THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

CLOSING CEREMONY ADDRESS

INTERNATIONAL LAW ASSOCIATION BIENNIAL CONFERENCE

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1. I would like to begin by respectfully acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders past, present and emerging.
2. It is my great pleasure to be invited to speak at the closing ceremony of this conference. I thank Dr Christopher Ward for the invitation and extend my warm welcome to New South Wales to the many distinguished judges and guests in attendance.
3. The outstanding program which has been on offer this week is a testament to the international legal profession's commitment to working beyond national borders on the most significant issues facing our communities.
4. In light of the depth and breadth of this program, I will endeavour to keep my remarks brief and light, and not take undue advantage of the prerogative of a judge to have the last word. I am aware that there are now only a few speakers standing between the week's packed schedule and a well-deserved night off.

[*] I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

5. The theme for this year's conference, "Developing International Law in Challenging Times", acknowledges the difficult international climate in which those committed to the international rule of law must now operate. The sessions have covered climate change, indigenous rights, corporate social responsibility, modern slavery, the use of force and the challenges facing international commercial and investment arbitration – among many other topics.
6. Indeed, today alone has covered the "Challenges of Extraterritorial Activities", and whether we are witnessing the "Endtimes of Human Rights", demonstrating the commitment of the international legal fraternity to facing the challenges of the future head on.
7. It would be impossible to overstate the importance and significance of this commitment in the current global climate. The three pillars of the international rule of law – private international law, public international law and international arbitration – are each indispensable to the maintenance of peaceful relations in the midst of rising international tensions.
8. I understand that over the last week you have covered these issues in some detail, and from the perspective of numerous different actors. I want to take this opportunity to focus on the role of the courts in the development of international law, and particularly the maintenance of the rule of law. I will also touch on the approach of Australian courts to these matters.

The role of courts in international law

9. Courts typically play a role in matters of private international law and arbitration. It is less common to see matters of public international law in domestic courts, at least in Australia, the primary exception being foreign state immunity. In all spheres, however, domestic courts are the pillar on which the effectiveness of trans-national dispute resolution rests – that is, the courts can ultimately decide to enforce or not enforce and thereby enable or frustrate the operation of international law.[1]

10. To this end, it is important that courts perform their role with a view to upholding and promoting the rule of law in international commercial and public law disputes. One of the primary ways that a court can impede the international rule of law is through the nebulous concept of public policy as a ground for denying enforcement.

11. Courts must pay increasing regard to the decrees of other countries and have regard to their notions of public policy, even where this conflicts in some way with domestic policies. This is not to say that we should ignore the basic tenets that underpin our society, but rather understand that these are not universally accepted. Public policy should only be invoked in exceptional circumstances, not used as means to enforce the idiosyncratic views of one region over another. The more courts are willing to do so, the more they will gain international respect. Parochialism can and should give way to internationalism.

[1] JG Wetter, 'The present status of the International Court of Arbitration of the ICC: an appraisal" (1990) 91 *American Review of International Arbitration* 58.

International Arbitration

12. To this end, I can say with confidence that Australian courts are well past the parochialism and particularism that attended the early English approach to enforcement of arbitral awards. There is widespread recognition that arbitration is critical to the continued stability of transnational commerce. As my predecessor the Honourable James Spigelman has stated, "the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch of supervisory jurisdiction directed to maintaining the integrity of the system."[2]

13. In the matter of *TCL Air Conditioner*[3] it was firmly established that Australian courts will interfere with enforcement only in limited circumstances, such as where a party is not given a fair and reasonable opportunity to present their case.[4] Courts do not and must not interfere in the merits of an arbitral award and bail out parties who have made choices that they might come to regret.[5]

14. Aside from enforcement, courts also play an important role in facilitating the process, including in staying proceedings so that parties are held to their

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[2] The Hon JJ Spigelman AC, 'Foreword' in L Nottage and R Garnett (eds), *International Arbitration in Australia* (The Federation Press, 2010) viii.
[3] *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83.
[4] See *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468. See also *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCCA 229; 324 ALR 372; *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSCA 37; (2015) 317 ALR 786.
[5] *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [37] (Croft J).

bargain to arbitrate,[6] issuing subpoenas,[7] assisting with the appointment of a tribunal,[8] determining its jurisdiction,[9] enforcing interim measures[10] and assisting in taking evidence.[11]

15. The general acceptance by Australian judges of arbitral awards and our willingness to facilitate the process has increased this country's attractiveness as a regional arbitration hub. This has been evident in the opening of multiple new arbitration centres across the country in the past few years.[12] It was also evident earlier this year, when the International Council for Commercial Arbitration held its 2018 Congress in Sydney – which I was pleased to be given the opportunity to attend.

16. Of course, courts do have a role at the enforcement stage that amounts to more than a mere "rubber-stamping" exercise.[13] Where this role causes the most judicial angst, I think, is in the question of public policy. However, in line with the approach I outlined earlier, Australian courts tend to construe this ground narrowly.[14] Justice Hammerschlag of the NSW Supreme Court, in a case in 2015, noted that it is not concerned with "procedural imperfections"

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[6] *International Arbitration Act 1974* (Cth) s 7, Model Law Article 8.
[7] *International Arbitration Act 1974* (Cth) s 23, Model Law Articles 9, 17J.
[8] Model Law Articles 11, 13-14.
[9] Ibid Article 16.
[10] Ibid Articles 17H-17I.
[11] *International Arbitration Act 1974* (Cth) s 23J, Model Law Article 27.
[12] Since the Australian Centre for International Commercial Arbitration opened its doors in 2010, there has been a significant increase in the use of Australian arbitration seats by international parties. In 2014, the Melbourne Commercial Arbitration and Mediation Centre opened and in 2015, the Perth Centre for Energy and Resources Arbitration opened.
[13] *International Arbitration Act 1974* (Cth) s 8, Model Law Articles 34-6.
[14] *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83, [80].

but a "negation of rights which our system recognises as being fundamental and therefore matters of public policy".[15]

17. A strong statement was made by Justice Foster in the Federal Court in 2012, that "it should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state"[16] and his Honour has later affirmed that "[t]he mere fact that enforcing [an arbitral decision] might not be consistent with principles developed in Australia" is not sufficient to refuse to enforce an award based on public policy.[17] The test has generally been described as requiring something contrary to "fundamental principles of justice and morality".[18]

18. The widespread uniformity of this approach across parties to the New York Convention has contributed in large measure to the application of the rule of law to transnational commercial transactions. The production and maintenance of this cross-border dispute resolution system, supported by but independent from national courts, is now an indispensable fixture of international commercial law.[19]

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[15] *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [46]-[47].
[16] *Traxsys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 291 ALR 99; [2012] FCA 276, [105].
[17] *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636. [67].
[18] *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83, [76]. See also *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [101].
[19] See James Allsop, 'Commercial and Investor-State Arbitration: The Importance of Recognising their Differences" (Speech delivered at the 2018 ICCA Congress, Sydney, 16 April 2018) 21.

Private International Law

19. It has added to the long history of private international law providing a means for litigants of different countries to resolve their disputes. The narrow construction of the public policy exception in arbitration is familiar in that context. The fact Australian law would have produced a different result to a foreign court, while "in some sense evidence that Australian law has a different 'policy' from the relevant foreign law … should not be sufficient".[20] Rather, the offence must be "profound" before refusal to enforce is warranted.[21]

20. In the matter of *Quarter Enterprises v Allardyce Lumber Company,* a case on which I sat in 2014, the Court was asked to set aside registration of a costs judgment of the High Court of the Solomon Islands on the ground, amongst others, that it was obtained by fraud – an argument which the Court rejected.[22] In the course of doing so, the Court considered whether an application to set aside the registration of a foreign judgment on the ground of fraud can only be made on the basis of evidence not available at trial.[23] While it was not necessary to decide the issue, the Court preferred the view that the party alleging fraud must establish that the allegation rests on evidence not available to be produced to the foreign court and that such evidence would have altered the result of the foreign court.[24] In preferring this view, I noted

[20] M Davies, A S Bell and P L G Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 9th ed, 2014) 928.
[21] Ibid.
[22] *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* [2014] NSWCA 3.
[23] Ibid [136] (Bathurst CJ, Gleeson JA and Sackville AJA agreeing).
[24] Ibid [137]-[146].

that "[t]here is no reason in a period of increasing international trade with the corresponding likelihood of further cross-border disputes to treat registered judgments any differently to judgments of domestic courts".[25] This approach was subsequently adopted by the Victorian Supreme Court in 2015 in *Doe v Howard.*[26]

Public International Law

21. Finally we come to public international law. As I mentioned, matters of this nature come less frequently before domestic courts in Australia, the primary exception being matters of foreign state immunity. In two cases in recent years, one involving the Republic of Nauru[27] and the other the People's Republic of China,[28] the Supreme Court of NSW found that the foreign state in question was entitled to immunity. In relation to Nauru, it found that the funds in bank accounts in Australia were immune from execution under a garnishee order on the basis that they were set aside for governmental and not commercial purposes.[29] The Court noted the importance of bearing in mind the individual circumstances of Nauru, where the government operates many services beyond what might be considered core functions of government in Australia, due to its remote location and small geographical

[25] Ibid [138].
[26] [2015] VSC 75, [127].
[27] *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWCA 360. See also *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.
[28] *Li v Zhou* [2014] NSWCA 176.
[29] *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWCA 360, [206] (Bathurst CJ, Beazley P agreeing) as upheld in relation to execution in *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, [128] (French CJ and Kiefel J), [131] (Gageler J), [256] (Nettle and Gordon JJ).

size and population.[30] Consideration of this kind for the customs and practices of other countries is a necessary part of the Court's role in matters of international law. In this way, confidence as between nation states that international law is a legitimate means of resolving disputes is enhanced. This in turn goes a long way to combatting anti-globalisation and sentiments of mistrust.

Cross-border court cooperation

22. Finally, courts can engage in cross-border dialogue with other courts, and ensure there is mutual understanding of each others' processes and procedures. The Supreme Court of New South Wales, for example, has entered into memorandums of understanding with the Chief Judge of the State of New York, the Supreme Court of Singapore, the Dubai International Finance Centre Courts, and the High People's Courts of Guangdong Province, Hubei Province and Shanghai. The memorandums entered into with New York and Singapore were in recognition of the difficulties and costs involved in traditional processes for determining questions of law by the judges of one state with respect to the law applicable in the jurisdiction of the other state, and provide for the referral of questions of law between the courts. In relation to the Dubai Finance Centre Courts, the Memorandum simply sets out the parties' understanding of the procedures for the enforcement of money judgments in the other party's courts.

[30] Ibid [176]. See also *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, [125] (French CJ and Kiefel J), [238] (Nettle and Gordon JJ).

23. Similarly, the Standing International Forum of Commercial Courts, which includes 37 different commercial courts, is in the process of developing a Memorandum of Enforcement between its members. In this document, the Commercial Court or jurisdiction of each member country would describe briefly the most efficient procedure through which money judgments of another country can be enforced. The aim is to state in a convenient form the arrangements that are already in place in the country, and although not a binding agreement, in my opinion it will improve the confidence of international commercial parties in the prospects of enforcement.

Conclusion

24. Courts should continue to take this sort of commercial-problem solving approach to transnational dispute resolution. In doing so they improve the stability of transnational commerce, which has a significant impact on broader international stability. The role of the courts is, however, only one small part of the work those present at this conference undertake regularly. I thank you for your commitment to this work, for the opportunity to address you this morning, and I wish you safe travels back to your home countries. It is my hope that the dialogue and discussions that have begun over the last week will continue over the next two years, before we meet again in Japan. Thank you.