Kluwer Arbitration Blog

Interviews with our Editors: In Conversation with The Hon. Wayne Martin AC KC

Emma Garrett (Assistant Editor for Australia, New Zealand and the Pacific Islands) · Tuesday, October 10th, 2023

The Honourable Wayne Martin AC KC is an arbitrator, mediator, and former Chief Justice of Western Australia (2006-2018). As Chief Justice, Mr Martin was a notable pioneer, particularly for his creation of the Supreme Court of Western Australia's Arbitration List. Prior to becoming Chief Justice, Mr Martin was a senior member of the Western Australian Bar, having taken silk in 1993. Whilst at the Bar, Mr Martin practised in commercial litigation, appearing in all Australian courts, and acted as counsel in both domestic and international arbitrations.

Mr Martin has also held numerous other elected roles, including, Lieutenant-Governor of Western Australia, President of the Western Australian Bar Association, Chairman of the Law Reform Commission, President of the Law Society of Western Australia, and Director of the Law Council of Australia. Additionally, Mr Martin currently sits as a part-time judge of the courts of the Dubai International Financial Centre.

Having been recognised for his service to the judiciary and within the law generally, Mr Martin was appointed a Companion in the General Division of the Order of Australia in 2012.

Mr Martin, it is an honour to have you with us on the Kluwer Arbitration Blog!

1. **You are known to have contributed significantly to the number of judgments within the arbitration space during your time on the bench. Are there any that stand out to you,**

and/or that you are perhaps particularly proud of?

In my judicial work involving arbitration, I was always cognisant of the need for the courts to support arbitration and its objectives. I hope that my judgments in general achieved that objective – no particular judgment stands out in that regard. There was a time, not that long ago, when countries competing for arbitral seats would point to Australia's Federal system and assert there were inconsistencies between the courts in different Australian jurisdictions in relation to their support for arbitration. Such assertions are no longer credible, as all Australian courts are singing from the same song sheet in this regard, and I hope that I have made a small contribution to this outcome.

2. **In my interview with Caroline Kenny KC, she expressed that for Australia to continue to progress and establish itself as a renowned arbitration hub, the Australian Government must support the growth of international commercial arbitration in Australia, including by funding ACICA. Do you agree? What else, if anything, do you think the Australian Government ought to be doing?**

I agree with Caroline. The arbitral institutions with which ACICA competes in our region have been seed-funded by their governments. Those governments recognise the multiplicative effect which investment in attracting arbitrations has upon their economies – not just their legal professions, but all providers of services, including accommodation and food which arbitrating parties require. In order to be competitive, ACICA needs the resources to expand its international outreach, including road shows, and the promotion of Australia as a seat. Arbitral hearing premises are also an issue in most Australian capitals, as compared to Singapore, Kuala Lumpur, and Hong Kong, to mention just a few of our competitors. Government investment in premises would return economic benefits in the longer term.

3. **Looking at the delicate ecosystem (state funding/endorsement, arbitration or ADR friendly courts, arbitration cognisant judges, etc.) that effective international dispute resolution needs to flourish, what are some of the key things that the Dubai International Financial Centre (DIFC) courts have got right compared to Australia? What are the areas in which Australia continues to excel?**

The DIFC courts thrive by providing an attractive alternative to national courts in the Middle East and North Africa (MENA) region. The Singapore International Arbitration Centre receives a number of cases involving Indian counter-parties because of the chronic delays in the courts of India. The Singapore International Commercial Court is endeavouring to attract similar cases. Australia has internationally recognised commercial courts which deal with their cases quickly and efficiently, serviced by a well-qualified and experienced legal profession charging rates below those charged in comparable jurisdictions within our region. The independence and integrity of the Australian judiciary is beyond question.

Like the courts of the MENA region, many of the national courts in South East Asia are unattractive to counter-parties used to the common law. Australia can offer those counter-parties a similar option to that provided by the DIFC courts, including a combination of an arbitral seat and a supportive and efficient judiciary. However, Australia's laws relating to misleading or deceptive

conduct are unattractive to international counter-parties when it comes to choosing substantive law. Further, other common law jurisdictions in our region, notably Singapore, Hong Kong and Malaysia offer similar options, with the advantage of geographic proximity to international parties and more established arbitral institutions with state of the art hearing facilities. So, while Australia can, and should promote itself as a seat for international dispute resolution, we must be realistic about the caseloads likely to be achieved.

4. **You have been involved in various initiatives to advance arbitration in Australia (including for example, your involvement as Patron of ACICA's Western Australia State Committee and your work with the WA Arbitration Initiative) and you have stated that you have been and continue to be, an "advocate of change". What are you currently advocating for?**

I am concerned that arbitration is seen as slow and expensive when compared to earlier arbitral practice and commercial courts. Over the last 30 years or so, commercial courts have adopted judge-managed flexible procedures aimed at early identification and speedy resolution of the real issues in the case. Unlike arbitral tribunals, courts can compel compliance with procedural directions by imposing sanctions for non-compliance, including default judgment. While "due process paranoia" in arbitration can be overstated, contemporary arbitration can fall short of the reasonable expectations of the parties with respect to speed and efficiency (cost).

Many commercial courts also integrate mediation within the dispute resolution services provided. By contrast, mediation and arbitration are seldom integrated, with the result that mediation, which offers speedy and cost-effective dispute resolution, is less common in international arbitration than in, say, domestic Australian litigation.

In short, I think arbitration should offer more proactive case management focused on the early identification of the real issues in the case and the earliest determination of those issues consistent with their just disposition in a context in which mediation is actively encouraged.

5. **In a previous interview, you noted that you borrowed heavily from your arbitration experience as Chief Justice in making changes within the Supreme Court of Western Australia. What do you think your experience as a judge has brought to your repertoire as an arbitrator? Has it altered your perspective in any way? Do you think it is beneficial?**

One of the earliest changes made in the Supreme Court of Western Australia following my appointment was the introduction of flexible judicial case management of all commercial cases aimed at achieving the objectives identified in my previous answer. During my 12 years as a Judge, I managed and tried a commercial list of cases. During that time, I honed an approach to case management, including the efficient management of issues such as expert evidence and disclosure of documents which can be applied in an arbitral context.

I also published many hundreds of judgments during my time as a Judge. Although arbitral awards are different in style, the process of assimilating the evidence in order to find the material facts and then applying the relevant law to those facts is common to judgments and awards.

6. **Following on from the previous question, one of the criticisms raised by survey respondents in the 2020 Australian Arbitration Report was the tendency of arbitration proceedings to mirror litigation. In particular, "[r]*espondents saw a relationship between the number of former judges and legal practitioners with a background in litigation acting as arbitrators, and the tendency for arbitration to resemble litigation*". Do you believe that arbitration in Australia too closely resembles litigation? What practices have you adopted as arbitrator to take advantage of the flexibility afforded by arbitration?**

My response to this question should be apparent from the answers above. Arbitrators have the ability to apply the best practices which have developed in contemporary commercial courts without being bound by some of the strictures which apply to courts – for example, the laws of evidence. So, arbitration resembling best practice contemporary litigation is a good thing, in my view, although if it resembles old (bad) practice litigation obviously that is most undesirable. Like docket case managers in a Commercial Court List, arbitrators manage a case from its inception until its determination. They can, and must, apply procedures creatively and innovatively to fit the particular circumstances of the case in hand in order to achieve a speedy and cost effective determination. Procedures relating to document disclosure and expert evidence can become black holes for time and money and should, in my view, be proactively case managed by the Tribunal.

7. **As Chief Justice, you issued practical judicial support to arbitration; you created and subsequently led the Supreme Court of Western Australia's Arbitration List for seven years which has been acknowledged to have positively contributed to Australia's arbitration jurisprudence. What were the biggest changes you saw within the arbitration space because of this? Do you think there are still changes that the judiciary should consider to further enhance arbitration jurisprudence in Australia?**

Specialised arbitration lists facilitate the development of judicial expertise and consistency in the judicial supervision of arbitration. Their use in many Australian jurisdictions has encouraged the development of a consistent body of jurisprudence which supports arbitrators and arbitration. This is consistent with long-standing judicial support for party autonomy in contract, by supporting the choice of the parties as to the manner in which their disputes are to be resolved. As mentioned above, I think the Australian courts have achieved levels of consistent support for arbitration which are comparable to other arbitration friendly jurisdictions.

8. **It has been suggested, notably by Lord Thomas of Cwmgiedd during his tenure as Lord Chief Justice of England and Wales, that the relationship between courts and arbitration should be "rebalanced" so as to facilitate the development of the common law. What is your view on the relationship between courts and arbitration? Do you think the balance is right in Australia?**

Lord Thomas has already actively and effectively "rebalanced" to some extent the relationship between courts and arbitration by promoting best practice among international commercial courts through the Standing International Forum of Commercial Courts, which he established in 2017, and which now has about 50 member courts. As I have already observed, international commercial courts provide parties with a viable alternative for the determination of international commercial

disputes. The problem to which Lord Thomas refers is the opacity of arbitral awards, and the constraints which this imposes upon the development of a body of precedent on topics which are more commonly arbitrated than litigated. However, most arbitral institutions are moving towards greater transparency in the publication of awards, subject of course to the protection of party confidentiality, which is an essential feature of arbitration. I am confident that an appropriate balance can be struck between the publication of those parts of awards which involve the determination of legal issues of potentially broader application, and the maintenance of party confidentiality.

In Australia, the proportion of cases going to arbitration rather than to court is so small that I do not think it can be seriously suggested that such cases have any impact upon the development of the common law of Australia.

Thank you very much for your valuable insights, Mr Martin. I am sure our readers will have appreciated your input!

More coverage from Australian Arbitration Week is available here.

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

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