# Business ‘weaklings’ using Australian laws to dodge contracts

**Michael Pelly** *Legal editor*

May 18, 2023 – 10.24am

Former High Court judge Patrick Keane has warned that global companies are no longer choosing Australia as a forum to settle disputes because of fears that contracts will be declared void under Australian consumer laws.

Mr Keane, who left the court in December, [https://www.afr.com/politics/who-s-in-the-running-to-replace-the-high-court-s-pat-keane-20220601-p5aq71] called on the federal government to pass laws that would stop business “weaklings” from using the laws “to modify otherwise unimpeachable contractual obligations”.

He said Australian legislation “should be clear that it strikes only at conduct relating to consumer contracts or domestic small business contracts”.

Former High Court judge Patrick Keane says Australia is missing out on international arbitrations. **Dan Peled**

Arbitration is the default method of dispute resolution for big business, especially when cross-border transactions are involved. A 2020 report said Australia handled disputes worth $35 billion between 2016-19, with former senior judges often presiding.

Mr Keane, who sits on the Hong Kong Final Court of Appeal and works as a mediator via New Chambers, made the comments on April 27 at a lunch hosted by the Chartered Institute of Arbitrators Australia (CIAB).
He said arbitration “as a voluntary system of dispute resolution” had served the values of the international trading community well “over millennia”.

## ‘Threatened’

“There is some irony then in the circumstance that today the success of arbitration in Australia as a trusted mechanism for the resolution of international commercial disputes should be threatened by the well-intentioned extension of domestic legal protection of consumers to disputes between international businesses,” Mr Keane said.

He cited section 21(1) of the Australian Consumer Law, which says those involved in trade or commerce must not “engage in conduct that is, in all the circumstances, unconscionable”.

Mr Keane said it not only covered the making of a contract, but also conduct after the contract was made.

“This provision is, it appears, being invoked to support arguments that seek to modify the contractual arrangements carefully and deliberately struck between the parties.”

He said section 18 of the same act, which covers conduct “that is misleading or deceptive or is likely to mislead or deceive”, was also problematic.

Mr Keane told *The Australian Financial Review* that he “became aware of these kinds of issues being raised in international arbitrations in Australia since I left the bench”.

“I should say, however, that it has not arisen in any case that I have been involved in myself.

“The problem, as I see it, is twofold: first, there is the risk of reputational damage to Australian businesses within the international community if they are seen to be unwilling to take responsibility for the commercial risks they have assumed by their contracts.

“Secondly, the possibility of these kinds of issues being raised in international arbitrations seated in Australia will be a real obstacle to international parties agreeing to choose Australia as a seat for the arbitration of international disputes.”

In his CIAB speech , Mr Keane said parties would not risk a decision at odds with the laws common to international trade”, or risk the expense and delay of a contest they would prefer to avoid altogether.

“Those engaged in international trade and commerce confronted by these risks will almost invariably ensure that Australian law is not the law of the contract.

“More importantly, they will also be astute to ensure that, if such laws apply peremptorily because Australia is the seat of their arbitration, then Australia should not be the seat of their arbitration.”

Mr Keane said global businesses “prefer to look after themselves and their commercial interests by their contractual arrangements”.

“They expect that those they are dealing with will do likewise. They do not welcome the application of a law invoked, after the event, by a weakling who wants to break ranks with the rest of the international trading community.

“And they will not welcome a dispute resolution process that invites or allows the weakling to break ranks simply because Australia is chosen as the seat of the arbitration.

“Left with a choice – and they will almost always have a choice – they will vote with their feet.”

Leading arbitrator Martin Scott, KC, said it was “not possible to contract out of claims” under Australian law.

He said section 21 had been commonly used in recent years, particularly in large project disputes. Section 18 had been “more prominent for longer”.

“As international firms become more aware of the contract risks, which are inherently problematic to price, it becomes more likely that Australian law will be resisted as governing law and more ‘commercial’ jurisdictions, like Singapore, will be preferred.

“If a firm has the choice between basing here or elsewhere, and it understands the added risk presented by section 21 for its conduct in Australia, it’s rational to base it elsewhere.”

---

**Michael Pelly** is the legal editor, based in our Sydney newsroom. He has been a senior adviser to federal and state attorneys-general and written two books, one a biography of former High Court Chief Justice Murray Gleeson. *Email Michael at michael.pelly@afr.com*