2006

F. S. Dethridge Memorial Address

International commercial law, maritime law and dispute resolution: the place of Australia, New Zealand and the Asia Pacific region in the coming years

Maritime Law Association of
Australia and New Zealand
Conference

Sydney

28-29 September 2006

The Hon. Justice James Allsop

It is a privilege to be asked to give this address in memory of a great maritime lawyer. I hope my efforts are worthy of that memory and worthy of the company of previous addresses.

I did not know Frank Dethridge personally. However, once one recognises the vision he displayed in his involvement in the establishment of this Association, one knows that he would now recognise the enormous challenges, and opportunities, facing Australia, New Zealand and the Asia Pacific Region in maritime affairs in the coming decades.

As an Australian judge, I do not presume to speak with any authority borne of practice about New Zealand or other countries in the region. I would like, however, to raise for consideration some issues, which are important in connection with the conduct and administration of maritime law and dispute resolution. With some trepidation, I propose to make some suggestions. Ordinarily, it would not be my place to make them. I have, however, been asked to give this address. That invitation and the authorisation flowing therefrom relieve me of any accusation of presumptuousness, I hope. My suggestions may or may not be worth implementing. I hope they are, however, worth listening to and considering. Of course, they are my thoughts and not the views or position of the Federal Court of Australia.

What can be referred to as the Asia Pacific Region has changed enormously in 60 years. Without being wedded to precise definition of the boundaries of the area under discussion, all countries in the region have experienced, in some form or other, some or all of war and conflict, the end of colonial rule, the emergence of independent sovereignty and, with the presence of relative peace in the last few decades, significant material growth. Indeed, it is not an overstatement to say that the growth of economic activity in the region has led to intercontinental shifts in economic power.

The economies of China, Japan, the Republic of Korea, India, the countries of South East Asia, Australia, New Zealand and Canada now represent a significant part of world

economic and financial activity. The financial centres of Tokyo, Hong Kong, Shanghai, Singapore, Mumbai, Sydney and Melbourne are some of the most important in the world. If one includes the United States of America as a Pacific littoral state, one has a preponderance of world economic activity.

It is against this background that I wish to say something of commercial law, maritime law and maritime dispute resolution.

Let me begin by saying something of the law and of commerce.

One striking contemporary phenomenon is the globalisation of commerce, brought about by astonishing changes in communications and the integrated global and regional markets created or fostered thereby.[1] The supranational forces impinging on municipal states have influenced virtually all economies of the world, creating linkages, dependencies and opportunities quite unrelated to sovereign nation states and their borders.

This, however, is nothing new. Only new, are the tools of communication of bringing about and effectuating commercial intercourse.

Commerce and maritime affairs are universal and timeless activities. "International commercial law" is not a new phrase. It can be distinguished from the phrase "international economic law", which describes a branch of public international law of more recent provenance. After the Second International Peace Conference at the Hague in 1907 and the end of gunboat diplomacy that had typified the foreign policy of European imperial powers in the 19th century and early 20th century, a framework of international economic treaties between nation states developed. Under this new system, the remedy of the national was through the diplomatic protection of his or her

[1] See Galgano, F "The New *Lex Mercatoria*" (1995) 2 *Annual Survey of International and Comparative Law* 99; and Bonell, MJ *An International Restatement of Contract Law* (Transnational Publishers 3rd Ed 2004) at 11-13.

state in the enforcement of that nation's rights.[2] This method of indirect protection of the individual's rights against the foreign state changed with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965 (the ICSID Convention) which provided for arbitration between the individual investor and foreign state.[3] Since 1965, there have been many bilateral treaties which have provided for private enforcement of rights against states, including recent bilateral free trade agreements. Thus, aspects of public international economic law are converging with traditional international private commercial law, in particular through the remedial mechanism of arbitral dispute resolution.

International commercial law is a species of private law that is supranational or transnational. Whether this law is "soft" or "hard", to use the idiom of the debate, is a question to which I will come.

History tells us to expect rules for human commercial and maritime activity that transcend the political structures of the day and that reflect the timelessness of the activity involved. The history of international commercial law takes one back to the medieval law merchant and before then to the commercial laws and activity in the Mediterranean, the Middle East, Greece, Rome, China, India and Asia. In Europe, even as nation states were developing from the complexity of early medieval royal authority, a community of cosmopolitan merchants travelled from fair to fair and port to port.

There is little doubt or controversy that in Europe, before the entrenched development of the modern nation state in and after the 15th and 16th centuries, there was a law merchant.[4] The title of Gerard Malynes' famous work of the 17th century was *The Ancient Law-Merchant*. Its title page stated that it contained the essentials necessary for

---

[2] See the Permanent Court of Justice in the *Panevezys – Saldutsikis Railway Case* series A/B 76 p 16 and the discussion in Redfern, A and Hunter, M *Law and Practice of International Arbitration* (Sweet and Maxwell 2004) pp 474-75.
[3] See Redfern, A and Hunter, M *op cit* pp 55 ff and pp 474 ff.
[4] See Malynes, G *The Ancient Law-Merchant* (3rd Edition 1686); Holdsworth, W *A History of English Law* (3rd Ed 1945) Vol V pp 60-154; Sanborn, FR *Origins of the Early English Maritime and Commercial Law* (Hein & Co reprint 2002).

statesmen, judges, lawyers, merchants, mariners and all negotiating in any part of the world.[5]

Important to the development and maintenance of a coherent law merchant were four elements: a degree of unifying commonality of the laws of the market places and fairs, a degree of unifying commonality in the laws and customs of the sea, a unifying role of specialised courts dealing with commercial disputes and a unifying role of standard forms of contracts[6]. These elements are recognisable aspects of international commercial life today.

I will not digress on the laws of the fairs. It is sufficient to say that they were central to the development of the law merchant in relation to agency, instruments payable to order and negotiability.[7]

---

[5] Malynes said this about the law merchant at p 2:

> *"Every man knoweth, that for Manners and Prescriptions, there is great diversity amongst all Nations; but for the customs observed in the course of traffic and commerce, there is that sympathy, concordance, and agreement, which may be said to be of like condition to all People, diffused and spread by right reason, and instinct of nature consisting perpetually. And these customs are properly those observations which Merchants maintain between themselves, and if these be separated from the Law of Nations, the remainder of the said Law will consist of but few points."*

[6] See Schmitthoff, CM "International Business: A New Law Merchant" (1961) II *Current Law and Social Problems* 129 in Cheng, C-J *Clive M Schmitthoff's Select Essays on International Trade* (Martinus Nijhoff 1988) ch 3.

[7] See Holdsworth, W *A History of English Law* (7th Ed) Vol 1 p 528; Sanborn, FR *op cit* esp ch III; Abu-Lughod, JL *Before European Hegemony: The World System AD 1250-1350* (Oxford 1989) ch 2.

Maritime law always revealed a striking degree of uniformity.[8] This is hardly surprising. Shipping is a universal activity. It has a history as long as mankind. It has been known across all littoral and riparian parts of the earth. The Persian Gulf, the Arabian Sea and the Tigris-Euphrates Basin all carried on early trade. The Phoenicians traded in the Western Mediterranean and past Gibraltar on to the Atlantic European coast. The Code of Hammurabi (1800 BC) contains provisions dealing with collisions and ship leasing. Herodotus speaks of Egyptian vessels (probably Phoenician) circumnavigating Africa. Egyptian frescoes show vessels of some size, for ocean, rather than river, use. Cretans, Etruscans, Greeks, Romans, Phoenicians and Carthaginians all plied the Mediterranean. Rhodes was an important maritime centre, providing an early and famous codification of maritime law. Constantinople, the capital of the Eastern Roman or Byzantine Empire, was the centre of European trade with India, China (via the Black Sea ports) and the Middle East. China, North Asia, South East Asia, India, the Arabian Sea and Africa were all active maritime areas before being "discovered" by Europeans. The great commercial centres of the Middle East – Baghdad, Damascus, Alexandria and others supported a great cosmopolitan commercial society from ancient to modern times. The Indian Ocean has nurtured commercial and maritime activity for millennia. Sanskrit sources described the extent of Indian shipping to the Middle East and Asia. The evidence of maritime trade between Gujarat and Babylon in 600 BC is well-known. The monsoons enabled trade from the Red Sea to Asia, with seasonal winds to China, the Philippines and North Asia. Malabar teak,

[8] As to what follows, see generally Tetley, W *International Maritime and Admiralty Law* (Editions Yvon Blais 2002) pp 5-30; Sanborn, FR *op cit* chs 1, 2 and 4; McFee, W *The Law of the Sea* (J B Lippincott Company 1950) chs 3-6; Gold, E *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington Books 1981) ch 1; *Benedict on Admiralty* (7th Ed) vol 1 chs 1 and 2; Gilmore, G and Black, CL *The Law of Admiralty* (2nd Ed, The Foundation Press 1975) pp 1-11; Schoenbaum, TJ *Admiralty and Maritime Law* (West Publishing) ch 1; Beutel, FK *Brannan's Negotiable Instruments Law* (7th Ed, The WH Anderson Company 1948) Part 1 ch 1; Day, C *A History of Commerce* (Longmans, Green & Co 1922, Garland Publishing facsimile edition 1983); Hourani, GF *Arab Seafaring in the Indian Ocean* (Princeton University Press 1951); Laing "Historic Origins of Admiralty Jurisdiction in England" (1946) 45 *Michigan Law Review* 163; Marsden, RG *Select Pleas in the Court of Admiralty* (Selden Society 1897, 1953 Reprint) Vol 1; Selfridge, HG *The Romance of Commerce* (Bodley Head 1918); Mangone *United States Admiralty Law* (Kluwer International, 1997) ch 1; Mears "The History of Admiralty Jurisdiction" *2 Select Essays in Anglo-American Legal History* 312; Mookerji, R *Indian Shipping*: *A History of the Sea-Borne Trade and Maritime Activity of the Indians from the Earliest Times* (Longmans, Green & Co 1912); Oakeshott, WF *Commerce and Society* (Oxford 1936); Anand, RP *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1983); Abu-Lughod, JL *op cit*; Charlesworth, MP *Trade Routes and Commerce of the Roman Empire* (Ares Publishing Inc 1974).

coconut fibre, flax, cotton and metals made India a flourishing site of shipbuilding. Ibn Battuta, the Tangiers-born lawyer, merchant and geographer of the 14th century described Calicut in South West India as one of the largest harbours in the world visited by men from China, Sumatra, Ceylon, the Maldives, Yemen, Persia and "all quarters". He described "Zayton"[9] in China as the very largest harbour in the world with hundreds of vessels.

The uniformity of the activity and the human intercourse in maritime commerce has always been a powerful force in favour of a degree of uniformity of rules. In an age when we once again seek to gain the advantages of harmony of rules, it is well to recall the lineage of which our efforts form part.

European maritime law can be traced from its Greek roots, through Roman law and the codes of Justinian and later Emperors, through the codes of city states and feudal territories of Venice, Ravenna, Pisa, Genoa, Amalfi, Trani, Marseille and Barcelona, through the laws and codes of Oléron, Flanders, Denmark and Germany, and port cities therein. The *Consulato del Mare* of Barcelona, the Rolls of Oléron, the Judgments of Damme, the laws of Wisby and the laws of the Hanseatic League are well known. They reveal elements and principles of commercial law and shipping law of universal application. They formed the basis for modern European Maritime Codes.

European maritime law has always had at its roots a coherent constancy of principle. No doubt the same can be said of the Middle East, India and littoral Asia generally.[10]

As we shall see from a United States case in the District Court and the Fourth Circuit as recent as 1999, all this is not just history. It is part of the very fibre of the living roots of the general maritime law common to all mankind.

[9] A port on the coast of China described by one writer, Oakeshott, in 1936, as "modern Chiian-Chau".
[10] See generally Anand, RP *op cit.*

Cohesive commercial and maritime law was encouraged by the use of specialist maritime and commercial courts. In Europe, it became widespread practice to have a maritime court in each port city, dispensing justice according to what was a *jus gentium,* an international private law. Maritime courts were accompanied by merchants' courts, such as the Piepowder courts, in which decisions were made by local and foreign merchants sitting together.

The uniformity of law and decision making was assisted by the widespread activities of the notary public drafting forms.[11] Each notary would be responsible for drafting many agreements, such as charterparties, contracts of insurance and sale, no doubt bringing a degree of uniformity to similar documentation.

This degree of harmony and uniformity in Christian Europe was mirrored in the Muslim world. Two great binding forces of the Caliphate were religion and commerce. The Muslim merchant class was respected, powerful and ubiquitous. The trading worlds of Christians and Muslims intersected and inter-reacted, especially through Venice, Constantinople and the Black Sea ports, but to a significant degree remained separate. The commercial intercourse of the Muslim world with India, Ceylon, South East Asia and China was, however, more open and vibrant.

One can see in the past the same forces and elements underpinning international or transnational commercial law today:

- the freedom and mobility of international commerce in times of peace
- the international character of commerce and maritime activity
- a degree of uniformity in approach to common and elemental activity – the promise, the bargain, payment, security, insurance, transport and the role of the agent

[11] See Schmitthoff, CM *op cit* note 6 above.

- dispute resolution closely suited to, and knowledgeable of, commercial and maritime affairs of the merchants involved
- a degree of uniformity in transactional documents

With the growth of strength of the nation state and the reduction of importance of the cosmopolitan merchant class, the law merchant became absorbed into European municipal law, especially in the 18th and 19th centuries. The European codifications of and after Napoleon and the attempts by Lord Mansfield in England to fashion a law merchant can be seen as part of the seamless process of the reduction of a wider law merchant into the municipal framework in the era of the sovereign nation state.

One aspect of the imperialism and colonialism of the British Empire and of other European states in the 19th and 20th centuries was that, at least within imperial borders, a degree of uniformity of commercial law evolved. The maintenance of this uniformity was a very important function of the Judicial Committee of the Privy Council.

An illustration of the transition from a recognition of law existing supranationally to its place as municipal law is the way the United States Supreme Court in the 19th century regarded the general maritime law. Article III section 2 of the United States Constitution provides for the Judicial Power of the United States to include all cases of admiralty and maritime jurisdiction. In 1828, the great Chief Justice, John Marshall, said in *American and Ocean Insurance Co v 356 Bales of Cotton* [12]:

> *"Admiralty cases [do not] arise under the constitution or laws of the United States [but] are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."*

This was similar to what Lord Mansfield had said in 1759 in *Luke v Lyde*[13]:

> *"The maritime law is not the law of a particular country, but the general law of nations."*

[12] 26 US 511 at 545-46 (1828).
[13] (1759) 2 Burr 882 at 887; 97 ER 614 at 617.

However, in 1875, Bradley J made clear in *The 'Lottawanna'*[14] that while the international sources of maritime law informed the development of United States maritime law as a distinct branch of municipal law, the law itself was of the United States – it was municipal law.[15]

This view prevails in England and Australia also. In 1972, in *The 'Tojo Maru',* Lord Diplock stated the primacy of municipal law, and rejected the existence of a free-standing maritime law of nations (with the exception of prize).[16]

---

[14] 88 US 558 (1875).

[15] At 573 stating

> *"...Each state adopts the maritime law, not as a code having any independent or inherent force,* proprio vigore, *but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.*
>
> *This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.*
>
> *...*
>
> *That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood."*

[16] At [1972] AC 242 at 290-91 he said:

> *"Outside the special field of `prize' in times of hostilities there is no `maritime law of the world,' as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a `maritime law of the world' and not from the internal municipal law of a particular sovereign state."*

In *Blunden v Commonwealth*,[17] Gleeson CJ, Gummow J, Hayne J and Heydon J discussed the place of maritime law as part of the law of Australia. They adopted and approved what Lord Diplock had said in *The 'Tojo Maru'*. *Blunden* involved (as did *The 'Tojo Maru'* and *The 'Lottawanna')* a rejection of any notion of a free-standing international maritime law affecting or creating municipal rights and obligations, as an external body of law, and of its own force.[18]

While this view that the maritime law is municipal is no doubt correct within the courts of the sovereign nation state, it does not address the question of the law applicable outside municipal boundaries – whether physically, on the high seas, or, legally, pursuant to the free choice of parties.

The high seas are subject to customary international law and applicable treaties. Actions done upon the high seas may, to a degree, be the subject of municipal control.[19] However, there is also the place for the *jus gentium* or the private common law of nations, based on common sense and right reason. The United States District Court and the Fourth Circuit Court of Appeals recently grappled with this in the *Titanic* wreck and

---

[17] (2003) 218 CLR 330 at 337-38 [13].

[18] *Blunden* was not, however, a rejection, but on the contrary, a recognition, of the breadth and international character of the sources of maritime law. That this is so can be seen from the passages from *Moragne v States Marine Lines Inc* 398 US 375 at 368-88 (1970) cited by their Honours, which included the following statement by Harlan J delivering the opinion of the Court at 386-87:

> *"Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. ... These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea."*
> [footnotes omitted]

For a somewhat more pessimistic view as to the effect of Lord Diplock's views in *The 'Tojo Maru',* see Zelling "Constitutional Problems of Admiralty Jurisdiction" 58 *Australian Law Journal* 8 at 12. For a stimulating discussion of the place of the Law of Nations in United States law, in particular the law maritime and the law merchant, see Dickinson, ED "The Law of Nations as Part of the National Law of the United States" (1952- 53) 101 *University of Pennsylvania Law Review* 26 and 792.

[19] Acts beyond state boundaries may still be the subject of the criminal law. The high seas are not lawless.

salvage case.[20] *Titanic* lay over 400 miles from the nearest land, at the bottom of the high seas. Could United States Admiralty *in rem* jurisdiction be exercised over a wreck in international waters? The answer was that it could be. The court rejected the proposition that it was powerless to recognise and apply the *jus gentium* on the high seas.[21] The applicable law was the law of salvage, which aspect of the *jus gentium* was derived by reference to the Rhodian Code, the Laws of Oléron and the modern reflection of this part of the law maritime in the 1989 Salvage Convention.[22]

A similar removal of the regulation of the affairs of parties by municipal law may occur if the parties choose to create their own law as between themselves and if they are able to find a regime of adjudication which will both respect and enforce that choice. This takes us to the development of non-national or transnational harmonised laws or principles and the role of international commercial arbitration in applying them.

With de-colonisation and the proliferation of nation states, since the 1960s in particular, a renewed effort has been made to bring a measure of uniformity to international commercial life and dispute resolution.

The attempts at unification or harmonisation of commercial law were dominated in the first half of the 20th century by maritime law and maritime lawyers. Carriage of goods under bills of lading was an excellent example. From the 1870s, it was recognised that individual national regulation by legislation of the kind passed in the United Sates, New Zealand, Australia and Canada[23] of the abuses produced by unbridled freedom of contract was unlikely to be comprehensively satisfactory. This led to the Brussels

---

[20] *RMS Titanic v Haver* 171 F3d 943; see also the article by Niemeyer J (who wrote the opinion of the Court on appeal) in (2006) 37 *Journal of Maritime Law and Commerce* 431.

[21] Niemeyer J on behalf of the Court of Appeals saying at 969:

> "*If we were to recognize an absolute limit to the district court's power that would preclude it, or essentially any other admiralty court, from exercising judicial power over wrecks in international water, we would be abdicating the order created by the* jus gentium *and would [be] return[ing] the high seas to a state of lawlessness never experienced – at least as far as recorded history reveals. We refuse to abdicate in this matter."*

[22] International Convention on Salvage, done at London 28 April 1989.

[23] See the *Harter Act 1893* in the United States; the *Sea-Carriage of Goods Act 1904* (Cth) in Australia; the *Shipping and Seamen Act 1903* (NZ); and the Canadian *Water Carriage of Goods Act 1910*.

Conferences in the early 1920s[24] and the establishment of a workable compromise of minimum rights and obligations in the carriage of goods by sea under bills of lading in the Hague Rules.

Until the formation of the International Maritime Consultative Council (IMCO)[25] later to become the International Maritime Organisation (IMO) and other United Nations bodies whose activities touch on maritime affairs,[26] the Comité Maritime International (CMI) played the leading role in the development of international conventions and rules concerning maritime law.[27] With the formation of the IMO, the primary burden of promulgation of maritime treaties, at least of a character dealing with safety, the environment and technical matters, has fallen to it.[28] The CMI remains significantly

[24] See *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 at [155]-[193].
[25] Established by convention in 1948 which came into effect in 1958.
[26] UNCTAD and UNCITRAL in particular.
[27] Covering transport of goods, carriage of passengers and luggage, collision and navigation, salvage and general average, limitation of liability, pollution liability and compensation therefor, maritime liens and claims, registration of ships, mortgages, arrest, classification societies, off-shore mobile craft and stowaways. See CMI *Handbook of Maritime Conventions* (Lexis Nexis 2001).
[28] The following is a list of IMO sponsored Conventions:
Maritime Safety: International Convention for the Safety of Life at Sea, 1974; International Convention on Load Lines, 1966; Special Trade Passenger Ships Agreement, 1971; Protocol on Space Requirements for Special Trade Passenger Ships, 1973; Convention on the International Regulations for Preventing Collisions at Sea, 1972; International Convention for Safe Containers, 1972; Convention on the International Maritime Satellite Organization, 1976 ; The Torremolinos International Convention for the Safety of Fishing Vessels, 1977 ; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978; International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995; International Convention on Maritime Search and Rescue, 1979.
Marine pollution: International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties), 1969; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990; Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000; International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001; International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.
Liability and compensation: International Convention on Civil Liability for Oil Pollution Damage, 1969; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971; Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974; Convention on Limitation of Liability for Maritime Claims, 1976; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996; International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.
Other subjects: Convention on Facilitation of International Maritime Traffic 1965; International Convention on Tonnage Measurement of Ships 1969; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988; International Convention on Salvage, 1989.

influential. Its role has been somewhat redefined to co-operation with intergovernmental organisations seeking to harmonise maritime law.[29]

The formation and development of UNIDROIT (in 1926)[30] and UNCITRAL (in 1966)[31] have fostered the development of conventions, model codes and model laws dealing with private law, especially commercial law, generally.

The pace of development of international commercial law has been remarkable in the last 20 to 30 years. There are international and European restatements, model laws, principles, conventions, directives and other instruments on contract law,[32] electronic commerce,[33] international sale of goods,[34] agency and distribution,[35] international credit transfers and bank payment undertakings,[36] international secured transactions,[37] cross-

[29] CMI's contribution to the work of the Legal Committee of the IMO has been huge, in particular in drafting conventions on carriage, limitation of liability, maritime assistance and salvage and arrest, harmful and noxious substances, places of refuge, fair treatment of seafarers and wreck removal.
[30] The International Institute for the Unification of Private Law was established by multilateral treaty in 1926.
[31] The United Nations Commission on Uniform Trade Law created by unanimous resolution of the general assembly of the United Nations on 20 December, 1966.
[32] As to international private law, see generally Goode, R et al *Transnational Commercial Law: International Instruments and Commentary* (Oxford 2004). The UNIDROIT Principles of International Commercial Contracts 2004, produced by a group of international scholars and practitioners under the direction of Prof Joachim Bonell (Part I of which was published in 1994); the Principles of European Contract Law completed in 2003 prepared by scholars from all member states of the European Community.
[33] UNCITRAL Model Laws on Electronic Commerce (1996) and on Electronic Signatures (2001); EC Directives on Electronic Commerce (2000) and on Electronic Signatures (1999); CMI Rules for Electronic Bills of Lading 1990; the Bolero (an acronym from Bill of Lading Registration Organisation) bill of lading prepared through the co-operation of the Through Transport Mutual Insurance Association (the TT Club) and the Society for Worldwide Inter Bank Financial Telecommunications (SWIFT) which operates through a joint venture company; and the ICC rules as to electronic presentation of documents.
[34] The United Nations Convention on Contracts for the International Sale of Goods done at Vienna 11 April 1980 ("CISG") which superseded the Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 and the Uniform Law on the International Sale of Goods, 1964; and the ICC Official Rules for the Interpretation of Trade Terms (Incoterms 2000), replacing earlier versions.
[35] The First Company Directive (EEC) (1968); the EEC Directive on Commercial Agents (1986); the UNIDROIT Convention on Agency in the International Sale of Goods done at Geneva 17 February 1983; and the UNIDROIT Model Franchise Disclosure Law (2002).
[36] UNCITRAL Model Law on International Credit Transfers (1992); ICC Uniform Customs and Practice for Documentary Credits (1993) (UCP 500) and electronic supplement (EUCP); ICC Uniform Rules for Demand Guarantees (1992); International Standby Practices (ISP 98) by the Institute of International Banking Law & Practice Inc; UN Convention on Independent Guarantees and Stand-by Letters of Credit done at New York 11 December 1995; ICC Uniform Rules for Contract Bonds (1993).
[37] The European Bank for Reconstruction and Development (ERBD) Model Law on Secured Transactions (1994); the Model Inter-American Law on Secured Transactions (2002); the various maritime

border insolvency,[38] securities settlement and securities collateral,[39] conflict of laws,[40] international civil procedure,[41] and international commercial arbitration.[42]

Some of these instruments are not legally operative, whether at the level of public international law, or municipal law. Such model laws or principles are sometimes referred to as "soft" law.

---

conventions dealing with security: on Maritime Liens and Mortgages (1926 and 1993) and on Arrest (1952 and 1999); the Convention on the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft done at Rome on 29 May 1933; the Convention on the International Recognition of rights in Aircraft done at Geneva on 19 June 1948; the UNIDROIT Convention on International Financial Leasing done at Ottawa 28 May 1988; the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment and Protocol done at Cape Town on 16 November 2001; the UNIDROIT Convention on International Factoring done at Ottawa 28 May 1988; the UN Convention on the Assignment of Receivables in International Trade done at New York 12 December 2001.

[38] The UNCITRAL Model Law on Cross-Border Insolvency (1997); the European Union Convention on Insolvency Proceedings; and the EC Council Regulation NO 1346/2000 on Insolvency Proceedings.

[39] The EC Settlement Finality Directive (1998), 98/26/EC; and the EC Directive on Financial Collateral Arrangements (2002), 2002/47/EC.

[40] The Convention on the Law Applicable to Agency done at the Hague on 14 March 1978; the Convention on the Law Applicable to Contracts for the International Sale of goods done at the Hague on 22 December 1986; the Convention on the Law Applicable to Contractual Obligations done at Rome on 19 June 1980; the Inter-American Convention on the Law Applicable to International Contracts done at Mexico on 17 March 1994; and the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary done at the Hague in 2002.

[41] The European Convention on State Immunity done at Basle on 16 July 1972; European Community Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; a MERCOSUR Convention and Protocol on jurisdiction in civil and commercial matters; the Buenos Aires Protocol to the Treaty of Asuncion signed on 26 March 1991, on International Jurisdiction in Contractual Matters done at Buenos Aires on 5 August 1944; the Convention on the Service Abroad of Judicial or Extra-judicial documents in Civil or Commercial Matters done at the Hague on 15 November 1965; the European Community Council Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters done at the Hague on 18 November 1970; European Community Council Regulation No 1206/2001 of 28 May 2001 on Cooperation of Courts of Member States in the Taking of Evidence in Civil or Commercial Matters; and the American Law Institute and UNIDROIT jointly developed Principles of Transnational Civil Procedure.

[42] The Convention on the Recognition and Enforcement of Foreign Arbitral Award adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting (the New York Convention); the Inter-American Convention on International Commercial Arbitration done at panama City on 30 January 1975; the UNCITRAL Model Law on International Commercial Arbitration (1985); the UNCITRAL Arbitration Rules (1976); the ICC Rules of Arbitration (1998); and the London Court of International Arbitraiton Rules.

There has been for many years a significant debate about the extent to which these kinds of instruments, at their varying level of legal standing, can be said to create a law merchant or *lex mercatoria* existing above and distinct from municipal laws.

Before turning briefly to that debate, it is appropriate to recognise that these conventions, model laws and principles, even if they are only so-called "soft" law, provide rules and principles of a greater or lesser degree of international acceptance in respect of important elements of commercial life: contracts (and their formation, interpretation and performance), the sale of goods, payment and credit, arbitration and civil procedure. These can be used by parties, by arbitrators and by judges as aspects of accepted international approaches to common international transactions.

They can also be incorporated into contracts as the rules of procedure or as part of a party chosen governing law.

One of the least outwardly exciting, but one of the most important, bodies of principles is the American Law Institute and UNIDROIT Principles of Transnational Civil Procedure. This was a hugely important project with an object which some said could not be achieved: the harmonisation of the civil law and the common law dispute resolution procedures.

The project was begun by distinguished American and European professors. Their vision was to develop a body of principles for transnational cases which could apply in national courts (or arbitral bodies) and in so doing replace domestic procedural rules when the parties to litigation involved nationals of different states or when the case could otherwise be described as international.

The Principles are an attempt to approximate, in a flexible way, important issues common to the two dominant legal systems. They are available for adoption and adaption by courts and arbitral bodies. They form a bridge between two very different legal cultures and provide a common and fair basis for hearing international disputes.

Importantly, they provide a procedural foundation that can give confidence to parties in litigation who come from different legal cultures.

The debate as to the existence and nature of a new modern *lex mercatoria* is a fascinating one.[43] In a practical context, it can arise starkly in relation to international commercial arbitration.

The relevant law applicable to the resolution of a dispute by arbitration is not a straight-forward topic.[44] There may be a number of different laws applicable: that governing the capacity to enter into the arbitration agreement; that governing the arbitration agreement itself and its performance; that governing the existence and proceedings of the tribunal; that governing the substance of the dispute; and that governing recognition and enforcement of the award.

Debate has proceeded between proponents and opponents of the view as to whether a *lex mercatoria* exists. What cannot be denied, however, is the utility to parties and arbitrators (and also judges) of understanding how the respected authors and proponents of model laws and principles, and how state parties in coming to agreement in international conventions, have addressed issues of relevance. For instance, the availability of relevant rules and principles may enable an arbitrator to choose an available body of rules about substance or procedure when the parties have failed to identify the relevant law. This choice might be made by reference to available unattached "soft" law, rather than by recourse to conflict rules to choose one particular municipal law. At its conference in Cairo in April 1992, the International Law Association expressed the view that the basing of an arbitration award on transnational rules rather than on municipal law would not affect the validity of an award where the parties have agreed that the arbitrator can do this, or, when the parties have said nothing

[43] For reference to the literature, see van Houtte, N *The Law of International Trade* (Sweet & Maxwell 2002) pp 24-28; Pryles, M "Application of the *lex mercatoria* in international arbitration" (2004) 78 *Australian Law Journal* 396; and Petrochilos, G *op cit* at 36 [2.04] ftnt 79.
[44] Redfern, A and Hunter, M *op cit* ch 2; Petrochilos, G *Procedural Law in International Arbitration* (Oxford 2004) chs 1, 2 and 3.

as to the applicable law. The French Court of Cassation, the Austrian Supreme Court and the English Court of Appeal have affirmed this approach.[45]

As can be seen from the list provided in the footnotes, this transnational law is really a smorgasbord of available rules, principles and conventions, more or less relevant to any particular problem.[46] Together with custom and usage, they also provide a principled basis for the application of equity and good conscience (*ex aequo et bono*) and a principled basis for the making of a decision by an *amiable compositeur,* if an arbitration is permitted to be approached in such ways.

These rules, principles and conventions also provide content to the application of clauses, which are not uncommon in international commercial agreements, that provide for a particular municipal law to govern, but only so far as it is common to, or conformable with, "principles of international law" or "general principles of law" as they may be applied by international tribunals.[47] In the early 1990s, a very large commercial dispute concerning the construction of the Channel Tunnel was submitted to arbitration with a clause that the contract would be governed by principles common to both English and French law, and in the absence of such common principles, by such general principles of international trade law as have been applied by national and international tribunals.[48] Whilst the court commented on the potential difficulties that such a clause might spawn, there was a recognition of the legitimacy and availability of such a choice by the parties. Such a clause, whether before an arbitrator or a judge, would require a decision as to the existence and content of non-municipal transnational law or principles.

The utility of these statements of principles are welcomed and appreciated more, I suspect, by lawyers coming from outside the imperial centres of legal power, in

---

[45] Redfern, A and Hunter, M *op cit* at 113 ftnt 68.
[46] For a discussion of the practical uses of the UNIDROIT Principles of Contract, see Bonell, MJ *op cit* ch 6.
[47] See Redfern, A and Hunter, M *op cit* pp 103 ff.
[48] *Ibid* p 106 and *Channel Tunnel Group Ltd v Balfour Beatty Construction ltd* [1992] 1 QB 656 and [1993] AC 334.

particular by lawyers from federal legal systems. No United States lawyer would doubt the utility of the great work of the Restatements. Yet, they are soft law. *La doctrine*, that is the work of learned authors, is also soft law. Yet, the persuasive influence of careful scholarly statement of essential features of unifying legal rules is impossible to deny.

To return to maritime law, the scope of maritime conventions now providing for international law and rules extends to all fields of maritime activity. [49] The tendency in maritime law (at least since the early 20th century), probably because of its entrenched historical international nature, has been to develop binding international conventions, rather than soft law.[50] The shipping industry has for many years used reliable well known standard form contracts; and the habit of using a chosen municipal law, often of the place chosen for dispute resolution, is ingrained.

The role of common forms in maritime activity plays its part today as it did in the age of the notary public. Today, industry organisations produce well-known and accepted standard forms for the conduct of maritime affairs. This important work is undertaken by organisations such as BIMCO,[51] Intertanko, [52] Intercargo,[53] FONASBA[54] and others. The central role of standard forms in the smooth operation of commercial markets was lucidly stated by Lord Diplock in *The 'Maratha Envoy'*.[55]

---

[49] Topics covered include the law of the sea, fishing, safety and navigation, jurisdiction, limitation of liability, carriage of goods and persons, employment, pollution, and the environment, liens and mortgages. See generally *The Ratification of Maritime Conventions* (Informa loose leaf 1990) edited by the Institute of Maritime Law University of Southampton.

[50] Though there are some outstanding examples of "soft" law in the maritime area: the York-Antwerp Rules and, before the Hague Rules, the various forms of bills and rules available to be picked up – the Common Form or Conference Bill of Lading 1882, the Hamburg Rules of Affreightment 1885 and the London Conference Rules of Affreightment 1893. See generally Karan, H *The Carrier's Liability Under International Maritime Conventions The Hague, Hague-Visby and Hamburg Rules.* (The Edwin Mellen Press, 2004) pp 15-19

[51] Baltic and International Maritime Council

[52] International Association of Independent Tanker Owners

[53] International Association of Dry Cargo Shipowners

[54] Federation of National Association of Ship Brokers and Agents

[55] [1978] AC 1 at 8:

> *"No market such as freight, insurance or commodity market, in which dealings involve the parties entering into legal relations of some complexity with one another, can operate efficiently without the use of standard forms of contract and standard clauses to be used in*

Those who interpret such contracts have a responsibility to provide clarity and consistency in this regard. This responsibility for consistency involves the expectation that such clauses will be treated as a type of legal commodity – as a "given" in a stable market in which the relevant commerce is contracted.

Thus, we find ourselves in an era of the active development of international legal principles, in the fertile soil of active global commerce, in a prevailing framework of freedom of international trade.

What of dispute resolution? The last 40 to 50 years, in particular the last 20 to 30 years, have seen changes to dispute resolution which reflect the growth of international commerce and the transnational principles governing it. There has been a significant shift away from municipal courts towards commercial arbitration. This is particularly so in the resolution of international commercial disputes. This can be seen in the development of international conventions promoting arbitration,[56] in the development of rules and model laws by supranational bodies such as UNCITRAL and UNIDROIT,[57] in the development of scholarship dealing with international commercial arbitration[58] and by the reduction of hostility of municipal courts to arbitration.[59] This shift, in what might be referred to as the consumption patterns of parties to commercial litigation, and the public policy now recognising the legitimacy of such choice, has occurred for many

---

> *them. Apart from enabling negotiations to be conducted quickly, standard clauses serve two purposes. First, they enable those making use of the market to compare one offer with another to see which is the better; and this, as I have pointed out, involve considering not only the figures for freight, demurrage and dispatch money, but those clauses of the charter-party that deal with the allocation of misfortune risks between charterer and shipowner, particularly those risks which may result in delay. The second purpose served by standard clauses is that they become the subject of exegesis by the Courts so that the way in which they will apply to the adventure contemplated by the charter-party will be understood in the same way by both the parties when they are negotiating its terms and carrying them out."*

[56] The United Nations Conference on International Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 (the New York Convention).
[57] The UNCITRAL Model Law on International Arbitration (as adopted in 1985).
[58] It is impossible to survey the literature adequately in a short footnote, but by way of introduction see Redfern, A and Hunter, M *op cit*, Mustill, M and Boyd, SC *The Law and Practice of Commercial Arbitration in England* (2nd Ed 1989) and 2001 Companion Volume; Petrochilos, G *op cit.*
[59] See the cases referred to in *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at [36].

reasons. The reasons vary from country to country and region to region. The reasons most usually put forward are flexibility, expertise, party autonomy, confidentiality, greater speed, lower cost and better enforcement. In part, the shift is explained by the failures or inadequacies of court systems, but I think that denigration of all national judicial systems as inherently incapable of satisfying the needs of international commerce is both wrong as a general proposition and overly simplistic.

In many countries, the legislatures and the courts themselves have recognised the need for efficient skilled commercial and maritime courts. In some countries, it must be said, the quality of the national legal systems is less than internationally acceptable. Commerce, however, will not wait for the antecedent development of skilled, unbiased and efficient commercial courts. In countries where the national courts are not seen as adequate, arbitration is not seen as a better alternative than a local commercial court, but as the only viable alternative. In such places, the availability of commercial arbitration is essential to underpin investor confidence and economic development.

It also must be said that commerce demands more than individual municipal court systems have provided, and to some degree, can provide:

- the autonomous choice of a perceived reliable and skilled adjudicator, without trusting to the municipal judicial organ to provide such a person in a manner which cannot be controlled or perhaps predicted
- a potentially wider enforcement regime
- the measure of control over the appeal structure in respect of the award
- the de-localisation of the process, away from the courts of the nationalities of the parties (the removal of "home-town risk", or worse)
- in some cases a desire for confidentiality
- sometimes, perceived greater speed and lower cost

That said, a number of attributes of the judicial system must be recognised. A good court system is vital for the health and well being of arbitration in any country. The skill and efficiency of the courts in supervision, enforcement and collateral assistance is

vital for successful arbitration. In that sense, arbitration and the court system have a symbiotic relationship.

Whilst recognising the above advantages of arbitration, it should be said that very often a commercial court can provide a skilled judge as promptly and effectively as any system of arbitration, can provide an arbitrator.

Also, the development of commercial law, whether municipal or in the form of a *lex mercatoria,* is assisted by good commercial courts retaining a real role in the development of the jurisprudence of commercial law. To a not insignificant extent, the attraction of places such as London for commercial arbitration is founded on the reputational legacy or goodwill of the great commercial judges of years past and upon the continuing quality of judges with deep experience of commercial law.

However, courts can do more. They should not abandon the attempts to make themselves more suitable venues for commercial dispute resolution. It is not a display of weakness or an admission of failure to seek to understand the needs of the commercial community and to meet them. Quite simply, it is improving the quality of government (in the broad sense) that courts administer. Much has been done in Australia. Identifiable commercial lists are common in superior courts, and even lower courts. There is a widespread (though not universal) appreciation in those who organise court business that, in specialist areas, courts should try to provide judges with some background and skill in the areas. The Federal Court of Australia, for instance, has a panel system in various specialities including, importantly for this audience, in Admiralty and maritime law. There is a national arrangement for Admiralty and maritime matters. There are thirteen nominated Admiralty and Maritime Judges who deal with matters at first instance, and, as far as practicable, on appeal. They are supported by experienced Marshals for *in rem* claims and Registrars with a background in maritime law who are responsible, under the supervision of the relevant Registry Convening Judges and the National Convening Judge, for the mediation, and, if desired by the parties, court-annexed arbitration, of *in personam* claims.

This court-annexed mediation and arbitration is important. It allows for a less combative approach to dispute resolution while remaining within the framework of a court system. Parties are encouraged to explore mediation very early in the proceedings with such Registrars and, if mediation is not possible, to arbitrate before them.

More can be done. My view is that legislatures and courts need to think more imaginatively as to how they employ the skills of their judges and how judges undertake the judicial task. There is a case at least to consider bringing the judicial dispute resolution system closer to the party autonomous arbitral model.

In maritime matters, greater use could perhaps be made of scholars, judges from other jurisdictions and maritime professionals in assisting the court. The model for assessors was the Trinity House Elder Bretheren in a navigation case.[60] However, the role of the assessor can be wider than that. Assistance in the assessment of a case can be not only technical, but also factual and jurisprudential. Consideration could be given to having a scholar, an arbitrator, another judge or a practical professional knowledgeable in maritime affairs sit with the court, not as a decision-maker, but to provide assistance, if the case warrants it and in conformity with the demands of the case, in assessing and synthesising facts and law. Such person need not be local. Indeed, in a suit with a foreign party, such person could well be from another country. Issues of procedural fairness arise.[61] Procedural fairness issues, whilst important, do not deny the flexible use of court assistance. If the identity and background of the person is known, if the role of the person is clear, if there is clear statutory authority and if the judge expresses as best as can be done the nature of the assistance gained, there can be no real objection. Of course, the case is to be decided by the judge on the evidence, but the ability to draw on skill and experience in assessing and weighing evidence and in the resolution of legal arguments in a subject with truly international sources and roots could be invaluable. In

[60] See generally Dickey, A 'The Province and Function of Assessors in English Courts' (1970) 33 *Modern Law Review* 494; and the Australian Law Reform Commission Report on Civil Admiralty Jurisdiction at [288]-[291].
[61] See *The 'Bow Spring'* [2005] 1 Lloyd's Rep 1 at 10-11 [57]-[63].

a case with foreign parties, the presence of an assessor or assistant in whom both parties have confidence is not quite the half-foreign Piepowder court, but, nevertheless, is a step which might bolster the confidence of foreign parties to the proceeding, provide an international perspective and develop the respect of different municipal systems for each other.

One aspect of this is a recognition in the courts of the region of the advantages available from use of each other's skills in mutual support and exchange.

There is a statutory precedent for this (apart from the Admiralty assessor practice). For example, s 217 of the *Patents Act 1990* (Cth) contains a simple provision for the use of assessors.[62]

Another question to consider is the amelioration of the strictures of proof in areas where there is room for judicial notice by a commercial judge or more informal proof.[63] This is hard to express in theoretical terms, but it is easily illustrated by the comparative length of cases in some arbitration and some judicial proceedings.

The structure of appeals could also be examined. A powerfully attractive attribute of arbitration is the sense of control that the parties have over the length of the process. Why do courts only have one appellate model for court proceedings: that of full re-hearing on facts and law and then the possibility of further appeal? Why could there not

---

[62] Section 217 is in the following terms:

> *"A prescribed court may, if it thinks fit, call in the aid of an assessor to assist it in the hearing and trial or determination of any proceedings under this Act."*

The legitimacy of the use of this statutory authority to have the assistance of someone sitting in court and with whom to discuss the matter outside court was dealt with by the Full Court of the Federal Court in *Genetics Institute Inc v Kirin Amgen Inc* (1998) 163 ALR 761 at [36] where a claim for a denial of procedural fairness was rejected. See also *In re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350-51.

[63] Parties do, however, too often ignore the place of s 190(3) of the *Uniform Evidence Acts* which is in the following terms:

> *"(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1)*[relating to admissibility of oral evidence and documents, hearsay and other exclusionary rules] *do not apply in relation to evidence if:*
>
> *(a) the matter to which the evidence relates is not genuinely in dispute; or*
>
> *(b) the application of those provisions would cause or involve unnecessary expense or delay."*

be a system whereby the parties can jointly choose their appellate model? If parties have confidence in the nominated trial judge, why cannot they be given the choice of having no appeal, or some truncated right of appeal – by leave, on a question of law, manifest error etc? This would introduce a degree of party autonomy into the process.

Equally, there should be a clear basis for the consensual waiving of the requirement of reasons or for truncated reasons.

Is it worth thinking about whether the parties (jointly) should have some (though not a determinative) say in the identity of the judge to hear the case? After all, one of them in fact often does that, or something close to that, when it chooses one court over another. This would be controversial. There are very good reasons why this should not occur. One reason is that the court should not be personified. It is an institution. Yet this kind of flexibility is something that reflects a degree of the party autonomy that is a considerable attraction of arbitration. This question raises the borderland between the two types of dispute resolution – governmental (judicial) and private (arbitral), and what are the essential elements of good government and good dispute resolution.

The above suggestions for discussion concern how the courts might approach their judicial work. I turn to arbitration. The courts can, as the Federal Court of Australia does, offer court annexed arbitration. Section 53A of the *Federal Court of Australia Act 1976* provides for court annexed mediation and arbitration.[64]

---

[64] Sections 53A, 53AB and 54 are in the following terms:

> *"53A (1) Subject to the Rules of Court, the Court may by order refer the proceedings in the Court, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration, as the case may be, in accordance with the Rules of Court.*
>
> *(1A) Referrals under subsection (1) to a mediator may be made with or without the consent of the parties to the proceedings. However, referrals to an arbitrator may be made only with the consent of the parties.*
>
> *(2) The Rules of Court may make provision for the registration of awards made in an arbitration carried out under an order made under subsection (1).*
>
> *53AB (1) If:*
>
> *(a) any proceedings in the Court, or any part of them or any matter arising out of them, has been referred under subsection 53A(1) to an arbitrator for arbitration; and*
>
> *(b) the arbitrator has made an award in respect of the arbitration; and*

This mechanism would enable parties entering into a maritime contract to choose the Court in a jurisdiction clause, with a further covenant to submit to arbitration under this section.

A question arises whether a judge can be an arbitrator. It cannot be said to be clear that s 53A authorises the appointment of a judge of the Court as an arbitrator. But it would authorise the judge of another court. Of course, in this last respect, co-operative arrangements between jurisdictions would be necessary.

(c) the award has been registered with the Court under the Rules of Court:
the following provisions of this section apply.

(2) A party to the award may apply to the Court for a review, on a question of law, of the award.

(3) If the Chief Justice considers that the matter to which an application made under subsection (2) relates is of sufficient importance to justify the giving of a direction under this subsection, the Chief Justice may direct that the jurisdiction of the Court in that matter is to be exercised by a Full Court.

(4) On a review of an award on a question of law, the Court may:

(a) determine the question of law; and

(b) make such orders as it thinks appropriate, including:

(i) an order affirming the award; or

(ii) an order varying the award; or

(iii) an order setting aside the award and remitting the award to the arbitrator for reconsideration in accordance with the directions of the Court; or

(iv) an order setting aside the award and determining the matter to which the award related.

(5) A party to the award may apply to the Court or a Judge for an order that the costs payable by the party in respect of the arbitration be taxed in accordance with the Rules of Court.

(6) The person who made the application is not liable to pay in respect of the costs of the arbitration an amount that is more than the amount of the costs as taxed under an order made under subsection (5).

54(1) The Court may, upon application by a party to an award made in an arbitration (whether carried out under an order made under section 53A or otherwise) in relation to a matter in which the Court has original jurisdiction, make an order in the terms of the award.

(1A) Subsection (1) does not apply to an award made in an arbitration carried out under an order made under subsection 53A(1) unless the award has been registered with the Court under the Rules of Court.

(2) Subject to subsection (3), an order so made is enforceable in the same manner as if it had been made in an action in the Court.

(3) A writ of attachment shall not be issued to enforce payment of moneys under an order made in accordance with this section."

There is precedent for a serving judge to carry out a local arbitration. In 1982, in *The 'Bamburi',*[65] Staughton J, with the Lord Chief Justice's permission, arbitrated various claims arising out of the Iran/Iraq war. The case raised important questions of war risk cover and whether vessels trapped in the Shatt-al-Arab waterway were constructive total losses. The market, in effect, wanted the opinion of Staughton J, without necessarily invoking the whole judicial framework.

One should not be surprised at this possibility. Arbitral dispute resolution is not a function inherently inimical to the judicial function otherwise to be undertaken by the judge in other disputes or to the judge's office (at least if reasons are made public). After all, every day, some judges of the Federal Court holding relevant additional concurrent appointments make what are non-judicial administrative decisions on review or as original decisions in bodies such as the Administrative Appeals Tribunal, the Copyright Tribunal and the Competition Tribunal.

Thus, there are steps that the courts can take in commercial matters to enhance their approach to the resolution of commercial disputes.

With that said, I do not see municipal courts slowing the growth of international dispute resolution through international commercial arbitration. The attractions of party autonomy, confidentiality, freely available skill of arbitrators of choice and greater reach of enforcement[66] will entrench the process of international commercial arbitration.

It is important to recognise that this growth and development of commercial arbitration is no more or less than the setting up, in the field of international commerce, of a world-wide de-localised private (or semi-public) dispute resolution system: a worldwide private court system, made up of a large number of self-created and self-administered,

---

[65] [1982] 1 Lloyd's Rep 312.

[66] The Hague Convention on Enforcement and Recognition of Judgments, even when it comes into force, will not give as wide an enforcement regime for court judgments as the New York Convention does for arbitration awards.

largely non-governmental, organisations.[67] With its importantly different characteristics or attributes, such as confidentiality, commercial arbitration, however, seeks the status of court determination. One only has to see the use of the word "court" in the names of some arbitral bodies or to ponder the use of powers of interlocutory injunction by arbitrators now being discussed at UNCITRAL meetings to appreciate this.

There are now numerous arbitral institutions worldwide catering for international commercial arbitration, including maritime arbitration.[68] Arbitration is active in this region. The Asia Pacific Regional Arbitration Group (APRAG) is an association of 24 arbitration centres in the region[69] which has a panel of arbitrators drawn from constituent arbitration centres and approved by the APRAG executive. APRAG points the way, I think, towards the future.

Given the importance of maritime activity in international commerce and given the region's significant place in maritime commerce, why should there not be an Asia Pacific Maritime Arbitration Commission? This could be set up through the offices of APRAG; or, it could be set up through the sponsorship of interested states in the region.

---

[67] There are important theoretical debates in relation to the sovereign role of the *lex arbitri,* of the seat of the arbitration and of the extent of lawful de-localisation: see generally Petrochilos, G *op cit* chs 1, 2 and 3.

[68] For example, the International Court of Arbitration, the London Court of International Arbitration, the Inter-American Arbitration Commission, the Singapore International Arbitration Centre, the Australian Chamber of International Commercial Arbitration, the Chartered Institute of Arbitrators, the American Arbitration Association, the London Maritime Arbitration Association, various national associations of maritime arbitration, the Paris Chambre Arbitrale Maritime, the Regional Centre for Arbitration Kuala Lumpur, the Association of Maritime Arbitrators Canada, Vancouver Maritime Arbitrators Association, the Society of the Maritime Arbitrators Inc, the Houston Maritime Arbitrators, the Japan Shipping Exchange, the Tokyo Maritime Arbitration Centre, the China Maritime Arbitration Commission. The list can go on, and on.

[69] Arbitrators and Mediators Institute of New Zealand, Australian Centre for International Commercial Arbitration, Australian Commercial Disputes Centre; Arbitration Association (Brunei), Beijing Arbitration Commission, Chartered Institute of Arbitrators (Australia), Chartered Institute of Arbitrators (East Asia) Chartered Institute of Arbitrators (Malaysia), china International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, ICC Asia, Indian Council of Arbitration, Indonesian National Arbitration Board, Institute of Arbitrators and Mediators Australia, Japan Commercial Arbitration Association, Korean Commercial Arbitration Board, Korean Council for International Arbitration, Kuala Lumpur Regional Centre for Arbitration, Malaysian Institute of Arbitrators, Mongolian Chamber of Commerce & Industry, Philippine Dispute Resolution Centre Inc, Singapore International Arbitration Centre, Tokyo Maritime Arbitration Commission, Vietnam International Arbitration Centre.

On a regional basis, with uniform rules as to the law of the arbitration, as to rules of procedure, with available transnational principles of contract and contractual interpretation, and with a uniform approach to curial supervision, enforcement and collateral assistance based on international conventions, such an organisation could call upon the maritime skill of the whole region – arbitral, judicial, scholarly and professional for the resolution of disputes. Hearings could take place at the most convenient place, with the use of widespread video link facilities. Parties could be given the choice of language and identity of arbitrator. A uniform approach to the *lex arbitri* and law of procedure would enable the development of a truly transnational arbitration structure to deal with maritime disputes in the region. A generous right of appearance could be given to lawyers of the litigants' choice who would not necessarily be admitted in the place where the arbitration takes place.

This region has enormous skill to harness in the formation of such a regional body. There are many scholarly institutions in the region with a significant, or sole, focus on maritime affairs and maritime law.[70] Maritime scholars and experienced maritime lawyers, arbitrators and judges are to be found throughout the region. There are flourishing arbitration centres in many countries of the region.

What then would be the advantage of a regional structure? There are a number: the harmonisation of the laws and rules of the arbitration, the harmonisation of the place of courts in support of the arbitration process, the deepening of the available pool of arbitrators for any particular dispute, the strengthening of the reputation of the region in the provision of maritime dispute resolution, the removal or amelioration of apparent fragmentation of approach by individual centres, the harmonisation of procedural law and the fostering of the development of a more consistent body of substantive maritime law.

[70] An incomplete list is Shanghai Maritime University, Dalian Maritime University, National University of Singapore, Maritime and Shipping Law Unit of the University of Queensland, Kobe University of Maritime Sciences, Vietnam Maritime University, McGill University, Korean Maritime University, Centre for Ocean Law and Policy Maritime Institute of Malaysia, the Australian Maritime College, to mention only a few.

These suggestions may be said to gloss over some of the theoretical questions as to: the nature of, and the legal theory governing, international arbitration; the role of different laws impinging on an arbitration; and the relationship between supervision, annulment and enforcement.[71] That said, the coherent organisation of regional arbitral decision-making is a goal worthy of aspiration and realistic effort.

In order to ensure harmony and comity it would be necessary to have a clear regime dealing with the law of the seat of the arbitration[72] and a clear regime of inter-jurisdictional curial supervision. These kinds of considerations would overcome, in a pragmatic way, any potential practical differences in the operation of the rival theories explaining the nature of international arbitration.

Above all, such a structure, if embraced by members of the region, could place this region far ahead of any individual local maritime arbitration centre anywhere in the world.

To illuminate its potential effect, let me explore one issue which might be addressed, at least in a practical sense, by this framework: the anti-suit injunction. This instrument of contractual enforcement has become the tool of choice to stay legal proceedings in national courts in apparent contravention of an exclusive jurisdiction or arbitration provision.[73] This is not the place to discuss the debates about the application of this remedy in the context of various classes of contracts, including contracts evidenced by bills of lading in liner trade, or about the risk the use of the injunction can pose to comity between courts. In cargo-claims, in particular ones of modest size (as many are), it may be an effective denial of any remedy to require the holder of a bill of lading (or its insurer) to cross the globe for enforcement. This problem has led to national

[71] Petrochilos, G *op cit* chs 1 and 2
[72] Involved in that is the question whether to make it central or peripheral.
[73] It has been the subject of two Dethridge Addresses in recent years: the Hon Mr Justice David Steel "The Modern Maritime Judge – Policeman or Salesman" 2002 FS Dethridge Memorial Address (2003) Vol 17 *MLAANZ Journal* 6 and the Hon Justice Hugh Williams "Anti-Suit Injunctions: Damp Squib or another Shot in the Maritime Locker? Reflection on *Turner v Grovit"* 2005 FS Dethridge Address.

legislation nullifying such clauses[74] and to discussion at international level.[75] Yet some courts will deliberately nullify such legislation by issuing anti-suit injunctions. The starkest example of an anti-suit injunction in aid of a bill of lading jurisdiction clause is *OT Africa Line v Magic Sportswear Corporation.*[76]

The existence of a regionally based and supported arbitration commission chosen in a jurisdiction clause could give cargo interests in the region enhanced confidence in international commercial arbitration and thus avoid the occasion for the perceived need for the use of the injunction.

Turning to Australia and New Zealand, one finds a moderate number of maritime disputes litigated in the courts. Admiralty claims are local *in rem* claims; some are to obtain security for proceedings, arbitral or curial, elsewhere. As to *in personam* claims, many are cargo claims where out-turn was local. Some are international cargo claims from and to foreign ports. There are local collision, salvage, charterparty and marine insurance claims. Parties are willing to use the court systems in Australia and New Zealand because of their reasonable availability, reliability and tolerable despatch. However, neither the Australian nor New Zealand court system is known as a venue of choice for large numbers of maritime disputes between international parties unrelated, transactionally or otherwise, to Australia and New Zealand. If both legal systems committed themselves to the provision of specialised maritime dispute resolution, perhaps with some of the additional degrees of party autonomy to which I referred earlier, more overseas litigants would choose Australian and New Zealand courts for maritime dispute resolution.

---

[74] Such as s 11(2) of the *Carriage of Goods by Sea Act 1991*(Cth) and s 46(1) of the *Canadian Marine Liability Act 2001*.

[75] In this regard see Ch III of the Proposed Hague Convention on Exclusive Choice of Court Agreements and in particular the exceptions set out in cl 7 of the draft: Hague Conference on Private International Law Working Document No 110E (27 April 2004); and see Meeson, M "Comparative Issues in Anti-Suit Injunctions" in Davies, M *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force* (Kluwer Law International 2005) ch 2.

[76] [2005] EWCA Civ 710.

As to maritime arbitration, both countries have been slow to organise themselves in this regard. Commercial arbitration generally is taking strong root in Australia. ACICA and the Chartered Institute are both active. There are some maritime arbitrations in Australia, but not in large numbers. There should be one recognisable and visible organisation for the undertaking of maritime arbitration in Australia, or Australian and New Zealand. There is not. I would suggest that an Australian and New Zealand maritime arbitration commission be established. The Commonwealth, New Zealand and the Australian States and Territories could sponsor the formation of such a body, in conjunction with this Association, ACICA, the Chartered Institute and New Zealand arbitration bodies. Like the suggested regional body, it could harness the skills of maritime professionals, scholars, arbitrators and judges to provide a structure and organisation to carry on arbitration, conciliation and mediation of maritime disputes, including international maritime disputes, in addition to the judicial and court annexed ADR resolution of disputes that now occurs.

Such a body would require harmonising legislation along the lines of the *International Arbitration Act 1974* (Cth) and the placement of all courts in an equal position of supporting such a body with interim and collateral orders. It might also deal with the question of confidentiality (or lack of it) in arbitration in Australia brought about by the decision of the High Court *in Esso Australia Resources Ltd v Plowman*.[77]

The potential theoretical complexities of rival theories of the nature and foundations of international arbitration are not as acute in connection with an Australian and New Zealand body, because of the role of domestic legislation in only two countries. To a large extent, however, even at the regional level, these kinds of theoretical difficulties can be overcome by harmonious municipal legislation of participating states. If political will were present, I doubt whether theoretical difficulties would be other than surmountable.

[77] (1995) 183 CLR 10. See generally, Rogers, AJ and Miller, D "Non-confidential arbitration proceedings" (1997) 71 *Australian Law Journal* 436; and see also the critical comments in Lord Neil QC "Confidentiality in Arbitration" (1996) 12 *Arbitration International* 287 at 316.

The motto "build it and they will come" should be adopted. "They", being international parties seeking a skilled maritime arbitration venue, certainly will not come if there is nothing to come to.

Australia has, in the new Federal Court arrangements, effectively, an operating national Admiralty and maritime court. Other courts have specialised maritime judges. This year, steps have been taken by those who teach maritime law in Australian and New Zealand universities to explore the possibility of co-operating and pooling their skills and resources to make available an Australian and New Zealand Masters of Maritime Law. I urge the universities to do this. Parochial interests and problems of organisation should not stand in the way of the creation of a transnational teaching unit and degree of the greatest distinction. Steps are being taken to create a course in Sydney run by the Marine Technology Centre to teach lawyers, brokers, insurers and other shoreside participants in the maritime community the important technical aspects of ships, shipping, cargo handling and carriage. This is a course specifically designed to give such people who advise, or who undertake collateral functions, in the maritime industry a good working knowledge of practical maritime affairs. It should provide a model for other institutions, in particular the Australian Maritime College. It is a step which recognises the importance of the interdependence between scholarship, the law and practical maritime affairs. Too often, and always to the disadvantage of the potential quality of scholarship, law and practical affairs are seen as separate worlds. They rarely, if ever, are – especially in maritime matters.

Thus, the symbiotic development of scholarship, practical affairs, the law and techniques of efficient dispute resolution is being fostered by constructive structural developments. An essential step in completing a coherent maritime system is the creation of an Australian and New Zealand maritime arbitration commission.

With the establishment of such a body, supported by the court systems of both countries, fostered and nourished by a transnational maritime law degree and the maritime colleges in both countries, Australia and New Zealand would be better able to

provide an integrated and complete maritime skill base befitting maritime and trading nations that account for approximately 13% of the world's maritime task by volume.

The above suggestions are made with due recognition of the fact that others are better placed to assess the likely viability of such structures or similar bodies. It may be that the organic and decentralised growth of individual arbitration centres in the region, against a background of international convention and the developing *lex mercatoria,* is a better alternative.

There is a place, in any event, for the development of inter-jurisdictional exchange in order to create a more regionally cohesive system of curial and arbitral maritime dispute resolution.

I do think, however, that for Australia, at least, the task is pressing. Government sponsorship (though not expenditure) will be important. There may be a need for some supporting legislation. Sponsorship will give momentum. It would be cheap, but good, policy.

I have sought to outline the growth of international or supranational commercial law and dispute resolution. It should be recognised as a contemporary reflection of forces long known to world commerce. The fields of maritime commerce and law have always formed integral parts of this supranational fabric. Australia, New Zealand and this region have the opportunity and challenge to create commercial and maritime dispute resolution procedures and structures conformable in importance with the region's contribution to international commerce and maritime activity.

Governments, courts, the legal profession, universities and the maritime community generally should recognise the need for reform to create coherent structures to provide the commercial community locally and internationally with the most efficient integrated dispute resolution mechanisms possible.

In undertaking this task, one goal should be the development of the whole region as a recognised leader in maritime scholarship, maritime affairs and commercial and maritime dispute resolution.

Sydney
28 September 2006