International Commercial Dispute Resolution: an Australian perspective

New Delhi, India

26 November 2019

Justice A. S. Bell, President of the Court of Appeal,

Supreme Court of New South Wales

Introduction

1 It is a great pleasure and honour to have been invited to attend and speak at your conference.

2 My senior colleague, the Chief Justice of New South Wales, the Honourable Tom Bathurst AC, spoke at your last conference two years ago and sends his regards and best wishes for this conference. And twelve years ago, the then Chief Justice of the Supreme Court of New South Wales, the Honourable JJ Spigelman AC QC, addressed the First Indo Australian Legal Forum, held here in New Delhi, on the topic of commercial litigation and arbitration.[1]

3 And to continue the link with New South Wales, over 20 years ago, Justice Michael Kirby AC CMG, who held the position that I now hold, delivered a paper here in New Delhi in which he stated that:[2]

> "Two countries sharing so many historical, linguistic, constitutional and legal links, such as Australia and India, should have more connection than they have."

I endorse that sentiment and think that the connections between our two countries, and in particular between lawyers from our two countries, have increased in the two decades since he spoke and will continue to increase in the future.

---

[1] The Hon Justice JJ Spigelman, 'Commerical Litigation and Arbitration: New Challenges' (First Indo Australian Legal Forum, New Delhi, 9 October 2007).

[2] The Hon Justice Michael Kirby AC CMG, 'India & Australia: A Neglected Legal Relationship and a Plan of Action' (Indo Australian Public Policy Conference, New Delhi, 23-4 October 1996).

4 This is my fourth visit to Delhi in the last 8 years: two were to see clients when I was still a barrister. They were engaged in litigation in Western Australia. The other visit was to play in the Lawyers' Cricket World Cup which was a great experience. Its motto was "Friendship through cricket".

Common ground

5 Australia and India have much more in common that simply a national love of cricket. Both countries are stable secular democracies, federations with written constitutions and apex courts at state and national levels. Both have dynamic economies.

6 Our respective systems of commerce are underpinned by the common law, and decisions of the Supreme Court of India have been cited both in the High Court of Australia[3] (our equivalent to the Supreme Court of India) and in the New South Wales Court of Appeal,[4] the busiest intermediate appellate court in Australia.

7 We also share a *system* for dispute resolution inherited from England, characterised by the adversarial system and the disposition of cases by an independent judiciary. There have been high level judicial delegations between our nations in recent decades with senior judges from both Australia and India visiting each other's jurisdictions to discuss common features of our legal systems.[5]

8 Both of our nations are also parties to the New York Convention of 1958 on International Arbitration, that most successful of all international treaties, and

[3] *Commonwealth v Tasmania (Tasmania Dam)* (1983) 158 CLR 1; *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v State of Queensland* (1988) 166 CLR 186; *Newcrest Mining (WA) Ltd v BHP Minerals Ltd & Commonwealth* (1997) 190 CLR 513; *SGH Limited v Commissioner of Taxation of the Commonwealth of Australia* (2002) 210 CLR 51; *Milat v R* (2004) 205 ALR 338; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; *Diehm v Director of Public Prosecutions* (2013) 303 ALR 42; [2013] HCA 42.

[4] *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447; *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377; *Segal v Barel* (2013) 84 NSWLR 193.

[5] See for example, The Hon RS French "Federalism in the Supreme Court of India and the High Court of Australia", 3 June 2009, a paper delivered by the former Chief Justice of Australia at the Second Indo Australian Legal Forum held in Canberra.

decisions such as those of the Indian Supreme Court in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552, *Shri Lal Mahal Ltd v Progetto Grano Spa* [2013] INSC 644 (3 July 2013), *Chloro Controls India Pty Ltd v Severn Trent Water Purification* Inc (2013) 1 SCC 641, *Ameet Lalchand v Rishabh Enterprises* (2018) 15 SCC 678 and *Cheran Properties v Katsuri and Sons* (2018) 16 SCC 413 closely align with decisions of Australian courts in the interpretation of both the Convention and the UNCITRAL Model Law as municipally implemented.[6]

9 The assent given in early August this year to amendments to the Indian *Arbitration and Conciliation Act 1996* and the proposed creation of an Arbitration Council of India and an independent New Delhi International Arbitration Centre based upon the recommendations of the Sri Krishna Committee highlights the importance which the Indian Government places on international commercial dispute resolution. Such is a necessary concomitant of a dynamic, liberalised modern economy.

10 Returning to aspects of commonality and overlap, at a professional level, there are many lawyers of Indian ethnicity practising in Australia, including at very senior levels, both at the Australian Bar as well as in leading law firms. They form part of a significant Indian diaspora in Australia, estimated at nearly three quarter's of a million people, a number which has doubled in the past 10 years.[7]

11 Two of the leading senior counsel in the field of white collar crime in New South Wales and indeed throughout Australia are of Indian ethnicity, as are two of the leading commercial barristers in Western Australia.

12 There is also a very large number of Indian students studying or who have recently studied law in Australia. According to one source, four of the top 20

[6] See, for example, Davies, Bell, Brereton and Douglas, *Nygh's Conflict of Laws in Australia* (10th ed., 2019) Chapters 7 and 43.
[7] Peter N Varghese, *India Economic Strategy to 2035: Navigating from Potential to Delivery*, Report to Australian Government (2018) Chapter 18.

law schools in the world are located in Australia.[8] Last year, over 75,000 Indian students enrolled at Australian tertiary institutions. I would anticipate that a good percentage of these are studying law.

13 Commenting on these figures, the Australian Minister for Trade said in an address to the Australian Financial Review India Business Summit 2018, this "has enormous potential for positive impacts for the future … a lot of friendships, a lot of contacts, a major brains trust and a cultural understanding that will transcend our business, commercial, cultural, governmental, diplomatic and security contacts and relations for years to come."[9] Lawyers will inevitably play a role in those growing relationships.

14 The common features of our legal systems and ongoing and increasing connection through legal education bear upon the subject of my address today. That subject is "International commercial dispute resolution: an Australian perspective". By this, as I shall explain, I do not simply mean international arbitration, important and popular though that means of dispute resolution is.

15 The topic is also of great and indeed obvious importance because of our countries' increasingly close and important trading ties and the growth of commerce in the region more generally. It is the exponential growth of international commerce that makes international commercial dispute resolution such an important topic.

Rapidly growing commercial ties

16 India is Australia's fifth largest export market[10] and fifth largest two-way trading partner.[11] Two-way trade in goods and services has grown in value

[8] https://www.topuniversities.com/university-rankings/university-subject-rankings/2019/law-legal-studies

[9] https://www.senatorbirmingham.com.au/address-to-the-afr-india-business-summit-2018/

[10] Australian Trade Commission, *Doing Business in India: Business risks – commercial disputes* (October, 2013) <https://www.austrade.gov.au/ArticleDocuments/4246/Doing-business-in-India-Commercial-disputes.pdf.aspx>; Department of Foreign Affairs and Trade (DFAT), Australia's trade in goods and services 2015, DFAT, Canberra, March 2016; Australian Government Department of Foreign Affairs and Trade, *Trade and Investments at a Glance 2019* (16 May 2019)

from $13.6 billion in 2007 to $30.4 billion in 2018. Australian services exports to India increased by 13.6% annually since 1999, and were valued at $3.5billion in 2016.[12] Service exports comprise 35% of Indian and 22% of Australian exports value.[13]

17 In 2018, a former Secretary of the Australia Commonwealth Department of Foreign Affairs and Trade and former Australian High Commissioner to India, Mr Peter Varghese, authored a report entitled *India Economic Strategy to 2035: Navigating from Potential to Delivery*.[14] It presented an ambitious vision for bilateral trade and investment over the course of the next 15 years.

18 This report was formally endorsed by the Australian Government on 22 November 2018 with economic diplomacy efforts to be prioritised in education, agribusiness, resources and tourism together with energy, health, financial services infrastructure, sport, and science and innovation. All of these areas have legal dimensions.

19 Consistent with the Australian Government's strategic commitment to enhancing the ties between our two countries, a high-level delegation led by our Prime Minister is due to visit India early next year.

20 Only last week, former Australian Prime Minister Abbott addressed the India Foundation here in Delhi urging greater ties between Australia and India.[15] And also last week, the Australian Disputes Centre, International Division, whose patron is a former Chief Justice of Australia, conducted a seminar

---

<https://dfat.gov.au/about-us/publications/trade-investment/trade-at-a-glance/trade-investment-at-a-glance-2019/Documents/trade-and-investment-at-a-glance-2019.pdf>.

[11] Australian Government Department of Foreign Affairs and Trade, *Trade and Investments at a Glance 2019* (16 May 2019) <https://dfat.gov.au/about-us/publications/trade-investment/trade-at-a-glance/trade-investment-at-a-glance-2019/Documents/trade-and-investment-at-a-glance-2019.pdf>.

[12] Australian Government Department of Foreign Affairs and Trade, *Australia's Trade in Services with India* 1, citing Australian Bureau of Statistics, *International Trade: Supplementary Information, Calendar Year 2018* (ABS catalogue 5368.0.55.004).

[13] Peter N Varghese, *India Economic Strategy to 2035: Navigating from Potential to Delivery*, Report to Australian Government (2018) 335 citing Commonwealth of Australia Department of Foreign Affairs and Trade, *Trade in Services Australia 2016-17* (Canberra, 2017).

[14] Peter N Varghese, *India Economic Strategy to 2035: Navigating from Potential to Delivery*, Report to Australian Government (2018) 335 citing Commonwealth of Australia Department of Foreign Affairs and Trade, *Trade in Services Australia 2016-17* (Canberra, 2017).

[15] http://tonyabbott.com.au/2019/11/address-to-india-foundation/

entitled “Beyond Googlies and Cricket: India and Australia Trade, Investment and Successful Dispute Resolution”, which was webcast throughout Australia and also to venues here in Delhi and also Kolkata.[16]

Indian companies in Australian courts

21 Reflective of Indian investment in Australia in recent years Australian courts have entertained a number of high-profile disputes involving Indian companies in the last decade.[17] I was a participant as counsel in a number of these matters.

22 Unsurprisingly, many of these cases were concerned with the resources sector and, in particular, coal, natural gas and steel making. One involved an Indian company’s investment in a coal mine in Western Australia, one the construction of an oil and gas platform off the coast of India by an Australian company for Oil and Natural Gas Company of India and another related to investments in a coal mine in Queensland.

International dispute resolution and Australia as a neutral venue

23 Obviously enough, in transnational commercial disputes, the disputing parties will often be parties to contracts which contain their own built-in dispute resolution clauses. These may nominate arbitration and, depending on the level of detail, a seat of the arbitration and set of arbitral rules by reference to which any dispute is to be administered and ultimately resolved.

24 Other contracts may include a forum or jurisdiction clause, nominating the courts of a particular country, state or province as the location for dispute resolution. Sometimes the nominated court system will be that of one of the contracting parties; on other occasions a neutral forum may have been chosen.

[16] https://www.disputescentre.com.au/events/beyond-googlies-cricket-india-and-australia-trade-investment-and-successful-dispute-resolution/

[17] See Appendix A

25 With the Indian economy growing at a quicker rate than almost any other country in the world, trade being liberalised and foreign investment in India encouraged by the Modi Government, Indian companies will become party to more and more contracts of and with a transnational commercial character.

26 With that in mind, and with a time difference of only four hours from the west coast (Perth) and six hours from the east coast (Sydney, Melbourne and Brisbane), the Australian legal system and profession may offer an attractive neutral venue for resolution of disputes between Indian and foreign countries. As a neutral venue, Australia provides an alternative neutral centre for dispute resolution in the region to Singapore and Hong Kong. Hong Kong's future is, of course, desperately uncertain at this point in time.

27 As such, in the balance of this address, I would seek to inform you a little about the Australian legal profession and the potential attraction of Australia as a forum for international commercial dispute resolution.

28 First, the profession.

29 Australia has always been a trading nation. One consequence of this is that Australian lawyers are both trained in and familiar with principles of commercial law particularly relevant to disputes between companies and individuals from different countries including principles relating to the export and importation of goods, of shipping law, international finance including letters of credit and principles of private international law or the conflict of laws.

30 Many Australian lawyers also undertake postgraduate legal qualifications and/or spend a period of time working overseas, most commonly in England but increasingly in the United States and in various South East Asian jurisdictions where they are permitted to practise.

31 As such, there is a cohort of Australian lawyers, including advocates, who claim a specialisation in international dispute resolution and there has been a

burgeoning of firms with their own dedicated international dispute resolution sections. So also Australian courts are increasingly engaged in matters involving disputes between companies from different countries.

32 In this environment, many recently retired commercial judges and practitioners have become international arbitrators, and Australian arbitrators are regularly appointed to international arbitral panels. So, too, there are a number of arbitral institutions in Australia which provide centres for the hearing and/or administration of international arbitrations.[18]

33 The Australian court system has also been very supportive of international arbitration, and has developed a jurisprudence which facilitates the efficient resolution of international commercial disputes by means of international arbitration (whilst at the same time providing a reliable institutional means of ensuring the integrity of the process). Australian judicial support for international arbitration may be seen in a host of decisions in recent years which:

* adopt a generous construction as to the scope of arbitration clauses;[19]

* have expanded the concept of arbitrability or the subject areas that are capable of settlement by arbitration;[20]

* adopt restraint in the scrutiny of the quality of the reasoning process in the award;[21]

---

[18] The Australian International Disputes Centre (**AIDC**) and the Australian Centre for International Commercial Arbitration (**ACICA**): see Deborah Tomkinson and Jun Won Lee, 'Australia as a seat for international commercial arbitration – a secure neutral option in the Australia-Pacific region' in *Australian Alternative Dispute Resolution Law Bulletin*, March 2015, p 5, 8-9.

[19] *Francis Travel Marketing* (1996) 39 NSWLR 160; *Comandate* (2006) 157 FCR 45.

[20] *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772; *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398; *Rinehart v Welker* (2012) 95 NSWLR 221; *Francis Travel Marketing* (1996) 39 NSWLR 160 (a *Trade Practices Act 1974* (Cth) claim for misleading or deceptive conduct); *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 (a statutory claim for contribution under the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)); *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (an *inter partes* claim under the *Corporations Act 2001* (Cth)); *Re Infinite Plus Pty Ltd* (2017) 95 NSWLR 282 (a shareholder oppression claim).

* adopt a relatively circumscribed view as to arbitral misconduct,[22] adequacy of notice,[23] and bias;[24] and

* take an extremely limited view as to when considerations of public policy will preclude enforcement of an award.[25]

34 Although much focus when it comes to discussion of international commercial dispute resolution naturally falls upon arbitration, we should not lose sight of the courts as a mode of international commercial dispute resolution. The Commercial Court in London has, after all, for well over 100 years, offered a neutral venue for effective international commercial dispute resolution frequently between companies from countries totally unconnected with England. The neutrality of venue, the relative certainty of the common law and the skill, quality and integrity of the judges have proved and continue to prove attractive to international corporations looking for a neutral venue for dispute resolution.

35 For Indian corporations involved in international commerce with counterparties from countries other than Australia, the commercial courts in Australia similarly provide a neutral venue with judges and lawyers of similar skill, quality, integrity and experience in the resolution of complex commercial disputes. These courts, being in the South East Asian region, may in many respects be more attractive to corporations doing business in this region than litigation in the United Kingdom. And the cost of such dispute resolution would undoubtedly be less crippling.

36 In his address on the topic of commercial litigation and arbitration to which I referred at the outset of this speech, Spigelman CJ noted that Australian courts have developed sophisticated tools to meet the peculiar challenges of

---

[21] *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 ('*TCL Air Conditioner*'); *Sauber Motorsport AG v Giedo Van Der Garde BV* (2015) 317 ALR 786

[22] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535.

[23] *International Relief and Development Inc v Ladu* [2014] FCA 887.

[24] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.

[25] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.

commercial litigation and that, for some time now, Australian courts have subjected commercial litigation to intensive case management, managing both individual cases and caseflow more generally. In many courts, including the Supreme Court of New South Wales, specialist judges preside over commercial lists for this very purpose.[26]

37 Further, he noted that Australian judges – many of whom practised extensively in commercial law before taking up judicial office – understand acutely the importance of minimising delay in commercial litigation and in ensuring that the costs of litigation remain, so far as possible, proportionate to the subject matter of the dispute.[27]

38 And finally he noted that, where appropriate, Australian courts actively encourage parties to engage in alternative dispute resolution mechanisms – indeed, sometimes Australian courts *order* that parties use such mechanisms before going to trial.[28]

39 All of that is to say that what was true in 2007 when Chief Justice Spigelman spoke in New Delhi about the attractions of Australian courts as fora for commercial disputes remains true today, and perhaps even more so: Australian courts remain committed to the just, quick, and cheap resolution of commercial disputes – indeed, all disputes – and are continually refining their case management practices in order to better serve the parties that come before the courts.

40 All that is necessary to take advantage of Australian commercial courts as neutral judicial venues for international commercial dispute resolution is to include a dispute resolution or forum or jurisdiction clause and a contract nominating the courts of, say, the Commercial List of the Supreme Court of New South Wales as the venue for the resolution of any disputes arising out of or in relation to the particular contract.

---

[26] The Hon Justice JJ Spigelman, 'Commercial Litigation and Arbitration: New Challenges' (First Indo Australian Legal Forum, New Delhi, 9 October 2007), 3-8.
[27] Ibid, 6, 16.
[28] Ibid, 22.

41 Generally speaking, where parties submit by means of such a clause to a particular judicial forum, the judgments emanating from a court so nominated are enforceable throughout the common law world according to established common law principles. Indeed, the enforceability of such judgments will be further enhanced in the event that the Hague Convention on Choice of Court Agreements[29] gains traction. That Convention has been designed to have the same effect as the New York Convention of 1958 in relation to international arbitral awards.

42 In the Supreme Court of New South Wales, we have a commercial list (the equivalent of a commercial court) which prides itself on the speed and efficiency of its dispatch of commercial disputes. The vast majority of such cases are resolved within a year of filing and appeals are generally heard and determined within 4 months. That benchmark illustrates, I think, that litigation in an efficient court system may be just as, if not more, expeditious than arbitration. Although it will not generally offer the confidentiality which arbitration offers, in many cases, transparency and a right of appeal may be regarded as more important.

43 Conferences such as this one, to which the organisers have been so very kind to invite me, allow lawyers not only to learn about new areas of law but also to learn of legal opportunities and possibilities in other countries.

44 If one thing can be predicted with some confidence, it is that international commercial dispute resolution as an area of major importance will continue to grow. With it, I expect and hope, will be an increase in the interaction between Australian and Indian lawyers reflective of the broader increasing interactions between our two nations.

[29] JJ Spigelman "The Hague Choice of Court Convention and International Commercial Litigation" (2009) 83 ALJ 386.

Appendix A: recent Australian decisions involving Indian companies

Clough Engineering Limited v Oil & Natural Gas Corporation Limited [30]

45 This case concerned a contract dispute relating to the development of oil and gas fields off the coast of the State of Andhra Pradesh in India and associated onshore facilities. The contract between Australian company Clough Engineering Limited (**Clough**) and Indian company Oil & Natural Gas Corporation Limited (**ONGC**) was expressed to be governed by Indian law and contained a mandatory arbitration clause. The clause specified that arbitration should take place where the contract was made: India. The contract also required that Clough furnish ONGC with unconditional and irrevocable performance bank guarantees, on which ONGC could call in the event of Clough's failing to honour any of its commitments under the contract. Australian banks, Commonwealth Bank of Australia, HSBC Bank Australia Ltd and BNP Paribas, had issued guarantees in favour of ONGC to be called upon in the event that Clough failed to honour any of its commitments under the contract.

46 Following disputes between the parties, ONGC terminated the contract and called upon the guarantees. Clough commenced proceedings in the Federal Court alleging ONGC had engaged in unconscionable conduct in calling on the guarantees. Clough sought and obtained leave to serve its application on ONGC in India. ONGC filed a motion seeking to have the application and service thereof set aside. That motion was granted by the primary judge.[31] Clough obtained leave to appeal that decision to the Full Court of the Federal Court and the Court found in favour of ONGC.[32]

47 The Court held that, properly construed, the contract entitled ONGC to call upon the performance guarantees notwithstanding that a genuine dispute existed as to whether Clough was in breach.[33] Clough was in breach of its

[30] [2008] FCAFC 136; (2008) 249 ALR 458.
[31] *Clough Engineering Ltd v Oil & Natural Gas Corp Ltd (No 3)* [2007] FCA 2082.
[32] [2008] FCAFC 136; (2008) 249 ALR 458.
[33] [86]-[112].

contractual obligations and the demands were valid, ONGC being entitled to call on the guarantees for their full amount.[34] The Court concluded that there was no serious question to be tried in relation to ONGC's unconscionable conduct in calling upon the bank guarantees.[35] The guarantees were designed to allocate risk and provide security, and there was thus limited scope for the application of unconscionable conduct (assuming the doctrine applied in light of the contract's being governed by Indian law) to restrain the exercise by a party of its legal rights under the guarantees.[36] As a result of its finding against Clough on the substantive merits of its case, it was unnecessary for the Court to deal with the choice of law and arbitration provisions of the contract although it stated these raised "considerable difficulties for Clough".[37]

Severstal v Bhushan Steel[38]

48 In *Severstal Export GmbH v Bhushan Steel Ltd*, Swiss company Severstal Export GmbH (**Severstal**) and Indian company Bhushan Steel Ltd (**Bhushan**) contracted for the supply of steel coils. Each supply of steel was provided for by a separate contract, and each contract was governed by Swiss law. The first five contracts were performed without incident. Before Severstal provided the sixth supply of steel, Bhushan attempted to renegotiate the terms of the sixth supply contract. Severstal refused to renegotiate, and Bhushan, in turn, refused to accept the sixth supply of steel. Severstal terminated the contract for breach and sold the steel at a loss.

49 Severstal brought proceedings against Bhushan in the Geneva District Court for damages for breach of the sixth contract. Before those proceedings had been determined, Bhushan brought proceedings in the Delhi High Court seeking damages for breach of the third, fourth and fifth contracts on the basis that the steel supplied was defective. (Those proceedings had not concluded at the time the proceedings came before the NSW Court of Appeal.)

[34] [113]-[128], [138].
[35] [139].
[36] [129]-[138].
[37] [140].
[38] [2013] NSWCA 102.

50 Severstal was successful in the Geneva District Court and on appeal but unsuccessful in having the judgment enforced in the Netherlands and Germany. Severstal did not attempt to enforce the judgment in India. Ultimately, Severstal had the judgment registered in New South Wales. Bhushan's solicitors thus delivered cheques to Severstal's solicitors in Sydney in satisfaction of the Swiss judgment, but sought and obtained a freezing order restraining transmission of the cheques or proceeds thereof out of Australia pending determination of the Indian proceedings.

51 The primary judge made the freezing order on the basis that there were sufficient prospects of the Delhi High Court giving judgment in favour of Bhushan and the NSW Supreme Court enforcing that judgment. The primary judge determined that, were the cheques or proceeds thereof removed from Australia, there was a danger that any judgment in the Indian proceedings would go unsatisfied. It was from that freezing order that Severstal sought to appeal in the NSW Court of Appeal.

52 The Court held, contrary to Severstal's contention, that the primary judge had satisfied himself that a prospective Indian judgment may go unsatisfied without a freezing order.[39] The Court further held that it was open to the primary judge to have so satisfied himself.[40] The primary judge was entitled to infer that there was a danger Severstal would rely on article 27 of the Swiss Federal Code on Private International Law to resist the enforcement of an Indian judgment in Switzerland.[41] There was also sufficient evidence before the primary judge to satisfy him of a danger that an Indian judgment would not be satisfied if the cheques or their proceeds were remitted to Switzerland.[42]

53 While there was no direct evidence as to whether article 27 would avail Severstal, it was not appropriate to apply the presumption of similarity to a statutory provision of a civil law country.[43] Thus, it was not possible to

[39] [55]-[56].
[40] [70].
[41] [63]-[64].
[42] [65]-[69].
[43] See *Damberg v Damberg* (2001) 52 NSWLR 492; [2001] NSWCA 87; *Boele v Norsemeter Holdings AS* [2002] NSWCA 363 at [40].

assume that an attempt by Severstal to rely on article 27 to resist enforcement of an Indian judgment would fail on the basis that no *res judicata*, issue estoppel or *Anshun* estoppel would have arisen in Australia. The Court held that, while the matter was finely balanced, there was sufficient evidence before the primary judge to be satisfied of the relevant danger: the defence filed in India by Severstal was verified; Severstal had asserted in the Indian proceedings that the suit was not maintainable as it was barred by res judicata and procedural law of India; and it was arguable that article 27 would operate to bar enforcement of an Indian judgment.

54 Although no challenge had been made to the primary judge's exercise of the residual discretion, Chief Justice Bathurst in obiter emphasised freezing orders of this nature should not be granted lightly.[44] His Honour noted that the contracts were governed by Swiss law and that if that law required all claims between Severstal and Bhushan to be heard together, then a NSW court should be reluctant to grant an injunction circumventing that requirement.[45]

55 Special leave to appeal from the decision of the Court of Appeal was refused.[46]

Pacific Carriers v BNP[47]

56 In *Pacific Carriers Ltd v BNP Paribas*, Australian grain trader New England Agricultural Pty Ltd (**NEAT**) sold chickpeas and dun peas to Indian grain trader Royal Trading Co (**Royal**). BNP Paribas was NEAT's banker and financed the export transaction and Swiss Singapore Overseas Enterprises Pte Ltd (**SSOE**) was Royal's financier. Pacific Carriers Ltd was the time charterer of the vessel on which the cargo was carried.

57 The High Court described the venture as "something of a disaster".[48] There was confusion between the parties relating to the letters of credit and bills of

[44] [71].
[45] [71].
[46] *Severstal Export GmbH v Bushan Steel Limited* [2013] HCATrans 282.
[47] (2004) 218 CLR 451; [2004] HCA 35.

lading. A fall in the legume market occurred while the cargo was between Australia and India. The trial judge found that Royal delayed accepting the cargo and failed to pay the purchase price. The carrier encountered problems discharging in India because of the size of the vessel, port draught and the absence of relevant bills of lading. As a result, the vessel was arrested. SSOE successfully arbitrated against Pacific. NEAT became insolvent.

58 The proceedings before the High Court related to two letters of indemnity purportedly signed by NEAT and BNP in favour of Pacific. Pacific claimed indemnification by BNP for the loss it suffered on account of delivering the cargo without the relevant bills of lading. BNP argued that, properly construed, the letters of indemnity did not constitute an agreement to indemnify Pacific, or, alternatively, that the letters of indemnity were signed without BNP's authority and were not binding on it.

59 The Court held that, construed in light of the surrounding circumstances, purpose and object of the transaction and market in which the parties were operating, the document would be understood by a reasonable reader in Pacific's position to give rise to BNP's liability to indemnify Pacific in support of a similar undertaking by NEAT.[49] The Court further held that it would be unjust to permit BNP to depart from Pacific's assumption that the letters of indemnity had been executed with authority in circumstances where the bank had placed the officer who dealt with the letters in a position to sign and stamp them.[50]

Paul's Retail Pty Ltd v Sporte Leisure Pty Ltd[51]

60 This case concerned a dispute relating to garments produced bearing the mark of two registered trademarks. Great White Shark Enterprises LLC (**GWS**) was the owner of the trademarks and Greg Norman Collections Inc (**GNC**) held the head licence. GNC granted a licence to Indian company BTB

---

[48] [3].
[49] [20]-[26].
[50] [27]-[44].
[51] (2012) 202 FCR 286; [2012] FCAFC 51.

Marketing Pvt Ltd (**BTB**) to use the trademarks in India. Garments were produced pursuant to a purchase order for the supply of goods to companies outside of India. The garments were purchased by, inter alia, Paul's Retail Pty Ltd (**Paul's**). Paul's then imported and sold the goods in Australia. GWS, GNC and others brought proceedings against Paul's for infringing the registered trademarks contrary to s 120 of the *Trade Marks Act 1995* (Cth). Paul's by its defence relied on s 123 of the Act, which provided that a person did not infringe a registered trademark if the trademark was applied by or with the consent of the owner of the registered trademark.

61 The primary judge determined that Paul's could not rely on s 123 because GWS has not consented to the application of the mark on goods supplied outside of India. Paul's appealed to the Full Court of the Federal Court. arguing, first, that the primary judge erred in taking into account territorial restrictions on the BTB licence when determining whether s 123 applied, second, that the primary judge erred in failing to apply the rule in *Blatch v Archer* or the rule in *Jones v Dunkel*, and, third, that the primary judge erred in dismissing Paul's cross-claim which alleged misleading and deceptive conduct on the part of the respondents.

62 The Court held that the primary judge correctly approached the question of whether s 123 applied. The finding that Paul's could not rely on s 123 was held to be "unexceptional" because the terms of the licence clearly limited the use of the marks in India.[52] As a result, GNC could not be said to have consented to the use of the marks and it was immaterial where the application of the mark occurred. The Court rejected Paul's argument relating to *Blatch v Archer* on the basis that it was not shown that the relevant witness was in the respondent's "camp".[53] The Court also rejected the challenge to the primary judge's dismissal of the misleading and deceptive conduct cross-claim.[54]

[52] [72]-[81].
[53] [82]-[99].
[54] [100]-[104].

Lanco Resources v Griffin Energy

63 The litigation in Western Australia between Lanco Resources Australia Pty Ltd and Griffin Energy Group Pty Ltd culminated in a confidential settlement. Companies of the Indian conglomerate Lanco Resources had purchased shares in the Griffin Coal Mining Company Pty Ltd and Carpenter Mine Management Pty Ltd which owned and operated a coal mine in the Collie Basin in Western Australia. The dispute concerned a claim by the Lanco Companies that during the course of the sale process, the vendors engaged in misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth) by failing to disclose to them reports relating to the resources and reserves of the coal mine. The Lanco Companies sought relief under ss 82 and 87 of the Trade Practices Act for damages, compensation and ancillary relief by way of variations to clauses within the parties' sale agreement.

64 There had been earlier related litigation in New South Wales in relation to a letter of credit that had been issued in favour of the vendors of the coal mine by, inter alia, ICICI Bank Limited, a prominent Indian bank: *Griffin Energy Group Pty Limited (Subject to Deed of Company Arrangement) v ICICI Bank Limited*.[55]

Kemppi v Adani **[56]**

65 The *Kemppi v Adani Mining Pty Ltd* litigation involved native title claims of the Wangan and Jagalingou people in relation to the Adani Mining Carmichael coal mine. Adani, the State of Queensland and the Wangan and Jagalingou native title claim group entered into an indigenous land use agreement pursuant to the *Native Title Act 1993* (Cth). The agreement was certified by Queensland South Native Title Services (**QSNTS**) and Adani applied to the Native Title Registrar to have the agreement registered. A minority of the native title claim group opposed the agreement and objected to its registration.

[55] [2015] NSWCA 29.
[56] *Kemppi v Adani Mining Pty Ltd (No 2)* [2019] FCAFC 117.

66 The terms of the Native Title Act were such that, following an application for an indigenous land use agreement to be registered, the Registrar was required to give notice of the agreement to various persons.[57] After notice was given, persons holding or claiming to hold native title in the area covered by the agreement were able to object to registration on the basis that certain requirements are not satisfied.[58] If the Registrar was satisfied that that the conditions were met, the Registrar was required to register the agreement.[59] If the Registrar was satisfied that the conditions were not satisfied, the Registrar was not to register the agreement.[60]

67 The Registrar considered the objection, determined that the relevant conditions were satisfied and registered the agreement.

68 The minority challenged the registration of the agreement. The minority attacked the QSNTS certificate on the basis that QSNTS entered into jurisdictional error in issuing it, either by acting unreasonably and or by failing to take into account a number of relevant considerations, or that the registration was otherwise defective because the application did not comply with the statutory requirements for a valid certificate or complete description of the relevant area.

69 The Full Court of the Federal Court held that the challenge to the agreement failed because the registration could only be set aside by a court exercising judicial review of the Registrar's conclusion that those statutory requirements were satisfied.[61] The challenge had, instead, been directed to the validity of the certificate, the jurisdiction of the delegate to consider the application and the decision of the delegate to register the agreement (the latter challenge not seeking to impugn the delegate's decision as to the statutory condition). The Court held that even had the challenge to the certificate not been misconceived, their exercise of their right to object to registration had "cured"

[57] *Native Title Act 1993* (Cth) s 24CH.
[58] *Native Title Act 1993* (Cth) s 24CI.
[59] *Native Title Act 1993* (Cth) ss 24CJ, 24CK.
[60] Ibid.
[61] *Kemppi v Adani Mining Pty Ltd (No 2)* [2019] FCAFC 117.

any effect of errors in the certificate as the determination by the Registrar on objection depended not on the opinion expressed in the certificate but on the Registrar's independent decision as to whether certain statutory conditions were or were not made out.

Traxys Europe SA v Balaji Coke Industry Pvt Ltd and Ors (No 5)[62]

70 This case provides another example of commercial litigation in Australia involving Indian companies. The case concerned Indian company Balaji Coke Industry Pvt Ltd (**Balaji**), a member of a group of companies which manufactures and imports coal and coke into India. A Luxembourg company, the moving party in the litigation, was a creditor under a foreign arbitral award and applied to the Federal Court to have the award enforced. Balaji's only known assets in Australia were shares it held in a Victorian incorporated company, Booyan Coal Pty Ltd (**Booyan**). Booyan did not have any employees in Australia, its only business activity concerning exploration permit relating to an area of land in Queensland. Mr Sharma, the chairman and managing director of Balaji, was also the person who made the business decisions for Booyan.

71 Shortly before the final hearing in the Federal Court, Balaji asserted that it had sold the shares and therefore had no assets in Australia against which a judgment could be enforced. The putative purchaser of the shares was Concast Exim Ltd (**Concast**), an Indian corporation with a place of business in Kolkata. Concast was a significant customer of Balaji, purchasing coke from Balaji to make steel, and the director of Concast was a close business associate of Mr Sharma. The discussions between the pair in relation to the sale of the shares had generally been conducted in Hindi or Rajasthani, yet the formal records of the discussions were expressed in English. The Luxembourg company alleged in the Federal Court that the sale of shares in Booyan by Balaji to Concast was a sham.

[62] [2014] FCA 976; (2014) 318 ALR 85.

72 Foster J held that it was.[63] His Honour rejected Mr Sharma's explanation as to the inconsistency between the language in which the sale discussions were had and the language in which they were recorded: that this was normal practice in India. His Honour regarded the discrepancy as "unusual".[64] His Honour also, notably, gave only slight weight to Balaji having taken steps to have the award set aside in India – although did remark that it was a "legitimate matter of criticism in terms of Balaji's commercial morality".[65]

Elecon Australia Pty Ltd v Brevini Australia Pty Ltd[66]

73 This case involved a claim against Indian company Elecon Engineering Co Ltd (**Elecon Engineering**) relating to a licence agreement between it and insolvent German company PIV Antrieb Werner Reimers GmbH & Co KG (**PIV Antrieb**). PIV Antrieb produced power transmission systems for use in the automobile industry and, relevantly, had invented gears with modular housing.

74 Elecon Engineering manufactured elevator and conveyor gears. The chairman and managing director of Elecon Engineering determined that it would be desirable that Elecon Engineering had the capacity to manufacture modular gearboxes and to that end organised a meeting with a representative of PIV Antrieb. A know-how contract was entered into between the two companies, written in English and governed by Indian law. Certain of the instalments were to be paid after the agreement was approved by the Reserve Bank of India. The contract provided for an extension of its term by mutual consent if approved by the Indian government.

75 During the course of the contract, PIV Antrieb went into liquidation. Elecon Engineering continued to use the know-how under the contract and manufactured and sold gearboxes bearing the mark of PIV. By their legal representatives, PIV Antrieb sought an end to the use of the know-how by

[63] at [125].
[64] at [102].
[65] at [106].
[66] [2009] FCA 1327; (2009) 263 ALR 1.

Elecon Engineering and Elecon Engineering claimed damages for breach of the know-how contract.

76 The proceedings reached the Federal Court of Australia because of an allegation made by an Australian company against Elecon Australia, a subsidiary company of Elecon Engineering. The Australian company made an unsuccessful tender to supply conveyor drives to a joint venture project relating to a coal handling and preparation plant at the Blackwater coal mine in central Queensland. Elecon Australia had made the successful tender. The Australian company alleged that Elecon Australia did not have rights in Australia to sell the gear units that it proposed to provide to the joint venture. Thus, proceedings were brought by Elecon Australia against the Australian company for misleading or deceptive conduct. Buchanan J, applying Indian law as the proper law of the contract, held that "Indian law closely follows English law"[67] and dismissed an argument that, despite no express territorial restriction in the terms of the contract, the know-how contract restricted the sale of gearboxes to within India.[68] Still, it was found that Elecon Engineering had indeed lost its rights under the know-how contract before the tender offer was made by Elecon Australia.

[67] at [32].
[68] at [63]-[73].