognise.

From the plain language, arbitration has to be fair; the parties have agreed that it shall be fair. Fairness, it is suggested, has a number of essential requirements

³ Entries from the *Oxford English Dictionary* online edition accessed Friday, 19 March 2010 <http://dictionary.oed.com/cgi/entry/50011315> (‘Arbitration’).

⁴ By legal term of art is meant a term which is used with a special meaning in a Court of Law.

which must be met, and which have become a fundamental part of arbitral procedure; where States have enacted laws of arbitration they will, in general, have incorporated these essential requirements, but it would be a mistake to think that these laws have created the requirements.

The first requirement is that there must be a difference between the parties. The definitions refer to claims but clearly that does not only mean claims for money (although the vast majority of claims are for money); a party may seek a declaration that he may or may not adopt a line of action or that a certain matter is thus and so.

Often there has been dispute as to whether or not there has been a *bona fide* difference between the parties; the simplest characterisation being by a respondent who says ‘I have not yet replied to or commented upon the claimant’s claim, therefore there is no dispute and no office, no role, for an arbitrator’. In legal terms, the respondent pleads that there is no arbitral jurisdiction. The argument is clearly specious. Failure to reply in a reasonable time is a de facto denial of a claim. Provided the appropriate steps have been taken, there is no logical objection to an arbitrator deciding whether or not there is a difference between the parties.

Defining those appropriate steps is not straightforward, which is why various provisions exist in most, if not all jurisdictions to facilitate unilateral action where a party is recalcitrant. However, we shall examine the logical justification of such provisions.

The definition of arbitration states that ‘the conflicting parties agree to refer their claims *in order to obtain an equitable decision*. Seemingly, the use of “in order to” implies a purpose, intent, on the part of *both*⁵ parties. It must be a common intent, because they both have agreed it.

⁵ *Both*: It is perfectly possible for more than two parties to agree to arbitrate their differences. That may be part of a wider agreement, such as a joint venture agreement, or it may be a looser arrangement. An agreement might be made post facto, e.g. where a tort has been alleged. In this article, the debate will concentrate upon arbitration between two parties.

However, fairness demands that the parties have an equal right to participate in choosing their arbitrator.⁶ To give practical effect to the agreed intention, that must mean that they should have equal opportunities to take part in the appointment. The claimant may invite the respondent to nominate an arbitrator or may nominate a person himself giving the respondent an adequate opportunity to research the nominee and object. In theory, the next step, absent any representation from the respondent, is for the claimant to appoint the nominee on behalf of both parties, after having made clear his intention to do so.

In practice, the Court, in most jurisdictions,^{7, 8} can add further legitimacy to this process by considering an application by the claimant and either appointing the claimant's nominee or appointing another instead.

There is another way of providing for an arbitrator when one or other party is in default, not cooperating with the arrangements for appointment. The arbitration agreement itself can include the necessary steps for appointment in default or, more probably, the agreement may incorporate a set of rules, either the United Nations Commission on International Trade Law (UNCITRAL) Rules⁹ or a set of institutional rules, such those of the Court of Arbitration of the International Chamber of Commerce (ICC), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), or the London Court of International Arbitration (LCIA).¹⁰

The argument is that, if properly prepared, the process can be conducted wholly outwith the Judicial system of the State.

⁶ *Or arbitrators*: International tribunals in particular are often made of three people; each party appointing one and the third being chosen by the other two. In ICC practice, the norm is for the third arbitrator to be of a nationality different from that of the other two.

⁷ See, for example, in England and Wales the Arbitration Act 1996, s. 17.

⁸ In Malaysia, the Arbitration Act 2005 grants this power to the Director of the Kuala Lumpur Regional Centre for Arbitration.

⁹ The UNCITRAL Arbitration Rules, 1976. They are intended for use in *ad hoc* arbitrations, i.e. arbitrations which are not administered by a standing body, such as the ICC etc. However, there is a facility for the nomination of an appointing authority to carry out various administrative functions. These functions include the determination of challenges to arbitrators, which may be difficult for such as technical institutions, who see the task of an appointing authority to be limited to providing nominations. The UNCITRAL Arbitration Rules 2010 came into effect on 15 August 2010.

¹⁰ Note that the word 'Court' is misleading whether intentional or not. These organisations are non-governmental and often privately owned. Ironically, only the KLRCA of the three listed has been granted an authority akin to that of a real Court in that the Director has default powers of appointment.

For many years it could be said that Arbitration Law was not the Law of the process itself but the Law of Court intervention in arbitration. Laws such as the Arbitration (Scotland) Act 2010, however, blur the distinction by themselves incorporating sets of Rules for Arbitration.

In considering in detail the way in which arbitration might be initiated in the absence of the other party this article seeks to show that an agreement to arbitrate operates as a contractual agreement and it is as such and only as such that it has effect.

In looking at the practical requirements which the arbitration agreement implies it may be wise to consider them from the point of view of a reasonable man.¹¹ For example: would a reasonable man expect an arbitrator, chosen to give a fair and equitable decision, to have an undeclared interest in the outcome? The answer as a matter of common sense is ‘No’; there is a maxim, the origins of which are lost in the mists of time,¹² *nemo iudex in causa sua debet esse* (‘no-one should be judge in his own cause’). It is sometimes shortened by lawyers to omit the words ‘should be’ but that misses the point. The maxim is not imperative; there is nothing objectionable in an arbitrator who has connections with one or other party, provided that the connection is not such as would impair his judgement. In practice, a candidate will err on the side of caution and declare every possible link with any party.

As it happens, that is one of the two Rules of Natural Justice. The other, often quoted, is *audi alteram partem* (‘hear the other side’); an imperative this time, but an unworkable one. Taken literally it would preclude any progress in the face of a recalcitrant party. What is a practical, logical and, it is submitted, a fair and just way to apply it is to give both parties equal and adequate opportunities to present their cases.

¹¹ See M. Moran, *Rethinking the Reasonable Person* (Oxford: University Press, 2003).

¹² It was certainly current in Roman times. Other forms are:

nemo iudex idoneus in propria causa est
nemo iudex in parte sua
nemo debet esse iudex in propria causa
in propria causa nemo iudex

Coke used the form *aliquis non debet esse iudex in propria causa quia non potest esse iudex at pars* (Co.Litt. 1418), that is, ‘no man ought to be a judge in his own case, because he cannot act as Judge and at the same time be a party’.

If there is a recalcitrant party, common sense dictates that he should be given notice of every step taken by the arbitrator or arbitrators and should be given copies of any submissions or written evidence from his opponent. It would be prudent if any notice complied with the requirements for notice in the course of legal proceedings in the jurisdiction of the domicile of the recalcitrant party.

These same requirements inform other aspects of ADR; indeed the second principle probably should inform every aspect of life including family life. In particular, Dispute Adjudication, about which there has been much discussion in recent years, follows Arbitration closely while remaining markedly informal in method.

A difficulty in any discussion of Adjudication is the fact that it exists in different forms. One form is found in *ad hoc* contracts, construction contracts for example. In some contracts the Adjudication remains in force unless and until superseded by litigation or arbitration. The purpose is to achieve an interim decision in the course of the contract. In other contracts the Adjudication can be final or may become final if not challenged within what is usually a restricted period.

In several jurisdictions, the United Kingdom¹³ for example, legislation provides for an Adjudication clause to be deemed to be incorporated by law into specified classes of contract. The present analysis will concentrate on the necessary implications of an agreement to adjudicate. This article is, after all, on *The Commercial Way to Justice*.

The dictionary definition of adjudicating is either 1 *an adjudging or awarding*, a meaning which is said by the OED to be obsolete, or 2 *a sitting in judgment, or pronouncing sentence, upon a claim*, which more closely describes the practice.

We are not discussing adjudication in the sense of the decision of a Judge, a servant of the State; more than a servant, the Judge embodies the power of the State. The Judge's role is a different matter altogether, although both the State process and the private processes are intended to lead to a fair outcome. Essentially, what we are discussing is Adjudication by agreement.

¹³ (*Sic*). The relevant legislation, the Housing Grants Construction and Regeneration Act 1996 is an act applicable to the whole of the United Kingdom, unlike the Arbitration Act 1996, which applies to England and Wales and also to Northern Ireland. The application of the Arbitration (Scotland) Act 2010 is perhaps self explanatory.

An agreement to determine a difference by adjudication necessarily depends upon the existence of a difference. It may be an immediately existing difference; it may be a difference arising in the future. The agreement is between two or more parties that the difference will be put to a third party, an *adjudicator* who may be one person or a group of people, for their decision.

The adjudicator may be any person the parties may choose, whether directly or through the agency of an appointer. At the risk of repetition the appointer, in turn, may be any person whether a natural person or corporate body, whom the parties may choose, either directly or in some standard form of contract. These choices are in principle unrestrained; legislation however, may impose certain restrictions. The British example¹⁴ provides for a statutory scheme to be imposed if the parties to some kinds of contract¹⁵ do not include provisions for adjudication meeting certain basic requirements.

The provisions of the British Act are worth some discussion, not least because they have been followed, more or less, by several Commonwealth countries. The words in the Act are:

Adjudication

108 Right to refer disputes to adjudication

- (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
For this purpose 'dispute' includes any difference.
- (2) The contract shall:
 - (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
 - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
 - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

¹⁴ See note 13 *supra*.

¹⁵ Principally construction contracts.

- (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
 - (e) impose a duty on the adjudicator to act impartially; and
 - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
- (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
- (4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
- (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.
- (6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.
For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

The quoted section is just one of a complex piece of legislation. It is associated with arrangements for payment in construction contracts.¹⁶ It deals with the principle '(2) The contract shall ... (e) impose a duty on the adjudicator to act impartially; and (f) enable the adjudicator to take the initiative in ascertaining the facts and the law' and the practice '(2) the contract shall ... (b) provide a timetable ... (c) require the adjudicator to reach a decision within 28 days ... (d) allow the adjudicator to extend the period of 28 days.'

On the face of it, where parties invoke the provision of sub-section 3 that 'the parties may agree to accept the decision of the adjudicator as finally determining

¹⁶ For the purposes of this legislation the words 'construction contracts' include service and professional contracts.

the dispute' the outcome would seem to be indistinguishable from an arbitration award.

Is a decision by an adjudicator to be regarded as identical with an arbitral award? Most lawyers would say it was not, but an application of inductive reasoning suggests that the question deserves further consideration.¹⁷ Different jurisdictions view arbitration through the lenses of their own legislation, but in an international context the tests are set out in the New York Convention (NYC).¹⁸

The important features of the NYC in the immediate context are to be found in Articles II and V. Article II¹⁹ requires States to recognise agreements in writing and broadens the definition to include signed agreements and agreement 'in an exchange of letters or telegrams *whether signed or not*' (author's addition). Article V²⁰ lists the reasons which may be invoked to refuse enforcement. The

¹⁷ 'If it looks like a duck, walks like a duck, and quacks like a duck, it's probably a duck'; Senator Joseph McCarthy, in a 1952 speech, suggesting a method for identifying communists and communist sympathizers. Indiana poet James Whitcomb Riley (1849–1916) may have coined the phrase when he wrote: 'When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck'. Also attributed to Richard Cardinal Cushing (1895–1970).

¹⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

¹⁹ Article II:

(1) Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

(3) The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

²⁰ Article V:

(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

overturning of an arbitral award is a matter for the Court at the seat²¹ and is therefore a matter for the law of arbitration at the seat.

Now an agreement to adjudication is likely to be in writing. If the adjudicator conducts him or herself judiciously, he or she will conform to Article V, whether consciously or not. The adjudicator will satisfy him or herself that the parties had the necessary legal capacity to make the agreement (V.1a), that his or her appointment was as agreed or in accordance with the appropriate law (V.1d), that proper notice was given and the parties had adequate opportunity to put their cases (V.1b). The decision will deal only with the matters referred to the adjudicator (V.1c).

A lot is said about arbitral procedure, rather less about adjudication procedure and still less about procedures for expert determination, the third method by

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

²¹ By seat is meant the juridical seat, which may or may not be the principal place of the proceedings but will usually be the place where the award is deemed to be signed. To attract the benefit of the NYC, an award must have a 'home' because of the words in Article I.1 that apply the Convention to 'awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'.

which a dispute *inter partes* may be determined by a third person of their choice. Of Expert determination it is relevant to note that a prudent expert would do well to observe the criteria of the preceding paragraph when carrying out the task.

Digressing briefly to review what the author suggests would be best practice for determinative expertise, it would certainly allow either for a simple tripartite agreement or for one agreement between the parties and another between the parties and the expert. The expert would satisfy himself or herself that, at least *prima facie*, his or her agreement was with parties who had the necessary authority, not least because that would establish a right to be paid. Similarly, the expert would seek to ascertain that the appointment was legal, although that is often self evident.

The application of the rules of Natural Justice, *nemo iudex in causa sua debet esse* and *audi alteram partem* is a more contentious question, particularly when the expert's task is to be principally or entirely one of inspection and opinion. The expert may be one of very few persons with the necessary knowledge and/or experience and who necessarily would have connections with one or other party.

It is probably true that, absent relevant national legislation,²² an expert may be someone with connections to one of the disputing parties. In such a case, the knowledge and consent of the other party or parties is important if the expert opinion or decision is not to be vitiated as fraudulently obtained.

As to the second limb, the second principle, it is suggested that an expert would be wise either to hear what each party has to say or to insist that no representations are to be made. The importance of ensuring that a party's representations are made in the presence of the other is less intuitively obvious. What is intuitively obvious, it is suggested, is that the expert would be unwise to act upon information given by one party in secret and on which the other has never had an opportunity to comment.

²² The writer knows of none.

The expert's expressed opinion or decision will, in general, be a finding of fact.²³ Whether or not the parties are to accept it, and how they are to act upon it, is a matter for the agreement between them, no concern of the expert.²⁴

That is a feature of ADR which is often forgotten: the fact that the neutral, expert, adjudicator, and arbitrator or, for that matter, mediator has no interest in what happens after his or her task is at an end. That is a generalisation, the agreement by which any of those persons are put in place or the relevant legislation may provide for amendment or interpretation. While in post, of course, the neutral should be interested in the future effect of his or her undertaking; once complete, however, the task is over. In arbitration law and practice, the term *functus officio* is used; the principle applies to all tasks of the kind. The office dies when the appointing agreement has served its purpose.

The position is different with a decision of the Court. To disobey the Court will often itself be an offence, to be dealt with according to the criminal law. Non-compliance with the decision of an arbitrator, adjudicator or expert, even with a mediated agreement, is a matter to be dealt with as a breach of contract, a matter of civil law. The existence of special legislation, especially as in the case of arbitration, providing for expedited enforcement, does not alter the underlying fact that it is always the result of a contract between the parties.

The description 'expedited enforcement' does, perhaps, call for explanation. What is meant is that Courts will enforce an agreement to abide by a decision, provided that it can be proved (a) that the decision is made according to the agreement, and (b) that the decision is one that is permissible in that jurisdiction.

Depending upon the national jurisdiction, the necessary proof will have to be established in an action; the person who made the decision may have to give evidence. If the decision is contested, there may be a trial more or less *ab initio*. In any event, the enforcement of what may be called an innominate decision making process is likely to be a complex matter. Legislation for arbitration (and for adjudication in some jurisdictions) provides for a kind of presumption in favour of enforcement; enabling it to be expedited within the legal system.

²³ Although the expert may be asked to determine a matter of law, his determination, once made, will become a matter of fact for the disputing parties.

²⁴ So the parties may act directly upon the expert opinion or they may choose to negotiate, with a view to agreeing a course of action, in the knowledge of the opinion given.

The purpose of this paper has been in part to argue that best practice in contractual adjudication and expertise has, at least in philosophical theory, close similarities with arbitration. Arguably the distinctions, such as they are, are suggested to be differences of procedural detail.

Earlier in the paper, it was suggested that the differences between parties that fall to be determined, whether in arbitration or by any other means, are in the main differences of fact. That is not surprising, because ADR is concerned with contentious issues that are justiciable²⁵ *inter partes*. They may be, and are most often, issues arising in connection with some contract between disputing parties. Even when there is an issue of law, it will generally be of immediate relevance to the factual effects of interpretation.

Less frequently, they may arise in connection with some other relationship, as in the example of a dispute between neighbours. Typically a dispute as to a tort such as negligence is amenable to ADR, although there may be a question as to who is one's neighbour.²⁶ Because ADR is voluntary, however, an agreement²⁷ must be made for it to take place.

²⁵ '*Jus-ti-ci-a-ble* adj. 1. *Appropriate for or subject to court trial: a justiciable charge.* 2. *That can be settled by law or a court of law: justiciable disputes.* Middle English, from Old French, from Medieval Latin *iustitiabilis*, from Medieval Latin *iustitiare*, to try, from Latin *iustitia*, justice' (The American Heritage® Dictionary of the English Language, Fourth Edition 2000 updated in 2009. Houghton Mifflin Company).

The word is used loosely here to include trial (in the sense of testing and determination) by individuals or small groups as voluntary private tribunals.

²⁶ See, for example the Scottish case of *M'Alister (or Donoghue) (Pauper) v. Stevenson* [1932] AC 562, 1932 SC 31, [1932] All ER Rep 1, Per Lord Atkin (26 May 1932):

The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.

The case is sometimes known as 'The snail in the ginger beer bottle' although it was what in Scottish Law is known as a debate on a point of law and whether there was in fact a snail in Mrs Donoghue's drink was never established.

²⁷ The agreement may be indirect, as for example when both parties are members of a society. Agreements may be deemed to exist by statute, in which case the resulting process becomes a public/private hybrid with morality supplemented by the provisions of the statute.

To develop one's understanding of ADR and in particular some idiosyncratic implications of the New York Convention it is necessary to be clear about the distinction between Law and Justice. Law is the creation of the Nation States and although the general principles are shared, details and their interpretation may vary from State to State.²⁸

Now, in most jurisdictions, there exists a right to make almost any agreement, provided it is not for a specifically illegal purpose. That right should be distinguished from the right to enforce that agreement at law, which may be restricted as a matter of policy. In the United Kingdom for example, as in a great many States, gambling *per se* is not an offence but there exists no right to recover a gambling debt²⁹ at law.

Nevertheless, there exists a regulatory institution, the Jockey Club, which administers a form of arbitration to deal with matters of Horse Racing discipline, including gambling debts, whereby a 'welsher'³⁰ may be 'warned off'.³¹ It is a powerful body; warning off may prevent a bookmaker or professional backer from making his livelihood, an extreme sanction.

The point is that the award of an arbitral tribunal (or other ADR actor) is an entity. Even if overturned it remains in existence. It has a life of its own.

Now, bearing that in mind, consider the position under the NYC Article V.1:

Recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has . . . been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made (author's emphasis).

²⁸ In this context, Federal States, such as the United States of America, incorporate States having disparate laws, in turn differing from the overall Federal law (now is not the time to explore differences between Circuits). Other groupings, such as the United Kingdom, may be divided into legal districts (Scotland, Northern Ireland) with their own laws while remaining subject to national laws.

²⁹ A gambling debt should be distinguished from a loan for the purpose of gambling.

³⁰ Someone who does not meet his debts.

³¹ Forbidden access to racecourses under the Club's control.

The wording of the article has been much discussed but its plain meaning is essentially logical. Firstly, the burden of proof is upon the losing party. Secondly, and this has been more contentious, the right of the sovereign State where enforcement is sought to form its own view is enshrined in the word ‘may’ which is permissive, rather than the word ‘shall’ which would be imperative.

Notionally, one might suggest that the Court in Country A, the seat of the arbitration, could tear up the written version of the award for it to be gathered up by the winner, pasted together and taken to the Court in Country B for enforcement. Indeed, that is precisely what has happened in a number of cases, including *Chromalloy*³² and *Hilmarton*.³³

But if one follows the argument that an award is simply the creation of the arbitral tribunal and the joint property of the parties, that is not what has happened. Nothing has been torn up. Clearly the Court of Country A has done something, and that something has all the force of the State behind it. The key, however, lies in the nature of a Sovereign state, which has defined territorial limits.

The traditional way to express this concept is to say that Country A’s writ does not run beyond its borders.³⁴ The justification for this is that the ultimate power

³² District Court for the District of Columbia back in *Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. and Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C., 1996). Chromalloy obtained an award in Egypt that was subsequently nullified by the Egyptian Court of Appeal. On the petition of Chromalloy to confirm the award despite the ruling of the Egyptian Court of Appeal, the District Court held that the award should be confirmed because to do otherwise would be to ‘violate’ the United States’ ‘public policy in favour of final and binding arbitration of commercial disputes’.

³³ In *Hilmarton*, there were two arbitrations. The topic was commission payment in Algeria. The applicable law was eventually found to be Swiss. An arbitration was held under Swiss law and later set aside by the Federal Court. In France the Cour de Cassation found that because the award once issued had become part of the international legal order, independent of any particular national system, any decision by a national court annulling the award only extinguished the award within that national system, even if the nationality of the court was that of the seat of arbitration. The award continued therefore to exist and could still be enforced in France. *Soci t  Hilmarton Ltd v. Soci t  OTV* (Cour de cassation, 23 March 1994), Rev. Arb. 1994, p. 327; JDI 1994, p. 701; YB Comm Arb, Vol XX (1995) 663.

Another arbitration was held in Switzerland however and the award of this arbitration was enforced in England. *Omnium de Traitement et de Valorisation AA v. Hilmarton Ltd*, High Court Queen’s Bench Division, 24 May 1999 [1999] 2 All E.R. (Comm) 146.

³⁴ Although, for criminal matters, some nations claim an extra-territorial jurisdiction. This does not generally extend to commercial issues and the debate is too complex to include here.

of enforcement is vested in the physical ability of the State, whether it be with armed force or merely by coercion or seizure of goods. For Country A to use its armed force on the territory of Country B is impermissible; tantamount to an act of war.

Accordingly, when the Court of Country A overrules, sets aside or vacates a purported arbitral decision, it does so for the territory of Country A. It does not do so for Country B, although its findings will be highly persuasive and, to use the key word of Article V of the New York Convention, *may* be followed.

The NYC is remarkable for its simplicity. It doesn't attempt to define Arbitration unless it be by reference to what it is not. It is limited to Arbitration which follows an agreement in writing, accepting that there may be Arbitration following an oral agreement, to which the NYC will not apply. That is not to say that a Court would not enforce the decision, only that it may apply its own standards of proof.

If one considers now a process agreed by the parties, carried out even-handedly and judiciously, with the parties allowed to state their positions and present evidence in one another's presence so that a final decision can be made, the question that remains is one of whether it is Arbitration by any other name.

Clearly, where the word 'Arbitration' is used in the agreement between the parties, whether it be incorporated in a contract for some goods or services or an ad hoc agreement to resolve a dispute, a Court will accept that it is an Arbitration agreement.

Similarly, where the words 'Adjudication' or 'Expertise' are used, the presumption will be that the Parties intend those processes to be engaged.

While that seems straightforward, it is suggested that there exists a continuum of processes, a spectrum of dispute resolution techniques in which the inherent flexibility of those processes implies that they may overlap and may sometimes be treated in the same legal way. This proposition, that rather than clearly defined distinct processes there is a spectrum of techniques available for the resolution of

disputes was developed in papers of Tom L Beauchamp³⁵ and Ernan McMullin³⁶ in the 1980s.

In practice, only where the Award or decision is contested will the local Courts require to examine the process and whether it is an Arbitration or something else. By local Court is meant the Court in which the contest takes place: it may be in the place where the award is made; it may be in the intended place of execution, usually where lie some assets of the loser.

In the country which is the seat of the process, whatever that process may be³⁷ the law of the land will prevail. As this article has pointed out, that means that the law of the land, the law of the seat, will prevail within that country's boundaries.³⁸ Outside those boundaries, in another country, if the process is seen to be Arbitration and especially if it has been unequivocally stated to be Arbitration, the NYC will ensure enforcement³⁹ where it has been adopted.⁴⁰

In other places, where the NYC has not been adopted, an Award may none the less be recognised, either directly, or through an action to prove and enforce the arbitration agreement. The outcome of other processes may also be recognised if it can be proven in an action that whatever the parties contracted for has been done and done according to their agreement.

The issues in commercial arbitration are usually matters of fact. In the Willem Vis Moot a factual matrix, which remains untested, is the foundation for a number of legal and quasi-legal issues (usually three or four of consequence,

³⁵ T.L. Beauchamp, *Ethical Theory and the Problem of Closure*, in *Scientific Controversies: Case studies in the resolution and closure of dispute in science and technology*, edited by H.T. Engelhardt Jr & A.L. Caplan (Cambridge: University Press, 1987, rep. 1989).

³⁶ E. McMullin, *Scientific Controversy and its Termination*, in *ibid*.

³⁷ I.e. Arbitration, Adjudication, Expertise or any ADR process however defined. There is likely to be legislation for Arbitration sometimes, but not always, distinguishing between international and domestic matters. Some provide for Adjudication in regulated industries; some have legislation to regulate Mediation, especially in regard to confidentiality. The writer could take another article to expand on this footnote alone.

³⁸ And, of course, within its Embassies, on its sovereign military bases and aboard its ships. No attempt will be made here to deal with places which are alleged to be subject to the laws of neither the guest nor the host nation. The matter is not within the present scope.

³⁹ Subject to the limited objections of Article V.

⁴⁰ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. This page is updated whenever the UNCITRAL Secretariat is informed of changes in status of the Convention.

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including a jurisdiction issue with little chance of success). In this crucible of legal training (there are few if any *commerçants* or technicians except occasionally among the volunteer arbitrators) the Vienna Convention on the International Sale of Goods is studied in depth, because that is the principal *raison d'être* of the Moot which has been so superbly led by Professor Eric Bergsten through the years, first in Vienna and now also in Hong Kong.

Liber Amicorum Eric Bergsten