

Transnational Dispute Resolution

Supreme and Federal Court Judges' Conference

Chief Justice Robert French AC
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This is the third occasion on which I have had the pleasure of addressing the Conference. The first was in 2013 in Adelaide on the topic of 'Essential and Defining Characteristics of Courts in an Age of Institutional Change'. That address concerned the constitutional protections afforded Australian courts in relation to their essential and defining characteristics and the existence of supervisory functions of the State Supreme Courts. Underpinning those protections is the notion of an integrated Australian judicial system within the framework of a federal structure with State, Territory and Federal courts.

That notion is reflected in the social reality of this Annual Conference which for many years has brought together judges from Supreme Courts across Australia and from the Federal Court along with guests from New Zealand. I have attended many of these conferences since my first, as a newly-appointed Federal Court judge, in January 1987 in Darwin. They have been important not just for the substantive presentations, but also as social occasions where there are new appointees to be welcomed as well as old acquaintances to be renewed. Putting faces to names separated by our great Australian distances is a necessary part of maintaining a national Australian judiciary.

Comity between our State, Territory and Federal courts is a principle which does not require extended justification. Comity rooted in knowing each other as judges is stronger for its connection to that knowledge. That does not, of course, prevent one court reaching the melancholy but robust conclusion that the decision of another is 'plainly wrong' and not to be followed. In the case of one of my former Federal Court colleagues, now retired and who will remain nameless, neither comity nor *stare decisis* would prevent him, on occasion, from concluding that a decision of the Full Court of the Federal Court was 'plainly wrong and not to be followed'.

The second occasion on which I addressed the Conference was in Darwin in the very sensible month of July 2014. There the topic was the emerging phenomenon of Investor/State dispute settlement arbitration processes under Free Trade Agreements and Bilateral Investment Treaties and their potentially negative implications for the finality and authority of the decisions of national judiciaries and, in particular, Australian courts. For those who regard arbitration as something like a football code whose virtues are not to be questioned, the speech was regarded as mildly controversial — indeed one informant told me later it had been described as 'shocking' by somebody in the industry.

In this third and more anodyne presentation, I would like to maintain a focus on our courts and their connection to the courts of other countries in the context of transnational dispute resolution and the trend to internationalisation of domestic laws and jurisdiction. The topic is timely as I have, in the last two days, attended a conference in Singapore convened by Chief Justice Menon to discuss opportunities and mechanisms for approaching convergence of commercial law and practice in the Asian region. That conference saw the launch of the Asian Business Law Institute in which Australia, China, India and Singapore are participants.

Recognition and enforcement of foreign judgments

One of the first matters to be considered by the Institute is likely to be the recognition and enforcement of foreign judgments. That is perhaps a good entry point to my general topic in this opening address, not least because it is a question which has recently required the attention of the High Court.

In Australia, recognition and enforcement of foreign judgments involves a mix of common law and statute law. At common law an action could be brought to enforce a foreign money judgment in personam subject to well-known criteria which I will not repeat here. Other kinds of judgments such as matrimonial property settlements could be enforced or declaratory orders made.

The Australian States in the 1960s enacted their own statutes for the recognition, registration and enforcement of foreign judgments based on the United Kingdom legislation of 1933. A nation-wide Commonwealth/State co-operative scheme was established with the enactment of the *Foreign Judgments Act 1991* (Cth), which conferred powers on the Supreme

Courts of the States and the Federal Court to register and recognise foreign judgments of countries to which the Act applied. The Act applies to countries in respect of which the Governor-General is satisfied that there will be substantial reciprocity of treatment. There are presently 28 such countries.¹

A paper published by the Australian Institute of International Affairs observed in May last year that the Act is 'fundamentally very picky with the judgments it recognises'. It was suggested that what is needed is a way to more closely align Australia's reception of foreign judgments with the legal systems of countries in our region with whom we are engaged in a significant amount of trade and commerce.² What is worthy of inquiry for Australia, is worthy of inquiry for other countries in the region. That makes the Institute's projected convergence project timely and relevant to Australia.

The question of enforcement of judgments internationally arises in the large context of the Hague Conference on Private International Law and its Judgments Project directed to world-wide recognition and enforcement of judgments. There are many difficult questions to be considered in the development of a global Convention, which continues as a work in progress. Not least among those questions is the variability of judicial systems and standards around the world. Plainly enough, the development of a regional perspective on the topic could be of benefit not only to our region but also feed into the global process.

I mentioned that the enforcement of foreign judgments has occupied the attention of the High Court in recent times. Last year in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*³ the Court considered whether the Supreme Court of Western Australia had inherent power to make a freezing order against a defendant to pending proceedings in a Singapore court affecting assets in Australia in relation to a prospective judgment of the Singapore court which would be registrable under the *Foreign Judgments Act*. The legal question for the Court, which concerned the powers of the Supreme Court under domestic law, arose in the context of an undoubtedly international commercial dispute.

¹ Foreign Judgments Regulations 1992 (Cth), Sch.

² Derek Bayley, *Australian and the Hague's Judgment Project* (19 May 2015) http://www.internationalaffairs.org.au/australian_outlook/australia-and-the-hagues-judgments-project

³ (2015) 325 ALR 168.

The appellant against the freezing order was a company incorporated in Indonesia. The respondent was the plaintiff in the Singaporean proceedings, which arose out of a joint venture dispute. The assets were held in a very Australian sounding company called 'Kangaroo Resources Ltd'. In the event, we held that the Supreme Court of Western Australia had power to make a freezing order in order to protect the process of registration and enforcement of the Supreme Court which was in the prospect of being invoked. The Singaporean proceedings which were commenced in the High Court of Singapore were eventually heard by the newly-established Division of that Court, which is called the Singapore International Commercial Court. Foreign judges sit on that Court and foreign counsel can appear before it. Australians on the Court are Justice Patricia Bergin of the Supreme Court of New South Wales, Roger Giles, formerly of that Court, and Dyson Heydon, formerly of the High Court. Judgment in the substantive proceedings in the Singapore International Commercial Court is presently reserved.

The complications of recognition and enforcement of a foreign judgment against a sovereign State were considered last year in a decision delivered on 2 December 2015, *Firebird Global Master Fund II Ltd v Republic of Nauru*.⁴ I recall about 18 months ago bumping into Justice Peter Young in Macquarie Street in Sydney as we were going into the Central Law Courts Building. He told me that he had an interesting case that day about an application to set aside a garnishee order against Nauru. It was an interesting case and I was a party to a more extended conversation about it when it reached the High Court last year. Nauru had guaranteed some bonds issued by its statutory finance corporation, which later ceased to exist. Nauru was sued on the guarantee in the Tokyo District Court by Firebird which had acquired the bonds and which obtained a judgment in the amount of about ¥1.3 billion, plus interests and costs. The judgment was registered under the *Foreign Judgments Act* by order of a Deputy Registrar of the Supreme Court of New South Wales. A Deputy Registrar also made a garnishee order against Nauru directed to Westpac in respect of Nauru's accounts with that Bank. Justice Young set aside the garnishee order and the Court of Appeal dismissed an appeal against his decision.

⁴ [2015] HCA 43.

When the matter came to the High Court the live issues concerned the application of the *Foreign States Immunities Act 1985* (Cth) to the registration and enforcement of the Tokyo judgment and the interaction of that Act with the *Foreign Judgments Act*. In short, the Court held that Nauru did not have immunity from the jurisdiction of the Supreme Court of New South Wales under the *Foreign Judgments Act* because the registration proceedings concerned 'a commercial transaction' which brought them within an exception to the immunity from jurisdiction. The commercial transaction was reflected in the guarantee provided for the bonds, upon which the Tokyo judgment was based. The garnisheed accounts on the other hand were immune from execution under the *Immunities Act* because the purposes for which they were in use or for which the moneys in them were set aside, were not commercial purposes.

The global and the local

Those two decisions are recent examples of domestic court decisions arising out of transnational or international commercial disputes. The terms 'transnational' and 'international', applied to dispute resolution, ordinarily suggest adjudicative processes concerned solely with disputes arising out of cross-border transactions. That should not be taken, however, as an indication that there is a bright line distinction in our courts or in the courts of other countries between the domestic and the international.

The lines between those categories of case started to become less bright quite a while ago with the dimming of the lines between the international and the domestic as subjects of legislation. That dimming was reflected in the consideration by the High Court of the external affairs power in 1982 in *Koowarta v Bjelke-Petersen*.⁵ In arguing unsuccessfully that the *Racial Discrimination Act 1975* (Cth) was outside the constitutional power of the Commonwealth Parliament to make laws with respect to external affairs, Senior Counsel for Queensland submitted, as recorded in the Commonwealth Law Reports: '[t]he Act relates entirely to the activity of Australians in Australia'.⁶ In rejecting that argument, Sir Anthony Mason, one of the majority Justices upholding the validity of the challenged provisions, said:

⁵ (1982) 153 CLR 168.

⁶ Ibid 170.

One knows or can readily imagine treaties on topics of international concern by which the parties agree to enact domestic legislation to attain a common object, whether it be to suppress a noxious traffic or trade, to eliminate an infectious or contagious disease, or to limit production of a commodity or of goods in order to stabilize and share markets.⁷

Since that time we have seen a plethora of domestic legislation which gives effect to international Conventions and Model Laws.

Mechanisms of transnational dispute resolution

Accepting that the international perfuses the domestic in a variety of ways, we also accept that transnational dispute resolution generally concerns cases in which the subject matter and/or the parties draw in more than one national jurisdiction. Dispute resolution in such cases involves a number of mechanisms which engage our domestic courts:

- The rules of private international law whereby courts can determine, among other things, what is the applicable forum and the applicable law in a dispute with elements in more than one jurisdiction.
- Transnational judicial co-operation and assistance.
- International commercial arbitration.

In addition, we are seeing the emergence of new dispute resolution institutions in the form of international commercial courts. I will offer a few comments about some of those mechanisms.

Judicial co-operation and assistance

Judicial co-operation is becoming increasingly important with the rise of globalisation and international trade. It occurs where a court in one jurisdiction assists another by, for example:

- Facilitating local service of process of a foreign court;
- Facilitating the taking of evidence locally for its use in a foreign court;

⁷

Ibid 230.

- Recognising and/or enforcing foreign judgments; and
- Co-operating generally with foreign courts with cross-border matters to avoid duplication and conflict;
- Determining questions of foreign law.⁸

As to the first, Australia is a signatory of the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.⁹ The purpose of that Convention is to ensure that service is effected between two countries who are party to the Convention. Australia is also a party to Judicial Assistance Bilateral Treaties with other countries to ensure effective service. There are service provisions contained in the rules of procedure of each State and Territory and the Commonwealth.¹⁰

As to the second matter, Australia is also a party to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*¹¹ ('Hague Evidence Convention') and to a number of Bilateral Treaties. Under the Hague Evidence Convention, a Letter of Request is required for all requests for assistance with the taking of evidence under international agreements.

I have already mentioned judicial co-operation through the enforcement and recognition of foreign judgments.

A developed form of judicial co-operation in Australia can be seen in the Trans-Tasman Proceeding Regime. Australia and New Zealand have agreed to streamline processes for managing and resolving civil and criminal proceedings involving elements crossing the

⁸ Ian Kawaley, 'Why Judicial Cooperation in Civil and Commercial Litigation in British Offshore World Matters: An Overview' in Ian R C Kawaley, Andrew J Bolton and Robin J Mayor (eds), *Cross-Border Judicial Cooperation in Offshore Litigation (The British Offshore World)* (Wildy, Simmonds & Hill Publishing, 2009) 4.

⁹ *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969).

¹⁰ *Uniform Civil Procedure Rules 2005* (NSW) Pts 11, 11A Div 4, *Uniform Civil Procedure Rules 1999* (Qld) Ch 4, Ch 4 Pt 7 Div 3 and Ch 4, Pt 7, Div 4, *Rules of Supreme Court 1971* (WA) Or 11 and 11A Div 4, *Supreme Court Civil Rules 2006* (SA) Div 3, Sub-Div 4 and r 70, *Supreme Court Form Rules 2000* (Tas) Pt 7, Pt 38, Pt 38A Div 4, *Court Procedure Rules 2006* (ACT) rr 6540 – 6542, 6562 – 6565 and *Supreme Court Rules Or 88* and Or 7A Pt 4, *High Court Rules 2004* (Cth) r 9.07, *Family Law Rules 2004* (Cth) Ch 7, Pt 7.6 and *Family Law Regulations 1984* (Cth) Pt II AB, Pt II AC, *Federal Court Rules 2011* (Cth) Divs 10.4, 10.5, 10.6 and *Federal Circuit Court Rules 2001* (Cth) Pt 6.

¹¹ *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 241 (entered into force 7 October 1972).

Tasman. The *Trans-Tasman Proceedings Act 2010* (Cth) makes it easier for persons to start Australian court proceedings against a defendant located in New Zealand, ask for some cases started in New Zealand to be heard before an Australian Court in certain circumstances, compel persons in New Zealand to give evidence in Australian proceedings and have judgments from each jurisdiction recognised and enforced in the other jurisdiction easily and cost-effectively.

When it comes to proof of foreign law, the common law principle is that foreign law should be pleaded and proved as a fact, generally by expert evidence. This principle has come to be characterised by exceptions, anomalies and special treatment.¹² As the former Chief Justice of New South Wales observed:

The defects in proof of foreign law by expert evidence are substantive. In principle, it must always be preferable for a question of law to be resolved in a manner which can be accepted by all parties to be authoritative. This can only be done by a court of the foreign jurisdiction. When forum non conveniens principles do not require the whole dispute to be decided in the foreign jurisdiction, it would be appropriate for a separate issue of law to be determined by the courts of that jurisdiction or by an expert appointed by the court.¹³

In New South Wales, Schedule 17 of the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), inserted s 125 of the *Supreme Court Act 1970* (NSW). That section provides for arrangements to be made between the Supreme Court of New South Wales and foreign courts where a court can refer a matter of foreign law to a court of another jurisdiction for determination.¹⁴ The Supreme Court has entered into memoranda of understanding with Singapore and New York to that effect.

A particular case of a well-developed process for judicial co-operation concerns cross-border insolvency. Attempts were made to develop bilateral and multilateral treaties on cross-border insolvency towards the end of the 20th century. They culminated in the UNCITRAL Model Law on Cross-Border Insolvency, issued in 1997.¹⁵ The Model Law

¹² See generally, The Hon JJ Spigelman AC, 'Proof of foreign law by reference to the foreign court' (2011) 127 *Law Quarterly Review* 208, 208–9.

¹³ Ibid 212.

¹⁴ Ibid 214 fn 49.

¹⁵ Ibid 355. See Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2009) 355; Professor Sandeep Gopalan and Michael Guihot, 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling' (Deakin Law School Legal Studies Research Paper No. 15-02, 2015) 4–5.

creates a framework for dealing with cross-border insolvency and is designed to be enacted by an adopting country as part of its national legislation rather than operating as a signed treaty between states. The Model Law:

- sets out procedures and conditions for access to local courts where a person is administering foreign insolvency proceedings;
- outlines the conditions for recognition in insolvency proceedings and relief for representatives of the proceedings;
- permits foreign creditors to participate in local insolvency proceedings;
- allows for courts and insolvency practitioners from different countries to cooperate more effectively; and
- coordinates insolvency proceedings that are taking place in different States concurrently.

Australia adopted the Model Law in 2008 in the *Cross-Border Insolvency Act 2008* (Cth) ('CBIA').¹⁶ The substantive provisions of the CBIA provide for some limited exceptions and procedural matters.

In addition to the work of UNCITRAL on cross-border insolvency, the American Law Institute (ALI) and the International Insolvency Institute (III) have been instrumental in developing soft law approaches to the issue. Initially the ALI's work focused on the creation of a set of regional guidelines for insolvency cases involving two or more of the North American Free Trade Agreement (NAFTA) States (the US, Canada and Mexico). The resulting *ALI Principles of Cooperation between the Member States of the NAFTA* (ALI NAFTA Principles)¹⁷ sparked a more recent ALI and III project to extend these principles globally. This has led to the preparation of an extensive set of global principles for cross-border insolvency co-operation.

¹⁶ Sheryl Jackson and Rosalind Mason, 'Developments in Court to Court Communications in International Insolvency Cases' (2014) 37 *University of NSW Law Journal* 507, 511.

¹⁷ American Law Institute and International Insolvency Institute, [Principles of Cooperation Among the NAFTA Countries](#) (2001).

The Global Principles¹⁸ have not yet been adopted in Australia, although the ALI-NAFTA principles have been referenced in the harmonised practice directions on cross-border insolvencies in the Federal Court and the Supreme Courts of NSW, the Northern Territory, Tasmania and Western Australia.¹⁹

The Council of Chief Justices about three years ago asked the Australian Academy of Law to review the Global Principles to determine whether they provided more extensive scope for co-operation than the Model Law. A study was undertaken by Sheryl Jackson, Rosalind Mason and Mark Wellard of Queensland University of Technology. The fruits of that study have been published in the *University of New South Wales Law Journal*.²⁰ At its meeting in October 2013, the Council of Chief Justices formed the view that uniform practice in the area was desirable and set up a committee comprising Chief Justices Warren, Bathurst and Allsop to prepare a paper making recommendations for Council's consideration at a future meeting. That paper was considered by the Council in March 2015 and the recommendations made in it were agreed in principle. The Council also agreed that the Committee would continue with the objectives of:

- (i) developing model practice notes, updated by reference to the UNCITRAL Practice Guide, Global Principles and Global Guidelines;
- (ii) identifying any rules which should be referred to the Harmonisation Committee of the Council; and
- (iii) identifying opportunities for judicial education and awareness of the Global Principles, Global Guidelines, Global Rules and international practice in cross-border insolvency proceedings.

¹⁸ Ian F Fletcher and Bob Wessels, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012) xvii;

¹⁹ See eg; Federal Court of Australia, *Practice Note CORP 2 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives*, 22 November 2013.

²⁰ Sheryl Jackson and Rosalind Mason, 'Developments in Court to Court Communications in International Insolvency Cases' (2014) 37 *University of NSW Law Journal* 507. See also Mark Wellard and Rosalind Mason, 'Global rules on conflict-of-laws matters in international insolvency cases: An Australian perspective' (2015) 23 *Insolvency Law Journal* 5.

At its October 2015 meeting, the Council of Chief Justices received a report from the Harmonisation Committee advising that a Working Group had commenced examining the formulation of harmonised rules relating to the Model Law and that a draft rule was being prepared along with a draft practice note. Since that time Chief Justices Menon, Ma, Bathurst and Allsop have agreed to establish a Working Group of judges from their four courts to establish protocols for court-to-court communications and guiding principles for co-operation between the courts under the Model Law with a view to regional harmonisation linking up with the work of the Council and courts in Australia and New Zealand to the extent possible. No doubt that exercise will feed into the Harmonisation Committee's deliberations.

Hague Choice of Court Convention

Of potentially wider importance, but still on the horizon for Australia, is the *Hague Choice of Court Convention*.²¹ The Council of Chief Justices has written to the Federal Government indicating its support for Australia's accession to it. Australia is not presently a signatory. It appears, however, that the Federal Government is favourably disposed to the suggestion. The European Union, the United States and Singapore are all signatories.²² It provides for parties to a contract to choose a jurisdiction in which disputes will be judicially adjudicated and for that decision to be respected and judgments emanating from it to be enforced.

The core justification of the Choice of Court Convention is similar to the New York Arbitration Convention²³: if parties to a commercial contract have chosen a jurisdiction, their autonomy should be respected. The difference between an arbitration agreement and a choice of court agreement is that in the former a private forum is chosen whereas in the latter a public forum is chosen.²⁴ The Convention establishes a presumption that where a particular court is designated, that designation is exclusive unless the parties expressly provide otherwise. It has the following three principal provisions:

²¹ *Hague Choice of Court Convention*, opened for signature on 30 June 2005, 44 ILM 1294 (entered into force on 1 October 2015).

²² See Hague Conference on Private International Law, *Status Table – Convention of 30 June 2005 on Choice of Court Agreements* (19 November 2015) <<https://www.hcch.net/en/instruments/conventionos/status-table/?cid+98>>

²³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

²⁴ The Hon JJ Spigelman AC, 'The Hague Choice of Convention and International Commercial Litigation' (2009) 83 *Australian Law Journal* 386, 387 and sources referred to therein.

- The chosen court must act in every case, if the choice of court agreement is valid. That is to say the court has no discretion on forum non conveniens or other grounds to refuse to hear the case (Article 5).
- Where another court, which is not the chosen court, has relevant proceedings commenced before it, it must dismiss the case, unless one of the exceptions in the Convention applies (Article 6).
- Judgment rendered by a chosen court, that is valid according to the standards of the Convention, must be recognised and enforced in other contracting states unless one of exceptions established by the Convention applies (Article 8).²⁵

The Convention has its limitations but is an important step forward in judicial co-operation in international dispute resolution.²⁶

International commercial courts

In addition to legal co-operation mechanisms in international dispute resolution, new institutions are beginning to emerge to provide judicial determination of such disputes. They are international commercial courts which have been established in Qatar, Dubai, Singapore and Abu Dhabi. The latter two were set up last year.²⁷ A number of broad similarities between these courts can be noted:

- With the exception of the Singapore International Commercial Court, which I have already mentioned, the courts operate with status as a separate jurisdiction in the host country, distinct from the mainstream court system.
- With the exception of the Abu Dhabi Global Market Courts, the courts operate through a consensual international jurisdiction whereby parties to an international commercial dispute can submit to jurisdiction, regardless of any territorial nexus.

²⁵ Ibid. See also Rosehana Amin, 'International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements' (2009) *Australian International Law Journal* 113, 116.

²⁶ The Hon JJ Spigelman, above n 22, 391–93.

²⁷ Damien P Horigan, 'From Abu Dhabi to Singapore: The Rise of International Commercial Courts' (2015) 3 *International Journal of Humanities and Management Sciences* 78, 79–80.

- The courts apply common law principles.
- The courts operate in English.
- The courts are presided over by a combination of local judges and judges from foreign jurisdictions.

It is too early in the history of those courts to predict with any confidence whether they will evolve into major institutions for the resolution of transnational commercial disputes. Their success may well feed into a process of convergence in transnational commercial law generally.

An international investment court

More speculatively, there is the possibility of the establishment of a permanent International Investment Court to hear and determine Investor/State disputes arising out of Free Trade Agreements or Bilateral Investment Treaties. The proposal is the result of European concerns about international dispute settlement arbitral processes under which foreign investors can take States to arbitration.

In May 2015, in the context of ongoing negotiations between the EU and the US for the Transatlantic Trade and Investment Partnership (TTIP), the EU Trade Commissioner Cecilia Malmstrom released a concept paper proposing the establishment of an international investment court, to replace the ad hoc ISDS arbitral tribunals.²⁸

In September, the EU announced that it had approved a proposal to establish the 'Investment Court System' (ICS) to 'replace the [ISDS] mechanism in all ongoing and future EU investment negotiations, including the EU-US talks on a Transatlantic Trade and Investment Partnership (TTIP)'.²⁹ The main elements of the reform were outlined as including:

²⁸ European Commission, ['Investment in TTIP and Beyond: The Path for Reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court'](#), (European Commission Concept Paper, 5 May 2015) 4.

²⁹ European Commission, ['Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations'](#) (Press Release, 16 September 2015).

- the setting up of a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal;
- judgements would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- the new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

In November 2015, the EU formally presented to the US its proposal for the Investment Court System for the Transatlantic Trade and Investment Partnership (TTIP).³⁰ I won't say 'watch this space' because it might be necessary to watch it for a long time.

International commercial arbitration

International commercial arbitration must be mentioned as a well-established mechanism for the resolution of transnational commercial disputes. Provisions of the *International Arbitration Act 1974* (Cth) giving effect to the UNCITRAL Model Law were upheld against a constitutional challenge in the decision of the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.³¹ The process meets important needs for the international business community.

There is a point to be made however about the distinction between the judicial function and arbitration. It is questionable how far arbitration contributes to the development and international convergence of commercial law. Militating against its influence is the

³⁰ European Commission, ["Transatlantic Trade and investment Partnership: Trade in Services, Investment and E-Commerce"](#) (Proposal for Investment Protection and Resolution of Investment Disputes, 12 November 2015).

³¹ (2013) 251 CLR 533.

absence of any doctrine of precedent in relation to arbitral decisions and the often confidential nature of the process.

Even if contrary to present practice, all arbitral awards were published in full and a comity-based convention analogous to *stare decisis* evolved, there would still be a difference in kind between such decision-making and the decision-making of the courts. That is because judicial adjudication serves larger purposes than the efficiencies, economic benefits and party autonomy served by the arbitral process.

There are many public dimensions to the judicial process. True it is focussed on the determination of particular disputes between particular parties. But it necessarily involves the public interpretation and application of laws, be they statutory or the judge-made common law which can affect a whole polity. The courts are not just one item on a list of dispute resolution service providers. They have an institutional responsibility to maintain the public face of the rule of law. In so doing they facilitate the flow of information about legal questions and their resolution within their home jurisdictions and into other national jurisdictions. In so doing they create opportunities for convergence and consistency in international commercial dispute resolution generally.

The courts themselves, of course, must ensure that they are effective actors in the administration of business law by trying to minimise inefficiencies and maximise efficiencies in their processes and to reduce transaction costs. In connection with transnational disputes, there is a common interest in co-operative action to reduce or eliminate disputes as to venue and to provide effective assistance to each other in relation to the enforcement of judgments and co-operation generally.

Conclusion

Transnational dispute resolution is part of the increasing globalisation of the law — particularly in relation to commercial law but not limited to it. Another and closely related part of that process of globalisation is the internationalisation of significant aspects of domestic dispute resolution.

Australian courts have an important part to play in both areas — in the developing trend to international judicial co-operation assistance and comity and in the development of a coherent and consistent international body of commercial law.