Introduction to International Arbitration

Chartered Institute of Arbitrators

Brisbane 23 May 2015

Opening Remarks

Justice James Douglas

Supreme Court of Queensland

Congratulations for undertaking the Chartered Institute of Arbitrators course, an Introduction to International Arbitration. The Institute is the world's oldest established professional association dedicated to the development and advancement of the practice of arbitration. It was founded in London in 1915 and incorporated in 1924, it was granted a Royal Charter in 1979. The Australian Branch was formed in 1995 and incorporated in 2006. To my understanding the qualifications it offers arbitrators are among the most well recognised in the world. Or at least that's what my brother Francis tells me. He's a fellow of the Institute!

When I was at the bar most of the arbitral work on offer seemed to consist of building arbitrations with occasional forays into disputes over commodities and energy contracts and insurance contracts. Australia's significant role as a major trading nation supplying bulk commodities such as coal, iron ore and, more recently, LNG to the world and particularly East Asia has provided a broader range of possibilities for arbitration in this part of the world. Many of the opportunities in our region have been taken up by Singapore and Hong Kong but the Australian Centre for International Commercial Arbitration, with offices in Sydney, Melbourne and Perth, and other bodies, including the Chartered Institute, are doing their best to attract more international commercial arbitration to these shores.

The lead has been taken by the Commonwealth Parliament in legislating for greater finality of arbitral awards by the adoption of the UNCITRAL Model Law in the *International Arbitration Act* 1974 (Cth) as amended in 2010. This has added to the attraction of arbitration as an efficient, potentially speedy and private method for resolving commercial disputes between international parties, particularly as rules of procedure and evidence have been considerably relaxed, and appeals are no longer available except on what may be described broadly as jurisdictional grounds. The limitation of the circumstances in which the Australian courts permit challenges to arbitral awards has been upheld by the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 as not inconsistent with the proper exercise of the judicial power of the Commonwealth. That is another significant boost to the use of this forum for international arbitrations.

It is also significant, as Justice Rares of the Federal Court has said recently, speaking in the wider alternative dispute resolution (ADR) context, that Australian courts are willing to enforce dispute resolution clauses requiring the undertaking of "genuine and good-faith negotiations" followed by mediation and arbitration: see *United Group Rail Services Ltd v Rail Corporation Ltd* (2009) 74 NSWLR 618. I had adopted a similar approach, a month earlier in *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2010] 2 Qd R 101. Justice Philip McMurdo has recently and usefully analysed those and other cases in a different factual context in *Baldwin v Icon Energy Ltd* [2015] QSC 12.

My involvement in arbitration now is principally as an interested observer. I am, however, our Supreme Court's representative on ACICA's judicial liaison committee. That committee's main role has been to focus on the harmonisation of procedural rules in the State

Supreme Courts and the Federal Courts for both international and domestic commercial arbitrations. We also hope, as a committee, to promote consistency and efficiency in the courts' resolution of disputes arising out of international arbitrations.

One of Australia's significant advantages as a jurisdiction in which to conduct arbitrations is our stable, reasonably predictable legal system. We have well-trained specialist lawyers used to dealing with international trade and shipping disputes, many of whom have worked in other jurisdictions around the world. The independence of Australian arbitrators in disputes between non-Australian parties can also provide opportunities for work away from Australia.

I discovered that about 10 years ago when I visited the International Chamber of Commerce's International Court of Arbitration in Paris. I was told by one of the Australian employees there that they would prefer to have more Australian and New Zealand members available for their panels than they then had. He had been a solicitor from Minters in Melbourne employed under Michael Pryles who has made quite a career in international arbitration. Go to his website if you want to see the potential for work in this field.

Much of the International Court of Arbitration's work arises from disputes under the *United Nations Convention on Contracts for the International Sale of Goods*, the Vienna Convention or the CISG. Some of you may be familiar with it from participating in the Vis international moots when you were students. It came into force internationally on 1 January 1988 after being ratified by 10 countries and was adopted by the Australian jurisdictions by legislation passed in 1986 and 1987 that came into force on 1 April 1989. It has been described as "the uniform law convention with the greatest influence on the law of worldwide transborder commerce" and is now developing a critical mass of interpretative jurisprudence that is

readily available through resources on the web at UNCITRAL and Pace University, New York.

Many of our major trading partners including China, Japan, the USA, most major European Union countries, Canada, New Zealand, Singapore, the Russian Federation and many South American countries are contracting States; in fact most of the major trading countries are, with the notable exceptions of the United Kingdom, Hong Kong, India, South Africa and Taiwan. The Convention is used frequently in legal practice in continental Europe but less so on a day to day level in the United States, Canada, New Zealand and Australia, at least so far as one can tell from the jurisprudence dealing with it, and even though they are all contracting States. Unless it is excluded by agreement, it is the appropriate legislation applying to many contracts involving Australian companies engaged in international trade, something not always realised as the decision in *Downs Investments Pty Ltd (in liq) v Perwaja Steel* [2002] 2 Qd R 462 made embarrassingly clear. You may well come across it regularly in international commercial disputes.

The Vienna Convention is a hybrid of civilian and common law principles, as are many of the procedural rules that are adopted in international arbitrations. An interesting example can be found in the *Principles of Transnational Civil Procedure* developed by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT). Although it provides for procedures familiar to us such as discovery and cross-examination, do not assume that lawyers from other legal systems will readily accede to such steps.

I attended a maritime law conference in 2012 in Beijing. During a session on maritime arbitration, there was an impassioned contribution to the debate by a Dutch maritime lawyer criticising the cost and expense associated with too many international arbitrations. She attributed the blame to the use of common law procedure, including overuse of discovery, cross-examination and the expense of engaging barristers when ordinary lawyers would do.

In principle I disagree with her views about the utility of discovery and cross-examination, and, of course, about the use of barristers! I have met arbitrators from civilian systems who revel in the greater forensic advantage they can achieve by the use of such procedures than is available in their domestic law. Nonetheless we all know of many examples where litigation can be derailed by misuse of disclosure at least.

In that context it seems to me that international commercial arbitrations can provide a useful testing ground for changes in procedure in domestic commercial disputes. The development of procedural techniques among lawyers engaged in international arbitration can lead to efficiencies that may translate to the national level. From that point of view at least, I remain an interested observer.

As I said earlier efficiency speed and privacy are often touted as advantages of arbitration. We all know of examples where efficiency and speed have not been achieved. It is one of the main reasons why domestic arbitration became less favoured here at least when I was starting at the bar. The efficiency of an arbitration will depend greatly on the qualities of the arbitrators whom the parties appoint and the procedures they adopt to resolve the disputes referred to them. This is where courses such as these come into their own. By identifying better techniques for resolving disputes and training arbitrators properly the Chartered

Institute serves a very useful public purpose. You can benefit from it by learning what international businesses expect from those whom they engage to resolve their disputes. I wish you well for the balance of the course and hope that it translates into a thought-provoking entry into the world of international commercial arbitration.