Australia's Lawyers on the World Stage

His Honour, Mr Justice Rogers, examines the desirability of Australian lawyers participating in the preparation of international legal conventions.

A recent experience has convinced me that members of the legal profession should be regularly involved in the formulation and presentation of Australia's attitude on "legal harmonisation". There is almost unprecedented activity in the international formulation of rules for trade, banking and associated topics. In relation to some of the topics, where international agencies have already formulated conventions or rules, Australia is considering adhesion or adoption. A by no means complete list of areas of activity and concern is impressive or frightening, depending on one's view.

I. Projects of The Hague Conference on Private International Law

- Draft Convention of the Law Applicable to Contracts for the International Sale of Goods (not to be confused with the differing UN Convention on Contracts for the International Sales of International Goods 1980)
- The Hague Evidence Convention
- The Law Applicable to Transport Contracts
- The Law Applicable to "Unfair Competition"
- Conflicts of Laws Occasioned by Extraterritorial Applications of Laws Regulating Competition and Similar Economic Regulation
- Revision of the Hague Convention on the Choice of Court 1965

II. Projects of the UN Commission on International Trade Law (UNCITRAL)

- Hamburg Rules 1978 (shipping)
- Model Law on International Commercial Arbitration
- Draft Convention on International Bills of Exchange and International Promissory Notes
- Liability of Operators of Transport Terminals
- Legal Guide on Electronic Funds Transfer (EFT)
- Draft Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

III. Projects of the International Institute for the Unification of Private Law (UNIDROIT)

- International Financing Leasing Convention
- Codification of International Trade Law
- International Factoring Convention
- Hotelkeepers Contracts
- Civil Liability for Carriage of Hazardous Cargoes by Road, Rail and Inland Navigation

IV. Projects of the UN Commission on Trade and Development (UNCTAD)

- Transfer of Technology Code
- Draft Law on Restrictive Business Practices

V. UN Centre on Transnational Corporations (UNCTC)

- Draft Code of Conduct on Transnational Corporations

Unfortunately, the impact of the private profession has been minimal. The Trade Law Committee of the Law Council does its best. Occasionally, the Attorney General's Department looks to an individual practitioner for assistance. Generally, the professional remains unconcerned, as does the business community.

This attitude of benign neglect is not unique to Australia. A member of the International Legal Affairs Committee of the American Corporate Lawyers' Association has written to complain of the same state of affairs in the US. At least there, the State Department, which is responsible for US participation in such multilateral negotiations, maintains a Private International Law Advisory Committee. Due to insufficient funding (a not unfamiliar refrain), amongst other causes, that body is not as effective as it could be.

During my recent sabbatical, I attended the conference on framing the Model Law for International Arbitration held by UNCITRAL as an alternate delegate for Australia. I am convinced that there is a niche for specialist practitioners, including some members of the judiciary, in the national delegations to many international conferences embracing legal topics. I suggest that the appropriate professional bodies discuss with the Attorney General the inclusion in future delegations of persons whose practical day to day experience would be useful in formulating the delegation's proposals. Let me illustrate the validity of this suggestion by reference to my own experience.

Some years ago, the General Assembly of the United Nations resolved to commission UNCITRAL to examine the feasibility of and to draft a model law for international arbitration. The desirability of such a legal regime was self-evident. For various reasons, some good, some not so good, there is always an apprehension in international trade in submitting to the jurisdiction of the courts of a foreign country in which the defendant is resident. Although provision for arbitration may remove the apprehension of an unsympathetic hearing from a foreign judge, it may involve proceedings and procedures in accordance with rules of arbitration with which the trader may not be familiar.

It seemed desirable that there should be prepared, for adoption by member nations, a set of rules which could

serve as a model for an international regime for the conduct of international commercial arbitration.

It was decided fairly early that, instead of producing a Convention to which nations could subscribe with or without reservations, the more convenient course was to produce a model law which could be adopted by member countries, hopefully with very few alterations, but nonetheless preserving to sovereign states the opportunity of making such alterations to the model as were deemed to be crucial.

A working party was established which, in twice yearly meetings, laboured to bring about a reconciliation in conflicting philosophies. Australia was represented on the working party usually by the Solicitor General, first Sir Maurice Byers QC and more recently Dr Griffith QC, assisted by officers of the Attorney General's Department. Nobody would question the learning and high standing of either of the occupants of the office of Solicitor General. However, I do not think that either of them would claim to have extensive special expertise in the field of arbitration. By contrast, the United Kingdom delegation was led by Lord Justice Mustill who, as well as being the author of Mustill and Boyd on *Commercial Arbitration,* conducted a considerable number of arbitrations whilst at the Bar, heard appeals from awards whilst a judge of the Commercial Court and maintains regular contact with arbitration as a member of the Chartered Institute of Arbitrators.

The Russian delegation was led by Professor Lebedev who is the president of the Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry. The Peoples Republic of China delegation was led by Mr Tang Houzhi, the Deputy Secretary General of the Foreign Economic and Trade Arbitration Commission. The United States delegation included Mr Howard Holtzman whose life in the law was spent in arbitration and who is currently a member of the US Iranian Claims Tribunal.

It can be seen therefore that contributions to the debate were made by persons eminently qualified as specialists in the field of arbitration. Again, the matters that were debated did, in a considerable number of instances, call for a close familiarity with the working of the arbitral system.

Probably, the most contentious matter for debate was the extent to which curial supervision of the arbitral process and of awards should be permitted. The civil law countries, joined by the United States, argued for the widest freedom from court control. They felt that, so long as natural justice was afforded to the parties, and absent any charge of fraud or dishonesty, there should be no resort to the courts and the award should be allowed to stand.

In contrast, the British delegation wished to maintain the same minimum judicial scrutiny of proceedings and of awards as that prescribed by the 1979 Arbitration Act. This was no arid philosophical debate. Its consequences in acceptability to the commercial community were of profound importance. This is well illustrated by the on-going British debate on the question whether the Model Law should be adopted. In order to formulate an appropriate Australian stand between these two competing approaches, it was advantageous to have a reasonable amount of practical experience of arbitrations, both as an advocate and as a judge reviewing arbitral procedures and awards.

The same experience was called for in the debate as to whether parties should be permitted to invoke court intervention at any time prior to the delivery of the award and whether the arbitral proceedings should be suspended if curial proceedings were commenced. To illustrate the nature of the problem, there was lengthy debate whether, in a case where there was doubt as to the jurisdiction of the arbitral tribunal to encompass one or more facets of the claim, the party objecting should be allowed to commence proceedings at any time prior to delivery of the award and, if so, whether the court should have power to stay the arbitral process pending a decision.

The competing considerations were clear enough. On the one hand the substantial raison d'etre of the arbitral process, a speedy resolution of the dispute, might be defeated if a stay could be and was granted, and, on the other hand, substantial costs could be thrown away in obtaining determination of a point which may ultimately be held to be outside the jurisdiction of the arbitral tribunal. Questions of this nature could only be approached in the light of practical experience of arbitral procedures and difficulties of the nature under consideration. There were many other instances in the course of the two week discussion where it was helpful and expedient to draw on specialist practical experience.

I have used the Conference on Model Law of International Arbitration as a convenient illustration because of the personal experience I enjoyed. It should not be thought that it is in any way unusual or exceptional as an example or topic in respect of which specialist lawyers may be of considerable assistance to the country's delegate. UNCITRAL is also considering a draft convention on international bills of exchange and international promissory notes. There are many others.

I appreciate that the Bar Association, Law Council, and indeed other professional organisations, at times have an opportunity of making a contribution to the formulation of Australia's views and stance on particular topics prior to the despatch of a delegation to any given conference. However, as I understand it, that is very much an ad hoc arrangement. Furthermore, I do not think that such random consultation sufficiently publicises the forthcoming conference or tests business and public response. Whilst prior consultation is a highly desirable course, I do not think that it meets the whole of the need. Quite obviously, in the thrust of debate, new problems are posed, new attitudes need to be formulated and often the problems evolve in unexpected ways.

Again, at the other end of the spectrum, it is too late for the profession to seek to make an input into governmental policy once a Convention has been agreed to by the international parties and the only question is one of Australian accession.

It behoves the profession to offer to make a more extensive input in the formulation and presentation of the country's views on issues on which it has special skills to offer. It goes without saying that the self-sacrificing practitioner giving his or her time could considerably enjoy such as period of public service.