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**TRADING IN THE REGION:  
DIFFERENTIAL ADVANTAGES  
OF LITIGATION AND ADR IN  
COMMON LAW AND CIVIL LAW  
COUNTRIES**

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The Hon. Michael Kirby AC CMG

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**SECOND ANNUAL PUBLIC SECTOR LITIGATION AND DISPUTE  
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**TRADING IN THE REGION: DIFFERENTIAL ADVANTAGES  
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LAW COUNTRIES\***

The Hon. Michael Kirby AC CMG\*\*

**THE AUSTRALASIAN LEGAL CULTURE**

The legal culture in Australia is not naturally hostile to the idea of international commercial arbitration, indeed alternative dispute resolution generally. 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 were subject, ultimately, to appellate supervision by the Judicial Committee of the

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\*\* Panel of Arbitrators, International Centre for Settlement of Investment Disputes (ICSID), Washington DC (2010-); President of the Institute of Arbitrators & Mediators 2009-10; Board Member, Australian Centre for International Commercial Arbitration (2009-); past Justice of the High Court of Australia, (1996-2009).

Privy Council in London<sup>1</sup>. After Federation in Australia, with the exception of so-called *inter-se* disputes involving the Federal Constitution<sup>2</sup>, 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 observed<sup>3</sup>, the participation of English judges in our cases linked our legal systems to one of the great legal traditions 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 secured full dominion status early in the twentieth century. Nevertheless, by the 1980s, the time had come for Australian law to achieve full independence<sup>4</sup>.

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<sup>1</sup> 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).

<sup>2</sup> Australian Constitution, s74.

<sup>3</sup> F.C. Hutley, "The legal traditions of Australia as contrasted to those of the United States", (1981) 55 ALJ 63.

<sup>4</sup> *Australia Acts 1986* (UK) and (Cth).

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*<sup>5</sup> 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 made to decisions in the courts of other Commonwealth countries, grappling with similar or analogous problems<sup>6</sup>.

Because Australia is a member 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 high importance to the role of the judges in declaring and expounding the law. They provide their decisions in reported opinions, 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

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<sup>5</sup> See M.D. Kirby, Foreword to the 100<sup>th</sup> volume of *Law Reports of the Commonwealth* [2009] 2 LRC iii-xii.

<sup>6</sup> 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.

dissenting opinions.<sup>7</sup> This was a point made at a recent Bar Association conference in Kuala Lumpur. I came away with the conclusion that the decisions of Australian 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 impediment, notwithstanding the great improvement in the speed and comfort of international travel, the expansion of telecommunications; and the growing involvement of Australians 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 in international commercial arbitration conducted in *our* countries;
- \* Australia remain substantially monolingual countries – at least so far as other world languages are concerned. 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 great impression in many quarters precisely because it was so unusual. Certainly, it

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<sup>7</sup> M.D. Kirby, “Judicial Dissent – Common Law and Civil Law Traditions”, (2007) 123 LQR 379.

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 who have never spent any substantial time in Asia and who regard Asian cities as transit ports for the more 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 dilemmas<sup>8</sup>. However, this is rare. Language skills and interest often stand in the way of exploring such analogies; and
- \* 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 may show<sup>9</sup>.

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<sup>8</sup> 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].

<sup>9</sup> 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.

## **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 of what is going on in other jurisdictions and, in particular, in different legal systems. Yet if the lawyers, accountants and business people of Australia 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"<sup>10</sup>. This was prepared by four researchers, led by Simeon Djankov. The report was 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

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<sup>10</sup> The data used in the project are available at <http://iicg.som.yale.edu/>.

features and ordinariness. The situations chosen were the steps necessary to:

- \* Evict a tenant for non-payment of rent;
- \* Collect 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. However, 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 the law or whether reliance on considerations such as 'equity' and the suggested merits of the case would suffice;
- \* Whether the procedures permitted free cross-examination of the parties and witnesses or whether some prior leave of the decision-maker to undertake such investigation was required;
- \* 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 report<sup>11</sup>:

“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 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

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<sup>11</sup> *Ibid, op cit*, Abstract.

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, therefore, the average for the disposition of the two typical cases was 83 days between commencement of process and judgment. Australia is below this average. However, the average amongst 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**

<b>Common Law Tradition</b>	
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 even 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 is 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**

<b>Country</b>	<b>Days</b>	<b>Costs as % of recovery</b>
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 are likely to exceed any recovery.

The information published in the Djankov report has been updated by later surveys which have addressed a wider range of countries<sup>12</sup>. 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 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

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<sup>12</sup> International Bank for Reconstruction and Development, *Doing Business 2010*, World Bank, Washington, Palgrave MacMillan, 2009, 55ff.

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.

In recent decades, many common law countries (including Australia) 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; the enhancement of formalised procedures; and the reduction of oral and jury trials. Perhaps significantly, Japan in August 2008, in domestic jurisdiction, re-introduced jury trials for serious criminal cases.<sup>13</sup> 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 findings<sup>14</sup>:

“[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 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

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<sup>13</sup> 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.

<sup>14</sup> “Courts”, above *op cit*, Abstract p1.

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 and compared to other recovery process. They conclude:

“[T]he evidence points to 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 is 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 lawyers should be aware generally 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, 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 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 our 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 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 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 and 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 Australia 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 a session on ADR at the recent Malaysian Bar Conference. 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 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 so in courts in Australia<sup>15</sup>? 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 in arbitral proceedings, as in any other decision-making, to lead to serious injustices against which a court should provide relief?<sup>16</sup> 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?

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<sup>15</sup> See e.g., *AED Oil Ltd v Puffin FPSO Ltd* (2010) 265 ALR 415; *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.

<sup>16</sup> *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 145 per Kirby P; contrast per Glass JA.

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, that those answers should 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, a leading Singapore arbitrator, 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. These include:

- \* The inevitable 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;
- \* The 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 trials<sup>17</sup>;

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<sup>17</sup> *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 (Spigelman CJ and Macfarlan JA concurring).

- \* The consequent enlargement of the time taken for the final disposition of the entire arbitral process;
- \* The emphasis thereby introduced with the consequent risks of departure from a search for an overall, sensible and commercially just conclusion; and
- \* The resulting disincentive to the use of local 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 and experienced judges or other appropriate 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. So far, after some initial ambivalence, we appear to be following the Singapore line. But we must recognise that this is being grafted on to 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 will depend upon considerations of history, tradition, and culture and judicial restraint. But also a hard-nosed estimation by the court concerned of the burdens that are placed on

them and a recognition of the skills that can be deployed in international arbitration in particular. Thus, the maintenance of the Singapore line will, in the end, depend, in part upon statutory provisions<sup>18</sup> but also, in part, upon professional and community acceptance of the skill adduced 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 and sensible finality.

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<sup>18</sup> See e.g. *International Arbitration Act 1974* (Cth) as amended 2010 and *Commercial Arbitration Act 2010* (NSW).