

**Australia as a 'safe and neutral' arbitration seat**

**The Hon. Marilyn Warren AC**

**Chief Justice of Victoria, Australia**

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**SPEAKING NOTES**

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In the Australian experience, the majority of arbitration disputes have related to infrastructure projects, mainly revolving around the cost of construction or time of construction, maritime disputes, and to a degree, disputes arising in the sale and purchase of commodities - oil and gas through to coal and iron ore.

Good business practice entails good risk management policy and in market based economies, the position of international arbitration as a cost-effective, time efficient dispute resolution mechanism is integral. Arbitration as a method of dispute resolution offers the major benefits of enforceability, speed, neutrality and expertise over court-based determinations and because it is quicker and more expert, it is also usually cheaper than traditional court based proceedings.

In the context of cross-border transactions, between parties who ordinarily reside in different countries, arbitration agreements are particularly important. Of course, it is imperative that parties include in their contract an agreement to arbitrate any disputes arising out of, or under their contract so as to provide an effective means for enforcing any award obtained following the dispute resolution process. In the absence of such a clause, there is a real, and not insignificant, risk that a party who obtains a favourable judgment may not be able to enforce it

against the other contracting party, where that party has assets in a different jurisdiction

Australia with its stable economic, political and legal systems and relatively recent legislative amendments to the *International Arbitration Act 1974*, is an ideal place to come when business want their problems fixed quickly and fairly. The Australian Legislative Architecture is now one which has been significantly enhanced so as to be more effective and facilitative to International Arbitration. Upgrades to legislation include (in the Commonwealth sphere), amendments to the International Arbitration Act 1974 (Cth) (IAA) which came into force in July 2010.

There has been significant legislative activity in the Asia-Pacific region in recent times. Most prominently, the governments of Australia, Singapore and Hong Kong have all independently reviewed their respective arbitration legislation. Such activity has been directed towards updating, modernising and clarifying existing arbitration law and practice, as well as promoting the individual jurisdiction as an attractive seat for future arbitrations.

Subsequently, Australia chose to adopt the majority of the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law"), bringing it into line with Singapore and Hong Kong. All three jurisdictions now have provisions largely consistent with the 2006 Model Law. The revised IAA in both Australia and Singapore came into effect on 6 July 2010 and 1 January 2010, respectively, with the updated Hong Kong Arbitration Ordinance commencing early last year.

In Australia, international arbitration is governed by the *IAA* – the national legislative regime, with domestic commercial arbitration governed by the *Uniform Commercial Arbitration Act* (“the *CAA*”) – this being state and territory legislation. For those from unitary systems, Australia’s system may appear unfamiliar, however, it reflects the realities of Australia’s federation based system and its separation of powers. The legislation applicable to arbitrations in Australia distinguishes between arbitrations that are domestic in nature and those that fall within the international category. The *CAA* being the domain of the states and territories and the *IAA* being the single Commonwealth statute for all international commercial arbitration.

The use of the amended Model Law and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (“the New York Convention”) as the basis for both international and domestic commercial arbitration legislation in Australia is consistent with the goal of creating a ‘best practice’ framework for arbitration in Australia. Notably, the Model Law is an internationally recognised arbitration regime endorsed in over 60 nation states that enables parties the freedom to choose how they want their disputes resolved with minimal court intervention. As my Victorian colleague the Honourable Justice Croft of the Supreme Court of Victoria recently observed, “the Model Law is the arbitration law against which all other arbitration laws tend to be judged”.

Currently, the State and Territory Supreme Courts together with the Federal Court of Australia enjoy concurrent jurisdiction over *IAA* matters. The conferral of concurrent jurisdiction on these courts assists parties with Australia wide enforcement of arbitral awards and gives

further emphasis to the development of consistent Australia-wide arbitral jurisprudence. The adoption of specialist international arbitration lists in the courts also ensures all courts – whether state or federal have similar procedures and expertise in international arbitration.

In the Australian arbitral landscape there are a number of very innovative and effective sets of Arbitral Rules which parties can readily adopt to supplement the Model Law and improve the management and predictability of the arbitral process. Examples are the ACICA (Australian Centre for International Commercial Arbitration) Rules (revised in 2011) and the IAMA (Institute of Arbitrators and Mediators Australia) Arbitration Rules. The IAMA Rules include the IAMA Fast Track Arbitration Rules providing for the option of an extremely expedited set of procedure rules as part of an additional framework for managing any given arbitration.

### **The role of the courts in arbitration**

The new upgraded IAA inter alia now provides:

- Section 39, (matters to which the court must have regard) which provides assistance to Courts in the approach to interpreting the Act;
- Adoption of the UNICTRAL Model Law as part of the relevant Law of Australia;
- Section 21 of the IAA clarifies the primacy of the Model Law in relation to all International Arbitrations.
- It is also to be noted that, to facilitate the appointment of Arbitrators, the IAA, (International Arbitration Regulations 2011 (Cth)) Regulation 4 provides that ACICA as the appointing body.

The judiciary has an essential role to play in both supporting and promoting arbitration. The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration. In my experience, it is often the degree of enforceability and support that the judiciary offers that determines the effectiveness of the arbitration experience.

The Supreme Court is vested with broad jurisdiction to assist with most aspects of both domestic and international commercial arbitration. The Federal Court of Australia has jurisdiction limited to the arena of international arbitration. The arbitration list of the Victorian's Supreme Court first began operation in January 2010, with all arbitration matters brought in the Victorian Supreme Court to be heard in this list, with its case management procedures and guidelines succinctly set out in *Practice Note 2 of 2010 – Arbitration Business*.

In our experience, allocating a Judge with international arbitration expertise to these lists ensures a much more consistent and efficient approach when managing litigation in relation to arbitrations. As the Judge in charge of the Victorian list, Justice Croft, has said, “[o]ne of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or group of judges. This should provide parties with greater certainty when judicial intervention or support is required”. This is with the intention of achieving a just, speedy and cost effective disposal of such proceedings. Justice Croft also established a Supreme Court International Arbitration Users Group. It meets at an international level and involves eminent, experienced arbitrators and arbitration leaders.

Between January 2010 and December 2011, eleven arbitration-related judgments (six of them international) were handed down by the Supreme Court of Victoria. Almost all of those arbitration matters were decided at first instance by Justice Croft as part of the Arbitration List. Such an arbitration model (involving a single judge, with the relevant expertise, hearing all arbitration-related matters) has been pivotal in our success to date.

Our specialist courts are focussed on clear and easily accessible listing procedures and expedition. In this respect, the Victorian Supreme Court Arbitration List is available 24 hours per day, seven days per week and hearings can, and do, take place outside court hours as required. It is the procedural approach to applications under the *IAA* and the *CAA* that will have a major impact on the way that Australian arbitration law is viewed. For example, staying court proceedings in favour of an arbitration is a pro-arbitration step, but if it takes an excessive time for the stay application to be heard and determined, the arbitration process has effectively been frustrated anyway. Procedural consistency and expediency is far more likely to be achieved when there are specialist arbitration lists and judges; as the experience in leading commercial arbitration centres such as London, Singapore and Hong Kong shows.

### **The judicial shift in attitude**

At times, there has been a perception that some Australian courts have hindered effective commercial arbitration in that they have been too interventionist in approach. This perception, amongst others, was a pivotal factor in Australia's overhaul of international commercial

arbitration in line with best international practice and also in giving strong direction to the judiciary to enable it to facilitate and support arbitral law.

There are two primary ways in which governments can assist arbitration: through the legislative provision of 'best-practice' in arbitral regimes and through other assistance, whether that be via trade promotion, public-private partnerships, or direct financial assistance.

In Australia we have seen the opening of the Australian International Disputes Centre in Sydney in 2010. Professor Doug Jones, in his capacity as President of the Australian Centre for International Commercial Arbitration ("ACICA") has promoted and supported the expansion of the arbitration grid in Australia. Building on the joint venture between ACICA and the New South Wales and Commonwealth Governments in Sydney, the next centre on the national grid I am sure will be Melbourne. It will be part of the **Australian International Disputes Centre - a national facility of great significance.** The aim of the grid is to provide a 'one stop shop' which allows national and foreign companies to resolve commercial disputes outside the court system in a stable and supportive political and legal system.

ACICA together with the Law Institute of Victoria, the Victorian Bar and the other arbitration centres and institutes have urged, with my strong support, the Victorian government will shortly open a centre in Melbourne. The Victorian Government Minister responsible, the Attorney-General, the Hon. Robert Clark, has suggested using the recently refurbished William Cooper Justice Centre as the Melbourne centre for arbitration. It is a modern facility in the heart of Melbourne's

legal precinct. The facility is under active consideration. I expect an announcement very soon. Meanwhile, the modern multi-functional arbitration facilities in the award winning County Court building in Melbourne are sought after for international arbitrations.

With a strong commercial and legal framework, Melbourne and Australia generally are ideally placed to provide the national grid for commercial arbitration in the Asia Pacific region. Again, I am very optimistic that the Melbourne centre will be opened in the near future. In the meantime, I expect more and more arbitration to occur in Victoria supported by the new Act as lawyers utilise arbitration as a means of tailoring dispute resolution more effectively to the commercial interests of their clients.

**Australia is well placed to meet the growing demand for first-rate, cost-effective arbitration services in the Asia Pacific region**

The introduction of the Model Law is intended to support the practice of international arbitration in Australia, and enhance Australia's profile as an international arbitration jurisdiction by, among other things, giving parties more power to tailor the arbitral process to their individual needs and reduce the scope for judicial intervention. It also applies to domestic arbitration and provides genuine advantages over litigation, particularly in the areas of flexibility and the ease of enforceability for cross-border disputes.

In terms of 'best practice' international arbitration law I would like to focus on five pertinent areas that really cement, I believe, Australia's position as a 'safe and neutral' seat for arbitration. They include:

- (a) the application of the rule of law;



- (b) an independent, impartial judiciary;
- (c) the level of judicial supervision of arbitral awards and enforcement;
- (d) the availability of interim measures from the arbitral tribunal; and
- (e) confidentiality of the arbitral process.

**So why is the rule of law and an independent judiciary important to commercial arbitration?**

If Australia is your chosen seat of arbitration you are guaranteed access to a legal framework that will provide you with due process, neutrality and a high degree of certainty when arbitrating. Our mandatory rules about how arbitration can be conducted require equal treatment, 'a reasonable opportunity to present your case' and the independence of arbitrators and the judiciary alike. Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation's courts and judicial system.

**The 'Australian' brand of arbitration**

At the forefront of the legal regime for international arbitration in Australia is party autonomy and the principle of the sanctity of contract. The central ideal behind arbitration being such that individuals should be free to define the scope of their agreement, how their disputes should be resolved and the freedom to choose the applicable procedure. Domestic laws cannot be presumed to operate as default measures, rather, parties to such agreements can customise

them to their particular needs in terms of the allocation of risks of their venue.

Essentially, this means that it is the parties who decide the manner in which the arbitration is to be conducted with many provisions of the IAA able to be expressly excluded by agreement, or which may only apply if the parties expressly agree to include them in the agreement.

Australian courts have exhibited a strong willingness to enforce the contractual choice of the parties. The decision of the High Court in *Tanning Research Laboratories Inc v O'Brien* exemplifies this approach with the court giving effect to agreements for international arbitration by staying proceedings within our own courts.

Further, the decision of the High Court in *CSR Ltd v Cigna Insurance Ltd* established that Australian courts may grant injunctions, described as 'anti-suit injunctions', to restrain parties to an arbitration agreement from bringing proceedings in breach of that agreement.

The Full Court of the Federal Court of Australia in the case of *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* accepted that clauses referring disputes to arbitration should be read, not with 'a jealous eye in favour' of the jurisdiction of the court, but as effecting the most comprehensive reference to arbitration consistent with the language of the parties' agreement.

### **The 'arbitrability' of a dispute – a liberal approach**

If a dispute is capable of settlement by arbitration, it will be 'arbitrable'. Determining arbitrability is first a question of domestic law and domestic public policy, and secondly, a question of the proper

construction of the arbitration clause. The arbitration clause essentially being a 'contract within the contract', and as such principles of contract law guide the court in its construction.

The courts retain the power to deny arbitral tribunals jurisdiction over particular types of disputes. Certain disputes have an undeniable public dimension that may make them incapable of settlement by arbitration, either because they impact upon persons other than the parties to the arbitration agreement, or because there is a legitimate public interest in the dispute being resolved in an open forum. Non-arbitrable disputes typically include taxation cases, matrimonial cases, securities and competition law.

### **Enforceability of Foreign Arbitral Awards - the pro-enforcement position**

The finality and enforceability of international arbitration awards are key reasons for the popularity of arbitration in cross-border transactions. It is therefore imperative that when drafting arbitration agreements - careful consideration is given to which arbitral rules will apply, which seat will apply, (this should be the one that maximises your chances of enforceability quickly and certainly) and what the applicable law of the arbitration will be. Whilst an award defines the winner and loser from a legal perspective, in the arena of international commercial arbitration - **it is the ability of the party to enforce the award that will define the ultimate winner**. Thus, the recognition and enforcement mechanisms propounded by the New York Convention are crucial to the success of any arbitral framework.

In broad terms, the New York Convention's operation is two-fold. It facilitates the recognition and enforcement of arbitration agreements, in particular, by ensuring that the parties to such agreements are unable to circumvent their bargain by pursuing their claims before the courts. Secondly, the Convention facilitates the enforcement of an award that is the product of the parties' agreement to arbitrate their disputes. This is by the operation of Articles III, IV and V of the Convention and provisions of our *IAA*.

Our judiciary's adoption of the pro-enforcement policy of the New York Convention is clearly illustrated in the Federal Court case of *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* where Justice Foster noted that, "...the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual agreements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution....".

### **An informed and supportive approach to foreign enforcement- the Victorian Court of Appeal**

Both the Victorian Supreme Court and Federal Court are committed to taking an informed and supportive approach when it comes to the enforcement of foreign awards. As I said in the Victorian Court of Appeal matter in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* ("Altain") the general principle remains that, "in all but the most unusual cases, [an] application to enforce foreign arbitral awards should involve only a summary procedure." Altain was just such a case.

In an ordinary case, however, an award creditor will have little difficulty in satisfying this threshold test. An Australian enforcing court

will always start with a strong presumption of regularity in respect of a tribunal's decision and the means by which it was arrived at. What is noteworthy is the flexibility our courts have in accommodating unusual cases such as these, ensuring that we have the ability to **take an informed and supportive approach** to arbitration.

### **Adjournment of enforcement proceedings – a restrictive approach**

There are limited circumstances in which a court can and will adjourn enforcement proceedings. In the recent Federal Court decision of *ESCO v Bradken* the principal application was for an adjournment of the enforcement proceedings pending the determination of proceedings challenging the award in the United States. This was the first case to consider an application for an adjournment under s 8(8) since the 2010 amendments were made to the *IAA*.

It illustrates the approach Australian courts will take when considering whether to grant an adjournment pursuant to s8(8) of the *IAA*. The Hon Justice Foster approved of the approach that had been taken in relation to the corresponding provision in England which is consistent with pro-enforcement adoption. He noted that whilst the discretion to adjourn proceedings under the *IAA* may appear wide, it must be exercised against the background that a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia restricts its enforcement. The pro-enforcement bias of the Convention and the *IAA* requires that the Court weigh very carefully all relevant factors when considering whether to adjourn. The discretion must be exercised against the obligation of the court to pay

due regard to the objects of the *IAA* and the spirit and intendment of the Convention.

### **Interim measures**

One of the innovative amendments to our *IAA* is the adoption of pivotal interim measures, as these may effectively 'nip disputes in the bud'. Justice Croft noted, that prior to the 2010 amendments, the *IAA* adopted Article 17 of the 1985 Model Law which states that the arbitral tribunal may 'order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.'

### **Confidentiality**

In relation to any business or legal transaction – often confidentiality will be at the forefront of the parties minds. In the arbitration process it may be pivotal in avoiding unwanted disclosure of business secrets and can ensure that damage to a company's public relations and other negative impacts are kept to a minimum. Notably, the confidentiality of arbitration does not extend to judicial review and enforcement procedure.

The confidentiality provisions found in ss23C – 23G of the *IAA* must be opted-into. Incorporating stringent confidentiality requirements can be extremely important and can aid significantly the tribunal's progress without them being subject to the possibility of public scrutiny regarding the tribunal's findings. Section 23C prohibits parties and the arbitral tribunal from disclosing confidential information, except as provided for by the Act. There will be instances though where such provisions are subject to the public interest element.

For example, this issue may arise in an appeal against the arbitrator's ruling on jurisdiction or in an application to set aside or resist the enforcement of an arbitral award as contrary to public policy. Our courts do not take a broad brush to this area and take a case by case approach.

Parties should be mindful at the time of entering into an arbitration agreement, whether confidentiality should apply by express provision in that document, and if so how far they wish the duty to extend – what information should be kept confidential and who may be bound.

**The recent case of *Westport Insurance Corporation v Gordian Runoff Ltd* - adequacy of arbitrator's reasons**

Australian courts accept that properly made arbitration agreements should be subject only to the minimum judicial review necessary to ensure the integrity of the system. Having said that, I want to make clear that there is a legitimate place for judicial involvement to ensure that the arbitration process is conducted fairly in conformity with the reasonable expectations of the parties to the dispute.

The recent High Court of Australia decision in *Westport Insurance Corporation v Gordian Runoff Ltd* (“Westport”), is important for arbitration practice generally as the primary ground of appeal was in relation to the adequacy of the reasons given by the arbitral tribunal in relation to its interpretation of s 18B of the *Insurance Act 1902 (NSW)* (“Insurance Act”) in relation to indemnifying Gordian for certain claims.

I wanted to draw your attention to this case as it espouses our judiciary's strong adoption of a position of transparency, neutrality and

accountability -we are committed to a system that ensures party autonomy and which maintains standards of integrity and conformity in the dispute resolution process with judicial support rather than judicial interference.

## **Conclusion**

There is one particular comment I must make. The Australian legal profession - the law firms and the bars - are of a very high standard. They offer specialist legal advocacy and arbitration services. From my own direct experience, the arbitration lawyers and barristers in Melbourne are outstanding. The same applies across Australia.

Victoria has some special capabilities and features to enhance International Arbitrations, namely:

- The Victorian Supreme Court has a specialist Arbitration List with modern Court Rules specifically designed to enable and facilitate Court dealings in relation to both International Arbitration and domestic arbitration;
- The Victorian Bar has a specialist International Arbitration Committee which works to establish both a structure to facilitate International Arbitration and to ensure that the corpus of specialist Barristers dealing with International Arbitrations are informed and up to date with all the latest developments in the area.
- The Victorian Bar has a corpus of highly experienced International Arbitration specialist advocates (and Barristers who have acted as Arbitrators).
- The Victorian Bar has established a unique and specialised "*virtual*" Chambers known as MTECC (Melbourne TEC



Chambers) which includes Barrister Members with extensive experience in International Arbitrations (and acting as arbitrators) in Australia and also elsewhere in the world including Hong Kong, Singapore, London and Dubai.

Our adoption of provisions consistent with the 2006 Model Law really brings Australia's arbitral framework to the fore - but it is the supportive and pro-enforcement approach of the judiciary, as well as the infrastructure and experienced arbitrators, that the Australian Centre for International Commercial Arbitration provides that really sets us apart.

Our 'Australian' brand of arbitration is one that looks to reduce transaction costs, ensure certainty and efficiency to the parties and one that provides a neutral and safe seat to dispute resolution.