

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
OPENING ADDRESS
4TH INTERNATIONAL ARBITRATION CONFERENCE
TUESDAY 22 NOVEMBER 2016*

1. It is a pleasure to have the opportunity to open the fourth international arbitration conference. I would like to begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders past and present.
2. International arbitration has been described as “a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week.”¹ Indeed, last year, almost five thousand requests for arbitration were filed worldwide in leading arbitration institutions.² In the Asia Pacific, the common golden thread of the UNCITRAL Model Law runs throughout most of the region. This, in addition to an exponential increase in transnational trade and commerce, has led to the increasing popularity of international arbitration as a method, if not the primary method, of international commercial dispute resolution.³
3. In this context, the theme of today’s conference, ‘New Horizons in International Arbitration’, allows us to take stock of recent developments and issues in international arbitration and look to the future. Today, you will hear from leading arbitration experts from around the world on recent issues in international arbitration, arbitration in the Asia-pacific region,

* I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

¹ JH Carter (ed), *The International Arbitration Review* 6th ed (Law Business Research Ltd, 2015) vii.

² M Altenkirch and N Gremminger, ‘Parties’ Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions’ (Global Arbitration News, 2015) available at <<http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/>>.

³ C Ong, ‘Asia Pacific Overview: Regional Overview and Recent Developments: Asia Pacific’ in S Finizio and C Caher (eds) *The International Comparative Legal Guide to: International Arbitration 2016* (Global Legal Group, 13th ed, 2016).

privilege disputes, ethical considerations and procedural and time issues.

4. In this opening address, I will use my prerogative as a judge to make some comments on the relationship between the courts and arbitration in the Australian context. I will keep my remarks brief, so as not to encroach on today's program.
5. Alternative dispute resolution has long been an integral part of the operation of the legal profession. It significantly pre-dates the English justice system, was prominent in ancient Egypt, China, Greece and Rome, and was the preferred method for resolving civil disputes in Europe during the Middle Ages. It would be trite for me to stand here and wax lyrical about the benefits of arbitration. Safe to say, arbitration is clearly beneficial to parties who desire a high degree of control over proceedings. It offers flexibility, privacy, efficiency, industry-expertise and it can be more cost-effective than litigation, assuming it is effectively managed.
6. However, the private agreements of parties in arbitration have not always been respected by us members of the judiciary. Traditionally, English courts exercised extensive supervision over arbitral processes and outcomes. In 1609, the great English jurist, Sir Edward Coke, held that an arbitral agreement was "by the law and of its own nature countermandable".⁴ Two-hundred years later, the United States Supreme Court referred to an arbitration tribunal as "a mere amicable tribunal", the decisions of which were essentially non-binding and irrelevant to the court's task.⁵
7. In December 1934, Professor Earl S Wolaver reiterated a frequently held view that arbitral awards were a "species of moral and economic justice".⁶ He stated that

[w]hile arbitration probably antedates all the former legal systems, it has not developed any code of substantive principles, but is, with very few exceptions, a matter of free decision, each case being viewed in the

⁴ *Vynior's Case*, 8 Cohe. Rep 81b, 82a, 77 Eng Rep 597, 599 (England, King's Bench).

⁵ *Hobart v Drogan* 35 US 108 (1836) (US Supreme Court) p 119.

⁶ Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 *University of Pennsylvania Law Review* 132, 133.

light of practical expediency and decided in accord with the ethical or economic norms of some particular group.⁷

8. As noted by Luke Nottage and Richard Garnett, “in the 19th century, there was [a] direct incentive for English judges to keep a wary eye on arbitration: it diverted cases away from the courts, which in those days were much more dependent on court user fees than on general government grants”.⁸
9. Australian courts inherited this traditional wariness towards arbitral agreements. Under the old Commercial Arbitration Acts, arbitral awards were often challenged for “technical misconduct”.⁹ However, over time, as arbitration has become more and more attractive for commercial parties, and certainly with the advent of the UNCITRAL Model Law and New York Convention, courts have become more supportive of enforcing arbitral awards.
10. One comical example of judicial acceptance of arbitral awards is described by Sir Robert Megarry in the latest edition of ‘Miscellany at Law’.¹⁰ I have recounted this story on a previous occasion, but I think it warrants a retelling. At some point in the 19th Century, in County Down, Ireland, a local form of arbitration involving a turkey was practiced. The arbitration took place at a long table, with the parties sitting at the head and an independent person acting as a referee. Grains of oats were placed at intervals along the centre line of the table. The grains stopped about a foot from the head of the table and two corn kernels were placed in front of each party. A turkey was deposited at the far end of the table and gradually pecked its way down the table before delivering its final verdict by selecting one of the corn kernels. The party whose kernel was consumed by the turkey would be the ultimate winner in the arbitration.
11. Unsurprisingly, one party whose corn kernel was not selected by the turkey was dissatisfied and decided to challenge the award. On appeal, the matter

⁷Ibid 132.

⁸ L Nottage and R Garnett, ‘Introduction: Addressing Australia’s Arbitration Ambivalence’ in L Nottage and R Garnett (eds) *International Arbitration in Australia* (The Federation Press, 2010) 2.

⁹ Ibid 3; V Donneberg, ‘Judicial Review of Arbitral Awards under the Commercial Arbitration Acts’ (2008) 30 *Australian Bar Review* 177.

¹⁰ See The Rt Hon Sir R Megarry, *A New Miscellany-at-Law: Yet Another Diversion for Lawyers and Others* (The Lawbook Exchange Ltd, 2005) pp 77-78.

came before Chief Justice Lefroy, who was unfamiliar with the local practice. During cross-examination of the disgruntled party, inevitable confusion arose about the role of the turkey in the arbitration. On realising that the turkey was in fact the arbitrator, and that the method was an established local form of arbitration, the Chief Justice became irate. “Do you meant to tell me that the plaintiff has brought this case in disregard of the award of an arbitrator?” he asked. “That is so, my Lord”, was counsel’s reply. “Disgraceful!”, the Chief Justice exclaimed, “Appeal dismissed with costs here and below”. To which counsel remarked, “The Lord Chief Justice affirms the turkey”.¹¹

12. Now, by recounting this story, I do not wish to imply that the job of arbitrators is as simple as a turkey eating oats. Or that the decisions of arbitrators are as arbitrary as who has the tastiest looking kernel of corn. Admittedly, comparing arbitrators to turkeys is a sure fire way to insult many of you in this room. However, the story does say something about judicial respect for arbitral awards, even where the method of arbitration is dubious. Indeed, some may argue that Chief Justice Lefroy’s decision provides a best practice standard for the review of arbitral awards.

13. It is obvious that in order for arbitration to boast the benefits of finality, certainty and efficiency, courts must be willing to enforce arbitral awards. In this respect, courts naturally form an essential part of the international arbitration landscape.

14. While historically, Australian courts have not always taken a consistent approach towards arbitration, in my opinion, in recent years, Australian courts have demonstrated a willingness to enforce arbitral agreements. Before I turn to some recent decisions demonstrating this, let me briefly describe the legislative framework governing Australia’s international arbitration regime.

15. The *International Arbitration Act*¹² incorporates the UNCITRAL Model Law on International Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New

¹¹ Megarry cites “an Irish judicial source” secondhand.

¹² *International Arbitration Act 1975* (Cth).

York Convention, into Australian federal law. In regard to the conduct and enforcement of international arbitration in Australia, the Act states that the Model Law provides an exclusive code setting out parties' rights and obligations in respect of international arbitration conducted in Australia. In respect of foreign arbitral awards, the Act adopts the New York Convention, which provides an internationally accepted framework for the recognition of foreign arbitral awards. Its adoption in Australia provides parties with reasonable certainty that arbitral awards can be enforced in multiple jurisdictions.

16. All States and Territories in Australia, with the exception of the ACT, have also adopted uniform commercial arbitration legislation based on the Model Law. In New South Wales, the *Commercial Arbitration Act* applies the Model Law, with some amendments, to domestic arbitrations. In 2012, I released an Arbitration Practice Note for the Supreme Court. The Arbitration note provides for an efficient, inexpensive and relatively informal procedure for resolving disputes arising in the context of arbitration agreements, awards or proceedings. The Federal Court and some other state courts have similar rules and practice notes.

17. In 2010, Australia's first international dispute resolution centre, the Australian Centre for International Commercial Arbitration, opened its doors. In 2011, the *International Arbitration Regulations*¹³ came into force, appointing the Centre as the sole authority to perform arbitrator appointment functions under the Act where parties haven't agreed on an appointment process. The Centre also released its arbitration rules in 2011. In January 2016, the most recent version of the Centre's rules was formally adopted. The new rules "build on [the Centre's] established practice of providing an effective, efficient and fair arbitral process. Developments of note include provisions on consolidation and joinder and the conduct of legal representatives, along with the introduction of an expedited procedure for lower value or urgent matters commenced under the Arbitration Rules."¹⁴

¹³ *International Arbitration Regulations 2011* (Cth).

¹⁴ Australian Centre for International Commercial Arbitration, 'ACICA Rules 2016' (2016) available at <<https://acica.org.au/acica-rules-2016/>>.

18. The implementation of this legislative framework and the new Centre for Arbitration in Sydney has led practitioners and judges alike to become increasingly familiar with the law and practice relating to international arbitration. A number of recent decisions have confirmed that Australian courts are supportive of enforcing arbitral awards in accordance with the Model Law and New York Convention.
19. Three years ago, in the case of *TCL Air Conditioner*, the High Court rejected a constitutional challenge to the Federal Court's entitlement to enforce arbitral awards under the Model Law. The High Court rejected the argument that section 16 of the *International Arbitration Act*, to the extent it gives effect to certain articles of the Model Law, is invalid because it impairs the institutional integrity of the Federal Court and further, because it vests judicial power in arbitral tribunals.¹⁵ The Court found that the Act made it plain that arbitral awards could only be set aside in limited circumstances, which did not include a legal error.
20. After the case was returned to the Federal Court, the full Federal Court endorsed the objects underpinning the Model Law.¹⁶ The Court stated that
- “The avowed intent of [the Model Law] is to facilitate the use and efficacy of international commercial arbitration ... [t]he system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties.”¹⁷
21. The Court went on to note that this system would be undermined by interference by national courts beyond that permitted under the Model Law.
22. In subsequent cases, the Federal Court has affirmed that it will only interfere with the enforcement of arbitral awards in very limited circumstances, such as where a party is not given a fair and reasonable opportunity to present their case before the arbitrator.¹⁸

¹⁵ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [40], [111].

¹⁶ *TCL Air Conditioner (Zhongshan) Co v Castel Electronics Pty Ltd* (2014) 311 ALR 387.

¹⁷ *Ibid* at [109].

¹⁸ See *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468.

23. In the case of *Armada (Singapore) v Gujarat*,¹⁹ the Federal Court held that Armada had a prima facie entitlement to the enforcement of a foreign arbitral award. It also held that while the Court had the power to determine whether the arbitral tribunal had jurisdiction, it should only make such determination when necessary. Further, the Court held that “[t]he mere fact that enforcing [an arbitral decision] might not be consistent with principles developed in Australia” for domestic declarations was not, of itself, “sufficient to constitute a reason for refusing to enforce [an] award on the grounds that to do so would be contrary to public policy.”²⁰

24. Most recently, last year, the Victorian Court of Appeal affirmed that there is generally no basis for Australian courts to engage in a review of arbitral awards where there is no unfairness or breach of natural justice and there is no basis for courts to decline to enforce such awards merely because the court considers that the award contains an error of fact or law. In *Sauber Motorsport*,²¹ a driver sought to enforce a foreign arbitral award against the Sauber Formula One team very shortly before the Australian Grand Prix. The Swedish award required the Formula One team to refrain from any action which would prevent the driver from participating in the 2015 Formula One season. The Court of Appeal dismissed an appeal against an order enforcing the award in Australia, holding that

“[c]ourts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator ‘dressed up as a complaint about natural justice’. Errors of fact or law are not legitimate bases for curial intervention.”²²

25. On previous occasions, I have noted that it is overly simplistic and unhelpful to apply blunt labels such as ‘pro-arbitration’, ‘internationalist’, ‘interventionist’ or ‘anti-arbitration’ to domestic decisions. It fails to appreciate the peculiarities of individual cases and the novel questions which can arise. However, in my opinion, the general approach taken by Australian courts in these decisions is representative of the general

¹⁹ *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636.

²⁰ *Ibid* at [67].

²¹ *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSCA 37.

²² *Ibid* at [8].

approach taken towards commercial arbitration in Australian courts. It is safe to say that Australian courts have generally been reluctant to review or interfere with arbitral decisions where there is no issue of procedural fairness.

26. As my predecessor, James Spigelman, stated in his foreword to the book, *International Arbitration in Australia*, in Australia, “the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch of supervisory jurisdiction directed to maintaining the integrity of the system.”²³

27. The general acceptance by Australian courts of arbitral awards, as well as our adoption of the Model Law and New York Convention, has gone a long way towards increasing Australia’s attractiveness as a regional international arbitration hub.

28. Since the Australian Centre for International Commercial Arbitration opened its doors in 2010, there has been a significant increase in the use of Australian arbitration seats by international parties. In 2014, the Melbourne Commercial Arbitration and Mediation Centre opened and in 2015, the Perth Centre for Energy and Resources Arbitration opened its doors. Australia’s emergence as a seat for international arbitration has been reinforced by Australia being selected by the International Council for Commercial Arbitration to be a joint host for its 2018 conference.

29. The advent of international arbitration in Australia has required courts and practitioners alike to change the way in which we operate and do business. Ultimately, the efficacy of international arbitration as a dispute resolution mechanism depends on widespread support throughout the profession and the judiciary. It also requires a dialogue between the judiciary and the profession and requires us to stay up to date with recent developments and future issues that may arise in the field. In this way, conferences such as the International Arbitration Conference are increasingly important. I extend

²³ The Hon JJ Spigelman AC, ‘Foreword’ in L Nottage and R Garnett (eds), *International Arbitration in Australia* (The Federation Press, 2010) viii.

my thanks to the Chartered Institute of Arbitrators for bringing us all together today and offering crucial training and education opportunities for arbitrators, mediators, adjudicators and practitioners. I also thank all of you for being part of the dialogue I have described. I hope that you find today both informative and thought provoking.