OPENING REMARKS TO THE GLOBAL ARBITRATION REVIEW CONFERENCE

28 November 2023, Sydney

The Hon. A S Bell, Chief Justice of New South Wales

1 It is a great pleasure to be invited to open this Conference. Given that not so long ago I delivered a lecture on "The Rise of the Anti-Arbitration Injunction" ((2021) 14 *The Judicial Review* 287), it is very good of you to have me! In that context, I am certain that I am not the first poacher turned game-keeper! Indeed, I can see a few former game-keepers in the audience who have recently returned to their natural habitat.

2 As many here will know, arbitration and international arbitration in particular formed a significant part of my practice when at the Bar, both in terms of adjectival arbitration-related court work at the front and back ends of arbitral disputes, and in substantive international arbitrations themselves which I had the opportunity to participate in in London, Singapore and San Francisco, as well as in Sydney, Melbourne, Brisbane and Perth.

3 On the adjectival side, many of the arbitration-related issues that occupied me at the Bar between 1995 and 2019 have largely been resolved or, at the very least, the law is far more settled than it once was. Two examples relate to the proper approach to the construction of the scope of an arbitration (or jurisdiction) clause and the ambit of the public policy defence.

4 As to the first, one of my earliest cases at the Bar was *Francis Travel Marketing v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160. That decision was notable for two reasons. First, Gleeson CJ laid down for Australian law the importance of taking a broad, liberal approach to the construction of the scope of arbitration clauses. Secondly, his Honour held that:

> "It will be for the arbitrator to decide, applying relevant principles of conflict of laws, what part the allegation of a contravention of s 52 of the Act 1974 (Cth),

> and the asserted entitlement to relief under s 87, will play in the arbitration. It is not for this Court to pre-empt that decision."

After going on to cite the decision of the United States Supreme Court in *Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc* 473 US 614 (1985), he said that "there is no reason in principle why the whole dispute [including the Trade Practices Act aspect of the dispute] is not amenable to arbitration in London."

5 That statement assumed that a TPA (now ACL) dispute was arbitrable but did not address the question of what would happen if, as was the fact in that case, the law governing the underlying agreement was not Australian. By what mechanism would an Australian statute be picked up? Thomas J, as his Lordship then was, in *Akai Pty Ltd v People's Insurance Company* [1998] 1 Lloyd's Rep. 90 held in an analogous context that English law would not pick up the *Insurance Contracts Act* in a case where Akai had been subjected to an anti-suit injunction restraining it from suing the PIC in Sydney even though the HCA had refused to stay those proceedings.

6 As people in this audience well know, *Francis Travel* was followed in *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 which dealt with many topics associated with international arbitration but, where parties agree to foreign law and arbitration, there remain nagging questions as to whether this amounts to a contracting out of consumer protection or other beneficial legislation and whether this is contrary to public policy. Arguments of this kind were raised but not resolved in *Clough Engineering Ltd v Oil & Natural Gas Company of India* (2008) 249 ALR 458

7 For High Court watchers, it may well be that the currently reserved decision of the High Court of Australia in *Karpik v Carnival plc* will cast some light on this, and any decision may well have important ramifications for arbitral disputes where the principal contract is governed by a foreign law clause but where one party seeks to engage consumer protection legislation which may be thought to have the character of a mandatory law of the forum.

8 As the High Court's decision in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 93 ALJR 582; [2019] HCA 13 on the subject of the meaning of the phrase "through and under" in an arbitration context illustrates, one cannot necessarily know what to expect. I refer in this regard to Edelman J's powerful dissent in that case, and his strong criticism of the majority's departure from a well understood meaning of that expression in international arbitration. The role of third parties in arbitration raised in *Rinehart* is conceptually problematic but certainly a real one in light of the majority's decision.

9 In one sense, the operation of mandatory laws such as the Australian consumer law may overlap with notions of arbitrability, an important concept which like some legal terms, may carry a variety of meanings.

10 Arbitrality may also depend on the actual legal context.

11 Six weeks ago, the Privy Council reversed a decision of the Court of Appeal of the Cayman Islands which had declined to stay a winding-up petition on the just and equitable ground which involved a dispute between shareholders whose agreement contained an arbitration clause. Notwithstanding the insolvency context of the dispute, its nature as a matter of substance was in fact *inter partes* and the dispute held to be arbitrable by the Privy Council and thus the proceedings were stayed; *Family Mart China Holding Co Ltd v Ting Chuen (Cayman Islands) Holding Corporation* [2023] UKPC 33.

12 The advice of the Board, given by Lord Hodge, deals with many important issues including when seeking a stay of proceedings on the basis of an arbitration clause may constitute an abuse of process, characterising a matter that may fall within an arbitration clause at an early stage of proceedings (reference is made in this regard to *Tanning Laboratories v O'Brien*) and the consequences of fragmentation and the importance of sensible case management. This last point arose many years ago now in litigation in the Federal Court of Australia involving *Hi-Fert*.

13 On the subject of arbitrability, attendees of this conference should also be aware of the significant recent decision of the Singapore Court of Appeal earlier this year in *Anupan v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 which concerned the question of the applicable law to determine the arbitrability of a dispute. It was there held that the Singapore courts will not allow an arbitration to proceed if the underlying dispute is not arbitrable under either the law which governs the arbitration agreement, or under Singapore law as the law of the seat. In both cases, it would be contrary to public policy to permit such an arbitration to take place. This is an important decision, especially in circumstances where it may not be clear or readily ascertainable whether or not the dispute is arbitrable under the law governing the arbitration agreement.

14 Other recent decisions of note include Sir Robin Knowles' decision in *The Federal Republic of Nigeria v Process and Industrial Developments Limited* [2023] EWHC 2638 (Comm) finding at [516] that "P&ID has the Awards only after and by practising the most severe abuses of the arbitral process". The Award, delivered by Lord Hoffmann no less, was set aside. Sir Robin found that there was "serious irregularity" within the meaning of s 68 of the *Arbitration Act 1996* (UK) which requires that the irregularity was a cause of substantial injustice to the affected party. The cases gathered and discussed by Sir Robin in this context show that the courts are prepared, where appropriate, to exercise their "long stop" jurisdiction in relation to miscarriage of the arbitral process. That is ultimately a positive for the practice of international arbitration for without such a judicial safety net, the reliability, integrity and attractiveness of international arbitration as a form of dispute resolution would be seriously compromised.

15 In this context, practitioners involved in arbitration and international arbitration must remember that, although arbitrations are invariably held in confidential settings and involve a contractually agreed "private" dispute resolution process, they remain subject to their ethical obligations as officers of the Court which admitted them to practice, and these professional and ethical obligations apply just as fully in an arbitral setting as in legal practice more generally.

16 Australian commercial and construction lawyers, as a general class, have strong reputations as skilled and extremely able practitioners. That reputation carries through into the field of arbitration and international arbitration, and there are many talented Australian lawyers working abroad in this field, just as there are many talented Australian solicitors and barristers who have worked abroad in international arbitration before returning to Australia to practice, both before the courts and in arbitral disputes. This is a dynamic area of practice.

17 There is a most impressive array of speakers assembled for this Conference. In particular, I acknowledge and welcome Justice Anselmo Reyes of the Singapore International Commercial Court and formerly a judge of the High Court of Hong Kong and a distinguished international arbitrator.

18 I am sure that the Conference will be a great success and I congratulate the organisers for arranging it.

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