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The Institute of Arbitrators & Mediators Australia, which was established in 1975, has its headquarters in Melbourne. In a reversal of the great federal experiment, it moved its headquarters from Canberra (which it presumably found a trifle quiet for the taste of its members) to Melbourne. But it has strong chapters in Sydney, Melbourne and elsewhere. It displays its national character by the way in which it has engaged universities throughout Australia in the provision of training for arbitrators and mediators: an essential aspect of its functions.

The Australian Centre for International Commercial Arbitration was established in 1985, started as initiative of the Institute. Its purpose is to encourage the use of arbitration as an appropriate and desirable means for the resolution of disputes having an

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international and commercial character. Along with other initiatives launched in Australia, its subplot has been, from the start, to attract international commercial arbitration to this country. That business has so far largely eluded Australia. It continues to flow to Paris, New York and London and, in our region, to Singapore and Hong Kong. The opening of a permanent national dispute resolution centre in Melbourne is a bright omen for Australia.

The growth of the economies of the countries in Australia's geographic region, the participation of multi-national corporations throughout the region and the vast flows of international capital, necessarily produce a proportion of cases where disputes arise. Where this happens those involved in such disputes must make the hard decision that is well known to every lawyer. The disputants must decide to abandon the claim if the amount at stake is not worth pursuing and if bluff and bluster get them nowhere; to take the matter to a court of law within the jurisdiction, if that course is open to them and justifiable in the circumstances; or to submit the matter to independent arbitration, by an expert acceptable to the parties, proceeding in private, pursuant to pre-arranged arbitral agreement or to post-dispute concurrence if that is the quickest, cheapest and most satisfactory way to a resolution.

THE FACILITIES WHICH THE CENTRE OFFERS

There are several reasons why the opening of the new Dispute Resolution Centre in Melbourne is an important event:

- The premises offer a venue for a system of dispute resolution alternative to the courts and a place in which, by agreement of the parties, arbitration can be conducted efficiently and economically;

- They provide facilities in which large scale and often complex commercial disputes can be investigated and resolved more quickly and economically than the formal court system can usually offer;

- They offer a resource close to the heart of a major legal centre of Australia where skilled lawyers of ability, integrity and experience offer their services to help the parties and arbitrators to cut through the detail of a dispute, sometimes horrendously complex and to arrive at an award which will finally put the dispute to rest;

- They support the very important drive to sell offshore legal services in which Australia has significant advantages; and

They can help to build up the effort of Australia to present to the world and to its region, its advantages as a significant Pacific financial centre.

Recent news reports in Australia have emphasised the way in which experienced retired judges in Victoria of great experience are now heavily engaged in arbitrations, national and international. In New South Wales, retired judges have also been engaged in international arbitrations. Recently, the Federal Attorney-General, Mr Daryl Williams QC, led an important delegation to China. As a result, China may be opening its borders to licences for more Australian legal firms and utilising more Australians as arbitrators in international commercial disputes concerning Chinese interests[1]. This is a very promising development for the future of this Centre and of its facilities in Melbourne. The media has also carried news of the indefatigable Sir Laurence Street who recently conducted four mediations in Bangkok, Thailand[2]. When I telephoned Sir Laurence to tell him of the opening of the Melbourne facilities, I found that he was in Malta and not for a holiday. He also sent the message that all Australians should get behind this initiative and, for once, rise

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1 A Burrell, "Williams confident China visit will benefit law firms", *Australian Financial Review,* 23 July 1999, 27.

2 B Smith, "Australian mediators now in heavyweight division", *Australian Financial Review,* 16 July 1999, 28.

above the parochialism that bemuses foreigners, depresses Australians and damages our national effort in a most competitive overseas market, such as that of international commercial arbitration.

THE OBSTACLES TO BE OVERCOME

It is necessary to explain frankly why Australia and its various arbitration and mediation services have not been flooded with clients using the undoubted talents of the Australian legal profession and experienced mediators and arbitrators to help resolve commercial disputes that arise internationally - especially in the Asia/Pacific region. There are several reasons. Unless Australians know them, and address them, they will not be able to remove such of the impediments as are susceptible to our influence. These include the following.

- Australia is not yet a traditional place, nor are Australians traditional players, for international commercial arbitration. Large businesses and the legal firms which advise them are fairly conservative in such decisions. They tend to feel more comfortable in sticking to the place, the institutions and the facilities that have an established track record: in Paris. London. New York. And to some extent in Singapore and Hong Kong. Once the resistance is overcome and quality services are provided, things will change. But lawyers everywhere, and not a few businesses, are creatures of habit

and precedent. Australia's international mediators and arbitrators have to break this mould.

Australia is, geographically, still a long way from everywhere else. True it is that Melbourne is closer, as the plane flies, to Singapore and Bangkok than it is Sydney. But not by much. It still takes effectively most of a working day to fly the long distance to Australia from the south-Asian mainland. Physical distance is, of course, becoming less important. This Centre needs to seize the opportunities presented by contemporary technology. According to one knowledgeable commentator, changes in information technology herald substantive changes in society equivalent to the invention of printing by Gutenburg in the 15th century which paved the way for the Reformation and the growth of the modern industrial economy. According to this view, "the present electronic revolution, which makes instant world-wide communication a reality, is gradually erasing the relevance of national boundaries, distinctions and separations"[3]. This revolution will have large implications for international commercial arbitration. The Centre in Melbourne will need to stay ahead of the field. Last week, in Sydney, I launched the AustLII National Law Collection which brings

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[3] J Werner, "Introduction to the 7th General Global Arbitration Forum" in [1999] *Journal of International Arbitration,* 57 at 61.

legal data to Australia and the world, free of charge. In two years this service has expanded to a million hits a week. International commercial arbitration will embrace the same electronic communication. The High Court of Australia has been a pioneer in the use of this technology. The judges have found that advocates are significantly briefer when speaking to the Court in disembodied electronic form than when they appear before the judges in the flesh. Perhaps the obstacle of distance, which probably still represents a psychological barrier against the use of Australia as an international centre for international commercial arbitration, will eventually be overcome by increased use of video and other electronic links. Technologically, there is virtually no difference between linking Darwin and Canberra and linking Kuala Lumpur or Manila to Melbourne. But a psychological bridge must be crossed. Australians should be addressing the ways in which we can make this easier and more attractive. It may sometimes be necessary for Mohammed to go to the mountain as I would note, without blasphemy, that Sir Lawrence Street and Dr Michael Pryles have done by conducting their hearings in Bangkok and elsewhere. If the parties or their lawyers will not, or cannot, come to Australia, Australian mediators and arbitrators should be foremost (as I believe they are) in packing their bags and going where the business is.

A further obstacle is this. In so far as courts are concerned, I believe that Australia's courts rightly enjoy a high reputation in

the region for integrity, complete independence of government and of vested interests and parochialism, high skill in the accurate resolution of complex commercial disputes; devotion to mastering extremely demanding and complex facts and law; and an ever increasing appreciation of the needs of parties and their advisers for efficiency, fast-tracking of urgent matters and effective case management. These are the merits of the independent courts of Australia. Everyone knows them. Yet, by definition, international commercial arbitration generally wants to steer clear of the courts. Australia thus loses an important advantage which it offers over most other countries of the world (and many of the region) whose courts are lacking in independence, expertise and efficiency. Yet, as many former Australian judges with long experience in the courts now offer themselves for international commercial arbitration and lawyers become available who are trained in, and accustomed to, the honest and professional legal culture of Australia, we can make the point that Australia has skills in arbitration and mediation which redound to the benefit of the parties if they entrust international commercial arbitration to Australians.

One problem derives from our history in the field of commercial arbitration, at least until recently. All too often in the past[4] Australian lawyers, and sometimes Australian judges (sometimes perhaps I myself) have approached commercial arbitration as if it were just another court case but one conducted at a disadvantage before a non-judge in a hired room where all the facilities have to be paid for. The approach of course need not be that of total withdrawal of the courts from commercial arbitration. Courts can sometimes play a supportive role[5]. Yet, in Australia, until lately, we did not always embrace wholeheartedly the different techniques needed for mediation and arbitration. Those techniques do not always come easily to people trained in the combative atmosphere of adversary trials before Australian courts. That is why the educative work of the Institute and of the Centre are so important. Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a

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4 An illustration of the turning tide is *Ferris v Plaister* (1994) 34 NSWLR 474. It has been suggested that *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 35 NSWLR 704 was a retrograde step. But it had special features and involved an Australian government party raising public law considerations specific to Australia.

5 P. Bernardini, "Arbitral Justice, Courts and Legislation", in International Court of Arbitration *Bulletin,* Special Supp 1999, 13 at 19.

new psychology. To earn and retain international commercial arbitration, Australian arbitrators and the Australian legal profession will have to show that they have these qualities as saleable virtues, without losing their priceless reputation for honesty, neutrality and professionalism.

It is essential to maintain consistently high standards of competence and expertise in the performance of international arbitrations. Serious problems arise when the nature of the issues of an international commercial arbitration change, rendering irrelevant, or much less relevant, the expertise of the arbitrators originally chosen. One of the main complaints of clients about international arbitrations, according to an expert, concerns the incapacity to correct plainly erroneous fact-finding or clear legal mistakes; the delivery of "unpredictable awards" on the basis that arbitrators may to render "equitable" awards ("cut the baby in half") rather than apply the law or established practice; the absence of established precedents that allow for accurate predicability; and the fact that arbitration can itself become protracted and even more expensive than ordinary court proceedings[6]. These and other perceived difficulties have caused knowledgeable

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[6] M C Boeglin [1999] *Journal of International Arbitration,* 62.

commentators to call for the creation of an International Arbitral Court of Appeal, at least for some of the largest international disputes[7]. The complexity of international arbitration and the need for a pool of varying expertise, as well as for flexibility and a measure of self-sacrifice, call for special measures of cooperation in a country like Australia. This is particularly so because of its relatively small population and its still limited hands-on experience in the wide range of commercial disputes that can arise.

There is a final consideration which Australians cannot ignore. Most Australians still wear a European face. Most have not been brought up in the Confucian, Islamic or Buddhist philosophies of most people in the nations to the north whose commercial disputes represent our most natural international market in this field. There was a time when the appearance of a European face might have been an advantage in dispute resolution. In some parts of the world that may still be true. But in the sophisticated commercial and financial markets of Asia, the days of the colonial decision-maker have long passed. In part, this consideration will be diminished in time by ethnic, cultural and social changes which reinforce

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7. H Holtzmann and S Schwebel cited J Werner in [1999] *Journal of International Arbitration* 57 at 60.

attitudinal developments that have already occurred. However, travelling in countries of our region, getting to know and appreciate their ways and respecting their customs, is an important preparation which Australia's arbitrators and mediators must be willing to accept if they hope to break into this market. In the expansion of Australian law firms throughout the region, there is much evidence of a willingness on the part of increasing numbers of young lawyers to embrace these challenges. I recently met a number of them in Hanoi, Vietnam. These people will themselves earn respect and appreciation. They will come, in time, to pay their part as lawyers in international arbitrations and as mediators and arbitrators in others. We should not forget that, within Asia, there are many strong cultural, religious and ethnic differences and even antagonisms which may make the use of a complete outsider of skill and efficiency positively attractive to the disputants and those advising them. Furthermore, we must never under-estimate the enormous head-start which the English language gives Australians in a world where English dominates most international commercial and legal dealings. We can learn from the very successful sale of Australia's educational services in the region. The potential for that export is virtually limitless.

AUSTRALIA'S COMPARATIVE ADVANTAGES

Australia's markets for international commercial arbitration are not limited to Asia and the Pacific. But that region seems likely to be the place to which most of our exports of such services will go. To maximise the attractiveness of the Dispute Resolution Centre in Melbourne and of other Australian bodies interested in international commercial arbitration, there are many preconditions. By its law and practice, Australia offers several advantages which Australians should make known as often as they can. These include:

- The freedom which the parties enjoy to determine the method and degree of formality in which their arbitration will be conducted.

- Their freedom to be represented by lawyers and other professionals of their choice, regardless of nationality.

- Their freedom to have an award expressed in a relevant currency, not necessarily Australian.

- The general freedom to enjoy a very high measure of confidentiality in the conduct and outcome of the arbitration.

- The restraint generally observed by Australian courts against undue interference in arbitrations, particularly of a commercial character and between international parties.

- The lack of nationalistic and parochial approaches to such arbitrations and the adherence of Australia to the *New York Convention* and its enactment of the UNICTRAL Model Law on International Commercial Arbitration in Pt III of the *International Arbitration Act* 1974 (Cth).

- The highly competitive fees charged by members of the Australian legal profession, especially when compared with the cost structures for English senior counsel, New York attorneys and even some lawyers in Hong Kong and Singapore.

- And, not least, the work of the Institute of Arbitrators an Mediators, Australia and of the Australian Centre for International Commercial Arbitration in the ongoing training of personnel for involvement in international commercial arbitration.

Australia's economy, although resilient and growing strongly, is still small by comparison to the economies of many of its neighbours. This means that Australians may not be seen as frequently on the international commercial arbitration circuit as arbitrators from countries with big economies and with countless disputes and repeat players. We need prominent lawyers and others to take the lead; to demonstrate an international outlook; and to manifest their expertise and efficiency. Sir Laurence Street,

Dr Michael Pryles and a host of others have accepted those obligations. It sounds a glamorous life. Often it means prolonged periods away from home with little but work to occupy one's time. Yet, if more Australian lawyers accept these obligations there is, I believe, a huge market for legal services which Australia can tap. It requires patience and persistence. But such virtues will be rewarded. They will bring much work to the new Centre in Melbourne.

OPENING THE CENTRE

The opening of this Dispute Resolution Centre is therefore an important initiative for Melbourne, Victoria and Australia. Personally, I am glad that it has not been called the Australian Dispute Resolution Centre. In the business to which it aspires, nationalism and parochialism are probably impediments to success, not advantages. The boast of a postcode Australia 3000 is not what a client with an international commercial dispute, or its lawyers, in Phnom Penh, Hanoi or Calcutta necessarily wish to hear. In the age of the Internet, of the Human Genome Project and of the global economy, Australian lawyers and others must adjust their mindset. They must see the world through completely different eyes. Before too long I expect that this Dispute Resolution Centre in Melbourne will open offices in Bangkok, Kuala Lumpur and other cities in Asia and perhaps wider afield. It will be necessary to take some risks, spend some money and secure seeding investments that will reap large rewards in the future. Just as was earlier done in the sale of

educational services. This is an International Dispute Resolution Centre which happens to be based in Melbourne engaging mostly Australian talent.

The establishment of this new Centre is a step in the right direction. It is brave and bold and worthy of the spirits who conceived it. I trust that it will enjoy the fruits of much disputation and bring efficient and just resolution to those who are in conflict who come to its doors - physically or electronically. Doing so, the Centre will bring rewards to lawyers and others in Australia. But the rewards will go far beyond the fees that are earned. Their work will bring respect to Australia and enhance Australia's ever-increasing involvement in the international trade in legal and arbitral services - especially in the Asia/Pacific region. Here is a good illustration of thinking globally and regionally; but acting locally.

If Australians can maximise their advantages, address their disadvantages and break the current mould, I expect that there will be a very large market for international commercial arbitration services. And if there is the Dispute Resolution Centre in Melbourne will become a major regional centre for international commercial arbitration.