

# International Commercial Law and Arbitration Conference

## International Commercial Dispute Resolution and the Place of Judicial Power

Chief Justice Robert French AC

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It is an old saw that the more things change the more they remain the same. While it no doubt illuminates a truth about constants in life, it also has the ring of nonsense about it. No more so than in the areas of interest to this Conference. In the delivery of legal services and in dispute resolution things are changing at a fast pace and nowhere at a faster pace than in the field of global trade and commerce which increasingly interpenetrates domestic trade and commerce. Those changes and changes in resolution of commercial disputes challenge long-established perspectives. One of those perspectives concerns the place of the judicial powers of the Commonwealth and the States in the field of international commercial disputes, which are constitutionally within the jurisdiction of Australian courts to resolve.

Reference to global trade and commerce conjures the ugly word 'globalisation'. That word, which has crawled out of its birthing cave in the dark landscapes of economics, has now acquired the status of a term of art in the social sciences. It is defined in the *Stanford Encyclopedia of Philosophy* as referring to:

fundamental changes in the spatial and temporal contours of social existence, according to which the significance of space or territory undergoes shifts in the face of a no less dramatic acceleration in the temporal structure of crucial forms of human activity.<sup>1</sup>

which is to say — things happen more quickly, in quicker succession, and in different places at the same time. So much can be said of international trade and commerce. It is an

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<sup>1</sup> Scheuerman, William, 'Globalization', *Stanford Encyclopedia of Philosophy* (Summer 2010 Edition), Edward N Zalta (ed) <http://plato.stanford.edu/archives/sum2010/entries/globalization/>, accessed 26 August 2013.

incidental truth that participants must be confident that disputes can be resolved quickly and in a way that is effective in different legal systems, in different places at the same time.

Legal service providers in global markets necessarily find themselves involved in negotiating and structuring transactions which must operate across a number of jurisdictions. Many such transactions use dispute resolution mechanisms which apply internationally accepted rules and/or attract the application of uniform and model laws derived from multilateral and international law-making bodies. Resolution in many cases requires the use of non-judicial mechanisms which are likely to be arbitral but may involve any one of the large menu of processes which can be brought under the general rubric of assisted negotiation.

Some of the complexities of structuring transactions across multiple jurisdictions were discussed in an article published in 2011 by a leading German practitioner and academic, Professor Eckart Brödermann.<sup>2</sup> He also has off-planet interests having represented the Space Law Committee of the International Bar Association as well as the Chinese European Arbitration Centre as an observer at working sessions preparing the 2010 revision of the UNIDROIT Principles. There are four points of interest which emerge from his article.

The first point is the information processing challenge which is posed to lawyers providing legal services to market participants from over 200 nations and legal orders. Brödermann described the lawyer preparing transaction documents in that environment as a scout in a jungle and maze of information who needs to 'compare the different laws that might be applicable and to choose the one best suited to the circumstances of the case.'<sup>3</sup>

The second point concerned the use of UNIDROIT Principles in combinations with arbitration and choice of jurisdiction clauses respectively. It is relatively easy to combine those principles with institutional arbitration clauses when the relevant arbitration rules refer to 'rules of law' rather than 'national law'. This is a point of general significance. In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*<sup>4</sup> attention was drawn to the requirement of Art 28 of the UNCITRAL Model Law that the arbitration tribunal 'decide the dispute in accordance with such rules of law as are chosen by the parties

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<sup>2</sup> Eckart Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice — The Experience of a German Lawyer' (2011) 16 *Uniform Law Review* 589.

<sup>3</sup> Ibid 589.

<sup>4</sup> (2013) 87 ALJR 410.

as applicable to the substance of the dispute'.<sup>5</sup> A passage from the UNCITRAL Secretariat Explanatory Note to the UNCITRAL Model Law, as amended in 2006, was quoted which said of Art 28:

It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of 'law', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system.<sup>6</sup>

Similar references to 'rules of law' appear in the Rules of Arbitration used by the International Chamber of Commerce and by the London Court of International Arbitration.

The third point was an example, from Professor Brödermann's own practice, of the flexibility with which an arbitration clause can provide for the application of more than one set of legal rules. The example was of a contract between a Hong Kong company and two Korean parties. The UNIDROIT Principles were combined with a clause providing for arbitration under the contract to be administered by the Hong Kong International Arbitration Centre. The contract conferred some third party rights which at the time were not covered by the UNIDROIT Principles. There was no time to research the position of the Hong Kong law on such rights. The parties reached a compromise which included a conditional choice of supplementary national law:

The agreements contained in this document shall be governed by the Principles of International Commercial Contracts as compiled by UNIDROIT (Rome) ... They are hereby incorporated into the entire contract. Should it become necessary to rely in addition on a national law, this will be the law of Hong Kong.

However, if the law of Hong Kong should consider the third party rights granted in the agreements as null or void (eg, for lack of due consideration), all clauses relating to

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<sup>5</sup> Cited in Ibid 426 [68], n 106.

<sup>6</sup> UNCITRAL Explanatory Note [39]; cited at (2013) 87 ALJR 410, 417 [13].

third party rights shall not be governed by Hong Kong law but instead by German law which recognizes such third party rights.<sup>7</sup>

The fourth point was that the combination, with a jurisdiction clause, of neutral transnational or non-national rules, such as the UNIDROIT Principles, can give rise to difficulties where, in a dispute before a national court, the court permits only the choice of a national law. This is evidently the case in respect of national courts located in the European Union since the entry into force of what is known as Rome 1 Regulation of the European Parliament and the Council of Europe made in 2008.<sup>8</sup>

It is not necessary here to pursue the intricacies of these issues further beyond pointing to them as examples of some of the questions that may arise in choice of law and arbitration clauses, and the flexibility that the arbitration process offers in terms of the substantive rules by which parties can agree to abide.

In all of these developments in global trade and commerce in which Australian citizens, corporations and governments can be involved as well as the legal profession, the future role of the Australian judicial system might be thought to be at some risk of becoming marginal. That is a concern which extends beyond institutional status. It is a concern about the authority and visibility of the rule of law in commercial disputes involving international actors which, although able to be classed as private disputes governed by contract, may yield outcomes of great importance to the Australian community. An obvious example might be a dispute about licensing arrangements with respect to intellectual property rights, the outcome of which might affect the availability and price of a range of goods or services within Australia — a fortiori, in the case of therapeutic goods or services. When disputes of that kind are heard by courts and decided in the exercise of judicial power, they are decided by publicly appointed judges exercising powers conferred on them by public law and not by private agreement. As Professor Owen Fiss wrote of the judges in a well-known essay in the *Yale Law Journal*:

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<sup>7</sup> Above n 2, 594–95.

<sup>8</sup> Rome Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 in the Official Journal of the European Union, L 177, 4 July 2008, 6 et seq.

Their job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.<sup>9</sup>

That having been said, there is no gainsaying the force of some observations on the topic by the former Chief Justice of New South Wales, the Honourable JJ Spigelman AC published in 2010.<sup>10</sup> The Chief Justice pointed to the distinctive burdens that national legal systems may impose upon international trade, commerce and investment, including uncertainty about the ability to enforce legal rights, additional layers of complexity, costs of enforcement and risks arising from unfamiliarity with foreign legal processes. A singular achievement of the international commercial arbitration system was 'the reduction of these transaction costs.'<sup>11</sup> Those sentiments were effectively reaffirmed in 2012 in India by the present Chief Justice of New South Wales who told audiences in Mumbai and New Delhi that Australia had embraced the arbitration option as a first class resolution mechanism.<sup>12</sup>

Arbitration does not totally dominate the field of international commercial dispute resolution. The PwC and Queen Mary University of London 2013 International Arbitration Survey reports that for disputes which could not be settled by other means their respondents referred 47 per cent to arbitration, 47 per cent to litigation and 13 per cent to expert determination. To some extent choices related to the particular industry sector. The construction and energy sectors preferred arbitrations because of the often technical nature of the disputes. The financial services sector preferred litigation because of the need for binding precedents in the construction of terms in financial documents.<sup>13</sup>

Beyond those general considerations other studies have suggested a number of factors affecting the choice between arbitration and litigation which may be either procedural or substantive in nature. Some may be based more on perception than on empirical evidence. A study by Professor Christopher Drahozal, published in 2011,<sup>14</sup> referred to parties' perceptions

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<sup>9</sup> Owen M Fiss, 'Against Settlement' (1983–1984) 93(6) *Yale Law Journal* 1073, 1085.

<sup>10</sup> Chief Justice JJ Spigelman, 'Preface' in Luke Nottage and Richard Garnett, (eds), *International Arbitration in Australia* (Federation Press, 2010) v–iii.

<sup>11</sup> *Ibid* vi.

<sup>12</sup> Tom Bathurst, 'The Australian Arbitration Option' (Speech delivered to the Australian Centre for International Commercial Arbitration Forum, Mumbai and New Delhi, 27 and 29 February 2012).

<sup>13</sup> PwC and Queen Mary University of London 2013 International Arbitration Survey, 7.

<sup>14</sup> Christopher Drahozal, 'Why Arbitrate? Substantive versus Procedural Theories of Private Judging' (2011) 22(2) *The American Review of International Arbitration* 163.

about process costs, speed, the freedom to choose experts as arbitrators, the avoidance of foreign courts, a preference for the application of formalistic trade rules rather than flexible national law rules and, associated with that, a preference for transnational law over allegedly inefficient national laws. His study suggested that litigation is preferred in high status 'bet the company' disputes because of the availability of appeals. It is preferred where the governing law is clear, the contract provisions well developed and the underlying facts are unlikely to be disputed. In such cases the arbitrator's expertise is of less value and litigation is thought to avoid the risk of a 'split the difference award'. There is also a perception by some that arbitration is inadequate to deal with emergency relief even allowing for the establishment by some centres of standing tribunals for that purpose.

An interesting feature of the 2013 PwC and Queen Mary's Survey was a recurrent complaint across various sectors about the judicialisation of international arbitration. Its processes were seen as becoming more sophisticated and more under the control of law firms than the users. There was a link to concerns about costs. Those observations evoke memories of what Justice Heydon said in *Westport Insurance Corp v Gordian Runoff Limited*:

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.<sup>15</sup> (emphasis in original)

User concerns about costs and delay have not gone unnoticed by the international arbitration community. Luke Nottage and Kate Miles have observed in *International Arbitration in Australia* that:

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<sup>15</sup> (2011) 244 CLR 239, 288 [111].

International commercial arbitration ... is facing another round of soul-searching, the current focus of which is the increasing costs and delays of proceedings.<sup>16</sup>

Among measures being taken by international and regional arbitration bodies are streamlined appearance procedures involving teleconferencing and video conferencing and expedited arbitrations.<sup>17</sup>

Despite complaints about costs and delay, international arbitration is growing as an industry. In particular, it is growing in the Asia Pacific region. The Hong Kong International Arbitration Centre (HKIAC) keeps records of the total number of arbitrations (international and domestic) undertaken by arbitration commissions throughout Asia. The long-term trend is clear. For example, between 1992 and 2012 the China International Economic and Trade Commission (CIETAC) and HKIAC experienced a 397 per cent and 24 per cent increase in arbitrations respectively.<sup>18</sup> In Australia, as Alfred Monichino, Luke Nottage and Diana Hu showed in an article published in 2012, there has been an increasing trend in the number of judgments, primarily in the Federal Court and in the Supreme Courts of New South Wales and Victoria, in which reference is made to the *International Arbitration Act*.<sup>19</sup>

International commercial arbitration is well-established as a preferred mechanism for the resolution of disputes arising out of multi-jurisdictional transactions. Important to the maintenance of that preference must be the availability of competent arbitrators and effective and economic procedures. If, in the end, international arbitral processes came to resemble those of an inefficient and expensive national court, their disadvantages might begin to outweigh their advantages, even the advantage of privacy. Of course arbitration depends for its ultimate efficacy upon the enforcement of awards by national courts. The support of such courts and their respect for the importance of finality in the process and the avoidance of its

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<sup>16</sup> Luke Nottage and Kate Miles, 'Revising Investor-State Arbitration Rules in Australia and Japan to Meet Public Interests' in Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010) 222, 222.

<sup>17</sup> K Nobles, 'Emerging Issues and Trends in International Arbitration' (2012) 43 *California Western International Law Journal* 77, 103–8.

<sup>18</sup> Percentage increases calculated using data available from the Hong Kong International Arbitration Centre, 'Statistics - 2012', at [http://www.hkiac.org/index.php?option=com\\_content&view=article&id=466&Itemid=13&lang=en](http://www.hkiac.org/index.php?option=com_content&view=article&id=466&Itemid=13&lang=en) >, accessed 26 August 2013 and "Statistics (1992 - 1997)", at <http://www.hkiac.org/index.php/en/hkiac-statistics/case-statistics/15-statistics-1992-1997> > accessed 26 August 2013.

<sup>19</sup> Albert Monichino, Luke Nottage and Diana Hu, 'International arbitration in Australia: Selected case notes and trends' (2012) 19 *Australian International Law Journal* 181, 184.

judicialisation by over-meddling judges, is indispensable to its success. I venture to say however that the efficacy of international arbitration is also supported by the availability of what might be called 'base-line supervision' on grounds of the kind set out in ss 8 and 19 of the *International Arbitration Act* and Articles 17I, 34 and 36 of the UNCITRAL Model Law.

The attitudes of the courts towards arbitration, is important. There was a time when the arbitrator seems to have been viewed, in the English common law tradition, inherited in Australia, as a rather questionable figure operating a second rate system of backyard justice and requiring close curial supervision.<sup>20</sup> That intervention may have been linked historically to concerns embarrassingly exposed by Lord Campbell in an unreported part of the judgment in *Scott v Avery*<sup>21</sup> where he pointed out that the emoluments of the judges at Westminster depended upon user-paid court fees. This underpinned a view that courts ought not to be ousted of their jurisdiction and that it was contrary to the policy of the law to do so. Lord Campbell's censored judgment was cited in a joint judgment of Spigelman CJ and Mason P in *Raguz v Sullivan*.<sup>22</sup>

A predisposition to judicial intervention for legal error was apparent up until 1979 in the United Kingdom and 1984 in Australia. As late as 1973 Mocatta J said in *Prodexport State Co for Foreign Trade v ED and F Man Ltd*:

It is well known that English law is nearly unique in the degree of interference it permits the courts in the conduct of arbitrations and the settlement of disputes thereby.<sup>23</sup>

In the same year, Lord Denning set down three criteria for a case to be stated over an arbitrator's objection. His criteria were thought to make it impracticable for an arbitrator to refuse to state a case when requested, as to do so might amount to misconduct under s 23 of

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<sup>20</sup> Luke Nottage and Richard Garnett, 'Introduction' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 1.

<sup>21</sup> (1856) 10 ER 1121.

<sup>22</sup> (2000) 50 NSWLR 236, 247–248 [47] quoted in Nottage and Garnett above n 20.

<sup>23</sup> [1973] QB 389, 395.

the *Arbitration Act 1950* and a ground upon which the award could be set aside.<sup>24</sup> Things changed with the enactment of the *Arbitration Act 1979* in England and Uniform Commercial Arbitration Acts in Australia in the 1980s.<sup>25</sup>

Apart from long-standing judicial tendencies to intervention, there was at one time among influential segments of the profession a view that arbitration, particularly in the field of construction disputes, was pretty uninteresting and perhaps even paralytically tedious. It may be that ancestral memory in Australia embraced the experience of Edmund Barton who, while a member of the New South Wales Parliament in 1896, agreed to become the arbitrator in a railway construction dispute, which it was estimated would take six months to hear. He spent nearly two years of his life hearing the case which involved 55 banks and cuttings, 70 waterways comprising bridges and box drains and numerous claims for extras. He also had to answer in some detail, allegations by his political opponents that he had deliberately lengthened the exercise.<sup>26</sup>

Writing in 1986, Richard McGarvie, formerly a Judge of the Supreme Court of Victoria and, at the time of his writing, Governor of that State, said in fairly uncompromising terms:

During my years at the Bar I always regarded it as my duty to my client to recommend the deletion of the arbitration clause from any draft agreement I settled. From the client's point of view arbitration seemed usually the worst mode of dispute resolution.<sup>27</sup>

Despite those adverse views held during his time at the Bar, McGarvie acknowledged that decisive changes in the nature of commercial arbitration and its institutional setting had

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<sup>24</sup> Anthony Walton and Mary Vitoria, *Russell on the Law of Arbitration*, (Stevens, 20<sup>th</sup> ed, 1982) 283-284; Citing *Halfdan Grieg & Co A/s v Sterling Coal & Navigation Corp (The Lysland)* [1973] QB 843.

<sup>25</sup> *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1990* (Qld).

<sup>26</sup> Ronald Fitch, *Commercial Arbitration in the Australian Construction Industry* (Federation Press, 1989), 149–50.

<sup>27</sup> Richard McGarvie, 'Litigation and Arbitration: A general account of dispute resolution as it is and is it is developing' (Paper presented at the Colloquium on Dispute Resolution in Commercial Matters, Australian Academy of Science, Canberra, 6 June 1986) published in *Dispute Resolution in Commercial Matters* (Australian Government Publishing Service, 1986) 29, 47.

rendered it, by the time that he wrote in 1986, an attractive forum for dispute resolution. The changes in the nature of arbitration were those effected by the Uniform Commercial Arbitration Acts. The new institutional setting included the establishment of the Australian Commercial Disputes Centre and the Australian Centre for International Commercial Arbitration.

My own limited experience, as a young barrister in Perth in the late 1970s and early 1980s, had left me with a fairly negative impression of the process. I remember appearing on a construction dispute involving laboratory fittings before an elderly engineer famous for once having awarded one party to an arbitration more than the party had claimed. He had a unique way of dealing with objections as to evidence. I took an objection. He looked at the lawyer for the other party and said 'That's my thinking too, Mr B'. Mr B replied to my objection by restating it with a negative. The arbitrator looked at me and said 'That's my thinking too, Mr French'. We two lawyers then looked at each other and got on with the business, which was no doubt the desired result.

Writing on the topic of the domestic commercial arbitrator in 1993, like McGarvie, I had changed my view.<sup>28</sup> The arbitrator had not only by that time cast off the shackles of the stated case and rubbed off the tarnish of error of law on the face of the record, but had acquired extraordinary powers. Two years earlier, Foster J had decided in *QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd*<sup>29</sup> that an arbitrator could declare void ab initio the contract containing the very arbitration clause from which he or she had derived authority. He was thus able to disregard paradox in the same way as Arnold Schwarzenegger did in his screen role as The Terminator. Schwarzenegger took the part of a robot assassin sent back in time by robots engaged in a future war against humanity with the task of eliminating the mother of the leader of the human resistance before she could give birth to him. The paradox was that if the Terminator had succeeded in his mission, the occasion for his being sent would never have arisen. I tried to explain this to my children at the time but they airily dismissed the problem.

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<sup>28</sup> R S French, 'Arbitration — The Court's Perspective', (1993) 4(4) *Alternative Dispute Resolution Journal* 279, 279–280.

<sup>29</sup> (1991) 33 FCR 227.

The role of the arbitrator as an important actor in modern dispute resolution and the enactment of provisions for court-annexed arbitration have enhanced judicial respect in Australia for the process and its actors.

That judicial respect has, no doubt, been enhanced by the training provided for arbitrators by bodies such as the Institute of Arbitrators & Mediators Australia.<sup>30</sup> Importantly, it is likely that the development of positive judicial attitudes to arbitral processes in the context of domestic commercial disputes has been relevant to the contemporary recognition by the Australian judiciary of the utility of arbitration as a mechanism for the resolution of international commercial disputes. Its constitutional compatibility with the judicial power was recognised earlier this year.

In *TLC Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*,<sup>31</sup> the High Court heard a challenge to the validity of provisions of the *International Arbitration Act 1974* giving the force of law to the UNCITRAL Model Law. The challenge involved the contention that the jurisdiction conferred by the Act on the Federal Court required it to act in a way that substantially impaired its institutional integrity as a court. A second related contention was that because the Act purported to make an arbitral award determinative, it conferred the judicial power of the Commonwealth on arbitral tribunals. Both contentions were rejected. It is not necessary to review the reasons for that rejection. They appear in the two joint judgments. Some elements of the history of the treatment of arbitral awards by the common law in successive statutes were canvassed in the judgments. In the plurality judgment of Hayne, Crennan, Kiefel and Bell JJ,<sup>32</sup> their Honours quoted from Lord Bingham's observation in *The Rule of Law* where he described arbitration as involving:

The appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to the terms of reference they give him. This can only be done by agreement, before or after the dispute arises, but where it is done the arbitrator has authority to make an award which is binding on the parties and enforceable by the process of the courts.<sup>33</sup>

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<sup>30</sup> See the observations of Smart J in *Park Rail Developments Pty Ltd v RJ Pearce & Associates Pty Ltd* (1987) 8 NSWLR 123.

<sup>31</sup> (2013) 87 ALJR 410.

<sup>32</sup> Ibid 422–23 [45].

<sup>33</sup> Tom Bingham, *The Rule of Law* (Penguin Books, 2010), 86.

Their Honours said of that description of private arbitration and of the relationship between arbitration and the courts that it was as apt for Australia as for the United Kingdom and the United States. They added:

The features of private arbitration identified by Lord Bingham underpin the widely shared modern policy of recognising and encouraging private arbitration as a valuable method of "settling disputes arising in international commercial relations", a policy reflected in the objects of the IA Act. Parties from different legal systems can agree to resolve an international commercial dispute by arbitration and choose both the law (or laws) to be applied and the processes to be followed.<sup>34</sup>

So far it seems there is a provisionally happy ending in, if not to, the story of the relationship between international commercial arbitration and judicial power in Australia. There is, of course, room for further chapters. It may be, for example, that at a political level a perception could arise that there are some classes of dispute which have such a public interest dimension that they are properly determined in public by the nation's courts. An example of such a development appears in a Commonwealth Government Trade Policy Statement, published in 2011, in which it was said:

In the past, Australian governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.<sup>35</sup>

That policy may have been related to Government concerns about investor-state arbitration concerning tobacco 'plain packaging' legislation.

The Productivity Commission in a report published in November 2010 expressed scepticism about the benefits of investor-state dispute settlement provisions, including

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<sup>34</sup> (2013)87 ALJR 410, 423 [45] (footnotes omitted).

<sup>35</sup> Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity (2011), 14.

provisions for arbitration, in bilateral and regional trade agreements. These were said to offer 'few benefits and considerable risks'.<sup>36</sup> In its extended discussion of investor-state dispute settlement processes in Chapter 14 of its report, the Commission observed that they had been included in trade agreements between developed and developing countries as a way of providing additional protection to foreign investors in the developing country given investor concerns about the state of the developing country's legal systems. The inclusion of such provisions in agreements between developed countries was, however, becoming increasingly common. All of the investment promotion and protection agreements to which Australia is a party were said to contain investor-state dispute settlement provisions and many of the bilateral regional trade agreements. Professor Leon Trakman has written both in the *Journal of World Trade* and in the *University of New South Wales Law Journal* substantial critiques of the Productivity Commission view.<sup>37</sup>

I offer no views about that debate. Its existence does indicate, however, that the relationship between judicial power and international commercial arbitration is not concluded by the decisions of courts.

That is not to say that courts may not sometimes emerge as political actors in debates about the relationship between international commercial arbitral tribunals and national judicial systems. When commercial arbitration treads upon judicial territory, hackles may rise. They did in the United States in relation to the operation of arbitral tribunals under free trade agreements where the tribunals, attributing to the State the decision and conduct of its courts, engaged, in effect, in a review of court proceedings and decisions.

A leading example of tribunal review of a national court proceeding arose under Chapter 11 of the North America Free Trade Agreement (NAFTA). That Chapter provides for the establishment of arbitral tribunals to which investors from one State in another may take disputes asserting contravention of the agreement. The case of *Loewen Group Inc v United States*,<sup>38</sup> heard by an arbitral tribunal established under NAFTA, involved a Canadian

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<sup>36</sup> Australian Government Productivity Commission Bilateral and Regional Trade Agreements, Productivity Commission Research Report, November 2010, xxv.

<sup>37</sup> Leon Trakman, 'Investor-State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 *Journal of World Trade* 83; Leon Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35(3) *University of Sydney Law Journal* 979.

<sup>38</sup> ICSID Case No. ARB(AF)/98/3. 42 ILM 811 (2003), NAFTA Chapter 11 Arbitral Tribunal, 26 June, 2003. Available at <http://www.state.gov/documents/organization/22094.pdf>, accessed 26 August 2013.

corporation which had been sued in a Mississippi State court. During the trial before a civil jury the company was subject to what were said to be irrelevant suggestions of management racism, reference to its founder's wealth including his yacht, and a suggestion that his business practices resembled the Japanese bombing of Pearl Harbour. The jury awarded an amount of \$500 million in compensation, of which \$400 million was by way of punitive damages. The contract in issue was worth less than \$5 million.<sup>39</sup> The company claimed it was unable to appeal the verdict because Mississippi law required it to place a bond of \$625 million in order to stay performance of the judgment pending the appeal. The requirement could be waived for good cause by the court, but the court refused to waive it.

The company instituted arbitration proceedings before a NAFTA tribunal. The company asserted contravention by the United States of non-discrimination requirements of NAFTA. The tribunal held that Chapter 11 was applicable to the actions, decisions and procedures of judicial institutions. It described the trial as a disgrace. The tribunal held that the proceedings had been infected by gross discrimination.<sup>40</sup> Unhappily for the company, however, its claim for damages was denied on the grounds that by its post-bankruptcy reorganisation as a United States corporation, and consequential loss of Canadian nationality, it had been deprived of standing to proceed under Chapter 11. It had also failed to pursue all available opportunities to challenge the trial court judgment in the national courts.

In a lengthy and interesting article on the case and on Chapter 11 of NAFTA published in the *New York University Law Review* in 2004, Professor Ahdieh proffered some reasons for the likely proliferation of such claims:

First, the statutory bases for such review are multiplying as the number of international agreements, including Chapter 11-like provisions, grows. Second, through such agreements, the relevant international law claim directed to judicial wrongs—assertion of a 'denial of justice'—now is grounded more explicitly in positive law, making violations easier to identify and assert. Third, more claims can be expected because Chapter 11 and similar agreements grant private investors the ability to bring claims themselves, rather than having to rely on their country of citizenship to espouse their claims. Finally, the general growth of international trade and investment can be

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<sup>39</sup> Robert Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79(6) *New York University Law Review* 2029, 2032.

<sup>40</sup> *Ibid* 2040.

expected to contribute to an increase in opportunities for objection to, or challenge of, national judicial conduct.<sup>41</sup>

That was perhaps a perception shared by the National Centre for State Courts in the United States, which urged the United States Trade Representative and Congress not to approve trade agreement provisions unless they:

recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments and to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than US citizens and businesses.<sup>42</sup>

This reflected an interesting reversal of the usual complaint about courts not recognising the finality of arbitration agreements. It may be taken as a measure of the growth of arbitral power in the context of investor-state agreements. Interestingly, the National Centre for State Courts contrasted the US/Australia Free Trade Agreement with other agreements to which the United States was party. They said:

The so-called investor-state provision of each of the FTAs (except Australia) permits an investor to challenge a decision of a court by referring the dispute to an international arbitration tribunal. The Australia FTA does not contain such a provision because the Australians objected on the grounds that both Australia and the US have well-developed court systems that can provide fair decisions in disputes between investors and governmental entities.<sup>43</sup>

One can perhaps generalise from the field of free trade agreements and imagine that cases might arise within the scope of international commercial arbitration outside free trade agreements that have such public significance that they might lead to political responses.

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<sup>41</sup> Ibid 2041–43 (footnotes omitted).

<sup>42</sup> National Centre for State Courts, Free Trade Agreements: <<http://www.ncsc.org/services-and-experts/government-relations/international/free-trade-agreements.aspx>>, accessed 21 August 2013.

<sup>43</sup> Ibid.

I would like to conclude by referring to a mechanism by which the judicial empire may strike back. That is through *The Hague Convention on Choice of Court Agreements*, which was concluded in 2005, but as yet has not entered into force. The Convention has been signed, but not ratified, by the United States and the European Union on behalf of all its Member States except for Denmark, and has been acceded to by Mexico. Ratification by one further country will trigger its entry into force.

State parties under the Convention agree to recognise a 'Choice of Court Agreement' between parties in civil and commercial matters. Courts not chosen in the agreement must stay all proceedings.<sup>44</sup> The choice of court must be 'exclusive' but this is a reference to the courts of a contracting state rather than to a specific court. Analogously to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, a judgment given by the chosen court must be recognised and enforced in all other contracting states.<sup>45</sup> The Convention seeks to make courts an 'equal and viable alternative to arbitration'.<sup>46</sup>

In an address to the Commonwealth Law Conference in Hong Kong in April 2009, the then New South Wales Chief Justice, the Honourable JJ Spigelman AC spoke strongly in support of the Convention as contributing to the reduction of the transaction costs and uncertainties associated with the enforcement of legal rights and obligations in international trade and investment.<sup>47</sup>

Time does not permit a detailed analysis of the Convention in this paper. It is, however, sufficient to note the following points made by Chief Justice Spigelman in his paper, with which I agree:

- The express provision in the Convention for recognition and enforcement of judgment of the chosen court attracts to commercial litigation one of the critical advantages that international commercial arbitration has received by reason of the wide-spread adoption of the New York Convention.

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<sup>44</sup> *Hague Convention on Choice of Court Agreements*, Art 6.

<sup>45</sup> *Ibid*, Art 8.

<sup>46</sup> Louise Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 *The American Journal of Comparative Law* 543, 548.

<sup>47</sup> J Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation', (2010) 9(4) *Judicial Review* 389, 392.

- The wide-spread adoption of expeditious case management proceedings for commercial dispute resolution by courts means there may be no significant difference in terms of costs and delay between international commercial arbitration and litigation.

The arguments in favour of Australia's accession to the Convention are powerful. In the long term it is likely to be a benefit to participants in international trade and investment by widening their choices of dispute resolution mechanisms. It is in the public interest that in this field of dispute resolution the option of the judicial process not be unduly handicapped because of burdens placed upon the recognition of judgments. Support and enhancement of the important public function of the courts in commercial dispute resolution, both international and domestic, is an object which serves and transcends the interests of parties to litigation.