# Remarks of the Hon Marilyn Warren AC
# Chief Justice of the Supreme Court of Victoria
# at the International Commercial Arbitration Conference:
# *Efficient, Effective, Economical?*
# The Victorian Supreme Court's Perspective on Arbitration
## 4 December 2009

If we commence our dialogue by contemplating how it was that arbitration came to play such an important part in the legal system, essentially the reasons seem to have been:

1. frustration by those involved in commerce with the cumbersome processes of the courts and their commensurate delays in determining disputes.
2. the lack of privacy and the necessary risk to business that sensitive information would reach the market place and the media.
3. the desire to in some form or other control the nature of the forum and the speciality of the service accessed.

Over the decades we have seen arbitration develop into a specialist jurisdiction. At first, the jurisdiction was approached when necessary by the courts with a minimalist hands-off approach. Over time a body of jurisprudence developed and inevitably the tentacles of courts invaded and on occasion frustrated the desired goals of going to arbitration in the first place.

We now see responses from legislatures both internationally and nationally responding to supervision by the courts of arbitration which those who have committed to arbitration have regarded as meddlesome, irritating and even frustrating.

Of course, at the end of the day arbitration remains a form of litigation and as long as litigators approach arbitration with a litigious mindset there will be problems. Thus, we have seen the courts impose their supervisory role upon arbitration. Under the new federal legislation this will change. Nevertheless it is worthwhile reflecting upon the impact that arbitration as a process in the legal system has had on that system.

When arbitrations commenced they were a rival forum for resolving disputes, quite distinct from courts. Courts were not concerned and if anything adopted the view that if parties wished to contract away their legal rights and access to the courts then it was on their own heads. The courts largely failed to comprehend that arbitration was pursued by business and commerce because of the inadequacies of the court system.

Inevitably, albeit slowly, the courts became savvy to what had happened. They were a long way behind and arbitration had a significant lead on the courts. Arbitration offered that which the courts could not – practical speedy outcomes, privacy and specialist forums.

As more commercially experienced judges were appointed to courts a keen sense of litigation competition developed not just between the

superior courts sharing jurisdictions, but also between the courts and the choice of arbitration.

Simultaneously we saw the courts become far more flexible and adaptive to the needs of business and commerce. By way of example it is not unusual in commercial courts these days for experienced commercial judges to sit. Largely gone are the days when judges generally did not specialise and rotated through the various jurisdictions each term of the year spending a term in what was known as “causes”.

25 years ago in Victoria the Commercial List was developed. Sydney developed its list. Other jurisdictions such as the Federal Court sat specialist judges to hear commercial cases in a specialist way.

As a result the expectations of the business and commercial sector changed and, indeed, were raised. Much more judicial involvement and intervention was sought and even demanded.

The services offered by courts has reached the level where courts in some sectors are able to compete with the service offered by arbitration. It must be observed that specialist tribunals such as the Takeovers Panel and the flexibility and fast-tracked service it provides has permeated into commercial litigation. Recently, a senior commercial corporate counsel suggested to me that what business and commerce really wanted was for courts to operate like a takeovers panel. The point was made that business does not want a 100-page judgment. Just as lawyers are expected to provide an advice on one to two pages (probably accompanied by a detailed opinion by way of

annexure to deal with the liability risk that necessarily arises) is what is expected by the business sector from judgments. This is a challenge for courts we are yet to embrace.

That brings me now to the Victorian context.

The Supreme Court has not only considered improvement to processes such as mediation, but also to other ADR techniques such as early neutral evaluation, case management and another, often underutilised ADR strategy - arbitration. The Court sees itself as a leader in dispute resolution and a real partner with the providers of these ADR services – to the extent that they are not provided by the Court itself.

Beyond this, in an international commercial sphere, the Supreme Court is supportive of parties who choose to have their disputes heard before arbitral tribunals. The Court recognises that there is no 'one best way' to conduct international arbitrations and that flexibility is the key to an effective arbitration system.

In arbitration, the directive role of the Court needs to be minimised. The focus instead turns to ways in which the Court can support the arbitration process and enforce arbitral awards in a timely and cost effective manner.

Having discussed some of the policy issues surrounding arbitration generally, I would like to turn the discussion to some of the international and domestic legal issues on arbitration.

Singapore and Hong Kong have been the two leading jurisdictions with respect to arbitration in the Asia-Pacific region. Both jurisdictions apply the *UNCITRAL Model Law on International Commercial Arbitration 1985*, often referred to as the 'Model Law'. They also provide court assistance with respect to arbitration, while maintaining minimal court interference. In short, they generally meet the needs of the international commercial arbitration community through the consistent application of the Model Law.

International arbitration is market driven, in that parties have a choice in terms of the jurisdictions in which they commence proceedings. If the legal system in Australia does not provide an attractive environment in which international arbitrations can occur, the parties may simply opt to go elsewhere.

Australia has some distinct advantages in terms of being a preferred venue for arbitration. We have :

- adopted the Model Law;
- our legal system is amongst the highest in quality and integrity in the world; and
- internationally renowned arbitration practitioners.

Australia can still learn a great deal from the arbitration experiences in Singapore and Hong Kong. The Supreme Court of Victoria is continually improving its processes to better compete with the Singaporean and Hong Kong arbitration markets. I will discuss some of these improvements to arbitration in the Supreme Court.

First of all, some preliminary comments.

The whole approach of courts to arbitration litigation should be national.

Attorneys-General have moved to nationalise the profession and the higher judiciary. There is an opportunity to nationalise the services of courts to arbitrations. Courts should focus on a national consistent service which, I expect, would be very attractive internationally. The service would be better if it was not centralised. It should operate on a harmonised basis just as corporations litigation is run. With modern technology and the calibre of litigators, judges and, of course, arbitrators across Australia, we have a competitive opportunity waiting to be seized.

Consistent with a national approach, Victoria has ramped up its service to the arbitration sector.

From 1 February 2010 the Supreme Court will run a new Arbitration List in the recently established Commercial Court.

The judge in charge of the Arbitration List will be the Hon. Justice Clyde Croft. Before his recent appointment to the Supreme Court Justice Croft was well known in both national and international arbitration circles. He is an experienced arbitrator. Justice Croft will sit in the Arbitration List with other commercial judges, including the Hon. Justice David Byrne, also an experienced arbitrator.

The new list will contribute to the overall national and international service offered in Australia and Victoria.

The Arbitration List will provide the necessary speed, flexibility and opportunity arbitration matters need. It will also offer all the services of the new Commercial Court including leading edge technology, case conferences run by judges and early neutral evaluation. Consistent with the philosophy of the Commercial Court litigators coming from arbitrations will be able to have the case run to suit their demands and circumstances.

I should now say a little about the Commercial Court. The judge in charge is the Hon. Justice Tony Pagone who recently presented a paper "The Role of the Modern Commercial Court"[1]. I urge its reading. To encapsulate developments in the Commercial Court (where the Arbitration List will be) the impetus for this has come from different sources but all largely prompted by the same objectives of achieving prompt, efficient and affordable resolution of commercial disputes in a modern environment.[2] These objectives are not especially new. However they have evolved over time with changing technology and changes in practices. In particular, the rapid growth in technology over recent years has posed challenges and costs for commercial litigation.

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1 Supreme Court Commercial Law Conference, 12 November 2009. See Commercial Court website: http://www.commercialcourt.com.au/Pages/Publications.aspx

2 See: "McClelland Urges Professional Reform," *Australian Financial Review*, 18 September 2009, 44; "Takeovers Panel Saves us 'millions'," *The Australian,* 14 September 2009, 23; "The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction," *National Alternative Dispute Resolution Advisory Council*, Report to the Attorney-General, September 2009, Launched 4 November 2009.

The burden of providing discovery in modern litigation is intimidating and prohibitive such that it is unattractive for some commercial disputes to be resolved by judicial determination.

The need for case management is well established and in "the public interest in the proper and efficient use of public resources."[3]

As my colleague Justice Pagone has said: "Business dealings need certainty, predictability and enforcement of deals. Commercial activity therefore needs the courts, and looks to the courts, to create an ordered environment within which to operate."[4]

To state the obvious, business needs speedy, efficient, financially reasonable and predictable outcomes for business and the economy to operate smoothly. The High Court has observed our legal system cannot afford to fail its business community and must provide a system of dispute resolution that takes account of the context in which disputes arise and the need to resolve them as business continues to be carried on.[5] So our Commercial Court aims to be a facilitator of efficient business activities. Its options of dispute resolution are moulded to business needs and demands.

**Case Management Conferences**

Drawing on the remarks of Justice Pagone:

> "One solution recently introduced by the Commercial Court to grapple with these problems is the case management

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3 *AON Risk Services Aust Ltd v ANU* (2009) 83 ALJR 951, 960 [23].

4 Supreme Court Commercial Law Conference, 12 November 2009. See Commercial Court website: http://www.commercialcourt.com.au/Pages/Publications.aspx

5 See *AON Risk Services Aust Ltd v ANU* (2009) 83 ALJR 951, 960 [23], 975 [97], 981 [137].

conference ("CMC")[6] borrowed from the London Commercial Court.[7] Each list judge may approach a CMC differently, but they are all directed to the early identification of what is in dispute between the parties after the pleadings have closed.[8] The CMC provides an opportunity to look carefully at what has been engaged as the dispute, to see whether it needs further refinement, and, significantly, to work out how best that dispute can be made ready for testing, resolution or adjudication. The CMC thus provides a unique opportunity before additional costs are incurred on discovery, witness statements, court books and the like, for the legal profession and the managing judge to look at how best a commercial dispute might be resolved.

An essential aspect for the success of the CMC is that it be attended by the people who are expected to have the actual conduct of the case at trial. A consequence of the CMC should be that those who have the carriage of a case at trial will focus upon the case as a whole at an earlier point in its journey to trial than may have been the practice in the past. That, in my experience to date, has had tangible benefits for litigants.

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6 Supreme Court of Victoria, "Notice to Profession 9/2009: Case Management Conference," 4 August 2009.

7 See London Commercial Court, "The Admiralty and Commercial Courts Guide," (8th ed, 2008) Her Majesty's Court Service, http://www.hmcourts-service.gov.uk/publications/guidance/admiralcomm/index.htm, at 9 November 2009.

8 See Supreme Court of Victoria, "Notice to Profession 9/2009: Case Management Conference," 4 August 2009, which requires parties to submit a draft list of issues to be discussed at the CMC.

> The success of CMCs, however, depend fundamentally upon the person who is expected to be in charge of the proceeding at the trial for each party genuinely turning his or her mind to the needs of the case sooner, rather than later. Savings to the clients can occur, efficiencies can be achieved, issues can be identified and refined, but this requires bringing an active consideration to what preparation a case needs *before* costs are incurred and *before* time is unnecessarily wasted. From the judge's point of view it requires finding time, often at nights and weekends, to read and analyse the pleadings and the documents required to be provided for a CMC."[9]

**Early Neutral Evaluation**

One of the new and really exciting developments in the Commercial Court has been the adoption of the pilot project of early neutral evaluation ("ENE").[10] It provides a private and non-binding indication of the likely outcome of a dispute or an issue in a dispute from a judge other than the judge who may hear the trial.[11] An ENE is only available at the request of the parties and cannot be imposed upon them without the consent of all. They are sufficiently flexible to suit a great variety of cases.

The legal profession in Victoria has responded to the Supreme Court's initiatives and assisted both in the formulation of the changes and in their implementation.

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9 Supreme Court Commercial Law Conference, 12 November 2009. See Commercial Court website: http://www.commercialcourt.com.au/Pages/Publications.aspx

10 See Supreme Court of Victoria, "Notice to Profession 10/2009: Early Neutral Evaluation," 4 August 2009.

11 John S. Blackman, "Neutral Evaluation – An ADR Technique Whose Time Has Come" (1999, Farbestein & Blackman), 1.

Again as Justice Pagone and others have observed "Commercial disputes in this State are well served by a diligent and specialist legal profession who have embraced the Court's attempts to improve the resolution of Commercial disputes."[12]

So, the Commercial Court with all its opportunities is where the Arbitration List will sit. The Court welcomes your interest. Justice Croft awaits your litigation.

[12] Supreme Court Commercial Law Conference, 12 November 2009. See Commercial Court website: http://www.commercialcourt.com.au/Pages/Publications.aspx