WHAT PRICE ARBITRATION?

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1. Even from a vantage point as distant as London, it is apparent that there are exciting developments in Australian arbitration law. I understand (1) that, subject to the special position of Queensland, each of the States and Territories has enacted its own arbitration legislation so that in effect, there is in force uniform legislation for commercial arbitrations. Most recently, the International

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(1) On questions of Australian arbitration law, I gratefully acknowledge the kind and extensive assistance given to me by David Bryne, Q.C.

Arbitration Amendment Act (2) has been passed by the Commonwealth Parliament. This Act is of importance for a variety of reasons but is perhaps most noteworthy for its adoption of the UNCITRAL Model Law as part of the law of Australia in respect of International Commercial Arbitrations. When all these developments are taken together, and when consideration is given to the position of Australia in the Asia-Pacific region, then it is clear that a framework is in place which is conducive to the development of Australia as an attractive centre for arbitration.

2. The question posed by this discussion is: What price arbitration?

2.1. Against the background of the exciting developments already mentioned, it may seem churlish even to pose the question. Instead, I would suggest that the present context adds to the importance both of the question itself and the need to answer it with caution. The theme of this discussion is the answer that the price will vary depending on the type of case in question and the aims and considerations uppermost in the minds of the parties concerned.

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(2) No. 25 of 1989.

2.2. The sophisticated framework in place gives to parties wide choice as to the mode of dispute resolution and the powers to be entrusted to arbitrators. In these circumstances, there is all the more need for the legal practitioner to undertake a sober cost/benefit analysis before opting for a particular forum or choice of procedure.

2.3. My approach to this discussion is from the standpoint of the practitioner. On the basis of familiarity with "London arbitration", I will seek to illustrate the general theme with particular reference to the position as it prevails in London - at the least, a major world arbitration centre - though, I hope, in a manner relevant and of interest to a MLAANZ conference.

3. The popularity of arbitration needs no emphasis.

3.1. If the question is next put, why is arbitration popular?, a variety of answers can be anticipated. Before listing these, two observations are appropriate.

Firstly, there are many cases where the decision to arbitrate is not the product of an individual choice but rather the result of long ingrained habit, now enshrined in standard terms of the contract in question; to this extent, the question has to be reformulated and should

ask why has arbitration become accepted in the trade or contract in issue?

Secondly, there must be confidence in the integrity and impartiality of the arbitration tribunal. Such confidence is a pre-requisite of any decision to arbitrate and hence underpins all the factors listed below. In some parts of the world, this matter may well loom large in a decision to arbitrate rather than litigate.

The factors which go to the popularity of arbitration, might be thought to read as follows:

(a) Cost;

(b) Speed;

(c) Informality;

(d) Familiarity;

(e) Experience and expertise of the tribunal;

(f) Freedom from local courts;

(g) Confidentiality.

3.2. An important matter is immediately apparent. The factors in the list do not all point in the same direction. By way of example, it is relatively easy for parties to agree to and for arbitrators to adopt a radically informal, cost effective procedure where the ambit of the dispute is narrow and essentially factual

and there is comparatively easy recourse to a Court on such questions of law which do arise. The position might be thought to be very different where very wide powers are vested in arbitrators (for example, disputes as to their own jurisdiction) and recourse to the Courts is limited in the extreme. It is not going too far to observe that confident Claimants generally prefer speedy arbitration and worried Respondents tend to be anxious that the law should be correctly applied; so too, it is normally successful parties who voice a preference for the finality of the arbitration procedure.

3.3. There is, of course, no simple correlation but I would, tentatively, suggest that the wider the ambit of the issues referred to arbitrators and the greater the powers vested in arbitrators, the more arbitration proceedings must tend to mirror court proceedings. Even so, there may be perfectly sound reasons for preferring arbitration, but there is much to be said for such a choice proceeding on an informed and considered basis.

4. Though English Law looks with a wary eye on some of the more imaginative proposals advocated in the international arbitration community, there are a number of developments in English Law which must be mentioned in the present context:

4.1. The stance taken by the Courts is supportive of arbitration. Court proceedings will be stayed when there is an agreement to arbitrate, rights to appeal to the Court are circumscribed under the 1979 Arbitration Act, arbitration awards will be benevolently construed if or when they are considered by the Court and the enforcement of foreign awards is facilitated in accordance with the New York Convention **(3)**. The restriction on the right to appeal to the Court is a particularly striking development, especially when it is borne in mind that the opening sentence of the text of the leading English work on arbitration law, reads as follows:

> "The law of private arbitration is concerned with the relationship between the courts and the arbitral process." **(4)**

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(3) See, generally, "Commercial Arbitration". Mustill & Boyd (2nd ed.).

(4) Mustill & Boyd, op. cit., p.3. See too, "Transnational Arbitration and English Law", by Sir Michael Mustill, at p.17, in "International Commercial and Maritime Arbitration" (edited by Francis Rose, Sweet & Maxwell, 1988).

4.2. English Law goes a long way to permitting party autonomy in the choice of law applicable to the arbitration process. While English Law has set its face strongly against the concept of "de-localised arbitration" - i.e. arbitrations "floating in the transnational firmament unconnected with any municipal system of law" **(5)** - parties are free:

(a) To choose one law to govern the underlying contract and a different law to govern the arbitration **(6)**;

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(5) Nav. Amazonica Peruana v Cie. Internat. de Seguros [1988] 1 Lloyd's Rep. 116. See too, the excellent discussion in "International Commercial arbitration", Redfern and Hunter (Sweet & Maxwell, 1986), at pp. 52 et seq.

(6) Compagnie d'Armement Maritime v Compagnie Tunisienne [1971] AC 572. On the number of potentially relevant systems of law, see too the **Peruana** decision (supra).

(b) To leave to the arbitrators the decision as to the applicable proper law of the underlying contract and, on this issue, not to confine the choice to national systems of law **(7)**;

(c) To agree to arbitrate in a place or country X but subject to the procedural laws of Y, though such a choice would have to be made in very clear terms **(8)**.

4.3. The typical arbitration clause is recognised as constituting a self-contained contract, collateral or ancillary to the main or underlying contract between the

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(7) **DST v Rakoil [1987] 2 Lloyds's Rep. 246**, a decision relating to an ICC arbitration. Cf. Art. 28(2) of the UNCITRAL Model Law.

(8) The **Peruana** decision (supra). See too, "International Arbitration", Redfern, in [1988] 1 LMCLQ 23.

parties (9). The arbitration clause is therefore the subject of contractual analysis in its own right. Further, in English Law, the arbitration clause generally survives the termination of the main contract provided only that the main contract was not void ab initio or (if it is different) provided that the main contract came into existence. (10).

4.4. To return to the theme of this discussion, these developments pose questions for the legal practitioner and his clients. What use can or should be made of the freedom of choice available? Perhaps the same question, put another way is: what powers do the clients wish to give to the arbitrators?

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(9) Heyman v Darwins [1942] AC 356; Bremer Vulkan v South India Shipping [1981] AC 909; Ashville v Elmer [1988] 2 Lloyd's Rep. 73

(10) Typically, English Law addresses the last topic in terms of consequences not concepts. The international arbitration community has devoted much attention to this topic under the rubric of the "separability" or "autonomy" of the arbitration clause. See, for instance, "The New York Arbitration Convention of 1958", Van den Berg, (Kluwer, 1981), at p.145, and Redfern & Hunter, op. cit., at pp. 132-134. An interesting question arises as to the true effect of Art. 16(1) of the UNCITRAL Model Law.

5. The range of London arbitration is wide indeed. Even if consideration is restricted to matters within the MLAANZ sphere of interest, it is possible to identify the following (not exhaustive) categories of arbitration:

(a) Charterparties;

(b) Commodity trades, for instance, GAFTA and FOSFA;

(c) Oil trading;

(d) "Institutional" arbitrations, for example, arbitration on International Chamber of Commerce ("ICC") or London Court of Arbitration ("LCIA") terms;

(e) Lloyd's Open Form ("LOF") salvage;

(f) Ship collisions.

6. It is next helpful to consider each of these categories of arbitration to illustrate (in very general terms) both how they vary and what each has to offer parties who opt for them.

6.1. Charterparties.

(a) Most charterparties governed by English law provide for London arbitration. Indeed, so settled is the choice of London arbitration, that in the vast majority of these cases a decision to litigate instead would be virtually unthinkable. This is so, notwithstanding that the Commercial Court has been a or

the leader in modernising its procedures and in seeking to provide a service to the users of the Court.

(b) The typical charterparty arbitration involves an oral hearing and legal representation, and takes place before an arbitrator or panel of arbitrators who will be members of the London Maritime Arbitrators' Association ("LMAA"). In effect, there is a "corps" of such arbitrators. These arbitrators bring to bear great experience and expertise in the handling of such disputes. This is derived not only from the personal qualities and qualifications of the arbitrators but also from the volume and variety of disputes which come before them.

(c) The overall success of the system, brings with it problems of its own. The best (or most popular) arbitrators tend to be very busy, so there are time lags which are not too dissimilar from those facing litigants in the Commercial Court. It is to be remembered that arbitrations always start on time; that means that if arbitration X overruns its allotted time span, the tribunal (not to mention the lawyers) will be unable to sit to the finish - arbitration Y has to start. Arbitrators tend to be extremely helpful in their preparedness to sit unorthodox hours and weekends in an attempt to deal with these problems, but such measures are beset with inherent difficulties. A further

difficulty, in a sense, is that the pressures of commerce and of arbitration are such that it is increasingly rare in this field to find an arbitrator who is able to combine full-blown commercial activity with large scale arbitration commitments. While the upshot is increasing professionalism of the arbitrators as arbitrators, there is the risk of the most active arbitrators being deprived of the opportunities for intensive, continuing involvement with the practical workings of the marketplace.

(d) These arbitrations will deal with issues of fact and law. The procedures will very largely mirror those available in the Commercial Court, though they tend to be a shade more informal. The beneficial result is a tendency towards consistency; parties need not be concerned at arbitrators going off on a frolic of their own with the risk that it will not be possible to right the matter at a later stage in Court. The "downside" is that these arbitrations do not offer advantages from the point of view of a saving of costs; indeed, because this is the "private sector" and the tribunal and the facilities have to be directly paid for, a typical arbitration may well be more costly than a visit to the Court.

(e) There is a debate over the vexed question of publication of arbitration awards. The current position

is that awards are not published, save (as I understand it) with the consent of the parties and then on an anonymous basis in the Lloyd's Maritime Law Newsletter. On the one hand, it is said that publication would expand the body of knowledge available to all practitioners and clients. On the other, it is argued that publication would infringe against the principle of confidentiality and could even lead to "arbitrator shopping" - if certain arbitrators were known to have adopted a particular point of view. The debate continues.

(f) In my view, London charterparty arbitrations offer users an excellent service, certainly one that both seeks to better the international competition and one that is reliable. Perhaps the true strength of these arbitrations is that the shipping market appears to feel comfortable with them. There is of course no room for complacency and the challenge for this part of the London arbitration fraternity is to ensure that market acceptability is retained.

6.2. Commodity trade arbitrations, for example, GAFTA and FOSFA.

(a) Here too, arbitration is a standard feature of standard form contracts. The arbitrations, which may typically be "two tier" - i.e. there is an arbitration and an appeal arbitration - tend to be considerably more

informal than court proceedings and the panel will have great experience of the trade in question. The attendance of lawyers is frequently discouraged and there is an emphasis on documentary submissions.

(b) It is these arbitrations, especially when they are dealing with a dispute as to the quality of goods, which are the inheritors of the tradition of "look-sniff" arbitration. Lord Justice Scrutton put the merits of going to arbitration in such cases in the following terms:

> "... We lawyers think, and have some justification for thinking, that the procedure of the Courts, and the way they investigate questions, is excellently calculated to arrive at a true result; but there is no doubt that it does arrive at that result in a somewhat lengthy and expensive manner. During the last 30 or 40 years business men have formed the view that it is possible to be too accurate in investigating disputes and that it is better on the whole for business to have a rough and ready way of getting at the truth than the more accurate, expensive and dilatory method of the Courts.
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> This is particularly the case with the class of disputes which are known as quality disputes. If a buyer rejects goods on the ground that goods do not comply with the contract in many particulars, the question is one which requires someone to understand the trade to decide it properly; and if that quality dispute is to be decided in the Courts, the Judge, who has the merit of complete impartiality and ignorance of the subject-matter, listens to three or four gentlemen who say it is in accordance with the contract and three or four gentlemen on the other side who say with equal positiveness that it is not. He may, if he is an exceptionally intelligent Judge, manage to see through the contradictions of the witnesses; but he may not. At the end of the proceedings there will be a fairly expensive bill of costs, and commercial

men may not be satisfied that the right result has been arrived at.

> So in commercial arbitrations many trades have arrived at a system that they think is much better and which probably is very much better than the system of the Law Courts. They each appoint an arbitrator. That arbitrator is not in the least like a Judge. He acts in a way no Judge would act. He hears statements from one side without requiring the presence of the other. He uses evidence submitted to him by his client, putting it forward as an advocate and not as an arbitrator. It is useless to call an arbitrator a Judge. He is a negotiating advocate, endeavouring to do the best he can for his client ... [the arbitrators] may not agree; and when that happens these commercial men appoint an umpire. It is quite a usual practice in London that when the umpire is appointed he is told where the goods are, and no further hearing takes place. He sees the goods ... or gets an agreed sample. He performs the mystic operations of smelling, tasting, touching and handling, which one sees witnesses do in Court; and these tell him the quality of the goods." **(11)**

(c) This informality has a price of its own. If there are - and on a good many occasions there have been - points of law which require careful treatment at the arbitration stage and if the trade tribunal takes too broad a brush to these points, no end of difficulty can be occasioned when the case ultimately winds its way to the Courts. The law reports bear witness to problems of this nature.

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(11) Naumann v Nathan (1930) 37 Ll. L. Rep.249, at p.250.

6.3. Oil trading arbitrations.

I mention this trade because although there are some standard terms, there are a good many contracts which are very much of the "one off" variety. To my mind, whether these contracts choose arbitration at all or opt for the Commercial Court and, if arbitration is chosen, whether they opt for an LMAA or an "institutional" type of arbitration, is very helpful as a barometer of the then current popularity of one or other mode of dispute resolution.

6.4. "Institutional" arbitrations (for example, ICC and LCIA).

(a) These arbitrations are the most likely to utilise to the full the extent to which English Law is prepared to recognise party autonomy and a wide arbitral jurisdiction **(12)**. It has been said **(13)** that the determination to keep ICC type "international" arbitrations in London was an important contributory

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(12) See the ICC Rules discussed in **DST v Rakoil** (supra).

(13) Sir Michael Kerr, writing in the July/August 1989 edition of "Counsel".

factor to the reforms of English arbitration law brought about by the 1979 Arbitration Act. Further, it is to be remembered that in these types of arbitration it may be possible to "contract out" of even the limited supervision retained by the Courts under the 1979 Act **(14)**.

(b) The attractiveness of embracing a "code" - such as that contained in the ICC Rules - must depend on the alternatives. If the choice is the Commercial Court in London or, no doubt, the Australian Courts, the parties may well be reluctant to commit themselves to an arbitration of this nature. If, however, the identity of the parties or the nature of the dispute is such that no forum would be acceptable to either side other than a truly "international" arbitration, then these arbitration rules have a most valuable role to play in international commerce. The framework furnished by the UNCITRAL Model Law may well be thought to achieve much the same ends.

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(14) Consider the topic of "exclusion agreements" dealt with in Ss. 3 and 4 of the 1979 Arbitration Act. See too, Mustill & Boyd (op. cit.), at p.635, the text and fn. 4.

(c) The identity and calibre of arbitration panels can diverge very considerably. Some times, the panels are comprised of or include lawyers of the greatest eminence. Some times, less fortunately, the price of international confidence may be a tribunal of indifferent quality.

(d) ICC arbitration has - at least in the past - been criticised for being cumbersome and expensive. There are high hopes for the LCIA **(15)** and there should be no doubt that London is anxious to provide and to go on providing a framework which is capable of accommodating such arbitrations.

6.5. LOF Salvage Arbitration **(16)**.

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(15) Kerr, op. cit.

(16) Apart from textbooks on the law of Salvage, there is a very useful paper on LOF arbitration, written by G.R.A. Darling Q.C. (the current LOF Appeal Arbitrator) in "International Commercial and Maritime Arbitration" (op. cit.) at pp. 95 et seq.

(a) The nature of maritime salvage requires a contract enjoying international acceptability; LOF is such a contract and is the world leader. LOF includes an arbitration clause and almost all London salvage disputes of any consequence go to LOF arbitration.

(b) LOF arbitration - a two tier system, there is provision for an original arbitration and an appeal arbitration - takes place before an Admiralty Q.C. sitting as arbitrator. The parties will be represented by counsel and both counsel and the tribunal will be specialised and highly familiar with salvage work. The procedure is informal in the extreme, with the hearing generally proceeding on documents rather than oral evidence. This informality is aided by the fact that most issues which arise are factual rather than legal and that it is in the nature of salvage that very often all the arbitrator is concerned to do is to reach an award in the right bracket. The system works relatively expeditiously; it might be expected that no more than a year would elapse from the date of a marine casualty to the conclusion of at least the hearing of the original arbitration.

6.6. Ship collision arbitrations.

Ship collisions can only give rise to ad hoc submissions to arbitration. In this sphere, arbitration does not predominate; more collisions almost certainly go to the Admiralty Court than are disposed of in arbitration. The popularity of arbitration in this sphere illustrates another feature of the arbitration process - namely, that while certain entities are reluctant to appear in a foreign court, they find London arbitration acceptable and welcome.

7. The conclusions at which I arrive are these:

7.1. It is apparent that what can be achieved by resort to arbitration and the manner of achieving it can vary widely. The options are there but they must be used wisely.

7.2. Although it may some times be tempting to seek to expand the powers of arbitrators to exclude all recourse to national Courts and to decide every manner of issue, there are two cautionary remarks which I would wish to emphasise. The first is that at some stage the support of a Court may well be necessary, if only to secure enforcement of the arbitration award; a purely voluntary system of arbitration cannot deal with the recalcitrant debtor. The second, is that it should never be forgotten that arbitration is consensual. Arbitrators have a necessarily limited jurisdiction. Problems of

acute difficulty can arise if or when it is sought to carry the "separability" of the arbitration clause too far.

7.3. Again as has been seen, arbitration may very often not differ radically from court proceedings. In such circumstances, how "alternative" a mode of dispute resolution has in fact been created? In this context, the question must be posed as to whether enough attention has been focused on the use of truly different solutions, such as Conciliation.

7.4. Given the popularity of arbitration, for diverse reasons, amongst the business community, there is likely to be a full agenda for continuing discussion of arbitration and for seeking to make advances in the service which can be provided to the commercial community. In this, as has so often been the case in connection with other legal topics, I am sure that there is much which our two systems can learn from each other.