10th Anniversary Conference

of the

Asia-Pacific Regional Arbitration Group

After Dinner Address

by

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I am greatly honoured to have been asked to address this 10th anniversary conference of the Asia Pacific Regional Arbitration Group. It is particularly apt that this conference is being held in Australia as it was at a propitious meeting in Australia in 2004 that APRAG was established. Before going any further, I would like to acknowledge the traditional owners of the land on which we meet, including the various cultural groups who together comprise the Kulin Aboriginal nation, and acknowledge that we meet on their country, and pay my respects to their Elders past and present. I would also like to acknowledge our many distinguished guests, too numerous to mention specifically.

To our various overseas guests I would like to reiterate a warm Australian welcome to those who have travelled from other countries, and in some cases quite long distances, in order to join us here in Melbourne. As you will have gathered from Ron's generous introduction, I am not, myself, from Melbourne, but hale from Perth. Visitors to this country might not be aware that there is great competition between the capitals of the various States in a variety of fields, including sport and commerce.

Perhaps I might be forgiven for indulging in that rivalry for just a few moments, by pointing out that although Western Australia has only about 10% of Australia's population, teams from Western Australia played in the Grand Final of last year's national football competition, the final of the national cricket competition held last week, currently lead the national basketball competition, and hold the top two places

in the national football competition, not to mention the fact that almost 50% of Australia's export income is generated in my State which has massive reserves of minerals and energy. Might I also be forgiven for mentioning that Perth is now generally regarded as the centre of the Australian natural resources and energy sector, and that the city in which I live is closer to Singapore than it is to Sydney and enjoys the same time zone as many Asian commercial centres, and is Australia's most multi-cultural city – one of my neighbours is a Singapore lawyer – another a Malaysian air force general. A judge of the Singapore State Court has his family in Perth and commutes to work. I do not need a map to appreciate my State's orientation to Asia, all I have to do is chat to my neighbours.

Of course, this is not to say that Melbourne has no claims to fame. Apart from being the place where Australia's famous bush ranger, Ned Kelly, was hanged, Melbourne came to international notice in 1956 when it hosted the Olympic Games. Those games became known as the "friendly games", and we sincerely hope that our overseas visitors are reliving that friendly experience during your stay with us.

Later that decade, Melbourne again came to international notice as the setting for a major film screened internationally. The title of the film was "On the Beach". It was set in Melbourne after World War III, during which nuclear explosions had essentially destroyed all life in the northern hemisphere, leaving the future of humanity depending on those in the southern hemisphere. However, nuclear fallout was gradually moving southwards, so people gathered in Melbourne, as the southernmost city on mainland Australia.

The film had an extraordinarily strong international cast, including Gregory Peck, Ava Gardner, Fred Astaire and Anthony Perkins, all of whom travelled to Melbourne for filming. When Ava Gardner was asked about her experience of Melbourne, she was said to have quipped that it was a perfect place to make a film about the end of the world, although, to be fair, it must be observed that in 1959, Melbourne was not the cosmopolitan, vibrant city it is today. Indeed it says something about the character of contemporary Melbourne that a musical about this called "Ava (At the End of the World)", by a local artist, was performed in this city last year.

Ms Gardner had some experience of apocalyptic events. She had been the girlfriend of Howard Hughes, at the time one of the wealthiest people in world, an aviator, engineer, film maker and philanthropist who unfortunately was also obsessive-compulsive to the point where he become quite eccentric. She was also was one of the eight wives of actor Mickey Rooney and later married another actor, Frank Sinatra, with alleged organised-crime links, before taking up a relationship with author and notorious alcoholic Ernest Hemingway. But I fear that I digress.

It is difficult to overstate the importance of the development of commerce and trade within the Asia Pacific region. The importance of the rapid development of commercialisation and industrialisation in our region has been recognised by all world powers and, of course, this century has been dubbed "the Asia Pacific century" many times in many places. It seems to me to follow that it is difficult to overstate the importance of commercial arbitration within the Asia Pacific

region. The development of international trade necessarily carries with it a need for the development of sophisticated systems for the resolution of commercial disputes, and that need has been demonstrably felt and met within our region over the last 20 years or so. Beijing, Hong Kong, Singapore, and other Asian centres have become major world centres for the resolution of international commercial disputes, comparable in significance to the more traditional centres of London, Paris and New York.

I would very much have liked to be able to put Australia in that list of significant world centres for commercial arbitration, but it is not a good look for judges to gild the lily, and the reality is that although Australian legal practitioners and judges are well represented in the field of international commercial arbitration, Australia has not been popular as a seat, in comparison to the other major centres within our region that I have already mentioned. We can debate the reasons for that for hours, but that is a topic for another day I think. All I can say is that I am, and have been for some time, working actively to add Perth to the Australian centres offering proper facilities for arbitration and mediation, so watch this space.

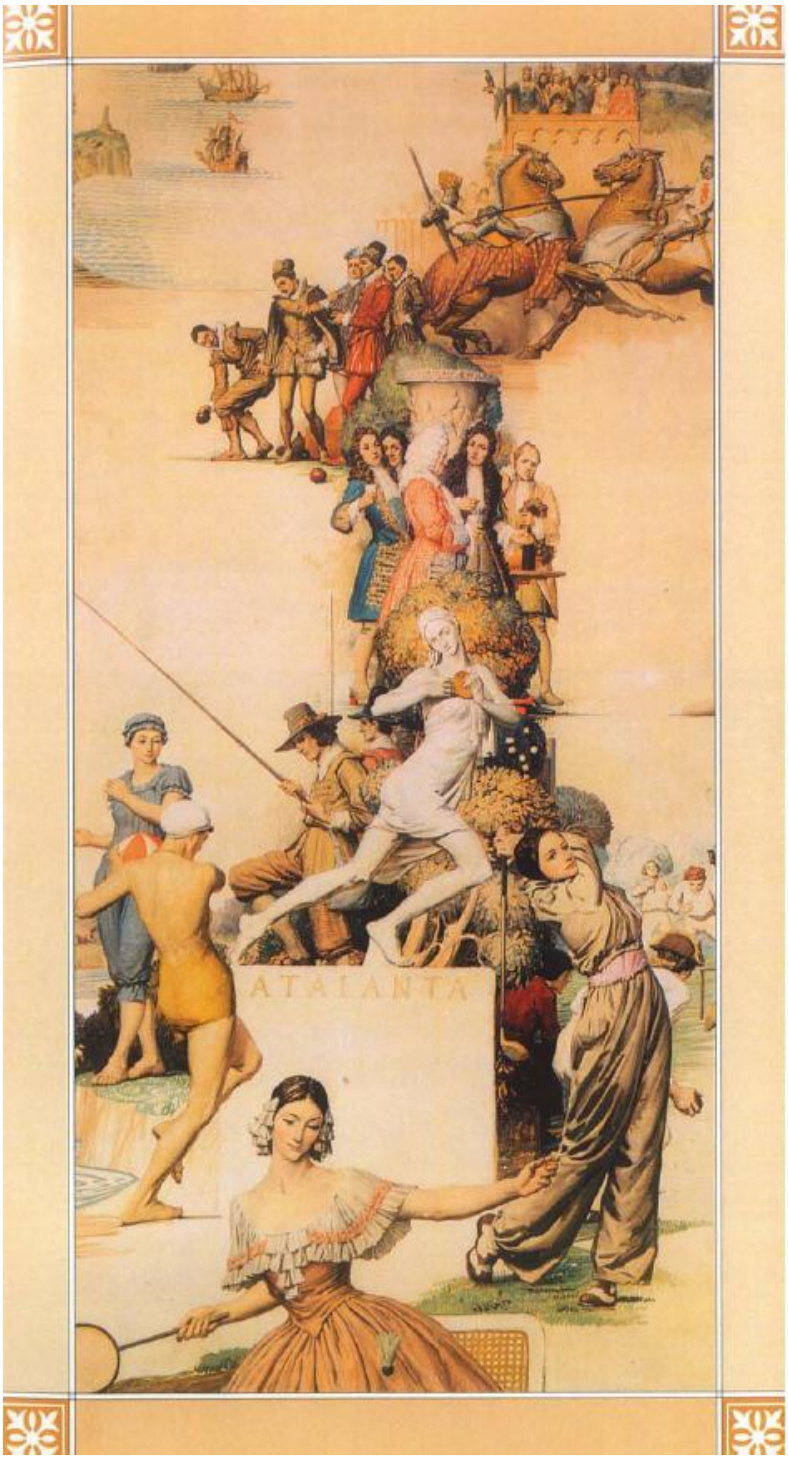
The effective resolution of international disputes of all kinds, including commercial disputes, requires the effective recognition, acknowledgement and accommodation of the cultural differences between the participants to the dispute. Those cultural differences may well give rise to quite different norms of behaviour, and quite different expectations with respect to both process and outcomes. That is why I have chosen, as the theme for my remarks this evening,

the impact of cultural differences upon the choices between different forms of dispute resolution, particularly the choice between consensus-based system like mediation and adjudication-based systems like arbitration.

We are fortunate to gather this evening in a room adorned with some quite exceptional artworks, and which, as it happens, illustrate my theme. The quality of these works is all the more remarkable, given that they were painted by Napier Waller, after he lost his right arm during the First World War. After relearning his skills using his left arm only, he was commissioned by Sidney Myer – then Australia's leading retailer, to create the artworks for this magnificent dining hall and restaurant which was opened in 1935. Waller spent months at the public library studying the histories and characters of the people he has depicted in these murals.

Sidney Myer's public mindedness extended much further than his contribution to the arts, and he left one tenth of his estate for the benefit of the community in which he made his fortune. His sons were equally visionary and philanthropic, establishing the Myer Foundation in 1959 as well as a charitable trust fund for what was at that time named a "School of Oriental Studies" at the University of Melbourne. More recently this was augmented by the construction of the award winning "Sidney Myer Asia Centre" at the University in 2002.

Returning to the artwork, I would particularly direct your attention to the mural on the western wall entitled "Summer - Sports Through the Centuries" (as reproduced below), which can be used to illustrate my theme.



(Myer, 'The History of the Napier Waller Murals', October 1994, available at: www.muralhall.net.au/docs/napier-waller-murals-sml.pdf accessed 1 April 2014)

As you will see, a central figure within the mural is a statue of the ancient Greek mythological figure Atalanta. You can tell from her pose that she was famed for her fleetness of foot. She is also clutching

a number of golden apples. The story comes from a Greek myth in which Atalanta was competing in a foot race with Melanion. If he won they were to be married, but if she won, he was to lose his life. She was much faster than him, so he enlisted the aid of Aphrodite, the goddess of love. Aphrodite provided him with the golden apples of the Hesperides and suggested that he drop them during the race in order to distract Atlanta's attention. It worked, and he won the race. The moral which I would extract from the story is not concerned with winning a woman's heart by distracting her with golden baubles. The moral which I draw from the story, relevant to my theme this evening, is that with a little strategic planning and forethought, the human desire for material wealth can be utilised to bring people with different strengths, attributes and quite different ambitions to a consensus, indeed in this case, to a love match.

The same mural depicts an international dispute resolved by agreement. In the top right-hand corner of the mural you will see two nights on horseback jousting. They were David Lindsay, the first Earl of Crawford, a Scot, and John De Welles, fifth Baron Welles of England. Indeed, that war waged on and off for most of the last millennium. During the 14th century there was a long-running state of war between Scotland and England. In May 1390, champions of each country undertook a dual to the death on London Bridge, in the presence of King Richard II of England and his court. The Scot unhorsed the Englishman and they fought on foot. Again the Scot prevailed. When he had his knife to the point of the Englishman's throat, the English king having declined to intervene to spare his champion, the chivalrous Scot relented and helped the Englishman to

his feet. The moral of this story is that human values, such as compassion, can prevail and bring about consensus even after the most hard-fought battles between people of different countries, and even between those with an entrenched history of hatred and enmity.

Students of dispute resolution, which I suspect we all are, will notice that in each of the two stories which I have chosen from the mural, the outcome was consensus rather than victory by one side over the other. Of course, this neatly frames the distinction between mediation and arbitration. My subtheme tonight concerns the extent to which cultural differences impact upon preferences for forms of dispute resolution focused upon consensus, as compared to those focused upon adjudication.

I am told that there is a Chinese saying:

> "In death, avoid hell. In life, avoid law courts."

A number of authors have attributed Chinese disdain for litigation, and corresponding enthusiasm for mediation or conciliation, to Confucian philosophy, with its emphasis on harmony and concord.

I digress to observe that I venture views in relation to Confucian philosophy and Chinese practice and procedure with great trepidation in this gathering, given the wealth of knowledge and experience in those fields present tonight, and which far exceeds mine.

However, drawing upon figures provided by the President of the People's Court of China during his keynote address to last year's conference, during 2012, 219 arbitration commissions across China accepted a total of just over 96,000 cases. The sheer volume of this

caseload would tend to suggest significant enthusiasm for alternative forms of dispute resolution. The published materials which I have read also suggest that conciliation is seen as an integral part of the court process in China. One article which I have seen quotes a Chinese judge as asserting that he had conciliated more than 10,000 cases.[1] Director Wang Jie of the China International and Economic Trade Commission (CIETC) told us that mediation and arbitration is well known in China.

Does this suggest that different cultural values might be at work? The same article suggests that a primary virtue taught by Confucius is *jen*: loosely translated as good, respect or benevolence expressed through an individual's conduct with others. So, the manner in which an individual handles his or her relationships with others is the mechanism for the expression of his or her wisdom, benevolence and kindness. The significance of harmony can also be seen in the respect for ritual and etiquette which is evident in Chinese culture.

By contrast, western cultures tend to place emphasis upon the virtue of self-determination and the vindication of individual rights and interests. So, in western culture, dispute resolution focuses critically upon the vindication of interests, and the assertion of rights and negotiation, such as through mediation, is often interest-based. If the articles which I have read, and which suggest that conciliation and consensual resolution is an integral part of the litigation process in China are accurate, this is a significant difference from the structures

[1] F Peter Phillips, 'Commercial Mediation in China: Challenge of Shifting Paradigms' *Contemporary Issues in International Arbitration and Mediation: the Fordham papers 2008* (2009) 319.

for dispute resolution in western cultures. In those cultures there tends to be a clear and rigid distinction between processes of adjudication, such as litigation and arbitration, and consensus-based processes such as mediation and conciliation.

This causes me to wonder whether the influence of western culture has created too rigid a distinction between differing forms of dispute resolution, such as mediation and arbitration. Under Australian domestic law there are clear legal constraints upon arbitrators acting as mediators and, in the event that a consensus is not reached, continuing in the role of arbitrator. If there is concern about arbitrators obtaining confidential information in the course of private caucusing sessions during a mediation, should those concerns be addressed by utilising the services of a separate mediator or mediators, appointed by the same body which appoints the arbitrators, or as some mediation practitioners suggest, by not caucusing?

Despite our western cultural orientation, over the last few decades, Australia has enthusiastically embraced consensus-based forms of dispute resolution which are more aligned with an eastern cultural perspective.

In Western Australia, we are committed to the virtues of mediation as a means of resolving disputes, and in general, will not allow a case to go to trial unless and until it has been mediated. Seven judges of our court, including me, are trained as mediators, and I regularly conduct mediations, although I cannot match the Chinese judge who has conducted 10,000 conciliations. This has had the result that the vast majority of the cases commenced in my court are resolved by

consensus rather than by trial. In fact, less than 3% of the civil cases commenced in our court are resolved by a trial.

We have found that the suggested tensions and conflicts between the judicial role and the role of a mediator are entirely theoretical and not real. This makes me wonder whether the institutions engaged in facilitating international arbitration are giving enough emphasis to alternative consensus-based systems of dispute resolution. Of course, many provide mediation services but I wonder about the emphasis.

I note with interest that the proposals published late last year relating to the Singapore International Commercial Court involve alternative forms of dispute resolution, litigation, arbitration and mediation[2], being enforceable through the one body. This will provide the parties with a range of alternatives, and the capacity to utilise those alternatives in sequence, in an appropriate case. I suspect that this will be an attractive option for parties to an international commercial dispute, and that the various other bodies within our region responsible for the resolution of those disputes might need to look at some greater flexibility in terms of the services which are provided. That flexibility should enable greater recognition and acknowledgement to be given to the different cultural expectations which parties to international disputes may have, and to facilitate the choice of a mechanism which will best reflect and harmonise those differing expectations. Med-Arb is, of course, well known, and I look forward to the session on the mediator-arbitrator tomorrow, not least

[2] It is proposed that mediation services will be provided by the Singapore Centre for International Commercial Mediation.

because it seems to me to offer the opportunity for a form of cultural reconciliation, between the eastern and western traditions.