‘Disputes with International Dimensions’

Address to the Annual Supreme Court Conference

Supreme Court of Western Australia

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Supreme Court of New South Wales

1 I have chosen the topic “Disputes with International Dimensions” for my address because it was such disputes which typically brought me to Western Australia, on my reckoning more than 100 times, in my last 15 years at the Bar. I should also say that I greatly enjoyed coming to Perth and I hope (but will not inquire) that the pleasure was mutual for those before whom I appeared!

2 I can recall appearing against and before Graeme Murphy and Michael Corboy, in front of Michael Buss, Andrew Beech, Rene Le Miere (often), Ken Martin (at length – but not his fault), Janine Pritchard (*ex parte*), John Vaughan (in his first case), and the redoubtable Master Sanderson whose encomium on the Bell litigation is a minor literary masterpiece.[1] I think that I was briefed by Jenni Hill, I locked horns and had the occasional drink with the ever genial Marcus Solomon and was instructed by Paul Tottle’s firm, acting for one of his partners in a famous Western Australian case about a balcony full of lawyers that collapsed in Fremantle one New Years’ Eve under what someone unkindly said was the weight of their collective egos.

3 I can also recall being in the Court of Appeal for some vigorous exchanges between Wayne Martin and Carmel McLure! As Sir Maurice Byers used to say, “I just put the ball in the scrum” or, to adapt to local custom, in the ruck.

4 What I can say is that, in my experience, visiting counsel were always treated with great courtesy and respect by both the WA profession and this Court

[1] *Bell Group (UK) Holdings Limited (In liquidation)* [2020] WASC 347.

and, I should add, the judges of the Perth Registry of the Federal Court. That was not always my experience in some other jurisdictions.

5 For these and other reasons, I was and am extremely disappointed that I am not able to deliver this lecture in person. Indeed, I almost changed my topic for this morning in order to vent my views on section 92 of the Constitution but self-discipline (and probably a degree of institutional self-preservation) prevents me from changing topics and further lamenting the opportunity to be with you all in person (and to have the excellent dinner, the Chief Justice's promise of which induced me to agree to give this speech). I have banked that promise, and have a good memory.

6 And so to my actual topic.

7 Let me start with some basic observations. By "Disputes with International Dimensions", I do not intend solely to confine myself to disputes raising questions of private international law or conflict of laws issues. I would include domestic law disputes but where the parties come from different countries and, in some cases and perhaps increasingly, from different legal traditions.

8 Recent cases in Western Australia falling into this category and with which I was involved include the CITIC litigation against Minerology which took place in both the Supreme Court of Western Australia[2] and the Perth Registry of the Federal Court,[3] and the Lanco litigation involving an Indian company's investment in Griffin Coal which owned and operated a coal mine in the Collie Basin. This case was heard before Kenneth Martin J for a number of weeks before it settled, also spawned a considerable amount of other litigation.[4]

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[2] See *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16)* [2017] WASC 340, reversed in part by *Sino Iron Pty Ltd v Mineralogy Pty Ltd* (2019) 55 WAR 89; [2019] WASCA 80.

[3] See *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1; [2015] FCA 825, affirmed in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2017] FCAFC 55.

[4] *Lanco Resources Australia Pty Ltd v Griffin Energy Group Pty Ltd* [2016] WASC 322; *Lanco Resources Australia Pty Ltd v Griffin Energy Group Pty Ltd (subject to a Deed of Company Arrangement) [No 2]* [2017] WASC 43; *Lanco Resources Australia Pty Ltd v Griffin Energy Group Pty Ltd (subject to a Deed of Company Arrangement) [No 3]* [2017] WASC 51.

9 Acting for foreign companies which I regularly did during my time at the Bar is both interesting and often challenging, especially if the companies involved are not used to litigating in common law courts, are not necessarily familiar with our procedural rules relating, for example, to discovery or if senior employees are required to give evidence and be cross-examined. Such challenges have no doubt been exacerbated by constraints on travel occasioned by the pandemic and time zone differences, a point recently made by Archer J in an interlocutory decision in this Court concerning the *Bombardier* litigation.[5] As an aside, although we are now, by virtue of the pandemic, far more attuned to interacting by AVL - and the various programmes such as MS Teams are excellent - I always found in my practice at the Bar that, at least for important witnesses, interviewing them for the purposes of taking witness statements and understanding a business or a transaction or a dispute was something best done in person.

10 Challenges in representing foreign clients of the kind I have outlined are obviously not insuperable but it is understandable how they arise and can lead not only to logistical but forensic issues. The challenges are made far more complicated where English is not necessarily the language in which the executives of a foreign client routinely conduct their business or where commercial and business behaviour of the foreign companies involved may not always be underpinned by the same ethical values that are required by our far reaching Commonwealth and State consumer laws which, of course, are not confined to consumer contracts in the ordinary sense of that word.

11 It is no coincidence that disputes with international dimensions frequently arise in Western Australia. Much, of course, is driven by WA's great mineral resources and the commercial opportunities they present but WA also has a strong entrepreneurial tradition which has generated both international investment in Western Australia and transnational commercial engagement abroad by both Western Australian individuals and businesses.

[5] *AVWest Aircraft Pty Ltd v Bombardier Inc* [2021] WASC 241.

12 The two matters I have already mentioned, namely those involving CITIC and Lanco Resources, are examples of the former phenomenon, namely disputes arising from international investment in Western Australia in relation to Western Australian resources.

13 Two examples of the latter phenomenon, namely transnational engagement off-shore by Western Australian entities, are Clough Engineering's dispute with the Oil and Natural Gas Company of India (ONGC)[6] (which Justice Murphy will recall well), and the current dispute between AVWest Aircraft Pty Ltd, a company owned by a member of the prominent Western Australian Roberts family, and Bombardier Inc, a famous Canadian private jet manufacturer. As I understand it, this case is set to be litigated in the Supreme Court of Western Australia next year, having already been the subject of jurisdictional arguments and forum non conveniens challenges at both first instance[7] before Master Sanderson and in the Court of Appeal.[8] This case involves a contractual dispute between AVWest and Bombardier and I must be circumspect in what I say about it as I appeared at a very early stage for AVWest prior to my appointment to the Bench.

14 What I think I can and will say about that case, however, relates to the forum non conveniens challenge which has already been dealt with. About that issue, I would make a number of points. First, in response to the contention that had been raised by Bombardier that it would have many witnesses who were based in Canada and North America and that this was a reason for staying or setting aside service of process out of the jurisdiction on clearly inappropriate forum grounds, Master Sanderson observed that:

> "Most of the evidence in this case will be of a documentary nature and which court hears the matter is not really a factor. It is true that the relevant witnesses whom Bombardier may wish to call are based in Canada or at least out of the jurisdiction. But, modern technology video links are possible and if there is any disadvantage, it is in cross

[6] (2008) 249 ALR 458.
[7] *AVWest Aircraft Pty Ltd v Bombardier Inc* [2018] WASC 139.
[8] *Bombardier Inc v AVWest Aircraft Pty Ltd* [2020] WASCA 2.

> examining a witness on a video link and that disadvantage rests with AVWest."[9]

15 The Court of Appeal noted Bombardier's argument that the assessment of the credibility of the various witnesses would be critical to the outcome of the dispute concerning alleged oral agreements, and that the assessment of credibility may be impacted by the fact that the evidence, if available at all, would only be available by video-link. This was submitted to be a disadvantage that impacted upon the party seeking to rely upon the evidence, just as much as upon the cross-examining party.

16 The Court responded to this submission by observing that:

> "[i]t is common for the Court to receive evidence by video-link, and the Court's facilities are such that the quality of the visual and audio link permits the Court to see and hear a witness' evidence with sufficient clarity to make an assessment of the witness' credibility, if that is in issue. … Furthermore, in many cases, the Court will receive a witness statement as the evidence in chief of the witness. That is no doubt what the learned master had in mind when he noted that if there was any disadvantage in the reception of the evidence by video-link, the disadvantage would fall on the party cross examining the witness, namely AVW."[10]

17 Returning to a point I made earlier, our Covid experience and reliance on "zoom" and "Teams" and Webex has probably only strengthened the positive approach to permitting examination and cross-examination of witnesses by AVL. I did quite a deal of it in practice and did not find it to be a disadvantage (although, as I have said, I took a different view about interviewing witnesses – staring people in the eye is best done actually rather than virtually). I have also sat at first instance and observed witnesses being cross-examined on AVL including on matters going to credit and did not feel unable to form a view or unduly constrained in doing so.

18 To the extent that one can find statements in certain authorities which warn of the shortcomings of cross-examination by AVL, especially on questions of

[9] *AVWest Aircraft Pty Ltd v Bombardier Inc* [2018] WASC 139 at [36].
[10] *Bombardier Inc v AVWest Aircraft Pty Ltd* [2020] WASCA 2 at [145].

credit,[11] I think that those views will be largely consigned to history, if that has not already occurred.

19 This point has some significance for standard arguments often raised on stay applications in transnational cases and also, for that matter, in cases arising under the cross-vesting legislation and, for inferior courts and tribunals, under s 20 of the *Service and Execution of Process Act 1992* (Cth)[12] where the location of likely witnesses (and the implied inconvenience and prejudice to a party seeking a stay or transfer of proceedings) is frequently called in aid.

20 In this context, it should be recalled that the seminal decisions concerning the more appropriate or natural forum doctrine in England, *Spiliada Maritime Inc v Cansulex Ltd*,[13] and its differently formulated Australian cousin, the clearly inappropriate forum doctrine articulated in *Voth v Manildra Flour Mills Pty Ltd*,[14] are now 35 and 30 years old respectively. Those two cases were decided at a time when mobile phones resembled a brick and were just phones ie were not smart, when email either did not exist or was in its infancy, and where the standard mode of international messaging was either telex or, for the more technologically sophisticated, the fax machine. *Voth*, for example, was delivered more than 6 months before the establishment of the world's first website.

21 Related to this point, in the early years after the decisions in *Spiliada* and *Voth*, one also encountered arguments to the effect that the bulk of the documents were located in one forum or another, and that that was a pointer to where litigation should most appropriately be heard. That consideration, too, has largely been overtaken by technological advances with the electronic imaging of documents a core feature of much modern commercial litigation.

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[11] See, for example, *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502 at [5]-[8]; *Hua Wang Bank Berhad v Commissioner of Taxation [No 4]* [2013] FCA 495 at [17]-[19]; *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732 at [59]-[64].
[12] S*ee Joshan v Pizza Pan Group Pty Ltd* [2021] NSWCA 219, esp at [58].
[13] [1987] AC 460.
[14] (1990) 171 CLR 538; [1990] HCA 55.

22 In addition to *Bombardier*, two other relatively recent decisions of the Western Australian Court of Appeal - *Sakari Resources Ltd v Purvis*[15] and *Singh v Singh*[16] - also involved appeals from the rejection of stay applications in favour of litigation in Singapore and Malaysia respectively. In the former case, Newnes JA observed that wherever the litigation took place, inconvenience associated with witnesses having to travel to give evidence would arise,[17] but that there was nothing before the Court which established that the continuation of the WA proceedings would be vexatious or oppressive to the appellant in the *Voth* sense.[18]

23 These three decisions – *Sakari*, *Singh* and *Bombardier* - rejecting applications for stays of proceedings having a transnational dimension - illustrate the reality that it is more difficult for a foreign defendant to obtain a stay of proceedings under the Australian *Voth* test than under the English *Spiliada* test.

24 The impact of technological developments on the jurisprudence relating to stays of transnational proceedings and the legacy of *Spiliada*, more generally, have been considered in a recently published *festschrift* for the noted Oxford Professor and private international law scholar, Adrian Briggs, in chapters written by Professor Martin Davies, once of the UWA Law School, and myself.[19]

25 One of the criticisms made of the *Spiliada* test is that it leads to significant satellite or adjectival litigation as to the appropriate forum which is vastly expensive, time consuming and does nothing to resolve the merits of the underlying dispute. This phenomenon has been the subject of strident complaint by very senior English judges for many years. In *Hindocha v Gheewala* [2003] UKPC 77, for example, Lord Walker, delivering the advice of the Privy Council on an appeal from Jersey, noted that more than six years

[15] [2016] WASCA 24.
[16] (2009) 253 ALR 575; [2009] WASCA 53 at [81].
[17] [2016] WASCA 24 at [64].
[18] [2016] WASCA 24 at [65].
[19] A Dickinson and E Peel (eds), *A Conflict of Laws Companion: Essays in Honour of Adrian Briggs* (Oxford University Press, 2021).

had elapsed fighting the issue as to whether or not the dispute should be heard in Jersey or Kenya.[20] In 2009, in *Deripaska v Cherney (No 2)*,[21] Waller LJ said that "disputes as to forum should not become state trials" and that:

> "here we are with an appeal to this court with a mountain of material; an appellant's skeleton argument of 69 pages; respondent's skeleton of 53 pages; a reply skeleton from the appellant of 39 pages. It surely would have been better for both parties and better use of court time if they had expended their money and their energy on fighting the merits of the claim."

26 In my chapter in the Briggs *festschrift*, I ventured the thought that the time occupied in England at least dealing with jurisdictional and forum non conveniens disputes by way of "preliminary skirmish" may in fact have fed or at least contributed to the phenomenal growth in international arbitration as an alternative mechanism of dispute resolution in transnational cases. I suggested that, by committing to arbitration, parties that may, pre-*Spiliada*, otherwise have been content to litigate in the Commercial Court in London are not exposed to the risk of having their proceedings stayed in favour of a different forum with less or no expertise or experience in commercial dispute resolution or tied up in expensive and time consuming litigation about where to litigate. Agreement to arbitrate largely immunises commercial parties from preliminary disputes about forum which, as experience, including under the *Voth* test, has taught can frequently delay resolution of the ultimate dispute quite significantly, with concomitant increases in costs to the parties.

27 This leads me neatly to international arbitration and, as many of you are well familiar in recent years, superior courts have become increasingly embroiled in adjectival issues concerning international arbitration in a host of different ways. This is perhaps particularly so in Western Australia given that the massive infrastructure projects that have occurred in connection with iron ore and oil and gas developments invariably give rise to disputes in respect of contracts which invariably contain arbitration clauses. The most recent decision – and a very significant one in this regard - is that delivered just over

[20] *Hindocha v Gheewala* [2003] UKPC 77.
[21] [2010] 2 All ER (Comm) 456, [6]–[7] (**Cherney**).

a month ago by Kenneth Martin J in *Chevron Australia Pty Ltd v CBI Contractors Pty Ltd*[22] dealing with questions of *res judicata*, issue and *Anshun* estoppel in an arbitral context, and whether or not the Tribunal in question was *functus officio*. On those questions (and most unusually in my experience), there was a division of opinion within the Tribunal itself. I dare say this matter is headed for the Court of Appeal.

28 The significant engagement by commercial courts with adjectival issues and disputes relating to or arising from international arbitration may relate to issues concerning:

- questions of whether there even is an arbitration agreement, and the doctrine of Kompetenz-Kompetenz, a matter addressed by Le Miere J in *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* in 2016;[23]
- the scope of particular arbitration clauses, a matter his Honour addressed in *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd;*[24]
- the arbitrability of particular disputes;
- the staying of litigation covered by an arbitration clause, something required by s 7 of the *International Arbitration Act 1974* (Cth);[25]
- claims for urgent interlocutory or ancillary relief including the drawing on performance bonds in construction disputes;
- procedural fairness in arbitrations and arbitral bias or misconduct;
- the enforcement of arbitration awards; and
- questions of public policy standing in the way of enforcement.

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[22] [2021] WASC 323.
[23] [2016] WASC 193.
[24] [2017] WASC 112; see also, for example, *Siam Steel International plc v Compass Group (Australia) Pty Ltd* [2014] WASC 415.
[25] See, for example, *KNM Process Systems SDN BHD v Mission NewEnergy Ltd* [2014] WASC 437; *Roy Hill Holdings Pty Ltd v Samsung C&T Corporation* [2015] WASC 458 ; *Eriez Magnetics Pty Ltd v Duro Felguera Australia Pty Ltd* [2017] WASC 304; *Duro Felguera Australia Pty Ltd v Samsung C & T Corporation* [2019] WASC 90.

29 The cynic in me, at least prior to my appointment, always thought that judges become more well disposed to upholding and supporting arbitration the closer they come to the age of retirement from judicial life. I have not included any footnotes to decisions of French CJ, Spigelman CJ or Martin CJ supporting this last statement and, of course, no longer hold that cynical view!

30 Both the Supreme Court of Western Australia and its Court of Appeal have been heavily engaged in the cross-over between the courts and arbitration in the last 15 years and contributed to the growing body of jurisprudence in significant ways. The Court of Appeal decisions have included *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*;[26] *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* (**Parapur**)[27] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (**Cape Lambert**)[28] and *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liquidation)* (**Duro v Trans Global**).[29]

31 In *Parapur,* the Court noted that whilst a "one stop adjudication" has commonly been invoked in cases involving disputes between the parties to an arbitration agreement, it did not necessarily follow that it applied in the same way where the dispute in question was not limited to the parties to the arbitration agreement.[30] That is, the Court held that it would be difficult to ascribe to the parties an intention that a dispute should be fragmented, and that the liability of the party to the arbitration agreement, and that of the third party, should be determined in different forums.[31]

32 In *Cape Lambert*, Martin CJ said (at [93]) that:

> "National courts are not properly regarded as competitors or rivals for the jurisdiction which the parties have agreed to confer upon an arbitral tribunal. … the exercise of judicial power to facilitate the agreement of the parties to resolve their disputes by arbitration, and the strictly

[26] (2012) 43 WAR 91; (2012) 262 FLR 1; [2012] WASCA 50.
[27] [2008] WASCA 110.
[28] (2013) 298 ALR 666; [2013] WASCA 66.
[29] [2018] WASCA 174.
[30] [2008] WASCA 110 at [42].
[31] [2008] WASCA 110 at [43].

> limited supervisory role usually conferred upon national courts by the *lex arbitri*, which is generally limited to containing arbitral tribunals within the jurisdiction conferred upon them by the parties and ensuring that the jurisdiction is exercised, is fundamentally different in character to the role of the arbitral tribunal in resolving the dispute by making an award defining the substantive rights and obligations of the parties. International comity requires national courts to faithfully respect these limitations upon their role - in this case by appropriately construing the ambit of the powers conferred upon the court by s 7 of the Act having regard to such limitations." [32]

33 These statements are absolutely classical and orthodox, and whilst I would agree that "[n]ational courts are not properly regarded as competitors or rivals for the jurisdiction which the parties have agreed to confer upon an arbitral tribunal", national courts *are in competition* with international arbitration as a mode of dispute resolution in the sense that international arbitration has not always lived up to its claims and promises of being quicker and less expensive than litigation, and, at least where commercial courts are capable of dealing with matters quickly and efficiently, some commercial parties may prefer that more orthodox form of dispute resolution, especially if they wish to have the benefit of rights of appeal.

34 The most recent decision of the Court of Appeal concerning international arbitration is the decision in *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liquidation)*,[33] in which the Court upheld a freezing order so as to prevent the frustration of an arbitral award, prohibiting Duro Felguera from disposing of any prospective proceeds awarded to it in its ongoing arbitration against Samsung C&T Corporation. The arbitration was seated in Singapore. The freezing order had been sought by TGP, due to concerns that Duro would loan the Samsung Arbitration proceeds to its Spanish parent company, Duro Felguera SA, and default on any potential award in favour of TGP.

35 Reference to *Duro v Trans Global* leads me neatly to a related point not confined to international arbitration. One consequence of the involvement of

[32] (2013) 298 ALR 666; [2013] WASCA 66 at [93].
[33] [2018] WASCA 174.

foreign parties in domestic litigation is that, where freezing orders or other interlocutory measures relating to underlying assets are in play, an added complexity is sometimes introduced because there may be a risk of assets being transferred out of the jurisdiction to other companies in a corporate group. A party's foreign financiers may also become involved in the litigation. Again, an earlier phase of litigation involving Lanco Resources and Griffin Coal supplies an example.

36 In *Perdaman Chemicals and Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd*,[34] Martin CJ, with whom Newnes and Murphy JJA agreed, upheld an appeal from Beech J who had declined to grant an interlocutory injunction restraining Griffin Coal from entering into any charge, pledge or other security as may be required by its sole shareholder, Lanco Resources Australia Pty Ltd, or by ICICI Bank Ltd, Singapore branch, without first giving ten prior business days' notice in writing to Perdaman through its solicitors.

37 ICICI Bank was also party to litigation of a related dispute involving Lanco concerning three standby international letters of credit. This litigation played out in the Supreme Court of New South Wales[35] and was a prequel to the proceedings that took place before Kenneth Martin J in 2017 in Western Australia to which I have earlier referred.

38 The Supreme Court of Western Australia was also involved in a fascinating case which developed the law in relation to international Mareva injunctions, or freezing orders as they are now called. That case started life as an urgent *ex parte* injunction before Pritchard J,[36] followed by an unsuccessful contested application to discharge it before Le Miere J,[37] an unsuccessful appeal to the Court of Appeal,[38] and a further unsuccessful appeal to the High

[34] [2011] WASCA 203.
[35] *Griffin Energy Group Pty Limited (Subject to Deed of Company Arrangement) v ICICI Bank Limited* [2015] NSWCA 29; dismissing an appeal from the decision of Hammerschlag J: *Griffin Energy Group Pty Limited (Subject to Deed of Company Arrangements) v ICICI Bank Limited (Singapore Branch)* [2015] NSWSC 87.
[36] *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2012] WASC 170.
[37] *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No 3)* [2013] WASC 239; (2013) 276 FLR 273.
[38] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 320 ALR 289; [2014] WASCA 178.

Court.[39] The case was *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* and the issue in it was whether a freezing order could be issued over assets in Western Australia, shares in Kangaroo Resources Limited (a company incorporated in Australia), in *anticipation* of the enforcement of a judgment that had not yet been given in proceedings that had just commenced in Singapore between the parties.

39 The High Court confirmed that the Supreme Court had inherent jurisdiction to grant a freezing order in relation to proceedings in a foreign court that might be enforced in Australia. It was held that the inherent power of a Supreme Court of a State to make such orders as that Court may determine to be appropriate "to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction" was not limited to cases where substantive proceedings in that Supreme Court had been commenced or were imminent; but applied equally to protect a "prospective enforcement process" under the *Foreign Judgments Act 1991* (Cth) even before an enforceable foreign judgment was obtained.

40 Finally in this journey through my consideration of aspects of transnational dispute resolution in the courts of Western Australia, the Court of Appeal found itself involved with fascinating issues regarding the enforcement of an actual as opposed to prospective judgment from Singapore in *Kok v Resorts World at Sentosa Pte Ltd*[40] in 2017. This was a case which concerned an attempt to enforce in Western Australia a judgment which Resorts World had obtained from the High Court of Singapore arising from the extension of credit to the judgment debtor, Mr Kok, in Singapore to facilitate his gambling at the Resorts World Sentosa Casino.

41 The judgment was registered in the WA Supreme Court under the *Foreign Judgments Act 1991* (Cth). Mr Kok sought to have the judgment set aside on the basis that its enforcement would be contrary to public policy – provision of credit for gambling being prohibited under Western Australian law. At first

[39] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1; [2015] HCA 36.
[40] (2017) 323 FLR 45; [2017] WASCA 150.

instance, Master Sanderson refused to set aside the registration of the judgment. It was held that, notwithstanding that many people in Western Australia may consider gambling and the extension of credit for gambling morally and ethically wrong, and that it was regulated in Western Australia by statute, it was not so inherently evil so as to render enforcement of a judgment from a legal system which does allow such credit contrary to public policy in Australia.

42 An appeal from the decision was dismissed.[41] In reaching its decision, the Court emphasised that only in very limited circumstances would the enforcement of a foreign judgment which conformed with the relevant foreign law be refused for being contrary to public policy. Martin CJ observed that:[42]

> "Different terminology has been used to describe the narrow and limited range of circumstances in which enforcement will be refused because it would contravene public policy. Expressions used include:
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> * violation of 'some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal';
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> * if 'enforcement were to offend some moral, social or economic principle so sacrosanct in [the forum's] eyes as to require its maintenance at all costs and without exception'; and
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> * 'where the offence to public policy is fundamental and of a high order'."

43 The Chief Justice also made an important observation about public policy in a federation, especially in the context of a Commonwealth Act such as the *Foreign Judgments Act 1991* (Cth). He held that public policy in the context of this Act must be understood as the public policy of Australia, rather than a reference to the public policy of the State in which a foreign judgment is sought to be enforced. As such, the laws of Western Australia relating to the provision of credit for gambling upon which the judgment debtor relied to

[41] *Kok v Resorts World at Sentosa Pte Ltd* (2017) 323 FLR 45; [2017] WASCA 150.
[42] (2017) 323 FLR 45; [2017] WASCA 150 at [18].

underpin his public policy argument had no greater significance than the law of other states or territories of the Australian polity.[43]

44 In what is a fascinating contrast, in 2019, Star Entertainment Qld Ltd (**Star**) had proceedings to recover a A$40 million plus debt incurred by a Singaporean gambler at its casino in Brisbane struck out by the Singapore International Commercial Court on the basis that s 5(2) of the *Civil Law Act* of Singapore provided that "no action shall be brought or maintained in the Court for recovering any sum of money or valuable thing alleged to be won on any wager."[44] The Court summarily dismissed Star's plea that the public policy of Singapore did not require s 5(2) to be applied,[45] and held that the clear words of s 5(2) had to apply.[46]

45 You will, I hope, have noticed that I have focussed almost entirely on Western Australian decisions in my consideration of the topic "Disputes with International Dimensions". That is not because transnational disputes do not arise in other Australian jurisdictions – they most assuredly do and you can read about them in the next edition of *Nygh's Conflict of Laws in Australia* – but I have focussed on Western Australian cases to highlight both the volume and complexity of transnational disputes which come before and are expeditiously resolved by this Court, contributing significantly to the growing body of jurisprudence in this area.

46 Finally, on a personal note, can I extend my best wishes to Rene Le Miere who I understand must retire from the Bench early next year. He has been a very highly respected, dedicated and exceptionally able commercial judge for many years. He has a national reputation and was always a great pleasure to appear before.

47 Many thanks to you all for your attention.

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[43] *Cf Poh Soon Kiat v Desert Palace Inc* [2009] SGCA 60.
[44] This is the equivalent of s 4(1)(a) of the *Gaming and Betting (Contracts and Securities) Act 1985* (WA).
[45] [2020] SGHC(I) 15 at [54].
[46] [2020] SGHC(I) 15 at [55].

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