THE RULE OF LAW AND INTERNATIONAL TRADE*

1 I am honoured to have been invited to give the 2018 address for the Australian Maritime and Transport Arbitration Commission. This year marks the 60th anniversary of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* done at New York on 10 June 1958 (the **New York Convention**).

2 The New York Convention has played a signal role in supporting international trade in the decades since it was agreed. The Convention provides an internationally uniform set of rules for the recognition and enforcement of, *first*, a contract to refer a dispute to arbitration and, *secondly*, an award made in such an arbitration. The Convention identifies a limited set of expectations for each category. It ensures that, ordinarily, a domestic court must recognise and enforce both an arbitration agreement and any award, and will stay a proceeding involving the parties to an agreement that contains an arbitration clause. An award made in such an arbitration is usually more readily enforceable internationally than a judgment of a foreign court.

3 There are 159 States Party to the New York Convention comprising about 80% of the world's nation states. To mark the Convention's 50th anniversary on 6 December 2007, the General Assembly of the United Nations adopted a resolution[1] that stated:

> the Convention, by establishing a fundamental legal framework for the use of arbitration and its effectiveness, has strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations…

4 The resolution also recognised:

> the value of arbitration as a method of settling disputes in international commercial

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1 Resolution (62/65)

> relations, contributing to harmonious commercial relations, stimulating international trade and development and promoting the rule of law at the international and national levels…

5 One significant aspect of that resolution is its recognition of the rule of law in this international context.

The role of the rule of law

6 I want to discuss in this address the perhaps counterintuitive concept of the rule of law in international trade, particularly in disputes where no one national system of law operates to define and enforce the rights of the parties to the dispute.

7 In a domestic setting, the rule of law is an essential attribute of a democratic society. It ensures that checks and balances govern the conduct of all persons and institutions within that society. Those constraints consist of existing legal rules that the three arms of government in a Westminster system (namely, the legislature, executive and judicial branches) apply, and respect, in a transparent way. The expectation that the rule of law creates within a democracy is that all persons are equal before, and subject to, the law. Such a legal system enables parties to enforce rights and obligations by a fair and impartial legal process.

8 In contrast, international trade arises out of relationships formed between persons located in, and or amenable to the law of, different nations. When persons from different nations and legal systems engage in trade, there is no overarching societal institution, like the rule of law, to regulate their relationship. The enforcement of rights and obligations in those relationships depends upon the willingness and ability of the national system of law, in which enforcement is attempted, to lend its aid to a foreigner.

9 A significant proportion (estimated to be over 10%) of the world's trade by volume comes into and sails out of Australia by sea. It is essential that effective mechanisms exist to give assurance to traders and those in the shipping industry that they can enforce, anywhere in the world, rights and obligations that arise in this area of commercial life. To be effective, those mechanisms must offer relatively predictable and just outcomes. No one with an effective choice would wish to subject the determination of their legal disputes to an arbitrary, partial, corrupt or unfair system of resolution.

10 The United Nations Commission on International Trade Law (**UNCITRAL**) is the primary organ of the United Nations responsible for formulating international conventions and other legal means for regulating trade law. In particular, over the last 40 years, UNCITRAL has

developed the concept of a **Model Law**. A Model Law is not itself a treaty or convention between States Party. Rather, it works as a standard template that individual States will enact in order to encourage the adoption of a multinational common legal framework to resolve particular areas of legal disputes.

11 The 1985 *Model Law on International Commercial Arbitration* has proved a useful supplement to the efficacy of the New York Convention. UNCITRAL amended this Model Law in 2006. Another example is the UNCITRAL *Model Law on Cross Border Insolvency*.

12 Australia is one of 80 nations and 111 jurisdictions (including each Australian State and self-governing Territory) that has given force of law not only to the New York Convention but also to the Model Law, as amended. That was achieved in the *International Arbitration Act* 1974 (Cth). Article 2A of the Model Law requires courts in interpreting it, to have regard to its international origin and the need to promote uniformity in its application and the observance of good faith.

Some history

13 Before discussing the role of the rule of law today in the context of the New York Convention and Model Law, I propose to divert to explore some matters of history.

14 Over the last century, the development of international treaties, conventions and model laws facilitated, significantly, the effective and efficient enforcement of private law rights and obligations. But nation states have had mechanisms in their legal systems that serve a similar end in place for millennia. Those mechanisms enabled creditors or other persons with legal claims against foreigners (or non-residents) to have them heard and determined by domestic courts. However, one significant problem in that process can be establishing jurisdiction over a foreign defendant (or respondent).

15 Our modern maritime law evolved because of international trade. Thus, in 1703, Holt LCJ, giving the judgment of the Court of Kings Bench, recognised that "it will be the greatest prejudice to trade that can be" if his court were to grant a writ of prohibition restraining the

English Court of Admiralty, that applied Roman or civil law principles, from enforcing a foreign maritime lien.[2]

16 In 1759, the great commercial judge, Lord Mansfield CJ, delivered the decision of the Court of King's Bench in *Luke v Lyde*.[3] This case involved a ship carrying a cargo of fish from St John, Newfoundland, Canada, to Lisbon, Portugal that had been captured by a French ship, and then rescued by a salvor. Some of the cargo was lost. The defendant purchaser paid salvage to the salvor and sold the balance of cargo in England. The plaintiff shipowners sued the defendant for the freight due on the voyage. The questions were to what, if any, freight were the plaintiffs entitled and what deductions could be made from it. Lord Mansfield CJ said:[4]

> I find by the ancientest laws in the world, (the Rhodian laws,) that the master shall have a rateable proportion, where he is in no fault.[5] And *Consolato del Mere*, a Spanish book, is also agreeable thereto. Ever since the laws of Oleron, it has been settled thus.

17 The Lord Chief Justice also drew on French texts and the laws of Wisbury. He found that the owners were entitled to a rateable proportion of the freight referred to the actual amount of cargo delivered in England.

18 A century later, Brett MR said that the source of contribution to general average arose:[6]

> from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean.

19 Indeed, the action *in rem* derives from Roman or civil law foundations and, before the *Judicature Acts* of 1873 and 1875 (UK), was not a procedure or remedy that formed part of the common law. However, because there was a common source of the curial power to arrest or attach a ship located within its jurisdiction and to sell her to pay maritime creditors, wherever they may have been located, the courts of other (mostly civil law) nations that also exercised this power generally recognised the judicial sale of a ship, although not on all occasions.

[2] *Johnson v Shippen* (1703) 2 Ld Raym 982 at 983 [92 ER 154 at 155]; see too the cases I collected in *The Ship 'Sam Hawk' v Reiter Petroleum Inc* (2016) 246 FCR 337 at 410-414 [307]-[320]
[3] (1759) 2 Burr 882 [97 ER 164]
[4] 2 Burr at 889; [97 ER at 619]
[5] V. artic. 27, 32, 42
[6] *Burton v English* (1883) 12 QBD 218 at 220-221

20 Similarly, courts that exercised Admiralty, or maritime, jurisdiction also were conscious that the common civil law source for their laws applicable to like situations, ought to command respect as "*the law of the ocean*". This mutual judicial respect reflected the policy considerations that Holt LCJ had expressed, namely that each nation's courts had to apply their domestic laws in a way, where possible, that did not injure international trade. Courts could be more confident that they were not applying idiosyncratic local rules that could operate unfairly to those with interests in a ship or who dealt with her, her master or owners or had a maritime lien on her, because the law maritime was recognised as a body of legal rules by the courts of other trading nations.

21 A similar and more modern broad perspective on the role of maritime law emerged in the Supreme Court of the United States 1953 decision in *Lauritzen v Larsen*.[7] There Jackson J, giving the opinion of the Court (Black J dissenting), said:

> the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. **Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality**. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but **from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations**.
>
> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, **it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own**. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. (emphasis added) (citations omitted)

22 In this way, common legal principles developed from ancient times that came to be applied internationally and can be described as an aspect of "the rule of law". The general judicial acceptance of these principles is the more important because some rights and liabilities can be

[7] 345 US 571 at 581-582 (1953)

created in international waters. The principles are apt to be applied universally; e.g., when two ships collide or a ship is in danger or distress and is salvaged. No national law could apply of its own force to or over an occurrence beyond the reach of the nation's jurisdiction. So the legal rules or principles that courts had to apply in order to resolve rights and liabilities derived in such occurrences needed to command general respect among other national courts exercising Admiralty or maritime jurisdiction.

23 The historical importance of the respect for comity that courts of nation states gave to support their international trade can be seen in another, local context. Three years ago we celebrated the 800th anniversary of King John's signing of *Magna Carta* on 15 June 1215.[8]

24 Quaintly, in December 1917, three years after its 700th anniversary, a majority of the High Court of Australia applied c. 30 of *Magna Carta* in construing the ambit of the power of the Comptroller-General of Customs to issue a clearance to a Finnish owned ship, *Samoena*, to leave the Port of Melbourne in ballast. The Comptroller-General had sought to impose a condition under the *Customs Act* 1901 (Cth) on the issue of the clearance that the ship load a cargo of wheat and carry it to the United Kingdom at the request (but not requisition) of the then Czarist Russian Admiralty. After about 3 months, the Prime Minister directed that a clearance be issued and the ship was then let go. The owners of *Samoena* sued the Commonwealth for damages for her unlawful detention in the original jurisdiction of the High Court.

25 Barton, Isaacs and Rich JJ held, over the dissent of Gavan Duffy J,[9] in *Zachariassen v The Commonwealth*[10] that the Comptroller-General had a duty to issue the clearance if all the statutory conditions were fulfilled, even though the *Customs Act* did not positively require this or even confer an express power to grant a clearance. They said:[11]

> The affirmative duty is found, we think, in other considerations. *Magna Charta* (9 Hen. III.), c. 30, relating to foreign merchants said: "All merchants unless they were openly prohibited before, shall have safe and sure conduct to depart out of England, and to come into England, and to tarry in and go through England, as well by land as

[8] see S. Rares: *Why Magna Carta Still Matters in: The Magna Carta in Australia* (Robin Speed ed: Australia's Magna Carta Institute 2016
[9] At 187
[10] (1917) 24 CLR 166 at 180-181
[11] 24 CLR at 181

> by water to buy or sell … except in time of war." This provision, as is observed in *Chitty on the Prerogative* (p. 163), "strongly proves that the English had this liberty before." **International commercial intercourse by sea (subject to any specially indicated municipal requirement) is always understood to imply a right to depart with the vessel. Foreign commerce and intercourse would otherwise be impossible, and one main object of the Customs Acts, including Tariff Acts, would be frustrated. The *Customs Act* must be read with reference to maritime practice, applicable to all oversea commerce, inwards and outwards.** It is trite law that Statutes should be construed, so far as their language permits, so as not to clash with international comity.[12] So reading it, there is a duty on the Commonwealth (by the hand of the Collector) to grant the clearance if satisfied that the law has been complied with**. An arbitrary refusal or one based on unjustifiable grounds is the denial of a right implicitly recognized, incorporated into and limited by the Act.** By unjustifiable grounds, we must not be understood as excluding in all cases an honest and not unreasonable belief on the part of the Collector acting for the Commonwealth, that the law has not been complied with. In times of peace, the refusal alleged in this case, if its possibility then be assumed, would be a clear *primâ facie* breach of the Statutes. (emphasis added)

26 In that passage, Barton, Isaacs and Rich JJ connected *Magna Carta* to the principles underpinning the assumption of the rule of law in cases involving international trade and commerce, not just to the Great Charter's famous and enduring promises, now in c. 29 of the 1297 reissue (or c. 39 and 40 of the 1215 version, but also to the long repealed (original) c. 30). The promise now in c. 29 was: [13]

> NO free man shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him,] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

27 The encouragement and protection of international trade had deep roots as *Zachariassen*[14] shows, although we are seeing some current challenges to that precept in the geopolitics of today.

[12] *Ex parte Blain; In re Sawers* 12 Ch D 522; *Winans v. Attorney-General* [1910] AC 22 at 31; *Colquhoun v. Brooks* 21 QBD 52 at 57; *Macleod v. Attorney-General for New South Wales* [1891] AC 455

[13] The perhaps now forgotten concluding words, that are still part of the law of England, read:

> We, Ratifying and approving these Gifts and Grants aforesaid, confirm and make strong all the same for Us and our Heirs perpetually, and by the Tenor of these Presents do renew the same: Willing and granting for Us and our Heirs, that [this Charter and] all and singular his Articles for ever shall be stedfastly, firmly, and inviolably observed; [and if] any Article in the same Charter contained yet hitherto peradventure hath not been kept [We will and by authority royal command from henceforth firmly they be observed].

[14] 24 CLR 166

Arbitration and the rule of law

28 Arbitration, too, has had a long history in the resolution of disputes. Its critical differences from the role of courts are that, *first* arbitration, is a voluntary process that is created by a contract between parties who mutually promise to use it as their agreed mechanism to resolve their dispute, usually confidentially, *secondly*, it can be conducted anywhere in the world and can apply any one or more systems of national law as the parties agree to use, and *thirdly*, it cannot enforce any resolution at which it arrives.

29 Courts, on the other hand, are an integral part of the government of a society. A court can compel a person, or a ship, within, or subject to, its jurisdiction to be a party to a proceeding and to be bound by its decision. At least in common law nations, almost all proceedings occur in open court in public. Moreover, a court can use the power of its national state to enforce any decision that it makes, so long as the person or property the subject of its order is within its jurisdiction. A court has to apply its own domestic law, although that may, and in cases involving international trade frequently does, include its domestic rules of private international law, where the parties have made the choice of foreign law in their contract or a foreign law applies to the events in which an asserted right or liability came into existence.

30 It is essential, if the parties and the public are to have confidence in the outcomes of both arbitral and curial dispute resolution, that an independent and impartial third person (arbitrator or judge) decide the result of the parties' legal relationship where some event has caused it to go wrong or to come into existence.

31 In his 2012 Clayton Utz University of Sydney International Arbitration Annual Lecture, David W Rivkin gave a detailed account of the history of commercial arbitration that spanned millennia.[15] Mr Rivkin pointed to evidence of an established system of private arbitration in ancient Greece that dated from as early as 500 B.C. The Greek statesman and orator of the 4th Century B.C, Demosthenes, described the arbitral system of his time in language which is

[15] D Rivkin, 'The Impact of International Arbitration on the Rule of Law', Clayton Utz and University of Sydney International Arbitration Lecture, Sydney, 2012

arguably, equally applicable today, although I will use English lest what I say is all Greek to you. He said: [16]

> It is lawful for parties who have a dispute with one another about their private obligations, and who wish to choose an arbiter, to select whomever they wish. But when they have together chosen an arbitrator they must abide by his decision and cannot in any way appeal from him to another tribunal: let the arbitrator's decision be final!

The modern place of arbitration

32 After some initial hostility to widely framed arbitration agreements, as potentially seeking to oust the jurisdiction of the courts, the House of Lords in *Scott v Avery*[17] settled on a principle of English law that a party to a contract with an arbitration clause had no right to bring proceedings in cases of dispute under until an arbitrator had made an award reflecting his view (in those days there were no female arbitrators).[18]

33 Spigelman CJ and Mason P explained in *Raguz v Sullivan*[19] the source of that hostility had emerged from Lord Campbell's original speech as reported in *Scott v Avery* 28 LT OS 207,[20] before his revised speech appeared in Clark's report in his House of Lords Cases. Spigelman CJ and Mason P said that Lord Campbell had "lifted the curtain on judicial opposition"[21] when he said:[22]

> My Lords, I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration. Now, I wish to speak with great respect of my predecessors the judges; but I must just let your Lordships into the secret of that tendency. My Lords, there is no disguising the fact, that as formerly the emoluments of the judges depended mainly or almost entirely upon fees, and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil. … Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law.

[16] Sourced by David W Rivkin to Derek Roebuck: A Short History of Arbitration in Hong Kong and China Arbitration: Cases and Materials (1994) at xxxviii
[17] (1856) 5 HLC 811 at 846 (10 ER 1121 at 1135)
[18] 5 HLC at 850 per Lord Cranworth LC at 851-852 per Lord Campbell with both of whom Lord Brougham agreed
[19] (2000) 50 NSWLR 236 at 247-248 [47]-[48]
[20] And, 25 LJ Ex 308 at 313
[21] (2000) 50 NSWLR 236 at 247-248 [47]
[22] 28 LT OS 207 at 211

34 Since then, legislation in England, Australia and elsewhere has progressively narrowed the supervisory role of the courts over arbitral decisions. During much of the 20th Century, the House of Lords regularly heard and decided appeals in respect of arbitration decisions on significant questions of law, particularly affecting the law of contract, in order to determine whether arbitrators had applied the law correctly to the resolution of the dispute in the award. This interaction between arbitration and the judiciary had the positive by-product of allowing the courts to develop the law, as our modern society evolved through two world wars and huge recent social, economic, industrial and technological changes. However, the degree of judicial intervention in arbitrations had the disadvantage of increasing costs and delay for the parties. Hence, legislatures and the international community progressively narrowed the bases on which the disappointed party to an award could challenge it.

35 Ultimately, in Australia, the *International Arbitration Act* confined the scope of challenges to the enforcement of both the agreement to arbitrate itself, and any award in an international commercial arbitration, to the grounds in the New York Convention and the Model Law, depending on the circumstances. The Australian Parliament identified the objects of that Act as including the facilitation of international trade and commerce by encouraging the use of arbitration as a method of resolving disputes.[23] And s 39(2) provides that all Australian courts, in considering matters that require the exercise of powers to recognise or enforce arbitration agreements or awards, must have regard to the objects of the Act in s 2D and to:

> (b) the fact that:
>
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
>
> (ii) awards are intended to provide certainty and finality.

36 The Model Law has force of law in Australia, by dint of s 16 of the Act, for the purposes of recognising and enforcing arbitration agreements and awards made in Australia. Part II of the Act gives effect to the New York Convention. It deals with recognition and enforcement of arbitration agreements and awards made outside Australia, or where the governing of the procedural law of which is the law of another State Party to the Convention, or where a

[23] s 2D(a)

person who is party to the arbitration agreement, is domiciled or ordinarily resident in such a State Party.

37 As experience has shown, a vast range of contracts in international trade and commerce can contain arbitration clauses, including charterparties, contracts for building ships, sale of ships, salvage and sale of goods. I leave to one side investor-State arbitrations for which Pt IV of the *International Arbitration Act* also makes provision by giving effect to the *Convention on the Settlement of Investment Disputes Between States and National of Other States*, signed by Australia on 24 March 1975.

38 In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*[24] French CJ and Gageler J said that both the English and Australian statute, law and Common Law governing arbitration had "approached the relationships between the parties and the arbitrator, and between the parties and each other unequivocally in terms of private law". But their Honours then said: [25]

> That is so notwithstanding the truth of the observation that performance of the arbitral function is not "purely a private matter of contract, in which the parties have given up their rights to engage judicial power" and is not "wholly divorced from the exercise of public authority"[26].

39 It is important to appreciate the nature of an arbitral award that underpins the New York Convention, the Model Law and the public policy of States, such as Australia, that have legislated to give those instruments effect in respect of the recognition and enforcement of arbitration agreements and awards. As Hayne, Crennan, Kiefel and Bell JJ said in *TCL*[27] applying what Rich, Dixon Evatt and McTiernan JJ had held in *Dobbs v National Bank of Australasia Ltd*[28], by agreeing to submit their dispute to arbitration, the parties give the arbitrator authority to determine their claims conclusively, and when an award is made, it is final and conclusive as to their rights. The award substitutes its determination for the parties'

[24] (2013) 251 CLR 533 at 546 [9] quoting Mustill & Boyd*: The Law and Practice of Arbitration in England Commercial* (2nd ed 1989) at p 4
[25] (2013) 251 CLR 533 at 546 [9]
[26] *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [20]
[27] 251 CLR at 566-567 [76]-[78]
[28] (1935) 53 CLR 643 at 653

pre-existing rights and liabilities, which it discharges by an accord and satisfaction. In *TCL*[29], their Honours said:

> The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award in fulfilment of the agreement to arbitrate[30].

40 However, if one party begins curial proceedings before the arbitrator makes an award that, ordinarily, will be a breach of the contract to arbitrate.[31]

41 Australia has also supported, in other ways, the autonomy of the parties to contracts, other than those for the carriage of goods by sea, to agree to refer disputes arising under those contracts to arbitration. The Parliament of Australia made a public policy choice in s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) to render of no effect an arbitration clause in a sea carriage document or non-negotiate document[32], so far as the clause purports to preclude or limit the jurisdiction of a Commonwealth, a State or Territory court in respect of a bill of lading or other such document. Nonetheless, s 11(3) provides that the arbitration clause will be effective if it provides that the arbitration must take place in Australia.

42 In *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd*[33], the Full Court of the Federal Court held in 2013 that a voyage charter with an arbitration clause, was not a bill of lading or other document that s 11 prevented from having effect. The Full Court noted that the Canadian Federal Court of Appeal had reached the same conclusion in *Canada Moon Shipping Company Ltd v Companhia Siderurgica Paulista-Cosipa*[34]. As Gauthier JA (with whom Pelletier and Mainville JJA agreed) said:

> One can readily see that the imbalance in the bargaining power that is the mischief that led to the development of the various international regimes discussed above did not exist in relation to charter-parties. The liner trade (common carriers operating regular services in certain areas, using the sea carriage documents covered by the various international regimes) is simply quite different from the tramp trade (chartered vessels). There was thus no policy to restrict the freedom to contract of parties to such agreements.

[29] 251 CLR at 567 [78]
[30] *Dobbs* (1935) 53 CLR 643 at 653. See also *McDermott v Black* (1940) 63 CLR 161 at 183-185; *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 at 267
[31] *Dobbs* 53 CLR 563, *TCL* 251 CLR at 356-367 [76]-[77]
[32] that expressly provides that the amended *Hague Rules* in Sch 1A of that Act are to govern it as if it were a bill of lading
[33] (2013) 216 FCR 469 (Mansfield and Rares JJ; Buchanan J dissenting)
[34] [2014] 1 FCR 836 at [61]; 2013 AMC 319 (2012).

Security for foreign arbitration under the *Admiralty Act*

43 Thus, s 29 of the *Admiralty Act 1988* (Cth) confers power on a court in which a ship or other property is under arrest in the proceeding, to stay or dismiss the proceeding on the ground that the claim concerned should be determined by arbitration and to impose a condition that the ship or other property be retained as security for the satisfaction of any arbitral award or foreign judgment that may be made in the arbitration or foreign proceeding. The section also specifically provides that the power to stay and dismiss comprehends a power to impose just conditions, including conditions with respect to the institution or prosecution of any arbitration or foreign proceeding and that equivalent security (as would have been provided here) be provided for the satisfaction of any award or foreign judgment.

44 This reflects a similar statutory power in England and Wales that, as Lloyd LJ[35] said in *The Bazias 3: The Bazias 4*[36], is exercised in accordance with the usual practice of the court only to order the release of the ship upon the provision of sufficient security to cover the amount of the claim, plus interest and costs, on the basis of the plaintiff's reasonably arguable best case.

45 However, recently, in Singapore, Chua Lee Ming J held in *DSA Consultancy (FZC) v The "Eurohope"*[37] that there was no similar statutory power in Singapore. Although he found that the court had a discretion to make such an order, he followed the earlier decision of Robert Goff LJ[38] in *The Andria now renamed Vasso*[39] who had held (prompting the enactment of the new statutory power that is similar to the Australian s 29) that, on principle, this discretion should not be exercised to order security for a claim in a foreign proceeding or arbitration as a condition for releasing a vessel from arrest.

Consequences of the lack of transparency in arbitration

46 No system is perfect, including both arbitral and judicial decision making, in which the existence of rights of appeal frequently establish error in an earlier phase of the dispute

[35] with whom Ralph Gibson and Butler-Sloss LJJ agreed
[36] [1993] QB 673 at 682 C-D
[37] [2017] 5 SLR 934 at 941-942 [25]-[29]
[38] for Slade, Waller LJ and himself
[39] [1984] QB 477 at 490

resolution process. However, there are some aspects of arbitration that, like beauty, may lie in the eye of the beholder. Arbitration is confidential. That may be desirable from the perspective of the parties for some or all of the duration of an arbitration. But, because it is confidential, the arbitrator or arbitrators are not publicly accountable, unlike judges, for delay or the quality or content of the reasons for, or the award itself. A party aggrieved by delay in an arbitration that sometimes can be caused by the unavailability of one or more of the arbitrators, has no ready recourse. Of course, judges, on occasion, can also be slow in hearing or deciding a matter but, at least, any judicial delay can be questioned, is open to public scrutiny and criticism, and the chief justice or head of jurisdiction can raise with the judge or judges the fact that a particular delay may need remedy.

47 But the more significant drawback from confidentiality of arbitration is that the law cannot develop from the process.

48 Thus, where arbitrators, for e.g., award damages for breach of a contract for the sale of goods, confidentiality prevents the general market in the particular commodity from becoming aware of it as part of any range of other comparable arbitral awards. This is unlike judicial decisions, such as awards of damages or sentences of imprisonment that, over time, establish what is within or outside a judicially determined and transparent range.

49 But there are exceptions. For example, Art 27 of the *International Convention on Salvage* done at London on 28 April 1989[40] provides that States Party should encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases. Lloyd's publishes statistics of arbitral awards made under Lloyd's Open Form (Lloyd's standard form of salvage agreement) that it bases on reports to its salvage arbitration branch.

50 In addition, arbitrations have no compulsive powers, either in the course of the process itself or to enforce an award. They depend on the parties' cooperation or on the assistance of the courts in the seat of arbitration or in a jurisdiction in which the successful party seeks to enforce the award.

[40] [1998] ATS 2

Cultural differences in litigation and decision-making

51 One matter that is vital to ensure confidence in the rule of law in both judicial and arbitral proceedings involving international trade is for the decision-maker to be conscious of cultural differences that may affect the evaluation of evidence.

52 We are all human and products of our individual backgrounds. Culture is but one aspect of those backgrounds, but it can afford a valuable insight to a court or arbitrator undertaking its evaluative functions, if the court or arbitrator is legally entitled to take into account whatever may be significant in the culture or background of a person in deciding a matter.

53 How can a court or arbitrator deal with differences in cultures? Can the parties call evidence to explain how, in one culture things are done differently to another, in a way that may affect a legal outcome? How flexible and tolerant can the court and arbitral systems be to accommodate particular cultural or linguistic nuances in any given case?

54 There cannot be one law for people of one culture and another law for those of a different culture. Equality under the law would have no meaning if we were to say that recognition of cultural differences in a court or arbitral context should, or could, lead to different substantive outcomes in litigation or arbitration under the same law.

55 That is not to say that the existence of cultural differences cannot inform a court or arbitrator of a reason or explanation for a person's actions, inactions or conduct in a particular litigious or arbitral context. Such considerations can, but do not necessarily, provide an important context for judicial and arbitral decision-making, including an appreciation of why a person may have engaged in conduct that, otherwise, would be difficult to understand. Such an understanding may also be relevant to the exercise of judicial discretions, such as sentencing.

56 Cultural differences can mean that one person in a court or arbitral context, or even in a conversation, may not be understood by others in the same way as if all those people were engaging within the same cultural or language background. Some of that lack of precise or complete understanding between persons will be inevitable in all human interactions. The challenge for courts and arbitrators is how best to address these issues, with the resources available to them, conformably with their independence and integrity.

57 A good example of how cultural differences can affect the quality of any decision-making process in a legal context was brought home to me at the Beijing Conference of the Comité Maritime International in 2012, by an excellent paper entitled *The Eastern and Western*

Cultural Influences on Maritime Arbitration and its Recent Development in Asia presented by Philip Yang.[41] He was a native Hong Kong resident, Oxford educated British citizen, barrister, vice-chairman of the Documentary Committee of the Baltic and International Maritime Council (BIMCO) and chairman of the Hong Kong International Arbitration Centre. He was also a maritime arbitrator.

58 Mr Yang opined that cultural differences remained the most important problem in international arbitration. He explained that many Asian cultures did not favour recording facts in writing, in contrast to the way in which business is conducted in Western societies. He gave as an example a London arbitration in which he sat with two retired English judges, in a reference involving a European ship owner and a Chinese shipyard. The three arbitrators had to decide whether a pro-forma contract for the building of six new bulk carriers signed on behalf of the Chinese shipyard by its senior delegate at the end of a visit to Europe was a legally binding contract. After the trip, the price on world markets of bulk carriers escalated significantly. The European party to that document asserted that what had been signed was a final contract, thus locking in the pre-rise price. And, as Mr Yang pointed out, common sense suggested that that assertion appeared to be right.

59 During cross-examination, the Chinese signatory said: "I have to sign something in order to justify the delegation's expensive trip to Europe to my superior and the State authorities". The witness added that both parties had agreed at the meeting that the signing of the pro forma contract would not signify a final agreement because the Chinese delegates still had to negotiate on a number of outstanding issues and to obtain approval for the deal from their superior.

60 That answer struck the other two arbitrators as unacceptable, but Mr Yang considered that the witness' account was corroborated by the subsequent correspondence between the parties dealing with those outstanding issues. The European party sought to explain that correspondence away by asserting that it was an attempt to renegotiate the signed pro-forma contract. The arbitral panel's chairman drafted an award finding against the Chinese party.

[41] *The Eastern and Western Cultural Influences on Maritime Arbitration and its recent development in Asia by Phillip Yang CMI Year Book* 2013, 396

However, after deliberations, drawing on Mr Yang's insights, the three arbitrators came to an unanimous award in favour of the Chinese party.

61 The importance of the illustration was that, through his Chinese cultural background, Mr Yang understood right away, before the later evidence was tendered, that the Asian way of doing business was very different to the European. That was so even though Mr Yang, on behalf of BIMCO, had been involved for many years in drafting standard form contracts, with arbitration clauses providing for arbitrations to be conducted in London and for English law to apply.

Conclusion

62 The *lex maritima* has supported international trade over millennia. That support, in turn, has both reflected and upheld the rule of law internationally as different nations' courts seek, to the extent that their domestic laws permit, to recognise the public importance of respecting other nations' laws, court decisions and arbitral awards in maritime and international trade disputes. This is what Jackson J referred to in *Lauritzen*[42] when he said that United States' courts and those of other nations "have generally deferred to a non-national or international law of impressive maturity and universality". And, as I have sought to demonstrate, international arbitration has also been an integral contributor to the rule of law in international trade.

[42] 345 US at 581