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INTERNATIONAL COMMERCIAL ARBITRATION AND DOMESTIC LEGAL CULTURE

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The Hon. Michael Kirby AC CMG*

AUSTRALIAN HESITATIONS

International commercial arbitration is on the rise. In the last decade, as the President of ACICA, Professor Doug Jones, has pointed out, leading international arbitration bodies have experienced a growing case load. Since 2000, the International Center for Dispute Resolution in the United States (ICDR) has witnessed a 38% increase in 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 Financial Crisis, the trend has been up. It seems likely to be maintained[1]. 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 Convention[2], including Australia.

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[1] D. Jones, cited by reference to his article "International Dispute Resolution in the Global Financial Crisis". See Z. Lyon "Arbitration Hesitation?", *Lawyers Weekly* (Aust) 28 August 2009, 17-18.

[2] 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).

Taking recourse to domestic courts and tribunals instead of utilising international commercial arbitration will not only involve the well-known problems of delay and cost. They will not only have to overcome, in some countries, difficulties of governmental interference, excessive legal and procedural formalism and possible corruption. They 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; hearings in safe and neutral venues; avoidance of gross delay and other differences 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 has proved hesitant 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 understand. [They] are very conservative and we've caught on to this [ADR] late."[3]

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 court system[4]. In particular, lack of familiarity with the substance and procedures of civil law countries has reduced

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[3] *Ibid*, 19.

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

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 now larger and more sharply focussed. Accordingly, the present contribution supports the efforts of ACICA, and the new initiatives of the Federal Attorney-General and the Federal Parliament, will ensure that Australian practice and inclinations turn a corner.

THE CONTEXT FOR INTERNATIONAL ARBITRATION

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

- The growth of global trade and commerce;
- The expansion of financial markets;
- The rapid increase in telecommunications;
- The massive expansion in the movement of peoples and businesses throughout the world; and
- 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 to 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. This paper, written for an Australian audience, is addressed to the likely impact of domestic legal environments upon the expectations of, and performance in, international commercial arbitration.

My contribution, like Caesar's Gaul, is divided into three parts:

- *Australian legal culture*: First, I will review some aspects of the Australian legal culture in order to identify forces that impact upon the performance of Australian lawyers in international commercial arbitrations, both for good or bad outcomes;
- *International legal culture*: Secondly, I will address a study of legal cultures in different countries as they 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 may 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 so long as 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 municipal court systems are speedy, cost-effective, impartial and untainted; and

* *Conclusions and lessons*: In consequence of the foregoing analysis, I will offer certain conclusions. In particular, I will be suggest that two variables can be identified as affecting the attractions of 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.

As well, significant differentiation has been reported between the performance of courts which follow the common law as against the civil law system. Generally, surveys of legal firms throughout the world suggest that countries that follow the common law tradition are likely to be swifter and more cost-effective in resolving a typical commercial dispute when compared with courts in civil law countries. There is no necessary coincidence between the appearance of corruption and lack of integrity and either of the major global legal traditions left as legacies by the former colonial rulers. However, the foregoing factors have contributed to the decisions of many multinational and local investors to resort to international commercial arbitration rather than to entrust substantial claims to the courts of the countries of investment. This consideration seems unlikely to change in the short run. A familiarity with local legal cultures may still shape the expectations, and performance, of international commercial arbitration, depending on the arbitrators, the venue of the arbitration, and the local legal culture in the country of the lawyers, parties and witnesses who participate in it. My conclusions will address what we can do in Australia, if we choose to, to increase the utilisation of Australian-based international commercial arbitration.

AUSTRALIA'S LEGAL CULTURE

Australia is not naturally a legal culture 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, Australian lawyers are better prepared than many others to cope with that variation. This is because Australian law has traditionally involved strong, comparativist features, dating back to colonial times and the settled existence of established rules of private international law which are well-known and observed.

Throughout the colonial era in Australia, domestic courts were subject ultimately, to appellate supervision by the Judicial Committee of the Privy Council in London. After Federation, with the exception of so-called *inter-se* disputes involving the Federal Constitution[5], 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 the federation. However, it was preserved, substantially on the insistence of the British government, to ensure that the large investments of the United Kingdom in Australia were safeguarded by recourse to English judges, applying the common law and relevant statutes without any risk of the potentially corrupting influences of Australian self-interest.

The preservation of Privy Council appeals was not, on the whole, an undue burden for the Australian legal system. On the contrary, as Justice Frank Hutley observed[6], the participation of the English judges in the Australian judicature linked Australian law to one of the great legal

[5] Australian Constitution, S74.

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

traditions of the world. It ensured that Australian courts applied orthodox and predictable legal doctrines and procedural approaches in deciding commercial disputes. There would have been certain economic disadvantages had that link been severed at federation. Nevertheless, by the 1980s, the time had come for Australian law to achieve full independence[7].

One consequence of the appeals to the Privy Council was that Australian lawyers maintained, in their libraries, the books containing the decisions of the English courts. To this day, Australian 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*[8] illustrates the high degree of comparative law borrowing that 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[9].

Because Australia is a member of this continuing network of common law courts, Australian lawyers are trained in it; familiar with its utility and limits; and uninhibited in reaching out to the laws of different countries, from which helpful legal analogies will often emerge. This feature of Australian law, like that of the law of many other Commonwealth countries, means that, on the whole, Australian lawyers are far less

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[7] *Australia Acts* 1986 (UK) and (Cth).

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

[9] 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.

hostile to other legal cultures than are, say, lawyers from the United States of America. At least, this is so where the foreign law observes follows the legal traditions of the 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, principle and policy and within a judicial tradition that permits the publication of dissenting opinions.[10]

Nevertheless, there are impediments to the invocation of the facilities of international commercial arbitration. Some may not be so significant. Other more so.

- The tyranny of distance remains an undoubted impediment, notwithstanding the great improvement in the speed and comfort of international travel, the expansion of telecommunication; 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 Australia. This is something that Australians become used to. They have no alternative. But foreigners occasionally view such journeys as a significant obstacle to engagement with Australians in international commercial arbitration conducted in Australia;
- Australia remains substantially a monolingual country. 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 Prime Minister Kevin Rudd in spoken Chinese made a great impression in many quarters

[10] Sic. M.D. Kirby, "Judicial Dissent – Common Law and Civil Law Traditions", (2007) 123 LQR 379

precisely because it was comparatively unusual. Certainly, it is not common amongst Australian lawyers and other experts;

∗ There may also be attitudinal leftovers in some quarters from the isolationist policies that survived until the late 1960s. Although such attitudes are much less common today, there are still Australian lawyers who have never spent any substantial time in Asia and who regard Asian cities as transit ports for the more familiar cultural attractions of Europe. Fortunately, amongst many young Australians, the wonder and attractions of Asia have replaced such narrow attitudes. But the viewpoints described still need to be eradicated in some quarters;

∗ Very few Australian lawyers have any 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 Australian 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[11]. But this is rare. Language and interest often come in the way of exploring such analogies; and

∗ And as for international law, this is another territory. Occasionally it engenders hostility among Australian lawyers as, I suggest, some recent court decisions may show.

References to international law have become more common in Australian courts as a result of the growing application of treaties to

[11] 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].

govern trade, communications and all manner of contemporary commercial activities. Because refugee cases involve the application of the treaty provisions stated in the *Refugees' Conventions* and *Protocol*, it is not at all unusual to see lengthy examination by Australian lawyers of that aspect of international law[12]. Before my appointment to the High Court of Australia, the international law of human rights was invoked in the historic decision of the Court in *Mabo v Queensland [No.2]*[13]. However, in the field of constitutional law, there is still a large controversy in Australia as to whether Australian law acknowledges any relevance so far as that body of law is concerned in the elucidation of the basic law of Australia's government.

In *Al-Kateb v Godwin*[14], a vigorous exchange occurred between Justice McHugh and myself concerning the relevance or irrelevance of international law. Such a debate would not take place in most countries of the developed world, where the utilisation of international law is quite common in the elucidation of the national constitution. The United States of America is one other jurisdiction where hostility to international law in constitutional discourse is evident[15]. Elsewhere it is rare or non-existent.

Occasionally in Australia, a more modern approach has been adopted. This happened, I believe, in *Roach v Electoral Commissioner*[16]. That case concerned a challenge to a 2006 amendment to the

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12 See e.g. *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 231, 247, 278, 292-296.

13 (1992) 175 CLR 1 at 42 per Brennan J.

14 (2004) 219 CLR 562.

15 *Atkins v Virginia* 536 US 304, 347 (2002); *Lawrence v Texas* 539 US 558, 586 (2003) and *Roper v Simmons* 543 US 551 (2005). See M.D. Kirby, "International Law – The Impact on National Constitutions", 21 American Uni Int L Rev 327 at 346 ff (2008).

16 (2008) 233 CLR 162.

Commonwealth *Electoral Act* designed to deprive all prisoners in Australia of the right (and duty) to vote in federal elections. In the reasons of the majority (Chief Justice Gleeson and, separately, Justices Gummow, Crennan and myself), references were made to decisions in foreign courts, applying universal standards of human rights, as bearing on the resolution of the Australian constitutional issue[17]. Strong dissenting opinions were filed by Justices Hayne and Heydon. They contested the relevance of such references.

Justice Heydon, in particular, argued that it was heretical and inconsistent with established legal authority in Australia to pay any regard to international human rights law in elucidating our Constitution. He seemed to question the integrity and acceptability of opinions of the United Nations Human Rights Committee[18]. This reflected a suspicion of multilateral agencies and of international law that has also been present in political discourse in Australia over many years. Our long physical isolation from traditional allies has made many Australians ver cautious about international law and occasionally hostile to its rules and principles.

It is my belief that Australians generally, and lawyers in particular, have to overcome such fears and anxieties. Certainly, they must do so if they hope to engage professionally with the rest of the world. In most countries such attitudes do not exist or are much less marked. To some extent, the antidote to such viewpoints must lie in legal education and in the exposure of Australians to international law and to the agencies of

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17 (2008) 233 CLR 162 at 203 [100]. See also at 177-179 [13]-[18] per Gleeson CJ.

18 (2008) 233 CLR 162 at 224-225 [181]. See also at 220-221 [163] per Hayne J.

the world community that devise and apply that law in an increasing variety of circumstances.

INTERNATIONAL LEGAL CULTURE

Because lawyers are ordinarily trained only in the laws of their own jurisdiction (in Australia, substantially of a sub-national jurisdiction), they sometimes reflect a lack of awareness of what is going on in other countries and, in particular, in different legal systems. Yet if Australian lawyers are to become engaged in international commercial arbitration, familiarity with other jurisdictions and different legal systems is clearly important. This is because such arbitrations will frequently involve participants and problems that come from the 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 legal culture that may help us to understand better the advantages involved in the conduct of an international commercial arbitration.

The research led in 2003 to a report, titled simply "Courts"[19], which was prepared by four researchers, led by Simeon Djankov. The report was conducted with co-operation, in 109 countries, from member firms of the

[19] The data used in the project are available at http://iicg.som.yale.edu/

Lex Mundi Group of legal firms. It set out to measure and describe the procedures used by litigants and courts in those countries in a small number of dispute situations, 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;
* The steps necessary to collect an unpaid cheque; and
* The steps necessary to 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 predictable. However, others are a little more surprising. The list of factors identified in the survey included:

* Whether a claimant was entitled to be represented in court by a friend or lay representative or only be licensed lawyers;
* Whether the court's procedures were substantially or wholly written 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 equity and the suggested merits of the case would suffice;
* Whether the procedures permitted free cross-examination of 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[20]:

> "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 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.

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[20] *Ibid*, *op cit*, Abstract.

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
German	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. 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 common law or a civil law tradition. Further, the differing sub-sets in the civil law tradition between those countries which can be grouped as influenced by the French legal tradition, the German tradition and the Scandinavian tradition show marked differences. 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 commencement of proceedings and 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. Again, this is a significant difference. It will be observed, however, that 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 Australian trade and commerce is most closely 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 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[21]. 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 suggested 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 discretion and procedural innovation.

On the other hand, the English judiciary, in the same historic period, were generally viewed as defenders of liberty. Normally, in the higher courts, they were generally 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

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

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, reducing paper disputes and enhancing speed in the resolution of litigation.

In recent decades, many common law countries (including Australia) have embraced habits of enhanced written documentation and have diminished the role for oral trial. The data in the Djankov report may therefore have implications for the approach of Australian governments and courts to reform of 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.[22] 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[23]:

> "[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 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."

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

[23] "Courts", above *op cit* Abstract p1.

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 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; introduction of cost incentives; and provision for contingency fees) all play a 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 AUSTRALIAN 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 sits on the edge of South East Asia and because most countries of that region have followed the civil law tradition (Thailand, Cambodia, Laos, Vietnam, China, Taiwan, Japan, Mongolia, Russia), it is important that Australian lawyers should be aware generally of features of that legal system 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, 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 procedures of independent, expert and neutral arbitration. Such importance goes beyond considerations of cost and delay. Reflecting on these features of legal systems of countries of the region will teach Australian lawyers that parties, witnesses, experts and others associated with such legal systems, will frequently approach the resolution of such disputes with a 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 through the 2009 ACICA conference 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 expert appointment 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 discussions at the 2009 ACICA conference and of the data revealed in the Djankov report is that Australian lawyers, considering a role for international commercial arbitration, must become more aware than they are at present of the commonalities and differences between the two great world legal traditions.

It was an assumption of many contributions to the ACICA conference that Australian participation in international commercial arbitration was a good thing. We need to ask whether this is necessarily so? Of course, such arbitration will benefit those persons who secure appointments as arbitrators. It will benefit some lawyers, arbitration bodies and doubtless bring high levels of performance, such as we expect in legal practice, and already see (at least in comparative terms) in Australian courts.

More fundamentally, it will provide an important service in which Australians have a comparative advantage as native-speaking

Anglophones, accustomed to independent and uncorrupted decision-making, and to professional legal skills of a high order.

Making such services available both in Australia and in the region and beyond, is an economic activity having a high money value. But it also helps to sustain economic progress, stable investments, secure capital flows and enhanced employment possibilities, such as attend stable economic investment. The point of this contribution is that Australian lawyers must overcome the lingering hostility they have to comparative and international law; and enhance their awareness of the world, and particularly of the region into which history has accidentally placed Australia. Australian lawyers must also become more familiar with the features of the civil law tradition which, until now, has been a legal mystery remaining to be discovered. Some elements of that tradition, once discovered, seem less attractive to the Australian lawyer than features closer to home. And that too may be a consideration favourable to the use of international commercial arbitration. We need to educate Australian lawyers in these truths.

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