

## The Court System and ADR Procedures

Sir Laurence Street\*

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*In this paper, which was delivered in Adelaide as the FS Dethridge Memorial Address of 1989, Sir Laurence surveys the range of ADR dispute resolution procedures and places them in the context of dispute resolution by judicial decision.*

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It is my purpose in this address to correlate the functions of the court system and ADR procedures in the resolution of disputes. In so doing I am, I believe, fulfilling the expectation of the distinguished maritime lawyer, whose memory we honour, that this Association should provide a wide-ranging opportunity for discussion on topics relating to the regulation of maritime commerce. The late Frank Dethridge, the founding President of this Association, was learned in the substance and practice of maritime law. Were he with us today we could be confident that he would share in the upsurge of interest in the dispute resolving mechanisms of the Common Law countries. I accordingly offer this address as a tribute to his leadership in his chosen field. In so doing I should say that I am aware of the distinguished lawyers who have in earlier years been invited to deliver this memorial address. Their names make up an honour roll in their own right and I am conscious of the compliment paid to me in entrusting me with this distinction this year.

The topic I have selected — the co-relation between the functions of the court system and ADR procedures in the resolution of disputes — will provide a context for the subject of this afternoon's business session — "What Price Arbitration?" I approach this topic by drawing an initial distinction between the mechanisms for resolving domestic disputes, that is to say disputes between fellow subjects of our nation, and international commercial disputes, that is to say disputes the parties to which include one or more subjects of a foreign nation'. I

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\* AC, KCMG, Lieutenant-Governor of New South Wales 1974-; Chief Justice of New South Wales, 1974-1988.

<sup>1</sup> UNCITRAL Model Law on International Commercial Arbitration (enacted as Schedule 2 of the Australian International Arbitration Amendment Act 1989) Art 1(3).

take first the topic of domestic disputes; as will appear, this is the major topic for consideration.

An essential aspect of sovereignty in any nation — democratic or totalitarian, primitive or civilized — is authority to maintain law and order, that is to say to rule conclusively upon disputes of public as well as private character. From the tribal chieftain on through King Solomon deciding the paternity suit on to the great courts of our Western Democracies, the function of adjudicating, of deciding disputes, is an exercise of an essentially sovereign character. Indeed in most religions final adjudicative authority is accepted without question as inhering in the deity.

We are all familiar with the dramatic confrontation between Lord Coke and King James I that played so significant a part in establishing in England the principle that the sovereign's power of judging is exercisable not by the sovereign personally but by the judges acting as delegates of the sovereign and deciding disputes for and in the name of the sovereign. The principle was carried further in the Act of Settlement in 1701 when judges achieved security of tenure. These constitutional developments, so far from taking the adjudicative role outside the concept of sovereignty, affirmed that this was the true nature of the function of the judges in England. They discharged the duties of their office with all the trappings of sovereignty. They carry with pride the description "the Queen's Judges". Royal insignia embellish their courts. The judicial institution is in every sense a part of the sovereignty of England.

In the United States and other constitutional democracies that embrace the concept of separation of powers the judiciary is just as much an integral part of sovereignty as it was part of King Solomon's authority. Its description as the third branch of government is eloquent of its involvement with the other two branches as together constituting the totality of sovereignty.

What I have said thus far is equally valid in totalitarian states as it is in western democracies. Power to adjudicate lies with the sovereign, that is to say the state. In totalitarian nations it is exercised under the control of the single totalitarian government of sovereign. In western democracies that impose constraints upon the internal exercise of arbitrary sovereign authority, the power to adjudicate reposes within the judicial institution — the third branch of government. In our democracies that third branch enjoys either constitutionally guaranteed or conventionally recognised independence from the executive government, this being an essential prerequisite to enable it to apply the rule of law as between the state and subjects. Even in countries such as the United States, where strict separation of powers is the foundation of the constitution, the difficulties of dividing the exercise

of sovereign authority have long been recognised. In 1908 President Theodore Roosevelt wrote in a message to Congress:

The chief lawmakers . . . may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making.

I take, then, as the indispensable starting point of correlating the court system and ADR procedures, the proposition that the judicial institution, with its inherent sovereign quality, cannot be confronted by any alternative mechanism. We cannot, for example, countenance any alternative parliament or legislature; we may provide, and indeed we do provide, additional or delegated mechanisms whereby to legislate or regulate. Again, we cannot countenance any alternative to the executive authority of the sovereign such, for example, as a military executive power structure; in this instance, too, we recognise additional or delegated mechanisms such as the police force to aid the exercise of sovereign executive authority. And so it is with the judicial branch of government, the court system; we recognise the need for, and we provide, additional mechanisms to assist the court system in the fulfilment of its sovereign dispute-resolving function. But these mechanisms, I repeat are not, and cannot be, recognised as alternative, in the true sense of the word, to the court system.

The importance of affirming the sovereign nature of our judicial institution is that this carries with it acknowledgment that the judiciary is the fiduciary custodian of our rule of law. It has the responsibility to enunciate, to apply and to require the enforcement of the rule of law. That is its true role in a democracy. It has become customary for the judiciary to fulfil this function through the medium of deciding disputes the resolution of which calls for the enunciation and application of the law. But the judges are not, nor should they be, obliged to be available to decide every dispute that may arise in society.

The judicial resource is too precious to be spread too thinly. That is a very real risk in modern democracies. So pressing, and indeed so valid, is the demand for equal justice for all, that judges have faced an expectation that they will be all things to all people in the realm of dispute resolution. Let me give an example of the point I seek to make. The conventional role of the judge as the exponent of the law is seen at its best in a jury trial. The judge directs the jury on the law and the jury decide the dispute. Indeed in the United States trial judges do not sum up on the facts at all. As pressures of case lists have created a need for more expeditious and economical hearings, the cumbersome jury trial is in this country, and in some other common law countries, being phased out and replaced with a fact-finding judge. A parallel process can be seen in the abandonment in this country of the system

of lay justices and the establishment, in lieu, of fully professional magistrates' courts.

The extension of the role of judges as universal fact finders is both a logical and a not surprising development. Judges are professionally the best equipped to decide disputes. But here lies the risk of overtaxing our judicial resources. It has become recognised in the last couple of decades that society must evolve and encourage supportive, additional processes that will enable the size of the judiciary to be contained and hence the quality of its individual members to be preserved on the highest plane. Only thus can society enable the judges to fulfil their essential task of maintaining, interpreting and seeing to the enforcement of the rule of law.

Where, then, do the ADR procedures, that is to say additional dispute resolution procedures, find their accommodation with the judicial institution? There are, I suggest, two categories to be considered in this regard, the first being arbitration (of which I identify four types) and the second being other consensual processes (which have endlessly variable forms). I take each of these categories in turn.

I have referred to four types of arbitration. The first is international commercial arbitration. I shall discuss that briefly in the second part of this address. The resolution of a dispute between entities that belong to two different sovereign nations does not inherently fall within the exclusive sovereign authority of either nation. It is thus to be distinguished fundamentally from the mechanisms that exist for the resolution of domestic disputes such as I have thus far been discussing.

The second type of arbitration I put before you is the conventional arbitration of a dispute between two entities within the domestic arena of a nation. Such arbitration is ordinarily regulated by statute in point of procedure, and the awards that issue are ordinarily capable of being enforced through the judicial process. Moreover, the judicial institution exercises, to a greater or lesser degree, facilitative powers in relation to the conduct of such arbitrations together with enforcement and some appellate powers in relation to awards. Invariably the originating ingredient in the initiation of an arbitration of this character is that the parties have made a contract to abide by the decision of the arbitrator. The contract may be a clause in their original agreement. It may be a specific ad hoc agreement reached once a dispute has arisen. In either event the arbitration is a contractual process chosen by the parties as the path to follow in resolving their dispute. So far from its being a procedure alternative to litigation, it is a procedure that exists within the purview of, and will be supported and enforced by, the court in exactly the same way as any other contract, subject of course to the regulatory provisions of any relevant statute.

It is at times said that an arbitrator in an arbitration of this character is an alternative judge. I entirely reject this proposition. The arbitrator may have a duty to act judicially, but so do many other persons in authority in our society. The arbitrator may be bound to apply the law, but once again so are many others. In essence the arbitrator is contractually chosen by the parties to decide their dispute. Both the powers and procedures of the arbitrator are on an entirely different plane from the powers and procedures of a court of justice. He or she does not sit with the wide-ranging protection, power and authority that are a part of the ordinary function of a judge — protection from contempt and civil liability, power to control and direct the course of proceedings by personally enforceable orders. Let me mention just two points of basic distinction: the arbitrator is not a custodian of the rule of law, bound, as such, to take account of public interest in the discharge of the arbitral function; nor is the arbitrator obliged to submit to the cathartic glare of publicity which is of such importance in the solemn exercise of sovereign authority by a judge. A third distinction, and this again inheres in the essentially contractual foundation of an arbitration, is that the parties have chosen their own arbitrator or selected the person by whom the choice will be made.

In short, arbitration arising from a contract between the disputants is a procedure accepted within society as a means by which disputes can be resolved by the working through of a contractual process that can give rise to a legally enforceable result. It operates, I repeat, under the aegis of the courts, not as an alternative. The last resort, as well as the enforcing authority both of the process and of the result, lies in the hands of the courts.

The third type of arbitration I identify originates from the same source as the second, or conventional, type, that is to say from a contract between the disputants. It involves the procedure of submitting the dispute to an expert appraiser. Classic examples are the "look and sniff" arbitration so common in London in resolving disputes in the commodities trade. Expert appraisal is coming to be used increasingly in this country in a variety of circumstances where the disputants do not wish to incur the expense and trouble of a cumbersome arbitration and agree to be bound by the summary decision of a trusted neutral. For presently relevant purposes it is important to recognise this procedure as nothing more or less than a contract and in consequence as involving obligations that, in the last resort, will be cognisable before, and where appropriate enforced by, the courts. It is no more a true alternative to the sovereign judicial process than a contract to pay a sum of money is a true alternative to a judgment for payment.

The fourth type of arbitration I should mention is not really arbitration properly so-called. It is a procedure compulsorily imposed

on the parties by the court as an aid to enabling the court to discharge its function of resolving a dispute that has been brought before it. It originates in an order of the court requiring a referee (often miscalled arbitrator) to hear the dispute, reach a decision and report back to the court so that the court can then consider the reported findings and enter such judgment as it considers appropriate. It requires no argument to expose the additional or supportive character of this procedure. It is in every sense a subordinated, delegated process imposed on the parties by order of the court.

I turn, then, to the other of the two categories of procedures that commonly fall within the classification of ADR. This comprises an almost endless variety of procedures that parties to a dispute may agree to adopt in order to achieve its resolution. Some common forms are emerging such as senior executive appraisal, mini-trial and the like. They can all, however, for present purposes be subsumed under the description of mediation, that is to say a structured process which is chosen by the parties as the means through which to reach agreement for the resolution of their dispute. As with ordinary domestic arbitration, the initiation of these procedures, that I shall describe by the global word 'mediation', is essentially the agreement between the parties to meet or exchange views in the hope of achieving a settlement. It is throughout an entirely voluntary, without prejudice, process. Either party is free to walk away from the negotiations at any stage. Of course if it results in an agreed settlement, then that is documented and becomes contractually binding. The mediator as such does not decide any aspect of the dispute or purport to impose any determination on the parties. Inherent within the personal dynamics of a structured mediation is a significantly enhanced prospect of satisfactory agreed resolution of the dispute.

What is important for presently relevant purposes is to note the absurdity of describing mediation as an alternative to judicial determination. The relationship between the two is not lateral, that is to say it does not involve the disputants deciding to follow the mediation line rather than litigation. The relationship is better described as linear, that is to say the disputants agree to participate in a properly structured mediation as a step towards achieving resolution which, if unsuccessful, can be followed by litigation. Statistics show that the overwhelming majority of disputes taken to mediation are resolved at that stage. Of the few that remain unsettled a significant proportion have been narrowed with consequent saving in the costs in the ensuing litigation. Mediation is, in short, a step along the way — hopefully the last step — but certainly not a step alternative to the ultimate availability of recourse to sovereign judicial power as the dispute-resolving entity.

As mediation is a comparatively novel concept in common law countries and is not yet universally understood, I shall, before moving to be comparatively brief topic of international commercial arbitration, take a few moments to suggest a reason for the recency of its emergence and to explain in very broad outline its anatomy.

The Islamic and Oriental cultures differ from Western cultures both in the structuring of commercial relationships and in the approach to resolving disputes. Commercial relationships in the former cultures are structured by a philosophical approach in which good faith plays a major part. In Western cultures precision in documentation and the application of principled legality govern the structuring of commercial relationships. In the realm of dispute resolution Islamic and Oriental cultures eschew so far as possible externally imposed determinations and strive to achieve a negotiated, consensual solution. Western cultures have in the forefront a confrontationalist approach, a trial of strength between the disputants by adversarial or inquisitorial process.

These cultural differences have existed over the centuries with little interaction. There has, however, in the last two or three decades been a dramatic shift in the pattern of international commerce. The Islamic nations of the Middle East have acquired power and wealth. They have become major investors in the West and major purchasers of goods and services from the West. In Asia the economic power of Japan, South Korea and Taiwan has been accompanied by an enormous surge in international commercial activity between those countries and the West. This interaction has given a new significance in the eyes of Western lawyers to the good faith element in commercial relationships and the consensus-oriented approach in dispute resolution. In the result we have seen demonstrable shifts in some of the doctrines of contract law in the West. And we have seen the advent of mediation as a dispute resolving process. I believe that it was this rise in status of Islamic and Oriental nations that, through cross-fertilisation, ushered in for the West the age of ADR.

I have mentioned the anatomy of mediation. I can best describe this by reference to the set of Communication Flow Channel Diagrams annexed to this address.

I have thus far sought to develop as my theme the proposition that ADR processes are not in their essence alternative to the exercise of sovereign judicial power as a means of resolving domestic disputes, nor do they present any threat, comparative or otherwise, to the stature and authority of our judicial institutions. They are in truth to be seen as no more than contractual arrangements chosen by the parties of their own free will as the way in which they wish to resolve their disputes. If the choice is for arbitration the court, so far from regarding that as an alternative, will lend its aid to the enforcement of

the arbitration contract. If the choice is for mediation, nothing more significant is happening in that the parties are seeking to settle their differences by agreement. There cannot be the slightest justification for public concern in encouraging parties to attempt to achieve amicable resolution. Nor does any question of competition with the sovereign judicial power arise for consideration.

It has been my purpose thus far to correlate the sovereign judicial function and additional dispute resolution procedures and to synthesise them in the part that they play in domestic dispute resolution. At the outset of this address I drew a distinction between the mechanisms for resolving domestic disputes (which I identified as the major topic for consideration) and the mechanisms for resolving international commercial disputes. It is to these latter mechanisms that I now turn. International commercial and maritime disputes are a broad category in which leaving aside legislative definition, the parties belong to different nations. They do not, as I said earlier, fall within the exclusive sovereign authority of either nation. Their resolution accordingly requires the creation of rules and structures directed to procuring determinations that, by principles of international law, will be recognised between sovereigns and accorded a greater or lesser degree of enforcement direct or indirect. There is here no element of a sovereign exercising the power of sovereignty by adjudicating in disputes within the realm.

Not surprisingly the mechanisms for resolving international commercial disputes, including maritime disputes, are as old as international commerce itself. Contracts between two mutually foreign entities almost invariably provide for the resolution of disputes through arbitration. By selecting the place for the arbitration the parties submit to the procedural laws of the sovereign of that place. In Australia these procedural laws are the Uncitral Model Law that was carried into effect by the International Arbitration Amendment Act, 1989. The parties may choose also the substantive law as well as the arbitrator. But this arbitration is not additional to any ordinary judicial function of the local sovereign. In effect it parasitises the local sovereign's judicial mechanisms to such extent as may be permitted in respect of procedural matters including some appellate rights. The award likewise is parasitic on the local sovereign's, or on other sovereigns', enforcement mechanisms<sup>2</sup>.

This is not the time or place for a lengthy dissertation upon international commercial arbitration both general and maritime. All that I am concerned to do is to expose the marked difference between the relationship in which it stands relative to the sovereign's courts and

the relationship that exists between domestic arbitration and the courts. It forms no part of the overall dispute resolving mechanisms, conventional and novel, that are utilised in domestic disputes. There thus arises no apparent conflict, no suggestion of an alternative to the court system, such as to call for the correlation and synthesis to which I have directed the principal part of this address.

Not all international engagements include an arbitration agreement and, for completeness, I should briefly touch on two categories of these in conclusion. The first such category is of particular relevance to the members of this Association. It is the category recognised as falling within the general scope of the law of Admiralty — a body of jealously guarded fictions and principles that enjoy international acceptance. Most notable amongst the fictions are the personification of a ship for the purposes of an action in rem and the concept of ambulatory (perhaps navigatory would be more fitting) sovereignty inhering in a ship. Admiralty jurisdiction has an ancient and internationally recognised place in the regulation of maritime matters. I trust I display no lack of reverence for it if I place it aside as lying beyond the scope of this address. It presents no problem for debate in its relationship to the general court system as does the field of ADR procedures.

The remaining category comprises international commercial contracts that do not include an arbitration agreement. In disputes within this category a sovereign may, in accordance with principles of private international law, extend the sovereign power by entertaining proceedings to which a foreigner is a party. For presently relevant purposes any such proceedings can be assimilated to the ordinary exercise of sovereign authority in the resolution of domestic disputes.

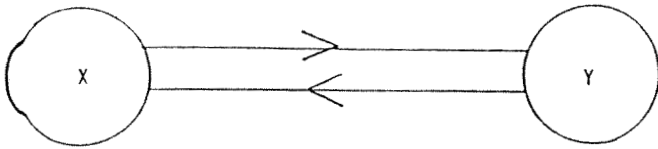
In the second part of this address I have skimmed over the field of international commercial and maritime disputes. I have done so for the purpose of showing that their relationship to the sovereign judicial power of one or other of the nations involved differs markedly from that relationship in the case of domestic disputes. It is in the field of domestic disputes that there is concern and lack of understanding about the role of ADR procedures. I have sought to dispel that concern. Increasing resort to arbitration, use of expert appraisals, references sent out by the courts and above all properly structured mediation are part of society's overall resources for resolving disputes. We must understand the symbiosis of their relationship with the court system, we must study their techniques, and we must be ready to practise them where appropriate if we lawyers are to discharge to the full our obligation to serve the peace, order and good government of our nation through the administration of justice.

<sup>2</sup> International Arbitration Amendment Act, 1989, Part II.

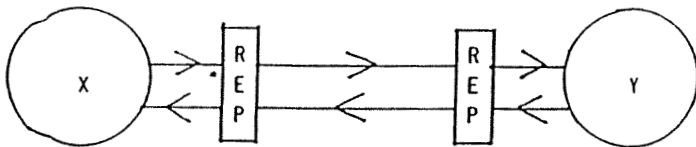
## APPENDIX

### COMMUNICATION FLOW CHANNEL DIAGRAMS

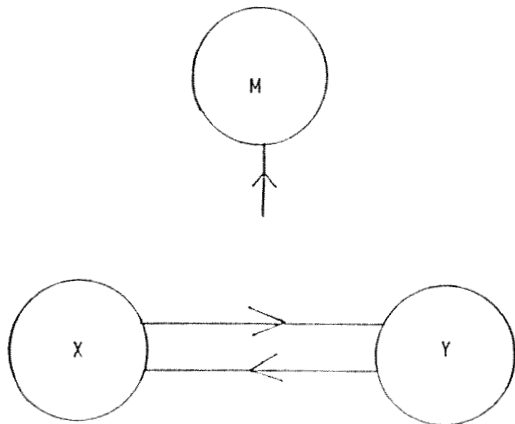
#### Direct Negotiation



#### Assisted Negotiation

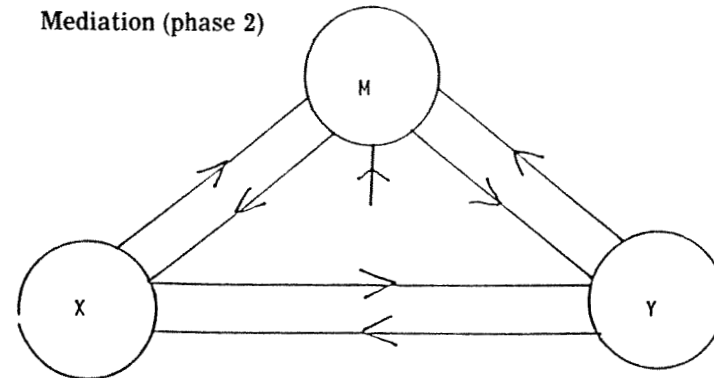


#### Mediation (phase 1)

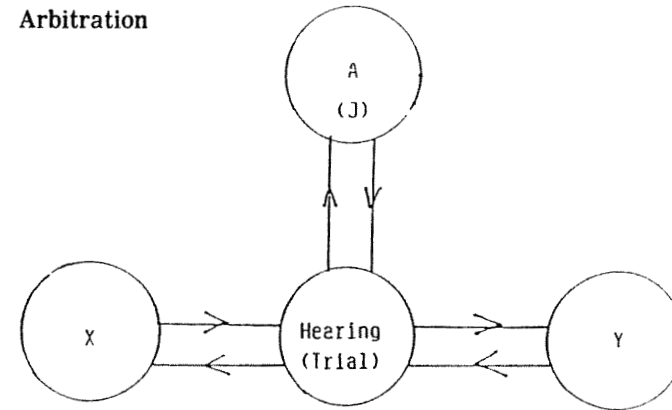


### Appendix

#### Mediation (phase 2)



#### Arbitration



#### Litigation

Shape of communication flow channels are the same as arbitration.

Fundamental difference is in power structure status as between Arbitrator and Judge. All foregoing procedures originate in the agreement of the parties. In contrast, litigation originates in one party invoking the judicial branch of Government of the State to resolve the dispute. The communication flow channels can notionally reflect this by introducing a third dimensional concept involving the Judge standing on a different plane from the Arbitrator — a position vertically above the trial process in contrast to the Arbitrator's position on the same flat, two-dimensional plane on which negotiation, mediation and arbitration take place.