THE PROSPECTS FOR INTERNATIONAL ARBITRATION IN AUSTRALIA

MEETING THE CHALLENGE OF REGIONAL FORUM COMPETITION OR OUR HOUSE OUR RULES[*]

by

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Sir Edward Coke said in *Vynior's Case*,[1] in 1609, that an award debtor was free to "countermand [an arbitration agreement], for a man cannot by his act make such authority, power or warrant not countermandable which is by the law or of its own nature countermandable …".

It was not unusual for Sir Edward Coke, when making a lofty pronouncement, to be a little less than disciplined in his language. Sometimes, the grandiose claims he made for the common law in the course of his judgments went beyond what was strictly necessary for the decision. *Dr Bonham's Case* is an example.[2]

Sometimes, his pronouncements had little to do with the actual decision at all. *Vynior's Case* is an example of such a case. In that case, the Court did not permit the award debtor to countermand the arbitration agreement. Indeed, it ordered the judgment debtor to pay the amount due under the award plus damages for the breach of the arbitration agreement. But Sir Edward Coke's *obiter dicta* have cast a long shadow down the centuries.[3]

The basic tenets underlying arbitration are no doubt familiar; but it does not hurt to remind ourselves of them.

Courts enforce arbitral awards because parties, by their own voluntary agreement, bargain to have certain matters referred for the determination of a third person and to be bound by that determination. As Lord Mansfield recognised in *Robinson v Bland*,[4] this approach reflects the value accorded by the common law to party autonomy. Courts enforce arbitration agreements because the common law insists that *pacta sunt servanda*: promises are to be kept.

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[*] AMTAC Address, Brisbane (via video-link), 25 September 2012.

[†] Chief Justice of the Federal Court of Australia. I acknowledge the great assistance of my associate, Ms Brooke Marshall (BA, LLB (Hons)), in the preparation of this paper.

[1] 8 Co Rep 81b, 82a; 77 ER 597, 598-599 (England, King's Bench).

[2] In *Dr Bonham's Case* 8 Co Rep 113b; 77 ER 646 (England; King's Bench), Sir Edward Coke said at 652 "… in many cases, the common law will … controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void …".

[3] For example, in *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643.

[4] (1760) 1 Black W 234 (Lord Mansfield).

The perceived advantages of arbitration are well-known. Arbitration enables parties to resolve their disputes while preserving their privacy. The importance of privacy to international traders who seek, for good or ill, to avoid scrutiny by government agencies or by local or international news media should not be underestimated.

There are also perceived advantages in terms of speed and efficiency. In this regard, the parties do not need to line up in a queue with those waiting for an audience in national courts.

And, because arbitration is thought to be quicker and more expert, there is an expectation that it will, in the long term at least, be cheaper than the lengthier and more elaborate proceedings in court with associated levels of appeals.

The well-resourced and well-advised parties who engage in international trade on a global scale can be expected to customise their agreements to their particular needs, both in terms of the allocation of the risks of their venture, and in their choice of dispute resolution mechanisms.

This means that, in terms of the substantive law to be applied to dispute resolution, those engaged in international trade and commerce look to their contract lawyers, rather than prescriptive national laws, with which they may not be familiar or comfortable, to protect their substantive interests.

Where a dispute is resolved by a person or persons whose authority to decide is derived from the parties' voluntary agreement, the parties are able to choose the forum in which their dispute is to be heard. These sophisticated parties, and the lawyers who advise them, will more and more look to have their disputes resolved by arbitration seated in legal systems which are known to be fair, efficient and supportive of their bargain including its bespoke dispute resolution mechanisms.

For these, and perhaps other, reasons, there is a growing preference among those engaged in international trade and commerce in the Asia-Pacific region for international arbitration as the mechanism for the resolution of international trade disputes.

Against that background, I turn to discuss the prospects for international arbitration within the Asia-Pacific region. I propose to survey some recent developments which bear upon the relative attraction of Australia as an arbitral seat in comparison with its competitors in the region. The point to be made here is the obvious one, that our principal competitors, Hong Kong and Singapore, share our common law inheritance and the use of English. With that inheritance and advantage, their embrace of international arbitration has been energetic and unequivocal. In Australia, however, our attitude may perhaps be described as two steps forward and one step back.[5]

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[5] cf I-Ching Tseng and Khory McCormick, "One Step Forward, One Step Back: Part I" *International Bar Association Legal Practice Division Arbitration Newsletter* (September 2011); cf Khory McCormick and I-Ching Tseng, "One Step Forward, One Step Back: Part II" *International Bar Association Legal Practice Division Arbitration Newsletter* (April 2012); See Albert Monichino, "International Arbitration in Australia: The Need to Centralise Judicial Power" (2012) 86 *Australian Law Journal* 118.

TWO STEPS FORWARD …

Governmental Reforms

In Australia, reform of the law governing arbitral procedure has been directed to the modernisation and clarification of existing arbitration practice.[6]

The amendments to the *International Arbitration Act 1974* (Cth) (IAA), passed in 2010 by the Australian Parliament, facilitate the conduct of international arbitration in Australia and the enforcement and recognition of arbitral awards made outside Australia.

By virtue of the combined operation of the IAA, the Model Law and the New York Convention, arbitral awards are almost universally enforceable in Australia subject to the supervision of the courts. With a view to ensuring that Australian courts discharge their functions in accordance with the "pro-enforcement and pro-arbitration policy that underlies the IAA", an objects provision has been included as s 2D of the IAA.[7] As the Explanatory Memorandum to the International Arbitration Amendment Bill 2010 (Cth) states, these objects "emphasise[] the importance of arbitration in facilitating international trade and commerce …".[8]

As Foster J of the Federal Court recently noted in *ESCO Corporation v Bradken Resources Pty Ltd*,[9] it is in keeping with the pro-enforcement preference of the New York Convention, that s 8(3A) of the IAA provides that the award is to be enforced unless one of the grounds in s 8(5) is proved by the party against whom the award is sought to be enforced or unless public policy, per s 8(7), "requires that the award not be enforced".[10]

Importantly, "public policy" is now defined in s 8(7A) of the IAA so that an Australian court may decline to enforce an award only on the grounds stated in the Model Law and not on local grounds of public policy which previously might have been invoked to prevent recognition or enforcement of a foreign judgment.[11]

As to the enforcement of awards in Australia, there is a discretion to adjourn enforcement proceedings in s 8(8) of the IAA (as amended in 2010). That discretion appears to be wide, but must be understood in light of the IAA as a whole.

The operation of the adjournment provision in subsection (8) is also tempered by subsections (9)-(11) which allow the Court to resume proceedings that have been adjourned under subsection (8) when one of the four circumstances listed in subsection (10) obtains. In *ESCO v Bradken*, Foster J said that "these provisions recognise the

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[6] The Hon. Marilyn Warren AC, Chief Justice of Victoria, "Australia as a 'Safe and Neutral' Arbitration Seat" (Speech delivered at the Australian Centre for International Commercial Arbitration, People's Republic of China, 6-7 June 2012) 2.
[7] Gregory Nell SC, "Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia" (2012) 26 *Australian and New Zealand Maritime Law Journal* 24, 37.
[8] Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth) 2.
[9] [2011] FCA 905.
[10] *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905 at [85] (*ESCO v Bradken*).
[11] IAA ss 8(7)(b) and 8(7A).

need for the Court to keep a close and active eye on the progress of foreign proceedings which will have underpinned any adjournment granted under subsection (8)".[12]

Other governments in the Asia-Pacific region have also been active.

Singapore[13] and Hong Kong[14] have recently reviewed their respective arbitration regimes with a view to bringing them into line with the Model Law. While amendments made to both the Singaporean and Hong Kong regimes are largely consistent with the 2010 amendments to Australia's IAA, they are, in some respects, more flexible.

One example of that flexibility concerns the opt-out procedure. In Australia, the Model Law applies exclusively to arbitrations with an Australian seat. Section 21 of the IAA, as amended in 2010, precludes the possibility of parties opting out of the Model Law in favour of a foreign arbitral procedural law or the uniform Commercial Arbitration Acts (CAAs) of the States and the Northern Territory,[15] which allow for a right of appeal on a question of law arising out of an award where the parties agree that an appeal may be made and the court grants leave.[16]

I note that Professors Garnett and Nottage have suggested there may be a lacuna in the new s 21.[17] The question they raise is whether the new s 21 has procedural or substantive effect and thus whether it applies retrospectively or prospectively only.[18] If Parliament intended that s 21 should only apply prospectively, an agreement made before 6 July 2010, in which parties to an international arbitration have chosen to opt out of the Model Law, would remain effective.[19] The *lex arbitri* of that agreement would be the old CAA. And if the Parliament of that State or Territory subsequently decides to enact the new CAA, thus repealing the old CAA before the parties commence arbitration, there will be no *lex arbitri* to govern that arbitration.[20]

While the Singaporean and Hong Kong regimes, by preserving the opt-out procedure,[21] allow greater scope for party choice, the other side of the coin is that the invocation of

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[12] [2011] FCA 905 [57].
[13] The *International Arbitration (Amendment) Act 2009* (Singapore) commenced on 1 January 2010.
[14] The *Arbitration Ordinance* (Hong Kong) cap 609 came into force 1 June 2011.
[15] Neither the uniform CAAs nor the old State and Territory Arbitration Acts have residual operation when the IAA applies: IAA s 21. To date, New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Northern Territory have enacted the uniform CAAs.
[16] CAA s 34A.
[17] Richard Garnett and Luke Nottage, "What Law (If Any) Now Applies to International Arbitration in Australia?" (Legal Studies Research Paper No 12/36, Sydney Law School, May 2012).
[18] Ibid 12-13. Murphy J held in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21 at [67] that s 21 of the Model Law does not affect the rights and liabilities of the parties to an arbitration and therefore could apply retrospectively on the principle established in *Maxwell v Murphy* (1957) 96 CLR 261 that legislation may operate retrospectively where it has procedural and not substantive effect.
[19] Richard Garnett and Luke Nottage, "What Law (If Any) Now Applies to International Arbitration in Australia?" (Legal Studies Research Paper No 12/36, Sydney Law School, May 2012).
[20] Ibid; Albert Monichino, Luke Nottage and Diana Hu, "International Arbitration in Australia: Selected Case Notes and Trends" (Legal Studies Research Paper No 12/53, Sydney Law School, August 2012).
[21] See Richard Garnett and Luke Nottage, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2011) 7 *Asian International Arbitration Journal* 33-35.

the opt-out procedure means that parties may opt-out of the national legal system entirely.

That the Model Law "covers the field" under the IAA does not preclude parties from supplementing it by the adoption of innovative rules of arbitral procedure such as the ACICA Rules (as revised in 2011), the AMTAC Arbitration Rules, the MLANZZ Arbitration Rules and the IAMA Rules. "In other words, arbitral rules and the Model Law can co-exist".[22] The possibility of co-existence reflects the underlying doctrinal distinction between arbitral rules which "amplify[] the agreement of the parties" and the Model Law which is the *lex arbitri*.[23]

The 2010[24] Queen Mary College, University of London, International Arbitration Survey *Choices in International Arbitration*[25] describes Singapore as the regional leader in Asia.[26]

The Singapore International Arbitration Centre (SIAC) secretariat is comprised of a staff of 20 full-time employees recruited from countries within and outside the Asia-Pacific region.[27] That SIAC received some 188 cases in 2011[28] confirms Singapore's rapidly growing popularity as an arbitral seat for international disputes. SIAC's success is confirmed by the ICC figures. In 2010, 24 ICC arbitrations were commenced with Singapore as the chosen venue.[29]

In comparison, Australia was chosen as the venue in two ICC arbitrations commenced in 2010, and in only one in 2011![30]

The Singaporean Attorney-General has emphasised his government's intention to solidify Singapore's reputation as a hub for international arbitration,[31] attracting business and legal expertise from within the region and beyond. The fact that such eminent Australian lawyers as The Hon Tony Fitzgerald AC QC, The Hon James Spigelman AC and Professor Michael Pryles are registered with SIAC attests to the Singaporean government's success to date in its pursuit of that goal.

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[22] The Hon. Justice Clyde Croft, "Recent Developments in Arbitration in Australia" (2011) 28 *Journal of International Arbitration* 599, 604.
[23] Albert Monichino, Luke Nottage and Diana Hu, "International Arbitration in Australia: Selected Case Notes and Trends" (Legal Studies Research Paper No 12/53, Sydney Law School, August 2012) 12.
[24] This is the most recent survey released by the School of International Arbitration at Queen Mary, University of London. The School is currently conducting its 2012 International Arbitration Survey entitled *Current and Best Practices in the Arbitral Process.*
[25] This empirical study was based on "136 lengthy questionnaires" and "67 in-depth interviews": School of International Arbitration, Queen Mary, University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010) <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> Introduction (Queen Mary College Survey).
[26] Queen Mary College Survey 17.
[27] Roger N Traves SC, *Singapore Trade Mission Report* (Queensland Bar Association) 4.
[28] Ibid 5.
[29] Ow Kim Kit, Director, ICC Arbitration & ADR, Asia "ICC International Court of Arbitration/ADR" (Presentation delivered at the ICC Australia Arbitration Roadshow, Brisbane, 25 July 2012).
[30] Ibid.
[31] Roger N Traves SC, *Singapore Trade Mission Report* (Queensland Bar Association) 5.

Choice of Law

China has also been an active participant in our region's increasing openness to reform to facilitate greater international engagement. In particular, China has made significant advances in the area of choice of law for international contracts. Its outward-looking Foreign-Related Civil Relations Law[32] aims to give primacy to the choice of contracting parties. It is consistent with major developments in national and regional codifications in the region, and it also reflects a movement in the private international law of China towards greater flexibility in aid of party autonomy.

In relation to Australia, two very broad points may be made. First, the momentum which has developed within the region should provide "a fresh impetus" to reform Australia's choice of law regime for contract.[33] The Law Reform Commission first recommended reform 20 years ago.[34] Its Choice of Law Report stated that "the proper law of the contract as developed by the common law is ill-defined and uncertain in scope and inadequate to deal with modern developments in international contracts". It made numerous recommendations, modelled on the European Community's *Rome Convention 1980 on the Law Applicable to Contractual Obligations*,[35] that have not been adopted by any Australian legislature.[36]

Secondly, uncertainty in a forum's choice of law regime necessarily increases "the risk that a transaction cannot be implemented according to its terms, defeating the parties' expectations".[37] Parties can reduce this risk by selecting "a forum with a choice-of law regime which respects party autonomy, and only exceptionally gives effect to [mandatory and] overriding mandatory rules …" .[38]

For this reason some of Australia's high-minded domestic laws, if given an expansive interpretation by the courts, may diminish Australia's relative attractiveness as an arbitral seat.

While many domestic Australian laws can be avoided by simply including a choice of law clause in favour of the laws of a less prescriptive foreign jurisdiction, the same cannot be said for *overriding* mandatory laws of the Australian forum; that is, statutes which contain self-limiting provisions.[39] These laws cannot be side-stepped simply by a contractual stipulation that the law of another country applies. Their application is immediate and precedes any sort of conflict of laws analysis.

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[32] «中华人民共和国涉外民事关系法律适用法» [Law on the Application of Law to Foreign-Related Civil Relations of the People's Republic of China] (People's Republic of China) National People's Congress, 28 October 2010 (Foreign-Related Civil Relations Law).
[33] Brooke Adele Marshall, "Reconsidering the Proper Law of the Contract" (2012) 13 *Melbourne Journal of International Law* 505, 507.
[34] Law Reform Commission, *Choice of Law*, Report No 58 (1992) 81. From 1996, the Law Reform Commission has been called the 'Australian Law Reform Commission'.
[35] Law Reform Commission, *Choice of Law*, Report No 58 (1992) 40.
[36] Brooke Adele Marshall, "Reconsidering the Proper Law of the Contract" (2012) 13 *Melbourne Journal of International Law* 505, 506.
[37] Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) 5.
[38] Ibid.
[39] See Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 2nd ed, 2011) 315.

Such laws serve to safeguard the forum's political, social or economic interests and to protect the broader public interest. Examples include the *Competition and Consumer Act 2010* (Cth) (CCA), the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA) and the *Insurance Contracts Act 1984* (Cth) all of which seek to impose higher standards of conduct on business.

It is no doubt true that these laws serve to create minimum standards for the protection of the national community. Whatever their domestic value, however, they are not likely to be welcomed by parties to multi-national agreements as a lucky door prize which comes with the choice of an Australian forum. That is especially so if Courts are disposed to take an expansive view of the application of these statutes.

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd[40] affords a recent example of the expansive view. In that case, the Federal Court held that an arbitration clause, in a voyage charterparty, referring disputes to London arbitration was void on the basis that a voyage charterparty falls within the definition of "sea carriage document" in s 11 of the COGSA.

In so deciding, the Court disagreed with the ruling by the Supreme Court of South Australia in *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd*[41] to the effect that "sea carriage document" is confined to bills of lading or similar, and not charterparties.[42] One might query whether the negotiation of charterparties involve the same imbalances in party bargaining power as affect the negotiation of bills of lading so as to warrant, as a matter of policy, an expansive application of the mandatory provisions of the COGSA.

On the other hand, the decision of the Federal Court in *Nicola v Ideal Image Development Corporation Inc*[43] affords an example of a Court giving a provision of this type a narrower operation. There the Court rejected the submission that claims arising out of laws proscribing unconscionable or misleading conduct in trade or commerce in the *Trade Practices Act 1974* (now the CCA)[44] involve issues of public policy that are not suitable for arbitration.

The Court held that although these consumer protection provisions "serve the public interest by fostering competition", this does not mean that claims arising out of them "are anti-trust or competition disputes" so as to affect interests broader than those of the parties to the dispute.[45]

It is worth noting that the Queen Mary College Survey reveals that parties usually select the governing law first, followed by the arbitral seat and then the arbitral institution and rules.[46] Sixty-eight percent of survey respondents "believe[d] that the

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[40] [2012] FCA 696.
[41] [2012] SASC 50.
[42] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [147].
[43] [2009] FCA 1177.
[44] (ss 51AC and 52 of the then TPA).
[45] *Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177 [59]-[60].
[46] Queen Mary College Survey 2.

choices made about these factors influence one another, particularly in relation to the governing law and seat".[47]

Accordingly, it is to be welcomed that the Australian Standing Council on Law and Justice, cognizant of the inter-connected nature of choice of law, choice of forum, and jurisdiction, is now actively exploring the possibility of legislative reform with a view to harmonising these rules.[48]

… ONE STEP BACK

Luke Nottage and Richard Garnett recently suggested that, if Australia wants to meet competition in the region, "a bolder and more progressive stance would highlight Australia as a … forward-looking player in the field …".[49] They, like other commentators, argue that, given some of the infelicities in the drafting of the 2010 amendments to the IAA, further legislative action is needed.[50] I have already mentioned one of these infelicities. I will now mention another.

You will recall that Part III of the IAA gives the Model Law force of law in Australia, and that Part II of the IAA introduces the terms of the New York Convention, concerning the enforcement of foreign awards, into domestic law. By virtue of s 8(4) of the IAA, for the New York Convention to apply, the award must have been made in a Convention country, or the person seeking to enforce the award must be domiciled or ordinarily resident in a Convention country or Australia. Where an award is not made in a Convention country, and the person seeking to enforce the award is not domiciled or ordinarily resident in a Convention country or in Australia, that person must apply to have the award enforced under article 35 of the Model Law. A person seeking to enforce an award made in an international arbitration in Australia (ie a non-foreign award) must also apply under article 35 of the Model Law.

An award will be enforced under article 35 on application in writing to a "competent court".

Rares J, in an address to the Senior Counsel Arbitration Seminar of the New South Wales Bar Association in September 2011,[51] noted that the expression, "competent court" is not defined in the Model Law or in the IAA. The IAA does not expressly confer jurisdiction on the Federal Court or the courts of the States and Territories in respect of applications under article 35 of the Model Law.

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[47] Queen Mary College Survey 2.

[48] Standing Council on Law and Justice, "Project to build upon the cooperative scheme established by the *Service and Execution of Process Act*: Driving Micro-economic reform through the establishment of more cohesive and clearer jurisdictional, applicable law and choice of court rules" (*Communiqué*, April 2012).

[49] Richard Garnett and Luke Nottage, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2011) 7 *Asian International Arbitration Journal* 2-3.

[50] Albert Monichino, Luke Nottage and Diana Hu, "International Arbitration in Australia: Selected Case Notes and Trends" (Legal Studies Research Paper No 12/53, Sydney Law School, August 2012).

[51] The Hon. Justice Rares, "The Federal Court of Australia's International Arbitration List" (Speech delivered at the Senior Counsel Arbitration Seminar of the New South Wales Bar Association, 14 September 2011).

Rares J went on to explain, by reference to ss 2D and 39(1)(a)(iii) of the IAA, that the Federal Court, by virtue of s 39B(1A)(c) of the *Judiciary Act*, and State Courts, by virtue of s 39(2) of the *Judiciary Act*, have jurisdiction to entertain an application under article 35 as a matter arising under a law made by the Parliament.

He concluded that, so far as the Federal Court is concerned, the power to enforce a foreign award from a non-convention country (where the person seeking to enforce the award is neither domiciled nor ordinarily resident in a Convention country nor in Australia) or a non-foreign award, to which art 35 of the Model Law applies, is a matter arising under a law made by the Parliament.

It was by this process of reasoning that Murphy J, in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*[52] (*Castel*) at [57], held that the Federal Court had jurisdiction to enforce a non-foreign award under art 35 of the Model Law.

So far as I know, the reasoning of Rares J, which was applied by Murphy J in *Castel*, has not been challenged. One should note, however, that there is a challenge to the decision of Murphy J which is currently pending in the High Court in its original jurisdiction. The matter before the High Court is due to be heard in November. I will return, in a moment, to the interesting contention which is to be agitated in that proceeding.

Australian Courts and Arbitral Tribunals

I turn now to mention some aspects of the debate about the different roles and powers of arbitrators and Australian courts.

There are obvious differences between the decision of a judge and an arbitrator's award.

A judicial decision of a particular case is the most concrete expression of the law of the land. In a hierarchical judicial system which observes the doctrine of *stare decisis* (ie. adherence to precedent) judicial decisions affect not only the immediate parties to the dispute but all other persons in like cases.

Decision making by the courts is not merely a matter of dispute resolution between private parties. Each decision by a court involves the compulsory application of the law of the land upon at least one unwilling party. That party is the losing party. That party, and the community at large, all have a vital interest in the quality of the judicial process and in the reasons given for the decision.

The giving of a comprehensive statement of reasons for judgment as to why the power of the state is to be exercised against an unwilling subject is an essential requirement of the exercise of judicial power as we conceive it. This requirement stems from that maxim that justice, as dispensed by the Courts, must not only be done, but be seen to be done.[53]

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[52] [2012] FCA 21.

[53] The Hon. T F Bathurst, Chief Justice of New South Wales, "Justice for Hire: Have Gavel, Will Travel (or Arbitrators and the Judicial Duty)" (Speech delivered at the Annual Dinner of the Diploma in International Commercial Arbitration, Law Society of New South Wales, Sydney, 26 July 2012).

In international arbitration, there is less call to be concerned about an unwilling party. On the contrary, it is the will of both of those parties to submit to arbitration from which the power of the arbitrator is derived.

That is not to say, of course, that private commercial arbitration should be completely insulated from the supervision of the courts. The commercial entities who seek the benefits offered by arbitration as a method of dispute resolution are not indifferent to the quality of the decision-making process by which they have agreed to abide. No party to a commercial dispute would be content to be bound by a dishonest or blatantly incompetent decision. There is, therefore, a legitimate place for some intervention by the judicial organs of states in which arbitrations are conducted to ensure that the arbitration process is carried out fairly in conformity with the reasonable expectations of the parties to the dispute.

But that having been said, it seems tolerably clear that the commercial parties who value speed, commercial expertise, privacy and finality do not bargain for the rigour and processes in judgment writing and the availability of levels of appeal which characterise the work of Australian courts. Professor Adrian Briggs, Professor of Private International Law at Oxford University, has said, a principal objective of agreements for international arbitration is to "keep the resolution of disputes as far away from the courts as practicable."[54]

The nature and extent of the reasons that an arbitrator must give in a domestic arbitration was recently the subject of controversy between the decision of the New South Wales Court of Appeal in *Gordian Runoff Ltd v Westport Insurance Corp*[55] (*Gordian Runoff*) and earlier in the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd*[56] (*Oil Basins*). The High Court granted special leave to appeal from the *Gordian Runoff* decision and allowed the appeal.[57]

The appellant in the High Court, relying on the *Oil Basins* decision, contended that the reasons given by the arbitrators for the award were inadequate. The Victorian Court of Appeal in *Oil Basins* had said at [55] that: a "judge is bound to enter into the issues canvassed before the court and to provide an intelligible explanation as to why the judge prefers one case over the other. In our view, an arbitrator is subject to similar obligations".[58]

The New South Wales Court of Appeal in *Gordian Runoff* rejected that view. Allsop P, with whom Spigelman CJ and Macfarlan JA agreed, stated that the provisions of the old NSW Arbitration Act require only a statement of factual findings and legal or other reasons which actually led the arbitrators to conclude as they did, and not a statement and assessment of the arguments rejected.[59]

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[54] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 199.
[55] (2010) 267 ALR 74.
[56] (2007) 18 VR 346.
[57] *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239.
[58] *Oil Basins* (2007) 18 VR 346 at [55].
[59] *Gordian Runoff Ltd v Westport Insurance Corp* (2010) 267 ALR 74 at [218].

As I mentioned, the High Court allowed the appeal against the decision of the New South Wales Court of Appeal, but accepted, in *obita dicta*, that s 29(1)(c) of the NSW *Arbitration Act* could not be taken to suggest that an arbitrator's reasons must be sufficient to satisfy the standards required of an exercise of judicial power. In this regard, it was said that the reference in *Oil Basins* to reasons of a judicial standard was "an unfortunate gloss". See *Westport Insurance Corp v Gordian Runoff Ltd*[60] at [53] per French CJ, Gummow, Crennan and Bell JJ and at [169] per Kiefel J.

In relation to the NSW Arbitration Act, the High Court observed at [18]-[20] under the sub-heading "The Arbitration Act and the Supreme Court":

> "An award, subject to the Arbitration Act and to any contrary criterion in the arbitration agreement, is final and binding on the parties to the agreement (s 28). The award may order specific performance of a contract if the Supreme Court would have power to decree specific performance (s 24). By leave of the Supreme Court, judgment may be entered in terms of an award and an award may be enforced in the same manner as a curial judgment or order … (s 33). The Supreme Court is empowered by s 44 to remove an arbitrator who has misconducted the proceedings or who is incompetent or unsuitable to deal with the particular dispute.
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> These statutory provisions indicate that the making of an award in arbitration proceedings is more than the performance of private contractual arrangements between the parties … They also suggest the importance which the provision of reasons by arbitrators has for the operation of the statutory regime. That statutory regime involves the exercise of public authority, whether by force of the statute itself or by enlistment of the jurisdiction of the Supreme Court. It also … displays a legislative concern that the jurisdiction of the courts to develop commercial law not be restricted by the complete insulation of private commercial arbitration.
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> No doubt it is true to say that the provision of an award under the [NSW Arbitration Act] lacks distinctive hallmarks of the exercise of judicial power, namely the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system. However, it is going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power (cf *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 585-586, 590-591) and is wholly divorced from the exercise of public authority."

[60] (2011) 244 CLR 239.

The majority referred, with approval, to the statement of Donaldson LJ in *Bremer Handelgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130[61] on the standard of reasoning couched in terms similar to the Model Law.[62]

Beyond that, their Honours contented themselves with the observation that what is required by way of reasons in a given case will depend upon the circumstances: See *Westport Insurance Corp v Gordian Runoff Ltd*[63] at [53] and [170].

Broad statements of this kind are susceptible to a range of judicial applications. For that reason, they are not likely to be seen by international traders, and those who advise them, as an unequivocal acceptance of the proposition that it is sufficient for an arbitrator to state the findings and reasons which lead to his or her decision without stating the arguments which have been rejected and the reasons why.

It will be appreciated that the case was not directly concerned with the IAA. When *Westport Insurance Corp v Gordian Runoff Ltd*[64] reached the High Court, Mr Stephen Gageler, SC, then the Commonwealth Solicitor-General, appeared as amicus curaie on behalf of the Attorney-General. He submitted that "the equation by the Court of Appeal in [that] case and the Victorian Court of Appeal in *Oil Basins* of the duty imposed by s 29(1)(c) of the [State Arbitration Act] and Act 31(2) of the Model Law was wrong".[65]

The Solicitor-General argued that articles 5, 31(2) and 34 of the Model Law require no more than a statement of reasons which demonstrates that the arbitrators have addressed the dispute referred for determination. In relation to these submissions, the High Court said at [22]-[23] under the sub-heading "The federal scheme":

> "Section 16 of the federal Act gives the force of law in Australia to the ... Model Law … If the Model Law applies to an arbitration, State or Territory law relating to arbitration does not apply to it (s 21). In exercising a power to recognise and enforce an arbitral award under the Model Law, a federal, State or Territory court must have regard to the objects of the federal Act and the circumstance that awards are intended to provide 'certainty and finality' (ss 39(1)(a)(iii), 39(2)(b)(ii)). The federal Act in this way enlists the judicial power of the Commonwealth in aid of the operation of the arbitration system established by s 16 and the Model Law.
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> Article 31(2) of the Model Law requires that an award 'shall state the reasons upon which it is based'. However, the Solicitor-General submitted that this appears in a context where Art 5 provides that 'no court shall intervene except where so provided in this Law', and there is no provision for appeal on a question of law. An award may be set aside only under Art 34 and relevantly only on the ground of a breach of the rules of natural justice. The Solicitor-General contended that

[61] *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132-133.
[62] *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at [54].
[63] (2011) 244 CLR 239.
[64] (2011) 244 CLR 239.
[65] (2011) 244 CLR 239 at 250.

> here these rules require no more than a statement of reasons to demonstrate whether the arbitrators have addressed the dispute referred for determination. Whether this is the proper construction of the federal Act and the Model Law may be left for determination on another occasion. The provisions of the federal scheme may be put to one side in construing the Arbitration Act, upon which this litigation turns."

These observations seem to acknowledge that the provisions of IAA exhibit a lesser degree of concern for the standard or quality of the reasons required of an arbitrator than the provisions of the State and Territory Arbitration Acts, and that this is significant.

Unlike the State and Territory Arbitration Acts, and the uniform CAAs, the IAA, does not contemplate an "appeal", as such, to a Court. Rather, by article 34 of the Model Law, the IAA grants a right of recourse in limited circumstances, the most significant of which is where the court finds that the award is in conflict with public policy.[66] This difference between the supervisory regimes of the IAA, on the one hand, and the State and Territory Arbitrations Acts and the uniform CAAs, on the other, might well affect how the role of the arbitrator is conceptualised and thus the nature and standard of the reasons that they are required to give.

It is possible that the High Court may soon have occasion to consider the extent and nature of reasons required of an arbitrator under the IAA in the proceeding, to quash the decision of Murphy J, in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Castel Electronics Pty Ltd* (*TCL*).[67]

The substantive contention to be advanced in *TCL* does not "touch[] to the slightest degree" (to use the words of Mr Walker SC for the plaintiff) the decision of Murphy J. The contention is, as I understand it, that Arts 35 and 36 of the Model Law, read with s 7 and Pt III of the IAA, purport to confer the judicial power of the Commonwealth on arbitral tribunals contrary to the requirements of Ch III of the Constitution explained in *Boilermakers' Case*.[68]

The contention seems to be that these central provisions of the IAA interfere impermissibly with the judicial power of the Commonwealth and are invalid as inconsistent with Ch III of the Constitution. That is said to be because remedies characteristic of judicial power may be enforced by Ch III courts even though the foundational reasoning behind the decision to grant the remedy is neither transparent, nor in substance that of a Ch III court.

On the hearing of the plaintiff's application to show cause in *TCL*, Justice Gummow remarked that "[o]nce you get into that territory …" (by which his Honour was referring to modern arbitration statutes which provide for specific performance orders and injunctions):

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[66] Model Law art 34(2) (b)(ii); Geoff Farnsworth, "Sufficiency of Reasons in Arbitration Awards", (2012) 26 *Australian & New Zealand Mar Law Journal* 69, 73.
[67] No S178 of 2012.
[68] See *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

> "… you get an enlistment of a court in the enforcement stage which can have an impact on third parties. For example, a banker, in effect, intermeddles in the performance of an injunction by paying out when he should not pay out, that sort of thing, even though the banker has not[,] obviously not[,] been a party to this private agreement. So I think the 19th century cases did not have to cope with some of these sophistications we now have in the system. That is part of the problem I think."[69]

The respondent alluded to the famous passage in *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643. The Court in *Dobbs* comprised of Rich, Dixon, Evatt and McTiernan JJ said at [652]-[654] that:

> "A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid.
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> …
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> By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action. His award will do so if it negatives the existence of liability … The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon
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> …
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> It is true that, apart from statute, such an authority was revocable. It must subsist up to the making of the award … [That] authority was by its nature countermandable and no act or contract of the party could make it otherwise (*Vynior's Case*) … But, when an arbitrator, exercising a subsisting authority, delivered his award, the law gave full effect to it ... [I]t was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court."

Obviously, I do not propose to enter upon a discussion of the merits of the arguments to be agitated before the High Court in *TCL*. One may say, however, that, whatever the value of Sir Edward Coke's *obiter dicta* in *Vynior's Case* as a statement of the common law, it had nothing to do with a statutory authorisation to the judiciary to hold parties to their bargain where one of the parties is disposed to seek to countermand it.

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[69] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2012] HCATrans 172 (23 July 2012).

In this regard, s 7 of the IAA provides for a stay of proceedings pending in a court constituted by a party to an arbitration agreement to which the section applies. Under s 7(2) of the IAA, a court is required to grant a stay if "the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration". It may be argued that a case of the kind postulated by Gummow J at the show cause hearing in *TCL*, ie. where third parties' rights are in issue, is outside the mandatory operation of s 7. If that were so, there would be no statutory attempt to "enlist" a Ch III court to the performance of a non-judicial function.

Having summarised the issues which might arise in *TCL*, I will not comment further on the case.

The crucial question for the prospects of international arbitration in Australia remains as to where the balance is to be struck between the maintenance of necessary standards of fairness and competence on the one hand and the respect for the manifest desire of commercial parties for speed, expertise and economy on the other. One feels that the last word has not been said in relation to this question.

Whether the extent of judicial supervision is a matter of "strict scrutiny" or a lighter touch may be thought to reflect the extent of judicial scepticism about the benefits claimed for arbitration. For example, in *Westport Insurance Corp v Gordian Runoff Ltd*,[70] some comments of Heydon J reflect scepticism as to the wisdom of the choice of arbitration as a dispute resolution mechanism. His Honour said of that case at [111] that:

> "The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy … [I]t must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater *relevant* expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three."[71]

It might respectfully be said these criticisms do not recognise that the failings of the arbitral process identified in *Westport Insurance Corp v Gordian Runoff Ltd*[72] reflect the Court's view of the extent of the proper level of judicial intervention in the process. If it were the case, understood from the outset, that the law required only the light judicial touch suggested by the NSW Court of Appeal, there might have been no occasion for his Honour's criticisms. Further, whatever perception the judiciary may have of the relative merits of litigation and arbitration, it is the perception of the parties and those who advise them that matter.

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[70] (2011) 244 CLR 239.
[71] Emphasis in original.
[72] (2011) 244 CLR 239.

Again it may be said that the High Court's decision in *Westport Insurance Corp v Gordian Runoff Ltd*,[73] strictly speaking, applies only to domestic arbitrations governed by the old NSW Arbitration Act. It will no doubt assist courts called upon to interpret the provisions of the new uniform CAAs. It may also be persuasive for courts called upon to interpret provisions of the IAA.

In this regard, Croft J of the Supreme Court of Victoria recently said extra-judicially:

> "as both the IAA and CAA apply the Model Law provisions, judgments under one regime can and will inform judgments under the other … [I]nternational and domestic parties are likely, and entitled, to assume that a decision on similar or identical provisions under one regime will be found to apply with equal force under the other regime".[74]

The views of Croft J draw support from the exhortation in s 2A of the CAA that courts are expected to interpret its provisions and the IAA consistently. Whether the view put by the former Solicitor-General in *Westport Insurance Corp v Gordian Runoff Ltd*[75] will prevail remains to be seen.

A Uniform Approach

The desirability of developing a uniform body of jurisprudence on the Model Law in Australia has prompted Albert Monichino SC to argue forcefully that the Commonwealth Parliament should amend the IAA to provide for all appeals from State and Territory Supreme Courts to be heard by the Full Court of the Federal Court comprised of judges with international arbitration expertise.[76]

Such an approach is not without precedent. For example, s 24(1)(c) of the *Federal Court of Australia Act 1974* (Cth), in conjunction with other legislation, confers jurisdiction on the Federal Court to hear and determine appeals from single judge decisions of State and Territory Supreme Courts in some intellectual property matters.[77]

It might be thought that this approach has appeal, given that the development of a uniform body of jurisprudence depends, at present, on the rarely heard voice of the High Court. As Mr Monichino has noted, the High Court considered the IAA only once, in 1990, in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.[78]

CONCLUSION

In the market-based economies of the Asia-Pacific region, the development of international arbitration as the preferred mechanism for the management of

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[73] (2011) 244 CLR 239.
[74] The Hon. Justice Clyde Croft, "Recent Developments in Arbitration in Australia" *Journal of International Arbitration* (2011) 599, 601.
[75] (2011) 244 CLR 239.
[76] Albert Monichino, "International Arbitration in Australia: The Need to Centralise Judicial Power" (2012) 86 *Australian Law Journal* 118, 131.
[77] For example, *Copyright Act 1968* (Cth) s 131B; Ibid.
[78] Albert Monichino, "International Arbitration in Australia: The Need to Centralise Judicial Power" (2012) 86 *Australian Law Journal* 118, 125.

performance risk has become one of the "facts on the ground" of the flourishing trade between our nation and those within our region.[79]

There can be no doubting the high quality of Australian courts and Australian justice. The question is whether, notwithstanding the high quality of our judicial institutions and their work, a strongly interventionist approach to the supervision of international arbitrations accords with the expectations of the parties to those proceedings. These parties have an unprecedented freedom to choose their dispute resolution arrangements; and they vote with their feet.

At a practical level, the views of international traders, and their priorities and perspectives, are crucial to the prospects for international arbitration in Australia. One is reminded of the observation that it makes little sense for sheep to pass resolutions in favour of vegetarianism while the wolves remain of a different opinion.

[79] The Hon. Marilyn Warren AC, Chief Justice of Victoria, *Australia as a "Safe and Neutral" Arbitration Seat* (Speech to Australian Centre for International Commercial Arbitration, PRC 6-7 June) 1.