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PRYING OPEN THE COURT DOORS: MEETING THE CHALLENGES OF
INTERNATIONAL COMMERCIAL LITIGATION IN AUSTRALIA

5TH JUDICIAL SEMINAR ON COMMERCIAL LITIGATION

FRIDAY 21 OCTOBER 2016*

Introduction

1. The past few decades have seen a rapid growth in international business. In our modern age, we can speak to people halfway across the world in a second, we can buy products from overseas sellers in a click, and we can have business meetings and conferences with people who are tens of thousands of kilometres away.
2. Moreover, we have seen an exponential increase in international trade and investment, particularly in the Asia Pacific region. In 1990-1991, Australian exports to ASEAN nations were worth \$8 billion and our two-way trade with China was worth \$3.2 billion.¹ By 2014-2015, those figures were more than \$38 billion and \$155 billion, respectively, and China was Australia's largest trading partner.²
3. One predictable result is that more and more commercial contracts have a cross-border element, leading to an increase in cross-border legal disputes. With globalisation and further technological advancements, this trend is only set to increase. However, the improved ability of businesses to conduct their operations smoothly across national borders stands in sharp contrast to the complexities, difficulties and risk that attend the resolution of cross-

* I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this paper.

¹ Department of Foreign Affairs and Trade, 'Australia's Trade Performance 1990-91 to 2010-11', available at <<http://dfat.gov.au/about-us/publications/Documents/australias-trade-performance-1990-91-2010-11.pdf>>.

² Australian Government Department of Foreign Affairs and Trade, 'Australia's trade in goods and services by top 15 partners 2015', available at <<http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2015.aspx>>.

border disputes. Historically, throughout Asia, we have tended towards isolation in the resolution of such disputes, closing “the door on mutual recognition of the expertise of our legal professions and our judicial officers”.³

4. It is only recently that we have started to pry open these doors through efforts promoting convergence in the rules and procedures of international commercial law. The negotiations which led to the *Hague Choice of Court Convention*,⁴ which entered into force last year, provide an example of such convergence efforts. In this paper, in speaking of convergence, I am referring to the development of shared approaches to international commercial litigation amongst judicial systems.
5. In this paper, I will discuss some challenges that I have witnessed in the Australian context with commercial litigation involving a cross-border element and some ways in which those challenges might be addressed.
6. While litigation is merely one means by which to resolve international commercial disputes, it has many desirable qualities which necessitate its availability as a dispute resolution mechanism for commercial parties. As stated by the president of the Australian Bar Association, the benefits of transnational litigation, as opposed to arbitration, include

“... efficiency (such as the ability to join third parties), lower costs, and transparency. [Its] outcomes are predictable – leading to commercial certainty and reduction of commercial risk.”⁵
7. The benefits of litigation as a means for resolving disputes with a cross-border element require us to identify and meet its challenges. It is trite to say that legal risks and uncertainties can create difficulties in bilateral disputes, creating transactional costs that impede mutually beneficial economic relationships. As my predecessor, James Spigelman, said at this same conference in 2010,

³ F McLeod SC, ‘Australia’s Approach to International Commercial Dispute Settlement and Enforcement’, available at <https://www.lawcouncil.asn.au/lawcouncil/images/2016_-_Australias_Approach_to_International_Commercial_Dispute_Settlement_and_Enforcement_.pdf>.

⁴ *Hague Convention on Choice of Courts Agreements*, 30 June 2005, entered into force 1 October 2015, available at <<https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>>.

⁵ McLeod, above n 3.

“one of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment by imposing additional and distinctive burdens”.⁶

8. While I cannot discuss all of the difficulties arising in cross-border disputes in this paper, I will discuss three issues which commonly create uncertainty for parties, add complexity to the resolution of transnational commercial disputes and increase costs. First, selecting a forum. Second, obtaining and presenting evidence in this forum. And finally, enforcing foreign judgments.
9. While I bring an Australian perspective to the discussion of these issues, all countries in our region share the issues discussed in this paper to a greater or lesser extent.

Challenges in conducting international commercial litigation

(i) Selecting a forum

10. In many international commercial disputes, absent a choice of venue clause, there will be a legitimate claim by both parties that the courts of their respective countries are more appropriate to hear the claim. Most countries, including Australia, have ‘long-arm jurisdiction’. For example, the rules governing the jurisdiction of the Supreme Court of New South Wales provide for jurisdiction based on extra-territorial service, where an element of the proceedings is connected with New South Wales.⁷ However, problematically, there is no uniform test for determining the appropriate forum for resolving cross-border disputes.
11. Most of the common law world has adopted the ‘natural or appropriate forum’ test, originating from the 1987 UK decision, *Spiliada Maritime Corporation v Consulex*.⁸ In that case, two ships docked in British Columbia were damaged when wet sulphur was loaded onto them. One of the ships, the *Spiliada*, had Liberian owners and was insured by an English insurer.

⁶ The Hon JJ Spigelman AC, “Cross Border Issues for Commercial Courts: An Overview” (Second Judicial Seminar on Commercial Litigation, Hong Kong, 2010).

⁷ *Uniform Civil Procedure Rules 2005* (NSW), Pt 11.

⁸ [1987] AC 460.

The owners of both ships brought claims for damages in England against the Canadian defendants.

12. Following a claim by the defendants on the basis of *forum non conveniens*, that Canada would be better suited to hear the case, the House of Lords determined that a court will only grant a stay on this basis if the defendant discharges the burden of establishing that there is some other forum which is clearly or distinctly more appropriate for the resolution of the dispute. Once the court is satisfied that there is another *prima facie* appropriate forum, the burden shifts to the plaintiff to establish that there are special circumstances requiring the dispute to be heard in the United Kingdom, “by reason of justice”.⁹
13. In Australia, we have rejected the *Spiliada* test. Proceedings will only be stayed on the basis of *forum non conveniens* if the court is a “clearly inappropriate forum”.¹⁰ This has been taken to mean that proceedings will be stayed if they would be “oppressive”, “meaning seriously and unfairly burdensome, prejudicial or damaging” or “vexatious”, “meaning productive of serious and unjustified trouble and harassment”.¹¹
14. The test in Australia is significantly more generous to plaintiffs, with the result being that even if there is a more appropriate forum, proceedings may not be stayed. Australian courts have sought to avoid the issue of duplication of proceedings through the rule that if an action is pending elsewhere, it is considered *prima facie* vexatious and oppressive to commence an action in respect to the same issue locally. However, this consideration is not necessarily determinative.¹²
15. The absence of a uniform test for the appropriate forum for international disputes creates uncertainty regarding the circumstances in which courts will decline to exercise their jurisdiction, and a risk that more than one court will decide it is appropriate for it to determine aspects of the dispute. This problem has been augmented in recent years with the advent of anti-suit

⁹ Ibid [477]-[478].

¹⁰ See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Garsec v His Majesty The Sultan of Brunei* (2008) 250 ALR 682.

¹¹ See *Oceanic* per Deane J at 247, approved in *Voth* at 556.

¹² See *Henry v Henry* (1996) 185 CLR 571 at 590-591.

injunctions, restraining a party from instituting proceedings in a foreign state, as well as anti-anti-suit injunctions, seeking to restrain a party from seeking an anti-suit injunction in a foreign state. One can hardly imagine litigation that is less productive of commercial benefit. As stated by Spigelman, disputes regarding jurisdiction are “always, in all circumstances, a waste of money”.¹³

(ii) Obtaining and presenting evidence

16. Even if there is no dispute as to forum, issues also arise in bringing evidence, including witnesses, to the forum of the dispute. Getting witnesses to the forum of a transnational dispute is notoriously difficult. As stated by Dr Andrew Bell,

“the nature of transnational disputes is such that, especially a number of years after the event when the litigation eventually comes on, witnesses will often be geographically dispersed and, not infrequently, will no longer be employed by the same corporation or working in the same country as when the relevant events occurred, a function of the demise of notions of life-time employment and corresponding increases in labour mobility.”¹⁴

17. Further issues arise from the fact that witnesses may not be amenable to the particular forum’s processes, may not speak the language used in the forum and may not be capable of being compelled to attend the forum to give evidence.

18. Challenges also result from the fact that documentary evidence in transnational disputes may be in a foreign language. Translations of documents may be poor and crucial information can become ‘lost in translation’. As stated by Bell, “[m]atters of idiom, cultural dislocation, and the variable quality of translators who, in a hearing, will need to translate

¹³ The Hon. JJ Spigelman AC, “Transaction costs and International Litigation” (2006) 80 *Australian Law Journal* 438 at 442.

¹⁴ Dr A Bell SC, ‘Getting to the Forum: Witnesses in Transnational Commercial Litigation’ in KE Lindgren and N Perram (eds) *International Commercial Law, Litigation and Arbitration* (Ross Parsons, 2011) p 35.

both questions and answers all contribute to the possibility that a party's particular 'story' and evidence will be incomplete or distorted."¹⁵

19. One recent Australian case illustrating these issues is *PCH Offshore Limited v Dunn (No 2)*.¹⁶ Although that case involved a claim by an Australian company against its former CEO, the company's operations were almost entirely conducted in Azerbaijan and Kazakhstan. Most of the witnesses who would be giving evidence resided in Azerbaijan and were Azeri speakers. As stated by the Federal Court,

"there would be a very considerable expense to be incurred by each of the parties in transporting the witnesses from Azerbaijan to Australia to give evidence in Australia. In addition, there will be a need for there to be an interpreter ... [t]he evidence also shows that there are only two potential interpreters in Australia, and that they are not accredited by NAATI. Further, ... [the defendant] would face very considerable obstacles in seeking to procure the attendance of any reluctant Azerbaijan witnesses, at a trial in Australia."¹⁷

20. Another challenge in that case was that important documentary evidence in the proceedings was in the Azeri language and, despite being translated into English, many of the translated documents, particularly legal documents, were not easy to follow. Justice Siopis noted that the "position would be considerably exacerbated in a trial in Australia when there would be even more translated documents which would find their way in to the evidence".¹⁸

21. Justice Siopis ultimately granted a stay of the proceedings. His Honour held that the difficulties of conducting the litigation in Australia would not arise in Azerbaijan, due to the relatively few English speaking witnesses and English documents.¹⁹

22. One can imagine that difficulties such as those presented in *PHC Offshore* would be even more difficult to overcome when documents and witnesses

¹⁵ Ibid p 42.

¹⁶ (2010) 273 ALR 167.

¹⁷ Ibid [131]-[132].

¹⁸ Ibid [133].

¹⁹ Ibid [134].

are located in multiple countries and where documents are in a number of different languages. Such problems are further pronounced when those in possession of foreign evidence, or foreign witnesses requested to give evidence, are uncooperative and refuse to comply with requests.

(iii) Enforcement of foreign judgments

23. The final challenge that I will discuss is that of enforcement of foreign judgments, particularly those which require one party to pay another a large sum of money. This is one area in which litigation compares unfavourably to arbitration. Approaches to enforcement differ markedly throughout Asia and indeed around the world.

24. In Australia, the *Foreign Judgments Act*,²⁰ the *Foreign Judgments Regulations*,²¹ and common law prescribe when foreign judgments can be enforced. Whether a foreign judgment can be enforced depends on the type of judgment and when it was issued. Under the Act, money judgments from certain prescribed jurisdictions can be enforced through statutory registration of a foreign debt. If the foreign judgment is not from a prescribed nation, then strict common law tests are applied in order to provide for enforcement or recognition.

25. The common law rule for the enforcement of foreign judgments is that courts will only recognise a foreign judgment where the forum which rendered the judgment had personal jurisdiction, according to common law standards.²² The basis of personal jurisdiction under the common law includes:

- (a) the presence of the defendant in the jurisdiction at the time of service;
- (b) that the defendant is domiciled or ordinarily resides in the jurisdiction;
- (c) submission by the defendant to the jurisdiction by express agreement or conduct.²³

²⁰ *Foreign Judgments Act 1991* (Cth).

²¹ *Foreign Judgments Regulations 1992* (Cth).

²² See *Buchanan v Rucker* (1808) 9 East 192.

²³ See J Hogan-Doran, 'Enforcing Australian judgments in the United States (and vice versa): how the long arm of Australian courts reaches across the Pacific' (2006) 80 *Australian Law Journal* 361 at 363.

26. There are also a number of other criteria required at common law for the foreign judgment to be enforceable. These include that the judgment be final and conclusive, that it not be out of time and that, if it is a money judgment, it be for a fixed sum. In enforcing foreign judgments, the common law approach is that “a new action for debt is brought for which the foreign judgment is conclusive proof.”²⁴
27. In other countries, this approach has been codified in statute and made subject to defences that appear more expansive than those that exist currently under common law. In others, there is no statutory mechanism for enforcement, leading the court to “examine the merits of the judgment creditor’s claim afresh”.²⁵ In yet others, foreign judgments are ‘in principle’ enforceable, but clear mistakes of fact or law are a ground for refusing to enforce the judgment.²⁶
28. This diversity of procedural and substantive rules naturally creates risk and uncertainty, and where re-litigation of substantive issues is allowed for, adds significant transactional costs to international commercial disputes. It also reduces the relevance of courts as a mechanism for resolving such disputes.

Meeting the challenges of conducting international commercial litigation

29. The result of the aforementioned uncertainties and complexities is that cross-border litigation can be expensive, time consuming and unpredictable, placing a burden on international commercial life and encouraging parties to seek de-localised dispute resolution. The fact that many of these issues arise from differing standards and approaches between legal systems is an indication of the importance that convergence of commercial legal systems holds for international trade and investment.

²⁴ For further discussion, see Spigelman, above n 12, 449-450.

²⁵ Ibid p 450.

²⁶ Ibid.

(i) Convergence through judicial decision-making

30. The first way in which we can achieve some convergence across legal systems is through judicial decision making which involves an understanding of each other's legal systems. This process can already be seen to a degree in common law countries in our region. Hong Kong, Australia, Singapore, Malaysia and New Zealand all have common law systems with English heritage. In courts in those countries, there is a level of deference to and respect for one another's decisions, stemming from common history and a shared understanding of one another's legal systems, which assists in harmonisation in the development of legal principle.²⁷ Judges, in my view, to the extent possible, should seek to familiarise themselves with the similarities and differences of approach taken by their court and the approach of other courts in the region. Conferences such as this can significantly assist in this area. In some instances, it is possible for sitting judges in one country to sit on international disputes in the courts of another country. This is a development which in my view, should be encouraged.
31. Such processes are only possible when there is a degree of mutual understanding between commercial legal systems, making looking to foreign jurisdictions practicable. Knowledge and understanding increases courts' intellectual toolkit in resolving disputes, allowing us to draw upon the strengths of other courts in our region.
32. I am not suggesting that judicial decision making can lead to a degree of convergence between common and civil law systems in the Asia Pacific region which completely mitigates the challenges I have discussed. Not only is complete harmonisation impossible, but it is also undesirable. All courts in our region have spent many years developing their own legal systems and adapting the law to suit the particular needs of their countries. However, even a modest degree of convergence in judicial decision making can increase certainty and reduce the costs of parties to cross-border

²⁷ See for example *Ng Giap Hon v Westcomb Securities Pte Ltd and Others* [2009] SGCA 19 (29 April 2009), in which the Singaporean Court of Appeal was guided by development in other common law jurisdictions including Australia in declining to recognise an implied duty of good faith in contract in Singapore.

commercial disputes. For example, a greater understanding and appreciation of different legal concepts enables judges to make decisions on issues such as venue disputes with a greater understanding of what will occur if they accept or decline jurisdiction.

(ii) Meeting challenges through technology

33. Another domestic method for reducing some challenges of international commercial litigation is through technological advancements. In particular, problems with getting evidence to the forum have lessened with the advent of video-conferencing technology, the reduced speed and cost of international travel and enhanced translation technology.

34. In Australia, we have procedures in place for the use of video-conferencing technology to obtain testimony from foreign witnesses. For example, in the Supreme Court of New South Wales, parties wishing to bring a remote witness to give evidence via video conferencing can make a request to do so before a judge of the court. The party requesting the conference has responsibility to coordinate the conference and follow the formal procedure.²⁸ There are obviously many issues which can arise regarding the use of video-conferencing technology in trials, leading many judges to remain apprehensive about the use of video-link.²⁹ However, with the increasing use of this technology, these issues can be addressed by the development of principles and rules that enable the efficient and fair use of this method of giving testimony.

35. Technology also opens up many other exciting possibilities. As stated by Dr Andrew Bell, “[t]he increasing availability of high quality technology also increases the scope for active *judicial* cooperation in transnational cases and opens up the possibility of ‘virtual litigation’ – a phenomenon perhaps peculiarly suited to the resolution of transnational disputes and by no means as remote a prospect as might be imagined.”³⁰ Although virtual litigation is still a thing of speculation, it is abundantly clear that it could

²⁸ See *Uniform Civil Procedure Rules 2005* (NSW) rules 2.3, 31.3 and 32.6.
http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_facilitiesupport/sco2_courtroomtechnology/sco2_videoconferencingteleconferencing.aspx.

²⁹ Bell, above n 13, pp 48-49.

³⁰ *Ibid* p 37.

provide many benefits where litigation involves parties, witnesses and documents from different corners of the globe.

(iii) Meeting challenges through international agreements

36. However, we need not restrict ourselves to these modest domestic approaches. Meeting challenges through judicial decision-making and technological advancements can only go so far. At the governmental level, multilateral agreements which standardise aspects of procedure in international commercial litigation can remove much of the complexity and uncertainty which exists in this area. Discussions at forums such as the United Nations Commission on International Trade Law, the International Institute for the Unification of Private Law or the International Association of Restructuring, Insolvency and Bankruptcy Professionals are undoubtedly useful in this respect. Indeed, many international agreements already exist which can mitigate many of the challenges that I have mentioned.

37. First, in regard to choice of venue disputes, some work has already been done at the international level. The *Hague Choice of Court Convention* entered into force on 1 October 2015. Under the Convention, signatories agree to adhere to choice of court agreements made by parties in civil litigation. The courts of signatories will thereby stay all proceedings where another jurisdiction has been chosen to hear the dispute, apart from in very limited circumstances.

38. The Convention also goes some way towards addressing the third challenge I have discussed. A judgment rendered by a chosen court that meets the requirements of validity under the Convention must be recognised and enforced in other signatory states, subject to certain exceptions.

39. One commentator has observed that in focusing on recognition of agreements, rather than of foreign judgments,

the negotiators managed to hide many of the difficult issues under the umbrella of consent ... Of course, the court receiving the judgment is still lending sovereign force to the judgment of the court of a different

sovereign, but the intervening agreement removes much of the pressure of scrutiny from the receiving court.³¹

40. While the Convention has only attracted the ratification of the European Union, Mexico and Singapore, Singapore's ratification this year has given it new momentum. Australia is yet to sign the Convention, however, there has been a renewed push for it to do so and the government is currently giving active consideration to signing and ratifying the Convention.³²

41. In my opinion, ratification of the *Choice of Court Convention* would be a positive step towards reducing uncertainties and risk for parties engaged in international trade and commerce. The Convention has, at its core, respect for the autonomy of commercial parties. By setting out the procedure for selecting a forum, where a choice of forum agreement is in force, the Convention reduces the risk of duplication of litigation and the costs of establishing jurisdiction and enforceability.

42. In regard to the second challenge, the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*³³ provides a procedure for obtaining evidence from witnesses abroad. The Convention came into force in October 1972. Australia is a signatory. However, we have made a number of reservations and declarations. The Convention provides a procedure by which a witness can be summonsed to physically attend in a foreign jurisdiction before a 'commissioner'. The evidence is then transcribed or filmed and the transcript or film is transmitted to the requesting court.

43. At least in Australia, the Convention has been frequently used to obtain evidence from witnesses in international commercial litigation. Despite the increased use of video-conferencing, the Convention enables courts to take evidence from witnesses who are uncooperative, need to be compelled to give testimony or where video-conferencing is unavailable. Video-link can only be used where a foreign witness voluntarily agrees to give evidence,

³¹ WJ Woodward, 'Saving the Hague Choice of Court Convention' (2008) 29 *University of Pennsylvania Journal of International Law* 657 at 661-662.

³² McLeod, above n 3, [26].

³³ *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 18 March 1970, ratified 7 October 1972, available at <<https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf>>.

where there are sufficient video-conferencing facilities in the jurisdiction where the witness resides and where time differences don't make it impractical or unfair for the conferencing to occur. Further, Australian judges have been said to have a preference to see and hear witnesses give evidence where the witnesses' credit is involved.³⁴ Although, I believe that this preference is declining with the increasing reliance on documentary and other objective material in determining contested issues. That being said, the Convention does have an important role to play in enabling the smooth conduct of international commercial litigation where witnesses are dispersed across borders.

44. In regard to the third challenge, the 'Judgements Project', the precursor to the Hague Convention, has recently been revived. Previous negotiations for a multilateral treaty governing the recognition and enforcement of judgments have consistently broken down.³⁵ As stated by Spigelman, "[c]ourts, unlike commercial arbitrators, are regarded as manifestations of national sovereignty which governments are reluctant to compromise, even in the promotion of economic growth."³⁶

45. However, in October 2015, a draft text of the *Hague Convention on Recognition and Enforcement of Foreign Judgments* was finalised.³⁷ In June of this year, it was presented to a Hague Conference Special Commission.

46. This Convention is complementary to the *Choice of Court Convention* and provides for the recognition and enforcement of judgments from other signatory states that meet the requirements set out in the text. The basic principle in the Convention is that the judgments of signatory states will be recognised and enforced unless one of the specified grounds for refusal is met. The Convention does not prevent signatories from recognising and enforcing foreign judgments under national law or other treaties.

³⁴ Bell, above n 13, p 47.

³⁵ See The Hon JJ Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation' (Speech, Commonwealth Law Conference, 7 April 2009).

³⁶ *Ibid.*

³⁷ Working Group on the Judgments Project, *Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments*, April 2016, available at <<https://assets.hcch.net/docs/01adb7d9-13f3-4199-b1d3-ca62de79360f.pdf>>.

47. The *Choice of Court Convention* carves out rules for a common form of international transaction, namely, those involving contracts. However, there are a range of international commercial disputes that it does not cover and which are excluded under article 2. These include insolvency matters, consumer transactions, anti-trust matters and intellectual property disputes.³⁸

48. As such, for these matters, and those in which no choice of court agreement has been reached, the Judgments Project presents new opportunities to reduce the cost and uncertainties regarding the enforceability of foreign judgments.

Conclusion

49. These measures by no means address all of the challenges in international commercial litigation. This is an expanding area of law and new challenges constantly present themselves.

50. Ultimately, global trade and commerce does not occur in a vacuum. For cross-border trade and commercial arrangements to work successfully, it is vital that such activity is conducted within a well understood legal framework. Efforts to promote convergence of commercial legal systems, through such mechanisms as I have described in this paper, provide an important means to ensure that business operations can be conducted smoothly across borders, with reduced risk and uncertainty.

51. The efficacy of the convergence mechanisms I have discussed depends on widespread support throughout the profession and the judiciary. It also requires dialogue between judicial systems and enhanced understanding of each other's approaches to cross-border dispute resolution. In this way, conferences such as the Judicial Seminar on Commercial Litigation are increasingly important. I look forward to continued dialogue between countries in this region and to opening the doors to the convergence of the rules and procedures of international commercial litigation.

³⁸ *Hague Choice of Court Convention* art 2.