

**THE HON T F BATHURST**

**CHIEF JUSTICE OF NEW SOUTH WALES**

**FRANCIS FORBES SOCIETY AUSTRALIAN LEGAL HISTORY TUTORIALS**

**'THE HISTORY OF THE LAW OF COMMERCIAL ARBITRATION'**

**THURSDAY 18 OCTOBER 2018**

**INTRODUCTION**

1. It can be tempting to seek to frame commercial arbitration as a uniquely contemporary threat to the “rule of law” in modern society. However, contrary to what many may assume, arbitration did not simply spring forth into existence upon the publication of the UNCITRAL Model Law,<sup>1</sup> nor even upon the entry into force of the venerable New York Convention.<sup>2</sup> As important as these two events were, arbitration has an interesting, and at times, convoluted, past which extends back further than most people realise.
2. Now, this should not really be surprising. Unlike other areas of law, arbitration is a phenomenon which is not unique to a particular legal system. Indeed, arbitration does not really depend upon the existence of any defined legal system at all. One can readily imagine disputes between our early human ancestors being resolved by both parties agreeing to place a final decision on the matter in the hands of one who

---

<sup>1</sup> United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*, UN GAOR, 40<sup>th</sup> sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex I, as revised by the amendments in United Nations Commission on International Trade Law, *Report of the Work of the United Nations Commission on International Trade Law at its Thirty-Ninth Session*, UN GAOR, 61<sup>st</sup> sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex I: see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

<sup>2</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

is older and wiser,<sup>3</sup> even though they might have been totally ignorant of the benefits of modern innovations such as “Redfern schedules”, “Sachs protocols”, “Reed retreats”,<sup>4</sup> and the hefty bill of costs to be paid to the lawyers at the conclusion of the proceedings.

3. Many of you might think that framing the history of arbitration like this is somewhat unfair, since it breaches the unwritten rules governing the perennial competition as to which area of law has the longest and most distinguished historical pedigree.<sup>5</sup> However, I would say that framing the history of arbitration in this way emphasises precisely how it is different from those other areas of law: while the study of areas of law such as contract, tort, and crime depends, at least initially, on identifying the existence of legal rules which define those areas, arbitration is a method for resolving disputes which has been, is, and will continue to be used regardless of what the legal system says about it.
4. This means that we have to be careful when we come to look at the legal history of arbitration. Despite the title of my address this evening, we cannot really speak of “the history of the law of arbitration”. Rather, we should speak of “the history of the law *relating to* arbitration”. We are looking at the way that the law responds to and regulates a consensual process for resolving disputes which, in a very real and important sense, is not a creature of the legal system. We are looking at the balance which the law strikes between two “alternative” systems which compete

---

<sup>3</sup> Cf M J Mustill, ‘Arbitration: History and Background’ (1989) 6 *Journal of International Arbitration* 43, 43.

<sup>4</sup> Stavros Brekoulakis, ‘The Evolution and Future of International Arbitration’ in Stavros Brekoulakis, Julian D M Lew, and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Wolters Kluwer, 2016) 1, 7 [1.17].

<sup>5</sup> For two somewhat strained examples of amateur legal history, see, eg, *Cooper v Wandsworth Board of Works* (1862) 14 CB (NS) 180, 195; 143 ER 414, 420 (administrative law); Frank D Emerson, ‘History of Arbitration Practice and Law’ (1970) 19 *Cleveland State Law Review* 155, 155 (arbitration).

with or complement each another, and the relationship which the law establishes between them.

5. This has a fairly significant consequence for how I will approach my address this evening. I will not be commencing my address at that tried and tested starting point which is usually described as “the beginning”. Instead, I will begin with “the end”, that is, the current balance which has been struck between arbitration and the courts as alternative means of resolving disputes in Australia, and more particularly, New South Wales. I will then trace how we have reached this position through time, showing how the balance between arbitration and the courts has shifted from the time of the origins of the legal system in England to the present.
6. The purpose of structuring my address in this way is to more clearly permit a comparison to be drawn between how the law has set the balance between arbitration and the courts, then and now. When history is viewed as a chronological narrative, it is often all too easy to view the past as being drawn towards the present by something like a gravitational pull. Such an approach usually ends up affirming or at least validating the status quo. If we are to learn from history, we must approach the past differently, and instead try to compare it with the present on its own terms.
7. When applied to the law relating to arbitration, I think that this method highlights an important misconception in modern debates about the desirability and efficacy of arbitration. As I have already emphasised in my address thus far, even though arbitration is a phenomenon which would still exist even in the absence of any legal system these debates too often tend to be framed around the question “How far ought we permit private parties to exclude determination of their dispute by a court?”. However, in my opinion, a reading of the history of the law relating to arbitration suggests that the question should really be “How

far ought courts be willing to intervene in arbitrations between private parties?”.

8. In this address, I will seek to demonstrate that the history of the law relating to arbitration establishes that this is the right question to ask. As I have said, to do that, we must first turn to the law relating to arbitration as it currently stands.

## **THE PRESENT LAW RELATING TO ARBITRATION**

9. At present, the principal legislative regime in Australia relating to arbitration has quite a simple structure. It takes as its criterion of operation the existence of a “commercial arbitration”. While the outer metes and bounds of both of the words “commercial” and “arbitration” might be somewhat difficult to define in the abstract, this question has appeared to cause few problems in practice.<sup>6</sup> Simply put, a “commercial arbitration” will occur where two parties have agreed to submit a dispute arising out of a relationship of a commercial nature to a third party for a final and binding decision.<sup>7</sup>
10. If such an arbitration exists, then the Commonwealth *International Arbitration Act 1974* applies if the arbitration is “international”,<sup>8</sup> while the equivalent State legislation applies if the arbitration is “domestic”.<sup>9</sup> However, both the Commonwealth and State legislation apply the same UNCITRAL Model Law to the arbitrations which they cover, with some

---

<sup>6</sup> Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2013) 40-43. Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2<sup>nd</sup> ed, 2014) vol 1, 244-245.

<sup>7</sup> United Nations Commission on International Trade Law, *Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) 12–13, citing *Sport Maska Inc v Zittner* [1988] 1 SCR 564.

<sup>8</sup> *International Arbitration Act 1974* (Cth) s 16(1), applying UNCITRAL Model Law art 1(1).

<sup>9</sup> *Commercial Arbitration Act 2010* (NSW) s 1(1).

minor modifications.<sup>10</sup> The law relating to arbitration in Australia is therefore substantially uniform throughout the continent, which is a pleasant surprise in an era where legislators like to stretch the expression “uniform law” as far as they can, so that it apparently can sometimes mean that the law applies in as few as two states.<sup>11</sup>

11. The Model Law narrowly confines the role of courts in resolving disputes which are subject to “commercial arbitration” pursuant to an arbitration agreement. It achieves this primarily by imposing three restrictions on court involvement in arbitral proceedings.
12. First, the Model Law prevents a court from hearing “a matter which is the subject of an arbitration agreement” against the wishes of a party to that agreement.<sup>12</sup> Article 8(1) provides that, in such matters, a court must “refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”. To paraphrase slightly, this means that, if an arbitration agreement is valid and enforceable, a court must not hear a matter which falls within its scope.
13. Second, the Model Law prevents a court from interfering in the conduct of an arbitration which has been commenced except where expressly provided. Article 5 provides that, in matters “governed by this Law, no court shall intervene except where so provided in this Law”. The exceptions to this prohibition are generally limited to circumstances relating to the constitution and jurisdiction of the arbitral tribunal, and only apply if the “place of arbitration” is within the jurisdiction of that

---

<sup>10</sup> *International Arbitration Act 1974* (Cth) sch 1; *Commercial Arbitration Act 2010* (NSW) pt 1A.

<sup>11</sup> See, eg, the *Legal Profession Uniform Law*, which, at the date of this address, had only been adopted in New South Wales and Victoria.

<sup>12</sup> UNCITRAL Model Law art 8(1). Section 7 of the *International Arbitration Act 1974* (Cth) also has a similar function, and implements the older New York Convention. It is available as an alternative to the UNCITRAL Model Law.

Court.<sup>13</sup> However, there is also scope for granting “interim measures” in aid of the arbitration even if it takes place outside that jurisdiction.<sup>14</sup>

14. Finally, the Model Law requires a court to treat an award made as a result of an arbitration as binding and enforceable.<sup>15</sup> Article 35(1) provides that a court must “recognise” and “enforce” such an award, made as a result of a commercial arbitration, subject to limited exceptions, most of which relate to the validity of the arbitration agreement and the “fairness of the arbitral process”.<sup>16</sup> Potentially the widest ground is that relating to “public policy”,<sup>17</sup> which, under the Commonwealth legislation, at least includes circumstances where an award is “affected by fraud or corruption” or there was “a breach of the rules of natural justice”.<sup>18</sup>
15. The overall effect of these restrictions is that the fact of the existence of an arbitration agreement between the parties places what might be described as the “merits” of a particular dispute, including both the findings of fact and the application of law to those facts, in the hands of the arbitral tribunal.<sup>19</sup> A corollary of this is that the Model Law prescribes aspects of the procedure to be followed in an arbitration by imposing duties and conferring powers on the parties to the agreement,

---

<sup>13</sup> UNCITRAL Model Law art 1(2)/

<sup>14</sup> UNCITRAL Model Law art 17J.

<sup>15</sup> UNCITRAL Model Law arts 34, 35. Section 8 of the *International Arbitration Act 1974* (Cth) also has a similar function, and implements the older New York Convention. Unlike s 7, where an arbitration falls within s 8, that section applies to the exclusion of the UNCITRAL Model Law.

<sup>16</sup> UNCITRAL Model Law art 36(1); see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 at [53].

<sup>17</sup> UNCITRAL Model Law art 36(1)(b)(ii).

<sup>18</sup> *International Arbitration Act 1974* (Cth) s 19.

<sup>19</sup> Cf *Commercial Arbitration Act 2010* (NSW) s 34A, which permits an appeal to be brought if the parties agree, or if the Court grants leave, essentially if the error alleged to have been made raises a serious issue.

although critical matters, such as the selection of the arbitrator, are left to the parties' discretion. By reason of the Commonwealth and State legislation implementing the Model Law, the duties imposed and powers conferred on the parties have the force of law.

16. The regime established by the Model Law is thus a consensual dispute resolution process supported by statute, removing the determination of what I have called the "merits" of a dispute from the courts, but at the same time, imposing a measure of control over the procedure which parties may agree to use to resolve the "merits" of that dispute. The regime therefore gives arbitral tribunals a wide latitude to "go wrong" in resolving the "merits" of a dispute provided that the correct procedure is followed. For some, vesting this almost unreviewable power in arbitral tribunals might evoke the fear of creating "islands of power"<sup>20</sup> where "the King's writ does not run"<sup>21</sup>, contrary to the trajectory of parallel developments in administrative law over the course of the 20<sup>th</sup> century.
17. These concerns no doubt loomed large when a company called TCL Air Conditioner challenged the validity of the provisions of the Commonwealth legislation implementing the Model Law in the High Court in 2013.<sup>22</sup> TCL asserted that the relevant provisions of the Act were invalid either because they impaired the institutional integrity of the courts which were required to enforce awards, or because they vested the judicial power of the Commonwealth in arbitral tribunals.<sup>23</sup> In the judgment of the majority of the High Court, a single proposition was identified as underpinning both submissions: "that to avoid contravening

---

<sup>20</sup> Cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1 at [99].

<sup>21</sup> *Czarnikow v Roth Schmidt & Co* [1922] 2 KB 478 at 488.

<sup>22</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 (*TCL Air Conditioner*).

<sup>23</sup> *TCL Air Conditioner* at [64]-[66].

Ch III of the *Constitution* courts *must* be able to determine whether an arbitrator applied the law correctly in reaching an award”.<sup>24</sup>

18. Now, it seems to me that the essence of this proposition is very similar to that underlying the first of the two questions which I identified earlier in my address: the proposition asserts that arbitral proceedings under the Model Law wrongfully exclude courts from performing a function to which they have an exclusive claim, that is, the interpretation and application of the law. However, in upholding the Commonwealth legislation implementing the Model Law and rejecting TCL’s proposition,<sup>25</sup> in my view, the High Court correctly drew attention to viewpoint expressed in the second of the two questions I identified earlier: since the foundation for the validity of an arbitration lies in the consensus of the parties to abide by the decision of the arbitral tribunal, it is not to the point that a court cannot review the “merits” of an award prior to its enforcement. Nothing in the nature of “judicial power” under the *Constitution* requires courts to be the sole arbiters of the “merits” of a case.<sup>26</sup>
19. In reaching this conclusion, the High Court paid close attention to the historical development of the law relating to arbitration under the common law, and emphasised, as I have done at the beginning of this address, how this history demonstrates that arbitration has always existed alongside, and not under, the courts, and that this has required the law to seek a balance between the two which was appropriate to the circumstances of the time. It is my view that this perspective is not only useful for resolving issues of constitutional law, or for determining whether air conditioner manufacturers can escape the consequences of an arbitral award which wasn’t to their liking, but that it is also the

---

<sup>24</sup> *TCL Air Conditioner* at [67].

<sup>25</sup> *TCL Air Conditioner* at [111].

<sup>26</sup> *TCL Air Conditioner* at [106]-[110].



correct perspective to use when evaluating what we ought to do as a matter of policy.

20. Now, to make good this proposition, it is time for me to take you on a brief tour of the history of arbitration and its relationship with the law. I will do so by dividing this history into two periods prior to our own “international” period. I will call the first the “formative” period and the second the “statutory” period.

### **THE “FORMATIVE” PERIOD: 1154 – 1698**

21. It is the first of these periods to which I will now turn. As with most legal history, the earliest period is usually the most difficult to grapple with. When it comes to understanding the law relating to arbitration, that difficulty is magnified. While it is clear that this period witnessed the growth and development of the common law and a vibrant practice of arbitration, there are no surviving sources from the period which really allow us direct insight into the key theme of my address: how did the law strike the balance between arbitration and the courts?
22. This problem is not insurmountable; after all, the same could be said about the development of the common law during this period generally.<sup>27</sup> However, the difference is that the primary sources which evidence the development of the common law as a whole has received sustained academic attention from researchers over the course of the 20<sup>th</sup> century, while sources which focus on arbitration and its relationship with the courts in this period have received little attention until recently.<sup>28</sup> This means that it is often difficult to make general statements about the

---

<sup>27</sup> Legal secondary sources analysing doctrine and practice were sparse at least until the 16<sup>th</sup> century. The two primary sources prior to this time are the texts commonly known as *Glanvill* and *Bracton*, and they do not give a holistic view of legal practice in this period: see J H Baker, *An Introduction to English Legal History* (Oxford University Press, 4<sup>th</sup> ed, 2007) ch 11.

<sup>28</sup> M J Mustill, ‘Sources for the History of Arbitration: Foreword’ (1998) 14 *Arbitration International* 235, 235; Derek Roebuck, ‘Sources for the History of Arbitration: A Bibliographical Introduction’ (1998) 14 *Arbitration International* 237, 239; .

relationship between arbitration and the courts during this period, even though we do not necessarily lack relevant evidence.

23. With this caveat in mind, I will do my best to give you a brief sketch of this “formative” period, which, as its label suggests, saw the birth of many of the rules and practices which would define the law relating to arbitration in later periods. The period starts in the reign of Henry II, whose legal reforms after the civil war between Matilda and Stephen had ended laid the foundations for the development of the common law.<sup>29</sup> At this point in time, while central royal justice, and thus, the common law, was just beginning, the practice of mediation and arbitration in England was already several centuries old.<sup>30</sup>
24. The evidence shows that mediation and arbitration, both public and private, was no less prevalent after Henry II ascended to the throne.<sup>31</sup> It certainly did not face any opposition from the gradual establishment of a system of centralised royal justice over the course of his reign. At this time, the jurisdiction of what came to be known as the “royal courts” was closely circumscribed by the types of royal writs which would be issued.<sup>32</sup> In particular, the royal courts were reluctant to assume jurisdiction over claims based on private agreements,<sup>33</sup> which were left to the local and manorial courts.<sup>34</sup> This explains the absence of the

---

<sup>29</sup> See J H Baker, *An Introduction to English Legal History* (Oxford University Press, 4<sup>th</sup> ed, 2007) ch 2.

<sup>30</sup> See Derek Roebuck, *Early English Arbitration* (Holo Books, 2008).

<sup>31</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 4–7.

<sup>32</sup> See generally J H Baker, *An Introduction to English Legal History* (Oxford University Press, 4<sup>th</sup> ed, 2007) ch 4. For the development of what we would now regard as “contractual” forms of action, see A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 3–4.

<sup>33</sup> G D G Hall (ed), *The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill* (Thomas Nelson & Sons, 1965) 132.

<sup>34</sup> A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 4–5.

development of any principles relating mediation and arbitration until much later.

25. However, this is not to say that mediation and arbitration, on the one hand, and the courts, on the other, were simply like ships passing in the night. On the contrary, there is ample evidence that, even in the limited matters in which they had jurisdiction, the royal courts actively encouraged the resolution of disputes through what we would now call “alternative dispute resolution”,<sup>35</sup> using the very early predecessors to what we now call “court-annexed mediation”<sup>36</sup> or “med-arb”.<sup>37</sup> But the medieval courts did not share our modern fondness for using such incredibly bland titles, and called these processes by a different name: the “loveday”.
26. Now, a “loveday” is really no different to what we now know as the process of mediation: Roebuck states that it refers to “a moment or period in which the parties were given an opportunity to settle, as well as what they did in it”.<sup>38</sup> The term gradually fell out of usage and became obsolete, perhaps because over time it acquired negative associations with delay, corruption, and abuse of power.<sup>39</sup> Nevertheless, it makes one wonder: “what if?”. Instead of having “court-annexed mediation”, we could have had “court-annexed lovedays”. Instead of “mediators” and

---

<sup>35</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) ch 3.

<sup>36</sup> Today, “court-annexed mediation” usually refers to a mediation conducted pursuant to a reference under Part 4 of the *Civil Procedure Act 2005* (NSW).

<sup>37</sup> “Med-arb” refers to a hybrid process of mediation and arbitration to achieve a settlement: see Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2013) 344. However, “med-arb” is much older, with evidence suggesting that it was in existence from the very beginning of the “formative” period: Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 47-49.

<sup>38</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 39.

<sup>39</sup> Sir John Baker, ‘From Lovedays to Commercial Arbitration’ in Sir John Baker, *Collected Papers on English Legal History* (Cambridge University Press, 2013) vol 1, 432, 436.

“mediation rooms”, we could have had “loveday-makers” and “love rooms”, although the latter does sound either slightly risqué or Orwellian, depending upon your frame of mind.

27. The evidence suggests that the most frequent contact the royal courts would have had with lovedays was through the royal eyres, when the justices were commissioned to sit and hold a court at the local assemblies of the counties, although examples also exist of the courts at Westminster Hall granting loveday adjournments.<sup>40</sup> Roebuck provides many examples of the justices in eyre approving settlements of litigation after local courts had adjourned a matter for a loveday,<sup>41</sup> and although he admits that statistical analysis is difficult, he cites statistics which show that, at some eyres, roughly equal numbers of matters were adjudicated and settled.<sup>42</sup>
28. As I have already hinted at, there was no close distinction between mediation and arbitration at the beginning of this period, and Roebuck proposes that it might have been common for parties to first resort to mediation assisted by their “friends”, who, if the dispute remained, would then appoint another person to make a final decision on the dispute.<sup>43</sup> If a settlement was reached through this process at the loveday, it could then be “approved” simply by returning to court and entering that fact onto the court roll. However, the more usual practice was for the settlement to be recorded on a document called a chirograph.<sup>44</sup> The

---

<sup>40</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 39-43; Sir John Baker, ‘From Lovedays to Commercial Arbitration’ in Sir John Baker, *Collected Papers on English Legal History* (Cambridge University Press, 2013) vol 1, 432, 434-435.

<sup>41</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 39-43.

<sup>42</sup> Ibid 44.

<sup>43</sup> Ibid 47, 54.

<sup>44</sup> Ibid 50-52.

settlement would be drawn up in triplicate on a single page, which was then divided into a “T” shape using a serrated cut. Each party to the settlement took one part, and the remaining part, called the “foot of the fine”, was retained by the court,<sup>45</sup> which would assist in later verifying the legitimacy of any settlement.

29. It also seems that, if they had wanted to, an option was available for the parties to secure even greater protection for their settlement: if the outcome of the settlement consisted of the payment of money or the transfer of land, a defendant could agree to having judgment entered against themselves in the terms of the agreement.<sup>46</sup> If necessary, the judgment could then be enforced in a much more summary fashion than if a party to the settlement were required to establish the terms of an agreement in a completely fresh action. Such “collusive concords”, as they are described, may not always have been the outcome of mediation or arbitration, as there were reasons for using them outside the resolution of disputes, but it certainly seems possible.<sup>47</sup>
30. A similar statutory mechanism existed for disputes between merchants from the late 13<sup>th</sup> century onwards. Instead of having to invoke the procedure of the courts, the Statute of Merchants<sup>48</sup> permitted a creditor and debtor to record their agreement before the mayor of certain towns

---

<sup>45</sup> Ibid 51.

<sup>46</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 49.

<sup>47</sup> Roebuck seems to take the view that a “collusive concord” could not be the outcome of a process of mediation or arbitration: Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 50. However, it is difficult to see why a “collusive concord” could not also have been the result of a prior agreement reached by mediation or arbitration.

<sup>48</sup> There are two statutes which are usually known as the “Statute of Merchants”. They are the statutes 11 Edw I (1283) and 13 Edw I (1285). The second of these two statutes updated the working of the first, and as a result, were usually referred to together.

or cities or between appointed merchants at fairs.<sup>49</sup> An agreement so recorded was called a “recognizance” and was immediately enforceable as if it were a judgment of a court. No doubt it would have been possible for parties to use this procedure to give effect to an agreement to resolve a dispute after mediation or arbitration, but the nature of these records make it difficult to “go behind” the recognizance to verify whether this was in fact the case.

31. In any event, it is clear that, right from the very beginning, there was a close relationship between the courts and various forms of “alternative dispute resolution”. There is little evidence of the animosity towards arbitration which would later become attributed to the judges of this early period.<sup>50</sup> Indeed, there is evidence which suggests that, to the contrary, many judges were actively involved as arbitrators while on the bench.<sup>51</sup> However, the relatively confined jurisdiction of the royal courts during this early period meant that there was usually little need to deal with the questions that arise in modern litigation about arbitration. This might have been just as well: one arbitrator’s award from this period resolved a dispute by decreeing that the parties “should give each other the kiss of peace and should henceforth be friends”,<sup>52</sup> which would no doubt pose somewhat unique problems of enforceability under the Model Law were such an award to be made today.

---

<sup>49</sup> A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 126-127.

<sup>50</sup> See the comments of Lord Campbell in *Scott v Avery* [1843-60] All ER 1 at 7. These comments were omitted from the reported version of the case.

<sup>51</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154-1558* (Holo Books, 2013) 371.

<sup>52</sup> Sir John Baker, ‘From Lovedays to Commercial Arbitration’ in Sir John Baker, *Collected Papers on English Legal History* (Cambridge University Press, 2013) vol 1, 432, 435.

32. As such, apart from possibly a few early instances,<sup>53</sup> the law did not really play much of a role in shaping the relationship between arbitration and the courts until there was a means by which issues relating to arbitration agreements and awards could regularly be brought before the royal courts. This only really began to occur over the course of the 14<sup>th</sup> and 15<sup>th</sup> centuries, when the conditional bond became a popular means by which to enforce an agreement to submit to arbitration and to accept the outcome.<sup>54</sup> It is around this time that the courts began to confront the questions posed by the interaction between litigation and consensual dispute resolution.
33. The conditional bond was a simple enough idea, and its use has had a large effect not just on the development of the law relating to arbitration, but on many other areas of law.<sup>55</sup> The term described a type of deed in which one person bound themselves to pay a certain sum of money to another person on a certain day, subject to the fulfilment of a condition endorsed on the deed or contained in a separate document.<sup>56</sup> In substance, the conditional bond was a means by which a penalty could be imposed on a person for failing to perform the condition. If the

---

<sup>53</sup> For some of the earlier possibilities, see J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) ch IX; Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 371-379.

<sup>54</sup> For the development of the conditional bond, see A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 88 ff; Joseph Biancalana, 'Monetary Penalty Causes in Thirteenth-Century England' (2005) 73 *Legal History Review* 231.

<sup>55</sup> For example, the equitable doctrines relating to relief against penalties largely evolved as a result of the use of penalties in conditional bonds: A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 118-122; see also *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

<sup>56</sup> A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 90-92.

condition was not performed by the time stated in the deed for payment, the debt could be recovered in an action of debt in the royal courts.<sup>57</sup>

34. Prior to the rise of the action on the case upon an *assumpsit*, the conditional bond was the favoured means of holding a person to their promise, and agreements to arbitrate were no different. In order to secure the performance of an agreement to arbitrate, the common practice was for both parties to execute a conditional bond, subject to a condition that they “stand to, abide, observe, perform, fulfil, and keep, the rule, order, judgment, arbitrament, sentence, and final determination” of one or more named arbitrators in relation to all “matters, suits, controversies, debates, griefs, and contentions heretofore moved and stirred, or now depending between” the parties, so long as the arbitrators made the award before a time specified in the condition.<sup>58</sup>
35. Using a conditional bond in this form permitted a party to bring an action in debt if the other party failed to abide by the arbitral procedure. This action offered several procedural advantages in securing the appearance of the defendant in court and allowed a fixed penalty to be recovered, rather than damages to be quantified by a jury as on an action in covenant.<sup>59</sup> The action of debt was also favourable to plaintiffs in terms of pleading: it was for the defendant to plead and prove that they had fulfilled the condition contained on the bond, and not the plaintiff.<sup>60</sup> These advantages lead to the dominance of the penal bond as the preferred method in practice to secure the performance of an

---

<sup>57</sup> Ibid 88-89.

<sup>58</sup> This example has been taken from the form of the conditional bond in *Vynior’s Case* (1609) 8 Co Rep 81b; 77 ER 597. There are similar examples from the 15<sup>th</sup> century in Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 58-60, 367.

<sup>59</sup> A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 117

<sup>60</sup> Ibid.



agreement to arbitrate; other methods were used, but effectively operated to achieve the same result as the use of a conditional bond.<sup>61</sup>

36. By and large, the general legal rules relating to conditional bonds were reasonably well established.<sup>62</sup> However, the use of conditional bonds to secure the performance of agreements to arbitrate raised two issues unique to the arbitral process which are of particular relevance. The first concerns the remedies which were available to a party if the other party failed to uphold an agreement to arbitrate or failed to comply with the terms of an award. The second concerns whether an award validly made could be relied upon as a defence to an action which was covered by that award.
37. If we were to discuss analogous issues which arise today under the Model Law, we might describe both of these issues in terms either of the “enforceability” of an arbitration agreement under article 8(1) or of an award under article 35(1). Simply put, under the Model Law, if there is a valid arbitration agreement, then litigation is precluded, and if a valid award has been made, then it will be enforced as a judgment of a court. However, the issues which arose from the use of conditional bonds to secure the performance of an agreement to arbitrate cannot be described in the same way. At the time, lawyers thought of the relevant legal concepts quite differently.
38. For example, the first issue I noted earlier concerned the remedies available to enforce a failure to comply with an arbitral process or an award. Under the Model Law, depending upon what the relevant “failure

---

<sup>61</sup> See Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347, 363, who also refers to “conditional recognizances”, which operated in a similar fashion to the recognizances discussed at [30] above, and a bond in escrow, where the bond was unconditional, but was placed in the hands of a third party with instructions to destroy it if a certain condition was fulfilled.

<sup>62</sup> For a detailed discussion of the principles by which conditional bonds were governed, see A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 88 ff.

to comply” is, there will either be a stay of litigation brought contrary to an agreement to arbitrate, or enforcement of an award as a judgment of the court. However, in the 14<sup>th</sup> to 16<sup>th</sup> centuries, the primary consequence of a failure to participate in the arbitral process or an award was the forfeiture of the penalty contained in the conditional bond, which could be recovered by an action in debt. It may seem curious to modern lawyers, but questions about whether an agreement to arbitrate precluded the bringing of an action covered by the agreement were never really squarely raised.<sup>63</sup>

39. Certainly, towards the end of the 17<sup>th</sup> century, at the end of what I have described as the “formative” period, the law was clear that an action brought contrary to an agreement to arbitrate prior to the making of an award would not be stayed merely by reason of that fact,<sup>64</sup> as it would now be under the Model Law.<sup>65</sup> The only consequence would be the forfeiture of a penalty under a conditional bond, in the same manner as in the 14<sup>th</sup> to 16<sup>th</sup> centuries, or, the breach of a promise giving rise to damages in an action on the case upon an *assumpsit*, after that cause of action came to be accepted over the course of the 17<sup>th</sup> century.<sup>66</sup> This conclusion followed from the proposition that, in most circumstances, prior to the making of an award, the authority of the arbitrators was

---

<sup>63</sup> The historical evidence is somewhat complex: both Roebuck and Cohen appear to be of the view that the practice of staying actions brought in defiance of an agreement to arbitrate is quite widely spread: see J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) ch IX; Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 371-379. However, Biancalana’s analysis of arbitration in the 15<sup>th</sup> century does not seem to support this view, given that it does not give examples of any cases where this occurred: Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347, 358 ff.

<sup>64</sup> See J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) 129 ff; Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 424. However, Roebuck does refer to other authorities which suggest that the practice may have been somewhat different at 410-411.

<sup>65</sup> UNCITRAL Model Law art 8(1).

<sup>66</sup> A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 502-503.

“revocable” by any one of the parties, and, if their authority was revoked, any award made by them was a nullity.

40. This proposition has long been recognised to have originated from Sir Edward Coke’s report of *Vynior’s Case*,<sup>67</sup> and, by the time of the publication of the first textbook on arbitration, the *Arbitrium Redivivum*, at the end of the 17<sup>th</sup> century, it was well-established.<sup>68</sup> The reasoning upon which Coke relied as supporting the “revocability” of the authority of an arbitrator is less than convincing,<sup>69</sup> but it does not really seem to have been inconsistent with how the courts had dealt with conditional bonds to secure the performance of arbitration in the 14<sup>th</sup> to 16<sup>th</sup> centuries. For example, in a review of the legal framework of arbitration in 15<sup>th</sup> century England, Biancalana makes no reference to the possibility that a party could have relied upon a mere agreement to arbitrate to prevent another party from continuing litigation in court in breach of that agreement.<sup>70</sup> While Cohen<sup>71</sup> and Roebuck<sup>72</sup> do cite isolated examples where this did in fact occur in earlier centuries, these decisions appear to have had no lasting impact on the law or practice of arbitration.
41. I do not propose to comment further on the consistency of *Vynior’s Case* with earlier authority. It suffices to say that, within only a few decades after it was decided, it was considered to have conclusively established

---

<sup>67</sup> (1609) 8 Co Rep 81b; 77 ER 597.

<sup>68</sup> See chapter II of the *Arbitrium Redivivum*, extracted in Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 452-453.

<sup>69</sup> J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) 93-96; Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 422.

<sup>70</sup> Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347, 358 ff.

<sup>71</sup> J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) ch IX.

<sup>72</sup> Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154–1558* (Holo Books, 2013) 371-379.

that the authority of arbitrators was “revocable” prior to the issue of an award.<sup>73</sup> Even if some might say that this is a less than desirable result as a matter of policy, to my mind, the result is consistent with the legal operation of a conditional bond: it did not purport to prevent a party from abandoning an arbitration in favour of litigation; it only imposed a penalty if a party did so.

42. Now, you may have realised that I have been careful to confine the discussion to a situation where a party attempts to revoke the authority of the arbitrators prior to the making of an award. If an award had already been made, the position was different, and much closer to what we might expect to find based on our experience with the Model Law. Essentially, if arbitrators had made a valid award, then it could not be “revoked”. If one party was found liable to pay an amount to another, then this could be recovered through an action in debt on the award.<sup>74</sup> There were many qualifications to these broadly stated rules, but, fortunately, it is not necessary to go into them in detail.<sup>75</sup>
43. Instead, I will turn briefly to the second of the two issues which I have noted as arising out of the use of conditional bonds to secure the performance of agreements to arbitrate, which is to what extent an award validly made could be relied upon as a defence to an action, rather than enforced directly. Again, as with the direct enforcement of

---

<sup>73</sup> J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) 129 ff; Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 424.

<sup>74</sup> Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347, 370-372; A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 173-177.

<sup>75</sup> Unfortunately, there is no one source which explores these legal rules in a systematic way over this time period. However, a good picture can be obtained from: A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975); Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347; Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017).

an award, the legal rules involved were complicated and turned on somewhat fine points relating to the art of pleading, but it was possible to rely on the existence of an award to defend a claim covered by that award,<sup>76</sup> as long as the party attempting to rely on the award had performed their obligations under it.<sup>77</sup>

44. However, there is one caveat to be noted here. While I have said that an award was a valid defence to a claim, it is important to realise what having such a “defence” meant in the 14<sup>th</sup> to 17<sup>th</sup> centuries. It did not mean, as it might under the Model Law today, that the proceedings were stayed at an early stage, saving the parties the expense of fully-litigated proceedings. It merely meant that an award could be a valid “plea in bar” of an action.<sup>78</sup> In other words, pleading the existence of a valid award simply allowed the plaintiff to join issue on the existence of this fact, and have it determined by a jury. A plaintiff could then attempt to persuade the jury that the award was invalid for some reason, perhaps because the arbitrators had not been appointed properly or acted fairly, or perhaps because the arbitration had not occurred at all. If they succeeded in convincing the jury, then the defence would fail.<sup>79</sup>
45. Thus, relying on an award as a defence to an action, even if permitted in law, could be risky, since it relied upon an issue being submitted to the jury, who could potentially find against the defendant for any number of reasons. No doubt parties might have incurred considerable expense in

---

<sup>76</sup> Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347, 368-370.

<sup>77</sup> Ibid 369; see also A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 175-176.

<sup>78</sup> A “plea in bar” was not, as it might sound nowadays, something that precluded a claim from proceeding altogether. Rather, it was a plea which established what we would now call a defence to a claim. For further discussion of pleading rules, see J H Baker, *An Introduction to English Legal History* (Oxford University Press, 4<sup>th</sup> ed, 2007) 76-81; H J Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (Joseph Butterworth & Son, 1824) 70-71.

<sup>79</sup> Joseph Biancalana, ‘The Legal Framework of Arbitration in Fifteenth-Century England’ (2005) 48 *American Journal of Legal History* 347, 369-370.

defending these proceedings, and having such an uncertain means of resolving a dispute already covered by an award must have been somewhat unsatisfactory. By contrast, the Model Law currently seeks to avoid the need for such prolonged proceedings, although I acknowledge that, sometimes, interlocutory skirmishes about whether proceedings are covered by an award far outstay their welcome.

46. I hope that this brief analysis of these two issues has given you some idea of how the early law as it developed during this “formative” period differs from what we now have under the Model Law, and has highlighted the key aspects of the relationship between the courts and arbitration. Returning to the two questions to which I referred at the beginning of my address, I would say that this analysis demonstrates that, for a period of over five centuries, the courts treated arbitration fairly indifferently; there was certainly no feeling that courts should assert jurisdiction to review the decisions of arbitrators, but at the same time, the conditional bond was not always successful in binding the parties to keep to the terms of an agreement to arbitrate.
47. It was perhaps for this reason that we do not really see much litigation involving agreements to arbitrate future disputes which might arise during this “formative” period.<sup>80</sup> If the use of a conditional bond could not bind a party to arbitrate a dispute which already existed at the time of the bond, it is difficult to see how a party would have had much more success by relying on an agreement to arbitrate a future dispute. The essential difficulty with the conditional bond was that the courts took the view that the implicit promise to arbitrate contained in the condition of the bond was distinct from the fact of the party’s consent to the arbitration, which, in the language of the time, could be “revoked” prior to the making of an award.

---

<sup>80</sup> However, Roebuck does point to examples of future arbitration clauses in use much earlier than they appear in the reported cases: Derek Roebuck, *The Golden Age of Arbitration: Dispute Resolution under Elizabeth I* (Holo Books, 2015) 303-305.

48. From the middle of the 17<sup>th</sup> century, a new mechanism began to develop to resolve this kind of issue. As I noted earlier in this address, the royal courts played an active role in referring disputes to arbitration or mediation in the form of “lovedays” since their very beginnings, and this practice continued throughout the “formative” period, although the moniker was left behind. However, in the mid-17<sup>th</sup> century, courts started to not only refer parties to arbitration or mediation by consent, but instead to embody such references in a “rule of court” if both parties agreed.<sup>81</sup> The advantage of such a procedure was that acting contrary to such a rule was a contempt of court, and rendered the defaulting party liable to attachment.<sup>82</sup> If an award was made, then it could also be made a “rule of court”, with the same benefits.
49. For the first time, we can see the courts implementing a legal rule which appears to adopt a clear policy in favour of arbitration. There was some uncertainty as to the circumstances in which courts would make such “rules of court”, and when they could be challenged,<sup>83</sup> but this procedure still offered advantages over the simple use of the conditional bond and quickly became popular.<sup>84</sup> As the 17<sup>th</sup> century drew to a close, the increased level of commercial activity and need for an efficient means of arbitrating disputes led Parliament to replicate the “rule of court” procedure in statutory form in the *Arbitration Act 1698*.<sup>85</sup>

---

<sup>81</sup> Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 412-413.

<sup>82</sup> See the later explanation of the process of attachment in Francis Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards* (William Benning & Co, 1849) 557.

<sup>83</sup> Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 414-416.

<sup>84</sup> Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century’ (1993) 36 *The Historical Journal* 137, 142-143.

<sup>85</sup> 9 & 10 Will III c 15.

50. That Act permitted parties to provide that their agreement to submit a dispute to arbitration should be made a “rule of court”, and that, if they did so, the agreement would be entered into the record of one of the courts of record and be treated as a “rule of court”, with all the procedural consequences which that would have for the parties.<sup>86</sup> This Act was the first step towards the consensual dispute resolution process supported by statute which we now have under the Model Law, but in essence, the procedure merely copied a mechanism which had already been developed at common law: it only removed the need to commence litigation prior to a submission becoming a rule of court.
51. For the next two centuries, the law relating to arbitration continued to be defined by the basic legal concepts which I have outlined in this “formative” period: the idea that an agreement to arbitrate was inherently “revocable” prior to an award, but an award validly made could be enforced and asserted in a defence to a claim. When viewed alongside the sanctions which could be imposed through the use of conditional bonds or “rules of court”, it could hardly be said that courts were hostile towards arbitration. However, through a series of creative misunderstandings over the following centuries, the idea that there was animosity between the courts and arbitration became widespread. The development of this view and the consequent statutory reforms constitute what I describe as the second period in the history of the law relating to arbitration, and it is to this period to which I will now turn.

### **THE “STATUTORY” PERIOD: 1698 – 1985**

52. While I have chosen to describe this as the “statutory” period to mark the introduction of the *Arbitration Act 1698* at the beginning of this period,

---

<sup>86</sup> See *Arbitration Act 1698* (UK) s 1, which states that “the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court ... and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court”.



the law relating to arbitration did not receive sustained legislative attention until the 19<sup>th</sup> century, and even then, only in the later part of that century. Until this time, the basic principles of the common law which I have outlined continued to govern the law and practice of arbitration. The *Arbitration Act 1698* gave a better remedy for breaches of agreements to arbitrate or failures to perform awards, particularly as conditional bonds became less popular after courts began exercising a jurisdiction to relieve against penalties.<sup>87</sup> However, the Act did not do anything to require actual performance of an agreement to arbitrate. In other words, the common law doctrine of “revocability” remained.

53. Even though the substance of the common law doctrine did not change during this period, its perceived rationale and basis did. Rather than simply resting on the slightly questionable legal reasoning of Sir Edward Coke in *Vynior’s Case*,<sup>88</sup> courts began to see the “revocability” of an agreement to arbitrate as being based on an implicit distrust, if not outright hostility, towards arbitration. The foundation of such a belief appears to have arisen from a misreporting and later misunderstanding of two 18<sup>th</sup> century decisions.<sup>89</sup> Finally, in 1856, in *Scott v Avery*,<sup>90</sup> the House of Lords described the doctrine of “revocability” as resting upon

---

<sup>87</sup> See A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975) 118-122.

<sup>88</sup> (1609) 8 Co Rep 81b; 77 ER 597; see J H Cohen, *Commercial Arbitration and the Law* (D Appleton & Co, 1918) 93-96; Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books, 2017) 422.

<sup>89</sup> *Wellington v Macintosh* (1743) 2 Atk 569; 26 ER 741; *Kill v Hollister* (1746) 1 Wils KB 129; 95 ER 532. See Earl S Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) *University of Pennsylvania Law Review* 132, 138 ff; see also Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century’ (1993) 36 *The Historical Journal* 137, 146.

<sup>90</sup> (1856) 5 HLC 811; 10 ER 1121.

the principle that private agreements to arbitrate were not capable of ousting the jurisdiction of the court to hear and determine disputes.<sup>91</sup>

54. Famously, in words which were deemed to be too scandalous for inclusion in the official report of *Scott v Avery*, Lord Campbell identified the genesis of the alleged “jealousy” of courts towards arbitration as having arisen from the fact that it deprived the judges and officers of the courts at Westminster Hall of their fees paid by litigants to commence their actions.<sup>92</sup> However, as his Lordship admitted, this had not occurred during the time of Sir Edward Coke, and, as is demonstrated by later historical evidence, did not really occur at any time thereafter.<sup>93</sup> Indeed, the courts had played in an increasing role in referring matters to arbitration since the later part of the 18<sup>th</sup> century, most probably as a result of the commercial sense of Lord Mansfield.<sup>94</sup>
55. At the same time that the House of Lords affirmed the “revocability” of agreements to arbitrate, they pointed to an escape route for those wishing to arbitrate: if, through careful drafting, the parties had agreed that the making of an award after an arbitration would be a *condition precedent* to any cause of action which accrued, then it would not be possible for a plaintiff to commence litigation contrary to such a clause, for the simple reason that no cause of action had in fact accrued.<sup>95</sup> It is

---

<sup>91</sup> (1856) 5 HLC 811, 853; 10 ER 1121, 1138 (Lord Campbell). For the application of this principle in Australia, see *Anderson v G H Mitchell & Sons Ltd* (1941) 65 CLR 543.

<sup>92</sup> [1843-60] All ER 1, 7.

<sup>93</sup> Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century’ (1993) 36 *The Historical Journal* 137, 146-147. See also William Cornish et al (eds), *The Oxford History of the Laws of England: Volume XI: 1820-1914: English Legal System* (Oxford University Press, 2010) 774.

<sup>94</sup> Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century’ (1993) 36 *The Historical Journal* 137, 147-148.

<sup>95</sup> *Scott v Avery* (1856) 5 HLC 811, 848-849; 10 ER 1121, 1136-1137 (Lord Cranworth). It has sometimes been said that *Scott v Avery* merely affirmed earlier authority. However, the leading text published almost immediately prior to *Scott v Avery*, does not really advert to the possibility of such a clause: Francis Russell, *A Treatise on the Power and Duty of an*

not difficult to see that such a cure might have been worse than the disease: under a *Scott v Avery* clause, a plaintiff's options for seeking remedies from a court were extremely limited if things went wrong in the arbitration,<sup>96</sup> which ultimately lead to such clauses being automatically voided by legislation in New South Wales in the 20<sup>th</sup> century.<sup>97</sup>

56. By the middle of the 19<sup>th</sup> century, then, the common law had reached something of a dead end in relation to arbitration. If they had been restricted to the common law, parties would have faced the unenviable choice of either agreeing to make their agreement to arbitrate a "rule of court" in the hope that the threat of court sanctions would force both parties to participate in the arbitration, or to include a *Scott v Avery* clause which could preclude their right to approach the court altogether. The only saving grace for the parties was that, if an arbitration in which they participated eventually proceeded to an award, the grounds on which the award could be defeated in an action appear to have been quite limited, unless an earlier application had been made to set it aside.<sup>98</sup>
57. While there does not appear to have been as much research into the historical circumstances surrounding the introduction of new legislation relating to arbitration in the 19<sup>th</sup> century,<sup>99</sup> it is probably safe to say that

---

*Arbitrator, and the Law of Submissions and Awards* (William Benning & Co, 1849) 66-68. Compare Francis Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards* (William Benning & Co, 2<sup>nd</sup> ed, 1856) 65-67. .

<sup>96</sup> See New South Wales Law Reform Commission, *Report on Commercial Arbitration*, Report No 27 (1976) 84 [4.2.3].

<sup>97</sup> *Commercial Arbitration Act 1984* (NSW) s 55. The United Kingdom took a different approach, conferring statutory powers on a court to order that such a clause would cease to have effect in certain circumstances: see *Arbitration Act 1950* (UK) ss 24, 25.

<sup>98</sup> Francis Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards* (William Benning & Co, 1849) 505 ff.

<sup>99</sup> The legislation was part of the general reforms to practice and procedure in the common law courts in the 19<sup>th</sup> century. However, the reports of the Common Law Commissioners which preceded the legislation did not really contain any general discussion of arbitration: see

these difficulties with arbitration were among those which prompted reform. In the United Kingdom, the reform proceeded in three separate stages: in 1833, in 1854, and in 1889.<sup>100</sup> Most of these reforms were replicated in New South Wales and the other colonies within a few years of their enactment and without substantial changes.<sup>101</sup> It is through these reforms that the relationship between courts and arbitration grew closer than ever before, and began to resemble the consensual dispute resolution process supported by statute now prevailing under the Model Law.

58. The first step was taken in the *Civil Procedure Act 1833*.<sup>102</sup> Section 39 of that Act provided that, where an agreement to arbitrate provided that it should be made a “rule of court”, the agreement “shall not be revocable by any party to such reference without the leave of the court”, and that the “arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation”. Essentially, this provision meant that, if the parties chose to make their agreement a “rule of court”, they were also choosing to submit their dispute to a *compulsory* process of arbitration. Powers were also conferred upon arbitrators in such compulsory arbitrations to compel attendance of witnesses and to administer oaths to them.<sup>103</sup>

---

*Second Report made to His Majesty by the Commissioners appointed to inquire into the Practice and Proceedings of the Superior Courts of Common Law* (Parliamentary Paper, 1830) 25-27.

<sup>100</sup> *Civil Procedure Act 1833*, 3 & 4 Will IV c 42; *Common Law Procedure Act 1854*, 17 & 18 Vict c 125; *Arbitration Act 1889* (UK).

<sup>101</sup> The relevant New South Wales legislation is referred to in New South Wales Law Reform Commission, *Report on Commercial Arbitration*, Report No 27 (1976) 43-44 [1.16]. The *Arbitration Act 1839*, 3 Vict No 4, implemented the *Civil Procedure Act 1833*. The *Common Law Procedure Act 1857*, 20 Vict No 31, implemented the *Common Law Procedure Act 1854*. The *Arbitration Act 1892* (NSW), and later the *Arbitration Act 1902* (NSW), implemented the *Arbitration Act 1889* (UK).

<sup>102</sup> 3 & 4 Will IV c 42.

<sup>103</sup> *Ibid* ss 40, 41.

59. It is important to note that engaging this compulsory process did not automatically result from the fact of an agreement to arbitrate: the parties still had to have agreed that the agreement should be made a “rule of court”, meaning that it was still possible for a party to escape an agreement to arbitrate if they had not so agreed. It was not until the *Common Law Procedure Act 1854* that this loophole was removed.<sup>104</sup> Section 17 permitted every agreement to arbitrate to be made a “rule of court”, regardless of whether the parties had agreed to make it such. When read with section 39 of the 1833 Act, this meant that, after the several centuries for which the doctrine of “revocability” had prevailed, it had finally been extinguished, though making an agreement a “rule of court” was subject to the leave of the court.
60. At the same time, section 11 of the 1854 Act conferred a power on a court to grant a stay of a proceeding if it was satisfied that “no sufficient reason exist why such matters cannot be or ought not to be referred to arbitration” according to an agreement to arbitrate. Other provisions were also enacted which provided for additional default rules if matters were not dealt with under the agreement to arbitrate or if a party failed to perform something that it was required to do under such an agreement.<sup>105</sup> Finally, section 5 of the 1854 Act provided that the arbitrators could state an award in “the form of a special case for the opinion of the court”, which effectively permitted difficult questions of law to be answered by a court rather than the arbitrator.
61. This “stated case” procedure was not the only mechanism by which courts could be required to reach a view on the “merits” of the determination made by an arbitrator. While the common law courts generally did not permit challenges to awards on the basis of an error or

---

<sup>104</sup> 17 & 18 Vict c 125.

<sup>105</sup> Ibid ss 12–16.

mistake of law or fact on the part of the arbitrator,<sup>106</sup> in equity, a jurisdiction to set aside an award where there was an error of law developed, and, based on an interpretation of the *Arbitration Act 1698*, this jurisdiction gradually became available at common law as well.<sup>107</sup> The jurisdiction survived the passage of the 1854 Act,<sup>108</sup> and has since received sustained judicial criticism as an unnecessary intrusion into the freedom of the parties to an award to resolve their dispute by the binding determination of an arbitrator.<sup>109</sup> Nevertheless, its existence was not challenged throughout the 20<sup>th</sup> century, and it survives in an attenuated form as one of the few deviations from the Model Law in the State legislation applying to domestic commercial arbitrations.<sup>110</sup>

62. However, some customary forms of arbitration seemed to have been able to avoid review for error of law on the face of the record.<sup>111</sup> In Northern Ireland, one such custom was to seat both parties on opposite sides of a table, and to place a grain of corn in front of each of them. A trail of oats was then spread along the centre of the table, finishing at each of the two grains of corn. A turkey was then released from the

---

<sup>106</sup> Francis Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards* (William Benning & Co, 1849) 614; see also New South Wales Law Reform Commission, *Report on Commercial Arbitration*, Report No 27 (1976) 172-173 [9.6.2]-[9.6.3].

<sup>107</sup> New South Wales Law Reform Commission, *Report on Commercial Arbitration*, Report No 27 (1976) 174 [9.6.6]; *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, 260-261 (Lord Diplock).

<sup>108</sup> A challenge to the jurisdiction after the passing of the *Common Law Procedure Act 1854* was rejected in *Hodgkinson v Fernie* (1857) 3 CB (NS) 189; 140 ER 712.

<sup>109</sup> *Hodgkinson v Fernie* (1857) 3 CB (NS) 189, 205; 140 ER 712, 718 (Willes J); *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253, 257-258 (Barwick CJ); *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, 261-262 (Lord Diplock).

<sup>110</sup> See, eg, *Commercial Arbitration Act 2010* (NSW) s 34A, which permits an appeal to be brought if the parties agree, or if the Court grants leave, essentially if the error alleged to have been made raises a serious issue.

<sup>111</sup> The following anecdote comes from Sir Robert Megarry, *A New Miscellany-at-Law* (Hart Publishing, 2005) 77-78.

other end of the table, and an award would be made in favour of the party whose grain of corn was pecked at first. One party, dissatisfied with their outcome, decided to challenge the process in court. Upon hearing that the case was brought in defiance of the award of an arbitrator, it was quickly dismissed by the Lord Chief Justice hearing the matter. Reportedly, one of the counsel whispered to a colleague afterwards, “The Lord Chief Justice affirms the turkey”.

63. The final statutory development in the 19<sup>th</sup> century was the *Arbitration Act 1889* and it determined the form of the law relating to arbitration for New South Wales for most of the 20<sup>th</sup> century under the guise of the *Arbitration Act 1902*.<sup>112</sup> The 1889 Act consolidated and updated all prior legislation relating to arbitration. Agreements to arbitrate continued to be irrevocable except by leave of the court under section 1,<sup>113</sup> and certain standard terms applied to an agreement to arbitrate unless a contrary intention was expressed under section 2.<sup>114</sup> Most importantly, the 1889 Act anticipated two of the main features of the Model Law which I outlined at the beginning of this address: the requirement to grant a stay of proceedings covered by an agreement to arbitrate or an award under section 4,<sup>115</sup> and the enforceability of an award as a judgment of a court under section 12.<sup>116</sup>
64. With the passage of the 1889 Act, the law relating to arbitration was well on its way to assuming its modern form under the Model Law. It is a testament to the endurance of the scheme established by that Act that its implementation in the *Arbitration Act 1902* was not significantly

---

<sup>112</sup> New South Wales Law Reform Commission, *Report on Commercial Arbitration*, Report No 27 (1976) 43 [1.16]. Corresponding references to the *Arbitration Act 1902* (NSW) will be given in the footnotes.

<sup>113</sup> *Arbitration Act 1902* (NSW) s 4.

<sup>114</sup> *Ibid* s 5.

<sup>115</sup> *Ibid* s 6.

<sup>116</sup> *Ibid* s 14.

amended<sup>117</sup> until its repeal by the *Commercial Arbitration Act 1984* as part of a new “uniform” scheme of State legislation.<sup>118</sup> Developments in the law relating to arbitration over this time mainly occurred at the federal level in relation to international commercial arbitration, with the implementation of the New York Convention in Australia in 1974 and the Model Law in 1989.<sup>119</sup> It was not until 2010 when the Model Law was applied to domestic commercial arbitrations<sup>120</sup> and the law finally assumed its modern form.

## CONCLUSION

65. What can we say that we have learned from this lengthy and complex history? For one thing, it certainly bespeaks the problems which can arise from placing too strong a reliance on old legal doctrines when their rationales have disappeared: for example, the doctrine of “revocability” made some sense in relation to the conditional bonds, but it was completely inapt when it was applied to the development of modern promissory agreements. We should not be too fond of retaining old legal forms when they serve no ongoing purpose other than to stymie legislative reform and make it less comprehensible.
66. More importantly, I hope that we can say that we have learned something about the importance of framing the ongoing debate about

---

<sup>117</sup> There were only two Acts which made amendments which were more than trivial: the *Supreme Court Procedure Act 1957* (NSW) and the *Supreme Court Act 1970* (NSW). However, neither affected the basic structure of the Act.

<sup>118</sup> For the history of the “uniform” legislation, see Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2013) 12-15.

<sup>119</sup> The New York Convention was implemented by the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). The *International Arbitration Amendment Act 1989* (Cth) inserted provisions implementing the Model Law and changed the title of the Act to the *International Arbitration Act 1974* (Cth).

<sup>120</sup> For the history of the adoption of the Model Law in State legislation, see Luke Nottage and Richard Garnett, ‘Introduction’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 1.



arbitration's place in our society using the second of the two questions I discussed at the beginning of my address: namely, "How far ought courts be willing to intervene in arbitrations between private parties?". The history shows us that arbitration is not a recent phenomenon which must necessarily pose a threat to the rule of law; it is much older than the law, exists independently from it, and for most of our legal history, was subject to much less oversight from the courts than it is today.

67. Going forward, this means that, while we must play close attention to the balance which the law strikes between the courts and arbitration, we must also approach it with an understanding of the important role that it has played, does play, and will continue to play in allowing parties the freedom to resolve their own disputes within the framework accorded by law, as held by the High Court in *TCL Air Conditioner* in upholding the validity of the Model Law. We must not treat arbitration as an alien interloper inimical to our system of justice, but as an integral and longstanding feature of dispute resolution in our society.