THE ROLE OF COURTS IN RELATION TO COMMERCIAL ARBITRATION

The Hon Justice Angus Stewart*

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I begin by acknowledging the traditional Custodians of the land on which we meet, the Gadigal people of the Eora Nation, and pay my respects to their Elders past, present and emerging. I also extend my acknowledgment and respect to any Indigenous Australians present. At this critical inflection point in our history when the form of constitutional recognition of First Nations people, and of any mechanism for the voice of First Nations people to be heard on matters most affecting them, is the subject of intense debate and scrutiny in the lead-up to a referendum later in the year, it is particularly important that we pause to recognize the ongoing connection of First Nations people to the land and to pay respect to their cultural and spiritual connections to it.

I also thank Georgia Quick, the President of ACICA, for the invitation to speak tonight at this event to celebrate the indispensable contribution of ACICA's Corporate Members. I take the opportunity to congratulate you all on your contributions to the ongoing success of ACICA as a leading dispute resolution institution. I welcome the opportunity to address users of international commercial arbitration and to offer some reflections on the role of commercial courts in supporting arbitration.

Arbitration has a lengthy history. The concept of parties selecting a trusted and independent arbiter to decide a dispute has been dated back as far as ancient Greece.[1] The capacity to select an arbitrator with a particular skillset or expertise is an enduring attraction of arbitration, as are the privacy or confidentiality that arbitration offers, the ease of enforcement of awards around the world and the ability to choose a neutral forum for the resolution of international commercial disputes.[2] Arbitration remains an important mechanism available to commercial people in the global dispute resolution landscape, even if contemporary arbitration is not

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1 A Gomez-Acebo, 'Chapter 2: Historical Background' in *Party-Appointed Arbitrators in International Commercial Arbitration* (Kluwer, 2016), 6.

2 Queen Mary University of London, 'International arbitration: the status quo' in *2018 International Arbitration Survey: The Evolution of International Arbitration*, 7; ACICA and FTI Consulting, 'The arbitration process: satisfaction and sentiment' in *2020 Australian Arbitration Report*, 20.

always quicker, less expensive and less formal than court proceedings given the increasingly complex, high-value disputes referred to arbitration, the professionalization and sophistication of the global arbitration community, and the efforts of commercial courts to adopt innovative case management.[3]

The relationship between international commercial arbitration and commercial courts is sometimes seen as one of competition, even hostility. That characterisation is inapt. Commercial courts play a crucial role in supporting arbitration and in bolstering the trust and confidence of its users in it, and the strengthening of arbitration does not undermine the work of courts, or courts as institutions.

The supervisory role of commercial courts is embedded in the framework of the New York Convention and the UNCITRAL Model Law:[4] it is to national courts that parties must turn when court supervision is required – for example, to stay court proceedings in favour of arbitration, to appoint or terminate the appointment of arbitrators, to determine claims of disqualification of arbitrators on account of bias, to issue subpoenas and order interim measures – and for the recognition and enforcement of arbitral awards.[5] The legitimisation of arbitral awards and thereby of the conduct of arbitration through curial processes is thus a critical underpinning feature of international arbitration.

In *TCL Air Conditioner*,[6] the High Court of Australia explained the difference between arbitration and judicial power with reference to what the Court had said previously in *CFMEU v Australian Industrial Relations Commission*.[7] The foundation of arbitration is the consent of the parties and unlike judgments produced by the exercise of judicial power, an arbitral award is not binding of its own force: "its effect, if any, depends on the law which operates with

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3 Clyde Croft, 'How the Judiciary can Support Domestic and International Arbitration' (Paper presented at the Arbitrators' and Mediators' Institute of New Zealand Annual Conference, Auckland, July 2013), 9. See also Sundaresh Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (Paper presented at the ICCA Congress, 2012); James Allsop, 'The Role of Law in International Commercial Arbitration' (CIArb Inaugural Annual Lecture, Melbourne, 15 October 2018).

4 The United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration.

5 Sundaresh Menon, 'International Commercial Courts: Toward a Transnational System of Dispute Resolution' (Opening Lecture for the DIFC Courts Lecture Series, Dubai, 2015), 9 and James Allsop, 'The Role of Law in International Commercial Arbitration' (CIArb Inaugural Annual Lecture, Melbourne, 15 October 2018).

6 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 (***TCL Air Conditioner High Court***).

7 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at [31]; *TCL Air Conditioner High Court* at [29] (French CJ and Gageler J) and [108] (Hayne, Crennan, Kiefel and Bell JJ).

respect to it." Doubtless a substantial proportion of arbitrations are commenced, proceed to hearing and end, including by the satisfaction of any award, without any reference to a court. But when there is a dispute about the process, or in the process, including as to the legitimacy of an award, reference to a court for the invocation of its coercive powers to apply the law is indispensable. [8] It is the ready availability of such a reference, in particular to courts with specialist expertise and the willingness and ability to deal with matters promptly, which is part of the reason that such a substantial proportion of arbitrations require no reference at all.

Although differences between jurisdictions will always be present, the degree of harmonisation of commercial courts' approaches to supporting arbitration in different countries is notable. International consistency is supported in part by widespread acceptance of the New York Convention and the Model Law, but it is also attributable to the increasingly internationalist construction and interpretation of those texts by courts.[9] To take one example, it might be thought that the evaluative basis to the power of courts to refuse enforcement of arbitral awards on the ground of public policy would lead to different approaches across jurisdictions.[10] However, as recognised by the International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, the public policy ground is "overwhelmingly considered to include only a very limited number of fundamental rules or values."[11] A position of minimal curial intervention, and the narrow construction of the public policy ground such that it operates only where recognition and enforcement of an arbitral award would violate basic notions of morality and justice, is the prevailing approach internationally.[12]

The harmonisation of the jurisprudence on the recognition and enforcement of arbitral awards illustrates the role of courts in articulating and enforcing norms applicable to international arbitration and supporting the predictability of its outcomes, which in turn supports the

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8 See the remarks of Lord Mustill in *SA Coppee Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38 at 53: "On the one hand, the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism, leans always against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering, and that the only court which possesses these powers is the municipal court of an individual state…there is, I believe, a broad consensus acknowledging that the local court can have a proper and beneficial part to play in the grant of supportive measures."

9 Angus Stewart, 'The Role of Courts in Supporting Arbitration: a Review of Recent Developments in the Asia-Pacific' (Presented virtually at the International Congress of Maritime Arbitrators ICMA XXI in Rio de Janeiro, 9 March 2020).

10 See New York Convention Art V(2)(b) and Model Law Art 36(1)(b)(ii).

11 International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention* (October, 2015), 18.

12 Michael Ng, 'Reviewing the Standard of Curial Review for Findings in Arbitration Involving Public Policy' (2022) *Singapore Journal of Legal Studies* 75, 77, 89.

confidence of commercial parties and reduces the perceived risks of doing business, in particular across national borders.[13]

In line with the internationally accepted approach, Australian courts have emphasised that conceptions of morality and justice invoked to refuse enforcement on public policy grounds must be confined to fundamental principles and instances of "real unfairness or real practical injustice".[14] A recent example close to home is a case I decided shortly before Christmas – *Guoao Holding Group v Xue*.[15] The question was whether the enforcement of an arbitral award would be contrary to public policy within the meaning of s 8(7)(b) of the *International Arbitration Act 1974* (Cth). The case concerned a contract to develop a proposed aged care facility in China, which was entered into by the applicant, Guoao (the award creditor) and entities controlled by the respondent, Ms Xue (the award debtor). A dispute arose as to whether one or both parties had breached the contract, which was arbitrated by the Beijing Arbitration Commission. The tribunal rendered an award in favour of Guoao, dissolving the contract and ordering the repayment to Guoao of shareholder loans of the equivalent of nearly A$50 million by the Xue entities.

Guoao successfully sought enforcement of the award in China, and recovered about A$5 million of the award debt. Guoao subsequently applied to the Federal Court to enforce the award in Australia to enable the recovery of the balance of the award debt. Ms Xue resisted enforcement of the award on the basis that the award rendered by the Beijing Arbitration Commission was unfair because the award resulted in an imbalance of the rights and obligations of the parties. That was because although the Xue entities were ordered to repay Guoao's investment in the project on dissolution of the contract, Guoao was not ordered to give up its shares in the project company.

Ms Xue's challenge to enforcement of the award on the ground of public policy failed. The scope of the public policy ground requires a degree of internationalism in approach, consistent with the subject matter of international commercial arbitration. To truly be a matter of public policy, the enforcement of an award must be fundamentally offensive to Australian notions of

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13 Roy Goode described the development of principles within a sound conceptual framework, sensitive to the usages developed by the mercantile community, as "the essence of commercial law": see Mark Leeming, 'The enduring qualities of commercial law' (Bathurst Lecture 2021, Sydney), 5.

14 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [55]; *Mango Boulevard* [2018] QCA 39 [104] (McMurdo JA).

15 *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584. Although a notice of appeal was filed, the appeal was subsequently discontinued.

justice. A declaration of rescission without accompanying orders fully restoring the parties to their pre-contractual positions does not rise to the level of being contrary to Australian public policy.[16] Furthermore, expert evidence indicated that the award debtors could still apply to the relevant Chinese courts seeking orders for restitution notwithstanding the exhaustion of the award debtors' rights to challenge the award itself in China. An additional impediment for Ms Xue in the case was that the courts of the seat of arbitration had already considered Ms Xue's arguments with respect to the asserted violation of public policy and found, contrary to her arguments, that the arbitral award was validly rendered. As reiterated by the Full Court in *Hub Street v Energy City Qatar*,[17] it is generally inappropriate for an enforcing court in a New York Convention country to reach a different conclusion to the court of the seat on the same question.

A recent example of significant internationalism is the decision of the High Court only a few weeks ago in the *Kingdom of Spain* case.[18] Drawing extensively on comparative authority, and recognising the "long standing" principle of interpretation that statutory provisions should be interpreted, so far as possible, to be consistent with international law, the Court held that by becoming a party to the ICSID[19] convention Spain had waived its foreign state immunity from recognition and enforcement of the ICSID award against it, but not its immunity from execution of the resultant judgment.

The attractiveness of arbitrating in Australia has increased in the 21st century following reforms to the *International Arbitration Act*, the adoption of a uniform regime by States for domestic arbitration based on the Model Law, the continuing development of arbitration expertise at leading law firms and the Bar and among the judiciary, the work of ACICA including the modernisation of the ACICA Rules, and the unambiguous acknowledgement of the "pro-enforcement" bias toward the recognition and enforcement of arbitral awards in Australian arbitration law as found and expressed by Australian judges.[20] As a result, Australian courts are regularly called on to respond to the business community's demand for efficient and effective procedures to resolve arbitration-related disputes.

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16 See *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5.

17 *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110.

18 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11.

19 The International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

20 Doug Jones, 'Arbitration in Australia – Rising to the Challenge' (Clayton Utz / University of Sydney Annual Lecture, 2019), 3, 6, 8-9. With regard to "pro-enforcement" bias see, for example, the statement of Hansen JA and Kyrou AJA in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 that the IAA and the New York Convention "reflect what is often described as a 'pro-enforcement bias' or policy" at [128].

The Federal Court and the Supreme Courts of New South Wales, Victoria and Western Australia have dedicated arbitration lists and practice notes.[21] The Supreme Court of New South Wales's practice note was recently revised – the revision came into effect just last week.[22] The common purpose of these lists and practice notes is twofold. First, to signal to the profession that these courts are well placed to deal with arbitration-related disputes and to facilitate the hearing of such disputes by judges with expertise and particular interest in this area.[23] As Justice Croft of the Victorian Supreme Court has outlined, one of the benefits of courts having dedicated lists managed by a limited number of judges is that such lists are likely to generate a body of relatively consistent decisions, providing parties with a greater degree of confidence and certainty in how judicial intervention will be effected if required in a particular case.[24] The management of dedicated commercial arbitration lists is likely to generate a depth of institutional knowledge and encourage awareness of topical issues among judges.[25]

Secondly, the purpose of maintaining specialist lists guided by practice notes is to set out clearly the procedures applicable to commercial arbitration matters and the various courts' approaches (and the courts' expectations of practitioners) to facilitate their prompt resolution. Although some differences in the procedures between the different courts is inevitable, particularly considering their different natures and, in the case of the Federal Court, different bases for jurisdiction, it is desirable that there be as much uniformity as possible, and that there is no unseemly competition between the different courts for this work. Also, substantive divergence of approach between courts may lead to perceptions of fragmentation and uncertainty, particularly for international parties considering arbitrating or enforcing in Australia.[26]

With regard to what differences there are, the new NSW Supreme Court Practice Note, for example, sets out prescriptive requirements for entry into the Commercial Arbitration List,

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21 Note that commercial arbitration matters are managed in the Queensland Supreme Court's Commercial List.

22 Supreme Court Practice Note SC Eq 9 'Supreme Court Equity Division – Commercial Arbitration List' (21 April 2023).

23 Doug Jones, 'Arbitration in Australia – Rising to the Challenge' (Clayton Utz / University of Sydney Annual Lecture, 2019), 5.

24 Clyde Croft, 'Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court – Supreme Court of Victoria' (Speech delivered at the Seminar of the Commercial Bar Association of the Victorian Bar, Victoria, 24 May 2010), 5.

25 Clyde Croft, 'How the Judiciary can Support Domestic and International Arbitration' (Paper presented at the Arbitrators' and Mediators' Institute of New Zealand Annual Conference, Auckland, July 2013), 29

26 Doug Jones, 'Arbitration in Australia – Rising to the Challenge' (Clayton Utz / University of Sydney Annual Lecture, 2019), 1, 15, 19.

including the filing of a summons in a particular form, and the filing of a Commercial Arbitration List Response in reply to the summons requiring the respondent to indicate whether it contends that it is more appropriate for the proceedings to be dealt with in another of the Court's lists.[27] It is thus essentially a matter for the parties and, in the event of a dispute, the list judge whether a matter is managed in the Commercial Arbitration List.

Under the operation of the Federal Court's National Court Framework, the characterisation of a matter is handled by the National Operations Registry and, upon filing, all Commercial Arbitration proceedings are provisionally allocated to one of two Commercial Arbitration National Coordinating Judges who are responsible for case managing the proceedings, and disposing of them if they are short or confined.[28] Matters not within those descriptors are allocated to a judge on the Commercial Arbitration list, which includes the National Coordinating judges, for resolution as appropriate. The Federal Court's practice note also provides some broader guidance on the Federal Court's arbitration jurisdiction and how the Court approaches referrals to arbitration, the enforcement of awards, and stay applications. It might be seen as educative in this respect.

The judiciary and ACICA are actively involved in considering issues of harmonisation via the work of the ACICA Judicial Liaison Committee. ACICA's work in this regard is to be applauded. The Committee is a valuable forum for the productive exchange of views as to how courts can offer appropriate support to the arbitration community in Australia. The insights of members of the profession who are engaged in arbitration and arbitration-related litigation are valuable to judges as it is imperative that commercial courts are responsive to the needs of the business community in designing and adopting effective procedures, which facilitate the ultimate task of the courts: the declaration and vindication of rights.

Once again, I thank you for this opportunity to share some thoughts on the role of courts in supporting arbitration.

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27 Supreme Court Practice Note SC Eq 9 'Supreme Court Equity Division – Commercial Arbitration List' (21 April 2023).

28 See Federal Court of Australia, 'Commercial Arbitration Practice Note (CA-1)' (21 December 2021).