Inquiry by Hon. Roger Gyles AO QC

on

International arbitration

REPORT ON ENHANCING INTERNATIONAL ARBITRATION OPPORTUNITIES

THE COMMISSION:

To inquire into and report on actions that the Australian Bar Association (ABA) can take to enhance opportunities for Australian barristers to practise international disputes, with a focus on arbitration in the Asia-Pacific region considering:

(a) how to retain international work in, and bring such work to, Australia;

(b) how to facilitate the briefing of Australian barristers to work overseas, particularly in the region.

INTRODUCTION

1. This Report deals with international commercial arbitration, not other international activities such as appearances in foreign courts; international commercial mediation; domain name arbitration; Court of Arbitration for Sport arbitration; WTO appeals; and state versus state public law disputes. Aspects of this Report may have relevance to those activities and vice versa. Time limitations have made it impractical to deal with investment treaty arbitrations and the Centre for Settlement of Investment

Disputes (ICSID) except in passing. It is a field where Australians practise as arbitrators and counsel that would repay attention by the ABA and ACICA.

2. The methodology has been to:

   (1) call for and consider submissions;

   (2) review the literature;

   (3) consult with persons with experience and knowledge in the field.

3. This Report sets out my conclusions from consideration of the information gathered and suggestions made rather than reproducing all of that material. The Report assumes a knowledge of the fundamentals of international commercial arbitration and assumes the desirability of the objective. It is written as a report, not an article to be published in an academic journal.

4. My recommendations are directed to the steps that the ABA can take. Topic (a) above is significant for the Bar as there is a natural advantage in barristers being briefed in arbitrations heard in Australia. That in turn would assist more barristers to become expert in the field and build international reputations. However, the ABA has no direct control over that objective and it is a medium and long-term goal. I will therefore deal with topic (b) first after setting out the relevant background.

5. I delivered an interim report on 2 December 2018, shortly after my appointment, following an announcement by the Government of a funding initiative for the Pacific, recommending that the ABA take immediate steps to prosecute the case with the Australian Government to ensure that contracts financed by the Australian Government pursuant to the Infrastructure Financing Facility for the pacific and the related EFIC financing include dispute resolution clauses providing for arbitration in Australia.

BACKGROUND

6. An overview of international commercial arbitration overseas and in Australia is required before discussing the way forward. What follows will not be comprehensive and may not be completely accurate or up-to-date in every respect. The broad picture is clear enough for the purposes of this Report.

7. There is a world of international commercial arbitration with an interesting and lucrative role for Australian barristers as advocates and arbitrators that has not been adequately penetrated by the Australian Bar.

8. The attraction of decision by an expert tribunal of choice that is more widely enforceable than a court judgment due to the New York Convention is unlikely to diminish.

ARBITRATION OVERSEAS

9. Obtaining an accurate account of arbitration in the region (understood broadly) is not easy. The reports from the administering bodies are not consistent in methodology and the treatment of ad hoc arbitrations and domestic arbitrations varies. It is said that North American activity is under reported.

10. The International Chamber of Commerce (ICC) ranks as the most preferred arbitral institution worldwide according to the 2018 Queen Mary/White and Case Survey. The LCIA ranked second but does not have a big presence in the Asia-Pacific. The Singapore International Arbitration Centre (SIAC) ranked third and the Hong Kong International Arbitration Centre (HKIAC) ranked fourth.

ICC

11. The ICC is based in Paris. It has case management offices in Hong Kong and Singapore (as well as New York and San Paulo), a regional office in Abu Dhabi and a representative office in Shanghai. The latest statistics available are for 2017. In that year 810 new cases were filed and at the end of the year 1,578 cases were pending.

12. There was a wide geographical spread of parties led by the USA with 8.4%. There were 323 parties from East and South East Asia and the Pacific. China led with 69 followed by South Korea 59, India 56, Japan 29, Australia 27, Singapore 23, Indonesia 10, Malaysia 10 and the rest under 10.

13. European locations, particularly Paris and London, dominated the places of arbitration, although Singapore was third with 38 arbitrations and Hong Kong fourth with 18. Australia had 4.

14. Interestingly, and significantly, Australia was the only Asian-Pacific country in the top 12 for the nationality of arbitrators with 39, ranking 11th. Singapore (25), New Zealand (17), India (16) and Malaysia (12) were the only others in double figures. Overall, the United Kingdom dominated with 219.

15. At the end of 2017, 36% of pending cases involved amounts in dispute below US $ 5,000,000 and 24% above US $50,000,000. The average value was US $ 137,325,630.

16. Australia has current representation on the ICC International Court and on the Commission for Arbitration and ADR. There is an Australian Nomination Commission of 7, all Australian. Of these, three are working overseas with international firms, one is working overseas as manager of arbitration chambers, and three are with Australian firms. None are barristers or ex-barristers.

LCIA

17. The LCIA has a joint venture in Dubai, a branch in India and offices in Maxwell Chambers in Singapore and Arbitration Chambers in Toronto, Canada.

18. London dominated as a place for hearing. Banking and finance was a major sector.

19. In 2018 it administered one case in Australia. Australian parties constituted 0.6% of parties, Singapore 1%, India 9.4% (compared with 1.3% in 2017), Pakistan 1.3% and the rest of Asia 2.8%. Australians received 11 arbitral appointments, Singapore and Malaysia 6 each and New Zealand 3.

Singapore

20. SIAC handled 402 new cases in 2018, 337 international and 65 domestic. SIAC administered 375 of them. US$7.06 billion was in dispute overall and US$7 billion in SIAC-administered cases. The average value for new cases was US$24.02 million and the highest for a single administered arbitration was US$2.38 billion.

21. The top foreign parties were USA 109, India 103, Malaysia 82, China 73, Indonesia 62, Cayman Islands 51, South Korea 41, Hong Kong 38 and Japan 30. Australia was 16, Vietnam 24, Bangladesh 19, Thailand 10 and Philippines 10.

22. Again, Australia is over-represented in the appointment of arbitrators. It ranked third behind Singapore and United Kingdom with 31 appointments.

23. SIAC has representative offices in Mumbai and Shanghai and an overseas liaison office in Seoul.

24. Australians have a long history of participation in the governance of SIAC. Professor Michael Pryles AO PBM is currently a member of the Court for Arbitration. He was the founding President of that Court, was the Chair of the Board of Directors and then President. A number of Australians are on the SIAC panel of arbitrators.

25. One of the reasons for Singapore's relative success has been the availability of Maxwell Chambers, a state-of-the-art arbitration facility, in a refurbished heritage building made possible by government support. It has become an arbitration hub, housing local offices of arbitration-related bodies and offices for lawyers, including barristers' chambers – principally English chambers, with one group of Australians to be mentioned later. It has recently been expanded with the acquisition and conversion of another building.

26. Singapore also has favourable tax treatment of visiting arbitrators and ready right of entry for the purposes of arbitration.

27. It is worth noting that Australia is also represented by four retired Australian judges as Justices of the Singapore International Commercial Court.

Hong Kong

28. In 2018, 265 arbitrations were submitted to HKIAC, of which 146 were administered under HKIAC or UNCITRAL Rules: 71% of cases were international in that at least one party was not from Hong Kong; 39.4% involved no Hong Kong parties; and 8.4% involved no Asian parties. The total amount in dispute was approximately US$6.3 billion and the average amount in dispute in administered arbitrations was approximately US$43.2 million. HKIAC has its own arbitration facilities.

29. The top ten nationalities of parties were (in order) Hong Kong, Mainland China, British Virgin Islands, USA, Cayman Islands, Singapore, South Korea, Macau and Vietnam (equal) and Malaysia. The number of Australian parties is not shown. Western Australian law was said to have been applicable but with low frequency.

30. Australia was equal fifth in arbitrator appointment (with France and Mainland China), with 6 cases behind United Kingdom 37, Hong Kong 25, Canada 7 and Singapore 7.

31. Some attribute the surge of Singapore ahead of Hong Kong to concern about the increasing control by China. On the other hand, Hong Kong is well placed to benefit from increasing arbitrations involving Chinese parties.

32. Australians have been involved with the governance of HKIAC. At the moment Mr John Cook, an architect now practising in Hong Kong is on the Council and the Hon. James Spigelman AC QC is a member of the International Advisory Board.

33. There have always been Australians on the Hong Kong Final Court of Appeal. Four retired Australian judges are now in office.

34. A number of Australians are members of the HKIAC panel.

Malaysia

35. The KLRCA has become the Asian International Arbitration Centre (AIAC) operating from the same attractive historic building in Kuala Lumpur. The last annual report by KLRCA was for 2017. Most cases were domestic construction adjudications. The statistics for international arbitrations are opaque. A number of Australians are on the arbitration panel.

China

36. There is a plethora of arbitration institutions in China. The best known for international arbitration are the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC). The vast increase in China's foreign trade and investment has led to a corresponding increase in disputes with Chinese parties. The belt and road project is expected to accelerate that trend. A number of Australians are on the CIETAC panel. CIETAC has established a sub-commission in Hong Kong: CIETAC HK.

India

37. Many Indian-based disputes, domestic and international, are arbitrated out of India because of the Indian arbitration regime and the role of the courts in relation to it, particularly in London, Singapore and Hong Kong under ICC, LCIA or SIAC rules. In addition, there has not been strong institutional support for international arbitration. Steps are being taken to change this. The Indian Arbitration and Conciliation Act 1996 has recently been amended twice to modernise it. The New Delhi International Arbitration Centre (NDIAC) has been established by Central decree to replace the ineffective International Centre for Alternative Dispute Resolution (ICADR). It is

declared to be an institute of national importance with a Central government promise of a contribution to funding each year. The Mumbai Centre for International Arbitration (MCIA) has been established with State government support. Foreign lawyers cannot appear in arbitrations in India.

Dubai

38. The Dubai International Arbitration Centre (DIAC) operates in Dubai proper. It received 161 new arbitrations in 2018 (compared with 440 in 2011).

39. DIFC-LCIA Arbitration Centre is a joint venture between the Dubai International Financial Centre (DIFC) and the LCIA. The DIFC is a special jurisdiction in Dubai with its own set of laws, regulations and court system. When DIFC is the seat of an arbitration, the DIFC courts are the curial court. There is an up-to-date arbitration law based on the UNCITRAL Model Law. The Court applies common law principles and has some foreign judges including the Hon. R. D. Giles QC, a former NSW Supreme Court judge. The Centre does not publish statistics on the website but claims that the workload is increasing fast.

New Zealand

40. The New Zealand International Arbitration Centre (NZIAC) provides a fully administered dispute resolution process. A number of Australians are arbitration panellists. It does not appear to have a physical centre. No statistics are published on the website. New Zealand has been a longstanding adherent to the New York Convention. The Arbitration Act 1996 was based on the UNCITRAL Model Law and was brought up-to-date in 2007. Interestingly, it aims at the "Trans-Pacific Region" including the western seaboard of the United States and South America.

41. The Arbitrators and Mediators Institute of New Zealand (AMINZ) is similar to, and has links with, IAMA in Australia – now part of the Resolution Institute. It is unclear whether it administers international arbitrations. One feature of note is an opt-in Arbitration Appeals Tribunal chaired by Sir David Williams QC, a prominent international arbitrator, dealing with appeals on questions of law.

42. Bankside Chambers in Auckland have taken space in Maxwell Chambers in Singapore led by Sir David.

Others in Asia

43. Most regional countries have an international arbitration body or bodies, but have not gained as much momentum as those discussed. Indonesia, South Korea, Japan, Vietnam, the Philippines and Mauritius are of interest.

Pacific Islands

44. There are no Pacific arbitral institutions. No States in the region other than Fiji and the Cook Islands have adopted the New York Convention but the Asian Development Bank has a project to achieve adoption with a barrister from Sydney playing a leading role. I am aware of disputes arising in Papua New Guinea over the years being

arbitrated in Australia – often in Queensland. I expect that disputes in other countries would be arbitrated in Australia or New Zealand.

Representation

45. I have found no statistics as to those acting in international arbitrations in the region. The local profession in the venue of hearing have a place and international firms are ubiquitous. The English Bar is well-represented in cases in Singapore, Hong Kong and Kuala Lumpur. A number of English chambers have a presence in those places and have clerks or managers actively marketing throughout Asia and the Pacific, including Australia. The Bar Council for England and Wales conducts international promotion, as does the UK COMBAR.

46. It is worth noting that there are many Australian lawyers practising in international arbitration abroad in law firms, some of whom have served time with international arbitral bodies.

Arbitrators

47. As seen, Australians have a good strike rate of appointment. This may reflect the fact that many of those available have held high judicial office and have acquired good reputations as arbitrators. It may reflect the effect of pioneer arbitrators such as Professor Doug Jones AO and Michael Pryles who have established large practices. It may reflect the number of Australian lawyers who have a profile through international practise in firms here and overseas.

INTERNATIONAL ARBITRATION IN AUSTRALIA

48. The International Arbitration Act 1974 (Cth) adopted the 1958 New York Convention on the Reciprocal Recognition and Enforcement of Foreign Arbitral Awards. Amendments in 1989 adopted the UNCITRAL Model Law providing rules for the conduct of international arbitrations and also adopted the 1965 Investment Treaty Convention (ICSID). The revised Model Law was substantially adopted by amendments in 2010. ACICA has been appointed as the default appointing authority for purposes of sections 18(1) and 18(2) of the IAA (which replicate Articles 11(3) and 11(4) of the UNCITRAL Model Law).

49. The Australian Centre for International Commercial Arbitration (ACICA) was founded in 1985 as a not-for-profit public company limited by guarantee. The history of it is traced in an entry in the Encyclopaedia of International Procedural Law by Nottage and Garnett to be published later this year. It is not necessary to set that history out for present purposes but there has been a good deal of effort by many to advance ACICA's cause. Dr Clyde Croft QC (now a judge of the Victorian Supreme Court), Professor Michael Pryles AO PBM and Professor Doug Jones AO warrant special mention. It is fair to say that, with exceptions, barristers have not played a major role in the governance of ACICA and the role of academics has declined. The influence of legal firms has increased over the years no doubt partly because the funding model has substantially depending on contributions from that source.

50. ACICA is now the only arbitral institution in Australia administering international commercial arbitrations in Australia. It has a comprehensive set of Rules and Guidelines for the administration of arbitrations and can also administer ad hoc and UNCITRAL international arbitrations. It has model clauses for use in contracts. The Australian Maritime and Transport Arbitration Commission (AMTAC) is a specialist commission of ACICA and they share premises and resources. ACICA shares premises and some administrative functions with the Australian Disputes Centre (ADC) in Sydney pursuant to an arrangement that makes the ADC premises available for both domestic and international arbitrations and mediations on a commercial basis. The ADC premises and associated facilities are modest by international standards.

51. It has memoranda of understanding with other interested Australian bodies such as the Chartered Institute of Arbitrators Australia (CIArb Australia). An MOU is currently being negotiated with the ABA. It is a member of the International Federation of Commercial Arbitration Institutions.

52. ACICA also has the function of attracting international commercial arbitration to Australia and of liaising with relevant international bodies. It conducts various promotions here and abroad. ACICA offers some training and education including in conjunction with CIArb.

53. ACICA does not publish statistics. Nottage in a recent Kluwer Arbitration Blog referred to "a board members publication" in 2015 suggesting that, on average, 8 cases per year had been attracted since 2010. I am aware of information suggesting a significant increase since then, but still small compared with SIAC and HKIAC.

54. The governance of ACICA is complicated. For example, it has a board of 27, a Council of 22 and a Practice and Procedures Board of 8. It does not publish accounts or an annual report on its website. The Constitution is not available on the website. There has been little, if any, direct funding from the federal government.

55. The Perth Centre for Energy and Resources Arbitration (PCERA) was established in 2014 to administer domestic and international arbitration of disputes in energy and resources and related fields, largely at the instigation of WA barristers. No statistics as to administered arbitrations are published. Arrangements to integrate ACICA and PCERA are said to be well advanced and are to be welcomed.

56. The Melbourne Commercial Arbitration and Mediation Centre (MCAMC) provides a venue but does not administer arbitrations. Information as to the actual venue is not transparent.

57. Apart from those mentioned above, various premises are available for the conduct of arbitrations in all State and Territory capitals on a commercial basis.

58. The rules of the Resolution Institute (the successor to IAMA and LEADR) are suited to all types of arbitration, but the focus is on domestic arbitration (and mediation). The Resolution Institute conducts training for arbitrators. State and Territory legislation is now reasonably aligned with the International Arbitration Act, so training and experience in domestic arbitration is useful in preparation for international work.

59. The Chartered Institute of Arbitrators (CIArb) is a global organisation with a focus on training and accrediting arbitrators and potential arbitrators. CIArb Australia provides training and accreditation for arbitrators. CIArb Australia is a proponent of international arbitration in Australia and sponsors events promoting it. The President's Report for May 2018 to April 2019 gives a good account of that activity. There has been a good deal of overlap between those involved in ACICA and CIArb Australia. In joint venture with CIArb East Asia and CIArb Singapore, CIArb Australia offers the CIArb Asia Pacific Diploma in International Commercial Arbitration. It conducts an introduction to international arbitration course, a course leading to Membership, a course leading to Fellowship and an Award writing course. It has provided a Tribunal Secretaries training course in conjunction with ACICA in 2016. Professor Doug Jones AO had a term as President of the global body. Barristers have been well represented in the running of CIArb. Caroline Kenny QC is the current President and Garry Downes QC (as he then was), Malcolm Holmes QC, Michael Shand QC, Rashda Rana and Albert Monichino QC were among her predecessors.

60. Arbitration week is held each year in a different city in Australia with interested bodies taking part.

61. The International Council for Commercial Arbitration (ICCA) 2018 conference was held in Sydney hosted by ACICA.

62. The Law Council of Australia and the ABA each has an international committee with an interest in international arbitration. Various of the State and Territory Bars and Law Societies have groups or events related to arbitration.

63. Undergraduate and graduate courses in international arbitration are offered by a number of Australian Universities. Some academics are well known internationally and some practise in this and related fields. Australian universities facilitate students participating in the Annual Willem C Vis International Arbitration Moots each year.

64. The Federal Court and all State and Territory Supreme Courts have jurisdiction in relation to applications under the International Arbitration Act. The State and Territory Supreme Courts each has jurisdiction under the similar domestic legislation. There is a scope for confusion by overseas observers. A risk of inconsistent decision exists. That risk has emerged in the past. Currently, the general approach can be seen as pro-arbitration, particularly following the High Court decision in TCL, and State courts and the Federal Court are tending towards specialist judges or lists to handle arbitration applications. However, uniformity in approach cannot be guaranteed. Some have complained of costs and delays in court proceedings and the difficulty of dealing with claims and defences with little merit.

65. The Federal Court is hosting an International Arbitration Series this year in conjunction with CIArb. The Hon. James Allsop AO, Chief Justice of the Federal Court has been a long standing supporter of international commercial arbitration and has written extensively in the field. ACICA has a Judicial Liaison Committee chaired by Allsop CJ.

66. The legal profession is also State and Territory based, although Western Australia recently agreed to join the Legal Profession Uniform Law Scheme with NSW and Victoria – as it happens, the principal States concerned with arbitration.

67. Anecdotal evidence is that the cost of arbitrating in Australia including administration fees, professional fees and facilities is significantly less expensive than in Singapore and Hong Kong.

68. A missing link in all of this is reliable information on the extent of international arbitration in Australia. As noted, ACICA does not publish statistics. Ad hoc arbitrations can have international parties and may not be administered by any institution. The line between domestic and international can be blurred. I am aware of only two surveys that give some insight.

69. A Report on Alternative Dispute Resolution was prepared for the Victorian Department of Justice and Regulation by Ipsos (a research organisation) and Jeffrey Waincymer (an academic and Arbitrator) and delivered in December 2016. It was based upon quantitative and qualitative research. It dealt with ADR generally and was focused on Victoria and the Victorian government. However, it has much of relevance to international commercial arbitration. It found general ignorance of international arbitration among in-house counsel in Australian corporations and governments leading to the use of foreign arbitrations, arbitrators and lawyers. The authors saw education of in-house counsel as a strategic priority. It was suggested that Australia lacked a critical mass of practitioners comparable with major international firms. When a counter party has power, it is unlikely to agree to Australian arbitration and is likely to choose a venue such as Singapore. Where an Australian party has power, there seems to be a reluctance to insist on an Australian venue. Geography is seen as a negative compared with Singapore or Hong Kong. There is also concern some about the application of Australian consumer and competition laws to arbitrations with an Australian seat, even if Australian law is not chosen. International respondents chose Singapore and Hong Kong ahead of any Australian city, with Sydney shading Melbourne behind them.

70. The WA Arbitration Initiative commissioned a Western Australian Arbitration Survey at the end of 2018 to assess the nature and extent of arbitration with a WA connection in the 2017/2018 financial year. The Survey Report is to be released on the day this Report is to be presented. Key findings are as follows:

- 105 unique arbitration proceedings were reported by respondents, including 53 domestic disputes and 52 international disputes;

- the combined value in dispute is over $14 billion in claims and an additional $8.5 billion in counter-claims;

- firms in WA billed an estimated $85 million on arbitration work plus $9 million in Tribunal costs, $13 million in witness fees and $4.5 million in other costs.

71. Another missing link is the amount of international arbitration work being done by Australian barristers here and abroad. My enquiries indicate that the answer is more than commonly thought but a good deal less than desirable.

72. The WA Survey provides the only systematic data. The trends identified were a stronger tendency to use interstate counsel than interstate solicitors and where disputes are international there appears to be a propensity to use overseas external counsel. The billing data indicates that, among the law firms, international firms perform most of the arbitration work in WA. Of the 25 barrister respondents, 19 were involved in arbitration in the year in question. Most were under 10 years' experience. There was a reasonably even split in the proportion of time spent on international arbitration between most, some and little. Twenty-two arbitrators responded of whom 14 had been involved in an arbitration in the year. Seventeen were from chambers in Perth, the balance from Melbourne (3), Singapore (1) and Hong Kong (1). Most spent only a portion of their time acting as an arbitrator. The Survey will repay closer study.

73. Some barristers (and ex-judges) are associated with English chambers. A small group of Sydney barristers with an interest in arbitration and mediation have had a virtual presence in Singapore for some time. One group of barristers from Brisbane and Sydney has recently taken chambers in Maxwell Chambers in Singapore under the name Maxwell 42 whilst continuing to be primarily located in Australia. Another group, principally from Melbourne and backed by the Victorian Bar, is negotiating for admission to Maxwell Chambers but has struck some roadblocks. The Victorian COMBAR held a conference in Hong Kong. Twelfth Floor Wentworth/Selborne have a senior Singapore lawyer as an honorary member and has held events in Singapore. A group of barristers, mainly from Melbourne, formed virtual chambers known as Melbourne TEC Chambers (MTECC) with a focus on arbitration. Barristers from Francis Burt Chambers in Perth are behind PCERA and the WA Arbitration Initiative. No doubt there have been other initiatives that I am not aware of. Barristers in most cities have appeared in international arbitrations here, in the region and in other overseas centres, but the number practising predominantly in international arbitration is modest. Barristers have been involved in the various local organisations concerned with international arbitration including CIArb and ACICA but have been under-represented in the latter. Some have been involved in training in the region. Some have attended overseas conferences, seminars and so on.

74. Many legal firms in Australia have international arbitration expertise, including those firms with international affiliations, with many practitioners having cut their teeth overseas.

DISCUSSION

75. This Report cannot do justice to all of the submissions received and the information and suggestions received orally. The fact that a suggestion is not taken up does not mean that it is rejected. I have had to concentrate on main themes. The submissions that are not confidential will be available on the ABA website in due course. They will prove a valuable resource to assist in implementation of reforms.

Enhancing opportunities in the Region

76. One of the key points in this landscape is that, by and large, there is a right of appearance of a barrister for a client in an international commercial arbitration governed by the New York Convention.

77. The choice of Australian law to govern a contract or an arbitration is the best selling point for the briefing of an Australian barrister. There is little that the ABA can do about that apart from backing the initiatives in the next section of this report.

78. The success of Australian arbitrators, the number of Australians that have been positions of relevance in the international arbitration institutions, the number of Australians working in the field in the international firms and the success of the barristers who have been obtaining work in the field, illustrate that Australian lawyers, including barristers, can hold their own against world competition. That competition is intense. The local Bars in the place of arbitration, the international firms and the English Bar will always jostle for position.

79. What are the points of difference which distinguish the qualities of a barrister from others in this field? The first is forensic experience. The benefit of doing case after case hones the ability to prepare and present a case competently before any tribunal. Then there is subject matter knowledge. Within commercial practise there can be many strands. Some barristers become more specialised than others. Expertise in a subject or subjects will be an advantage. Next, there is the advantage of independence. Barristers are accustomed to viewing and analysing cases dispassionately, unencumbered by the conflicts and difficulties where the firm of the in-house advocate may wish to maintain a long-term relationship with the client. This is allied to the fact that a barrister can be briefed by a solicitor without fear that the barrister is going to filch the client. Above all, the client gets the benefit of the choice of the best advocate, not just the advocate sitting in the firm of lawyers.

80. All of the foregoing features apply to Australian barristers in ordinary practice. What needs to be added is a knowledge of the fundamentals of international commercial arbitration. These do not vary greatly from the conduct of domestic arbitrations under the modern laws applicable in the States and Territories. There is, however, a milieu to be understood. Competent junior counsel and solicitors with a good knowledge of the field could, no doubt, educate an experienced commercial silk without the need for formal training. That does not obviate the need for such training to be available for members of the Bars of the States and Territories. It needs to be borne in mind that there is a perception among some solicitors, and perhaps clients, that barristers bring too much formality and aggression to arbitration proceedings, not sufficiently distinguishing them from litigation.

81. That is surprising, as Australian commercial judges these days tend to be more innovative and efficient than many arbitrators. Furthermore, members of the Bar are accustomed to appearing before tribunals and inquiries of various kinds, including before laypeople. Nonetheless, the perception exists and steps should be taken to dispel it.

82. The CIARB courses are aimed at arbitrators. The ABA has an existing training program and a course on advocacy in international commercial arbitration, along the lines of a course presented by Greg Laughton SC though ACICA in 2017, leading to a diploma or some form of certificate, would be a useful addition to that program. Offering the course to overseas practitioners would be a useful way of promoting Australian excellence. Consideration could be given to offering that program in the region in conjunction with the local professions.

83. A segment on international commercial arbitration should be a feature of all reading courses for admission to the Bar and should form part of continuing professional development. The local Bars should be encouraged accordingly.

84. It is necessary to attract a sufficient cohort of barristers equipped to and prepared to undertake international commercial arbitration work. It is not everybody who is prepared to travel or to be involved in promotional activities. There needs to be a perceptible career path in or including international commercial arbitration to attract entrants. That path is not clear at the moment. There is not an observable significant cohort of active practitioners.

85. Significantly, according to a number of practitioners, performance in this field is given little, if any, weight in the applications for silk in the various States and Territories. That is most unfortunate. It disadvantages those practitioners who should be entitled to silk in obtaining work from overseas clients, and indeed from local clients, and does not show a career pathway to practise as a silk in the field, or to appointments as arbitrator, or to appointments to the Australian bench. It diminishes the Australian Bar in the world arbitration community. This does not assist in the recruitment to the Bar of those with an interest in this field, often having had significant academic and/or practical experience here or overseas or in enticing competent junior counsel to enter the area.

86. An aspirant for silk would have appeared before arbitrators with international reputations, including Australian former judges, appeared against opponents and been briefed by solicitors with significant experience. There should be no difficulty in obtaining references that could be relied upon. The ABA should press the local bars and authorities in this respect. If they prove recalcitrant, then the award of Commonwealth silk should be explored.

87. Steps should be taken to encourage promising lawyers to come to the Bar. It is worth considering measures such as those undertaken by the professional service firms in attracting bright graduates with offers of scholarships, internships, placements and so on in conjunction with local Bars and local chambers. Newcomers with an interest in international work should be put in touch with barristers practising in the field and chambers where there is a focus on the field.

88. Assuming that a barrister has aspirations to making a career in or at least participating in international arbitration, how can the ABA help?

89. The ABA should facilitate the creation of an international arbitration community of Australian barristers. A first step would be to ascertain those who actually practise in the field. This could perhaps be done by analysing claimed practice areas with the

local Bars but may need a basic survey. The advantage of a survey is that it could distinguish between various levels of involvement, from aspiration up. An objective of this exercise would be to enable solicitors and potential clients, here and abroad, to locate barristers practising in international arbitration plus their respective substantive areas of practice.

90. The ABA should look to the English Bar. It has an established place in the firmament. It has advantages in that London has long been a centre of international commercial arbitration and English barristers have been involved in that. England also has historic connections with Singapore, Hong Kong and Malaysia. It has a larger economy than Australia and more worldwide connections. On the other hand, Australia is situated in the fastest-growing trading area of the world and does not carry any, or if any, little, colonial baggage. Where put to the test, Australian barristers have not suffered by contrast with their English counterparts. The English Bar is broadly structured, like our Bars, and their mode of practice is broadly similar. They have established the separate bar model as a significant player in the field and to that extent, the Australian Bar can "piggy back" on the English Bar. Fraternal links ought to be established or re-established in order that the ABA can fully understand how the English Bar operates in this field. However, the broad picture is clear enough to point the way for the ABA.

91. The peak body is the Bar Council of England and Wales. It has produced an International Practice Information Pack for members of the Bar who are practising or intending to practise internationally.

92. The work of the Bar Council is done by an executive secretariat and a number of committees of practitioners. The secretariat includes a Head of International Policy and an International Policy and Programme Director. The International Committee carries out the representational work of the Bar Council, overseen by the General Management Committee. It consists of a number of members, some from the Council and some co-opted, with the Head of International Policy as the executive.

93. The terms of reference of the Committee are:

    a. To promote the standing and the interest of the Bar internationally;

    b. To support the rule of law internationally;

    c. To keep abreast of international developments;

    d. To inform and educate the Bar about international developments and opportunities;

    e. To further the objectives above by cooperation between the Bar and legal professions abroad and by participation in the work of international legal associations and professional bodies;

    f. To influence international legal developments;

    g. To support the strategic aims of the Bar Council as published.

94. The Bar Council directs those enquiring about selection of a barrister to consult a Bar directory for specialties in various areas of the law. It refers on the website to the following publications:
- Barristers in the International Legal Market;
- Barristers in International Arbitration 2014-2015;
- Legal Services 2016.

95. The Bar Council website refers to specialist Bar Associations including the Commercial Bar Association, known as COMBAR.

96. Membership of COMBAR is offered to those where commercial work forms a substantial part of the person's practice. If 10 or more members of a set of chambers are members, then the Chambers is also entitled to membership. International commercial arbitration is one topic of interest to COMBAR. It has an International Committee with a sub-committee for, amongst other places, Asia.

97. The COMBAR website says that in 2013 more than 1,100 English barristers were working on international cases bringing in £132 million to the UK economy. The UK Bar now has about 16,000 members including employed barristers. The ABA has approximately 6,000 members. This is not far out of kilter with a comparison between the populations; England and Wales have approximately 66 million people and Australia has approximately 25 million people. Allowing for an increase in work since 2013 and discounting for a balance of natural advantage to the English Bar leaves potential for a substantial number of Australian barristers – in the order of 250 – to be involved in international work.

98. Then there are the sets of chambers. Chambers tend to specialise to an extent going beyond that of the Australian Bars. A number of the commercial chambers have a focus on international arbitration. They have considerable resources. Take 39 Essex Chambers. It has over 120 members, more than 40 of whom are silk. It has 5 clerks devoted to commercial work plus the senior management clerks and junior clerks. It has an Asian manager living in Asia and promoting their barristers throughout Asia. It has chambers in both Singapore and Kuala Lumpur. The promotional activities of the English clerks and managers is legendary in Asia. I have witnessed some of it.

99. Individual barristers of course also engage in career development and many of them have substantial reputations. Many English silk are seen in arbitration circles in Asia.

100. What stands out in this analysis is that the Bar of England and Wales speaks with one voice through the Bar Council, in effect delegating that to the International Committee. It is outward-facing, building multiple overseas links and at the same time, doing what it can to assist and encourage members of the Bar to develop international practices. COMBAR and the various chambers are all clearly adjuncts to and parts of the overall English Bar. A similar unitary story can be seen when considering Singapore, Hong Kong and Malaysia (where Kuala Lumpur dominates).

101. Australia is different. It is a federation and the profession is organised along State and Territory lines. The admission of barristers and the regulation of the practice of barristers is governed by the local Bars, although, as noted, Western Australia has

recently agreed to join the *Legal Profession Uniform Law Scheme* with New South Wales and Victoria from next year. Hopefully, other States and Territories will join and there will be a move to a genuine National Bar. However that may work itself out, and whatever role the ABA ends up playing, there is an overwhelming case for the ABA to assume leadership in relation to international affairs that affect the Bars, including international commercial arbitration. The ABA and the State and Territory Bars should negotiate that outcome, including the provision by those State and Territory Bars of the resources necessary to carry out that function. Existing State and Territory programs could continue and there could be arrangements for delegation of particular activities to local Bars, provided that the Australian Bar Association badge was associated with that activity.

102. The overwhelming view of those to whom I spoke and a common theme in submissions is that the Australian Bar should be speaking to the world with a single voice promoting a single "brand".

103. Carrying out that function will involve a restructuring of the executive capacity of the ABA. As we are starting the race some distance behind scratch, the ABA will have to plan and administer a significant outreach program. The planning of that program will itself be a significant task and the execution of it even more significant. The International Committee should, as in England, lead the task, but it will require some reorganisation and enhancement. Difficult strategic and tactical decisions will need to be made as to how the role of the Committee is to be advanced. The Chair should be an acknowledged leader of the Bar with a commitment to taking the Australian Bar to the world.

104. The following passage from the speech by Chief Justice Allsop to the ABA/NSW Bar Association Biennial conference is particularly apt:

> "What of the place of the Australian Bar in the Asia-Pacific region? This is not just (though it includes) the participation in the burgeoning commercial arbitration life of the region. The strength and depth of the Singaporean and Hong Kong courts and professions in dealing with vast bodies of commercial work in the region has not been appreciated by many Australian barristers. The reality may perhaps become that if you wish to be a commercial litigator, to paraphrase Paul Keating, "In the future, if you are not engaged in international arbitration, you will be camping out"; even if that "camping out" seems, at the moment, to involve reaping lucrative fees in a local lake. That lake will, however, over time, become shallower. The place of the Australian Bar in Asia in the future does not just lie in this commercial work. The region is one whose polities do not all reflect the dedication to freedom and justice that this country has, or should have. The Australian Bar should take a leadership role in the region. From a practical point of view, this may require the marshalling of capital to spend on entry into, and development of, that professional market. I am not sure how this can be done in the sole practitioner model. It may require some thinking and imagination on professional structure for off-shore practice. It may carry with it the seeds of tension between professionalism and commercialism; but there is no reason to think that

any such tension cannot be managed. The Bar must compete and take its place in an international legal environment dominated by global law firms with their models of practice."

International Arbitration in Australia

105. The background discussion demonstrates that Singapore and Hong Kong have leaped ahead of Australia in attracting international commercial arbitrations, having started from much the same position. The task is to understand why that is so, what the barriers are to Australia's ranking improving and what should be done to remove those barriers.

106. There is a long list of positives so far as arbitration in Australia is concerned:

- The legislation is now up-to-date, although that needs to be kept under consideration.
- The Court system is well-regarded and corruption-free. Courts are not in general interventionist in arbitration, and there are no difficulties of enforcement.
- Australia is politically and economically stable.
- International arbitration is supported by the government. See, for example, Australia's Capability in International Commercial Arbitration (Austrade 2018). The Commonwealth Attorney-General nominates a representative to the ACICA Board.
- Australia has a substantial economy with a good deal of international trade, including trade by sea and trade in goods.
- There have been and will continue to be massive mining and energy projects in Australia producing their share of disputes with international parties involved in contracts.
- The legal profession is respected as competent and honest.
- Australian arbitration is cost-effective.
- There has been substantial domestic arbitration experience over the years.
- All capital cities have amenities suitable for overseas visitors and facilities for arbitration.
- Australian law is based upon common law and English is the language.
- The ACICA rules are of international standard, as is its administration of arbitrations. It is effectively the only Australian institution that administers international arbitrations.

- Australian arbitrators are appointed to many overseas arbitrations.
- Australian former judges sit on courts in Singapore, Hong Kong and Dubai.
- A substantial number of Australians work in the field overseas.
- Australia has significant immigrant communities from Asian countries.
- Australia is in the fastest-growing economic region in the world.
- Many students, graduate and undergraduate, from Asian countries have been educated in Australia and have returned to positions of influence in their home country.
- The Australian government is heavily invested in engaging with the Asian Pacific region and has a network of resources through the Department of Foreign Affairs and Trade, including Austrade and EFIC, that are available to assist.
- Australians are well-respected contributors to UNCITRAL, including through the UNCITRAL National Coordination Committee for Australia (UNCAA) and ACICA by Vice-President, Mr Khory McCormick.

107. Why, then, the relative lack of success in attracting international arbitrations?

108. One usual response is geography. That is certainly true when looked at from the vantage point of Europe. It is also true that Singapore and Hong Kong are somewhat closer to many Asian capitals than Australian cities. The difference is very marginal so far as Perth and Darwin are concerned, and there are direct flights from all the significant Asian centres to the East Coast cities. It is not a long addition to a flight. The eastern seaboard is closer to the Pacific and the western seaboard of North and South America than Singapore. In that respect, it is to be noted that US companies ranked first amongst parties utilising SIAC. The difference between Singapore and the Australian cities is hardly significant for the north Asian cities. Geography cannot be changed, but hopefully perceptions can be.

109. Transactional lawyers indicate that Singapore's advantage is neutrality in the sense that it does not have many Singapore companies involved in large Australian projects compared with other countries. Thus, when negotiations occur between an Australian party and an international party, the international party presses for a neutral venue even if Australian law or one branch of Australian law is to govern the contract. Some have the impression that Australian corporates are not inclined to push the point. With the ability for the parties to choose arbitrators and given the present non-interventionist stance of the Courts, it is difficult to see why "home town" decisions are feared in Australia. All that can be done in this respect is to continue to bring the realities of the situation home to foreign parties.

110. A common theme amongst respondents was the problem of Australia speaking with many voices due to our Federal system and the lack of any dominant commercial city. The jurisdiction under the International Arbitration Act 1974 (Cth) residing in all

States and Territories and the Federal Court is unsatisfactory. The chance of inconsistent approaches is magnified, with no appellate control short of the High Court. It is puzzling to those who do not come from a federation, and even in a federation, it is difficult to justify not having Commonwealth-exclusive jurisdiction in a matter of external relations. Allan Myers AC QC made this point recently and reflects a common view. It would be another important step along the way to countering the perception of fragmentation.

111. Another step in countering fragmentation would be to instigate formal cooperation between the various parties that have an interest in international commercial arbitration that could be styled the Australian International Arbitration Council or a similar name. It could meet in Arbitration Week and such other times as agreed. It could also encompass ICSID arbitrations. It could be facilitated by the Commonwealth Attorney-General's Department and include the States and Territories.

112. Another point made by many respondents is the lack of a state-of-the-art facility to match Maxwell Chambers in Singapore. Maxwell Chambers has indeed set a high bar, but it should be recognised that it was driven by active government support. There is no agreement as to where such a centre would be located within Australia, or how it would be financed. It would almost certainly have to be based on the eastern seaboard where the principal legal and commercial centres are based. Perth, and to some extent Darwin, have claims because of the closeness to Asia and having the same time zone as much of it and the volume of disputes that arise from projects in Western Australia and the Northern Territory which include international parties.

113. As far as I am aware, there is no current commercial interest in constructing such a centre. That is not to say that there could not be commercial interest. I note that apparently both Auckland and Toronto have what appear at least on the face of it to be high class facilities provided commercially.

114. A state-of-the-art centre would stand for a lot more than just the business coming through the door and all the associated monetary benefits to parts of the economy. It would assist in putting Australia on the map as a financial and commerce hub. That is consistent with Austrade's National Brand project and the earlier Australian Financial Centre Taskforce chaired by Mark Johnson AO. It would reduce the fragmentation seen by outsiders. Domestic arbitrations, domestic and international mediations and general meeting room hire could generate revenue if necessary to make a business case.

115. If a state-of-the-art centre to act as an arbitration hub were to be established on the eastern seaboard, it would be prudent to upgrade the facilities available in Perth and consider the two being run in conjunction. It would also make sense to consider ACICA being located in the centre and perhaps managing it.

116. If centralisation does not occur, then there is a case for ACICA to be located in Canberra. That would ease the intercity tensions in its operation. Arbitrations can be and often are administered remotely. It would be appropriate for a national body. It would facilitate relations with government departments. If a state-of-the-art centre

proves too difficult to attain, there will be the need to upgrade facilities in at least Sydney, Melbourne and Perth.

117. The question of facilities would be an ideal topic for the Council to address once established.

118. In a speech late last year, Allan Myers AC QC identified the application of the Australian Consumer Law to international business contracts as a disincentive to the choice of any branch of Australian law to govern a contract and any arbitration arising from it. That echoed concerns raised earlier by Luke Nottage and Richard Garnett. That is borne out by a number of informants, particularly solicitors, as to views of international parties. Indeed, rightly or wrongly, some international parties are reluctant to have an arbitration seated in Australia for that reason. That is a log-jam that should be removed.

119. Complaints are also made about the visa process for arbitrators, lawyers and witnesses visiting for the purposes of an arbitration. That should be streamlined.

120. Singapore gave arbitrators a tax exemption for a number of years that will run out. Australia should consider the same. Arbitrators have big say in the actual venue of a hearing regardless of the seat.

121. A more effective promotion of Australian arbitration is needed to stop the bleeding of Australian-based disputes to arbitration elsewhere and accelerate attracting international arbitrations to Australia. The reality is that Australia is barely on the international map as a place for arbitration. There needs to be a concerted campaign on two fronts: the first front is to have appropriate clauses included in contracts; the second front is outreach to the arbitration community and business overseas. The first of these has two principal targets: the government and Australian business. The second has many targets – an issue is priorities. If there is success on the second front, the chances of attracting neutral arbitrations (that is, with no Australian party) will improve. Each campaign should be recognised as marketing and promotion, and planned and resourced accordingly.

122. It might be thought that instituting and enforcing an Australian government policy in relation to arbitration clauses in government contracts and government-financed contracts might be straightforward. The Victorian IPSOS Waincymer survey shows that to be too simple. Education at many levels might be required.

123. ACICA has a function of attracting international commercial arbitration to Australia. As the administering body and as the default UNCITRAL appointment authority it should be well placed to lead these campaigns. Why has it not had greater success in the past? It is not as if considerable effort has not been expended. The negative factors discussed must be acknowledged. It must also be acknowledged as a competitive field and many other places are struggling to attract arbitrations. On the other hand, there are many positives.

124. From outside, it seems that ACICA does not have the staff or professional resources to both administer arbitrations and carry out marketing and promotion abroad in the same way, for example, as done by SIAC, HKIAC and the ICC. Leaving promotion

to the ad hoc availability of busy practitioners is unlikely to be productive. I am not privy to the financial position of ACICA. Unless it can devote some serious resources to planned promotion, it is unlikely to make strides in the region.

125. As noted earlier, to the outsider, the structures of ACICA seem unwieldy. I appreciate that history and finances play a part. A review of the governance of ACICA might be timely. The operations and finances of ACICA are not transparent and this might be reviewed at the same time. Support for what amounts to the export of services will be sought for external promotion of Australian arbitration from relevant government bodies. The review might help that objective.

126. The Council could also play a role in assisting ACICA to promote Australian arbitration.

RECOMMENDATIONS

Enhancing opportunities for Australian barristers in the region

1. The State and Territory Bars should recognise and facilitate the leadership of the ABA in the handling of international outreach in general and in international arbitration in particular and should provide the resources necessary to exercise that leadership.

2. The ABA should accept such leadership as an ongoing commitment requiring executive support and an ongoing promotional budget.

3. The ABA should pay an institutional role similar to that of the Council of the Bar of England and Wales through a reorganised and enhanced International Committee. The Chair should be an acknowledged leader of the Bar with a commitment to taking the Australian Bar to the world.

4. The ABA should construct a database of barristers involved in international work, particularly arbitration work, with a view to forming an Australian Bar international arbitration community under the aegis of the International Committee; and with a view to enabling solicitors and potential clients to have ready means of locating barristers practising in international arbitration together with their other fields of practice.

5. The ABA should undertake a professionally planned and continuing campaign to raise the profile of Australian barristers abroad, particularly in the field of arbitration, and with local solicitors practising in the field.

6. The formation or development of barristers' chambers – real or virtual – with, or including, a focus on international work should be encouraged and given marketing guidance and support, with priority given to those chambers that seek to establish a presence overseas.

7. Individual barristers should be encouraged to actively seek out international arbitration work and foster personal overseas relationships, and should be given guidance and assistance by the ABA in doing so.

8. The ABA should establish or re-establish fraternal contact with the International Committee of the Bar of England and Wales.

9. The ABA should extend its advocacy training program to training in conducting international commercial arbitrations with CPD recognition and offer the program to overseas practitioners.

10. The ABA should offer training in the region in conducting international arbitrations in conjunction with the local profession.

11. The ABA should liaise with ACICA so as to avoid overlap or conflict between outreach campaigns.

12. The ABA should use its influence with the local Bars to have international commercial arbitration recognised as a legitimate and desirable field of practice at the Bar. Pathways to international practice should be developed and steps taken to promote it as a career at the Bar so attracting those with talent and an interest or involvement in the field to come to the Bar and in enticing established juniors into the field. It ought be a component of reading courses and continuing legal education. Practice in the field should be given due recognition in the awarding of silk. If the States and Territories are recalcitrant in that respect, then the award of Commonwealth silk should be explored.

Attracting arbitrations to Australia

The ABA should actively engage in supporting the attraction of arbitrations to Australia and use what influence it has to seek to achieve the following:

1. Formal coordination between the various bodies that have an interest in international arbitration (including ICSID arbitration) that could be styled the Australian International Arbitration Council (the Council).

2. Exclusion of business-to-business contracts including an international party from Australian consumer law or other means of preventing that law from applying to international arbitrations.

3. Removal of visa restrictions on arbitrators, parties, lawyers and witnesses involved in an arbitration to be heard in Australia and a review of the application of taxation to arbitrators.

4. Provision of a state-of-the-art arbitration centre in Australia on the eastern seaboard with a satellite in Perth; alternatively, the provision of upgraded facilities in Sydney, Melbourne and Perth with co-ordination between.

5. The Federal Court of Australia having exclusive jurisdiction in relation to the International Arbitration Act 1974.

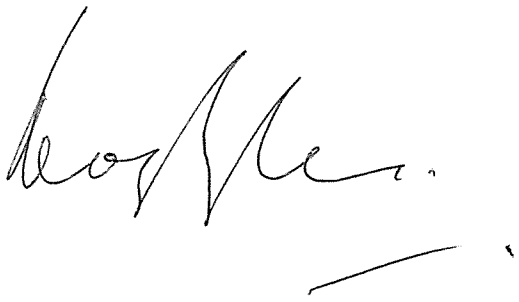
6. Exploration of the use of the physical and file management facilities of the Federal Court of Australia for international arbitrations.

7. A campaign to achieve a whole of federal government commitment to include clauses requiring the law of an Australian State or Territory to govern the contract and arbitration in Australia in government contracts including an international party and contracts financed by the government by loan or grant whether to be performed in Australia or not with corresponding commitments by State and territory governments.

8. A campaign to persuade companies based in Australia to include similar clauses in contracts including an international party whether to be performed in Australia or not.

9. A campaign to promote Australian arbitration in the region.

10. A recognition that these campaigns are best managed by ACICA, with co-operation from the Council, if it has appropriate governance and sufficient financial resources.



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