Foreword

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The widespread adoption of the interlocked provisions of the UNCITRAL Model Law on International Commercial Arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention on the Settlement of Investment Disputes represents the most coherent and successful regime in history for applying the rule of law to the resolution of disputes arising in international trade, commerce and investment. By comparison, the patchwork quilt of rules and practices of private international law with respect to the application of foreign law and the recognition and enforcement of court proceedings is, and will remain, an impenetrable jungle.

Originating in Europe, but now widely adopted throughout the world, the arbitral regime is an honourable and preferable successor to the previous practice of European states dispatching one of their regiments or gunboats to assert the contractual rights, and to protect the property, of its citizens. This was how it used to be done in every sphere of international economic activity, ranging from cotton products, through spices to opium.

The international treaties underpinning the modern arbitration regime developed on the basis that commercial arbitration serves the interests of each nation that participates in it. Reciprocity is at heart of this international deal. Each ratifying nation has accepted that it is in its interests to behave in this manner, in order to receive for its citizens and corporations the benefits of other nations behaving in the same manner.

There is no law of nature which says that this form of enlightened self-interest will continue. In the world before World War I, when international communications had been revolutionised by wireless telegraphy and the speed and cost efficiency of transportation had been substantially increased, the benefits of globalisation were as obvious as we believe them to be today. That globalised world changed very quickly into war and national autarky, at great cost. No one should assume that similar regression is impossible today.

One of the barriers to international trade, commerce and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes

transnational trade, commerce and investment by imposing additional and distinctive burdens. These include:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, from corruption.

These additional transaction costs of international trade, commerce and investment are of a character that does not operate, or operates to a lesser degree, with respect to intra-national trade and investment. Such transaction costs impede mutually beneficial exchange. That is why business lawyers have been described as 'transaction costs engineers' who add value to commercial transactions by, relevantly, facilitating the resolution of disputes that inevitably arise in commercial relationships.

One of the singular achievements of the international commercial arbitration system is the reduction of these transaction costs. By this means, the economic welfare of all who benefit from the reduction of such costs and risks has been enhanced.

In order to preserve this system, all participants in and beneficiaries of its operation should do whatever they can to ensure that the benefits continue to be provided. The legal resolution of disputes must deliver a high level of predictability, so that economic actors can proceed with confidence that their reasonable expectations will be met. The global system for dispute resolution by international commercial arbitration constitutes a legal infrastructure that is as sophisticated, and as necessary, as the physical infrastructure required for the successful operation of the global market economy.

This book, with the depth of learning displayed by the authors in their analysis of a wide range of issues that arise in this context, will enhance the ability of Australian lawyers to continue to make a contribution to the success of the system. It is a welcome addition to the small library of texts in the field.

As the content of many essays in this book attests, the effective operation of the system requires continual attention and amendment. The timing of this book is of particular significance because of the recent amendments to the *International Arbitration Act 1974* (Cth) and the adoption of the UNCITRAL Model Law as core also for the Australian domestic arbitration statutes.

I strongly support the latter development. I became aware of the project undertaken by the New South Wales Attorney-General's Department, on behalf of the Standing Committee of Attorneys-General, to review the uniform

Commercial Arbitration Acts which had become embarrassingly outdated. The Department gave me access to the files revealing what had gone on during the relevant consultations. It became clear to me that the process had become bogged down and was unlikely to produce any satisfactory result in the medium, let alone in the short, term. This was because the basic approach was to draft amendments to the existing scheme. This could only result in consensus on a lowest common denominator basis.

I proposed to the State Attorney-General that the way to achieve a breakthrough was to ignore the existing legislative scheme and adopt the UNCITRAL Model Law as the core of the new Australian scheme. The Attorney raised the proposal with his colleagues and I discussed it with a number of other persons involved in commercial arbitration. I put forward the suggestion publicly in my annual address to the Law Society's Opening of Law Term dinner on 2 February 2009. I am very pleased with how this initiative has developed.

The creation of a seamless regime between domestic and international commercial arbitration will, I am sure, enhance the Australian contribution to both. I am well aware that many young Australian lawyers find this international dimension of legal practice particularly appealing. I noticed the global significance of such involvement at first hand at the International Investment Treaty Law and Arbitration Conference held at the University of Sydney in February 2010. International arbitration involves lawyers in cross-border disputes which have major commercial significance. The field of investment treaty arbitration gives rise to a fascinating interplay between private rights and public international law.

I have no doubt that this book will encourage many more young Australian lawyers to pursue a career in this exciting field of legal practice.

As a serving judge, it is appropriate that I refer to the criticism that is often directed to the judiciary to the effect that judges are too prone to interfere with the arbitral process and thereby fail to respect the autonomy of the parties reflected in the contract. Sometimes, but not always, those criticisms are valid.

The confidence of the commercial community in arbitration depends, in large measure, on the belief that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the process are assured. Sometimes that requires the exercise of a supervisory jurisdiction by a court. Indeed, the very existence of a supervisory jurisdiction assists in maintaining confidence in the system.

Arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind as, on any view, to justify intervention by a court. The fundamental

commercial concept underlying arbitration agreements is respect for the autonomy of the parties. The parties' choice was not, however, to select arbitration per se. It was to select arbitration by persons and by procedures that manifest a high degree of integrity.

So long as they restrict intervention to matters of integrity, judges serve the fundamental objectives of the system. The primary role in this respect is served by the process of selecting arbitrators and agreeing on the rules. However, recognition that any system is fallible and may need to be corrected in retrospect is not an insight unique to arbitration.

In the jurisdictions with which I am most familiar, the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch supervisory jurisdiction directed to maintaining the integrity of the system. A number of the recent amendments to the Australian legislative regime, set out in these essays, are directed to ensuring that judicial intervention is limited in this way.

In so far as arbitrators sometimes express dissatisfaction in such respects, such commentary is, or at least should be, diminishing in frequency. This book will play a significant role in ensuring that this development in judicial attitudes is reinforced.

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