Australian Bar Association and NSW Bar Association
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Commercial Law Stream Opening Address
A.J. Myers

1. This morning I will talk about two matters. First, I will say something about matters which relate to the integrity and standing of Australian State courts. Later I will speak briefly about international arbitration in Australia.

2. Australia is fortunate to be a society the strong skeleton of which is formed by institutions which support the aspiration of Australians to live in a free, tolerant, egalitarian and prosperous society. An essential foundation for a society having those aspirations is that it is governed by the rule of law. The rule of law, as it is conceived in Australia, depends upon a system of administration of justice by courts which, in the conduct of their functions, are independent of other branches of government and the judges of which, in the discharge of their duties as judges, are independent of improper influence, give effect only to the law and not to any other social, political, religious or ideological opinions and do so with a high degree of skill and knowledge of the law and of the craft of judging.

3. The remarks I will make today are no more nor less than the product of my experience especially as a barrister. The remarks I will make about State Courts are connected to their role in the maintenance of the rule of law. Some of things I will say may be applicable to Federal Courts but I am not speaking about Federal Courts to which some different considerations apply. The remarks I will make about State Courts are somewhat of a miscellany, but I believe all bear upon the capacity of State Courts to fulfil their purpose of determining disputes according to law fairly, efficiently and in a manner which upholds the rule of law and enjoys the confidence of litigants and the community. I will touch upon class actions, case management, advocacy and international arbitrations but not in a way, I hope, which steals any thunder of those who come after me today.

4. My experience does qualify me to say with authority that the life of a barrister is demanding: requiring hard work, some considerable resilience of personality and a deep knowledge of the practice and procedures of our courts, which knowledge can only be gained by experience in the practice of the law in the courts. As a barrister one makes one's mistakes in public under the scrutiny of judges, opponents, colleagues, litigants and the public. It is a crucible of experience which forms and hones character and skills pertinent to the conduct of litigation in our adversarial system.

5. As I have said, the rule of law is the fundamental condition for the maintenance of the sort of Australia to which, I believe, my countrymen and women aspire. That is, to say it again, a free, tolerant, egalitarian and prosperous society. It is beyond what I can say today to elaborate upon what is meant by those four elements of the aspiration of Australians for the society in which they live and wish their children and grandchildren to live.

6. The rule of law is not like other social values or norms. Let us think about freedom from discrimination on the basis of religion, ethnicity, or gender. Freedom from discrimination on those grounds is thought to require the assistance of laws framed for that purpose. Freedom from discrimination on those grounds is, in an important sense, a secondary value or social norm depending, as it does, on a more fundamental value or norm embodied in the rule of law. Thus, it would be folly to make a decision to weaken the rule of law for the ostensible objective of reducing undesirable discrimination. At least one would need to think very carefully before doing so.

7. What is meant by the rule of law is a matter that may be considered from various points of view. The least desirable state in which human life may be lived is anarchy: a condition which, for example, existed in Iraq and Syria or parts of those countries after the destruction of the regime of Saddam Hussein and before a new order was created. A sense in which we might use the expression "rule of law" is to describe any condition which is not anarchy. But it is not that crude view of the rule of law which is used in ordinary discourse in Australia. Law may be regarded as the rules which certain institutions administer. A law is a norm of conduct created by the legislature, the legitimacy of which derives from the democratic manner of the election of its members. As we know, judges also create law and, in the common law system, have created many of the rules governing matters of contract, property, civil wrongs and evidence. Some of the commonly accepted characteristics of a system governed by the rule of law are that the law is capable of being

complied with, that the rules which constitute the law are published, that those rules are clear, that the rules can only be changed in accordance with known and clear rules and that, in all significant respects, the rules are enforced by courts (or tribunals having characteristics of courts).

8. The courts (or kindred tribunals) that enforce the law should have certain characteristics: they should enforce the law according to reason, unaffected by prejudice or bias; they should decide the cases before them on the evidence and arguments presented; they should be accessible by all affected by the operation of the law; the judges should be fit by education and experience to determine the application of the law to the matters before them; the judges should be free from interference by the legislature and executive and judges should be assured and confident in the discharge of their duties so that their decisions, although not above scrutiny or criticism, command the confidence of litigants and the community.

9. The proposition I assert is that, in the Australian legal system, the administration of justice consistent with the rule of law, is dependent on the manner in which the courts discharge their functions.

10. It seems to me elementary that Judges should be appointed according to their competence to determine the application of the law to disputes arising for determination under the procedures of our courts between persons and the state and between persons other than the state. Thus, a judge should be a person of good character having the qualities that make him or her fit for the task of judging according to the law and procedures of the court to which the appointment is made. Second, the person to be appointed should be qualified by intellect and experience for the office of judge. Third, the person appointed should not be so associated with any particular group, faction or ideology so as to create a doubt as to his or her freedom from prejudice or bias in matters ordinarily arising for decision in the court.

11. There is little that can be said about qualities of personality and character or about the associations a person has which may be relevant to judicial office. The decision to appoint a judge should, no doubt, be made only if, after proper enquiries, it may safely be concluded that the appointee is not deficient in those qualities or by reason of those associations.

12. That the appointee should be qualified by intellect and experience for judicial office seems to me undeniably true. First, the rule of law in Australia requires that trials be held in public (with some exceptions) according to rules of evidence and procedure that are directed to ensure a fair process and a just outcome of the trial. The judge must possess not only a knowledge of substantive law but also must possess knowledge and experience to ensure a fair trial, fair in fact and in appearance. Thus, it was the practice that experienced barristers were appointed as judges of the superior courts. In the past 25 years this practice has not been invariably observed. Lawyers who have practised only as solicitors or who have no experience beyond teaching law in a university or other institution of higher education have been appointed to all superior courts. Very often appointees have never appeared as counsel in any trial. I have no doubt the appointment of persons who do not have substantial experience and familiarity as advocates with the practice and procedure of trials has affected the administration of justice. There may be exceptions to the proposition I have advanced, but generally the quality of the administration of justice by Courts is enhanced by the appointment of judges who are experienced and familiar with the practice and procedures of trials. This observation applies also to appeal judges. My observation is that appeal judges who have no, or little, experience of the conduct of a trial are less satisfactory than those judges who have that experience. The inexperienced appellate judge is apt not to understand the significance of matters which have occurred in the conduct of a trial; the inexperienced appellate judge is also apt to misunderstand that it is not the function of an appeal court to "second guess" decisions of a trial judge about matters of practice or procedure or matters involving the exercise of judgment as to how a trial should be conducted. A further tendency in recent times has been to urge that the diversity of the community, especially in gender and ethnicity, should be reflected on the bench. If the composition of superior courts were to reflect the diversity of the community that would, in general, have the tendency to increase community confidence in the courts. But this would be so only if those who were appointed merited appointment because of fitness to undertake the duties of judge. The mere ambition for the glittering prize of judicial office does not qualify an aspirant to judicial office to be appointed to that office. Generally, if a person aspires to the honour (and responsibility) of judicial office, that person should become qualified for that office on his or her own time and at his or her own expense, not as a judge at the expense of the public purse and the quality of administration of justice administered to litigants. There is

no need to appoint as judges those who need a course of instruction in how to conduct a trial and it should not happen, as it now does.

13. As a young barrister I admired the independence, diligence, learning and courtesy of Richard Newton, a judge of the Supreme Court of Victoria. My first trial as a barrister before a judge of the Supreme Court of Victoria, in February 1976, was before him: my client, the Commissioner of Taxation, was unsuccessful after a hard fought trial. Neither the officers of my client nor I had any doubt that the trial and its outcome was justice fairly done. In the next matter before that Judge, his oral judgment delivered very soon after the trial was concluded was critical of the honesty of a litigant, from the United States of America, who was present to hear the reasons for judgment, including that criticism, and the verdict against him. The litigant stood up in the body of the court when the verdict had been given. Everyone was apprehensive about what would be said and happen. But he praised Newton J for the fairness of the trial and the integrity of the administration of justice in the Court. That, it seemed to me, then as now, is the true measure of the quality of a Judge and the workings of the court, that the losing party has confidence in the process by which the dispute has been determined and accepts the verdict as just.

14. I have made some comments about the qualifications of persons to be appointed as judges. It has been suggested that appointments to superior courts should be made by some independent commission, or may be made only from a panel of persons who have been nominated by some independent commission. I do not believe that this is necessary as a solution to the recent tendency to make appointments for reasons other than capacity properly to discharge the duties of the office. Appointments made by the executive arm of government are an entrenched part of our constitutional heritage. The manner in which any independent judicial appointments commission is to be constituted and how appointments are to be made to it will give rise to difficulties, some of which cannot properly be foreseen. If the commission itself is criticised, but is not directly answerable to the electorate through parliament, then that would be a highly undesirable result and would tend to undermine confidence in the administration of justice.

15. There has been some discussion in the press recently about judges being slow to deliver decisions. There was a table of judicial performance published in the newspapers. No doubt, some judges were upset by what was published. I see that various explanations were made for delays and it was suggested that, in some sense, the facts that were contained

in the table were irrelevant to judging fairly the competence of individual judges. For myself, I was not so impressed with the analysis of words and paragraphs written and composed per day by individual judges. Indeed, I think one proper criticism of many modern judgments is that, not only are they too long delayed, but also they are also burdened by very longwinded recitations of parties' arguments and of facts which are not the dispute. One is inclined to think that the method of composition of judgments comes from tutorials given at some "judges school". Most of us who have the burden of reading judgments, and are paid to do so, would welcome more concise reference to facts and argument. Another feature of judgments nowadays is that, after a longwinded "run-up", the actual analysis of the law and the reasons for findings of disputed facts are concise to the point of being unintelligible. All that said, I have not seen it suggested that any of the published facts detailing the periods of delay in the delivery of judgment are wrong. And since I am at the Australian Bar Association conference I ought to say that correspondence in the press from barristers, whether on behalf of this organisation or otherwise, defending dilatory behaviour of judges was misguided. Relations between the bench and bar are important, but some of the correspondence that I saw defending judges could aptly be described as oleaginous. One wonders why.

16. One of the issues affecting the efficiency of judicial administration is the present tendency of judges to provide written reasons for decisions concerning matters of practice and procedure that arise in the course of trials. A judge who is experienced in the practice of the courts and knowledgeable about matters of evidence ought to be able to deal with all but very few issues of practice and procedure, including admissibility of evidence, at once and orally without reasons, unless requested by a party. In my experience, this was along the practice of competent judges, but often it does not happen nowadays. Does the present practice have something to do with the way in which statistics are collected in relation to judicial performance? It may also be related to a lack of confidence of some judges, who do not have sufficient experience as to matters of practice and procedure and admissibility of evidence. It may also be related to a tendency, in some courts of appeal in state supreme courts, to be unduly technical and critical of trial judges. Very often these appellate judges have had little or no experience in the conduct of trials.

17. I wish to say something about written evidence of fact, that is evidence which is not admitted as expert evidence. The practice of tendering evidence through written statements is generally a cause of unnecessary expense and delay. The evidence itself is created or confected in solicitors' offices and fashioned, not from the words of the witness, but with an eye to putting in the mouth of the witness words which it is thought will advance a particular cause. Great expense is incurred in the preparation of written evidence. Furthermore, as I have said, the evidence is usually created in solicitors' offices and that has the consequence that important decisions concerning the conduct of a case are not made by counsel who will appear at the trial.

18. If the written evidence is not bad enough, then one only needs to think about written submissions. Written opening submissions are invariably required. These are expensive to create and generally result in every point being taken, even unsustainable points, by the committee in the solicitors' office that prepares the written submission. Even if written submissions are sent to counsel to be "settled", as often is not, counsel's advice will be given little weight about the points that should be opened and the weight that should be attributed to particular matters. Very often, after reading written opening submissions, the unfortunate judge who has to read them will seek oral opening submissions. These may differ in content and emphasis from the written submission and add further to confusion and expense. Why cannot we make do with the pleadings for a statement of a party's case and a succinct opening of the oral evidence that will be called on behalf of the party? The quality of administration of justice, including speed and expense thereof, would be better served. Then, at the conclusion of the evidence in a modern trial, there is normally an application for days, or even weeks of time, to be devoted to the preparation final written submissions. Again, this matter is often not entirely in the control of counsel having the conduct of the case, and the closing submissions are overly long and very expensive to prepare. Written evidence and written submissions have contributed to the cost and complexity of trials without any advantage for the administration of justice. Cost and complexity of litigation make the courts less accessible. That affects the rule of law and public confidence in the courts.

19. Can I say something about "overarching purpose and overarching obligations". I take as an example, chapters 1-6 of the *Civil Procedure Act* 2010 of the State of Victoria. Section 7 of that Act provides that the overarching purpose of the Act and the Rules of Court in relation to civil proceedings is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute. Did we need to be informed of that? The legislation goes on to say that, without limiting how the overarching purpose is achieved, it may be achieved by the determination of the proceeding by the Court, agreement between the parties or by any appropriate dispute resolution process agreed to by the parties or ordered by the Court. Did we need to be informed of that? And should the Court have the power to order "appropriate dispute resolution process", independently of the agreement of the parties. I think not. The job of the courts is to determine disputes between the parties according to law, not to tell the parties it knows better than they how a dispute should be determined. It is then said that the Court must give effect to the overarching purpose in the exercise of its powers or in the interpretation of those powers whether they are part of the courts inherent jurisdiction, implied jurisdiction, or statutory jurisdiction or a rise from or are derived from the common law or any procedural rules or practices of the court. Again, did the court really need to be so directed? I can go on. The provisions of chapters 1-6 run to 84 sections creating uncertainty and confusion about how procedural rules, clearly expressed, should be applied by experienced judges. No, that is not what is most undesirable about these provisions: the overarching purpose is an invitation to the exercise of untrammelled discretion in relation to conduct of trials. My own experience is that judges who can barely control their instinct for prejudgment, manipulate the power to control the conduct of litigation by reference to "overarching purpose". Litigants are often puzzled by decisions made by judges with reference to the overarching purpose in circumstances where counsel can only explain that the judge can apply the procedural rules concerning litigation as the judge sees fit to achieve what the judge considers to be a just outcome of the case. This does not cut the mustard with the unsuccessful litigant who is, as I have suggested, the most important person in court. The overarching purpose is also a mechanism by which the judge, who is reluctant to undertake a difficult trial, may attempt to force parties to an agreement. Many of us will have experienced cases where multiple mediations have been ordered when one, or sometimes both, of the parties do not want to waste time and money in relation to the mediation.

20. One of the worst decisions of the High Court of Australia is undoubtedly *Campbells Cash and Carry Pty Limited* v. *Fostif Pty Ltd* (2006) 229 CLR 386. In that case, that unruly horse, litigation funding, was freed by the High Court. Litigation funding occurs when an entrepreneurial person, sometimes outside the jurisdiction and of shady character, identifies persons who may have a good cause of action but which, generally, would yield to any one of them, if successful, an insufficient sum, to warrant the expense and risks of undertaking litigation. The funder then takes control of the rights of that person by assignment or some other form of agreement in consideration for taking a third, or more, of the proceeds of litigation, if successful. The funder acquires the ability to control the litigation. In *Fostif* the submission of counsel for the appellant was that there is an important public policy against unjustifiable intermeddling by a non-party in litigation concerning the disputes of others. The proscription of trafficking in litigation is at the heart of this policy which plays an important part in preserving the integrity of the administration of justice. I was the counsel for the appellant who spoke those words. They still seem to me to be correct. My client was unsuccessful on the larger issue of public policy but succeeded on the appeal on a relatively narrow point concerning the meaning and effect of Part 8, Rule 13 of the Rules of The Supreme Court of NSW. The effect of litigation funding is to take the conduct of litigation out of the hands of the person whose interest is intended to be vindicated by the litigation. A vice of litigation funding is that it leads in the first place to multiplication of litigation, because it is in the interest of litigation funders to institute litigation, and, in the second place, to the settlement or compromise of that litigation, regardless of the interests of the nominal litigant, because the litigation funder, by the maintenance of the litigation, has been able to cause the defendant to form the view that it would be better to pay some amount than suffer the continued risk of paying the full amount to which each nominal litigant is entitled. It may also be pointed out that the litigation funder is not a person who owes duties to the court as do solicitors and counsel.

21. The function of a court is to determine disputes between parties. The court's processes do not exist in order to enable third parties to make money by stirring up disputes in which they have no interest. It seems to me that in a fundamental way the court's processes and the administration of justice, and thus the rule of law, are harmed by litigation funding. The decision in *Fostif* concerning litigation funding was a decision about a matter of social policy. A court is not equipped to make such a decision. It was a naïve and vain exercise

of judicial power by the High Court to sanction litigation funding businesses in Australia. It was unnecessary to do so to decide the appeal which upheld the decision below on a different ground. Litigation funding cases have imposed a considerable burden on state and federal courts and diverted them from the quelling of real disputes. One does not have to be cynical to see litigation funding as essentially a way of making money for the funder, and the funder's lawyers, by using the court's processes. I believe the role of the courts in determining disputes maintained by litigation funders has reduced public acceptance of the functions of the courts and thereby damaged the rule of law in Australia.

22. Generally, I do not believe that a particular form of judicial overreaching, that is to make decisions according to criteria which are not strictly legal but which reflect the ideological preferences of the judge, is a common phenomenon in Australia. Generally also there does not exist a propensity of judges to make statements upon matters which are in the political arena. Nonetheless, there have been some recent instances where judges have intervened in political controversies about sentencing practices. These interventions have demonstrated how unwise it is for a judge to venture a public opinion on a matter of political debate. The judges in question have been sternly corrected and, indeed, ridiculed through means of communication that politicians have and which are not available to judges.

23. There is one rather curious issue which has been the subject of public comment by judges and some officers, I believe, of the Australian Bar Association. It was suggested in newspaper reports that barristers have complained that they consider certain conduct by judges to be bullying. Now "bullying" (whatever exactly that means) is a form of conduct that has achieved a lot more prominence in Australia in recent times than formerly. The bar is not for the overly sensitive and a trial is a tough environment in which to earn a living. Some judges can be grumpy and some judges may be critical, quite properly, of the manner in which an advocate is conducting himself or herself. Courtesy between the bench and bar is best achieved in an environment of mutual respect between colleagues, judges and advocates, who are all members of the same profession. But the long and the short of the matter is that a court room is not a public service work place. If the conduct of a judge is not such as to affect the quality of administration of justice, that is, it is not a matter that can properly be raised as a ground of appeal against any decision of the judge, justice is best served by dealing with incidents of rudeness (or if you like, bullying) quietly and informally. A statement reported in the financial press about a month ago that "all

work places should be safe and respectful, and our courts are no different" embodies a serious misconception about our courts. "Our Courts" are different from "work places". The Supreme Court of a State may be the "work place" of the registry staff or the cleaners, but it is not in the same sense, or perhaps any sense, the work place of judges and legal practitioners. The assimilation of a superior court to any work place would gravely diminish the standing of that institution and this would be a step in the weakening of the administration of justice according to law. It will not serve the interest of the administration of justice if the courts come to be seen as a public service work place. Next we will have debates about whether it is appropriate for the judge to give the unsuccessful litigant a hug or whether pet dogs ("companion animals") should be allowed in court.

24. Now may I come, albeit briefly, to what may well be, in due course, a threat to judicial independence of the most serious character. The *Judicial Commission of Victoria Act* 2016 established in Victoria a Judicial Commission which came into existence on 1 July last year. The Act is 169 pages long and runs to 217 sections. Its purposes discerned from the Act are (and I quote) to ensure a transparent and accountable process for investigation of the performance of functions of judicial officers, maintaining present and future public confidence in the Victorian courts, protecting the privacy and safety of individuals and preventing disruption to the orderly administration of justice. The Act enables any person to make a complaint to the Judicial Commission about the conduct or capacity of a judicial officer. It also authorises each of the Law Institute and the Victorian Bar to make a complaint on behalf of a member, without disclosing the identity of the member. There is the usual panoply of draconian powers to compel evidence, to seize documents to enter premises and so on. The Act provides a variety of mechanisms for dealing with the judge who has transgressed.

25. The Judicial Commission is full blooded assault on judicial independence. The purposes of the enactment, as I have described them, are Orwellian expressions of the opposite of the effect of the enactment, which will undoubtedly reduce the independence of the judiciary, undermine public confidence in the judiciary and have a marked tendency to disrupt the orderly administration of justice. As far as I can determine, there is no abuse identified to which the enactment is a response. I do not know how many complaints have been made to the Judicial Commission in its 17 months of existence or by whom. I do know that it will undermine the rule of law in at least Victoria. That is because it is an assault on the independence of courts. Its purpose and effect is to diminish the authority

of the Courts to regulate themselves. The Supreme Courts of the states and their judges should not be subject to the control of an authority which is part of the executive government. Judges should perform their functions without supervision or interference from any such authority, but subject only to the power of Parliament to remove any judge by a majority vote of the Parliament, which, in our democracy, is accountable to the electorate for the exercise of its powers.

26. The second matter about which I wish to say something today is international arbitration.

27. Australia is well furnished with bodies, which are in competition with each other, concerned with arbitration, including international arbitration. The Chartered Institute of Arbitration (Australia) offers accreditation and training to arbitrators and mediators. There are other bodies in Australia with similar objectives including, at least, the Australian Commercial Disputes Centre, which changed its name about eight or 10 years ago to the Australian International Disputes Centre, the Institute of Arbitrators and Mediators Australia, the Australian Centre for International Commercial Arbitration and the National Alternative Dispute Resolution Advisory Council. The Institute of Arbitrators and Mediators Australia, about 20 years ago, published the "IAMA Rules for the Conduct of Commercial Arbitrations". The Australian Centre for International Commercial Arbitration has published its own arbitration rules since 2005. Thus, there is no shortage in Australia of bodies which have the function of supporting arbitrations and other methods of alternative dispute resolution.

28. We also know there is a vigorous contest between nations, states and cities to establish and maintain successful dispute resolution centres. Such a centre is believed to serve the interests of the nation, state or city by attracting parties to come to the centre for the purpose of efficiently and fairly quelling disputes, especially between commercial enterprises, by alternative dispute resolution mechanisms, alternative that is to the judicial processes of the state which can be slow and a costly imposition on the public purse. Increasingly, the operation of those alternative dispute resolution mechanisms is seen as a valuable economic activity, providing employment for local lawyers, administrative personnel, and in hotels and restaurants, because it attracts foreigners who come to utilise the dispute resolution centre to resolve disputes that may otherwise have little or no connection with the place where the centre is established. The Singapore International Arbitration Centre is a good example. The ICC in Hong Kong is another regional example.

London teems with solicitors and barristers and arbitration rooms offering their skills and facilities to foreigners. There has been established in Auckland an international arbitration centre with similar characteristics to SIAC. In Toronto there is a centre for dispute resolution which economic studies suggest brings to the city annual economic benefits of many hundreds of millions of dollars.

29. In the space of less than 20 years, the provision of university education to persons who come to Australia from abroad has come to rival the sale of iron ore and of coal as an engine of the Australian economy and is a signal to the whole world of the highly advanced character of Australian society. The "export" of education services from Australia was valued last year at $35 billion. The rise of tertiary education in Australia has contributed mightily to the social and intellectual life of the country and has created very many fulfilling jobs for Australians. The burgeoning of tertiary education in Australia has educated many young men and women from abroad in the values of our country, much to the advantage of those young men and women and to their home countries when they return there with the capabilities to be leaders in their own societies. The attributes of Australia which have made it a destination for so many foreign students and the attributes which would make Australia an ideal place for establishment of successful arbitration facilities for the determination of foreign as well as local disputes are not materially different. Australia has been conspicuously successful in the field of university education but would not be judged so in the field of alternative dispute resolution.

30. May I say at once that the last remark is not a comment upon the quality of my country men and women engaged in the field of alternative dispute resolution. They are equal to the best as arbitrators, solicitors and advocates.

31. But these qualities are not recognised or acknowledged by many. To Europeans especially, Australia is, and is situated in, a remote and unimportant part of the world. That is not merely a comment on the "tyranny of distance". It reflects an ignorance of the remarkably advanced society and economy of Australia.

32. May I suggest some remedies. First, Australian lawyers and professional people who are engaged in activities connected with alternative dispute resolution are among the most capable in the world. I have seen it as an arbitrator and experienced it on the receiving end as counsel. English arbitrators with whom I sit invariably remark (as is the fact) that the Australian advocates before us are the best that have appeared before them.

33. This country is free of corruption and is governed under the rule of law. The language of Australia is English, the international language, especially in business. The cities are safe and the facilities for visitors and for the conduct of business are very good indeed. "Brand Australia" is very strong, especially in the Asia/Pacific region.

34. These advantages of people and facilities notwithstanding, we lack in Australia a single institution in the field of alternative dispute resolution which can promote the advantages of Australia as a place for the conduct of international arbitrations and can provide a centre with appropriate physical facilities to do so. Singapore, for example, does this well.

35. The Australian Bar Association would serve well its members if it set as goals of the IBA the development in Australia of an equivalent of SIAC and the promotion the attributes of Australia which make our country an ideal place for international arbitration. I cannot resist saying that the establishment of an equivalent of SIAC would be more important to the Australian legal profession than writing in the press about bullying by judges.

36. Second, it does not appear that Australian lawyers, as often as they could do so, advise clients of the advantages of embodying in arbitration agreements provision for the resolution of disputes in Australia, under Australian law and Australian dispute resolution procedures. This is a long game as is evident, for example, in the many Australian agreements, often written long ago, which refer to disputes being resolved under ICC Rules.

37. Third, I believe that the provisions of the Australian Consumer Law which prescribe and provide remedies for "misleading and deceptive conduct" should be amended to provide that the misleading and deceptive conduct provisions do not apply to "commercial" as opposed to "consumer" transactions or at least do not apply to commercial transactions which have an international character, in each case where the transactions are regulated by agreements which exclude the effect of the statutory provisions of the Australian Consumer Law. The effect of the misleading and deceptive conduct law is a reason many persons do not wish to have disputes determined according to Australian Law or in Australia, where the "misleading and deceptive conduct" rules have a much more lively influence on the outcome of dispute resolution procedures.

38. Finally, it is the fact that the Australian State Supreme Courts (including Courts of Appeal) are of uneven quality. This leads one to the Federal Court, which I believe, can continue to make an enduring contribution to arbitration in Australia through its specialist arbitration list, with judges of appropriate learning and experience, able to provide an Australia wide service of high and unvarying quality to deal expeditiously and competently with disputes arising in connection with arbitration matters.

39. The Federal Court can, over the long run, create an Australian arbitration law and become known throughout the world for its contribution to the field of arbitration law. This itself would be another reason for people to choose Australia as an arbitration venue.

A.J. Myers

16 November 2018