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**Diversity of Expertise in Arbitration:
The Past, Present and Future**

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DIVERSITY OF EXPERTISE IN ARBITRATION: THE PAST, PRESENT AND FUTURE

*Professor Doug Jones AO**

INTRODUCTION

It is an honour to be asked to deliver the annual lecture of the Australian branch of the Chartered Institute of Arbitrators ('Ciarb'). As a member of the Ciarb now for over thirty years, having joined before the establishment of the Australian branch, I have watched with pride the growth of the Australian branch since its establishment and the contribution that it has made to many of the developments of arbitration in Australia, which have succeeded in creating an arbitration environment in this country of excellence and vibrancy. It is of considerable pleasure to me that my giving this address has coincided with the incumbency of Gianna Totaro as CEO of the Australian branch. Her contribution to the development of ADR, including arbitration, in Australia over many years has been significant. It is also fair to say that Australia has played an important part in recent years in the activities of the Ciarb internationally, something of which I am proud, including most recently, through Geoff Farnsworth as President of the Australian branch. His interest in participating in the affairs of the institute internationally is to be highly commended.

In this address, I would like to focus on a topic of importance to the future of the arbitration community. It has increasingly become the case that we have been closed-minded to the significant contributions which non-lawyers can make as arbitrators. The complaint is

* Independent arbitrator and International Judge of the Singapore International Commercial Court. The author gratefully acknowledges the assistance in the preparation of this lecture of Isander Mesimeris and Peter Taurian, Legal Assistants, Sydney Arbitration Chambers.

often made that arbitration has a tendency simply to become court proceedings by other means.¹ Whether accurate or not, the perceived failure of the arbitral process to distinguish itself from court proceedings in terms of efficiency, cost, expertise and procedural innovation is something which degrades arbitration's ability to remain the preeminent form of cross-border dispute resolution. It is suggested that, in no small part, some of the shortcomings of the arbitral process can be related to the absence of non-lawyer arbitrators.

It is useful to begin by considering the historical importance of diverse technical expertise in arbitration. In the second part of my address, I will deal with the causes of the present culture; and, in the third, sketch out some paths towards solutions. It is difficult to identify exactly what fixes need to be made to maximise the contributions of non-lawyers as arbitrators. It is an issue in which institutions, parties, counsel and indeed lawyer arbitrators all have some role to play. But it is not something that can be resolved 'from above' as it were. Given the foundational place of party autonomy in the arbitral process, any 'solutions' need to be treated with considerable sensitivity and must respect that autonomy.

Perhaps the most important step is to begin a discussion.

I THE PAST

To address the importance of the contribution of non-lawyer arbitrators, it is useful to share some history of the development of arbitration in Australia with which I have been familiar during my career as an infrastructure lawyer prior to undertaking the role of international and domestic arbitrator. Following this, I will trace the origins of the non-lawyer arbitrator further back into the history of arbitration.

¹ James Oldham, 'The Historically Shifting Sands of Reasons to Arbitrate' [2016] (1) *Journal of Dispute Resolution* 41, 42–3; Thomas J Stipanowich, 'Arbitration: The New "Litigation"' [2010] (1) *University of Illinois Law Review* 1. See also Justice Robert McDougall, 'Arbitration: Past, Present and Future' (Speech, RAIF Arbitration Conference, 25 November 2016) 5 [16], 6 [19]. As the similarity in titles suggests, his Honour also considers the development of arbitration through an historical lens.

A Personal Experience

Arbitration contributes to dispute resolution in a range of areas of commercial activity including importantly in the delivery of infrastructure. When I commenced doing construction dispute work, at first domestically, arbitration was the preferred method of dispute resolution, and the arbitrators who presided in construction arbitration were primarily architects and engineers chosen for the role because of their seniority and standing in the industry. I regard many of these arbitrators as my mentors, certainly as exemplars of how effective arbitration could then be in the resolution of construction industry disputes. Some were legends. To name a few (without wishing to suggest they were the only successful exponents of the art of arbitration): Ron Fitch, John Keays, Ian Cameron, Max McDougall and John Morrissey. These arbitrators were senior professionals in their industry, respected not just by their peers but by legal dispute practitioners, and each with a respected prior track record as expert witness in court and arbitration. They played a significant role in the success of arbitration in those days, and left with me an appreciation of the real potential that non-lawyers can offer to the effective conduct of arbitration proceedings. Appearing before them as a young projects lawyer, it was apparent that their capacity to manage arbitral procedure was equal to, if not greater, than many contemporary lawyers, including retired judges.

Their careers may offer some clues as to how experts might segue into acting as arbitrators themselves, and how we might, as an arbitral community, open doors wider to their contributions. As engineers and architects at the top of their field, they had experience of adjudicating as project administrators, later as court-appointed referees, and serving on dispute boards. I will say something briefly now about these forms of expert-led adjudication, to which I will return at the end of this lecture.

First, expert referees may be appointed by courts, with or without the parties' consent.² The power to appoint referees has existed in statutory form since at least 1854,³ and was

² *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd* (1987) 8 NSWLR 123, 129 (Smart J). See also *Knight v Coales* (1887) 19 QBD 296, 298 (Lopes LJ for Lopes and Fry LJJ), 302 (Lord Esher MR).

³ *Common Law Procedure Act 1854* (UK) s 3. Prior to the statute see, *Gyles v Wilcox* (1740) 2 Atk 141; 26 ER 489, cited in *Kadam v MiiResorts Group 1 Pty Ltd [No 4]* (2017) 252 FCR 298, 308 [36] (Lee J). References in NSW are now made under *Uniform Civil Procedure Rules 2005* (NSW) pt 20 div 3 ('UCPR'). The power is more recent in the Federal Court of Australia: *Federal Court of Australia Act 1976* (Cth) s 54A, inserted by *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).

expanded and regularised by legislation in Australia in the 1980s.⁴ The latest practice directions from the New South Wales Supreme Court, Technology and Construction List continue to affirm that consideration should be given throughout proceedings to whether reference should be made to a referee.⁵ In view of the masses of documentary evidence often required to be evaluated,⁶ courts appreciate that expert referees are better placed than judges to assess and decide matters of technical fact,⁷ and referees' reports are often accepted and adopted by the Court without variation.⁸

As for dispute boards, they involve a panel of industry experts who are appointed to 'supervise' the progress of construction disputes, including by resolving disputes as and when they arise.⁹ They have existed since the 1960s in the US,¹⁰ and have grown in use in Australia under the auspices of the Dispute Board Resolution Foundation.¹¹ The quick and ad hoc nature of the process demands deep expertise in the subject matter and the resolution of disputes of this kind: formal hearings, and the taking of (fact and expert) evidence under the rules of evidence are simply not part of the process.¹² That knowledge is already held by dispute board members.

⁴ See, describing the history, Justice PA Bergin, 'Methodology of the Management of Construction Disputes in the Supreme Court of New South Wales' (Speech, Construction and Infrastructure Seminar, Law Council of Australia, 5 May 2004).

⁵ Supreme Court of New South Wales, *Practice Note SC Eq 3: Commercial List and Technology and Construction List*, 26 February 2025, para 43; *Kadam v MiiResorts Group* (n 3) 309 [42] (Lee J). See also UCPR (n 3) r 20.14: '[a]t any stage of the proceedings, the court may make orders for reference...'

⁶ *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* (2012) 203 FCR 520, 526 [16]–[17] (Rares J), citing Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12296 (Robert McClelland, Attorney-General), Explanatory Memorandum, Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth) 5 [24]; *Santos Ltd v Fluor Australia Pty Ltd [No 2]* (2020) 37 BCL 324, 334–5 [65]–[70] (Bradley J) (QSC).

⁷ See, eg, *Cave v Allen Jack & Cottier Pty Ltd* [2014] NSWSC 1365, [17] (Campbell J); *Owners of Strata Plan No 89074 v Ceerose Pty Ltd* [2024] NSWSC 1494, [6] (Rees J), citing *Telecomputing PCS Pty Ltd v Bridge Wholesale Acceptance Corporation (Australia) Ltd* (1991) 24 NSWLR 513, 517 (Rogers CJ Comm D).

⁸ *Woolf v 52 Birriga Road Pty Ltd* [2012] NSWSC 921, [29], [37] (Beech-Jones J).

⁹ For a general survey, see Doug Jones, 'Dispute Boards: An Australian Experience' (Canadian College of Construction Lawyers Conference, 24 May 2024) (available at <https://dougjones.info/content/uploads/2024/05/Doug-Jones-Dispute-Boards-Final-14-May-2024.pdf>); Doug Jones and Ron Finlay, 'Disputes Arising from Government-Funded Infrastructure Projects: Application to India of the Australian State and Commonwealth Experience' (SCL India International Conference, 8 December 2023) 44–6 (available at <https://dougjones.info/content/uploads/2023/12/Doug-Jones-and-Ron-Finlay-Disputes-Arising-from-Government-Funded-Infrastructure-Projects-4-December-2023.pdf>).

¹⁰ Nick Gillies, 'Rebuilding New Zealand: A Case for Dispute Resolution Boards' (2014) 33(2) *Arbitrator and Mediator* 121, 126. See further Standing Committee No 4, National Committee on Tunnelling Technology, *Better Contracting for Underground Construction* (National Research Council, 1974).

¹¹ See Dispute Board Resolution Foundation, 'DRBF in Australasia' (available at <https://www.drbf.org/drbf-australasia>).

¹² Gillies, 'Rebuilding New Zealand' (n 10) 125; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, 325 [47]–[48] (Rajah JA for the Court), citing Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (Blackwell Publishing, 2008) 192.

Now, statutory adjudication in many common law jurisdictions involves many non-lawyers. Its history in Australia commenced in 1999, when the first enactment was passed in NSW,¹³ followed by equivalent legislation in all other jurisdictions,¹⁴ but it has its origin in contractual forms of adjudication used since the 1970s in the UK.¹⁵ Adjudication has been described as a ‘statutory arbitration’,¹⁶ and as ‘quasi-legal proceedings’.¹⁷ The rationale is ‘pay now, argue later’,¹⁸ the purpose being to ensure that cash flow to a project is not disrupted by providing for a quick and efficient means of resolving payment disputes.¹⁹ Given the quick²⁰ and ad hoc style of these adjudications, there is no requirement that they obey strict legal formalities,²¹ and non-lawyers (engineers, architects, quantity surveyors, etc) frequently serve as adjudicators for this reason.²²

¹³ *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘SOP Act’).

¹⁴ *Building and Construction Industry Security of Payment Act 2002* (Vic); *Building and Construction Industry Payments Act 2004* (Qld); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry (Security of Payment) Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Building Industry Fairness (Security of Payment) Act 2017* (Qld); *Building and Construction Industry (Security of Payment) Act 2021* (WA).

¹⁵ See, eg, *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689. The first statutory measure in the UK was *Housing Grants (Construction and Regeneration Act) 1996* (UK). Cf Robert Fenwick Elliott, ‘Consensual Adjudication’ (2009) 124 (January/February) *Australian Construction Law Newsletter* 32, 32.

¹⁶ *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 398 [5]–[6] (Spigelman CJ).

¹⁷ *A Straume (UK) Ltd v Bradlor Developments Ltd* [2000] BCC 333, 336 (Judge Behrens) (Ch).

¹⁸ *Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813, [98] (Coulson LJ, Andrews LJ agreeing at [99], Elisabeth Laing LJ agreeing at [100]); *John Doyle Construction Ltd v Erith Contractors Ltd* [2020] EWHC 2451 (TCC), [85] (Fraser J); *Michal J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in liq)* [2020] Bus LR 1140, 1147 [12] (Lord Briggs JSC, Lord Reed PSC, Lords Kitchin, Hamblen and Leggatt JJSC agreeing). In Australia, see: *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2025] NSWCA 5, [67]–[70] (Bell CJ, Ward P agreeing at [75], Payne JA agreeing at [76]); *Venture Spirits Pty Ltd v Adjudicate Today Pty Ltd* [2024] TASSC 12, [4] (Brett J), citing *R v Pettersson*; *Ex parte Fenshaw Pty Ltd* [2015] TASSC 33, [8] (Porter J); *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, [55] (Pullin JA, Newnes JA agreeing at [94], Murphy JA agreeing at [95]); *Walton Construction Pty Ltd v Pines Living Pty Ltd* (2013) 8 ACTLR 57, 61 [20], 62 [26] (Master Mossop); *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362, [13] (McDougall J), citing *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [96] (Palmer J).

¹⁹ *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49, [3] (Payne JA, Gleeson JA agreeing at [1], Griffiths AJA agreeing at [306]), citing *Probuild Constructions (Australia) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 18 [44] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) and *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390, 400–1 [39]–[40] (Keane JA, Fraser JA agreeing at 402 [51], Fryberg J agreeing at 402 [52]); *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con LR 1, 6 [14] (Dyson J) (TCC).

²⁰ The adjudication determination must be filed within 10 days of the respondent’s adjudication response, unless the parties otherwise agree: SOP Act (n 13) s 21(3).

²¹ Peter Wood and Phillip Greenham, ‘Australia’ in James Pickavance, *A Practical Guide to Construction Adjudication* (John Wiley & Sons, 2015) ch 22, [22.38]. See also SOP Act (n 13) s 21(4A): ‘If any such conference is called [under sub-s (4)(c)], it is to be conducted informally and the parties are not entitled to any legal representation’ (emphasis added).

²² By statute, a person is eligible to act as adjudicator if they have either ‘a degree or diploma in architecture, building surveying, quantity surveying, building and construction, construction management, project management, engineering or law conferred by an Australian or foreign university or tertiary institution and at least 5 years of

The construction industry as a whole, therefore, recognises the importance of experts not only contributing to the resolution of a dispute, but also acting as adjudicators themselves. There is no reason why the potential for contributions by non-lawyers should be confined to the context of construction disputes.²³

B Historical Development of Arbitration

My own experience is very recent in the history of arbitration as a means of the settlement of disputes within civilised communities. The late Professor Dereck Roebuck has undertaken a superb overview of the history of arbitration in his various publications which trace the history of arbitration across five books from the Ancient Greek *polis*²⁴ up until the ‘Long Eighteenth Century’.²⁵

The concept of arbitration as a means of dispute settlement in civilised society has always been one sitting outside the state court process and thus one which was carried on without the trappings of procedure and the assistance of lawyers that one would find in court proceedings. Focusing on the evolution of arbitration under the English common law during the modern and early modern periods is particularly useful for our purposes. It was during this period when the arbitral process, and acceptance of it by the courts and the legislature, was transformed by the rapid industrialisation and modernisation of English society, and thus evolved many of the foundational ideas which have been bequeathed to modern commercial arbitration both internationally under the New York Convention,²⁶ and in many domestic jurisdictions such as our own.

The remark was once made by a former judge, ‘I shall endeavour to perform an extraordinarily difficult task — to talk about the Law and Commercial Arbitration and make it

relevant experience’ or ‘at least 10 years of relevant experience’: *Building and Construction Industry Security of Payment Regulation 2020* (NSW) reg 19(1), read with SOP Act (n 13) s 18(1).

²³ See Advisory Committee on Alternative Dispute Resolution, *The Use of Dispute Resolution Boards and Their Expansion beyond Construction Matters* (Law Council of Australia, 27 November 2012) 4 [7].

²⁴ Derek Roebuck, *Ancient Greek Arbitration* (HOLO Books, 2001).

²⁵ Derek Roebuck, Francis Calvert Boorman and Rhiannon Markless, *English Arbitration and Mediation in the Long Eighteenth Century* (HOLO Books, 2019).

²⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (‘New York Convention’).

scintillating'.²⁷ I think, as Professor Roebuck's superb historical overviews demonstrate, the evolution of arbitration, and indeed the changing role of expertise in arbitration as societies struggled to find solutions to the ever more complex growth of society, is a story of great human interest.

In the early days, arbitrators were almost exclusively non-lawyers. An often-cited medieval prototype of modern commercial arbitration are the great merchant fairs that occurred throughout Western Europe in the Middle-Ages. In those days, merchants travelled together to seasonal fairs to ensure safety while on the road. It was standard practice that, if merchants had a disagreement requiring a final adjudication and that applied well recognised principles of trading, their recourse would not lie through the Royal Courts of law, but instead through a panel of around five merchants. What is more, a panel was likely to be international in composition: 'merchants who formed a market court at Antwerp might, 6 months later, perform the same service at St Ives across the North Sea'.²⁸ The key features of justice so dispensed were that merchants received a quick, binding resolution made by fellow merchants who lived and breathed the same everyday problems of the market-place. A central reason for the efficiency of this early ADR was the familiarity of the decision makers with the traditions and technical aspects that informed disputes. Indeed, one sees that very same justification underpinning arbitrations in Ancient Greece. Although Ancient Greek arbitration is typically associated with matters that would now be described as issues of 'public international law',²⁹ smaller scale commercial arbitrations also existed, such as in the 'emporic courts' of democratic Athens. Instead of leaving factual matters to be decided by a jury of lay citizens, the emporic courts were presided over by men of commerce, and were 'marked by [their] rapidity, supra-nationality and rigor'.³⁰ These are features of international commercial arbitration to which I refer throughout this lecture.

Fast-forwarding to the 1700s, if an English man or woman was to have any experience with the law at all, it was most likely to be through arbitration or mediation conducted by their

²⁷ Michael Kirby, 'The Law and Commercial Arbitration' (Speech, Commercial Institute of Arbitrators, Canberra, 25 June 1976).

²⁸ Sir Ninian Stephen, 'Historical Origins of Arbitration' (1991) 10(2) *Arbitrator* 45, 50.

²⁹ Derek Roebuck, 'The Myth of Modern Mediation', (2007) 73 *Arbitration* 105, 106. Cf the Near East, in which arbitration was relatively unknown: Amnon Altman, *Tracing the Earliest Recorded Concepts of International Law: The Ancient Near East (2500–330 BCE)* (Martinus Nijhoff Publishers, 2012) 78, 202.

³⁰ Edward E Cohen, *Ancient Athenian Maritime Courts* (Princeton University Press, 1973) 93–9. See also Emmanouil ML Economou and Nichols C Kyriazis, 'The Emergence and the Evolution of Property Rights in Ancient Greece' (2017) 13(1) *Journal of Institutional Economics* 53, 67. This author has previously written on expertise in ancient arbitrations: Doug Jones, "'Hired Guns": Modern Solutions to Ancient Problems' [2024] (3) *Supreme Court Cases J-6*.

community's Justice of the Peace ('JP'). The notebook of one JP, Edmund Tew, indicated that, amongst his many duties, nearly half of his time was spent administering what we would call 'ADR' to neighbours, employers and employees, masters and apprentices, and family members.³¹ Awards issued, often pursuant to informal headings in an inn, or a JP's home, were technically reviewable at 'quarter sessions', where a bench of JPs sat with a jury in the presence of a qualified lawyer. From there, decisions were appealable to the King's Bench; although in practice, it was exceedingly rare for an arbitral decision to be overturned. When, twice a year at assize time, circuit courts visited communities, it was not unusual for the court to order arbitration and make the order a rule of court.³² Arbitration was used even in areas that would now be considered 'inadmissible', including criminal and family law.³³ Additionally, like the courts today,³⁴ the King's Bench could refer disputes to experts like surveyors, merchants or artisans.³⁵ A large portion of legal decisions, then, were taken by those who lived in the community of the complainants, and who had direct experience with the sorts of everyday problems they were likely to experience.

For much of its English history, arbitration by lawyers was seen as antithetical to the purposes of arbitration in the first place: as a means of escaping judgement by the courts, presided over by strangers from the City of London, with entirely different outlooks on life. English men and women wanted disputes adjudicated by local people who might know the lay of the land, and by those with relevant expertise in the field of industrial endeavour. This same trend can be observed in the early American colonies, where it was catalysed by a general hostility towards the lawyer class and to English law.³⁶

Perhaps the key catalyst for arbitration assuming a central place in modern commercial life was the industrial revolution. Lord Mansfield, during his tenure as Chief Justice, is known to have regularly referred disputes to arbitration as part of attempt to make common law fit needs of the industrial revolution.³⁷ The prominence given to arbitration was intimately linked

³¹ Roebuck, Boorman and Markless, *English Arbitration and Mediation* (n 25) 15.

³² *Ibid* 17.

³³ *Ibid* 96–7, 182–94.

³⁴ See **Part I.A** above.

³⁵ Oldham, 'The Historically Shifting Sands of Reasons to Arbitrate' (n 1) 49–50.

³⁶ Frederic S LeClercq, 'The Constitutional Policy That Judges Be Learned in the Law' (1980) 47(4) *Tennessee Law Review* 689, 704.

³⁷ Christian R Bursset, 'Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire' (2016) 34(3) *Law and History Review* 615, 640–1; JJ Spigelman, 'Lord Mansfield and the Culture of Improvement' (2008) 52(10) *Quadrant* 53, 54. On the declining case load of the courts during this period, see Wilfrid Priest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (UNSW Press, 2004) 34–6.

to the need for expert judgement by non-lawyers in fields of industrial expertise. Indeed, one could tentatively suggest that the principal reason for the professionalisation of arbitration in England resulted from the growing importance of technical expertise specific to particular areas of industry during the industrial revolution. Until this point, arbitration had been regarded as a civic duty often performed by (usually non-lawyer) JPs without costs; it was regarded as inconsistent with the special responsibility and trust placed in an arbitrator for them to take payment.³⁸ However, as commercial disputes scaled in their size and technical complexity, guild members (ranging from weavers to textile experts to printers) began to charge fees to arbitrate because their expertise was in such high demand. Lawyers were hot on the heels of expert arbitrators, and soon begun to cash in, charging to arrange arbitrations. So, the rise of arbitration's importance in private dispute resolution was in some ways inextricably linked to anxieties about the size and technical nature of disputes, and accordingly, to its colonisation by the legal profession.

There is a pernicious and deeply rooted misconception that, in these days before the arbitral profession was penetrated by lawyers, arbitration was regarded with suspicion as the ugly sister of court proceedings. Viscount Hailsham,³⁹ writing extrajudicially, spoke in 1936 of the 'remarkable development' in 'the attitudes of the Courts of law to the system of arbitration. From being regarded with jealousy and aversion, arbitration is now recognised and encouraged'.⁴⁰ This jealousy and aversion has been presumptively attributed to the way in which the pre-judicature courts competed with one another for work. As Lord Campbell was reported as having said in the (unauthorised)⁴¹ report of *Scott v Avery*:⁴²

My Lords, there is no disguising the fact, that as formerly the emoluments of the judges depended mainly or almost entirely upon fees, and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil.⁴³

³⁸ John Palmer, *Supplement to the Attorney and Agent's Table of Costs* (1833), discussed in Oldham, 'The Historically Shifting Sands of Reasons to Arbitrate' (n 1) 43.

³⁹ The elder, Douglas Hogg.

⁴⁰ Viscount Hailsham, 'Foreword' in Quintin Hogg, *The Law of Arbitration: Incorporating the Arbitration Acts 1889–1934* (Butterworth, 1936).

⁴¹ Justice McDougall notes that this passage 'must have been regarded as somewhat scandalous', as it was apparently omitted from the official citation of the case in (1856) 5 HL Cas 811: McDougall, 'Arbitration: Past, Present and Future' (n 1) 3 [7]–[8].

⁴² (1856) 28 LTOS 207. This decision has been regarded as marking a change in attitude: Russell Thirgood, 'Arbitration through the Ages' (2013) 32(3) *Arbitrator and Mediator* 79, 83.

⁴³ *Scott v Avery* (1856) 28 LTOS 207, 211 (HL).

Certainly, there is some truth to this image of jealous competition between the courts, and between the courts and arbitration.⁴⁴ Until judicature, the courts existed as though in a marketplace, with litigants as their customers; and the victor was the court that demonstrated a willingness to innovate within its own procedural and jurisdictional framework.⁴⁵ One such innovation was the legal fiction of ‘transitory actions’. The common law courts were originally confined in their jurisdiction to disputes occurring in England. However, with this fiction, whenever a dispute, other than a dispute concerning land,⁴⁶ occurred overseas, the common law court would permit the plaintiff to make a non-traversable averment that the breach or injury in fact occurred in England.⁴⁷ In this way, the court could assume jurisdiction over international disputes; and in doing so steal away some of the case load that would otherwise have been left for arbitration or for the High Court of Admiralty.

However, the historical friction between the courts and arbitration is exaggerated. Although not the norm for commercial disputes, lawyers and judges were known to sit as arbitrators.⁴⁸ During the 18th century, and earlier, reference to arbitration by non-lawyers was regularly made by the Court of Common Pleas and the King’s Bench.⁴⁹ As Jacobs J noted in *Buckley v Bennell Design & Construction Pty Ltd*,⁵⁰ Courts had the power since the end of the 17th century to compel the Parties to refer their disputes to arbitration.⁵¹ Indeed, the *Arbitration Act 1698*, 9 & 10 Wm 3, c 15, had the following preamble:

Whereas it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission.⁵²

⁴⁴ See generally Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 46–58; Stephen, ‘Historical Origins of Arbitration’ (n 28) 53–4.

⁴⁵ Edward Peter Stringham, ‘Rivalry and Superior Dispatch: An Analysis of Competing Courts in Medieval and Early Modern England’ (2011) 147(3/4) *Public Choice* 497, 505–7.

⁴⁶ A ‘local’ action.

⁴⁷ PE Nygh, ‘The Territorial Origin of English Private International Law’ (1964) 2(1) *University of Tasmania Law Review* 28, 33–4, citing *Dowdale’s Case* (1606) 6 Co Rep 46b; 77 ER 323. See further *Mostyn v Fabrigas* (1774) 1 Cowp 161; 98 ER 1021, 1026–7 (Lord Mansfield CJ).

⁴⁸ Anthony Musson, ‘Arbitration and the Legal Profession in Late Medieval England’ in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process: Substantive Law and Procedure in English Legal History* (Cambridge University Press, 2013) 56, 60 et seq.

⁴⁹ Baker John Sellon, *The Practice of the Courts of King’s Bench and Common Pleas* (Stahan & Woodfall, 1792) vol 2, ch 16.

⁵⁰ (1978) 140 CLR 1.

⁵¹ *Buckley v Bennell Design & Construction Pty Ltd* (1978) 140 CLR 1, 28–9 (Jacobs J).

⁵² *Arbitration Act 1698*, 9 & 10 Wm 3, c 15.

This leaves a very different impression to that which Lord Campbell sought to leave.⁵³

Additionally, although arbitration agreements were not regarded initially as sufficient to effect a mandatory stay of court proceedings,⁵⁴ once an arbitration was initiated and an award rendered, the courts would generally not interfere. In 1683, Lord Guilford⁵⁵ declined to set aside an arbitral award even though he would have come to a different conclusion: ‘where the error does not appear without unravelling of it, and examination to matters of account, he thought it was not relievable here’.⁵⁶ 100 years later, Lord Thurlow LC likewise declined to set aside an award in *Price v Williams*,⁵⁷ to which the official headnote in the report of the case reads ‘Parties to an award bound by it’. Although his Lordship expressed no small amount of surprise at the outcome of the award,⁵⁸ he went on to say ‘the question now is not so much, what [the arbitrators] did, as what the parties can do. I think, they have by choosing private judges placed it beyond the reach of any principle of law’.⁵⁹ Lord Eldon LC put the point succinctly a few years later: ‘[i]f a question of law is referred to an arbitrator, he must decide upon it, though he decides wrong, you cannot help it’.⁶⁰ After the tribunal was constituted, the Court of Chancery assumed a mere supervisory role, having powers, for example, to replace arbitrators for non-performance of their duties.⁶¹

It was not only early modern English arbitration that has been retrospectively disparaged. Victor Bérard, a well-known French diplomat and Hellenist writing at the turn of the 20th century, after conducting his seminal survey of ancient Greek arbitrations, came to the following conclusion:

*Re vera, ad lites finiendas pacemque inter Graecos stabilitandam arbitria nihil valere.*⁶²

⁵³ Roebuck, Boorman and Markless, *English Arbitration and Mediation* (n 25) 53–5; Stephen, ‘Historical Origins of Arbitration’ (n 28) 55.

⁵⁴ *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652–3 (Rich, Dixon, Evatt and McTiernan JJ), citing, inter alia, *Vynior’s Case* (1609) 8 Co Rep 80a; 77 ER 595. See also *Kill v Hollister* (1746) 1 Wils KB 129; 95 ER 532.

⁵⁵ Lord Keeper of the Great Seal.

⁵⁶ *Brown v Brown* (1683) 1 Vern 157; 23 ER 384, 384.

⁵⁷ (1791) 1 Ves Jun 365; 30 ER 388

⁵⁸ The award involved an account, at which the arbitrators arrived at a wildly different conclusion than the Master in Chancery. Lord Thurlow LC said ‘I cannot help saying, I am rather surprised at the result of the reference; and that in an affair of such a nature as an account, and where after much examination so many errors were assigned and proved, it should now come out to be a perfect account entirely free from error’: *Price v Williams* (1791) 1 Ves Jun 365; 30 ER 388.

⁵⁹ *Price v Williams* (n 58).

⁶⁰ *Ching v Ching* (1801) 6 Ves Jun 282; 31 ER 1052.

⁶¹ Such supervisory powers were of long standing: see Musson, ‘Arbitration and the Legal Profession in Late Medieval England’ (n 48) 59.

⁶² V Bérard, *De arbitrio inter liberas Graecorum civitates* (Paris, 1894) 103.

In truth, arbitration did nothing to resolve disputes and secure peace among the Greeks.⁶³

This is hardly a credible conclusion. As Marcus Niebuhr Tod noted in his monograph on Ancient Greek arbitrations, in by far the majority of cases, a single arbitral award was treated as final and disposed of the dispute in question.⁶⁴ International arbitration was thus a hugely successful export from Greece.

Of course, by modern standards of ‘arbitration-friendliness’,⁶⁵ marked by the uniform international standards of the New York Convention and Model Law,⁶⁶ both Ancient Greece and 18th century England left much to be desired. However, arbitration, and specifically arbitration by non-lawyers, enjoyed a comfortable symbiosis with national courts in the common law throughout the early development of arbitration in England. The two had different roles. Arbitration enabled a swift, extra-curial resolution of disputes, particularly of complex commercial or technical matters to which an expert arbitrator could meaningfully contribute. On the other hand, the courts were the sole repository of the compulsory and coercive powers of the state, and were uniquely placed to enforce agreements and awards rendered in such arbitrations. That they were different was the whole point.

II THE PRESENT

Moving now from the past to the present, the reality of international commercial arbitration is far removed from this romantic past. Although the industry expertise of arbitrators continues to be (rightly) touted as a key justification behind preferring arbitration as a means of dispute resolution,⁶⁷ in practice, ‘expertise’ in this sense now largely refers to *lawyers* with familiarity with the industry in question, rather than non-lawyers actually from the industry. For example, if parties specify that ‘the arbitrator must have ten years’ experience in construction’, this is

⁶³ Rough translation.

⁶⁴ Marcus Niebuhr Tod, *International Arbitration amongst the Greeks* (Clarendon Press, 1913) 184–7.

⁶⁵ Cf Albert Monichino and Gianluca Rossi ‘Enforcement of Foreign Awards in Australia: Never Under-Estimate the Primacy of the *Arbitration Agreement*’ (2022) 31(4) *Australian Dispute Resolution Journal* 321, discussing the proper connotations of this label: at 330. See also Andrea Anastasi, Benjamin Hayward and Stephanie Peta Brown, ‘An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia’ (2020) 44(1) *Melbourne University Law Review* 1, 26–7; *Kaspersky Lab UK Ltd v Hemisphere Technologies Pty Ltd* [2016] NSWSC 1476, [25] (Bergin CJ in Eq).

⁶⁶ *UNCITRAL Model Law on International Commercial Arbitration* (adopted 21 June 1985) (‘Model Law’).

⁶⁷ Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (Wolters Kluwer, 7th ed, 2023) [4.41]–[4.68].

taken usually to refer to a *lawyer* with experience in construction law, rather than to a quantity surveyor, engineer or project manager actually in the industry itself.⁶⁸ In practice, personal experience suggests that parties are overwhelmingly more likely to appoint a construction lawyer in favour of a non-lawyer in such circumstances.

This phenomenon is not restricted to infrastructure disputes, and is the problem that I will be exploring in this second part of the lecture.

A Outside Commercial Arbitration

Before continuing to develop this narrative, however, I want to shine a spotlight on some areas of international arbitration in which the use of non-lawyer arbitrators *has* made, and continues to make, a substantial contribution. I will touch on three: maritime; grain; and sports arbitrations.

First, the world of maritime arbitration is one that continues to see the advantage of non-lawyers (master mariners, brokers, surveyors, superintendents, naval architects) acting as arbitrators.⁶⁹ Maritime law has always had a close relationship with international commercial law, and was historically separate from the common law:⁷⁰ its practitioners and arbitrators were not educated at the Inns of Court, but through first-hand experience in shipping itself. The London Maritime Arbitrators Association ('LMAA') continues to play a leading role in this regard. Its criteria for full membership require 'at least 15 years in a responsible position or positions in one or more areas of the shipping industry, either commercial, technical or legal',⁷¹

⁶⁸ See, eg, *Tonicstar Ltd v Allianz Insurance plc* [2018] Bus LR 2347, 2353–4 [15]–[19] (Leggatt LJ, Underhill LJ agreeing at 2357 [29], Leveson P agreeing at 2357 [30]). His Lordship distinguished between sports, engineering and telecommunications on the one hand, and insurance and reinsurance on the other hand, on the grounds that there is no distinction between the law of insurance and the insurance industry, whereas there is a difference between each of the former and the corresponding law. In view of his Lordship's finding (at 2354 [19]) that criteria of eligibility should be clearly expressed, it is doubtful whether the phrase, 'ten years' experience in telecommunications' would exclude a lawyer working in that area of law, despite the distinction described above.

⁶⁹ See generally Kyriaki Noussa, Mohammed Al Muqaimi and Stanislava Nedeva, 'How to Teach an Old Dog New Tricks: Appeals and the English Arbitration Law Reform' (2025) 42(5) *Journal of International Arbitration* 629, 652; Clare Ambrose, Karen Maxwell and Michael Collett, *London Maritime Arbitration* (Informa Law, 4th ed, 2017) [11.3].

⁷⁰ See Justice Steven Rares, 'Admiralty Law: The Flying Dutchman of Cross-Border Insolvency' (International Commercial Litigation Conference, Sydney, 28 November 2009) 4–5 [7]–[8], quoting *Holt Cargo Systems Inc v Trustees of ABC Containerline NV* [2001] 3 SCR 907, 923–4 [25]–[26] (Binnie J for the Court), itself citing William Tetley, *Maritime Liens and Claims* (International Shipping Publications, 2nd ed, 1998) 56.

⁷¹ London Maritime Arbitrators Association, 'Guidelines for Full Membership', para (i) (available at <https://lmaa.london/guidelines-for-full-membership/>).

and it was said by a member of the LMAA 20 years ago that ‘the world of shipping is a club and that very few arbitrators are lawyers’.⁷² Although that is probably an exaggeration in terms of the numbers of non-lawyer arbitrators today — lawyers now make up approximately two-thirds of the LMAA⁷³ — non-lawyer arbitrators still retain a special position in maritime arbitration, and it is not uncommon for parties to favour non-lawyer arbitrators — ‘commercial men’⁷⁴ — over lawyers in maritime disputes.

Secondly, there has long been a separate industry for resolution of disputes in the international grain trade. The Grain and Feed Trade Association (‘GAFTA’), whose standard form contracts are used in 80% of the world’s grain sales,⁷⁵ runs the majority of grain trade arbitrations in the world, recording approximately 350 cases in 2023–24 with awards issued totalling USD 223,407,745.00.⁷⁶ It traces its origins back to its predecessor, the London Corn Trade Association (‘LCTA’), which was founded in 1878 to encourage and facilitate the use of arbitration in grain disputes.⁷⁷ GAFTA arbitrations place a strong emphasis on the commercial, rather than legal, aspects of the trade. It does not have practising lawyers on its panel, its Selection Criteria being to ‘[e]nsure that any panel has a sufficient mix of trade knowledge and expertise’,⁷⁸ and legal representation is permitted only with agreement from the parties.⁷⁹ GAFTA contracts may provide for a form of expert determination by approved surveyors, in which two surveyors are appointed to assess the quality and condition of goods, with a third surveyor to be appointed as arbitrator in the event of a major discrepancy.⁸⁰ This is only appropriate. Lord Bingham described issues in grain arbitration as being ‘of the “look-sniff”

⁷² See Fabrizio Marrella, ‘Unity and Diversity in International Arbitration: The Case of Maritime Arbitration’ (2005) 26(5) *American University International Law Review* 1055, 1086.

⁷³ Ambrose, Maxwell and Collett, *London Maritime Arbitration* (n 69) [1.7].

⁷⁴ A term of art generally meaning ‘non-lawyers’: Kate Lewins, ‘Maritime Arbitration, Maritime Cases and the Common Law: The Early Development of the Doctrine of Frustration’ [2016] (7) *Journal of Business Law* 589, 590, citing *Armada (Singapore) Pte Ltd v Gujarat NRE Coke Ltd* (2014) 318 ALR 35, 48 [53] et seq (Foster J) (FCA). See further *US Ship Management Inc v Maersk Line Ltd*, 188 F Supp 2d 358, 363 et seq (Marrero J) (SD NY, 2002); *WK Webster & Co v American President Lines Ltd*, 32 F 3d 665, 668–9 (Miner J for the Court) (2nd Cir, 1994); *Pando Cia Naviera SA v Filmo SAS* [1975] QB 742, 746–7 (Donaldson J).

⁷⁵ Marsans GitlinBaker, ‘GAFTA and the Grain Trade’ (5 February 2020) (available at <https://mgb.law/2020/02/05/gafta-grain-trade/>).

⁷⁶ Grain and Feed Trade Association, *Annual Report and Consolidated Accounts* (2024) 18–19.

⁷⁷ Tom Sewell, *Gain Carriage by Sea* (LLP Reference Publishing, 1999) 271 et seq.

⁷⁸ Grain and Feed Trade Association, *Guidelines for GAFTA Appointment of Arbitrators*, rule 4 (available at <https://www.gafta.com/arbitration/guidelines-for-gafta-appointment-of-arbitrators/>).

⁷⁹ *GAFTA Arbitration Rules No 125* (1 July 2024) r 17.

⁸⁰ See, eg, *Aston FFI (SUISSE) SA v Louis Dreyfus Commodities Suisse SA* [2015] 1 All ER (Comm) 985, 993–4 [19]–[20] (Eder J) (Comm). On the procedure used, see Jacques Covo, ‘FOSFA and GAFTA Standard Form Contracts and Their Arbitration Systems’ (2013) 31(2) *ASA Bulletin* 293, 296–7.

variety’, determined more or less by the experience and expertise of the arbitrator rather than logic or legal reasoning.⁸¹

Thirdly, in sports arbitrations, non-lawyers, including athletes and doctors, regularly sit on arbitral panels in addition to their lawyer colleagues. Sports arbitration differs from the other two examples I have discussed in that it is a relatively recent phenomenon, with the Court of Arbitration for Sport (‘CAS’) only being established in 1984. However, diversity has long been an important feature of sports arbitrations, and the prevalence of diverse tribunals — diverse in nationality and expertise — helped to make legitimate the new transnational legal order of sports law that the CAS was intended to create.⁸² Statistics from Sports Resolutions,⁸³ a UK-based ADR provider, reveal that out of its 339 panel members, 33% are non-lawyers, including people from professions one would not see outside of sports arbitration, including investigators and former police officers, sports executive and administrators, former athletes, doctors and social workers. Thought that is not a remarkable percentage by itself, what distinguishes arbitrations with Sports Resolutions is that institutional appointment, rather than party appointment, is the norm.⁸⁴ This means that it is far more common for the institution to specifically appoint, for example, a doctor in a doping case, or an accountant or financial advisor in a financial fair play case. Lawyers still play a role — they are generally required to be appointed as chair of the tribunal⁸⁵ — but there is a mechanism to ensure that the panel still has the relevant technical expertise. Even in the CAS, which largely uses party appointment, a 2019 study found that sports officials were appointed at almost the same rate on average as lawyers.⁸⁶

These trends are not reflected, however, in the wider world of international commercial arbitration. To take the Ciarb itself, it has a fairly high proportion of non-lawyer members — higher than other institutions⁸⁷ — with approximately 55% of members being non-lawyers. However, this high proportion of members does not translate into a high proportion of non-

⁸¹ Lord Justice Bingham, ‘Differences between a Judgment and a Reasoned Award’ (1997) 16(1) *Arbitrator* 19, 23.

⁸² A Duval, ‘*Lex Sportiva*: A Playground for Transnational Law’ (2013) 19(6) *European Law Journal* 822, 834.

⁸³ The author gratefully acknowledges the assistance of Sports Resolutions in providing these statistics.

⁸⁴ On the less privileged position occupied by party autonomy in sports arbitrations, see Elizabeth Brimer, ‘Sports Arbitration: Consent, Independence and Impartiality’ (2019) 38(1) *Arbitrator and Mediator* 88, 88–9.

⁸⁵ See generally Sports Resolutions, *Applying for Membership of Sports Resolutions National Panel: Selection Criteria 2024* (2024) (available at <https://www.sportresolutions.com/about/join-our-panels>).

⁸⁶ Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (Springer, 2019) 269–70, Table 9.1.

⁸⁷ See also Luke Nottage, Nobumichi Teramura and James Tanna, ‘Developing Diversity within Diversity Discourse: Remembering the Non-Lawyers in Arbitration’ in Shahla Ali et al (eds), *Diversity in International Arbitration: Why It Matters and How to Sustain It* (Edward Elgar, 2022) 101, 111.

lawyers being appointed as arbitrators. In 2024, 134 appointments were made through the Ciarb's Dispute Resolution Service ('DRS').⁸⁸ Of those, only 10 were non-lawyers. That is a significant discrepancy. Indeed, non-lawyers have been taking the back seat for some time. A 1989 directory of international arbitrators listed 459 potential candidates, of which 382 were practitioners or teachers of law.⁸⁹ In part, this is because the forms of international arbitration discussed above have remained largely separate from the wider world of international commercial arbitration, and their practices and trends have not carried over.⁹⁰ But why, beyond that, does international commercial arbitration not make use of non-lawyer arbitrators, whereas it did historically, and whereas other forms of arbitration continue to do so today?

B Causes of the Problem

It is difficult to identify why this is the case. Empirical evidence is sparse in confidential international commercial arbitrations,⁹¹ and lawyers largely have a monopoly on the scholarship of international arbitration. The legal profession has largely (unsurprisingly) accepted the new status quo. However, in my opinion, three factors have contributed to the present dominance of lawyers as arbitrators in international commercial arbitration.

The first concerns predictability in arbitral procedure. There is a real anxiety that non-lawyer arbitrators will lack the expertise to manage the procedural complexities of large matters with complex intersecting issues of fact and law, and to do so in a procedurally fair manner. Both require experience. The latter — ensuring procedural fairness — arguably requires more. Procedural fairness under the Model Law entails more than merely acting in a bona fide manner.

⁸⁸ DRS is a mainly UK Process for Ciarb appointment of arbitrators, although the main function of the Ciarb is not appointment of arbitrators, but rather their training and accreditation.

⁸⁹ Parker School of Foreign and Comparative Law, *The 1989 Guide to International Arbitration and Arbitrators* (1989) 469, discussed in James E Meason and Alison G Smith, 'Non-Lawyers in International Commercial Arbitration: Splinters on the Bench' (1991) 12(1) *Northwestern Journal of International Law and Business* 24, 26. See also Wendy Miles, 'Practical Issues for Appointment of Arbitrators (Lawyers vs Non-Lawyer and Sole Arbitrator vs Panel of Three "or More")' (2003) 20(3) *Journal of International Arbitration* 219.

⁹⁰ Alejandro García Jiménez, 'On the Use of GAFTA, FOSFA, Coffee and Cocoa Arbitration and Other ADR Mechanisms for Land Freight Transport Disputes' (2024) 21(3) *Brazilian Journal of International Law* 204, 206–7; Russell J Cortazzo Jr, 'Development and Trends of the Lex Maritima from International Arbitration Jurisprudence' (2012) 43(2) *Journal of Maritime Law and Commerce* 255, 264–6.

⁹¹ Lucy Greenwood, 'Revisiting Bifurcation and Efficiency in International Arbitration Proceedings' (2019) 36(4) *International Arbitration* 421, 423; Christopher R Drahozal, 'Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration' (2006) 22(2) *Arbitration International* 291, 291–2. See also, albeit in a different context, Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16 *International Journal of Law in Context* 108, 121.

It entails a suite of procedures that must be followed, and that can only be learned through experience (eg, how to manage disclosure, how to manage applications to amend cases). It also entails very real legal questions such as the proper scope of an arbitration agreement, to which the arbitrator must be confined in both matters of substance and procedure. A non-lawyer does not necessarily have these skills. Nor, may I say, do all lawyers.

This ‘procedural’ aspect of arbitration was one reason why courts would historically refuse to refer entire disputes for expert determination. The point was put by WB Campbell J in *Honeywell Pty Ltd v Austral Motors Holdings Ltd*:⁹²

The defendant wishes to have the decision of a judicial tribunal and not the decision merely of a person skilled in the appropriate scientific field. It is very likely in this case that the fact finding process will be a difficult one and it is likely that there will be conflicting views and opinions of expert witnesses. In my opinion the fact finding process will be more satisfactorily handled by a judicial officer than by a person who lacks the training, experience and skills of a trial court judge. In a complex case of this sort there will be problems arising as to the admissibility of evidence and a person lacking legal training will find such matters very difficult to decide.⁹³

Although arbitration has long been *formally* free of the rules of evidence and procedure to which the courts are bound, in practice, arbitral tribunals have often found them to be helpful means of dealing with novel procedural issues, and helpful means of following a structure which is designed to grant procedural fairness to both sides.⁹⁴

One reason why this might be felt particularly in Australia, although it is by no means confined to Australia, is the unique history of arbitration in Australia. One of the early places in which non-Indigenous ADR was taken up in Australia was in the context of industrial relations,⁹⁵ in which disputes increased dramatically in the late 19th century.⁹⁶ Hence the explicit reference to arbitration in s 51(xxxv) of the *Commonwealth Constitution*, under which the *Conciliation and Arbitration Act 1904* (Cth) was passed soon after federation.⁹⁷ The corollary of this early Commonwealth Court of Conciliation and Arbitration, which famously

⁹² [1980] Qd R 355.

⁹³ *Honeywell Pty Ltd v Austral Motors Holdings Ltd* [1980] Qd R 355, 360.

⁹⁴ Adrian J Bradbrook, ‘Teaching Arbitration to Non-Lawyers’ (1999) 17(3) *Arbitrator* 173, 178.

⁹⁵ See David Stewart, ‘Alternative Dispute Resolution in the Employment and Industrial Field’ [2020] (Autumn) *Bar News* 54, 54.

⁹⁶ Gordon Pears, *Beyond Dispute: Alternative Dispute Resolution in Australia* (Corporate Impacts Publications, 1989), referring to similar trends in the US: at 13, 114–15.

⁹⁷ Noone and Ojelabi, ‘Alternative Dispute Resolution and Access to Justice in Australia’ (n 91) 112; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 16.

spurred the *Boilermakers' Case*⁹⁸ on the separation of powers under the *Constitution*, may have been that the notion of 'arbitration' in Australia became tangled up with this 'arbitration' court, a quasi-judicial government body that was far more formal and 'court-like' in its proceedings than arbitration ever was.⁹⁹

In any event, if the consequence of this is that parties feel uncomfortable appointing non-lawyers as arbitrators, this becomes a self-perpetuating issue, as it denies non-lawyers the opportunity of ever acquiring these skills through experience. The dominance of lawyers as arbitrators is therefore both a cause and symptom of the problem.

The second aspect is related to the first: it is the finality of arbitration proceedings. Although the word, 'final', does not appear in the Model Law per se, this finality is brought about by the fact that an arbitral award can only be set aside on the limited grounds contained in Article 34 of the Model Law, which turn on issues of jurisdiction and procedure, but, importantly, not substance. Indeed, the word 'final' has been added throughout Australian arbitration law, including s 39(2)(b)(ii) of the *International Arbitration Act 1974* (Cth), which affirms that 'awards are intended to provide certainty and finality',¹⁰⁰ and in s 1C(1) of the *Commercial Arbitration Act 2010* (NSW) (and the uniform Acts of the other States and Territories), which provides that '[t]he paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense'.¹⁰¹ Related to this finality is the limited scope that courts otherwise have to interfere in arbitral proceedings under Article 5 of the Model Law: they are largely *not* to intervene, and must stay court proceedings if there is an enforceable arbitration agreement.

Finality of arbitration proceedings is typically regarded as one of its advantages. It has also been regarded as having the potential to improve the role of non-lawyers as arbitrators. Professor Bradbrook, writing in 1999 about the uniform arbitration legislation in force at the time, opined that the more limited scope for recourse against an arbitral award should give arbitrators more confidence: '[a]rbitrators can therefore afford to be less timid and more

⁹⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁹⁹ Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1 *Australasian Dispute Resolution Journal* 61, 62.

¹⁰⁰ *International Arbitration Act 1974* (Cth) s 39(2)(b)(ii) (emphasis added) ('IAA').

¹⁰¹ *Commercial Arbitration Act 2010* (NSW) s 1C(1) (emphasis added) ('CAA 2010'). Equivalent provisions are in force in all other States and Territories: *Commercial Arbitration Act 2017* (ACT) s 1C(1); *Commercial Arbitration Act 2013* (Qld) s 1AC(1); *Commercial Arbitration Act 2012* (WA) s 1C(1); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 1C(1); *Commercial Arbitration Act 2011* (SA) s 1C(1); *Commercial Arbitration Act 2011* (Tas) s 1C(1); *Commercial Arbitration Act 2011* (Vic) s 1AC(1). This lecture refers hereafter only to the NSW enactment for simplicity.

adventurous in terms of their approach to procedural questions'.¹⁰² He was not alone in thinking as much. Barwick CJ opined that '[f]inality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award established only after successive appellate processes'.¹⁰³ And in a similar vein, Cedric Barclay, a former president of the LMAA, was recorded as saying that 'in trade, engineering or quality arbitrations the interposition of a lawyer on the tribunal works as a brake on progress'.¹⁰⁴

However, to say that finality benefits proceedings before non-lawyer arbitrators is not to say that parties are happy to go along with this. I am sceptical about the way in which this 'finality' interacts with party autonomy and party choice in the appointment of arbitrators. Put simply, if parties (and their lawyers) know that they are only getting one bite at the cherry, they might prefer to appoint someone who speaks their language: a practitioner or a retired judge. This is particular the case as arbitrations become more expensive. Litigation is a massive industry, and the concept of multiple large, multinational commercial law firms that do masses of litigation is a relatively recent phenomenon.¹⁰⁵ Certainly, these firms were unfamiliar to the Lord Chancellors to whom I referred earlier. Litigants in expensive proceedings are willing to pay for expensive arbitrators: the 'best' in the profession. That was also unknown in the 18th century: the concept of a select few arbitrators doing a large portion of the work was unheard of, and arbitrators were drawn from a massive pool of people of expertise and commerce.¹⁰⁶

In a way, this should be unsurprising. 'Finality', writes the Hon Robert McDougall (the son of Max McDougall, the engineer arbitrator referred to at the outset of this lecture), 'is shared with the resolution of disputes through litigation'; but party autonomy is not.¹⁰⁷ This is a significant disjunct. The 'finality' of court proceedings goes hand in hand with the predictability of court process under the (mandatorily applicable) rules of evidence and procedure, and the appealability of court judgments. Neither of these features is present in arbitration. Why, then, should we expect litigants to accept the 'finality' of arbitration while 'risking' a non-lawyer arbitrator who is unfamiliar with, or unwilling to follow, the predictable process derived from or similar to that which a practitioner or judge would? It might be

¹⁰² Bradbrook, 'Teaching Arbitration to Non-Lawyers' (n 94) 181.

¹⁰³ *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253, 258 (Barwick CJ).

¹⁰⁴ So quoted in Lord Justice Mustill, 'Cedric Barclay Lecture' (Speech, International Congress of Maritime Arbitrators X, Vancouver, 11 September 1991) 27.

¹⁰⁵ Justice Peter McClellan, 'Dispute Resolution in the 21st Century: Mediate or Litigate?' (Speech, National Australian Insurance Law Association Conference, 17–19 September 2008) 11–13.

¹⁰⁶ Oldham, 'The Historically Shifting Sands of Reasons to Arbitrate' (n 1) 48–9.

¹⁰⁷ McDougall, 'Arbitration: Past, Present and Future' (n 1) 1 [1].

otherwise if there were scope to appeal in the case of legal error, such as under the old uniform legislation, which allowed the court to give leave to appeal in the event of either manifest error of law, or strong evidence that the arbitrator made an error of law.¹⁰⁸ Although these provisions were narrowly construed,¹⁰⁹ they provided an ‘out’ in the event of an overly zealous non-lawyer arbitrator who misunderstood the legal issues. However, that possibility is now entirely absent from the Model Law.¹¹⁰ If anything, the current legislative framework’s focus on procedure over substance in the grounds for setting aside is more likely to stultify rather than encourage innovative procedures. The tribunal’s task has arguably shifted away from seeking efficiently to arrive at the correct outcome towards seeking meticulously to ensure procedural fairness and arrive at an enforceable award. This is a shift away from the original purpose of arbitration.

The third and final factor is another kind of conservatism — a lack of creativity — that one often sees as an arbitrator among lawyers.¹¹¹ To put it simply, it is not the ‘done thing’ to appoint non-lawyers as arbitrators. The ‘done thing’ is to appoint ex-judges or experienced lawyer arbitrators, and to litigate disputes before them in a way not dissimilar to how it would be done in the courts: that is, in an adversarial way and with voluminous submissions.

To be clear, by this I mean no criticism of my practitioner colleagues. I am myself not immune to these pressures in the process of appointing chairs when I am a party-nominated co-arbitrator. A multi-million dollar arbitration may not be, I appreciate, the best time for a party to experiment or go outside its comfort zone: a case can be presented in a logical, clear and comprehensive way without reinventing the wheel. And, particularly in technical, detail-heavy disputes, there may well be no substitute for a massive load of pleadings and expert material, dealt with by an experienced lawyer.

However, in many cases, this reflects a tendency simply to go for a ‘more is more’ approach.¹¹² Pleadings and submissions can be overly repetitive without substantially adding

¹⁰⁸ *Commercial Arbitration Act 1984* (NSW) ss 38(4)–(5). As with the modern Commercial Arbitration Acts, this Act was part of the previous uniform arbitration legislation in Australia.

¹⁰⁹ See, eg, *Re Tiki Village International Ltd* [1994] 2 Qd R 674, 680 (Byrne J); *Commonwealth v Rian Financial Services & Developments Pty Ltd* (1992) 36 FCR 101, 109 (Higgins J dissenting); *Commonwealth v Thiess Contractors Pty Ltd* (1991) 4 WAR 425, 433 (Master White); *D Phillips Constructions (Vic) Pty Ltd v Mullavey* [1980] VR 171, 176 (Murray J). *Leighton Contractors Ltd v Government Railways Commission (WA)* (1966) 115 CLR 575, 578 (Barwick CJ, McTiernan and Owen JJ).

¹¹⁰ Only Australia’s domestic arbitration legislation allows for appeals with the Court’s leave, and then only if the parties agree in advance: CAA 2010 (n 101) s 34A(1).

¹¹¹ Professor Bradbrook refers in this regard to the ‘inherent conservatism’ of the profession: Bradbrook, ‘Teaching Arbitration to Non-Lawyers’ (n 94) 178.

¹¹² An approach noted by Sir Robin Knowles in the case discussed below: *Nigeria v Process & Industrial Development Ltd* [2023] EWHC 2638 (Comm), [13] (Knowles J).

to a party's case. Expert evidence can be led even where not really needed given the nature of the dispute.¹¹³ There can be a general unwillingness to make reasonable concessions or confront difficult arguments. None of these serve the efficient disposition of a dispute. These are all features, to some extent, of the adversarial, common law model of proceedings that has come to dominate the world of international commercial arbitration since the mid-20th century.¹¹⁴ A reflection of that lies in the *IBA Rules on the Taking of Evidence in International Arbitrations*: although designed as a compromise between common and civil law systems, their technical approach to the rules of evidence and discovery reflects the large proportion of commercial litigators from large firms who contributed to the drafting of the Rules,¹¹⁵ and has spurred the creation of the *Prague Rules*¹¹⁶ as a simplified alternative.¹¹⁷ Indeed, one of the motivating factors behind the IBA's 2024 update to its Guidelines on Conflicts of Interest was to modernise its approach to non-lawyer arbitrators.¹¹⁸ It is too early to say whether they will have that effect.

The issues of voluminous, irrelevant material can be mitigated through proactive case management on the part of the tribunal. For example, it is good practice to require the parties and experts jointly to confer and reach agreement on the issues requiring expert evidence. Additionally, experts should first meet and provide a joint report summarising matters agreed and disagreed, prior to filing any individual reports.¹¹⁹ And, in filing and responding to one another's individual reports, they should be required to adopt the other expert's methodological assumptions and provide a figures-as-figures analysis. The pre- and post-hearing period is also important. An early case management conference can help ensure that the parties and tribunal focus on the most contentious issues in dispute.¹²⁰ And after the hearing, agreement can be

¹¹³ This is contrary to best practice recommended in International Chamber of Commerce Commission on Arbitration and ADR, *ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration* (Report, 2018) 13 [62].

¹¹⁴ See Javier Rubenstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004) 5 *Chicago Journal of International Law* 303, 303.

¹¹⁵ Nottage, Teramura and Tanna, 'Developing Diversity within Diversity Discourse' (n 87) 112, citing Michael J Bond, 'A Geography of International Arbitration' (2005) 21(1) *Arbitration International* 99.

¹¹⁶ *Rules on the Efficient Conduct of Proceedings in International Arbitration* (2018).

¹¹⁷ Janet Walker, 'The Prague Rules: Fresh Prospects for Designing a Bespoke Process' in Amy C Kläsener, Martin Magál and Joseph E Neuhaus (eds), *The Guide to Evidence in International Arbitration* (Law Business Research, 2nd ed, 2023) 44, 45–6.

¹¹⁸ IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration* (25 May 2024) 2.

¹¹⁹ See also Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (September 2007) art 6.1.

¹²⁰ International Chamber of Commerce Commission on Arbitration and ADR, *Facilitating Settlement in International Arbitration* (Report, July 2023) 6, 13–16. See further Doug Jones, 'Midstream CMC: A Blessing or a Curse?' (Luncheon Address, International Arbitration Club, 14 September 2023) (available at <https://dougjones.info/content/uploads/2023/09/Luncheon-Address-to-the-International-Arbitration-Club-14-September-2023-.pdf>).

reached between the parties, experts and the tribunals to allow the tribunal to refer certain questions of calculation not requiring analysis to the experts.¹²¹ These processes can minimise the risk of the parties and experts passing one another like ships sailing on different oceans, and gives the tribunal a better sense as to the true issues on dispute.

A recent, unfortunate example illustrates the dangers of proceeding without critically reflecting on how expertise can inform the issues in dispute. The dispute between Nigeria and Process & Industrial Developments Ltd ('P & ID') has been infamous of late.¹²² That dispute involved a gas supply and processing agreement that Nigeria was alleged to have entered into and breached. Relevantly, an award was issued in favour of P & ID in January 2017 to the tune of USD 6.6 billion; but after a number of years (and a string of unprecedented extensions of time in the courts), the award was set aside on the grounds of various serious abuses of arbitral process on the part of P & ID.

The case was recently the subject of the 15th Ciarb Roebuck Lecture (named for Professor Roebuck), delivered by Sir Robin Knowles, who was the judge in the setting aside applications in these proceedings.¹²³ In that Lecture, Sir Robin touches on many of the same topics that I have already raised: the anxiety for predictable procedure; the concern for arriving at a correct outcome; the increasing size and complexity of arbitral awards. Specifically on the issue of expertise, he notes the regrettable lack of competent expertise on the part of Nigeria, which led to the tribunal essentially adopting the claimant's expert's quantification of the claim at USD 6.6 billion, a figure described in the setting aside proceedings as 'a sum so vast that it is material to Nigeria's entire federal budget'.¹²⁴ The conclusion Sir Robin comes to is that the tribunal should 'have confidence in itself'.¹²⁵ A 'confident' tribunal, equipped with its own expertise on the matter, would not — I say with the benefit of hindsight — have entertained

¹²¹ See the author's proposal for a Post-Hearing Expert Access Protocol: Doug Jones, 'Redefining the Role and Value of Expert Evidence in International Arbitration' (2023) 17(2) *Journal of the American College of Construction Lawyers* 1, 40–1.

¹²² For the decisions in the English courts, see: [2025] EWCA Civ 715; [2024] EWCA Civ 790; [2023] EWHC 3320 (Comm); [2023] EWHC 2638 (Comm); [2020] EWHC 2379 (Comm); [2019] EWC 2241 (Comm).

¹²³ Sir Robin Knowles, 'Damages and Remedies: Responsibilities and Reputation' (Speech, Ciarb Roebuck Lecture, 18 June 2025) (available at <https://www.ciarb.org/media/m0vmtc4o/roebuck-lecture-transcript-2025.pdf>).

¹²⁴ *Nigeria v Process & Industrial Development Ltd* (n 112) [4] (Knowles J).

¹²⁵ Knowles, 'Damages and Remedies' (n 123) 12.

the massively inflated case brought before it based on a contract that anyone in the industry would clearly have recognised as a sham.¹²⁶

That is, admittedly, an extreme case. But it does raise the issue of parties trying to leverage the *lack* of expertise of a tribunal. We should wonder how many arguments have been made by way of expert evidence that a party would not dare raise if it knew that a member of the tribunal was an expert in that field. However, even in more conventional cases, the potential that expertise on the tribunal has to improve the outcome of the proceedings should not be overlooked.

III THE FUTURE

I wish to look to the future, and to ways that we might be able to improve the possibility for non-lawyers to contribute meaningfully as arbitrators in commercial arbitrations. But before doing that, I must emphasise that we *should* do something — that something has been lost by moving from the emporic courts of Ancient Athens and the guild-arbitrators of early modern England to the retired-practitioner-arbitrators and retired-judge-arbitrators of the present — and suggest that we should regain what has been lost.

A What Has Been Lost

It is not necessarily obvious that the trends that I have described are a problem.¹²⁷ Parties do not just choose legally qualified people as arbitrators per incuriam, or due to a lack of imagination. They choose them because they are very likely to be competent: to know the law; to know the procedure; to render an enforceable award; and to have experience, both industry-specific and more broadly. Indeed, with the advent of international commercial courts (such as

¹²⁶ See also Robert G Shaw, ‘Embracing Maritime and International Arbitration’ (2019) 50(1) *Journal of Maritime Law and Commerce* 123 on the utility (but also reticence) of arbitrators lending their personal knowledge and expertise: at 128–30.

¹²⁷ Aspects of this paragraph draw from James Allsop and Peter Taurian, ‘Mediation in Australia: Some Comments on Its Context and Character’ (32nd UIA World Forum of Mediation Centres, London, 5 April 2024).

the Singapore International Commercial Court),¹²⁸ and of specialised court lists and divisions with specialised judges (such as the Technology and Construction Court of the England and Wales High Court), it may be unfair to depict practitioners and judges as lacking deep understanding of the technical aspects of these kinds of disputes.¹²⁹ In the same way as one sees reference to the ‘judicialisation’¹³⁰ of arbitration (which is intended as a criticism), it might be correct to refer to the ‘arbitralisation’ of courts, to borrow a phrase from Professor Georgia Antonopoulou.¹³¹ Although Australia has not taken steps towards instituting an home-grown, international commercial court, Australian courts have benefited from greater familiarity with commercial arbitration. Indeed, the Federal Court of Australia is an example of a court that was designed, at its inception, to have greater flexibility in procedure and case management (à la arbitration).¹³² In NSW, the past few generations of judges in NSW have certainly had the benefit of judges such as Sir Laurence Street and Andrew Rogers,¹³³ both of whom brought a greater awareness of ADR and effective civil procedure to the NSW bar and Supreme Court.¹³⁴ It is not too radical to suggest that today’s judges might make for better arbitrators than judges from 50 or 100 years ago.

¹²⁸ See generally Doug Jones, ‘Flexibility in International Commercial Dispute Resolution: CI Arb Singapore Annual Thought Leadership Lecture’ (2024) 90(2) *Arbitration* 109.

¹²⁹ The Full Court of the Federal Court declined to stay proceedings in favour of an exclusive jurisdiction clause providing for proceedings in California in *Epic Games Inc v Apple Inc* (2021) 286 FCR 105 on the grounds that, inter alia, there was benefit in having competition and consumer claims decided by the ‘specialist judges’ of the Federal Court of Australia: at 126 [104] (Middleton, Jagot and Moshinsky JJ). Although this is a somewhat different kind of ‘specialisation’, courts are increasingly regarding their work as technical, and themselves as *competitive* fora of dispute resolution.

¹³⁰ Or ‘juridification’: Gu Weixia, ‘Arbitration in Comparative Perspective’ in Maria F Moscati, Michael Palmer and Marian Roberts (eds), *Comparative Dispute Resolution* (Edward Elgar, 2020) 311, 318.

¹³¹ Georgia Antonopoulou, ‘The “Arbitralization” of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts’ (2023) 14(3) *Journal of International Dispute Settlement* 328.

¹³² *Lenjamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388, 394–5 (Wilcox and Gummow JJ), quoted in John Sheahan, ‘Brief History of the Court’ in Law Council of Australia and Federal Court of Australia, *Case Management Handbook* (2014) 12, 12 [2.1]. See similarly *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 211–13 [93]–[98] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹³³ Chief Judge of the (now defunct) Commercial Division from 1987 to 1992, which itself is evidence of this kind of procedure revolution in NSW: Astor and Chinkin, *Dispute Resolution in Australia* (n 97) 237. Note its radical powers as granted under *Supreme Court (Commercial Division) Amendment Act 1985* (NSW) sch 1 item 6, inserting *Supreme Court Act 1970* (NSW) s 76A: ‘The Court may, from time to time, give such directions as the Court thinks fit (whether or not inconsistent with the rules) for the speedy determination of the real questions between the parties to proceedings in the Commercial Division’.

¹³⁴ See Justice Andrew Rogers, ‘Dispute Resolution in Australia in the Year 2000’ (1984) 58 *Australian Law Journal* 608. See also Arthur R Emmett, ‘Obituary: The Hon Laurence Street AC KCMG QC’ (2018) 92 *Australian Law Journal* 565, 568; Michael McHugh, ‘Mediation and Negotiation in Legal Disputes’ (2021) 31 *Australasian Dispute Resolution Journal* 104, 104. Some significant decisions by Justice Rogers include *Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd* (1991) 22 NSWLR 653, 661, 666 (Rogers CJ Comm D); *Qantas Airways Ltd v Dillingham Corporation* (1985) 4 NSWLR 113, 118 (Rogers J).

Even more fundamentally, parties choose legally-trained arbitrators because they *can*. Party autonomy is always rightly identified as the core, conceptual underpinning of arbitration.¹³⁵ And if party autonomy lies at the centre of arbitration, who are we to say that parties' choices are wrong or problematic?

It is at this point that we arrive at the title of the lecture: 'Diversity of Expertise in Arbitration'. A panel with diverse expertise, particularly of non-legal disciplines, is likely to bring about a more effective process and a better outcome in international commercial arbitrations.

I am not the first to speak of the benefits of diversity among arbitrators. Arbitral institutions have made a push this past decade for greater representation of gender and racial minorities among arbitral tribunals. For example, the London Court of International Arbitration ('LCIA') released Equality, Diversity & Inclusion Guidelines in December 2024, which instruct practitioners to consider 'sex, gender, race, nationality, ethnicity, sexual orientation, age, disability, religion, geographic location, and social, professional and legal backgrounds' when selecting arbitrators and experts.¹³⁶ Closer to home, the Australian Centre for International Commercial Arbitration ('ACICA') launched its Diversity Committee in June 2023, with the stated aim of helping 'ensure that [ACICA] operates as an inclusive, equitable, culturally competent, and supportive arbitration institution'.¹³⁷ Earlier this year, my colleague (and wife) Professor Janet Walker CM delivered the 24th Annual Clayton Utz / University of Sydney International Arbitration Lecture on the topic of 'Dissents in International Arbitration'. One important point that was made was the way in which the Collective Intelligence, or 'CQ', of groups was impacted as the group became more diverse.¹³⁸ Studies suggest that there are measurable benefits to the intelligence of a group when there is more diversity of

¹³⁵ See, eg, *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880, 887 [19] et seq (Gageler CJ), 898 [87] (Gordon and Gleeson JJ), 909 [147], 911 [157] et seq (Edelman J), 934 [273] (Steward J); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 549 [15] (French CJ and Gageler J); *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 87–8 [165], 106 [237] (Allsop J, Finkelstein J agreeing at 52 [9]). Party autonomy was regarded as '[p]robably the most important principle on which the [Model Law] should be based': *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/207, 78 [17].

¹³⁶ London Court of International Arbitration, *LCIA Equality, Diversity & Inclusion (EDI) Guidelines* (December 2024) r 2.1.

¹³⁷ Australian Centre for International Commercial Arbitration, 'ACICA Launches Diversity Committee' (1 June 2023) (available at <https://acica.org.au/2023/06/21/acica-launches-diversity-committee/>).

¹³⁸ Discussing the work of Dr Ula Cartwright-Finch. See further Alice Woolley et al, 'Evidence for a Collective Intelligence Factor in the Performance of Human Groups' (2010) 330(6004) *Science* 686.

perspective.¹³⁹ In this way, diversity is not just about fairness: it is about improving the quality of productivity of, in this case, the tribunal.

Without overstraining the metaphor, what I wish to focus on is another kind of diversity, one that is also important, but that is too often overlooked: diversity of *expertise*. To illustrate, a 2022 book from Edward Elgar titled *Diversity in International Arbitration*¹⁴⁰ contained 19 chapters, of which only one considered diversity in terms of the use of non-lawyers as arbitrators.¹⁴¹ The authors of that chapter took note of the disparity.¹⁴²

Key to appreciating the potential benefits of an expert arbitrator is an appreciation of the fundamental importance of expert evidence in commercial arbitrations.¹⁴³ In some disputes, expert evidence of a technical kind is inescapable. Where the subject matter of a dispute involves issues of, for example, pharmacology, computer programming or metallurgy, experts in those fields are obviously required. But even in conventional commercial or construction disputes without matters requiring particular, scientific knowledge, the use of ‘analysis’ experts to calculate delay and disruption to a project, or the quantum of claims, including for loss of profits, are typically regarded as necessary. Their expertise arises from the ability to analyse and parse vast quantities of data in much more detail than an arbitrator would otherwise be able to.¹⁴⁴ Incidentally, this was originally the role that arbitrators held vis-à-vis the court: many an overworked Master in Chancery conducting a massive accounting exercise sought the quantum expertise of an arbitrator to assist him.¹⁴⁵

Discussions around the role of expert evidence in arbitration frequently centre upon the benefits of party-appointed, as opposed to tribunal-appointed experts. Put simply, there are advantages and disadvantages to both. Party appointment best serves party autonomy,¹⁴⁶ and takes full advantage of the adversarial system by providing two competing perspectives, of

¹³⁹ See generally Nathalie Allen, Leonor Díaz Córdova and Natalie Hall, “‘If Everyone Is Thinking Alike, Then No One Is Thinking’”: The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making’ (2021) 38(5) *Journal of International Arbitration* 601.

¹⁴⁰ Shahla Ali et al (eds), *Diversity in International Arbitration: Why It Matters and How to Sustain It* (Edward Elgar, 2022).

¹⁴¹ Nottage, Teramura and Tanna, ‘Developing Diversity within Diversity Discourse’ (n 87).

¹⁴² *Ibid* 103.

¹⁴³ See generally Jones, ‘Redefining the Role and Value of Expert Evidence’ (n 121).

¹⁴⁴ Edna Sussman, ‘Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do about Them’ (2013) 24 *American Review of International Arbitration* 487, 497.

¹⁴⁵ Oldham, ‘The Historically Shifting Sands of Reasons to Arbitrate’ (n 1) 51–3.

¹⁴⁶ George Burn, Claire Morel de Westgaver and Victoria Clark, *Expert Evidence in International Arbitration: Saving the Party-Appointed Expert* (Survey, Bryan Cave Leighton Paisner, 2021) 17.

which a tribunal can compare the respective merits and demerits.¹⁴⁷ However, party-appointed experts suffer from the issue of perceived (or actual) bias in favour of their appointing party: the problem of ‘hired guns’.¹⁴⁸ Meanwhile, tribunal appointment essentially avoids the problem of bias outright; but leaves the tribunal with only one analysis of events, whereas there may be multiple, legitimate, or diverse, perspectives that should be considered.¹⁴⁹

There are ways of mitigating these challenges by the use of certain procedures and techniques. I have already discussed some of them. Adopting these kinds of procedures can transform the efficiency and productiveness of the expert process and of a tribunal’s award. However, by far the most effective way of dealing with evidence of this kind would be to have a member of the arbitral tribunal with the relevant expertise in question. There are two immediate benefits to this.

First, this approach keeps, to some extent, the benefits of both party-appointed and tribunal-appointed experts. It enables both parties to present their respective cases through their own appointed experts; while at the same time ensuring that the tribunal has a means, independent of either party, of understanding the technical aspects of the expert evidence. There is an understandable fear that the expert arbitrator might overbear his or her colleagues on the panel, who might be inclined to accept that arbitrator’s views without much consideration. This fear is similar to that of a tribunal-appointed expert acting as the ‘fourth arbitrator’.¹⁵⁰ However, in my experience, the opposite is more likely. It is rarely the case that either expert’s opinion is *entirely* persuasive and correct: often, the real answer is somewhere between two extremes. Without technical expertise, it can be difficult to meaningfully negotiate two sets of expert evidence. Take, by way of example, delay evidence in a construction case. Two experts might each come up with their own assessment of the activities that were ‘critical’ to achieve completion of the project: the ‘critical path’. That assessment is usually made using a combination of data, complex (and proprietary) programming technology, and human adjustment to account for the factual reality of the project. Sometimes, the experts’ respective critical paths may diverge dramatically. There may be reasonable criticisms that both experts

¹⁴⁷ Sir Harry K Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996) [13.6].

¹⁴⁸ See Jones, “‘Hired Guns’” (n 30).

¹⁴⁹ Jones, ‘Redefining the Role and Value of Expert Evidence’ (n 121) 21–2.

¹⁵⁰ Ioan Schiau, ‘An Arbitration Dilemma: Party-Appointed Experts vs Tribunal-Appointed Experts: A Comparative Study’ (2022) 12(3) *Juridical Tribune* 329, 340; Paul Friedland and Stavros Brekoulakis, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (Survey, White & Case, 2012) 14.

levy at each other's critical path. In these circumstances, it is generally entirely infeasible for the tribunal to reconstitute its own 'best-of-both-worlds' critical path, and the tribunal is left in the difficult position of not being able fully to accept either party's case. Having a delay expert on the tribunal might allow the entire tribunal better to engage with, rather than disengage from, the two sets of expert evidence. It is perfectly legitimate for an arbitral tribunal to use its own expertise in this way, and this is one of the key distinguishing characteristics between arbitration and litigation in the courts: to paraphrase Lord Mustill, an arbitrator must always use their own knowledge and expertise; a judge must never do so.¹⁵¹

Secondly, issues such as delay and quantum inevitably touch on mixed questions of fact and law, particularly, where questions of causation are involved.¹⁵² To take quantum as an example, a complaint often made of quantum experts is that their analysis tends to intrude on questions of liability, particularly when the expert opines on questions of breach of contract and causation. Whether a quantum expert exceeds their remit depends on the circumstances of each case. However, the line between 'an issue of liability' and 'an issue of quantum' is seldom obvious.¹⁵³ On one reading, whenever an expert evaluates the 'quantum of a claim', they are assessing what costs, as evidenced by the documentary record, are attributable to (or 'caused by') a breach of contract. Therefore, although 'causation', at a general level, is properly a question of fact for the tribunal to determine, it is something that, when one gets into the nitty gritty of the claim, a quantum expert might legitimately opine on. If the tribunal has as one of its arbitrators a quantity surveyor, that arbitrator can read the expert evidence through two lenses: the lens of an expert who understands the technicalities of the subject; and the lens of an arbitrator invested with authority to decide all questions of fact in the matter. That arbitrator has the potential to help the tribunal wade through vexing, mixed questions such as causation.

These are some of the advantages that I felt in arbitrations where a member of the tribunal was a non-lawyer expert. I will share two. First, a complex hydroelectric dispute involving, amongst other issues, turbine performance. My tribunal was blessed with a (party-appointed) female engineer experienced in arbitration and coming from an extensive expert witness background. Her contribution to the tribunal's understanding of the turbine issue was

¹⁵¹ See Mustill, 'Cedric Barclay Lecture' (n 104): '[t]he expert arbitrator who uses his own knowledge. The old-style arbitrator was appointed to do exactly this. The judge should never do so': at 25–6.

¹⁵² See the discussion in *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2016] NSWSC 1116, [22]–[24], [195]–[196] (Hammerschlag J).

¹⁵³ See generally David Hamer, "'Chance Would Be a Fine Thing': Proof of Causation and Quantum in an Unpredictable World' (1999) 23(3) *Melbourne University Law Review* 557.

of immense value. Secondly, an oil concession accounting dispute where, again as a party-appointed arbitrator member of the tribunal an experienced quantity surveyor added numeracy skills which were a most welcome supplement to those of the other tribunal members. Both are experiences which dictate the need for them to be replicated.

B How to Regain It

There has to be a level of comfort, in a structure which allows for party appointment, in the capacity of party appointees to adequately perform the role of arbitrator. And, to a degree, while arbitrations with three arbitrators continue to be the norm, and party appointment dominates the appointment process for the party-appointed arbitrators, and, sensibly, the party-appointed arbitrators dominate the selection of the presiding arbitrator, the key issue in diversity is having a level of confidence and comfort with parties potentially appointing non-lawyers, or, alternatively, the issue of choice of presiding arbitrator.

However, as things stand at the moment, in both respects, the likelihood of appointment of non-lawyers, either as party-appointed arbitrators or as presiding arbitrators, is starkly predicted by the present situation. Therefore, careful thought needs to be given to what can be done to raise the level of awareness of the value of non-lawyers.

There are no quick fixes to this problem. Some aspects that have contributed to the present state of affairs cannot easily be undone, such as the increasing of costs of litigation and arbitration. Some should not be undone. For example, although the restricted grounds for setting aside an award have arguably contributed to the present situation, the finality that they bring to arbitral awards is fundamental and should be preserved.

This is also not a problem that can be reformed by statute. None of Australia's arbitration legislation prescribes legal training as a criterion for appointment as an arbitrator.¹⁵⁴ Parties are free to choose whomever they want as arbitrators; and certainly I would not go so far as to *compel* parties to appoint non-lawyers. This brings us back to where we began: noting

¹⁵⁴ CAA 2010 (n 101) s 11; IAA (n 100) sch 2, art 11. The position is consistent throughout Australia, and has also been largely consistent internationally for some time: Meason and Smith, 'Non-Lawyers in International Commercial Arbitration' (n 89) 47. See also Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 261–2 [5.2.2.4]. Cf Lukáš Ryšavý, 'The Lawyer in the Context of Arbitration' (2024) 11(1) *European Studies* 225, 233–4.

the sensitive issues at hand when party autonomy is in question. Of course, this could be remedied by arbitral tribunals being wholly appointed by institutions, in which event institutions can carry forward the responsibility of being aware of the value of diversity of expertise, particularly in the context of being fully informed by parties of the skillsets needed for resolution of the particular dispute. However, that is a development that would require substantial reform to the party appointment process, which is not presently on the horizon.

Essentially, what is required is an attitude shift, or a changing in perspective: among litigants and their lawyer; arbitrators; and arbitral institutions. These are the people that appoint arbitrators: litigants are generally each entitled to appoint their own arbitrator; those arbitrators are sometimes able to nominate or appoint a president; and the institutions serve as a back-up appointing authority in the Regulations.¹⁵⁵ Unless they see the value in having non-lawyers serve as arbitrators, there will be no change.

With that context in mind, there are some ways in which the present attitudes towards the use of non-lawyers as arbitrators might begin to change.

First, Ciarb training and accreditation provides a very useful way in which levels of comfort regarding the expertise of potential arbitrators can be established, particularly in the context of fellowship and chartered arbitrator qualifications.¹⁵⁶ There already exists a substantial cohort of non-lawyers who have established their qualifications through Ciarb training, and thus, the process of recognition of expertise among non-lawyers is well advanced through the work that the Ciarb has done. However, the criteria for obtaining those qualifications are often dependent on experience as an arbitrator. Therefore, there is a real chicken and egg problem. Thus, consideration should perhaps be given to mentoring and pupillage of non-lawyers who do not meet the requisite experience qualifications; and mentoring and pupillage is, in any event, which, independent of the Ciarb qualifications, capable of giving substantial levels of comfort to appointing parties and institutions.

Lawyers tend to presume that their knowledge of the law gives them a privileged position, one that a non-lawyer cannot attain without acquiring legal qualifications of their own. But this is simply not true of arbitrators. Non-lawyer arbitrators can develop, and have developed, the skills needed to run an effective arbitration that respects the mandatory

¹⁵⁵ In Australia, see *International Arbitration Regulations 2020* (Cth) reg 6, prescribing ACICA as the prescribed authority in relation to, inter alia, appointments.

¹⁵⁶ On the importance of institutions to the training of non-lawyer arbitrators, see Bradbrook, 'Teaching Arbitration to Non-Lawyers' (n 94) 183–4.

arbitration law, and deliver an enforceable award. Concepts such as the duty to give parties an equal and reasonable opportunity to present their respective cases, have become very technical through a long history of case law on the subject.¹⁵⁷ But, at their core, these concepts are rooted in broader notions of justice and procedural fairness,¹⁵⁸ that can, with training, be mastered. Party-appointed experts in particular are already very familiar with arbitral process, and are, in my experience, sensitive and receptive to the tribunal's directions with regard to case management and examination. Taking the step towards being an arbitrator is, after all, as much about gaining experience and confidence as it is about gaining knowledge. It is something experts are able and willing to do, if properly supported.

Secondly, there is also an opportunity for non-lawyers seeking appointment as arbitrators to provide services as tribunal secretaries on an ad hoc basis, which would supplement the experience of the process which many potential candidates would naturally develop in their role as expert witnesses.

Thirdly, to a significant degree, the attitude of 'users' of arbitration, rather than their legal advisors, needs to be informed by discussion of the value of having subject matter experts acting as arbitrators. History suggests that users had a very well-developed view on this. But, that view has clearly faded in the commercial arbitration context, although it is alive and well elsewhere, as already mentioned. The influence of in-house counsel is critical, because, in many instances, they would be the gatekeepers of users' views.

Finally, in the infrastructure context, the experience of non-lawyers as adjudicators and as members of dispute boards is an obvious opportunity for potential non-lawyer candidates to build a reputation for adjudicative expertise with counsel, and with the other participants, say, in a dispute board, who could well be lawyer party-appointed arbitrators looking at potential

¹⁵⁷ Australian international and domestic commercial arbitrations use a test of 'justifiable doubts', which arise where there is a 'real danger of bias' on the part of the arbitrator: CAA 2010 (n 101) ss 12(1), (5); IAA (n 100) s 18A read with sch 2, Art 12. This test derives from *R v Gough* [1993] AC 646, 670 (Lord Goff), and has been subject to substantial judicial elaboration: *Hancock v Hancock Prospecting Pty Ltd* (2022) 409 ALR 638 (NSWCA); *Hancock v Hancock Prospecting Pty Ltd* (2022) 402 ALR 328, 333 [15] et seq (Ball J) (NSWSC); *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, 345 [240] et seq (Beach J) (FCA); *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, [191] et seq (Beach J); *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480 [25] et seq (Lord Bingham CJ, Lord Woolf MR and Scott V-C).

¹⁵⁸ The core of the duty is 'obligation to "fairly listen to both sides" being "a duty lying upon everyone who decides anything": *Xuereb v Viola* (1989) 18 NSWLR 453, 471 (Cole J), quoting *Board of Education v Rice* [1911] AC 179, 182 (Lord Loreburn LC). Note also that terms of Articles 18–19 of the Model Law were kept general, it being thought unnecessary or inappropriate overly to particularise the duties of procedural fairness: Ilias Bantekas, 'Equal Treatment of Parties in International Commercial Arbitration' (2020) 69(4) *International and Comparative Law Quarterly* 991, 997–9.

candidates for presiding arbitrator roles. Coulson LJ described the success of statutory adjudication and the Technology and Construction Court in the UK in the following terms:

[Statutory adjudication] is one of the reasons why, speaking personally, I rather cavil at the suggestion that construction adjudication is somehow ‘just a part of ADR’. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town.¹⁵⁹

Dispute boards are a somewhat more recent innovation, and are being used at an ever-increasing rate.¹⁶⁰ Although judicial commentary on dispute boards is still (understandably) somewhat limited, these trends towards the use of dispute boards were noted by the High Court in 2011 in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*.¹⁶¹ If parties and the profession become more familiar with these kinds of procedures, and with the experts that lead them, they are more likely to see value in appointing such non-lawyers if disputes should escalate to arbitration.

CONCLUSION

Commercial arbitration has failed in recent years to avail itself of expertise which has historically provided real value to the process. The legal profession’s dominance of arbitral appointments in commercial arbitration has been pervasive, and continues with the support of the mainstream arbitral institutions. It is time for the arbitration community to recognise that this undermines the legitimacy of the process, and to take active steps to remedy the situation. This is an issue of diversity fundamental to the process and to the quality of decision-making in commercial arbitration. It is simply not good enough for the legal profession to perpetuate

¹⁵⁹ *John Doyle Construction Ltd v Erith Contractors Ltd* [2021] Bus LR 1837, 1845–6 [29] (Coulson LJ, Edis LJ agreeing at 1864 [110]).

¹⁶⁰ See generally Michael Christie, ‘The Growing Importance of Dispute Boards in Australian Infrastructure Projects’ (2021) 37(2) *Building and Construction Law Journal* 91.

¹⁶¹ (2011) 244 CLR 305, 314–15 [25] (French CJ, Crennan and Kiefel JJ), citing Nicholas Dennys, Mark Raeside and Robert Clay, *Hudson’s Building and Engineering Contracts* (Sweet & Maxwell, 12th ed, 2010) 706 [4-102].

the conceit that only lawyers are capable of delivering enforceable awards of real determinative quality. Solutions are available in which the Ciarb can play an important role.

May the debate flourish.

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