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ADR AND DIFFERENT LEGAL CULTURES

Article for *The Arbitrator and Mediator*

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The Hon. Michael Kirby AC CMG

THE ARBITRATOR AND MEDIATOR

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CULTURAL REMINDERS

Two conferences in South East Asia gave me a theme for this paper. The first was the International Bioethics Congress in Singapore¹. The second was the 15th Malaysian Law Conference in Kuala Lumpur². Each conference illustrated an issue that remains one of the most important to be addressed by proponents of alternative dispute resolution (ADR) in the context of disagreements spanning different legal cultures.

In an increasingly interconnected world, we face new problems. For lawyers, these may include language, traditions, professional customs and educational habits. For bioethicists, one can add the shared challenges of contemporary biotechnology and the puzzling moral dilemmas that it presents, both for individual and societal resolution. For ADR, the contemporary world offers the challenge of the common realisation of the imperfections and costs of traditional court-based way

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¹ M.D. Kirby, "Health Care and Global Justice", unpublished paper Singapore, 28 July 2010.

² M.D. Kirby, "The Rule of Law and the Law of Rules: A Semi-Sceptical Perspective", unpublished paper 15th Malaysian Bar Association Conference, Kuala Lumpur, 29 July 2010.

of resolving disputes and conflicts. And the need to find quicker, cheaper and more conclusive methods of settling differences finally, and restoration of long-term relationships with an emphasis on common sense rather than hair-splitting technicalities.

In my Singapore address, I examined the issue of whether, against the assertion of so-called 'Asian values', the very idea of a 'global' bioethics congress and of 'universal' principles to resolve bioethical questions constituted a kind of oxymoron, given the differing cultures that exist in Asia itself and as between Asia and other continents. Is it inevitable that differing approaches will be adopted that will produce differing outcomes? To these questions, I concluded, with a little help from the Nobel laureate Amartya Sen³, that there were no relevant differences in fundamental human values. And that universal human rights (which constitute the bedrock of human values today) were just that: universal, indivisible and not racially based or culturally pre-determined⁴.

An indication of the recognition of the growing importance of commercial arbitration in contemporary legal practice can be seen from the many sessions of the Malaysian Bar Conference that were devoted to ADR issues. Indeed, one of three streams was concerned with ADR and also commercial litigation. As well, that stream examined the problems presented by the interface between the Sha'riah legal system, lately introduced into Malaysia, and the general legal system as otherwise applied to financial disputes. Specific to my present thesis, several sessions were devoted to aspects of the law as it concerns the relationship between arbitral procedures and proceedings in the courts.

³ Amartya Sen, "Human Rights and Asian Values" (16th Morganthau Memorial Lecture on Ethics and Foreign Policy), Carnegie Council, 1997, 7 at 9.

⁴ Kirby, above n1,p20.

A specially interesting debate followed my opening address in Kuala Lumpur. It concerned “Setting Aside and Enforcement of Arbitration Awards”. The session was moderated by Dato’ V.C. George, a former judge of the Court of Appeal of Malaysia. The principal speakers in the session were Mr. Michael Hwang SC, a leading Singapore advocate and now Chief Justice of the Dubai International Financial Centre; together with Tan Sri Dato’ Cecil Abraham and Vinayak Pradhan, each of whom is a Malaysian advocate and international arbitrator.

All of the speakers were proponents of judicial restraint in disturbance of, or too ready an intrusion into, ADR proceedings. All were supporters of their respective international commercial arbitration centres. All were highly knowledgeable about the case law governing the setting aside and enforcement of arbitral awards. But whereas Mr. Hwang could point to the consistent restraint, non-interference and support exhibited by the Singapore courts⁵, it was the lament of Dato’ Abraham and Mr. Pradhan that the Malaysian courts had been too prone to intrude: substantially substituting their own ideas of the justice and merits of the case for the determinations reflected in the arbitral awards.

Given the commonalities of the shared legal systems between both countries, was there something in the substantially Chinese culture of Singapore that sustained this judicial attitude of restraint? Was there some feature of exceptionalism in the substantially Malay culture that explained the many cases of intervention in Malaysian courts? Was the Singapore restraint another illustration of an attitude of mercantile savvy

⁵ See e.g. *Tjong V. Sumito v Invests* [2009] SGCA 41; *Board of Control of Cricket Sri Lanka Case* [2002] 3 SLR 603; *Insignia Techn. Case* [2009] 3 SLR 939.

rather than a reflection of specifically Chinese cultural norms? Or did those ethnic norms contribute to the savvy? Was the Malaysian legal culture (now increasingly imbued with Sha'riah elements) more anxious for that reason about perceived injustice and concerned with moral questions of right and wrong?

At the end of the session, I asked the speakers for an explanation of the difference. It is to explore these and other differentiations that I will offer the present reflections. Consciously or unconsciously, we are all the products of our respective legal traditions, conventions, habits, societal, cultural and moral values. But this can present a problem in international arbitrations involving people of different legal jurisdictions. How should the law react to such diversity? Should it embrace diversity as part of the precious variety of human culture? Or should it attempt to banish it and if so, whose culture should then reign?

ARBITRAL HESITATIONS

International commercial arbitration is on the increase. As the President of the Australian Centre for Commercial Arbitration (ACICA) (Professor Doug Jones) has pointed out, in the last decade, leading international arbitration bodies have witnessed a significantly growing case load⁶. Since 2000, the International Center for Dispute Resolution in the United States (ICDR) has witnessed a 38% increase in the number of cases filed. The London Court of International Arbitration (LCIA), has seen an 81% increase. The Hong Kong International Arbitration Centre (HKIAC) has experienced a 100% increase. The International Chamber of Commerce (ICC) a 22% increase. Far from being reduced by the Global

⁶ Doug Jones, "International Dispute Resolution in the Global Financial Crisis" (2009) 28 *The Arbitrator and Mediator* 35 at 37.

Financial Crisis, the trend has been up. The trend seems likely to be maintained⁷. The “steel chain” that holds the “fabric of international dispute resolution” together is the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Now, 145 countries have ratified and implemented this Convention⁸, including Australia and New Zealand.

Taking recourse to domestic courts and tribunals instead of utilising international commercial arbitration will not only involve the recognised problems of delay and cost. It will not only have to overcome, in some countries, difficulties of governmental interference, excessive legal and procedural formalism and possible corruption in the courts. It will also often face significant problems in obtaining enforcement of orders internationally, on a mutual and reciprocal basis.

Most international commercial arbitration is performed under conditions involving the selection of respected and independent arbitrators; the conduct of hearings in safe and neutral venues; the avoidance of gross delays and other difficulties due to local factors; and (to some extent) party control over costs and the specification of privacy/confidentiality. Yet despite these well-known advantages, and the growth of international commercial arbitration elsewhere, the Australian legal profession, at least, has so far proved somewhat slow in embracing such arbitration. Max Bonnell has suggested that this is because “Australian lawyers have been traditionally very suspicious of international law and much more comfortable with Australian courtroom processes, which they

⁷ D. Jones, above n6, 36-38. See Z. Lyon “Arbitration Hesitation?”, *Lawyers Weekly* (Aust) 28 August 2009, 17-18.

⁸ J. Teerds, “Arbitration without Borders”, *Proctor* (QldLS), October 2009, 17 (report on the visit of Simon Greenberg, Secretary General of the International Court of Arbitration, an institution of the International Chamber of Commerce (ICC), Paris).

understand. [They] are very conservative and we've caught on to this [ADR] late."⁹

Another experienced international commercial arbitrator, Toni De Fina, attributes some of this Australian hesitancy to narrow legal training and to a reluctance on the part of Australian lawyers to consider the benefits of processes outside the familiar court system¹⁰. In particular, lack of familiarity with the substance and procedures of civil law countries has reduced Australian professional involvement in a growing international market for arbitral services.

Australian courts and legal practitioners, law teachers and judges, need to overcome these parochial and insular deficits. I have been saying this for two decades from the judicial seat. But the present problem is a larger and more sharply focussed one. The same challenges face New Zealand practitioners although, by common reputation, the resistance to arbitration in New Zealand is less noticeable than on the other side of the Tasman.

THE CONTEXT FOR INTERNATIONAL ARBITRATION

International commercial arbitration does not exist in a vacuum. It expands out of needs and opportunities presented by:

- * The growth of global trade and commerce;
- * The expansion of financial markets;
- * The rapid change in telecommunications;
- * The massive expansion in the movement of peoples and businesses throughout the world; and

⁹ *Ibid*, quoted in Teerds, *op cit*, 19.

¹⁰ A.D. De Fina, "Arbitration cultural shift", *Law Society Journal* (NSW), July 2009.

- * The inadequacies and imperfections of national courts in providing redress to those who have a legal dispute arising out of an international commercial transaction.

Obviously, technology is an important stimulus to all of the foregoing developments. Technology both occasions the need for international commercial arbitration and facilitates its performance in ways unimaginable in earlier generations.

Whilst technology has leapt ahead of human predictions, most of the participants in the foregoing developments remain influenced by the social and legal environment in which they grew up. Many of them are familiar with, and have confidence in, their national court systems. They do not see any reason for resorting to other institutions when a dispute arises.

This paper is divided into three parts:

- * *Australasian legal culture*: First, I will review some aspects of the Australasian legal culture so as to identify forces that impact upon the performance by Australian and New Zealand lawyers in international commercial arbitrations, both for good and bad outcomes;
- * *International legal culture*: Secondly, I will address a study of legal cultures in different countries as those cultures affect the speed, cost and satisfaction of national legal systems in delivering services to those who invoke them. This study may be useful in identifying the expectations which those operating within such legal systems generally have for the respective performance of their national courts and of international commercial arbitration. They may also indicate the opportunities that exist to expand arbitration as an alternative to

the invocation of local court proceedings. Where court proceedings are typically slow, costly and affected by perceived or actual bias, corruption and other disadvantages, the adoption of commercial arbitration, particularly in disputes involving international parties, may become irresistible. At least this will be so if the arbitration is conducted expertly and as envisaged by the parties, without undue interference by the courts. In such a case, the expansion of arbitration will possibly be more attractive even where the municipal court system is speedy, cost-effective, impartial and untainted; and

- * *Conclusions and lessons:* Finally, I will offer a few conclusions. In particular, I will suggest that two main variables can be identified as affecting the attractions that national legal systems present as an alternative to international commercial arbitration. These variables are the level of economic and social development in the country concerned and the sophistication, integrity and efficiency of its courts.

THE AUSTRALASIAN LEGAL CULTURE

The legal culture in Australia and New Zealand is not naturally hostile to the idea of international commercial arbitration. In so far as a dispute, submitted to arbitration, involves recourse to the laws, customs and mores of another society, Australasian lawyers are better prepared than many others to cope with that variation. This is because their law has traditionally involved strong, comparativist features, dating back to colonial times. As well, the established rules of private international law are well-known and faithfully applied.

Throughout the colonial era, domestic courts in Australia and New Zealand were subject, ultimately, to appellate supervision by the Judicial

Committee of the Privy Council in London¹¹. After federation in Australia, with the exception of so-called *inter-se* disputes involving the Australian Constitution¹², most cases could be reviewed by an appellate panel of (mostly) English judges, sitting in London. The survival of Privy Council appeals was contested at the time of federation. However, it was preserved, substantially on the insistence of the British government. This was probably to ensure that the large investments of the United Kingdom in Australia were safeguarded by ultimate recourse to English judges. They would apply the common law and relevant statutes without any risk of the potentially corrupting influences of antipodean self-interest.

The preservation of Privy Council appeals was not, on the whole, an undue burden for the Australasian legal systems. On the contrary, as Justice Frank Hutley once observed¹³, the participation of English judges in our cases linked our legal systems to one of the great legal cultures of the world. It ensured that our courts applied orthodox and predictable legal doctrines and procedural approaches in deciding commercial and other legal disputes. There might have been certain economic disadvantages had that link been severed when Australia and New Zealand secured full dominion status early in the twentieth century. Nevertheless, by the 1980s, the time had come for Australian law to achieve full independence¹⁴. The right to appeal to the Privy Council

¹¹ M.D. Kirby, "Australia and New Zealand", chapter 19 in Louis Blom-Cooper, Bruce Dickson and Gavin Drewry, *The Judicial House of Lords 1876-2009*, OUP, Oxford, 2009, 339 at 343, 348-9 (New Zealand).

¹² Australian Constitution, s74.

¹³ F.C. Hutley, "The legal traditions of Australia as contrasted to those of the United States", (1981) 55 ALJ 63.

¹⁴ *Australia Acts 1986* (UK) and (Cth).

was also abolished in New Zealand in 2003, with the establishment of the New Zealand Supreme Court as the country's final appellate court¹⁵.

One consequence of the appeals to the Privy Council was that Australasian lawyers maintained, in their libraries, the books containing the decisions of the English courts. To this day, our judicial decisions and text books are replete with English legal authority. This was also true of other countries of the British Empire and Commonwealth. A glance at *The Law Reports of the Commonwealth*¹⁶ illustrates the high degree of comparative law borrowing that still happens in the world-wide family of Commonwealth courts. Even in highly sensitive local constitutional controversies, it is not unusual to see references to decisions in the courts of other Commonwealth countries, grappling with similar or analogous problems¹⁷.

Because Australia and New Zealand are members of this continuing network of common law courts, our lawyers are trained in it; familiar with its utility and limitations; and uninhibited in reaching out to the laws and court decisions of different countries, from which helpful legal analogies will often emerge. This feature of our law, like that of the law of many other Commonwealth countries, means that, on the whole, our lawyers are far less hostile to other legal cultures than are, say, lawyers from the United States of America. At least, this is so where the foreign law follows the legal traditions of the English common law. Those traditions assign a high importance to the role of the judges in declaring and

¹⁵ *Supreme Court Act 2003 (NZ)*. See Kirby, above n11, *ibid*, 348.

¹⁶ See M.D. Kirby, Foreword to the 100th volume of *Law Reports of the Commonwealth* [2009] 2 LRC iii-xii.

¹⁷ A good example is *Joy v Federal Territory Islamic Council & Ors*. [2009] 1 LRC 1 concerning apostasy and the right to change religion in Malaysia. The divided decision of the Federal Court included citation from courts in Australia, India, and the United Kingdom, as well as Malaysia.

expounding the law. They provide their decisions in reported opinions, generally written in the English language. They are also written in a discursive style, with a candid disclosure of legal authority, legal principle and legal policy, all presented within a judicial tradition that permits the publication of dissenting opinions.¹⁸ This was a point made at the Kuala Lumpur conference. I came away with the conclusion that the decisions of Australia and New Zealand courts are much more commonly cited in Singapore and Malaysia than vice versa. If this is so, it is a defect that we should repair, certainly in the field of commercial law and the law on ADR where differing public law values do not ordinarily intrude.

Still, there are impediments to the invocation in Australia of the facilities of international commercial arbitration. Some may not be so significant. Others more so.

- * Geographical distance remains an undoubted obstacle, notwithstanding the great improvement in the speed and comfort of international travel, the expansion of telecommunications; and the growing involvement of Australians and New Zealanders with nearby regions of the world, it still takes at least ten hours from most overseas ports to fly to the principal cities of our two countries. Often much more. This is something that we become used to. We have no alternative. But foreigners occasionally consider such journeys as a significant obstacle and discouragement to engaging with Australians and New Zealanders in international commercial arbitration conducted in *our* countries;
- * Australia and New Zealand remain substantially monolingual countries – at least so far as other world languages are concerned.

¹⁸ M.D. Kirby, “Judicial Dissent – Common Law and Civil Law Traditions”, (2007) 123 LQR 379.

The teaching of foreign languages in Australian schools may even have declined in recent years. Every now and again a blow is struck for skill in communications. The facility of the former Australian Prime Minister Kevin Rudd in spoken Chinese made a large impression in many quarters precisely because it was so unusual. Certainly, it is not common amongst Australasian lawyers and other ADR experts;

- * There may also be attitudinal leftovers in some quarters from the isolationist policies that substantially survived until the late 1960s. Although such attitudes are much less common today, there are still lawyers in Australia and New Zealand who have never spent any substantial time in Asia and who regard Asian cities as no more than transit ports for the familiar attractions of Europe. Fortunately, amongst many younger travellers, the wonder and attractions of Asia and the Pacific have replaced such narrow attitudes. But the viewpoints described still need to be eradicated;
- * Very few of our lawyers have familiarity with the civil law tradition. Yet it is the legal system that predominates in the world. It operates in many more countries than follow the common law system derived from England. Rare indeed are the references in Australasian case law to judicial and other opinions of the courts of civil law countries. Occasionally, in tort cases, dealing with problems of universal application (such as ‘wrongful birth’ or ‘wrongful life’), references will be made to civil law responses to shared dilemmas¹⁹. However, this is rare. Language skills and interest often stand in the way of exploring such analogies; and

¹⁹ See e.g. *Cattanach v Melchior* (2003) 215 CLR at 51 [132]; *Harriton v Stephens* (2006) 226 CLR 52 at 111 [202], 121 [236], 122 [237-238].

- * And as for international law, this is another territory altogether. Occasionally it engenders hostility among antipodean lawyers as, I suggest, some recent court decisions in Australia illustrate²⁰.

INTERNATIONAL LEGAL CULTURE

Because lawyers are ordinarily trained only in the laws of their own jurisdiction (in Australia, in large part, the laws of a sub-national jurisdiction), they sometimes reflect a lack of awareness about what is going on in other jurisdictions and, in particular, in different legal systems. Yet if the lawyers of Australia and New Zealand are to become engaged in international commercial arbitration, some familiarity with other jurisdictions and different legal systems will clearly be important. This is because such arbitrations will frequently involve participants and problems that come from these different legal cultures and traditions. Moreover, to understand the attractions, opportunities and advantages of commercial arbitration, it will often be important to be conscious of the alternative forms of dispute resolution available, principally in the courts of the jurisdiction where the parties are resident or where a dispute arises.

Recent research, funded by the World Bank's World Development Report, the World Bank's Financial Sector and the International Institute of Corporate Governance at Yale University, has thrown light on aspects of the legal culture that may help us better to appreciate the advantages involved in the conduct of international commercial arbitration.

This research led, in 2003, to a report, titled simply "Courts"²¹. This was prepared by four researchers, led by Simeon Djankov. The report was

²⁰ See e.g. *Al-Kateb v Godwin* (2004) 119 CLR 562 at 589 [62] per McHugh J; cf. at 623 ff [173] per Kirby J.

conducted with co-operation, in 109 countries, from member firms of the *Lex Mundi Group* of legal practices. It set out to measure and describe the procedures used by litigants and courts in those countries in a small number of dispute categories, chosen by reference to their shared features and ordinariness. The situations chosen were the steps necessary to:

- * Evict a tenant for non-payment of rent;
- * Collect on an unpaid cheque; and
- * Secure a remedy for a simple breach of contract.

The research in the resulting survey showed that a number of variables affect the efficiency and costs of resort to the courts in different countries. Some of these variables are reasonably predictable. Others are a little more surprising. The list of the factors identified in the survey included:

- * Whether a claimant was entitled to be represented in court by a friend or lay representative or only by licensed lawyers;
- * Whether the court's procedures were substantially or wholly conducted by written process and whether they involved the facility of an oral hearing;
- * Whether the proceedings were heard by the general courts or by a specialised court or tribunal, dedicated to the type of dispute being studied;
- * Whether it was necessary, at the outset of a proceeding, for a claimant to demonstrate an entitlement by reference to the letter of a particular law or whether reliance on considerations such as 'equity' and the suggested merits of the case would suffice;

²¹ The data used in the project are available at <http://iicg.som.yale.edu/>

- * Whether the procedures permitted free cross-examination of the parties and witnesses or whether some prior leave of the decision-maker was required to undertake such investigation;
- * Whether the hearing of the claim resulted in a formal transcript or whether no such record was taken;
- * Whether an appeal or some other form of review was available or whether no appeal was permitted;
- * Whether, in the event of an appeal, a stay of the original judgment was easily obtained or whether a stay was not available or difficult to secure; and
- * The number of steps that were involved in bringing the proceedings to conclusion. (In some countries there were eight or nine steps, whereas in others there were between 40-45 steps that had to be undertaken.)

The general thesis of Simeon Djankov and his colleagues was, as stated in the abstract of their report²²:

“We used these data to construct an index of procedural formalism of dispute resolution for each country. We find that such formalism is systematically greater in civil than in common law countries, and is associated with a higher expected duration of judicial proceedings, less consistency, less honesty, less fairness in judicial decisions and more corruption. These results suggest that legal transplantation may have led to an inefficiently high level of procedural formalism, particularly in developing countries.”

A breakdown of the data elaborated in the report indicates significant differences in the mean time (measured in the average number of days) between initiating proceedings to evict a tenant or recover on an unpaid

²² *Ibid, op cit*, Abstract.

cheque as between developed and developing countries and between common law and civil law countries.

Taking, first, a sample of the developed countries, by reference to the estimated number of days taken to bring proceedings to finality in a judgment in these two simple types of cases, the findings were as follows:

TABLE 1
Average mean delay (in days) between commencement and recovery of judgment

Developed Countries

Common Law Countries

Canada	43 days
Australia	44 days
USA	49 days
Singapore	60 days
New Zealand	80 days
UK	115 days
Hong Kong	192 days

Civil: French tradition

Netherlands	52 days
Belgium	120 days
Spain	193 days
France	226 days
Greece	247 days
Italy	630 days

Civil Law: German tradition

Korea	303 days
Taiwan	330 days
Germany	331 days
Japan	363 days
Austria	547 days

Civil Law: Scandinavian tradition

Finland	64 days
Sweden	160 days
Denmark	225 days
Norway	365 days

Amongst the developed common law countries mentioned the average for the disposition of the two typical cases was 83 days between commencement of process and judgment. Both Australia and New Zealand are below this average. However, the average in developed civil law countries in the resolution of the same types of cases from commencement to judgment was 347 days. This is a statistically relevant difference. It suggests very much greater delay by reference to whether a country is a civil law or a common law tradition. Further, the differing sub-sets in the civil law tradition between those countries that can be grouped as influenced by the French legal tradition, the German tradition and the Scandinavian tradition show marked differences *inter se*. There are lower mean delays in Scandinavia but the highest figures exist in civil law countries that have followed the German *Civil Code*.

When the foregoing outcomes are compared with data with respect to a sample of developing countries, the results are equally striking.

TABLE 2
Average mean delay (in days) between commencement and recovery of judgment

Developing Countries

Common Law Tradition

Bermuda	50 days
Belize	59 days
Barbados	92 days
India	212 days

Malaysia	270 days
Nigeria	366 days
Bangladesh	390 days

Civil Law Tradition

Indonesia	225 days
Egypt	232 days
Turkey	300 days
Argentina	440 days
Colombia	500 days
Mozambique	540 days
Morocco	745 days

The average mean time between the commencement of proceedings and the recovery of judgment in the named developing common law countries is 212 days. The average mean time in developing countries that follow the civil law tradition is 426 days. This too is a significant difference. The named *developing* countries of the common law tradition have a significantly shorter time delay (212 days) than the average of the named *developed* countries of the civil law tradition (347 days). As might be expected, the delays in developing countries of the civil law tradition are greater than delays in developed countries of the same tradition (426 days as against 347 days). However, on this data, the marked disadvantage of commencing proceedings in such relatively simple and straight-forward cases in lower courts in civil law countries appears plain.

In the case of simple contract enforcement, data from the Asia/Pacific region, with which the trade and commerce of Australia and New Zealand are increasingly involved, reflects similar patterns of delay. To this data the authors have added information on the cost of recovery proceedings as a percentage of the amount recovered in consequence

of the proceedings. Once again, the table is instructive. It reveals the significant cost burden of court litigation in many of the countries of the region, as well as a delay involved in recovery:

TABLE 3
Delay and costs as a percentage of recovery in simple contract enforcement in countries of the Asia/Pacific region

Country	Days	Costs as % of recovery
Afghanistan	1642	25%
Australia	395	20%
Bangladesh	1442	63%
Cambodia	401	102%
China	406	11%
Fiji	397	38%
Hong Kong	211	14%
India	1420	39%
Indonesia	570	121%
Iran	520	17%
Kiribati	660	25%
Laos	443	31%
Malaysia	600	27%
Micronesia	965	66%
New Zealand	216	22%
Papua New Guinea	591	110%
Samoa	445	19%
Singapore	150	25%
Solomon Islands	455	78%
Sri Lanka	1318	22%
Taiwan	510	17%
Thailand	479	14%
Vietnam	295	31%

Comparable developed countries

Canada	570	22%
France	331	17%
Germany	394	14%
USA	300	9%

The most disadvantageous jurisdiction in which to attempt court recovery for enforcement of a simple contract alleged to be breached is Afghanistan. Delays of five years can be expected there. Singapore has the best record for court recovery in such cases, with Hong Kong and New Zealand close behind.

The lowest percentage of costs as a proportion of recovery appears in the United States of America, probably because of the rule applicable in most litigation in that country that each party pays its own costs. On the figures stated, Cambodia is not an advantageous place in which to litigate such a claim. Not only is there a delay of more than a year, but, in the outcome, the costs may exceed any recovery.

The information published in the Djankov report has been updated by later surveys which have addressed a wider range of countries²³. Such surveys have continued to report the significant differential between the time taken to resolve litigation in most civil law countries when compared with countries that follow the common law tradition.

Attempts are made by Mr. Djankov and his colleagues to speculate as to why there should be such significant variations between common and civil law jurisdictions. For example, it is noted that, before the codification of French law under Napoleon, the judges of the royal courts were viewed as enemies of the objectives of the Revolution. They were perceived as opponents of reforms deemed necessary to effect change in society. The post-codification judges were therefore intended to be little more than the “mouth of the law”. Highly formal procedures were imposed on them, designed to reduce elements of judicial discretion and procedural innovation.

On the other hand, members of the English judiciary, in the same historic period, were generally viewed by their citizens as defenders of

²³ International Bank for Reconstruction and Development, *Doing Business 2010*, World Bank, Washington, Palgrave MacMillan, 2009, 55ff.

civic liberty. Normally, in the higher courts, they had been independent lawyers, chosen from the senior ranks of the practising profession of barristers. This had the result that they were generally more powerful within the legal system; they enjoyed larger discretions; and they exercised significant flexibility in the conduct of trials. As well, the tradition of jury trials enhanced the oral hearing typical of the common law. It reduced paper disputes and enhanced the speed taken in the resolution of litigation. The early juries could not read and had to be quickly returned to their homes and work. These traditions have been copied in the courts of Australia and New Zealand.

In recent decades, many common law countries (including Australia and New Zealand) have embraced habits of enhanced written documentation which have diminished the role of the oral trial. The data in the Djankov report may therefore have implications for the approach of Australian governments and courts to reform civil procedure. It may suggest a re-think of the recent shift from oral to written procedures; of the enhancement of formalised procedures; and of the reduction of oral and jury trials. Perhaps significantly, Japan in August 2008, in domestic jurisdiction, re-introduced jury trials for serious criminal cases.²⁴ Despite such changes, the strong differential between the time taken to dispose of litigation, on average, in common law and in civil law countries persists to this day. The conclusion stated by Djankov and his colleagues includes the following findings²⁵:

“[W]e find that judicial formalism is systematically greater in civil law countries, and especially French civil law countries, than in common law countries. Formalism is also lower in the richest countries. The expected duration of dispute resolution is often

²⁴ M. Knox, “Citizens sit alongside judges”, *Law Society Journal* (NSW), November 2009, 20. See also A. De Fina, “Arbitration Cultural Shift” in *Law Society Journal* (NSW), July 2009, 8-9.

²⁵ “Courts”, above *op cit*, Abstract p1.

extraordinarily high, suggesting significant inefficiencies. The expected duration is higher in countries with more formalised proceedings, but is independent of the level of development. Perhaps more surprisingly, formalism is nearly universally associated with lower survey measures of the quality of the legal system. These measures of quality are also higher in countries with richer populations. We find no evidence that incentives facing the participants in litigation influenced the performance of courts.”

The authors acknowledge that the time for disposition of proceedings and the proportion of costs as a percentage of recovery do not tell the whole story about the advantages and disadvantages of the court systems in the countries examined. They indicate that considerations of the integrity of courts; the level of state intervention in court proceedings; and the existence of external *stimuli* (mandatory time limits; creation of specialist tribunals; hearings in public where the decision-maker can be observed; introduction of cost incentives; and provision for contingency fees) all play their part in assessments about the utility of court proceedings compared to other recovery process. They conclude:

“[T]he evidence points to the extremely long expected duration of dispute resolution, suggesting that courts are not an attractive venue for resolving disputes. Furthermore, we find no offsetting benefits of formalism, even when looking at the variety of measures of the perception of fairness and justice by the users of the legal system. Moreover, legal origin itself appears to determine judicial quality, other things equal, suggesting that formalism is unlikely to be part of an efficient design. ... One cannot presume in economic analysis, especially as applied to developing countries, that property and contract are secured by courts. This conclusion has two implications. First, it may explain why alternative strategies of securing property and contract, including private dispute resolution, are so wide-spread in developing countries. Second, our results suggest a practical strategy of judicial reform, at least with respect to simple disputes, namely the reduction of procedural formalism.”

CHANGING THE ANZ LEGAL CULTURE

The Djankov report was highly controversial when it was released. It was strongly contested by defenders of the civil law legal tradition. This is unsurprising given cultural loyalties that exist in every country and legal tradition. To some extent, the report did not gain the attention that it possibly deserved. That is why I have referred to it in this paper.

Because Australia and New Zealand are on the edge of South East Asia and the Pacific and because the majority of countries of that region have followed the civil law tradition (Thailand, Cambodia, Laos, Vietnam, China, Taiwan, Japan, Mongolia, Russia and Noumea), it is important that Australian and New Zealand lawyers should be generally aware of features of the legal systems in those countries where that tradition applies. In particular, it is important that they should be aware of features that affect delay in the disposition of proceedings in the courts; increase the costs of such dispositions; enhance the formalism of the applicable legal procedures in all countries of the region, but particularly in civil law countries; and provide an environment for the endemic problems that fester in circumstances of high formalism without open oral trials, namely corruption of decision-makers and of court officials.

The foregoing data is also important for those considering the option of international commercial arbitration. At once, the twin problems of delay and cost provide an explanation of why, in large and complex disputes especially, it is important to agree in advance upon the procedures of independent, expert and neutral arbitration. In reality, such importance goes beyond considerations of cost and delay. Reflecting on these features of legal systems of countries of the region will teach lawyers from Australia and New Zealand that parties, witnesses, experts and

others associated with such legal systems, will frequently approach the resolution of such disputes with a significantly different mind-set; differentiated expectations; and in particular, radically different experience in domestic courts, in terms of speed, cost and party satisfaction.

A constant theme of recent ADR conferences in the Asia Pacific region has been the differences that exist between the attitudes and expectations amongst participants in international commercial arbitration coming from common law as against civil law backgrounds. Such differences emerged, for example, in discussion of:

- The basal attitudes to the role of courts and the rule of law in common law countries as applied to judicial review of commercial arbitration;
- The different opinions concerning the availability of *ex parte* interim orders as an adjunct procedure (less surprising to common lawyers than to civilians);
- The different approaches to the appointment of 'experts' by parties (as in the common law) or by an official (as in the civil law); and
- The different approaches to pre-hearing disclosure (more common in common law jurisdictions and less so in civil law jurisdictions).

The lessons of the data revealed in the Djankov report is that Australian and New Zealand lawyers, considering a role for international commercial arbitration, must become much more aware than they are at present of the commonalities and differences between the world's two great legal traditions.

It is a common assumption of expert Australian and New Zealand participants in international commercial arbitration that it is a good thing. We need to ask whether this is necessarily so? Of course, arbitration benefits those persons who secure appointments as arbitrators. It benefits some lawyers, arbitration bodies and doubtless brings high levels of performance, such as we expect in legal practice, and already see (at least in comparative terms) in Australasian courts. More fundamentally, it provides an important service in which the professional participants usually have a comparative advantage as native-speaking Anglophones, accustomed to independent and uncorrupted decision-making, and to professional skills that are expensive but of a very high order.

Making such services available both in Australasia and in the region beyond, is an economic service having a high money value. However, it also helps to sustain economic progress, stable investments, secure capital flows and enhanced employment possibilities, such as attend stable economic investment. This paper seeks to establish that lawyers from both Australia and New Zealand must overcome any lingering hostility they may have to comparative and international law; and enhance their awareness of the world, and particularly of the region into which history has accidentally placed these two countries.

Lawyers and other professionals in ADR must also become more familiar with the features of the civil law tradition which, until now, has substantially been a mystery to those trained in the common law. Some elements of that tradition, once discovered, seem less attractive to the Australasian lawyer than features of the systems closer to home. That too may be a consideration favourable to the use of international

commercial arbitration. We need to educate our ADR practitioners, and especially our lawyers, in these basic truths.

THE RESULTING EQUATION

I return, in conclusion, to the question that I asked in the session on ADR at the Malaysian Bar Conference mentioned at the outset of this paper. More interesting on the issue of why the Singapore judges are more inclined to adopt a ‘hands off’ policy than the Malaysians, it is perhaps more interesting to ask why *any* court system would substantially opt out of its traditional duty. After all, this is basically to uphold the rule of law in every case and to do whatever the court can do to ensure that justice is attained and not rendered unattainable or discounted by reference to irrelevant or unpersuasive considerations.

What is the persuasive reasoning that sustains a general ‘hands off’ attitude to proceedings before arbitral tribunals and to their awards, such as is now strongly observed in the Singapore courts? And why is this increasingly also true in courts in Australia and New Zealand²⁶? Given that the rule of law is promoted as an essential feature of civilised nations, why should courts today effectively wash their hands, or turn their backs, on parties to commercial arbitrations, including those having an international element? Are such parties not also entitled to the application of the rule of law to their cases? Are errors of law in arbitral determinations somehow less important than similar errors in administrative decisions? Are egregious errors of fact-finding not just as likely to occur in arbitral proceedings, as in any other decision-making, and to lead to serious injustices against which a court should provide

²⁶ See e.g., *AED Oil Ltd v Puffin FPSO Ltd* (2010) 265 ALR 415; *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

relief?²⁷ How can we explain and support the emerging bifurcation of attitudes to judicial supervision of arbitrations, when contrasted to the supervision of the decisions of judges, independent statutory tribunals, administrators and other decision-makers in society?

I posed this question bluntly for the participants in Kuala Lumpur, knowing roughly the answers that they would probably give. I asked my question, in effect, so that those answers could be given in public. An equation of values is at work here. Decision-making is important for all parties locked in a serious dispute. But it is especially important for business disputants both to have a formal response and to secure it quickly, and if possible, with finality. Generally speaking, more than other parties, business disputants are not interested in legal reasoning or fine points of judicial analysis. What they most need are quick decisions so that they can get on with the work that business does best: investing shareholder funds wisely and imaginatively and maximising profits.

Mr. Hwang conceded that in very special cases, the fact-finding by an arbitral tribunal might be so manifestly wrong as to demand judicial intervention. However, this, he said, would be extremely rare. The *marginal utility* of such judicial intervention has to be weighed against the significant *marginal costs* involved in intervening. Those costs include:

- * The consequent delay in the finalisation of the commercial dispute;
- * The opening up of prospects for further interlocutory proceedings once the court doors have been opened;
- * The invitation to appeals or applications for leave to appeal;

²⁷ *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 145 per Kirby P; contrast per Glass JA.

- * The consequent fine tooth-combing of arbitral reasons and the tendency that this will provide for a replication in arbitral tribunals of the procedures and habits of judicial trials²⁸;
- * The consequent enlargement of the time taken for the final disposition of the entire arbitral process;
- * The emphasis thereby introduced with the resulting risks of departure from a search for an overall, sensible and commercially just conclusion; and
- * The disincentive to the use of a particular jurisdiction if that jurisdiction attracts a reputation for judicial intervention in ADR.

It has to be conceded that, with courts, whatever defects may occasionally arise in individual cases in the qualifications of judges, there is in place, generally, a serious procedure to ensure that only qualified persons are appointed as judges. There is no equivalent legal assurance of minimum requirements in appointments as an arbitrator. It is left to the parties to control the process of appointment. They do so either directly through their respective appointments or indirectly through the selection of an umpire. Yet the parties will usually be advised by lawyers upon such choices. Often they will select retired experienced judges or other appropriate legal practitioners known for specific skills in the arbitration. The final selection depends on those who participate in making it. Perfection is not guaranteed.

The considerations debated in the Malaysian conference confront us also in Australia and New Zealand. So far, after some initial

²⁸ *Transcatalana de Commercio SA v Incobrasa Industrial Commercial Brasileira SA ('The Vera')* [1995] 1 Lloyd's Reports 215; compare *Oil Basins Ltd v. BHP Billiton Ltd* [2007] VSCA 225; 18 VR 346 not followed. *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57 at [224] per Allsop P (Spigelma CJ and Macfarlan JA concurring).

ambivalence, we appear to be following the Singapore line. But we must recognise that this is being grafted onto a legal tradition which is probably generally closer to the reported inclinations of the Malaysian courts. Whether the Singapore line can be held in Australia and New Zealand will depend upon considerations of history, tradition, and culture and judicial restraint. But also a hard-nosed estimation by the courts concerned of the burdens that are placed on them and a recognition of the skills that can be deployed in international arbitration. Thus, the maintenance of the Singapore line will, in the end, depend, in part upon statutory provisions²⁹ but also, in part, upon professional and community acceptance of the skill displayed by arbitrators and by the organisations and centres that now provide the venues for this efficient form of bringing international commercial disputes to a speedy, confidential and sensible finality.

²⁹ See e.g. *International Arbitration Act 1974* (Cth) as amended 2010 and *Commercial Arbitration Act 2010* (NSW).