THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
'JUDICIAL SUPPORT FOR ARBITRATION, A REPRISE'
INTERNATIONAL ARBITRATION CONFERENCE
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1. Twenty five years ago the late Lord Bingham delivered an address at the University of London.[1] The focus of his paper – the problem of delay in arbitration – is not of any particular relevance for present purposes. What is notable is that Lord Bingham began his address with what is arguably my favourite story about arbitration. Whether the tale is a tall one is unclear.[2]

2. It is a piece of courtroom drama that I have recounted at previous events. However, it is so outrageous that it warrants retelling on any occasion where it is even vaguely relevant. An abridged version of the story goes a little like this. At some point in the 19th century in County Down, Ireland, a local form of arbitration was practised which involved a turkey. An independent person would sit at one end of a long table with the disputing parties on either side. A line of oats would be drawn down the length of the table, and two corn kernels placed at the end, one before each of the parties. A turkey would then be deposited at the far end. It would gradually peck its way down the table before finally delivering its verdict by selecting one of the corn kernels.

3. Unsurprisingly, one dissatisfied participant eventually decided to challenge an award in court. On appeal the matter came before Chief Justice Lefroy, who was unfamiliar with the local practice. During cross-examination of the disgruntled party the inevitable confusion arose as to the role of the turkey. On realising that it was in fact the arbitrator, Lefroy became irate. 'Do you mean to tell me that the plaintiff has brought this case in disregard of the award of an arbitrator?' he asked. 'That is so, my Lord' came the reply. 'Disgraceful!' he thundered; 'Appeal dismissed with costs here and below'.

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[1] The Rt Hon. Lord T Bingham, "The Problem of Delay in Arbitration", *The Freshfields Arbitration Lecture 1989*. An edited version of the address appeared in (1989) 5:4 *Arbitration International* 333.

[2] The story is originally recounted in The Rt Hon. Sir R E Megarry, *A New Miscellany-At-Law* (Oxford and Portland, 2005) at 77-78, which cites "an Irish judicial source" secondhand.

4. This technique, of course, is entirely foreign to modern arbitration and bringing it up may seem a sure-fire way to insult a group of arbitrators. However, as Lord Bingham himself observed, this unorthodox practice does in fact illustrate many of the benefits of arbitration. Admittedly, the turkey poorly reflects the ability of parties to select an arbitrator with expert knowledge to resolve a dispute. However it is cheap, confidential, certain and – as Lefroy's response makes abundantly clear – generally it should not involve intervention by the courts. In fact, some may argue that Lefroy's decision provides a best practice standard for the review of arbitral awards.

5. The relationship between courts and arbitration has not always been an easy one. For this reason, it is not uncommon for judges to be asked to speak or write about how their court is supportive of arbitration. That is why I have entitled this paper, 'Judicial support for arbitration, a reprise'. It is also common for practitioners and commentators to scrutinise each successive judgment in an attempt to glean what they might say more broadly about a court's general attitude to commercial arbitration. Without wanting to generalise, blunt labels are often applied to each decision: whether it is pro-arbitration, internationalist, interventionist or anti-arbitration. In my view, this binary distinction about whether a court or jurisdiction is pro- or anti-arbitration is overly simplistic and unhelpful. It fails to appreciate the peculiarities of individual cases and the novel questions which can arise.

6. That is not to say that the extent to which domestic courts facilitate the quick enforcement of arbitral awards or prevent post-award litigation from flourishing are unimportant matters. These are definitely significant factors for parties when determining their preferred venue for arbitration. In this respect, courts naturally form an essential part of the international arbitration landscape. However, I am of the view that there are weaknesses in applying a bare pro- or anti-arbitration label to each decision, and seeking to draw from that a broader narrative about the inclination of courts toward commercial arbitration. This is especially the case in jurisdictions where there is not a particularly large body of case law being generated.

7. It is certainly the case that courts in Australia have not always taken a consistent approach toward arbitration. The attitude in Australia could, as Justice Keane recently put it, be said to be one of 'two steps forward and one step back'.[3] In that observation, Justice Keane was not simply referring

[3] The Hon Justice P A Keane, "The prospects for international arbitration in Australia: meeting the challenge of regional forum competition or our house, or rules" (2013) 79:2 *Arbitration* 195 at 196ff.

to the approach of Australian courts. It is important, in this respect, to acknowledge that a range of factors beyond domestic judicial decision-making will affect the fortunes of a jurisdiction's appeal as a venue for arbitration. The legislative framework, stability and neutrality of the broader legal system, the quality of arbitration facilities and simply the convenience of the parties are only a few of the many features which will influence the choice of location for arbitration. However, that is not to discount the importance of the degree to which domestic courts facilitate commercial arbitration and uphold the values of finality and efficiency which underpin it.

8. My opinion is that, as a general rule, Australian courts today are extremely supportive of commercial arbitration. I would endorse the views expressed by former Chief Justice Spigelman in his foreword to *International Arbitration in Australia*, where he comments that the historic tension between judges and arbitrators has all but disappeared, that judges no longer see arbitration as a trade rival, and that courts typically exercise their supervisory powers with a light touch that is directed at maintaining the integrity of the system.[4] I would suggest this characterisation of the approach of Australian courts toward international arbitration is borne out by a number of recent decisions.

9. In this paper I intend to survey several of those decisions and address what I see as the typical attitude of Australian courts in relation to arbitration today. I also propose to say something about the relationship between domestic courts concerning arbitration, and the possibility of further reforms to ensure parties have an effective choice between litigation and arbitration.

I JUDICIAL SUPPORT: SOME RECENT EXAMPLES

10. The decision of the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; (2014) 311 ALR 387 ('*TCL*') is a recent case in point in relation to the contemporary approach of Australian courts toward arbitration. Among a number of other recent decisions, the judgment of Allsop CJ, Middleton and Foster JJ in *TCL* reveals a deep understanding of the objects that underpin the *International Arbitration Act 1974* (Cth) ('IAA') and the UNCITRAL Model Law on International Commercial Arbitration ('Model Law').[5] It also illustrates a firm

[4] L Nottage and R Garnett (eds), *International Arbitration in Australia* (The Federation Press, 2010), foreword by the Hon JJ Spigelman AC, at viii.
[5] UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and amended by the United Nations Commission on International Trade Law on 7 July 2006) ('Model Law').

view of the relationship between arbitration and the courts, and emphasises the importance of coherence between jurisdictions in relation to arbitration.

11. The lengthy history of the proceedings has been summarised elsewhere and it does not need to be repeated in any detail.[6] The following will suffice. In 2003, a Chinese manufacturer of air conditioning units, TCL, entered into an exclusive distribution agreement with an Australian company, Castel. The agreement granted Castel the exclusive right to sell TCL-manufactured air conditioning units in Australia. A dispute arose, with Castel claiming that TCL had breached the agreement by selling certain products in Australia.

12. Castel commenced arbitration in July 2008 under the arbitration clause in the agreement. Following an interim award, several sets of satellite proceedings were brought in the Supreme Court of Victoria in relation to the scope of the arbitration clause,[7] and issues regarding service on TCL in China.[8] In the meantime, the dispute proceeded to arbitration and after a ten day hearing the panel of three delivered awards in favour of Castel.

13. The awards resulted in two sets of proceedings in the Federal Court. Castel sought enforcement of the awards under Art 35 of the Model Law, which has the force of law in Australia by virtue of s 16 of the IAA. TCL opposed this on the basis the Court had no jurisdiction to enforce the awards and, even if it did, they should not be enforced, as to do so would be contrary to public policy. Consistent with the latter point, TCL separately sought to set aside the awards under Art 34 of the Model Law on the basis they were contrary to public policy because of a breach of the rules of natural justice.

14. The primary judge, Murphy J, rejected the argument that the Court lacked jurisdiction to enforce the awards.[9] TCL then applied in the High Court's original jurisdiction for writs prohibiting the Federal Court from dealing with the matter and quashing the primary judge's decision. It did so on grounds that s 16 of the IAA, to the extent it gives the force in Australia to certain articles of the Model Law, is invalid because it impairs the institutional

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[6] See *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; (2014) 311 ALR 387 ('*TCL*') at [2]-[10]; A Monichino and A Fawke, "International arbitration in Australia: 2012/2013 in review" (2013) 24 *Alternate Dispute Resolution Journal* 208, 210-214; L Nottage, "International Commercial Arbitration in Australia: What's New and What's Next?" in The Hon Justice N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, Sydney, 2014) at 308ff.

[7] *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 (Hargrave J).

[8] *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* [2012] VSC 548 (Daly AsJ); *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* [2013] VSC 92 (Davies J).

[9] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21; (2012) 201 FCR 209.

integrity of the Federal Court, and further, because it vests judicial power in arbitral tribunals. The High Court unanimously rejected both arguments.[10]

15. In a separate judgment, the primary judge dealt with Castel's application to enforce the awards and TCL's contention that they should be set aside. His Honour dismissed TCL's applications and ordered the enforcement of the awards.[11] It was on this basis that the matter came before the Full Court.

16. From this condensed summary it is apparent that, to say the very least, the proceedings have been protracted. Like any matter which has surfaced in different courts and made its way up on appeal and back down on a number of occasions, inevitable comparisons have been drawn between the TCL proceedings and *Jarndyce v Jarndyce* in Dickens' *Bleak House*.[12] It has also been said that the matter, and particularly the challenge to the IAA provisions, has damaged Australia's standing as a venue for international arbitration.[13] Practitioners are in all likelihood better placed to comment on whether this has been, or could be, the practical effect of the decision(s). However, I would suggest the drawn-out nature of the proceedings is more a reflection of the willingness of a disappointed party to pursue their case in any available forum, than it is a criticism of Australia as a seat for arbitration.

17. Regardless of this, it is undoubtedly the Full Court's unequivocal statements in dismissing TCL's appeal and the general approach taken toward commercial arbitration that is of much greater significance. TCL's grounds of appeal focussed on an asserted lack of evidence for several critical findings made by the panel. It required the Court to consider the correct approach under the IAA regarding the notion of 'public policy', and where an arbitral award might be set aside for breach of the rules of natural justice.[14] It is useful to consider the Court's decision under several broad headings.

The IAA and the Model Law

18. The most significant feature concerns the interpretation and application of the IAA and the Model Law. As I mentioned, the grounds of appeal largely revolved around an asserted failure by the panel to accord TCL procedural

[10] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 87 ALJR 410 at [40] (French CJ and Gageler J); [111] (Hayne, Crennan, Kiefel and Bell JJ).
[11] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214.
[12] L Nottage, "International Commercial Arbitration in Australia: What's New and What's Next?" in The Hon Justice N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, Sydney, 2014) at 308.
[13] Ibid.
[14] In relation to the *International Arbitration Act 1974* (Cth) ('*IAA*'), ss 8(7A) and 19.

fairness, such that there had been a breach of the rules of natural justice in relation to the making of the award.[15] As a result, it was said that the award was contrary to the public policy of Australia and it should either be set aside,[16] or the court should refuse to recognise or enforce it.[17] The Court ultimately arrived at the conclusion that either course will not be taken

> '…unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural unfairness.'[18]

Here, that was not the case. There are several aspects of the Full Court's reasoning in arriving at that statement which warrant particular emphasis.

19. The first is firmly grounding the interpretation of 'natural justice' and 'public policy' in the commercial context in which international arbitration occurs. The Court traced both the history and negotiation of the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'),[19] as well as later amendments to the IAA.[20] In doing so, it emphasised that the reference to 'public policy' in Art V of the New York Convention was meant to be limited to fundamental principles. It was not intended to be interpreted broadly in a way that might encompass domestic notions of public policy.[21] Similarly, amendments to the IAA were not to bring about an 'idiosyncratic national approach' to public policy.[22]

20. The Court ultimately concluded that the notion of public policy was intended to be limited to 'the fundamental principles of justice and morality' that fitted appropriately within the area of international commercial arbitration.[23] This, it was said, was very different from the review of public power in administrative law.[24] In the result, the Full Court adopted a narrow definition of public policy. This approach is consistent with international case law,

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[15] As the Court noted, Grounds 4 to 7 were in effect a comprehensive re-agitation of the arguments made before the primary judge regarding the factual findings of the arbitrators. See *TCL* at [6], [52]-[53].
[16] Pursuant to the Model Law, Art 34(2)(b)(ii), and the IAA, s 19(b).
[17] Pursuant to the Model Law, Art 36(1)(b)(ii), and the IAA, s 19(b).
[18] *TCL* at [55], [111].
[19] Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration ('New York Convention'). The history and negotiation of the Model Law (particularly Arts 18, 34 and 36) and the New York Convention (particularly Art V) are addressed in *TCL* at [57]-[73].
[20] IAA s 19 was introduced by the *International Arbitration Amendment Act 1989* (Cth) and s 8(7A) by the *International Arbitration Amendment Act 2010* (Cth).
[21] *TCL* at [64] referring to A J van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer, 1981).
[22] *TCL* at [73].
[23] *TCL* at [74], [76].
[24] *TCL* at [74]. See also *TCL* at [105].

avoids excessive intervention by domestic courts, and does not have the effect of allowing differences between jurisdictions in terms of the meaning of public policy to cloud the recognition and enforcement of arbitral awards.

21. The Court took a similar approach in relation to the rules of natural justice. As I mentioned, the breaches were said to have arisen from several findings made by the arbitral panel in the absence of probative evidence. The Court emphasised that the rules of natural justice are to be considered in their particular context. Here, it was international commercial arbitration, where the object of the IAA and the Model Law is to facilitate the effective and efficient use of arbitration as a means of settling international disputes.[25] The precise content of natural justice or procedural fairness is context-specific and will depend on the individual circumstances of the case.[26] In *TCL*, the 'proper content and reach' of the general rules that were designed to ensure fairness were shaped by the context of commercial arbitration.[27]

22. The second and related matter is the way in which courts are to apply the concepts of public policy and natural justice in relation to an application to set aside or refuse to enforce an award. Once again, the Court emphasised that this is a matter of context. It will depend on whether the commercial party has been 'treated unfairly' or 'suffered real practical injustice' in the circumstances of the actual dispute and the particular forum in question.[28] Importantly, this is a matter of fairness and equality; it is not a question of whether there has been a breach of some prescriptive or technical rule.[29]

23. What I think can be said at this point is that the Full Court adopted both a principled and practical approach to the question of whether to set aside or refuse to enforce an award. The emphasis placed on context is particularly significant. The content of the rules of natural justice and what is contrary to public policy may well vary. Equally, whether a party has suffered 'real unfairness' or 'real practical injustice' depends on the circumstances of the case within the broader framework of international arbitration. The Court repeatedly emphasised the danger of allowing a breach to be established by showing that a particular 'technical' rule had been broken.[30] This was of course an essential point to have been made. It would be unacceptable if

[25] *TCL* at [109].
[26] *TCL* at [85]-[86].
[27] *TCL* at [112].
[28] *TCL* at [110]-[111].
[29] See *TCL* at [54], [73], [87], [153] and [169].
[30] *TCL* at [54], [87], [110], [153], [169].

inflexible rules were applied to a method of dispute resolution focussed on flexibility, which in fact gives parties a degree of control over the process.

Coherence with other jurisdictions

24. The two further issues that I want to raise in relation to *TCL* can be stated with greater brevity. The second concerns the significance of coherence with jurisprudence in other jurisdictions. TCL complained that in addressing the issue of public policy, the primary judge had also fallen into error by relying on the importance of uniformity with decisions in other jurisdictions.[31] The Full Court correctly rejected this submission and went on to emphasise the need for consistency with foreign jurisdictions to the extent it is possible.

25. As the Court properly said, to the degree that the language of the IAA permits, it is essential to maintain 'international harmony and concordance of approach to international commercial arbitration.'[32] This view properly reflects Art 2A of the Model Law, which directs that when interpreting the Law, regard must be had to its 'international origin' and the importance of promoting 'uniformity in its application and the observance of good faith'.

26. The approach taken by the Full Court in this respect is certainly not unique. The importance of consistency with foreign jurisdictions where it is at all possible has been noted in numerous recent decisions in relation to the IAA and the Model Law.[33] It is an approach to interpretation which is consistent with the essential objectives that underpin both the IAA and the Model Law. At a basic level, it also reflects the very purpose of pursuing, negotiating and entering international commercial agreements. As Kirby J observed in *Great China Metal v Malaysian Shipping* in relation to the Hague Rules:[34]

> 'Reflecting on the history and purposes of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by

[31] Ground 8 of the notice of appeal. See *TCL* at [51].
[32] *TCL* at [75].
[33] For recent examples in relation to the IAA and the Model Law see *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 87 ALJR 410 at [7]; *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 at [128]; *International Relief and Development Inc v Ladu* [2014] FCA 887 at [169]; *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414 at [13]-[15]; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; (2012) 201 FCR 535 at [105].
[34] The Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, 120 LNTS 187, 51 Stat. 233 ('Hague Rules').

serious disagreements between different national courts. What is at stake is not merely theoretical symmetry in judicial interpretation.'[35]

27. There is little point working toward such agreements and incorporating them into domestic law if schisms are allowed to develop in their interpretation and application. This will, of course, depend on the drafting of domestic legislation. However, to the extent that courts are able to, regard should be had to the approach taken in other jurisdictions which are signatories to the agreement in question. It is an attitude I believe courts in Australia have consistently adopted, and particularly in relation to the IAA and Model Law.

The court and the parties

28. The Full Court also made several significant comments about the general role of courts when dealing with arbitral awards, as well as the line that parties should adopt when approaching the courts in relation to an award.

29. At its most basic level, the relationship between international arbitration and the role of domestic courts is shaped by the international legal order – the Model Law and the New York Convention – to which the IAA gives effect. The Court addressed the connection between the two in the following way:

> 'The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties. The a-national independence of the international arbitral legal order thus created required at least two things from national court systems for its efficacy: first, a recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system; and secondly, the swift and efficient judicial enforcement and recognition of contracts and awards.'[36]

30. The approach taken by domestic courts must be informed by the need for balance between maintaining the independence of the arbitral system, while giving that system force by way of courts acting swiftly to enforce awards or dealing with applications that they be set aside or not recognised. As Chief Justice Sundaresh Menon of the Republic of Singapore put it recently, it is a

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[35] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* [1998] HCA 65; (1998) 196 CLR 161 at [137] (citations omitted). See also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* [2006] HCA 53; (2006) 231 CLR 1 at [34] and *Povey v Qantas Airways Limited* [2005] HCA 33; (2005) 223 CLR 189 at [25].

[36] *TCL* at [109].

matter of 'quality control' to ensure the integrity of the system.[37] Here, the Full Court described the task as being one in which it is essential for a domestic court to act 'prudently, sparingly and responsibly, but decisively'.[38] Care must be taken in the extent to which such quality control is exercised.

31. The Court emphasised that the primary judge had gone into greater detail than was necessary to deal with the applications.[39] The hearing before the primary judge had extended over three days[40] and, as the Full Court made clear, had essentially involved a re-running of the factual disputes which were originally argued before the arbitral panel. It is this type of approach which weakens the principles that underpin arbitration; the costs of the dispute resolution process swell, confidentiality is extinguished and, most notably, certainty and finality – which are perhaps the essential hallmarks of international arbitration – are undermined to a considerable degree.

32. In this respect, the Court offered a number of careful warnings to parties who might consider approaching a domestic court to intervene following the making of an arbitral award. Of course it is important for courts to consider applications under Arts 34 and 36 with the prudence and decisiveness identified by the Full Court. However, they should be alive to the possibility of disgruntled parties coming to them with complaints about the arbitrator's findings disguised as alleged breaches of the rules of natural justice.[41] The role of domestic courts is to properly consider post-award claims; be that to set aside, enforce or recognise, or refuse to enforce or recognise an award. It is this connection between courts and international arbitration which gives strength and stability to the arbitral process. Courts must prevent parties who are simply unhappy with an award from upsetting that balance.

33. The Full Court's judgment concludes by noting that the approach advocated by TCL would attribute to Parliament an intention that would 'undermine fatally the facilitation and encouragement of international commercial arbitration in Australia.'[42] This comment was made in relation to a particular submission that technical breaches of natural justice would be enough for a court to set aside or refuse to enforce an award if it could not exclude the possibility of a different result. However, the Court's concluding words could

[37] The Hon. Chief Justice S Menon, "The Somewhat Uncommon Law of Commerce" (2014) 26 *Singapore Academy of Law Journal* 23, 45-46.
[38] *TCL* at [109].
[39] *TCL* at [53], [81].
[40] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214.
[41] *TCL* at [53]-[54], [113], [167].
[42] *TCL* at [169].

be said to have broader application. TCL's submission regarding the scope of review for a claimed breach of the rules of natural justice, as well as the alleged error by the primary judge in emphasising the importance of comity with other jurisdictions, had potential to undermine arbitration in Australia.

34. From these three broad issues – interpreting and applying the IAA and the Model Law, coherence with foreign jurisdictions, and the particular roles of the court and the parties in relation to arbitral awards – several conclusions can be drawn regarding the approach of the Full Court toward arbitration.

35. The Court was careful to adopt an interpretation of public policy and natural justice that is firmly rooted in the commercial context in which international arbitrations occur, and one that does not leave Australia as an outlier in the arbitration landscape. It is a decision that will inevitably guide courts in their approach to the interpretation of the IAA and the Model Law.[43] Second, it illustrates an acute awareness of the relationship between arbitration and courts, and offers clear direction as to how claims pursuant to Arts 34 and 36 should be approached in a way so as not to undermine that relationship. Finally, it cautions against parties seeking to re-agitate factual matters in court where they are dissatisfied with the findings of the arbitrator. In short, it is a decision that would undoubtedly receive the 'pro-arbitration' stamp.

36. This, however, does not mark *TCL* as being in any way an unusual decision. There are any number of recent first instance decisions which reflect what I suggest is the broadly supportive attitude that Australian courts have taken to international commercial arbitration. It is commonplace for courts to adopt an approach to the interpretation of the IAA and the Model Law that has careful regard to the construction accepted in foreign jurisdictions.[44] Other recent instances include a practical approach to the definition of a 'commercial man' in an arbitration clause,[45] and to the issue of partial enforcement where there has been a breach of the rules of natural justice.[46]

37. The relatively recent decision of the Western Australia Court of Appeal in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* is also undoubtedly supportive of international arbitration, in the sense it endorses

[43] As it has already done so in decisions such as *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 at [41]-[44], [128].
[44] See eg *International Relief and Development Inc v Ladu* [2014] FCA 887 at [169], [183] in relation to the meaning of 'proper notice' in s 8(5)(c) of the IAA.
[45] *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Ltd* [2014] FCA 636 at [53]-[56].
[46] *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 at [124]-[131].

an expansive approach to the construction of arbitration clauses.[47] Chief Justice Martin judgment in *Cape Lambert* has been described as a critique of my own judgment in *Rinehart v Welker*.[48] I do not see any real difference between them. Both, I think, endorse a liberal approach to the interpretation of arbitration clauses. However, as Allsop P (as his Honour was) said in *Lipman Pty Ltd v Emergency Services Superannuation Board*, to adopt a liberal approach is not to depart from the meaning of the words of the clause.[49] I agree with Martin CJ's observation that an expansive approach to the interpretation of dispute resolution clauses in Australia is consistent with other jurisdictions.[50] There have of course been calls for a presumptive approach to the construction of arbitration clauses in Australia.[51] To that, I would simply say that Australian courts liberally construe arbitration clauses with careful regard to their commercial objects and purposes, and the circumstances of the commercial parties. That is uncontroversial and unexceptional. It does, however, mark Australia as a jurisdiction that wholly supports international arbitration, without resort to an interpretative gloss which I suggest has little practical effect on the approach to construction.

38. Despite having examined the Full Court's decision in *TCL* at length, I would otherwise reaffirm my initial observation that it is difficult to extract broad trends from individual cases. There will inevitably be decisions that are not universally approved. This may arise from legislative drafting, the nature of the matter or, in some instances, judicial error. This has been known to occur. It does not, however, mean that Australian courts are anti-arbitration.

39. I accept there is something to be said for the argument that it may only take a small number of decisions to damage Australia's reputation as a venue for arbitration.[52] This, however, should not be overstated. For instance, the Singapore Court of Appeal recently overturned a decision of the High Court, which set aside part of an award on the basis that there had been a denial of natural justice because the arbitrator had failed to consider one of the

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[47] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; (2013) 298 ALR 666 (Martin CJ with whom Buss JA agreed, McLure P agreeing with additional remarks).
[48] See The Hon. JJ Spigelman AC, "The Centrality of Contractual Interpretation: A Comparative Perspective", *Neil Kaplan Lecture* (Hong Kong, 27 November 2013) at 24 and footnote 48 referring to *Rinehart v Welker* [2012] NSWCA 95 at [115]-[124].
[49] *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 at [8].
[50] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; (2013) 298 ALR 666 at [61] in relation to *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951.
[51] See eg J Delaney and K Lewis, "The presumptive approach to the construction of arbitration agreements and the principle of separability – English law post *Fiona Trust* and Australian law contrasted" (2008) 31:1 *UNSW Law Journal* 341.
[52] A Monichino, "International arbitration in Australia: The need to centralise judicial power" (2012) 86 *Australian Law Journal* 118, 125-6.

respondents' counterclaims.[53] The Court of Appeal disagreed with the primary judge's conclusion and offered the following observations:

> '…it is important not to underestimate the ingenuity of counsel who seek to launch backdoor appeals or, worse still, completely reinvent their client's cases with the benefit of hindsight in the guise of a challenge based on an alleged breach of natural justice.'[54]

> '…courts should guard against attempts by a disgruntled party to fault an arbitrator for failing to consider arguments or points which were never before him. The setting aside application is not to be abused by a party who, with the benefit of hindsight, wished he had pleaded or presented his case in a different way…'[55]

40. Although no doubt different, there are perhaps some similarities with the Full Court's concern in *TCL* about complaints in relation to factual findings being dressed up as alleged breaches of the rules of natural justice. However, putting that aside, it would be irrational to begin to suggest that this first instance decision damaged Singapore's broader reputation as a desirable venue for arbitration. While the volume of arbitration work as between Australia and Singapore differs significantly, it is, in my opinion, similarly unhelpful to single out particular decisions here as being anti-arbitration.

41. Cementing broader cultural change in Australian courts and among the legal profession is important. However, fostering that change is not served well by pointing to one decision or the next, or focussing on clearance rates or the makeup of benches hearing arbitration matters. While these issues are significant, they are not the best measures of judicial support for arbitration.

42. Ultimately, striking a balance between the autonomy of the arbitral process and the need for appropriate but restrained judicial supervision to maintain the integrity of the system is not an enviable task. Nor is it straightforward. The difficult role that courts are charged with is perhaps illustrated by the colourful terms in which the test for granting leave under s 69 of the *Arbitration Act 1996* (UK) has been described. In *The Kelaniya*, Lord Donaldson stated that even in one off cases, an arbitrator is not allowed

> '…to cavort about the market carrying a small palm tree and doing whatever he thinks appropriate by way of settling the dispute. What it does amount to is that the Courts will normally leave him to his own devices and leave the parties to the

[53] *BCL v BLB* [2014] SGCA 40.
[54] *BCL v BLB* [2014] SGCA 40 at [4].
[55] *BCL v BLB* [2014] SGCA 40 at [53].

consequences of their choice. They will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong.'[56]

In a similar vein, Sir Anthony Colman, then a judge of the Commercial Court speaking extracurially, described the test in the following way:

'What is "obviously wrong"? Is the obviousness something which one arrives at, as I say, on the first reading over a good bottle of claret and some pleasant smoked salmon or is "obviously wrong" the conclusion one reaches at the 12th reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter.'[57]

43. The legislation differs (probably as do the food and beverage choices). However, the task of determining the extent of judicial supervision is similarly challenging. In my view, Australian courts in recent times have reliably adopted the light touch approach referred to by former Chief Justice Spigelman. The decision of the Full Court in *TCL* is, among others, further indication of the support for international commercial arbitration in Australia.

II THE COURTS AND ARBITRATION: BROADER ISSUES

44. There is then the issue of what can be done to further encourage parties to consider Australia as a desirable venue for commercial arbitration. Much needed steps were taken in 2010 with amendments to the IAA[58] and the move toward uniform State and Territory legislation for domestic commercial arbitration.[59] As is to be expected, some further changes may well be required to address issues that have arisen following the significant 2010 amendments to the IAA.[60] There are also emerging or so-called 'burning issues' in arbitration which will need to considered to ensure the arbitral system in Australia remains up-to-date with innovation in the international

[56] *Seaworld Ocean Line Co SA v Catseye Maritime Co (The Kelanya)* [1989] 1 Lloyd's Rep. 30.
[57] Sir A Colman, "Arbitrations and Judges – how much interference should we tolerate?", *The Worshipful Company of Arbitrators' Master's Lecture* (London, 14 March 2006) published in (2006) 72:3 *Arbitration* 217, 219. The passage from *The Kelanya* and from the address of Colman J are extracted in *AMEC Group Ltd v Secretary of State for Defence* [2013] EWHC 110 (TCC); 146 Con. L.R. 152 at [22]-[23]. However, the passage in *AMEC Group Ltd* refers to 'Chablis' rather than 'claret'. It is unclear if this alters the test in any meaningful way.
[58] By the *International Arbitration Amendment Act 2010* (Cth).
[59] In New South Wales, the *Commercial Arbitration Act 2010* (NSW). The ACT is the only state or territory to have not yet introduced amended commercial arbitration legislation.
[60] See eg the discussion in L Nottage, "International Commercial Arbitration in Australia: What's New and What's Next?" (2013) 30:5 *Journal of International Arbitration* 465, 478-480; A Monichino and A Fawke, "International arbitration in Australia: 2011/2012 in review" (2012) 23 *Alternate Dispute Resolution Journal* 234, 235; The Hon Justice P A Keane, "The prospects for international arbitration in Australia: meeting the challenge of regional forum competition or our house, or rules" (2013) 79:2 *Arbitration* 195 at 197-198 regarding the suggested lacuna in s 21 of the IAA.

landscape. However, beyond that, there is in my view, something to be said for giving the system time to grow naturally without too much intervention.

45. At a conference held last year in relation to international commercial law and arbitration, the Commonwealth Solicitor-General, Justin Gleeson SC, queried whether it would be better for judges and practitioners to work with the IAA in its current form and allow the common law to deal with difficulties as they arise.[61] I would suggest that such an approach is indeed preferable. This is particularly the case when, as I outlined above in relation to *TCL*, Australian courts are carefully considering matters regarding international arbitration and adopting an approach that is consistent with jurisprudence in other jurisdictions, and which is informed by the objects that underpin the IAA and the Model Law, including the independence of the arbitral process.

46. However, there is one specific proposal that has surfaced in various forms and on a number of different occasions which warrants further attention. It concerns the supposed benefits of centralising or rationalising jurisdiction in relation to matters concerning international commercial arbitration. The issue was raised squarely in the federal Attorney-General's 2008 discussion paper, which asked if the Federal Court should be given exclusive jurisdiction in relation to matters arising under the IAA.[62] Needless to say, the proposal was not adopted when the IAA was subsequently amended.

47. That, however, has not quelled proposals regarding the centralisation of jurisdiction for disputes arising out of international arbitration. More recently it has been suggested that appeals from first instance decisions of State and Territory Supreme Courts be heard by the Full Court of the Federal Court.[63] Others have spoken favourably about the general idea of moving toward a single intermediate appellate court in some form or other.[64] The reasons given in support of such a plan generally focus on a centralised jurisdiction producing more consistent jurisprudence, and the notion that

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[61] J Gleeson, "Commentary on paper by Professor Luke Nottage" in The Hon Justice N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, Sydney, 2014) at 346.

[62] *Review of the International Arbitration Act 1974* (Discussion Paper, November 2008) at 9 ('Question H') available at http://www.ag.gov.au/Consultations/Documents/ReformstotheInternationalArbitrationAct1974/Review%20of%20the%20International%20Arbitration%20Act%201974%20Discussion%20Paper.pdf.

[63] A Monichino, "International arbitration in Australia: The need to centralise judicial power" (2012) 86 *Australian Law Journal* 118, 130-1; L Nottage, "International Commercial Arbitration in Australia: What's New and What's Next?" (2013) 30:5 *Journal of International Arbitration* 465, 477-78.

[64] See eg J Gleeson, "Commentary on paper by Professor Luke Nottage" in The Hon Justice N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, Sydney, 2014) at 347.

vesting IAA jurisdiction in the Federal Court alone would be commercially sensible in promoting Australia as a venue for arbitration.[65] There are also more unusual explanations, such as the High Court being 'less inclined' to grant special leave from a bench of the Full Federal Court comprised of specialist judges.[66] There is, I think, no reason why that would ever occur.

48. It is the case that there are particular statutes which already provide for appeals from a State or Territory Supreme Court judge to the Full Court of the Federal Court.[67] These are statutes in which the Federal Court and State and Territory Supreme Courts share jurisdiction at first instance. It is not appropriate in this paper to discuss the merits of that approach. However, in my view, there are a number of compelling reasons that dispel the idea of centralising jurisdiction for international commercial arbitration.

49. First, and most obvious, is the fact that the High Court has repeatedly emphasised that there is only one common law of Australia.[68] In relation to statutory interpretation, which is relevant for present purposes, the High Court abundantly made clear in *Farah Constructions v Say-Dee* that

> 'Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.'[69]

When matters are determined by courts exercising federal judicial power they are determined as part of an 'integrated Australian legal system'.[70]

50. This has been emphasised before. It was the focus of the brief submission made by the Chief Justices of the States and Territories in response to the Attorney-General's discussion paper.[71] However, it is worth repeating. It is

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[65] See eg *Review of the International Arbitration Act 1974* (Discussion Paper, November 2008) at 9.
[66] A Monichino, "International arbitration in Australia: The need to centralise judicial power" (2012) 86 *Australian Law Journal* 118, 130.
[67] See eg *Trade Marks Act 1995* (Cth), Pt 18. Examples are canvassed in A Monichino, "International arbitration in Australia: The need to centralise judicial power" (2012) 86 *Australian Law Journal* 118, 130.
[68] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112; *Lipohar v The Queen* [1999] HCA 65; (1999) 200 CLR 485 at [43]-[44].
[69] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at [135]. See also *Hili v The Queen; Jones v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at [57]; *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board C.A.L. No 14 Pty Ltd v Scott* [2009] HCA 47; (2009) 239 CLR 390 at [50]; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.
[70] *Commonwealth v Mewett* (1996) 191 CLR 471, 534 (Gaudron J) extracted in *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504 at [279].
[71] Comments by the Chief Justices of the States and Territories to the Review of the International Arbitration Act 1974 (10 December 2008).

the case that inconsistencies between jurisdictions have developed in the past in relation to the interpretation of the IAA. However, it remains that State and Territory Supreme Courts, as well as the Federal Court, are obliged to follow other intermediate appellate courts unless they believe the decision to be plainly wrong. This may occur from time to time. However, there is nothing to suggest there are presently significant differences in the approach taken between jurisdictions regarding the IAA. Nor is it the case that vesting jurisdiction solely in the Federal Court would necessarily result in more consistent jurisprudence. Minds can differ in relation to complex problems. In fact, any such differences – and their ultimate resolution by the High Court – will arguably lead to a more considered jurisprudence.

51. There is, however, some merit in the second complaint about the system as it currently exists. It is reasonable to suggest that jurisdiction over the IAA being vested in the Federal Court and State and Territory Supreme Courts might create confusion for international parties, which may discourage them from selecting Australia as a venue for arbitration. However, the proposal that appeals regarding the IAA only be heard by the Full Court of the Federal Court does not resolve the issue. In fact, it could be said to further complicate the problem. More importantly, it is difficult to calculate the extent to which this 'complexity' actually affects Australia's appeal as an arbitral venue. Furthermore, even if that calculation was possible, it would need to be balanced against the expertise of many Supreme Court judges, particularly in appellate courts, which would be lost if jurisdiction was vested solely in the Federal Court.

52. This leads to the issue of judicial specialisation, which is a topic that I have addressed recently in a different context.[72] The Federal Court is, of course, a generalist court. However, the basis for vesting jurisdiction in the Federal Court alone in relation to the IAA bears similarities to some of the benefits that are cited in support of the creation of specialist courts. In relation to this, there are a number of matters which I believe should be kept in mind.

53. First, a division whereby the Federal Court hears matters under the IAA and State and Territory Supreme Courts in relation to domestic commercial arbitration would, I think, create an unfortunate divide. As former Chief Justice Gleeson identified in his address to an international commercial law and arbitration conference last year, the distinction between international

[72] The Hon. TF Bathurst AC, Environmental/Judicial Session, 27th LAWASIA Conference (Bangkok, Thailand, 5 October 2014).

and domestic arbitration can at times be very artificial.[73] More importantly, state-based legislation that regulates domestic arbitration specifically states that in interpreting the statute, regard is to be had to the need to promote uniformity between the regulation of domestic commercial arbitrations and the application of the Model Law.[74] It is possible that vesting jurisdiction in the Federal Court alone regarding the IAA might have the unintended result of creating divergent jurisprudence in relation to the IAA as compared to the domestic arbitration regime. This would be a most unfortunate result. There is, I would suggest, a need to retain a consistent and coherent approach to the interpretation of legislation that concerns the Model Law, and to avoid what Chief Justice French once described as 'a kind of archipelago of islands of expertise separated by a sea of unknowing.'[75]

54. Putting that to one side, in my view the most significant argument against vesting jurisdiction over the IAA solely in the Federal Court is the expertise in State and Territory Supreme Courts which would be lost. The Federal Court has a depth of skill in relation to IAA-related matters. However, there is no reason or evidence to suggest that State Supreme Courts are not equal in the experience and expertise they bring to matters concerning international arbitration. In the end, the attraction of a particular jurisdiction as a venue for arbitration is to an extent affected by the competence of its domestic courts in dealing with proceedings arising out of international arbitrations. It would be unfortunate if the expertise that presently exists in State Supreme Courts was lost.

55. As I noted above, I am of the view that the system for arbitration in Australia should be given some time to develop organically. As the saying goes, a watched pot never boils. There may, however, be more that State and Territory Supreme Courts could do to promote consistency in approaching matters regarding both international and domestic commercial arbitration. I would, for instance, suggest that consideration be given to a practice note which provides the Court with flexibility regarding arbitration-related matters.

56. The New South Wales Supreme Court's Practice Note SC Eq 9, which was introduced in February 2012, establishes a specialist Commercial Arbitration

[73] The Hon. M Gleeson AC, "Some practical aspects of international arbitration", in The Hon Justice N Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, Sydney, 2014) at 298.
[74] See eg *Commercial Arbitration Act 2010* (NSW) s 2A.
[75] The Hon R French, "'In praise of breadth' – A reflection on the virtues of generalist lawyering", *Law Summer School 2009, University of Western Australia* (20 February 2009) at 18.

List.[76] The purpose of the Practice Note is to facilitate the prompt resolution of disputes arising in the context of arbitral proceedings. It simply provides for the filing of a summons setting out certain matters, and within 14 days of service, the filing of a Commercial Arbitration List Response. It specifically states that the nature of proceedings concerning arbitration should make substantive interlocutory steps unnecessary. The Practice Note provides, I believe, a guide to aid the efficient resolution of matters arising under both the IAA and the *Commercial Arbitration Act 2010* (NSW). However, in doing so, it leaves sufficient flexibility in the hands of the experienced list judge.

57. Beyond that, time should be allowed for practitioners as well as the judiciary to further adjust to the regime. As I have said, Australia has a domestic court system that is extremely supportive of international arbitration and the autonomy of its processes. Australia also has the benefit of a great many experienced practitioners and retired judges that are working on a regular basis in the field, both here and abroad. Those relationships and the renewed arbitral regime here in Australia, will, I believe, bear fruit with time.

III COURT REFORM: MAINTAINING OPTIONS

58. Having said all that, it would be fair to assume that arbitration had a virtual monopoly over international commercial dispute resolution. However, that is not at all the case. A survey last year into corporate choices in international arbitration found that across all industry sectors, respondents referred as many international disputes to litigation as they did to arbitration.[77] In the construction and energy sectors, arbitration was the preferred mechanism for international dispute resolution; however, in relation to financial services, litigation was overwhelmingly favoured.[78] With that in mind, it is necessary to address the future role of domestic courts in international dispute resolution. In particular, the growth of international commercial courts is a development that should not be ignored in Australia.

59. I should emphasise at the outset that one can be a supporter of arbitration as well as international commercial litigation conducted in domestic courts. Despite the benefits or arbitration, as the above survey illustrates, some parties will continue to prefer to submit their disputes for judicial resolution. Beyond it simply being a matter of preference, litigation also has the added

[76] Commercial Arbitration List, Practice Note SC Eq 9.
[77] PwC and School of International Arbitration, Queen Mary, University of London, *Corporate choices in International Arbitration: Industry Perspectives*, at 7. Available at http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf.
[78] Ibid.

benefit of transparency, in the sense that public decisions form part of the body of precedent which in turn aids in the development of commercial law.

60. There are a range of reasons why a party might opt for litigation rather than arbitration. What is important is that domestic courts remain a viable alternative. It should not be the case that parties view arbitration as the only available option if they become involved in a cross-border dispute. Australian courts must not vacate the field of international dispute resolution and should, I believe, take active steps to ensure that traditional litigation remains a genuine alternative to international commercial arbitration.

61. There have been several recent developments in relation to international commercial courts which should be considered in terms of future innovation in the Australian system. Both Dubai and Qatar have created international commercial courts which allow parties anywhere in the world to opt into their jurisdiction.[79] For instance, the Dubai International Financial Centre (DIFC) Courts has jurisdiction over claims arising out of or in relation to a contract or transaction within DIFC, where parties have agreed to submit to the DIFC Courts before a dispute arises, or where the parties, after a dispute has arisen, agree in writing to have the DIFC Courts adjudicate their dispute.[80]

62. In a similar vein, legislation was passed only this month by the Parliament of Singapore to create what will be known as the Singapore International Commercial Court (SICC).[81] The goal of the SICC is to cement Singapore as a dispute resolution hub in the Asia Pacific region,[82] and it is obviously intended to complement the recently opened Singapore International Mediation Centre, as well as the Singapore International Arbitration Centre.

63. The SICC will be a Division of the High Court and will have jurisdiction over three categories of cases: those that could be heard in the High Court and are international and commercial in nature; where the parties have agreed to submit to the SICC's jurisdiction; and matters that have been transferred from the High Court to the SICC.[83] The SICC will generally have all the powers of the High Court and will be constituted by High Court judges as

[79] The Qatar International Court and the Courts of the Dubai International Financial Centre.
[80] See Dubai Law No 12 of 2004, as amended. See also Practice Direction No. 2 of 2012 – Jurisdiction of the DIFC Courts, which provides model clauses for submitting to the jurisdiction of the DIFC Courts.
[81] The *Supreme Court of Judicature (Amendment) Bill 2014* (Singapore), which amends the Supreme Court of Judicature Act (Ch 322, 2007 rev ed, Singapore), was passed on 4 November 2014.
[82] See generally the Report of the Singapore International Commercial Court Committee (November 2013) available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf.
[83] *Supreme Court of Judicature (Amendment) Bill 2014* (Singapore), ss 18A, 18D, 18F, 18J.

well as international judges of the Supreme Court who are appointed for specified periods to sit in the SICC.[84] The international judges can, I assume, be drawn from other jurisdictions, and will no doubt have extensive experience in relation to international commercial disputes. Appeals will lie from the SICC to the Court of Appeal. In addition, a party can be represented by a foreign lawyer and, significantly, the rules may allow for questions of foreign law be determined on submissions instead of proof.[85]

64. In one sense, the jurisdiction and constitution of the SICC is nothing out of the ordinary. There are other judicial bodies that have been established to hear international disputes which have no direct connection with the jurisdiction in which the court is located. However, what is noteworthy is the comprehensive and integrated approach that Singapore is taking in terms of the international commercial dispute resolution facilities that it is offering. Mediation, arbitration and court-based services are being given equal billing.

65. There are, I think, a number of lessons that Australia can learn in the short-term in relation to the three-pronged approach that Singapore is taking to the provision of commercial dispute resolution services. In particular, it is all well and good to have legislation and a judiciary that are broadly supportive of arbitration. However, it is, I suggest, equally important to ensure the judicial system is itself a desirable venue for resolving international disputes. To an extent, Australia will always be at a geographic disadvantage when compared to some of our neighbours in terms of being a desirable venue for commercial litigation and arbitration. However, we have an extremely stable legal system as well as a wealth of experienced legal practitioners. We must ensure that our venues for dispute resolution are equally appealing.

66. There are fine commercial lawyers who have been appointed to the judiciary across Australia, both in State Supreme Courts and in the Federal Court. One fine day – hopefully sometime in the not too distant future – it may be they can work more collaboratively in the international dispute resolution space. As I have said, it is essential that our judicial system not just support international arbitration, but present itself as a capable alternative. This is not arbitration and litigation reverting to a position of being trade rivals, but rather, offering a suite of dispute resolution options to commercial parties.

[84] *Supreme Court of Judicature (Amendment) Bill 2014* (Singapore), ss 5A, 9, 18G.
[85] *Supreme Court of Judicature (Amendment) Bill 2014* (Singapore), ss 18M, 18L.

67. The major shortcoming of domestic courts in terms of international dispute resolution has always been enforceability. Equally, the ability to have awards swiftly recognised and enforced by way of the New York Convention is without a doubt a key aspect in the success of international arbitration. This is particularly so when viewed against the ad hoc arrangements that are in place in terms of registering and enforcing foreign judgments. There is, however, room for further innovation in this respect. As the report which recommended the structure of the SICC makes clear, there are three options in terms of enhancing the enforceability of judgments; those being: multilateral government agreements (including ASEAN-level arrangements); bilateral government agreements; and arrangements between courts.[86]

68. The New South Wales Supreme Court has taken steps to enter one-off agreements to facilitate the enforcement of judgments. For instance, last year the Court signed a memorandum of guidance with the DIFC Courts regarding the enforcement of money judgments.[87] The Court also has an arrangement in place for the referral of questions of law with the State of New York.[88] The Court remains open to entering further such agreements.

69. However, what would obviously be of greater utility is moving toward multilateral arrangements to deal with some of the difficulties which have hampered domestic courts as compared to international arbitration. This is, I accept, no easy feat. However, I have never entirely understood why countries did not move quickly to ratify the Hague Convention on Choice of Court Agreements ('Hague Convention')[89] to bring a degree of uniformity in relation to choice of court agreements, as well as the recognition and enforcement of foreign judgments. It is admirable that some of these issues have been addressed between Australia and New Zealand under the *Trans-Tasman Proceedings Act 2010* (Cth). However, it would be preferable to see some greater multilateral progress. It is, in this respect, encouraging that some recent steps have been taken by the European Union toward ratifying the Hague Convention.[90] It may be that such a step, which would bring the Convention into force, would act as a catalyst for other nations.

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[86] Report of the Singapore International Commercial Court Committee (November 2013) at 20-22.
[87] Memorandum of guidance between the Dubai International Financial Centre Courts and the Supreme Court of New South Wales (9 September 2013).
[88] Memorandum of understanding between the Chief Justice of New South Wales and the Chief Judge of the state of New York on references of questions of law (20 December 2010). The memorandum was considered to some extent in the recent decision of *Marshall v Fleming* [2014] NSWCA 64.
[89] Convention on Choice of Court Agreements, June 30, 2005, reprinted in 44 I.L.M. 1294 (2005).
[90] On 10 October 2014 the EU Justice Ministers approved a decision to ratify the Hague Convention. Following approval by individual EU members, consent of the European Parliament will be sought.

70. There are naturally other innovative proposals, such as the concept put out for public consultation by the DIFC Courts that would allow parties opting into the jurisdiction to also refer their judgments for enforcement through the DIFC Arbitration Centre.[91] The purpose of this novel suggestion is to allow a judgment to simply be converted into an arbitral award, therefore opening up access to enforcement under the New York Convention. This type of innovation should be encouraged. However, in my view a preferable course would be for simpler processes for the recognition of foreign judgments on their own terms. We have achieved a considerable degree of international convergence in relation to the approach taken to arbitral awards under the Model Law. There is no reason to doubt that similar results could not be a delivered regarding the recognition of foreign judgments in civil proceedings.

IV CONCLUSION

71. To complete the reprise, as other judicial officers have said previously, Australian courts are supportive of international arbitration and adopt, as former Chief Justice Spigelman put it, a light touch regarding the review or arbitral awards. Amongst others, this approach is clearly demonstrated by the decision of the Full Court of the Federal Court in *TCL*. However, I remain firmly of the view that pointing to the outcome in one decision or the next is a poor indicator of the general approach taken by a particular jurisdiction to arbitration. It is an unsophisticated measure and is possibly indicative of an unhelpful level of naval gazing. We have, I believe, reached a time where we can work from the assumption that Australian courts will exercise their supervisory powers in relation to arbitration with utmost care and in a manner supportive of the arbitration process.

72. The reforms that were made to the IAA in 2010 should generally be allowed to settle. In particular, I believe there is little reason to support the ongoing calls for structural changes in terms of which courts are to hear IAA-related matters. However, courts must remain a viable alternative to arbitration in the international dispute resolution landscape. As the changes underway in Singapore reveal, courts and arbitration should not only co-exist in the sense that courts respect the autonomy of arbitration and review awards sparingly. Not only are courts and tribunals no longer trade rivals, they are instead dispute resolution alternatives that should be equally available to parties who trade across borders. In this respect, there is, I believe, more we can do to improve what is available on the court side of the equation.

[91] See "DIFC Courts Consult Legal Community on Pioneering Mechanism to Increase Enforceability of Judgments" (Media Release, 14 July 2014).