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Introduction

1. It is a pleasure to have the opportunity to speak at this symposium, as we celebrate 60 years of the New York Convention.¹ I would like to begin by 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. I intend this evening to briefly outline first, the history of judicial suspicion towards arbitration that, in my opinion, has given way to collaboration and complementarity,² second, the functions that courts exercise under the Convention, and third, the experience of the Supreme and Federal Courts in dealing applications under the Convention.
3. I then want to move a little beyond the confines of the New York Convention to the investment arbitration sphere, and consider whether the role of the courts will continue to be non-interventionist when domestic court decisions are brought into question by arbitral tribunals. This is an issue that looms large in the field. It involves broad questions of public policy, the public interest and how the domestic rule of law interacts with the international one. First, however, let me outline the story of the courts and the Convention.

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

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Australian Treaty Series 1975 No 25, (opened for signature 10 June 1948, entered into force (Australia) 24 June 1975) ('New York Convention').

² See James Allsop, 'National Courts and Arbitration: Collaboration or Competition?' (Speech delivered at Chartered Institute of Arbitrators Centenary Conference, London, 2 July 2015).

The historic approach

4. Historically, English courts retained extensive jurisdiction over arbitral process and outcomes, and intervened directly in the course of the proceedings.³ In 1609 Sir Edward Coke, held that an arbitral agreement was “by the law and of its own nature countermandable”.⁴ Two-hundred years later, the United States Supreme Court referred to the process as “a mere amicable tribunal”.⁵
5. The common law had a long tradition of such distrust — although in reality it had roots in economic motives. Arbitration threatened barristers’ exclusive right of audience, and also judges’ livelihoods, as the emoluments of judges depended upon court user fees more than government grants.⁶ In the words of Lord Campbell in 1856, there was “great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil”.⁷

The current approach

6. I hardly need to remind the older practitioners in the room that unfortunately, Australian courts did inherit this traditional suspicion. In fact, you probably don’t want to be reminded of it – you had to live through it. Under the old Commercial Arbitration Acts, awards were often challenged for what can be described as “technical misconduct”.⁸
7. The New York Convention, and the Australian legislative response, has slowly but surely changed the judicial approach to foreign arbitral awards.

³ Stavros Brekoulakis, ‘Introduction: The Evolution and Future of International Arbitration’ in Stavros Brekoulakis, Julian D.M. Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) 1.

⁴ *Vynior’s Case*, 8 Cohe. Rep 81b, 82a, 77 Eng Rep 597, 599 (England, King’s Bench).

⁵ *Hobart v Drogan* 35 US 108 (1836) (US Supreme Court) p 119.

⁶ See Keith Mason, ‘Changing Attitudes in the Common Law’s Response to International Commercial Arbitration’ (Speech at the International Conference on International Commercial Arbitration, Sydney, 9 March 1999).

⁷ *Scott v Avery* 28 LT 207, 211. Note the passage was replaced in *Scott v Avery* 5 HLC 811, 853 with “it probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction”. See the discussion in Mason, above n 6.

⁸ See V Donneberg, ‘Judicial Review of Arbitral Awards under the Commercial Arbitration Acts’ (2008) 30 *Australian Bar Review* 177 quoted in L Nottage and R Garnett, ‘Introduction: Addressing Australia’s Arbitration Ambivalence’ in L Nottage and R Garnett (eds) *International Arbitration in Australia* (The Federation Press, 2010) 4.

Although Australia was comparatively slow in adopting the Convention,⁹ the *International Arbitration Act* has become one of Australia's most important pieces of legislation.¹⁰ It brought Australia into an international system for the peaceful and civilised resolution of disputes, under international rule of law principles. The enforcement aspect of the New York Convention is the pillar on which this system rests, and its efficacy is thus dependant on the domestic court process.¹¹

8. In my opinion, we are well past the parochialism and particularism that initially attended the judicial approach to enforcement. Parochialism has given way to internationalism. 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."¹²
9. The Federal Court has repeatedly affirmed its approach in *TCL Air Conditioner*¹³ that it will not interfere with the enforcement of arbitral awards save in very limited circumstances, such as where a party is not given a fair and reasonable opportunity to present their case.¹⁴ The Supreme Court of New South Wales has applied the same approach, for example in a case on which I sat in 2015, *Aircraft Support Industries v William Hare UAE*,¹⁵ as has the Victorian Supreme Court in the *Sauber Motorsport*¹⁶ decision.

⁹ Nottage and Garnett, above n 8, 3.

¹⁰ See James Allsop, 'Foreword' in Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis Butterworths, 2018) vii.

¹¹ JG Wetter, 'The present status of the International Court of Arbitration of the ICC: an appraisal' (1990) 91 *American Review of International Arbitration* 58.

¹² The Hon JJ Spigelman AC, 'Foreword' in L Nottage and R Garnett (eds), *International Arbitration in Australia* (The Federation Press, 2010) viii.

¹³ *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83.

¹⁴ See *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468.

¹⁵ *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCCA 229; 324 ALR 372.

¹⁶ *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSCA 37; (2015) 317 ALR 786.

10. Courts have recognised that central to arbitration is the concept of party autonomy, and just as the parties enjoy the benefits of that autonomy, they must be willing to accept the consequences of that choice. 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”.¹⁷
11. Aside from enforcement, courts also play an important role in facilitating the arbitration process, including in staying proceedings so that parties are held to their bargain to arbitrate,¹⁸ issuing subpoenas,¹⁹ assisting with the appointment of a tribunal,²⁰ determining its jurisdiction,²¹ enforcing interim measures²² and assisting in taking evidence.²³
12. The general acceptance by Australian courts of arbitral awards and our willingness to facilitate the process has increased Australia’s attractiveness as a regional international arbitration hub. This has been evident in the opening of multiple new arbitration centres across the country in the past few years.²⁴ 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.

The role of the judiciary in questions of public policy

13. Of course, courts do have a role at the enforcement stage that amounts to more than a mere “rubber-stamping” exercise.²⁵ While the eight grounds within s 8 for refusal to enforce are designed to ensure limited curial intervention,²⁶ they do ensure a supervisory role to maintain the “structural integrity”²⁷ of arbitral proceedings.

¹⁷ *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [37] (Croft J).

¹⁸ *International Arbitration Act 1974* (Cth) s 7, Model Law Article 8.

¹⁹ *International Arbitration Act 1974* (Cth) s 23, Model Law Articles 9, 17J.

²⁰ Model Law Articles 11, 13-14.

²¹ *Ibid* Article 16.

²² *Ibid* Articles 17H-17I.

²³ *International Arbitration Act 1974* (Cth) s 23J, Model Law Article 27.

²⁴ See generally TF Bathurst AC, ‘Opening Address’ (Speech delivered at the 4th International Arbitration Conference, 22 November 2016, 8-9).

²⁵ *International Arbitration Act 1974* (Cth) s 8, Model Law Articles 34-6.

²⁶ The enforcement and setting aside of awards is also governed by articles 34-36 of the Model Law and ss 34-36 of the Uniform Domestic Arbitration Acts.

²⁷ *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1, [7] (Tang V-P, Kwan and Fok JJA agreeing).

14. The ground where this role causes the most angst, I think, is the question of public policy under s 8(7). This is probably because the concept of public policy is necessarily nebulous. Probably to your collective relief, as I have touched on earlier, the courts approach has, on the whole, been to construe it narrowly,²⁸ lest the purpose of the Convention and the Act be undermined.²⁹ Justice Hammerschlag in a case in 2015 noted that it is not concerned with “procedural imperfections” but a “negation of rights which our system recognises as being fundamental and therefore matters of public policy”.³⁰
15. 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”.³¹ In 2014 Justice Foster again expressed the “internationalist” approach that Australian courts will take, in *Armada (Singapore) v Gujarat*,³² stating 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.³³
16. The test has generally been described as requiring something contrary to “fundamental principles of justice and morality”.³⁴ To sustain an argument based on a breach of the rule of natural justice it is necessary to show “real unfairness” or “real practical injustice”.³⁵ It must be said, however, that “unfairness”, “justice” and “morality” are concepts which at some point must involve a value judgment. As a result, there is an inherent tension between certainty of enforcement, and the court’s role in making these judgment

²⁸ *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83, [80].

²⁹ *Ibid.*

³⁰ *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [46]-[47].

³¹ *Traxsys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 291 ALR 99; [2012] FCA 276, [105].

³² *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636.

³³ *Ibid* at [67].

³⁴ *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].

³⁵ *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37; (2015) 317 ALR 786, [7]-[8]. See also *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCCA 229; 324 ALR 372, [42].

calls. Whilst in the commercial arbitration field I think there is a settled body of principles which provides reasonable certainty; these concepts remain problematic when it comes to investor state dispute settlement.

The role of the “public” in Investor-State Dispute Settlement

17. This is probably because investment arbitration inherently involves questions of the public interest and public purpose. Taking as an example the recently signed TPP-11,³⁶ Article 9.8 prohibits the expropriation or nationalisation, directly or indirectly, of a “covered investment” except where it is for a “public purpose”. It also provides in Annex 9-B that “non-discriminatory regulatory action” designed to “protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances”.³⁷ When considering disputes, tribunals take into account whether measures taken are “proportional to the public interest”.³⁸ Much like the question of public policy, questions of proportionality, particularly when considering the public interest, must at some point involve a value judgment.

The debate around Investor-State Dispute Settlement

18. The legitimacy of tribunals making these judgment calls, outside the accountable structures of domestic government, is in sharp focus. The debate over ISDS is highly charged. In 2014, for example, *The Economist* went so far as to call it “a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law”.³⁹ Competing submissions made to the Senate Standing Committee considering the issue in 2014 show that there are intelligent and thoughtful points on both sides of the debate.⁴⁰ Some stressed the

³⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, <<http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/official-documents/Pages/official-documents.aspx>>.

³⁷ Ibid Ch 9.

³⁸ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability (3 October 2006) [195] citing *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/02 Award ¶ 154 (29 May 2003) [122].

³⁹ The arbitration game: Investor-state dispute settlement’, *The Economist* (online), 11 October 2014 <<https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game>>.

⁴⁰ Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014

importance of ISDS when dealing with developing countries with judicial systems that may not meet accepted global standards, its increasing acceptance by our major trading partners in the Asia-Pacific, and the fact there has only been one claim brought against Australia in the relatively long history of our bilateral investment treaties.⁴¹ On the other hand, competing submissions raise legitimate concerns about the lack of public accountability, regulatory chill and the cost to taxpayers. The Productivity Commission in 2010 had also recommended against including ISDS in future treaties, essentially because in its opinion, the drawbacks outweigh the benefits.⁴²

The interaction of national judiciaries and ISDS tribunals

19. Now, I know some of you may be thinking I have gone completely off-script from the topic of the New York Convention. I disagree and I hope to persuade you otherwise. Say, for example, Phillip Morris' claim against Australia had been successful and it was sought to be enforced in this country.⁴³ The dispute in that case was not conducted under ICSID, and thus the award would have fallen to be enforced under the New York Convention. Now the High Court had held in *JT International* that there was no acquisition of property within the meaning of s 51(xxxi) of the *Constitution*.⁴⁴ It is difficult to see how a conclusion could be reached consistently with that decision which nevertheless found there was an expropriation.⁴⁵ A domestic court may therefore have been called to enforce, pursuant to the Convention, an award making findings inconsistent with a binding High Court authority.

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Report>.

⁴¹ See Professor Luke Nottage, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (2 April 2014)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions>.

⁴² Productivity Commission, *Bilateral and Regional Trade Agreements* (2010)

<<http://www.pc.gov.au/inquiries/completed/trade-agreements>> ch 14.

⁴³ *Phillip Morris Asia Ltd v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

⁴⁴ *JT International v Commonwealth* (2012) 250 CLR 1.

⁴⁵ Mark Davison, 'The Bilateral Investment Treaty Dispute between Australia and Philip Morris Asia: What Rights are Relevant and How Have they Been Affected?' (2012) 9(5) *Transnational Dispute Management* 9.

20. This was a concern highlighted on a number of occasions by the Hon Robert French AC, former Chief Justice of the High Court of Australia.⁴⁶ He considered that while the issue is presently of “small compass” it “has the potential to become larger” and should be addressed sooner rather than later.⁴⁷ In recognition of this, the Council of Chief Justices of Australia (of which I was, and continue to be, a member) took the step of writing to the Attorney-General of Australia requesting that regard be had to the question of how the decisions of domestic courts might be called into question in arbitrations, either by submissions that those decisions themselves breach the treaty by effecting an expropriation, or by seeking findings inconsistent with those decisions,⁴⁸ as for example in the Philip Morris case.

21. There are of course important differences between the ICSID⁴⁹ and New York Conventions. ICSID was designed to achieve a “total divorce” from the enforcement system under the New York convention.⁵⁰ ICSID awards are therefore “directly enforceable, upon registration and without further jurisdictional control”.⁵¹ The role of the courts in investor-state dispute settlement was to be minimised so far as possible. This is legislatively recognised in the *International Arbitration Act*, as section 32 provides that the Convention has the force of law in Australia, and section 33 that an award is binding and not subject to appeal, save to the extent provided for in the Convention. As was stated in the *Vivendi v Argentina* stay decision, “[a]ny possible intervention by a judicial authority in the host State is unacceptable under the ICSID Convention, as it would render the awards

⁴⁶ RS French AC, ‘Investor-State Dispute Settlement – A Cut Above the Courts?’ (Speech delivered at the Supreme and Federal Courts’ Judges’ Conference, Darwin, 9 July 2014); Robert French AC, ‘ISDS – Litigating the Judiciary’ (2015) 81 *Arbitration* 288.

⁴⁷ *Ibid* (2014) 15.

⁴⁸ Letter from Council of Chief Justices to Attorney-General, 6 November 2014.

⁴⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (‘ICSID Convention’).

⁵⁰ *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Second Annulment Proceeding), decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (4 November 2008) [35].

⁵¹ *MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/17, Decision on the Respondent’s Request for a Continued Stay of Execution (1 June 2005) [31].

simply a piece of paper deprived from any legal value and dependant on the will of State organs”.⁵²

22. In Australia, an award was enforced under ICSID and Part IV of the *International Arbitration Act* just last year by Justice Gleeson of the Federal Court. Her Honour made orders granting leave for two ICSID decisions against the Democratic Republic of Congo to be enforced as if judgments of the Court, pursuant to s 35(4) of the *International Arbitration Act*.⁵³

23. Notably, however, section 35 does provide that an award may be enforced as if a judgment or order of the Court, but only with leave. Some commentators have warned that equalising ICSID awards to national judgments could mean that by “creative argument, the condemned States may still seek relief from a final judgment under national laws which provide exceptional remedies to final judgments”.⁵⁴ One question that comes to mind is to what extent a question of inconsistency with a judgment of a domestic appellate court might affect the question of leave pursuant to section 35.

24. Similarly, in relation to awards sought to be enforced pursuant to the New York Convention – and putting to one side the issue of execution of state assets and state immunity — would an inconsistent domestic judgment on the same issue have any impact on the question of public policy under s 8(7)? Is it contrary to “fundamental Australian public policy”⁵⁵ that an award has been made in rejection of a domestic decision, or even perhaps in contention that a Court decision has itself effected an expropriation?

25. While the integrity of domestic court processes and the domestic rule of law might suggest it is, there are equally arguments to be made on the other side. The aim of the ICSID Convention, and to a large extent the New York

⁵² *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Second Annulment Proceeding), decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (4 November 2008) [36].

⁵³ See *Lahoud v The Democratic Republic of Congo* [2017] FCA 982 (23 August 2017) (Gleeson J).

⁵⁴ Inna Uchkunova and Oleg Temnikov, ‘Enforcement of Awards under the ICSID Convention — What Solutions to the Problem of State Immunity?’ (2014) 29(1) *ICSID Review* 187, 191 citing Edward Baldwin, Mark Kantor and Michael Nolan, ‘Limits to Enforcement of ICSID Awards’ (2006) 23 *Journal of International Arbitration* 1, 11.

⁵⁵ *Stern v National Australia Bank* [1999] FCA 1421, [144] (in relation to the analogous obligation on a party resisting the enforcement of a foreign judgment).

Convention, was to eliminate or minimise state intervention. From our perspective, court intervention might seem justified where arbitration has called into question the authority and finality of an Australian court's decision. However, as I mentioned earlier, investment arbitration sits outside the domestic court structure for good reason, namely to mitigate the risk that domestic judicial systems do not meet accepted global standards.

26. In that context, an Australian court deciding that its processes were adequate and refusing to enforce an inconsistent foreign award, no matter how justified that conclusion might be, would see the courts playing a role that the ICSID Convention, and the New York Convention, specifically aims to preclude.

27. These are difficult issues that raise questions of “public policy, the public interest and international, constitutional and domestic law”.⁵⁶ One thing I hope is not forgotten in the debate is that there is a clear public interest in the continued existence and legitimacy of international commercial and investment arbitration. It provides a cross-border dispute resolution system that maintains the rule of law in international commerce, and ultimately, the peaceful resolution of international disputes.⁵⁷

Conclusion

28. On that note, I would like to conclude with my view that these agreements are of fundamental importance, and that to achieve their purpose they require support from both the profession and the courts. As we celebrate the importance of one of the most significant – and probably underrated – conventions in the history of international law, the challenges ahead are not insignificant. Continued dialogue, and mutual grappling with these difficult questions is required in order for the international arbitration system to retain its legitimacy and efficacy.

⁵⁶ French (2015), above n 46.

⁵⁷ 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) 14, citing Lord Neuberger, ‘Keynote Speech’ (2015) 81 *Arbitration* 427, [14]-[15].