New South Wales Bar Association Commercial Law Section Inaugural Bathurst lecture

Advocate, judge and arbitrator: perspectives on commercial law

By the Hon A M Gleeson AC QC

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The decision of the Commercial Law Section of the Bar Association to institute a lecture series in honour of the chief justice of New South Wales, Chief Justice Bathurst, was an excellent idea, and a fitting recognition of a former President of the Bar Association and current leader of the state's judiciary. As a practitioner, Tom Bathurst had an extensive practice in the commercial field and was held in the highest esteem by his professional colleagues and by judges of whom at the time I was one. His work since he took over from James Spigelman in what had earlier been my job has been universally applauded.

I was invited to speak on some aspects of commercial law, as someone who has been a barrister, a judge, and an arbitrator. I have an ideological preference which, in these transparent times, I should disclose. We live in a market economy. It probably does not resemble the kingdom of heaven, but it is better than anything else presently on offer. A central value of a market economy is honouring contractual obligations. To support that value, it is necessary to have a fair, efficient and credible system of enforcement of those obligations.

When I left the Bar in 1988 and took up my appointment here, there were extreme delays in both civil and criminal cases, which were dealt with by the Common Law Division. There was also a Commercial Division of the court, presided over by a vigorous judge, where commercial matters were handled under a special regime of case management. The list was up to date. With various refinements of detail, this had been the system in the Supreme Court since the enactment of the *Commercial Causes Act 1903* (NSW). Some commentators of an inclination to the left, and even one or two judges, deplored what they said was a system that gave 'the big end of town' special treatment. That complaint fell on unsympathetic ears: mine. I agreed that delays in ordinary civil and criminal cases should be tackled, hard, by a *Common Law Delay Reduction Programme*, but I had no interest in weakening the regime that applied to commercial cases.

The New South Wales legislation of 1903 was modelled on the United Kingdom precedent. The history in the United Kingdom is summarised in a chapter written by Sir Richard Aikens, a former judge of the English Commercial Court, in a book about another former judge of the court, Lord Bingham.[1] The establishment of the Commercial Court was in part a response to competition from arbitration, and to the establishment, at the instigation of the City of London, in 1892, of a Court of Arbitration. To this day, the London Court of International Arbitration, which functions quite separately from the regular court system, as an arbitral institution, is a major centre for commercial dispute resolution.

During the 19th century, there was a great expansion of international trade, and by the end of that century London was its major centre. This dominance was reinforced by the use of standard forms of contract in commodity trade, shipping and insurance which made English law the proper law, and which identified England as the venue for dispute resolution. Dispute resolution was itself an important form of business, and a source of substantial intangible earnings.

Although the royal commission whose work led to the Judicature Acts of the 1870s noted

general dissatisfaction with the way courts of justice dealt with mercantile disputes, those Acts did not address the problem. One major complaint was lack of knowledge and experience of the ordinary judges as compared with specialist Tribunals of Commerce that existed elsewhere in Europe. Another was delay and resulting uncertainty for business people who needed to know, in short order, where they stood when a dispute arose. In 1892 a judge, in a public statement, said that the dissatisfaction was so great that some businessmen 'prefer even the hazardous and mysterious chances of arbitration, in which some arbitrator, who knows about as much of law as he knows of theology, by the application of a rough and ready moral consciousness, or upon the affable principle of dividing the victory equally between both sides, decides intricate questions of law and fact with equal ease'[2].

This prompts a digression. Especially in disputes in commodity trades, much arbitration was more like what we would now call expert determination. A dispute about product quality, for example, could be resolved quickly by someone knowledgeable in the trade who would examine the product, and make a ruling, and the parties could get on with their business. This overlap between arbitration and expert determination was reflected in my own experience when I first started practice. In the 1960s in New South Wales, the most common form of arbitration was in building cases. As young barristers, we were sometimes sent up to the premises of the Master Builders' Association where building disputes were determined by an arbitral panel consisting of a builder, a representative of an owner, and, commonly presiding, an architect. This was because the standard form of contract for a domestic or commercial building, issued by the Master Builders' Association, provided for that form of dispute resolution. The link between standard forms of arbitration clauses in commercial contracts and the practical realities of dispute resolution is of major importance. A large part of the legal work that comes to London is built upon it.

Large construction contracts usually had more tailor-made provisions, but they reflected the same basic scheme. The first major arbitration in which I appeared, as a junior counsel, arose out of a dispute between a Commonwealth instrumentality and the Australian subsidiary of an American civil contractor. The construction contract provided for arbitration. The case involved a large amount of money. The hearing lasted several months. There were senior and junior counsel on both sides. Points of law were argued, including issues about the meaning of the contract. The arbitrator, an eminent retired engineer, dealt with them all without apparent difficulty. He listened courteously to the lawyers arguing about the contract. I am sure he would have suspected that to them it had the charm of novelty, whereas he had spent a large part of his professional career administering contracts of this kind. That is why he was chosen as arbitrator.

What was going on in such arbitrations involved an expectation of expertise on the part of the arbitrator; expertise, not in process, but in the subject matter of the dispute. To this day, at the interface of the topics of arbitration, expert determination and expert evidence, there are theoretical distinctions that are sometimes rather blurred in practice. Expert evidence may be necessary in order to make technical language in a contract comprehensible, or to explain matters of context, but the meaning of a contract is ultimately a question of law. Putting matters of foreign law or technical terms to one side, a party could not call an expert lawyer to give an opinion about the meaning of a contract but, surprisingly, experts from other fields are sometimes asked by counsel to express their views on contractual construction. Confining expert evidence to its proper field can be a challenge for judges and arbitrators. An expert called to provide information relevant to the understanding of a contract may find it hard to resist the temptation to tell the tribunal what the contract means.

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Between the 1960s and the 1980s, a change occurred, for which I cannot account. It might be described as the judicialisation of the arbitral process. At the time of my appointment to the Bench, I was in the second phase, which was being conducted in London, of an arbitration of which the first phase had taken place in Melbourne. The contract concerned oil and gas. The parties on both sides were represented by lawyers from Sydney, Melbourne and the United States. The arbitrators were a former Australian Federal Court judge, a former United States Federal judge, and a former United Kingdom Law Lord.

Somewhere along the way, commercial arbitration in Australia expanded beyond the confines of building and construction work, and other trade disputes, into general commercial law. Perhaps in this respect we were merely entering into a field that for more than a century had been familiar to lawyers in London; a field which, by reason of standard forms of contract used in commerce, had to some extent been their preserve.

To return to commercial litigation, there was in the United Kingdom at the end of the 19th century a common complaint that judges who dealt with large commercial disputes had no relevant expertise. A senior English judge famously observed that the primary judge in a notorious shipping case 'was a very stupid man, a very ill-equipped lawyer and a bad judge [who] knew as much about the principles of general average as a Hindoo about figure-skating'[3]. However, it was inappropriate that the judiciary should attempt to replicate the expert determination aspect of arbitration. It is incompatible with the judicial process; and the strength of some arbitrators based on their personal business experience was often matched by weakness in legal competence. What commercial people pressed for was a half-way measure; they wanted a court, or at least a list, dedicated to their disputes, with judges experienced, not as participants in trade or commerce, but in commercial law and the process of commercial dispute resolution, which would be more expeditious than that of the ordinary courts and better adapted to commercial requirements.

They achieved that with the establishment, in 1895, within the Queen's Bench Division of the Supreme Court, of a Commercial List, which became popularly known as the Commercial Court. Sir Richard Aikens wrote:[4]

> In the early years most of the cases involved shipping and marine insurance disputes but a look at the Times Reports of Commercial Cases reveals that the court took commodities cases, banking disputes, intra-company disputes, and appeals from arbitrations. The procedures were quick and informal. Pleadings were often dispensed with altogether; and evidence was dealt with much more informally than in other courts.

The *Commercial Causes Act 1903* (NSW) was said to be an Act to provide a more expeditious method for trial of commercial causes; an expression that was defined to include causes arising out of the ordinary transactions of merchants and traders, among others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency

and mercantile usages. It provided for the establishment of a Commercial List, and, in the practice of the Supreme Court thereafter, a particular judge was assigned to that list. In the 1960s, when I commenced practice, the Judicature Act pleading system had not yet been transported to New South Wales. Common law pleadings followed the 19th century forms set out in the pre-1870 edition of *Bullen & Leake*. Equity cases, with a different form of pleading, were dealt with by a separate division of the court. Commercial causes were received into the Commercial List only if prompt application was made, and they were retained in the list only if requirements of expedition were satisfied. The initiating process, after the formal writ by which all common law actions were commenced, was a summons. Directions were then made with a view to defining the issues. Most common law cases were tried by jury; commercial causes were tried by judge alone, as were Equity cases. Commercial work tended to be the preserve of Equity barristers. The common law bar was mainly concerned with personal injury work, although some of the leading common law advocates were in demand in all fields.

For a time in the later part of the 20th century, the internal arrangements of the Supreme Court provided for a Commercial Division but today the Commercial List is operated by the Equity Division. The current Practice Note (SC Eq 3) dates from 2008, and has to be read with SC Eq 4 (Corporations Law) of 2011, SC Eq 6 (Cross Border Insolvency) of 2017 and SC Eq 9 (Commercial Arbitration List) of 2012. The court's general objective is said to be to 'facilitate the just, quick and cheap resolution of matters'. I did not coin that phrase and I would stress the importance of punctuation. The practice note deals with various matters of procedure, including, I notice, stopwatch hearings. I have only once conducted a stopwatch hearing in an arbitration although, of course, in most arbitration hearings, there are somewhat less formalised time limits imposed on evidence and argument. The stopwatch procedure was a little inflexible for my taste; but it seemed to work well enough, mainly because counsel co-operated successfully. Perhaps it is at its most useful where there is a risk that the presiding judge or arbitrator lacks sufficient force of personality to control counsel.

The corresponding practice note in the Federal Court of Australia is the Commercial and Corporations Practice Note of 25 October 2016. The practice area to which it applies covers commercial and corporations disputes within federal jurisdiction, including commercial contract disputes; disputes concerning the conduct of corporations and their officers; commercial class actions; insurance disputes; insolvency matters; international commercial arbitration disputes and others.

I was interested to see that the practice note provides for the possibility of a 'memorial' style process to be adopted similar to that used in some international commercial arbitrations. I have been involved in arbitrations that use that process, and I have mixed feelings about it. As with many of the available techniques of case presentation and management, its efficacy largely depends upon the capacity and motivation of counsel. In the hands of counsel who understand the difference between issues, evidence and argument, and whose appreciation of the merits of their case motivates them to respect that difference, it works well. In other cases it can produce a document that is messy and confusing. The same, however, can be said of much court process.

A recent decision of the Full Court of the Federal Court, *Hancock Prospecting Pty Ltd v Rinehart*[5] examined the scope of the concept of 'commercial arbitration' in its application to a dispute between members of a certain family and interests associated with the family.

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It is not only the process of commercial dispute resolution that has been influenced by the demands of consumers; it is the substance of commercial law also. There is a revealing sentence in the speech of Lord Bingham in *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)*.[6] He said:

> [I]n my respectful opinion, the existing decision [of the Court of Appeal] undermines the quality of certainty which is a traditional strength and *major selling point* of English commercial law, and [the decision] involves an unfortunate departure from principle. (Emphasis added.)

The reference to a particular value, certainty, being a major selling point of English commercial law reflects the origins of that law and also one of its aspirations. Lord Mansfield set out to make the custom of merchants part of the common law of England. This, in turn, made the common law attractive to merchants as the law to govern their transactions, and England attractive as a forum for dispute resolution. I have seen statistics as to the proportion of cases in the Commercial Court in England where one or both parties are foreigners. Many arbitrations in London are between foreign parties and arise out of transactions that have no connection with the United Kingdom except that United Kingdom law has been chosen as the proper law of the contract, or England has been named as the place of arbitration. The imperialism of the common law has outlived the British Empire, and almost matches that of the English language. English judges and lawyers have been astute to identify and protect the qualities that have made this so. One of those, as Lord Bingham said, is certainty. Absence of certainty means risk.

In commerce, profit is the reward for risk. Where risk exists, someone will have to pay for it. In international trade, a well-known example is what is sometimes called sovereign risk. It would be invidious to mention them by name, but it is easy to think of countries where the risk of government intervention means that an investor or trader will require a higher rate of return before doing business there. Where governments or their instrumentalities are parties to contracts, resisting enforcement of contracts by relying on sovereign immunity (where it exists) or interference (where it does not) will add to their costs of doing business.

There is a constant trade-off between the value of certainty and pressures for appropriate legal development and refinement. This can be illustrated by a course of litigation in which I became involved at the final stage.

Midland Silicones Ltd v Scruttons Ltd[7], a case decided by the House of Lords in 1962, turned on an unsuccessful attempt by a third party (stevedores) to obtain the benefit of a contractual limitation of liability in a shipping contract. Opposing counsel were Mr Ashton Roskill QC for the cargo interests and his brother Mr Eustace Roskill QC for the shipping interests. The former successfully argued that, on the application of established rules of privity of contract, the third party's attempt to rely on the contractual limitation failed. The report of his argument records[8]

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that he said: 'It is more important that the law should be clear than that it should be clever'. His argument prevailed, but that was not the end of the story. The legal development that was attempted in that case reflected reasonable commercial aspirations, and the shipowners and their contractors were not inclined to give up on them.

Contracts of carriage and affreightment are good examples of contracts that are made in the expectation that third parties will be affected by their provisions, sometimes because the work involved in performance of such contracts is to be done by third parties such as stevedores. A provision limiting the liability of the carrier, which in turn is likely to reflect the insurance cover taken out by the principals to the contract, and is a well-known form of allocation of risk, is going to be of little practical effect if it does not apply to the people who actually perform the contract. International conventions regulate these risk allocation practices. Contracts for the carriage of goods routinely allocate the risk of loss or damage to the goods according to which party bears the cost of insurance, and the cost of the carriage will vary according to the choices made in that respect. You will find that out if you send a parcel by Australia Post.

After *Midland Silicones Ltd v Scruttons Ltd*, the shipowners' lawyers went back to the drawing board.[9] They drafted the contract of affreightment to extend to servants, agents and independent contractors of the carrier defences and immunities available to the carrier, and they used the law of agency to make that effective. Their new provision (called a Himalaya clause) was described by Lord Bingham in a 2004 decision[10] as 'a deft and commercially-inspired response to technical English rules of contract, particularly those governing privity and consideration'.

The clause was tested in 1975, in the New Zealand case of *The Eurymedon*[11]. The Privy Council upheld the effectiveness of this technique. The opinion was delivered by Lord Wilberforce, who said:

> The carrier [in an American case] contracted, in an exemption clause, as agent for, *inter alios*, all stevedores and other independent contractors, and although it is not in doubt that the law in the United States is more liberal than ours as regards third party contracts, their Lordships see no reason why the law of the Commonwealth [of Nations] should be more restrictive and technical as regards agency contracts. Commercial considerations should have the same force on both sides of the Pacific.
>
> In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat those intentions[4].

The same clause was later tested in Australia in the case of the *New York Star*[12] which, in 1981, was the last appeal to go from the High Court to the Privy Council. A cargo from overseas was stolen from a Sydney wharf while in the custody of the stevedores, in circumstances found to involve their negligence. The bill of lading limited liability for such loss, and one question was whether the stevedores could take the benefit of the exemption. At first instance, and in the New South Wales Court of Appeal, the judges followed *The Eurymedon*. In the High Court, when counsel for the stevedores came to address on that point, he was stopped. The court said it did not need to hear him. The High Court reserved its decision and then decided against the stevedores, declining to

follow the Privy Council. There was a dissent from Chief Justice Barwick. The majority judgments included some nationalistic overtones. The stevedores briefed new counsel. They were advised that, if the Privy Council granted special leave to appeal, an appeal would succeed, but that special leave would be hard to get. Appeals from the High Court to the Privy Council had been abolished some years before, and although pending cases had been grandfathered, the English judges would be reluctant to get involved, especially since the High Court had made a conscious choice that, on the point in question, Australian law should depart from English (and New Zealand) law.

Sitting on the bench that dealt with the special leave application in London was Lord Wilberforce. Of course he did not approve of the outcome in the High Court, which had refused to follow his decision in the New Zealand case. What also troubled all their Lordships was the fact that the High Court had decided the point against the stevedores without giving them an opportunity to present their argument. This made the task of persuading them to grant special leave easier. Leave was granted, although not without some intensity of argument.

The appeal, which was heard a year later, was plain sailing. One of the members of the appeal bench was Lord [Eustace] Roskill. The respondents were represented by leading English counsel, a relative by marriage of Lord Roskill, who was quick to remind his Lordship that his argument in *Midland Silicones Ltd v Scruttons Ltd* had failed. 'But in that case,' said Lord Roskill, 'I did not have a decent contract to rely on'. The Privy Council upheld the dissenting judgment of Chief Justice Barwick and followed its own earlier decision in *The Eurymedon*.

That litigation was a dispute between two insurance companies, and the amount of money involved was modest. What was at stake superficially was a question whether the cost of the theft of a cargo of razor-blades would be borne by the insurers of the stevedores, or the insurers of the consignees. But it raised a deeper question of the uniformity of the common law, and of where commercial law was to come down as between being clear and being clever. In these respects, the law is conscious of its own marketability.

One of the principal successes of English law has been in maintaining the objectivity of contractual interpretation. Like the doctrine of consideration, this is an example of the commercial orientation of the common law of contract.

In his rationalisation of the objective theory of interpretation, Lord Devlin said that 'the common law of contract was designed mainly to serve commerce'.[13] He explained that, typically, a contract is 'embodied in a document which may pass from hand to hand when the goods it represents are sold over and over again to a string of buyers, or when money is borrowed on it, or insurance arranged . . . The document must speak for itself. For the common law has its eye fixed as closely on the third man as on the original parties; and the final document is the only thing that can speak to the third man'.

To use a more recent expression, a typical commercial contract is intended to be a bankable document. A contract for the construction of a power station is likely to be an elaborate instrument, drafted over negotiations between well-lawyered parties. It will be shown to and relied upon by financiers. What do those financiers know of the exchanges between the parties and their lawyers during the drafting process? They only see, and must rely upon, the text. The common law's resistance to permitting information about the drafting process to influence the meaning of the text is pragmatic, and satisfies legitimate commercial expectations.

'It is more important that the law should be clear than that it should be clever'.

Other practical considerations point in the same direction. If two individuals, in a private or domestic setting, make an agreement, it may make sense to speak of a common subjective intention. But if a complex legal instrument is negotiated between two large corporations, each with legal advice, where the drafters of the document had no legal capacity to bind their principals, and the directors or managers whose signatures gave the document binding effect may never have read it in any detail, where does an enquiry as to subjective intention lead? Whose intention is relevant? Principles of agency are sometimes pressed into service where a particular person can be regarded as to guiding mind or will of a corporation, but the drafters of commercial contracts rarely fall into that category.

The primary common law principle of interpretation is that the meaning of the terms of a contractual document is that which a reasonable person, in the position of the parties, would have understood them to mean.[14] Lord Hoffman pointed out in *Attorney General of Belize v Belize Telecom Ltd1*[5] that the objective meaning of a legal instrument, that is, the meaning which it would convey to a reasonable person, 'is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body is deemed to be the author of the instrument'. In a Constitutional context, it is orthodox and legitimate to express a construction of a statute as reflecting the intention or the will of Parliament. Such a mode of expression reflects the constitutional relationship between Parliament and the courts, and the legal foundation of a law enacted by statute. It is not to be understood, however, as a reference to the psychological state of some person or persons involved in drafting the Act, or debating it, or undertaking the formal procedures necessary to give it force. So it is also with references to the intention of the parties to a commercial contract.

A reasonable person's understanding of the meaning of the terms of a written document may require consideration not only of text but also of context, including surrounding circumstances known to the parties, and the purpose and object of the transaction.[16] This, in turn, may (or may not) give relevance to information appearing from pre-contractual negotiations.[17] In how many commercial cases is the judge spared a reference to the 'factual matrix'? That phrase, coined by Lord Wilberforce, is a reference to the organic environment in, or out of which, something develops; it is not a reference to all the chatter that goes into the drafting of a contract. The prize does not go to the party whose lawyer had the most to say during the drafting process.

The common law's way of dealing with this question is not the only way, even in the case of commercial transactions. A different technique, based on the civilian approach, may be seen in *The United Nations Convention on Contracts for the International Sale of Goods*, the Vienna Sales Convention, which has been ratified in Australia, where the objective approach is a kind of default option to be applied when there is insufficient information about the subjective state of mind of the parties to the contract.

Consistent with the common law's stress on objectivity of meaning, questions of fault and blame are frequently immaterial to a commercial dispute. If a party to a contract fails to perform its obligations, the reason why that has occurred may, and commonly does, not matter. More often than not, it will have no bearing on the consequences for the other party. There may be any number of reasons why a party may fail to comply with contractual obligations. Morally, they may be good, bad or indifferent. One of the most common reasons for failing to perform a contract is lack of necessary funds. The reason for the lack of funds is usually irrelevant.

The English courts, in the context of contracts for the sale of land, appear to have become concerned, for a time, that some decisions of the High Court of Australia[18] in the 1980s had assumed an over-expansive jurisdiction to grant equitable relief against the exercise of a right to terminate a contract for breach of an essential condition by a purchaser.[19] The concern was misplaced. In two cases decided in 2003,[20] the High Court held that, where there was no question of a penalty, or of unjust enrichment, or of a vendor's

conduct having contributed to the breach, or of the transaction being in substance a mortgage, and where no more was involved than the application of strict contractual provisions as to time, then such provisions would apply. The court said that the equitable jurisdiction to relieve against unconscientious exercise of legal rights was not an authority 'to reshape contractual relations into a form the court thinks more reasonable or fair where subsequent events have rendered one side's situation more favourable'.[21] That was said in a case concerning a large sale of development land. Time was made of the essence, in circumstances of previous extension of the completion date. The purchasers were relying on finance to come from overseas, and there was a last-minute hitch in the transfer of funds. Settlement could not occur in the time stipulated. The vendors terminated. The High Court upheld their contractual right to do so. It was argued their termination was unconscientious, but nobody could explain why. If a purchaser, in circumstances that are in no respect attributable to the vendor, cannot come up with the money within the time stipulated, and time is of the essence, why should the vendor be concerned about or affected by the reason for the delay? Why should it make a difference to the vendor if the delay is the result of bad luck, or bad management, or simple poverty? It is the contract that allocates the risk.

Perhaps the high point of the amorality of contract law is the well-known proposition that the law gives a party to a contract a choice between performing the contract and paying damages for breach.

This does not mean that all commercial disputes are resolved in a moral vacuum, but only that, in many cases, it will be the scheme of contractual allocation of risk, rather than some search for blame, that will decide who, as between the parties, bears the consequences when things do not go as planned. Perhaps the high point of the amorality of contract law is the well-known proposition that the law gives a party to a contract a choice between performing the contract and paying damages for breach. In some circumstances that is an over-simplification, but it is true often enough to make it a sobering check on over-enthusiastic advocacy. It is also part of the conceptual framework for analysis of primary and secondary obligations.

As with most of the common law, in practice the application of contract law is now heavily influenced by statutory intervention. A prime example of this is the legislation prohibiting misleading and deceptive conduct in trade or commerce and providing remedies, including damages, and potential reformation of contracts, for breach. Such legislation, which is now to be found in Federal and State enactments, originated with s 52 of the *Trade Practices Act 1974* (Cth). Two features were established early on. First, the section was not confined to conduct that was intended to mislead or deceive or that resulted from failure to take reasonable care.[22] As Gibbs CJ put it in 1982[23], '[T]he liability imposed by s 52, in conjunction with ss 80 and 82, is . . . quite unrelated to fault'. Secondly, although presented politically as a consumer protection law, the legislation created a norm of behaviour which applied regardless of whether a particular case involved any consumer in need of protection. Gibbs CJ said in the same case:[24]

> It may have been thought that the unequal position of consumers as against the corporations which supply them with commodities justified a measure that from the point of view of the latter seems draconic, but although s 52 is intended for the protection of consumers it is enforceable by a trade competitor who is not a consumer . . . and is not infrequently used by one trader against a rival . . .. The section may have been designed to protect the weak from the powerful, but it may be used by a large and powerful corporation to restrain the activities of a smaller competitor.

An allegation of misleading and deceptive conduct is now a feature of much commercial disputation, often in circumstances remote from any context of consumer protection. Similarly, there are statutory provisions against unconscionable conduct. The High Court dealt with s 51AA of the *Trade Practices Act 1974* (Cth) in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*[25] which concerned the terms of a renewal of a lease of business premises. The context was commercial. The Court decided that good conscience did not require the lessor, in circumstances where there was no exploitation of any special disability or disadvantage, to do other than pursue its own legitimate business interests. There is a tendency on the part of some advocates to assert unconscionable conduct in the event of any exercise of unequal bargaining power. The great majority of contracts are made between parties of unequal bargaining power, and most people routinely enter into contracts whose terms and conditions are not open to negotiation. Businesses, whether run by private enterprise or government agencies, commonly contract with their customers as to such terms and conditions on a take-it-or-leave-it basis.

In the joint judgment in *Bridgewater v Leahy*,[26] there was an attempt to remind lawyers of the scope of unconscionability as applied in practice by the courts. It was said (case references omitted):

> It is of interest to note the findings of fact at first instance in some of the leading cases on this topic. In *Wilton v Farnworth*, a person who was 'markedly dull-witted and stupid' was persuaded to sign over to another his interest in his wife's estate without having any idea of what he was doing. In *Blomley v Ryan* the defendant took advantage of the plaintiff's alcoholism to induce him to enter a transaction when his judgment was seriously affected by drink. In *Amadio* the special disability of the guarantors included a limited understanding of English, pressure to enter in haste into a transaction they did not understand, and reliance upon their son. In *Louth v Diprose* the primary judge found that the donee, with whom the donor was 'utterly infatuated', had threatened suicide, manufactured a false atmosphere of personal crisis, and engaged in a process of manipulation to which the donor was vulnerable. The judge found the donee's conduct 'smacked of fraud'.

Legislation imposing broad normative standards of behaviour, some of it based upon legislative power with respect to trade and commerce, now potentially affects the outcome of many contractual disputes. Even so, a commercial context will often influence the approach of a court, or an arbitrator, to issues such as reliance, or obligations of disclosure.

Chief Justice Allsop, in a paper published in the October 2017 issue of the *Australian Law Journal*,[27] made the important point that commercial contracts themselves are not value-free zones, and are often expressed in terms of values and norms, sometimes well understood by people in an industry, sometimes of more general application, which reflect expectations of honest and reasonable dealing. He went on[28] to consider the wider question of good faith in contractual performance, considered at least as a principle in furtherance of the contractual bargain, and gave a series of examples of familiar implications and principles of construction which gives effect to the elements of good faith and fair dealing. This led him to explore the potential relationship between the development of the common law's approach to good faith and modern legislative intervention in commercial dealing. Current events in respect of financial services may be telling us to watch this space.

The relationship between common law

and statute is a complex topic, and emphasis on a particular aspect of it may risk over-simplification. Even so, one point worth considering is the liberating effect upon judges of statutory intervention in aid, for example, of consumer protection. This point was made by Lord Wilberforce in *Photo Productions Ltd v Securicor Ltd*[29], in a judgment that has been referred to in later High Court decisions. His Lordship said that consumer protection legislation made it unnecessary for courts to give strained and unnatural meanings to the language of contracts in order to avoid harsh consequences. Hard cases can make bad law, but if the hard cases are adequately covered by legislation, then the pressure upon courts to attempt to avoid injustice by doctrinal distortions or strained interpretations of language is relieved.

In his paper, Chief Justice Allsop showed that, in the United States, some leading judges have felt obliged to temper the use of the concept of good faith in contractual performance by insisting that it is fidelity to the bargain that is at the centre of the concept. An everyday example is the implication of a term that each party to a contract will co-operate in the doing of acts necessary to perform, or to enable the other party to secure a benefit provided by the contract[30]. The old-fashioned officious bystander would readily accept that such a term goes without saying because it is inherent in the bargain. But the pursuit of self-interest is not foreign to commercial relationships, even when it is at the expense of the other party. People would not need contracts if their interests were never going to diverge. Whatever the scope of an obligation of good faith, it cannot be to turn ordinary commercial relationships into partnerships. Fidelity to the bargain is a coherent principle; self-denial is not.

To return to the matter of commercial dispute resolution, both litigation and arbitration are choices of last resort; neither is the principal method employed by business people resolving disputes. This is why I am puzzled by occasional statements of regret that, by going to private arbitration, parties deprive the public of the benefit of judicial clarification of the law. Business people have no obligation to contribute to the clarification or development of legal principle. Most disputes that arise in commerce, even if they find their way into the hands of lawyers, never get to court or to arbitration; they are settled by the parties based upon an assessment of where their interests lie. Once litigation arises, most court cases are settled, on the same basis, without the need for any judicial decision. Almost every arbitration clause I have seen in recent years is part of a wider dispute resolution provision that involves anterior stages of a resolution process that is often quite elaborate. There is now a developing body of jurisprudence concerning the jurisdiction of arbitral tribunals in cases where there has been a failure to follow the antecedent process. It often depends upon whether, on the true construction of the contract, the antecedent process is mandatory or facultative.

In the case of domestic, as distinct from international, commercial arbitration, the question why some parties choose arbitration over litigation can, I think, be answered in one word: privacy. To revert to the 'just, quick and cheap' formula, arbitration is neither quicker nor cheaper than litigation in the Federal Court, or the Supreme Court of New South Wales, subject only to one qualification, and in terms of justice I have not seen any material difference. The qualification I mentioned concerns the matter of finality, which can in turn affect cost and delay. Because of the limitations on appellate review of arbitral awards, arbitrations are more likely to produce finality at an earlier stage in most cases. However, the value that parties attach to finality normally depends on whether they win or lose. It is important to remember the point in time at which the choice of arbitration is made. Most arbitrations result from agreements made before parties have fallen into dispute and, therefore, at a time when they will value the prospect of finality more highly than they may come to at a later stage. The principal attraction of arbitration, however, is that it is private. The parties to an arbitration agreement, of course, can always, by consent, by-pass their agreement and litigate. Nothing better illustrates the essentially contractual foundation of arbitration than the consideration that the parties can agree not to enforce their contract, or waive a right to arbitrate. Litigation, on the other hand, invokes the exercise of the judicial power of government. Save in exceptional circumstances, that must be done in public. The publicity necessarily associated with litigation is, from my experience, the most likely explanation of why parties make arbitration agreements at a time when they are not in dispute, and cannot foresee what their disputes might be, keeping also in mind that modern arbitration agreements are usually part of more elaborate dispute resolution procedures which, at least in their early stages, are essentially private.

In the case of international commercial arbitrations, an additional consideration is often at work: forum neutrality. Parties to international commerce are sometimes cautious about entrusting the resolution of their disputes to the courts of the home country of the other party. (Caution of this kind may also explain the striking fact that, by reason of international conventions, enforcement of foreign arbitral awards is more widely accepted than enforcement of foreign judgments.) This, again, reflects the basic difference between dispute resolution by the exercise of the judicial power of a government and dispute resolution by an agreed process, where the parties are free to choose the place of arbitration and the tribunal. Whereas, in the case of litigation, emphasis is often placed on identifying a natural forum; in the case of arbitration, there is often a conscious attempt to seek out a neutral forum.

The proper law of a contract is not necessarily the law of arbitration under that contract. The place of arbitration (which in turn is not necessarily the venue of the arbitration hearing or hearings) may be selected for the very reason that it is not the home territory of one of the parties to the contract, or the place where the contract is to be performed. Some arbitration clauses specify that the arbitrator or arbitrators must not be of the same nationality as the parties.

Commercial considerations are important both to the substance of commercial law and to the process of commercial dispute resolution. Australian governments and courts are alive to that.

END NOTES

1 R. Aikens, ' "With a view to despatch and the saving of expense". How the Commercial Court has attempted to meet the demands of the business community for efficient and cost-effective litigation procedures', in T*om Bingham and the Transformation of the Law*, M. Andenes and D. Fairgrieve (eds), OUP, 2009, pp 563-587.

2 Ibid at 568-569.

3 Ibid at 569.

4 Ibid at 571.

5 [2017] FCAFC 170.

6 [2007] UKHL 12, [2007] 2 AC 353

7 [1962] AC 446.

8 At 459.

9 The history is recounted by the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 (HL).

10 Above at 744 (n 41)

11 *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 (PC).

12 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* [1981] 1 WLR 138 (PC).

13 Patrick Devlin, *The Enforcement of Morals* (1965) at 44. (PUBLISHER?)

14 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* 92004) 219 CLR 165 at [10].

15 [2009] UKPC 10 at [16].

16 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

17 *Oceanbulk Shipping SA v TMT Ltd* [2010] UKSC 44, [2011] 1 AC 662 at 680.

18 Such as *Legione v Hately* (1983) 152 CLR 406 and *Stern v McArthur* (1988) 165 CLR 489.

19 See, for example, *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC).

20 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367.

21 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 337.

22 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216.

23 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44 at [7]; (1982) 149 CLR 191.

24 Ibid at [7].

25 (2003) 214 CLR 51.

26 (1998) 194 CLR 457 at [46].

27 *Conscience, Fair-Dealing and Commerce: Parliaments and the Courts* (2017) 91 ALJ 820 at 823.

28 Ibid at 833.

29 [1980] UKHL 2; [1980] AC 827.

30 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [61].