After Dinner Speech

CIArb Australia Annual Dinner

Melbourne, 17 October 2018

Madam President, Ladies and Gentleman.

1. I am greatly honoured to have been asked to speak this evening to this very distinguished gathering of arbitration practitioners.

2. The Chartered Institute of Arbitrators (Australia) has a long history of serving the community by supporting arbitration and other methods of dispute resolution. The Chartered Institute was established in Australia as a branch of the Chartered Institute established in the United Kingdom more than one hundred years ago. The work of the Chartered Institute is important.

3. Although I have appeared as counsel in many arbitrations, both local and international, and I have sat in many arbitrations as a sole arbitrator or as a member of an arbitral tribunal with other arbitrators, to my shame, which this evening I confess to you distinguished ladies and gentlemen, I have been, to the Chartered Institute, like Winston Churchill described his relationship with the established Church of England, "a buttress rather than a pillar", supporting the Chartered Institute only from without.

4. Madam President, please accept my offering a few words this evening as a modest first instalment of repayment of the large debt I owe the Chartered Institute.

5. I remain a practising barrister and arbitrator. As the invitation to this dinner records, I am also the Chancellor of the University of Melbourne. I have taken that fact recorded on the dinner invitation as being a licence (if not an implied request) to say something about University education. The remarks I will make about University education are not irrelevant to Australia's role in international arbitration.

6. The Chartered Institute 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 8 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 that have the function of supporting arbitrations and other methods of alternative dispute resolution.

7. Let me return for a few minutes to universities. The University of Melbourne is, by the standards of those who establish and apply standards by which to judge universities, the foremost University in this country and one of the top three or four universities of the Asia-Pacific region. Those of you who are alumni of other universities need not rise to contest what I have just said because the qualities for which the University of Melbourne is judged thus are shared by many, perhaps most, Australian universities. This is the reason why, in the space of less than 20 years, the provision of university education to persons who come to Australia from abroad now rivals the sale of iron ore and of coal as an engine of the Australian economy and a signal to the whole world of the highly advanced character of Australian society. 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 a free, tolerant, egalitarian and prosperous 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.

8. The University of Melbourne and other Australian Universities are attractive to the best and brightest students from abroad for some reasons that are pertinent to those who see Australia as a possible centre for the conduct of international arbitrations.

9. First, the teaching and research at Australian Universities is very good by any standards. Those who teach and undertake research are mostly of outstanding skill and learning.

10. Second, Australia is a free, tolerant, democratic society under the rule of law. The parents of young people who come from abroad express it thus: we want our young adult children to be educated in a society the values of which we admire and which is free from physical and ideological dangers.

11. Australian young people who come to the University of Melbourne (and their parents) do not have views markedly different from the students (and parents) abroad. They wish for themselves and their children that the environment in which those students will be educated is safe, but intellectually and culturally stimulating.

12. Third, almost everyone in the world wishes to be educated in the English language, in an English speaking society.

13. Fourth, education must lead to a real job. This is true of post graduate education as it is of undergraduate education. There is, of course, an organisation, established in the USA, which compiles annually an index of the "employability" of graduates of universities all over the world. Last year the University of Melbourne was rated 7th in the world for the "employability" of its graduates. Universities undertake a great deal of research. In the 19th Century J.H. Newman could write in his seminal work entitled "The Idea of a University" that the object of a University education was not practical nor was it to be judged by how "useful" was that which I was taught at the University. Learning for its own sake was the end or purpose of a University which it was believed would be apparent from the personal and moral qualities of the young men who were the graduates of the University. Now a University is judged upon the employability of its graduates and the usefulness of its research.

The University must serve the needs of the society of which it is part and by which it is sustained.

14. Does all this about universities have anything to do with arbitration?

15. We 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 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. SIAC is a good example. The ICC in Hong Kong is another regional example. London teams with solicitors and barristers and arbitration rooms offering their skills and facilities to foreigners.

16. One can readily discern similarities between the impetus to expand the availability of university education to foreign students and the establishment of successful arbitration facilities for the determination of foreign as well as local disputes. Australia has been conspicuously successful in the field of university education but would not be judged so in the field of alternative dispute resolution.

17. 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.

18. 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.

19. May I suggest some remedies. I do so with trepidation being in the presence of so many of you who are more experienced than I in arbitration.

20. 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.

21. This country is free of corruption and is governed under the rule of law. The cities are safe and the facilities for visitors and for the conduct of business are very good indeed.

22. These advantages of people and facilities notwithstanding, we lack in Australia a single institution in the field of alternative dispute resolution which can embody and promote arbitration in Australia and a favourable "brand image" of Australia and the attributes of the institutions and of the legal and social environment relevant to the resolution of disputes. Singapore, for example, does this well.

23. 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.

24. 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.

25. 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.

26. The Federal Court can, over the long run, create an Australian arbitration law 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

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