

FOREWORD

THE HON J J SPIGELMAN AC*

I am pleased to introduce this special Forum issue of the *University of New South Wales Law Journal* which has as its focus current trends in international commercial arbitration. The multi-faceted process known as globalisation has brought with it a widespread recognition of the benefits potentially available from the reduction of national barriers to mutually advantageous exchange by trade and investment. The rapid expansion of such commercial interaction inevitably brings with it the need for dispute resolution.

One of the non-tariff barriers to international trade and investment, being a barrier which impedes such mutually beneficial exchange to a greater degree than domestic trade and investment, arises from the transaction costs and uncertainties involved in international dispute resolution.

The transaction costs involved in international litigation include:

- Additional layers of complexity;
- Additional costs of enforcement, indeed uncertainty about the ability to enforce contractual rights;
- The risk arising from unfamiliarity with foreign legal process;
- The risk of unknown and unpredictable legal exposure.

Lawyers and other practitioners in this field can make a significant contribution to the reduction of this non-tariff barrier and, thereby, improve the economic welfare of all those who benefit from trade and investment.

The coherent international system for resolving commercial disputes that has been devised in the interlocked provisions of the UNCITRAL Model Law on International Commercial Arbitration, the New York Convention for Enforcement of Arbitral Awards and the Washington Convention for Investment Disputes, plays an important role in international commerce. These international instruments are so widely adopted that they facilitate such commerce to a substantial degree.

For all of those who are involved as practitioners in the resolution of international commercial disputes, whether as lawyers or arbitrators or judges, the contribution that we can make to the maintenance of the system is twofold: first, to ensure that the public and political decision-makers are aware of the benefits of the system; secondly, to ensure that the system actually delivers the benefits of which it is capable.

* Chief Justice of New South Wales.

The costs and uncertainties of international commercial dispute resolution are capable of being minimised, and brought into some kind of reasonable relationship with the costs and uncertainties of domestic commercial dispute resolution, only if all of us who are involved in the process are committed to the just, quick and cheap resolution of such disputes.

Business lawyers have been described as 'transaction cost engineers' who facilitate commercial intercourse by reducing future transaction costs. Well drafted commercial arrangements avoid conflict with regulatory regimes, anticipate and therefore avoid disputes and create structures for dealing with the unknown or the unanticipated. By such involvement, transaction lawyers add value to commercial transactions. The same is true of the contribution by lawyers to dispute resolution processes.

The international regime for commercial arbitration does have advantages. It avoids the proclivity to engage in venue disputation that has bedevilled such litigation in Australia, England and North America but, not yet, elsewhere. The burgeoning case law on anti-suit injunctions and then anti-anti-suit injunctions and, inevitably, anti-anti-anti-suit injunctions, reflects the simple proposition that when it comes to the procedure of courts and the quality of judiciaries, parties believe that where a case is determined matters. This is so even if disputation about venue involves considerable expenditure that is, on any objective view, completely wasteful. Avoiding venue disputation is a real cost and time advantage of choosing the international arbitration regime.

Perhaps most significantly, nothing remotely comparable to the international system for enforcement of arbitral awards exists with respect to enforcement of judgments of courts. There have been numerous attempts to develop some kind of system for enforcement of judgments and they have all failed. I cannot see this situation changing. This is a substantial advantage of international commercial arbitration. Facility of enforcement, perhaps more than any other single factor, ensures that the subject of this Forum will remain of critical importance for international trade and investment.