



5th International Arbitration Conference

address

by

**The Honourable Wayne Martin AC
Chief Justice of Western Australia**

Perth
21 November 2017

Introduction and welcome

It is my very great pleasure to make some opening remarks at the 5th International Arbitration Conference, and particularly to welcome to Perth the many participants in this conference from other States, Territories and countries. As I am sure you are expecting, I will say a little more about the propitiousness of Perth as a venue for this conference, and as a seat for international commercial arbitration a little later in these remarks.

The Traditional Owners

But first I wish to acknowledge the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present, and acknowledge their continuing stewardship of these lands.

Special Guests

All participants in this conference are most welcome, and each special in their own way, but I would like to particularly acknowledge the presence of the Honourable Robert French AC, former Chief Justice of Australia, Justices John Gilmour and Michael Barker of the Federal Court of Australia, the President of the Law Society of Western Australia, Mr Alain Musikanth, and the President of the Western Australian Bar Association, Mr Matthew Howard SC.

On behalf of all conference participants, I would also like to acknowledge the special thanks and gratitude that are due to the conference planning committee - Mr Ian Nosworthy representing the

Business Law Section of the Law Council of Australia, Ms Caroline Kenny QC, President of the Chartered Institute of Arbitrators Australia, and Mr Khory McCormick, Vice-President of the Australian Centre for International Commercial Arbitration.

An Australian Approach to International Commercial Arbitration

The rebadging of the series of events which have together been collectively presented as 'Sydney Arbitration Week' for the last four years under the banner 'Australian Arbitration Week' has much more than cosmetic significance. Whenever two or more Australian practitioners interested in international commercial arbitration gather, it is only a question of time before invidious comparisons are made between the paucity of international commercial arbitration in Australian seats, as compared to the flourishing arbitration scenes in other better recognised seats, both in our region and further afield. In the course of discussion it is likely that attention will be given to the incongruity between the relative infrequency of international arbitration in Australia, and the significant representation of Australian practitioners - as counsel and arbitrators - in arbitrations conducted all around the world. During a recent visit to London and Paris, I was struck by the number of Australian practitioners working at all levels in the field of arbitration, from the junior to the most senior, and I am sure that the same holds true of other significant arbitral centres like Singapore, Hong Kong, Beijing and so on.

When discussion turns to the reasons for this incongruity, and the unpalatable but undeniable truth that, despite the best efforts of everybody at this conference, Australia punches below its weight as a seat, the contributing factors identified will likely include:

- Australia's federal structure - leading to nine different courts with the capacity to supervise international arbitration, and the consequent possibility of divergent approaches emerging from those courts;
- The competition between Australian cities, and the legal professions within those cities - a competition which does not exist in most other countries competing for seats - almost all of which have a single city where all relevant participants will be located, whether that be London, Paris, Singapore, Hong Kong, Beijing or Kuala Lumpur.

The last decade or so has seen a clear convergence of approach in Australia's superior courts with respect to the support and encouragement of commercial arbitration, overcoming the first part of the problem to which I have referred. I suspect this convergence of judicial approach is not readily acknowledged by Australia's commercial rivals in this field. However, if we are to address the second problem to which I have referred, it is essential that we promote a single national arbitral face to the world, putting aside our parochial rivalries. That is why I am so pleased that the series of significant events which had a somewhat parochial flavour have been rebadged as a national event, which will occur in different Australian cities from time to time. That step will, of itself, stimulate the

development of a unified Australian arbitral profession - an objective which is already well advanced.

Western Australia's Contribution to the National Scene

I am delighted that, with only a little prompting from me, the three institutions which convene this conference decided that the first venue for the conference outside Sydney should be Perth. It would be entirely inconsistent with the remarks I have just made for me to now catalogue the competitive advantages which Perth enjoys as a seat for international commercial arbitration, as compared to other Australian seats.

However, there is no inconsistency in me briefly identifying the significant contribution which Western Australia can make to the national arbitration profession.

Energy and resources

Western Australia has some of the most significant deposits of minerals and energy on the planet. Iron ore, liquefied natural gas, gold, nickel and more recently lithium are exported from Western Australia on a scale which matches any mineral province in the world. As a consequence, Perth has become a recognised hub for energy and resources law, and is home to many experienced practitioners in that field. Mining and resource development projects are of course invariably associated with the construction of very large pieces of plant and infrastructure including ore and gas treatment plants, railways and ports, which has in turn attracted lawyers with expertise in those fields to Western Australia as well. I note that the first

session in this conference is to address arbitration in the gas, energy, resources and projects sectors.

Commerce

Exports from Western Australia represent more than 40% of the value of all goods exported from Australia.¹ If Western Australia was a country, its GDP would place it just outside of the largest 50 economies in the world.² Commerce in Western Australia has developed a truly international character.

Geography and time-zone

Situated on the rim of the Indian Ocean, close to the developing economies of the Indian subcontinent, south-east Asia and northern Asia, Perth enjoys regular and convenient connections with most major centres in Asia and more than half of the world's population lives within 2 hours of Perth time.³ The Western Australian resource sector also has strong links to Africa. I note that another session in this conference will address the development of arbitration in Africa, and that Africa has also been a significant source of investor-state

¹ Australian Government Department of Foreign Affairs and Trade, *Australia's Trade by State and Territory 2015-16* (February 2017) 14 < <http://dfat.gov.au/about-us/publications/Documents/australias-trade-by-state-and-territory-2015-16.pdf>>.

² World Bank, *World Development Indicators database – Gross domestic product 2016* (17 April 2017) 1 <<http://databank.worldbank.org/data/download/GDP.pdf>>; Australian Government Department of Foreign Affairs and Trade, *Australia's Trade by State and Territory 2015-16* (February 2017) 74 < <http://dfat.gov.au/about-us/publications/Documents/australias-trade-by-state-and-territory-2015-16.pdf>>.

³ Government of Western Australia Department of Jobs, Tourism, Science and Innovation, *Key facts -Shared time zone* < <http://www.jtsi.wa.gov.au/invest-in-wa/key-facts/shared-time-zone>> (accessed 20 November 2017).

arbitrations including the first such awards to be enforced by an Australian court.⁴ I will come back to this topic a little later.

Arbitral facilities

State of the art dedicated arbitral and mediation facilities have recently been opened by a private provider in Perth.⁵ I hope that in the very near future, those facilities will be augmented by facilities for mediation and arbitration in the David Malcolm Justice Centre which are also state of the art, and which will soon be made available for private hire.

So, there is every reason to conclude that Western Australia can make its fair contribution to the development of a national face for the arbitral profession in Australia.

I am sure that many of you are thinking "well he would say that wouldn't he?" But these views are not idiosyncratic, and are shared by others without my parochial sentiment. Last week it was announced that Perth has been chosen as the venue to host the 2018 Chartered Institute of Arbitrators Diploma in International Commercial Arbitration - a programme which is provided as a joint venture between the Singapore, East Asian and Australian branches of the Chartered Institute. The Perth programme will follow similar successful programmes in Singapore in 2016 and in Hong Kong last month, and can be expected to attract participants from all around the globe. The choice of Perth as the venue for next year's programme is

⁴ *Lahoud v Democratic Republic of Congo* [2017] FCA 982.

⁵ The ADR Centre, 32 St Georges Terrace, Perth WA 6000.

another very significant step forward in the development and promotion of a unified Australian arbitration community.

A significant recent development

I would like now to briefly refer to a very significant development in the field of international commercial dispute resolution which occurred a little over two months ago, when Australia's largest trading partner, China, signed the Hague Convention on Choice of Court Agreements (**the Convention**). This significant step is obviously consistent with China's drive to become an integrated member of the global economy, in conjunction with its 'Belt and Road' initiative.⁶ Although I am not aware of any pronouncements made by China in relation to likely reservations with respect to any provisions of the Convention, or the time which the ratification process is likely to take, it seems unlikely that China would have taken the step of signing the Convention unless it was committed to moving towards ratification within a reasonable time-frame.

Although the Convention was settled on 30 June 2005, it did not come into force until more than 10 years later on 1 October 2015 when the European Union (EU) deposited its instrument of approval.⁷ The United Kingdom government has indicated a commitment to

⁶ A foreign policy and economic strategy of the People's Republic of China which aims to systemically promote the cultural, economic and developmental connections between Asia, Europe and Africa and their connecting seas. See People's Republic of China National Developmental and Reform Commission, *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road* (28 March 2015)

<http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html>.

⁷ The EU made a declaration under Article 21 of the Convention, under which certain insurance contracts will fall outside the scope of the Convention, except in certain cases provided for in paragraph 2 of that declaration. See HCCH, *Conventions, Protocols and Principles – Status Table* <<https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98>> (accessed 20 November 2017).

international civil judicial cooperation, and an intention to participate in The Hague conventions to which it is already a party, post Brexit.⁸ As of today, only the EU,⁹ Singapore and Mexico have ratified the Convention, although the United States of America signed the Convention on 19 January 2009, the Ukraine on 21 March 2016, China (as I have mentioned) on 12 September 2017, and Montenegro on 5 October 2017.

The Hague Convention on Choice of Court Agreements and Australia

In October 2016, the Joint Standing Committee on Treaties of the Australian Parliament recommended that Australia accede to the Convention and take binding treaty action, noting that, at that time, Asia was under-represented in the Convention¹⁰ - a situation which will, of course, change dramatically if and when Australia's largest trading partner ratifies.

The government has subsequently stated that the Convention would be implemented domestically through the passage of an International Civil Law Act.¹¹ A Bill for that Act was proposed to be introduced in

⁸ HM Government, *Providing a cross-border civil judicial co-operation framework: A future partnership paper* (22 August 2016) 6-8 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf>; House of Commons Justice Committee, *Implications of Brexit for the Justice System*, House of Commons Paper No 9, Session No 9, Session 2016-17 (22 March 2017) 15 <<https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf>>.

⁹ With the exception of Denmark.

¹⁰ Parliament of Australia Joint Standing Committee on Treaties, *Report 166: Choice of Court Agreements – Accession* (10 October 2016) [3.4].

¹¹ It was proposed that the International Civil Law Act would implement the Convention and also the Hague Principles on Choice of Law in International Commercial Contracts which were approved by the Hague Conference on Private International Law on 19 March 2015. See the National Interest Analysis [2016] ATNIA 7, *Australia's Accession to the Convention on Choice of Court Agreements* [2016] ATNIF 23 [22]–[24].

the autumn 2017 sittings of the Commonwealth parliament,¹² and in January of this year, the Council on General Affairs and Policy of the Hague Conference reported that it was hoped Australia would be in a position to accede to the Convention during 2017.¹³ However, it seems that our legislators may have been a little distracted by other matters recently.

Detailed discussion of the scope and effect of the Convention is well beyond the scope of these brief remarks. It is sufficient for present purposes to say that, generally speaking, the Convention would confer upon parties choosing a national court as the forum for the resolution of their disputes, roughly the same measure of enforceability of the judgment as is conferred upon international arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)(the **New York Convention**). The New York Convention has been the fertiliser which turned the previously barren ground of international commercial arbitration into a veritable cornucopia.

The Hague Convention on Choice of Court Agreements is no threat

I respectfully join other judicial commentators in expressing the view that the development of an international regime providing

¹² Australian Government Department of the Prime Minister and Cabinet, *Legislation Proposed for Introduction in the 2017 Autumn Sittings* <<https://www.pmc.gov.au/sites/default/files/publications/2017-autumn-public-list.pdf>> (accessed 20 November 2017).

¹³ Council on General Affairs and Policy of the Hague Conference - Hague Conference on Private International Law Permanent Bureau, *Suggested Further Work in Support of Forum and Law Selection in International Commercial Contracts* (No 5 January 2017) [4], [8] <<https://assets.hcch.net/docs/a357a94b-5bac-44c5-9fa3-4f1a079b2411.pdf>>.

enforceability to parties who wish to choose a court as the forum for the resolution of their dispute is entirely consistent with, and provides no threat to, international commercial arbitration.¹⁴

One of the great strengths of international commercial arbitration has been the flexibility which it offers to parties who wish to fashion a bespoke solution for the resolution of their disputes. It is entirely consistent with that philosophy to provide parties with the opportunity, if they wish, to choose a court as the forum for the resolution of their dispute.

International commercial arbitration would not have received the strength of support it has enjoyed from participants unless it was perceived in the marketplace as having considerable strengths. However, this is not to say that international commercial arbitration is perfect, or without blemish. A number of commentators have observed that the complaints of cost and delay which have been directed at courts for centuries, and which provided great stimulus for the alternative of arbitration, are now being directed at international commercial arbitration.¹⁵ On the other hand, procedural reform in the courts has blunted some of those long-standing criticisms.

International commercial arbitration can be confronted with procedural obstacles which do not impede courts in areas like the provision of enforceable interim relief (by way of injunction or other

¹⁴ See, eg, Chief Justice Marilyn Warren AC and Justice Clyde Croft, 'An International Commercial Court for Australia - looking beyond the New York Convention' (Paper presented in an abridged version at the Commercial CPD Seminar Series, Melbourne, 13 April 2016) 16.

¹⁵ See, eg, Queen Mary University of London – School of International Arbitration, 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration* 7 <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> (accessed 20 November 2017).

interim order) and in relation to the joinder of parties who are not parties to the arbitration agreement. Critics also point to the lack of a developed transparent body of jurisprudence with respect to international commercial arbitration, and the consequent inability of international arbitration to assist in the convergence of international commercial law¹⁶ - a convergence which is obviously highly desirable in an increasingly global economy.

Commentators also point to the inability of arbitral institutions to regulate the conduct of practitioners, resulting in forensic strategies which have been described as gaming the system or as guerrilla tactics.¹⁷ Unlike arbitral tribunals, courts have the capacity to regulate the conduct of practitioners, ultimately by controlling the right of audience.

The placement of courts as another tile in a mosaic of international commercial dispute resolution, at the choice of the parties, provides another option to parties concerned by one or more of those aspects of arbitration, and augments the range of mechanisms available to those engaged in international commerce for the resolution of their disputes. For my own part, I do not see anything antithetical, threatening or confronting in the development of this alternative to international

¹⁶ See, eg, Chief Justice Robert French AC, 'Convergence of Commercial Laws – Fence Lines and Fields' (Paper presented at the Singapore Academy of Law Conference, Singapore, 22 January 2016) 16-17; Chief Justice Robert French AC, 'Transnational Dispute Resolution' (Paper presented at the Supreme and Federal Court Judges' Conference, Brisbane, 25 January 2016) 14-15; Chief Justice Thomas Bathurst AC, 'The Importance of Developing Convergent Commercial Law Systems Procedurally and Substantively' (Paper delivered at the 15th Conference of Chief Justices of Asia and the Pacific, Singapore, October 2013) 11.

¹⁷ See, eg, Justice Clyde Croft, 'Recent Developments in Arbitration: at Home and Abroad' (Paper presented to the Arbitration Special Interest Group at the Resolution Institute, Melbourne, 16 October 2017) 8-9; Chief Justice Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' (Keynote Address, Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013) 4-5.

arbitration. I draw support for this view from the observation that Singapore, a great and very successful promoter of international commercial arbitration, has ratified the Convention.

The Draft Hague Convention on Recognition and Enforcement of Foreign Judgments

The Hague Convention on Choice of Court Agreements only applies if parties agree to select a national court as the forum for the resolution of their dispute. However, there will also be cases in which international commerce will be facilitated by enhancing the enforceability of court judgments in appropriate circumstances. To that end, a Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments is in the course of preparation, and the Special Commission charged with the project met in The Hague for the third time last week.¹⁸ Although it is, of course, too early to proffer a view with respect to the merits of a convention which remains in draft, it is difficult to argue coherently against expansion of the opportunities for the efficient and definitive resolution of international commercial disputes in the context of a rapidly expanding international economy.

Investor-State arbitrations

Finally, I am unable to resist the temptation to dip my toe, ever so gently, into the maelstrom of debate surrounding investor-state arbitrations. Provisions in trade treaties providing foreign investor

¹⁸ HCCH Special Commission, *Legislative Projects – Judgments*, <<https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1>> (accessed 14 November 2017).

protection, and the arbitrations which they can generate, have been the subject of recent vociferous criticism.¹⁹ Critics include the then Chief Justice of Australia, who drew attention to the fact that an investor-state arbitration brought against Australia would have involved the determination, by an arbitral tribunal, of a question which was significantly similar to that which was determined by the High Court of Australia, had the case not been resolved on a preliminary basis.²⁰

His Honour's concern at the prospect of the decision of Australia's highest court being implicitly impugned or undermined by the inconsistent decision of an arbitral tribunal is entirely understandable. On the other hand, damage to the commercial interests of international investors as a result of decisions of domestic courts applying laws promulgated by the State is a significant component of the sovereign risk to which provisions of this kind are directed. In my respectful view, the understandable sensitivities of national courts applying domestic laws need to be viewed in the context of the mitigation of sovereign risk, and the imbalance of power between investors and state parties which provisions of this kind are intended to mitigate.

Sovereign risk is undoubtedly a significant fetter on international investment and therefore upon international trade and commerce. The mitigation of fetters on international trade must generally be in the

¹⁹ See, eg, D Jones, 'The Problem of Inconsistency and Conflicting Awards in Investment Arbitration' (Paper presented at the German – American Lawyer's Association, Frankfurt, March 2011); Marta Latek, European Parliamentary Research Service Briefing, *Investor- State Dispute Settlement (ISDS); State of play and prospects for reform* (21 January 2014) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2015\)545736](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)545736)>.

²⁰ Chief Justice Robert French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Paper presented to the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014) 4–6.

interests of all, especially the best interests of the many residents in developing countries whose lives might be changed for the better by international investment and trade. The real question, as it seems to me, is not so much whether investor-state dispute settlement provisions are, in themselves, a good thing or a bad thing, but rather whether, in the context of a particular trade treaty, the mitigation of sovereign risk which they provide is necessary and justifiable, in furtherance of bilateral trade. In this context I note that Australia now seems to be taking a case by case approach on these issues,²¹ which appears consistent with the views which I and others have expressed.

Other criticisms of investor-state arbitrations include the hoary old chestnuts of delay and expense,²² and the capacity which ISDS provisions provide for forum shopping, whereby international companies can channel investments through subsidiaries in a particular jurisdiction in order to take advantage of the provisions in a particular treaty.²³ It seems to me that these are areas in which the development of international commercial courts might offer the possibility of mitigating some of these concerns. A standing international court, with permanently employed personnel and judicial officers and established procedures and infrastructure might be quicker (if properly resourced) and cheaper than the ad hoc tribunals which dominate this area, and if given sufficient coverage, would

²¹ See Australian Government Department of Foreign Affairs and Trade, *Free Trade Agreements* <<http://dfat.gov.au/TRADE/AGREEMENTS/Pages/trade-agreements.aspx>> (accessed 20 November 2017).

²² D Gaukrodger and K Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', *OECD Working Papers on International Investment*, 2012/13, OECD Publishing, 19 <<http://dx.doi.org/10.1787/5k46b1r85j6f-en>>.

²³ D Gaukrodger and K Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', *OECD Working Papers on International Investment*, 2012/13, OECD Publishing, 51-54 <<http://dx.doi.org/10.1787/5k46b1r85j6f-en>>.

likely reduce the incentive for forum shopping. However, I am not so naïve as to under-estimate the many hurdles which would have to be overcome to achieve international consensus in this area.

Conclusion

In these short remarks I have touched upon just a few of the issues that will engage our attention and interest throughout what promises to be a very stimulating day. Might I finish by reiterating my very warm welcome to all delegates to this conference. I look forward to meeting as many of you as I can and very much hope that you enjoy your stay in our beautiful city.