JUDICIAL CO-OPERATION IN TRANSNATIONAL DISPUTE RESOLUTION: CONSTITUTIONAL DIMENSIONS

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I INTRODUCTION

The rule of law in transnational commercial dispute resolution is primarily supported by national courts. Their interactions are tending to the emergence of what has been called 'an organisational field' of convergent and sometimes common rules, practices, values and goals. However, they do their work subject to domestic constitutional constraints on their jurisdiction and powers. This paper considers the mechanisms of judicial cooperation in transnational commercial dispute resolution and concludes that, despite constraints, its development appears to be ongoing and open-ended.

Transnational commercial disputes involve actors or activities with connections to more than one State.[1] They frequently, although not always, arise out of transactional relationships. Some do not — disputes about intellectual property rights for example. Disputes may arise between non-government actors, between non-government actors and governments or their enterprises, and between governments and government enterprises. They may also arise between non-government actors and regulators or public officials in relation to trans-border commercial activity. There is a variety of ways in which national courts may be involved in the resolution of such disputes. Their cooperation and mutual assistance is essential to the maintenance and development of the global legal order.

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[*] Chancellor, University of Western Australia. Paper presented atconference: International Commercial Dispute Resolution for the 21st Century: Australian Perspectives, 20 February 2018, University of Western Australia.

[1] A conveniently broad definition taken from Christopher A Whytock, 'Litigation, Arbitration, and the Transnational Shadow of the Law' (2008) 18 *Duke Journal of Comparative & International Law* 449, n 5.

II TRANSNATIONAL LAW

The exercise of judicial power in transnational commercial dispute resolution engages with a body of law which can conveniently be called 'transnational law'. That term, as coined by Philip Jessup, covers 'all law which regulates actions or events that transcend national frontiers'.[2] It covers public and private international law and other rules which cannot be fitted within standard categories. It covers domestic legal rules, contract law, competition law and choice of law and forum rules.[3]

Some argue that transnational law should be distinguished from international and municipal law on the basis that its primary sources are private actors in international relationships. There may be force in that argument. Nevertheless, the breadth of Jessup's definition, like that of 'commercial dispute', as a dispute arising out of trade and commerce, enables a relatively coherent discussion of the topic. Jessup's definition picks up the considerable body of 'soft law' relevant to transnational dealings. That body includes model laws, principles, guidelines and standard form transactional documents.

The existence of 'soft law' as a useful category of legal norms has been debated. In a paper published in 2000, Professor Kenneth Abbott of Arizona State University and Professor Duncan Snidal of Nuffield College, Oxford, described 'hard law' as referring to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and delegated authority for interpreting and implementing law. The realm of 'soft law' is entered when 'legal arrangements are weakened along one or more of the dimensions of

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2 Philip C Jessup, 'Transnational Law' in Christian Tietje, Alan Brouder & Karsten Nowrot (eds) *Philip C Jessup's Transnational Law Revisited: On the Occasion of the 50th Anniversary of its Publication* (2006) 45.

3 Ibid.

obligations, precision and delegation'. The term 'soft law' thus used describes a broad class of deviations from 'hard law'.[4]

A subset of the Abbott and Snidal category focuses on the dimension of obligation and includes 'normative provisions contained in non-binding texts'.[5] Transnational law, including that kind of 'soft law', encompasses a variety of legal regimes and texts some of which are provided by non-State actors and depend for their legal effect upon adoption into domestic law or into agreements by contracting parties.

There is a definitional debate about whether transnational law is concerned with procedure rather than substance. Professor Roger Cotterell in a review essay in 2012 posed the question thus: 'Is transnational law primarily made up of rules applying directly across national borders, or is it mainly coordinating regulation, harmonizing or linking substantive rules that may differ between States?' The latter characteristic, as he suggested, allows for pluralism in national legal regimes but smooths their interactions. The substantive approach is linked to the object of legal uniformity across national boundaries.[6] To the extent that definition can be instrumental, a broad approach is to be preferred which is consistent with a degree of pluralism. That said, transnational law, including 'soft law' beyond the merely procedural can be a source of convergent and even harmonised substantive law.

It is next useful to direct attention to the range of institutions which are 'courts' for the purpose of a discussion of transnational judicial cooperation. Such discussion must acknowledge the constitutional settings which affect the scope of judicial cooperation. Broadly speaking, the concept of a 'court', even allowing for considerable diversity, embodies common elements of institutional character, function and relationships with

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4 Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organizations* 421, 421–22.

5 D Shellon (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000).

6 R Cotterell, 'What is Transnational Law?' (2004) 37 *Law and Social Inquiry* 2–3.

other branches of government. It does not extend to ad hoc tribunals appointed by parties pursuant to agreement as in the case of arbitration.

III COURTS — A CONSTITUTIONAL DIMENSION

Other than by curial adjudication, transnational commercial disputes can be resolved by negotiation, mediation or arbitration. Those mechanisms may be facilitated or mandated by law. Legally enforceable contractual provisions may require referral to mediation and/or arbitration. Mediated settlements may be enforced as contracts — sometimes they are converted by consent to enforceable arbitral awards. In the near future they may be enforceable directly in the same way as arbitral awards.[7] Arbitration awards can be enforced by domestic law giving effect to the New York Convention and/or under the UNCITRAL Model Law on International Commercial Arbitration which has been adopted in Australia. The resolution of disputes may also be effected by judicial processes. 'Judicial' in this context has a generic meaning — 'of, by, or proper to a law court or judge; relating to the administration of justice.'[8] That definition opens the question: 'What is a court?'

An essential requirement of any court, which distinguishes it from an arbitral body, is that it determines questions of fact and law binding on the disputants, not pursuant to an enforceable private agreement, but in the exercise of authority conferred by public law. If it is a domestic court it will act pursuant to the law of its State. If it is an international court it may be supported by the domestic laws of States which subscribe to its jurisdiction.

In Australia the core meaning of judicial power has long been understood as:

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[7] Refer UNCITRAL Draft Convention on International Settlement Agreements Resulting from Mediation and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements.

[8] Online *Oxford English Dictionary* <https://en.oxforddictionaries.com/definition/judicial>.

> the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.[9]

That said there is no comprehensive definition of judicial power.[10] Moreover, even within Australia there is room for diversity in the institutional design of the courts of the States and their relationship with the legislatures and the executive governments of those polities. Nevertheless, certain characteristics have been identified as essential and defining characteristics of courts generally for Australian constitutional purposes. They include the following:

- the conferring upon the court of judicial power;
- the reality and appearance of decisional independence from the executive and from the legislature;
- adherence to procedural fairness effected by:
  - (i) impartiality, in reality and appearance;
  - (ii) observance of the hearing rule.
- adherence to the open court principle;
- accountability for decisions effected by publication of reasons.

Perhaps the most important of these characteristics in the Australian setting is decisional independence from the executive and other external influences.[11]

Looking beyond Australia, the dictionary meaning of a court is 'an assembly of judges or other persons acting as a tribunal legally appointed to hear and determine causes.[12] That definition detached from any particular constitutional framework may raise a question about whether some tribunals, nominally arbitral or administrative, are nevertheless

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9 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffiths CJ).

10 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

11 See generally *South Australia v Totani* (2010) 242 CLR 1.

12 Online *New Shorter Oxford English Dictionary*, (1993).

generically courts where the power of the tribunal derives from statute rather than agreement. The lines are not always bright.

Global agreement about the nature and limits of judicial power and the essential characteristics of courts may be beyond reach. However, an attempted definition relevant to transnational commercial disputes appears in the first of the Principles on Transnational Civil Procedure developed by the American Law Institute (ALI) and UNIDROIT in 2004. That Principle sets out common characteristics of courts. It bears the heading 'Independence, Impartiality, and Qualifications of the Court and Its Judges' and provides:

> 1.1 The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence.
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> 1.2 Judges should have reasonable tenure in office. Non-professional members of the court should be designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution.
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> 1.3 The court should be impartial. A judge or other person having decisional authority must not participate if there is reasonable ground to doubt such person's impartiality. There should be a fair and effective procedure for addressing contentions of judicial bias.
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> 1.4 Neither the court nor the judge should accept communications about the case from a party in the absence of other parties, except for communications concerning proceedings without notice and for routine procedural administration. When communication between the court and a party occurs in the absence of another party, that party should be promptly advised of the content of the communication.
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> 1.5 The court should have substantial legal knowledge and experience.

The Reporters' brief Commentary suggests that judges, on the courts which it covers, typically serve for an extensive period of time (as in civil jurisdictions). It acknowledges that in some systems judges assume the Bench only after careers as lawyers (as is generally the case in Australia and other common law jurisdictions) and that some judicial officers are appointed for short periods. An objective of the Principle is 'to avoid the creation of ad hoc courts'. The term 'judge' includes 'any judicial or quasi-judicial official under the law of the forum'. The Principle embraces a large class of tribunals. It is debatable however, whether its requirements of independence and tenure could be met by all 'courts' relevant to a discussion of transnational judicial cooperation.

The first ALI/UNIDROIT Principle may be contrasted with the Statement of Judicial Independence adopted by the International Bar Association (IBA) in 1982. The IBA expressly prescribes independence from the executive government in the exercise of the judicial function. It would also limit the powers of legislatures in relation to the judiciary prohibiting retroactive reversal of court decisions and the diminution of the terms and conditions of the service of judges during their terms of office. Again, it should not be assumed that all important trading nations have courts that meet all the requirements of the IBA Statement. Some of those requirements lie at the boundary of definition and desiderata.

It may be accepted that decisional independence from executive government is a fundamental requirement. In its absence, a party appearing in or seeking the assistance of a court may be dealing not with the court but with the executive. And if a decision of a court were to be subject to reversal by the legislature[13] then a party appearing before the court may also be appearing, in a virtual sense, before the legislature.

A body may be a court even though it is not completely institutionally independent of the legislature or the executive. The

[13] To be distinguished from legislation which alters or reverses the legal 'effect' of a particular decision.

executive may be responsible for its budget and administration. The members of the court may be appointed for fixed terms and subject to termination for misbehaviour as assessed by the executive. There may be courts whose members are appointed for terms which are renewable at the discretion of the executive. There may be courts which are not the definitive interpreters of legislation and are subject to interpretations given by a legislative body.[14] In any discussion on transnational judicial cooperation it would be wrong to take too narrow a view of what constitutes a judiciary.

That said, the 'courts' of a State which lack institutional independence, even if perceived as honest and competent, may not attract the level of confidence of other national courts which is necessary to cooperation and assistance in transnational dispute resolution. The need for mutual confidence among diverse judiciaries no doubt exercises the minds of those seeking to construct a global convention for the recognition and enforcement of judgments between jurisdictions. No doubt, it also explains the use of specific purpose arbitral tribunals, not connected with a national judiciary, in the resolution of disputes arising under international investment agreements.

IV THE CONSTITUTIONAL DIMENSION AND BEYOND IN JUDICIAL COOPERATION

Taking a broad view of what a 'court' is, municipal courts have the primary role in the judicial resolution of transnational commercial disputes. That role is defined by the jurisdictions and powers conferred upon them by domestic laws, including applicable provisions of national constitutions. The terms 'jurisdiction' and 'powers' are here used in the senses, familiar

[14] Bui Thi Bich Lien, 'Legal Interpretation and the Vietnamese Version of the Rule of Law' (2011) 6(1) *National Taiwan University Law Review* 321; Xian Yang, 'Two Interpreters of the Basic Law: The Court of Final Appeal and the Standing Committee of the National Peoples' Congress' in Young and Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 69.

to many Australian lawyers, of 'authority to decide' and 'powers in aid of the exercise of that authority' respectively. The jurisdiction and powers of any domestic court determine its capacity to engage in legally effective action cooperating with or in aid of the courts of other national jurisdictions. Its ability to cooperate and assist other courts therefore has a constitutional dimension.

There are many examples of mechanisms for judicial assistance and cooperation in transnational civil disputes available to Australian and other national courts. Some have their origins in international conventions or agreements. For example, Australia is a signatory to the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.[15] There are service provisions to give effect to it found in the Rules of Procedure of each State and Territory and the Commonwealth.[16] Australia is also a party to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*.[17] Under the Evidence Convention, requests for assistance may be made from the court of one State to the courts of another and may be acted upon.

National courts may be expressly empowered to cooperate with each other in cross-border insolvency. In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted a model law on cross border insolvency. As described on the UNCITRAL website it:

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15 *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969).

16 *Uniform Civil Procedure Rules 2005* (NSW) Pts 11, 11A Div 4; *Uniform Civil Procedure Rules 1999* (Qld) Ch 4, Ch 4 Pt 7 Div 3, Ch 4, Pt 7, Div 4; *Rules of Supreme Court 1971* (WA) Or 11 and 11A Div 4; *Supreme Court Civil Rules 2006* (SA) Div 3, Sub-Div 4 and r 70; *Supreme Court Form Rules 2000* (Tas) Pt 7, Pt 38, Pt 38A Div 4; *Court Procedure Rules 2006* (ACT) rr 6540 – 6542, 6562 – 6565; *Supreme Court Rules* Or 88 and Or 7A Pt 4; *High Court Rules 2004* (Cth) r 9.07; *Family Law Rules 2004* (Cth) Ch 7, Pt 7.6; *Family Law Regulations 1984* (Cth) Pt II AB, Pt II AC; *Federal Court Rules 2011* (Cth) Divs 10.4, 10.5, 10.6; *Federal Circuit Court Rules* 2001 (Cth) Pt 6.

17 *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 241 (entered into force 7 October 1972).

> focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.

The Model Law applies to insolvencies where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

The Model Law provides for access to the courts of an enacting State by creditors and representatives in foreign insolvency proceedings and provides for an enacting State to authorise representatives in local proceedings to seek assistance elsewhere. It covers recognition of qualifying foreign proceedings and the grant of relief to assist foreign proceedings. It also provides for cooperation among the courts of the States where a debtor's assets are located and for coordination of concurrent proceedings. Legislation based on the Model Law has been adopted in 43 States including Australia, which enacted the *Cross-Border Insolvency Act 2008* (Cth). That Act provides, in s 6, that the Model Law will have the force of law in Australia. The Act falls well within the definition of transnational commercial law discussed earlier.

The recognition and enforcement of foreign judgments of one judicial system by another is also well-established, at least on a bilateral basis as an aspect of transnational law. Although, in Australia, there is a common law process for recognition and enforcement of a foreign judgment where various criteria are met, it is somewhat cumbersome. The *Foreign Judgments Act 1991* (Cth) provides a simpler statutory process for the recognition of money judgments and non-money judgments of the superior courts of countries designated for that purpose by the Governor-General and pursuant to regulation. The common criterion for recognition and enforcement is that substantial reciprocity of treatment will be assured in relation to the enforcement of judgments in Australian courts in the other countries.

An opportunity for expansion of the field of transnational judicial cooperation involving recognition of contracting parties' choice of an exclusive judicial forum and the recognition and enforcement of judgments of the chosen court is provided by the *Hague Choice of Court Convention* which entered into force on 1 October 2015.[18] The Convention, in substance, provides for parties to a contract to nominate the jurisdiction in which their disputes will be judicially adjudicated and for that decision to be respected and judgments emanating from it to be enforced. The justification of the Convention, party autonomy, is similar to that which underpins the *New York Arbitration Convention*.[19] It establishes a presumption that where a particular court is designated, that designation is to be exclusive unless the parties expressly provide otherwise. It involves the following three principal requirements:

- The chosen court must act in every case, if the choice of court agreement is valid. That is to say the chosen court has no discretion on forum non conveniens or other grounds to refuse to hear the case (Article 5).
- Where another court, which is not the chosen court, has relevant proceedings commenced before it, it must dismiss the case, unless one of the exceptions in the Convention applies (Article 6).
- Judgment rendered by a chosen court, that is valid according to the standards of the Convention, must be recognised and enforced in other contracting States unless one of the exceptions established by the Convention applies (Article 8).

The *Choice of Courts Convention* is potentially an important step forward in judicial cooperation in international dispute resolution. Australia is on the path to becoming a party to it and to enacting legislation to give

[18] *Hague Choice of Court Convention*, opened for signature on 30 June 2005, 44 ILM 1294 (entered into force on 1 October 2015).

[19] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

effect to it. Judicial cooperation will be mandated by domestic law giving effect to the Convention. The core features of that cooperation are deference to the parties' choice of forum and recognition and enforcement of the judgment rendered by the chosen court. The Joint Parliamentary Standing Committee on Treaties recommended in a Report published in November 2016 that Australia accede to the Convention.

A more ambitious project still underway in relation to judicial cooperation and assistance in transnational disputes is the *Hague Convention Judgments Project.* The Project has developed a draft convention which is intended to simplify and strengthen international law by creating a regime for the recognition and enforcement of foreign judgments. The Hague Conference on Private International Law has identified it as a priority project supporting:

> effective and robust transnational dispute resolution mechanisms to minimise the costs and risks associated with international litigation and to promote confidence in the global economic system.[20]

Some cooperative arrangements are bilateral. There are well-developed arrangements for judicial cooperation in place between Australia and New Zealand. The *Trans-Tasman Proceeding Act 2010* (Cth) facilitates the initiation of Australian court proceedings against a defendant located in New Zealand, allows for some cases started in New Zealand to be heard before an Australian court, provides for the compulsion of persons in New Zealand to give evidence in Australian proceedings and provides for judgments from each jurisdiction to be recognised and enforced in the other.

A development of interest is in the area of proof of foreign law. The common law rule is that foreign law has to be pleaded and proved as a fact, generally by expert evidence. The application of this rule has been

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[20] A Sherborne, 'The Judgments Project: An Update from the Hague', Australian Institute of International Affairs website, Australian Outlook (30 April 2017).

attended with difficulties.[21] In New South Wales, s 125 of the *Supreme Court Act 1970* (NSW) was inserted in 2010. Under that section arrangements can be made between the Supreme Court of New South Wales and foreign courts by which the Supreme Court can refer a matter of foreign law to the court of another jurisdiction for determination.[22] The Supreme Court has entered into Memoranda of Understanding with Singapore and New York to that effect. Presumably the Supreme Court could not be bound by the judgment of the foreign court any more than it would be bound by the finding of a special referee. If it were, then a constitutional question might arise.

Judicial interpretation of the scope of judicial power may be informed by a purpose of facilitating judicial cooperation where a facilitative construction is open. An example of such a choice came before the High Court of Australia in 2015 in *PT Bayan Resources TPK v BCBC Singapore Pte Ltd*.[23] A case was pending against PT Bayan in the Singapore International Commercial Court. The plaintiff BCBC applied to the Supreme Court of Western Australia for an order freezing Bayan's share in a company through which it had conducted a joint venture with BCBC. The order was made against the possibility of a money judgment from the Singapore International Commercial Court which would be amenable to recognition by the Supreme Court of Western Australia under the *Foreign Judgments Act 1991* (Cth).

Bayan argued, on appeal to the High Court, that the power of the Supreme Court to make a freezing order was limited to cases in which a substantive proceeding in that Court had commenced or was imminent.[24]

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21 See generally the James Spigelman, 'Proof of Foreign Law by Reference to the Foreign Court' (2011) 127 *Law Quarterly Review* 208, 208–9.

22 Ibid 214 n 49.

23 (2015) 258 CLR 1.

24 Ibid 19 [44].

In the joint judgment of five Justices, their Honours applied language used by Lord Nicholls in *Mercedes Benz AG v Leiduck*[25] saying:

> Even where a court makes a freezing order in circumstances in which a substantive proceeding in that court has commenced or is imminent, the process which the order is designed to protect is a 'prospective enforcement' process.[26]

Lord Nicholls had held that 'there was nothing exorbitant' about a Hong Kong court making a freezing order in aid of a prospective judgment of a foreign court able to be recognised and enforceable in Hong Kong. He said, in a passage quoted by the plurality judgment in *Bayan*:

> The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community.[27]

The High Court in *Bayan* expressly recognised the importance of transnational judicial assistance and that recognition informed its determination of the scope of the Supreme Court's power. There is a more general point to be made in this connection. The existence of rules and mechanisms for transnational cooperation and assistance is no guarantor of its occurrence in any given case. Much will depend upon the attitudes and cultures of the particular court involved. A leading international commercial arbitrator, W Laurence Craig, wrote in 2016:

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[25] [1996] AC 284 306 which was approved in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1, 32 [35]; see also *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 400 [41].

[26] (2015) 258 CLR 1, 19 [46].

[27] [1996] AC 284, 313-14. See also *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676, 686 [35].

> While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary was slow to change, ill-informed about modern commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or unbusinesslike to outsiders.[28]

That is a fact which may inform choice of international commercial arbitration or investor/State arbitration as a form of dispute resolution. It is also a factor which may inform a contractual choice of a preferred judicial forum whether pursuant to the Hague Convention or otherwise.

V A 'SOFT LAW' PRESCRIPTION FOR COOPERATION – THE ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE

A broad concept of transnational commercial law will include common form principles and rules which national jurisdictions are encouraged to adopt in the interests of convergence upon minimum common standards, procedures and substantive law in relation to transnational commercial disputes.

An example is the ALI/UNIDROIT Principles of Transnational Civil Procedure. The first of those Principles, dealing with courts, has been mentioned. The Principles are described in the opening Statement of their Scope and Implementation as 'Standards for adjudication of transnational commercial disputes'. The commentary on their scope and implementation acknowledges that there may be specific definitions of 'commercial' and 'transnational' in national adoptive documents which

[28] W Laurence Craig, 'Some Trends and Developments in the Laws and Practices of International Commercial Arbitration' (2016) 50 *Texas International Law Journal* 699, 700 quoted in F Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross-Border Dispute Resolution in Asia' (2016) 14 *Loyola University Chicago International Law Review* 31, 35–6.

may be connected to local legal traditions and the connotations of legal language.

The last of the Principles, Principle 31, is entitled 'International Judicial Cooperation' and provides:

> The courts of a state that has adopted these Principles should provide assistance to the courts of any other state that is conducting a proceeding consistent with these Principles, including the grant of protective or provisional relief and assistance in the identification, preservation and production of evidence.

The commentary on Principle 31 asserts that international judicial cooperation and assistance supplement international recognition and, in the modern context, are equally important.

The Principles are accompanied by Rules of Transnational Civil Procedure which were not adopted by UNIDROIT or ALI. They nevertheless offer a model for the implementation of the Principles. In 2013, the European Law Institute and UNIDROIT commenced a joint project to develop a set of European Rules of Civil Procedure to give effect to the ALI/UNIDROIT Principles. In this project they have had the cooperation of the ALI. Consolidated drafts of three sets of rules dealing with access to information, provisional and protective measures and service and due notice of proceedings, together with draft rules on judgments were presented at a joint meeting of a steering committee and working groups in November 2017. The steering committee met with the co-reporters of all working groups in Rome on 9-10 April 2018 and considered working drafts on 'Judgments', 'Parties' and 'Lis Pendens and Res Judicata'. The process is continuing.[29]

[29] UNIDROIT, 'Study LXXVIA', Transnational Civil Procedure – Formulation of Regional Rules, UNIDROIT website.

The Principles provide for the bases of jurisdiction in transnational dispute resolution. Those bases include the existence of a substantial connection between the Forum State and the party transaction or occurrence in dispute, the absence of any other reasonably available forum and the consent of the parties.[30] Jurisdiction *must* ordinarily be declined where the parties have previously agreed another tribunal has exclusive jurisdiction. It *may* be declined where the court in which the proceeding is commenced is manifestly inappropriate relative to another court.[31] It *should* be declined where the dispute is pending in another court competent to exercise jurisdiction unless the dispute will not be fairly effectively and expeditiously resolved in the other court.

There is a principle of procedural equality of the parties,[32] a right to engage a lawyer whose professional independence should be respected,[33] and a general requirement for due notice and procedural fairness.[34] There is a familiar common form structure for proceedings ordinarily in three phases — pleadings, interim and final.[35] The obligations of lawyers and parties are stated in broad terms.[36] The Principles otherwise describe processes and requirements which reflect the substance of much of what is found in rules of civil procedure familiar to Australian lawyers.

VI PRINCIPLES OF COOPERATION ON CROSS-BORDER INSOLVENCY

The UNCITRAL Model Law on cross-border insolvency has already been mentioned. A wider ranging project leading to a Statement of Principles in this area was initiated in 2006 by the ALI in conjunction with the International Insolvency Institute (III). The objective of the

30 Principle 2.
31 Principle 2.5.
32 Principle 3.
33 Principle 4.
34 Principle 5.
35 Principle 9.
36 Principle 11.

'Transnational Insolvency Project' was to investigate whether provisions of existing ALI Principles of Cooperation applicable to parties to the North American Free Trade Agreement (NAFTA) would be appropriate for use by jurisdictions across the world. A document entitled 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' was presented at the annual meeting of the ALI in May 2012 and of the International Insolvency Institute in Paris on 22 June 2012. There were also Global Guidelines annexed to the Principles concerned with court-to-court communications.

Subsequently the Australian Academy of Law (AAL) was invited by the Council of Chief Justices of Australia to identify possible benefits of the use by Australian courts and insolvency administrators of the ALI-III Principles. The AAL enlisted the services of Professor Rosalind Mason, Sheryl Jackson and Mark Wellard from the Queensland University of Technology for that purpose. They concluded that the Principles provided a more comprehensive approach to international insolvency cases than the Model Law, addressing jurisdiction and requiring an explicitly global approach to recognition and enforcement. They observed also that the *Cross-Border Insolvency Act* was more limited than the Principles because it excludes certain prescribed entitles — banks and insurance companies — from its coverage. Further, the General Principles were said to take a more comprehensive approach than the Model Law to the management by courts of international insolvency cases in particular drawing upon the Model Principles of Transnational Civil Procedure already discussed.

On the matter of court-to-court communications in international insolvency cases, the ALI-III Global Guidelines resemble those developed by ALI for NAFTA. In the Federal Court of Australia and most Australian State and Territory Supreme Courts the procedural rules made pursuant to the *Cross-Border Insolvency Act* have now been supplemented by

Practice Directions referring to the ALI-NAFTA Guidelines. The authors of the AAL report have suggested that Australian courts should adopt the Global Guidelines in lieu of the ALI-NAFTA Guidelines. They also argued that Australia should give serious consideration to the possibility of adopting the Model Principles of Transnational Civil Procedure previously discussed.

The area of cross-border insolvency makes an interesting case study of the role to be played by transnational law reform bodies in the development of transnational law by creating resources in the form of 'soft law' principles which national courts can adopt and adapt. Convergence and cooperation are both outcomes of this process.

VII TRANSNATIONAL JUDICIAL DIALOGUE

Cooperation and assistance includes transnational judicial dialogue through meetings and conferences of judges, exchange of judgments and temporary exchanges of judges and other personnel. Such activities may ultimately lead to courts seeking to extend their own capacities to participate cooperatively in transnational commercial dispute resolution. They may lead to the adoption of uniform or convergent rules and practices in relation to classes of dispute and procedures for international assistance and cooperation.

There is some interesting and relatively recent writing about the growing phenomenon of transnational judicial dialogue and the application to it of 'organisational field' theory developed in the 1980s. There is a typical academic disagreement about what the term 'organisational field' should cover. It may be constituted 'by a community of organisations with similar functions or roles, in so far as these organisations are aware of each other, interact with each other and perceive each other as peers or

'like units' in some important sense.'[37] One of the elements of an organisational field is said to be a cultural-cognitive system described as 'the development of a mutual awareness among participants in a set of organisations that they are involved in a common enterprise.'[38]

In the case of the courts there has undoubtedly been a considerable increase in interactions, face-to-face and using information technology and by citation of each other's decisions. The metaphor of a field does suggest a multiplicity of connections and interactions with feedback effects on and from the courts constituting the field. It is a concept which may provide a framework for inquiry into the possibility and probability of institutional convergence, reflecting convergences in transnational law and practice across national boundaries. It may also be of importance as a kind of 'common enterprise' explanation of a pro-active approach by courts to the interpretation of their own powers and the development of their own practices in favour of convergence and cooperative action.

VIII COOPERATION AND CONVERGENCE

[37] O Frishman, 'Transnational Judicial Dialogue' (2016) 19 *European Law Journal* 739, 744.

[38] P J DiMaggio and W W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields' (1983) 14 *American Sociological Review* 147, 148 cited in Frishman, above n 37, 744.

There are many resources and mechanisms for achieving convergence and cooperation to facilitate transnational business generally. They include international conventions and free-trade and international investment agreements generally which provide an important framework for developing convergent business laws to give effect to them. There are many bodies of learning and experience and instruments based on them which can be drawn on as resources to assist in cooperative convergence. They include:

- international legal standards setting out objectives and guidelines for national laws in particular subject areas;
- international statements of principles — eg the ALI/UNIDROIT Principles and Rules already discussed and the *United Nations Convention on Contracts for the International Sale of Goods* (1980);
- model laws, including codes — eg the UNCITRAL Model Law on Cross Border Insolvency;
- statements reflecting regional or sub-regional consensus about particular areas of business law;
- common form transactional documents and terms.

In addition to these resources, there are institutional mechanisms which support convergence such as:

- meetings of regulators, legal drafters, policy advisors, business associations, the legal profession and judges;
- formal inter-jurisdictional arrangements;
- international commercial courts or tribunals.

New mechanisms can be envisaged. There would be merit, for example, in the development of a principle of interpretive comity between national judiciaries in relation to similar business laws. That might be supplemented by a multi-jurisdictional convergence or harmonisation

committee to make specific proposals to be considered by national jurisdictions.

An institutional initiative in the Asian region relevant to convergence is the creation of the Asian Business Law Institute (the Institute) which was launched at the beginning of 2016 in Singapore at the instigation of Chief Justice Sundaresh Menon. The Institute, supported by the Singapore Academy of Law, aims to evaluate and stimulate the development of law, legal practice in the region and, in particular, to make proposals for the convergence of business law among Asian countries. The High Court of Australia and the Supreme Courts of India, China and Singapore are the foundation members of the Institute represented on its Board of Governors. The first project accepted by the Institute related to the recognition and enforcement of foreign judgments. It involves a collation of information about law and practice in the region. A report has recently been published.

There are constraints on convergence which involve changes in the law and practice of converging jurisdictions. Such changes may come up against the history, culture, economy, social conditions and the nature and distribution of power within the jurisdiction. And even after formal harmonisation, similar laws may be interpreted, administered and enforced differently in different countries.

As a general proposition it is to be expected that convergence in private law rules and practice will be easier to achieve than convergence in public law. In the field of public law convergence projects are likely to encounter difficulties linked to differences in constitutional and legal systems and legal cultures. In some countries contested questions of statutory interpretation and constitutional interpretation are placed beyond the reach of the courts. The development of judicial cooperation and assistance in transnational commercial dispute resolution must be able to

accommodate diversity. Homogenisation is not available in the short term and probably not in the long term.

IX SOCIETAL BENEFITS OF THE JUDICIAL PROCESS

There are significant benefits, beyond the efficient resolution of commercial disputes with a transnational dimension, that public courts determining them confer on their own societies and upon international trade and commerce generally. Those benefits do not flow from ad hoc and confidential arbitration processes. Courts are standing bodies conducting their business in the public gaze and, generally speaking, publishing reasons for decisions. In so doing they facilitate the flow of information about legal questions and their resolution both domestically and internationally where similar questions may arise. They contribute in this way to the development of transnational commercial law. The metaphor of the 'organisational field' again comes to mind. The point about the distinction between arbitration and judicial determination of disputes has been made repeatedly by heads of jurisdiction in Australia and elsewhere. Chief Justice Murray Gleeson said in October 2014:

> Because of the significance of precedent, judgments of a court may serve the purpose of clarifying, or developing, or, on occasion, altering the law. Arbitral awards serve no such purpose.[39]

The Chief Justice of New South Wales, Chief Justice Bathurst, in 2013[40] and the President of the UK Supreme Court, Lord Neuberger in 2015,[41] argued that the want of transparency in arbitration tends against the development through that process of transnational commercial law.

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[39] The Hon Murray Gleeson AC, 'Writing Awards in International Commercial Arbitrations' (Speech delivered at Chartered Institute of Arbitrators (Australia) Ltd, Sydney, 31 October 2014).

[40] Bathurst CJ, 'The Importance of Developing Convergent Commercial Law Systems: Procedurally and Substantively' (Speech delivered at the 15th Conference of Chief Justices of Asia and the Pacific, Singapore, 28 October 2013).

[41] Lord Neuberger, 'Arbitration and the Rule of Law' (Speech delivered at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) 12 [24].

Former Lord Chief Justice of England and Wales, John Thomas, has been a prominent judicial proponent of the argument and of what commercial courts must do to meet the challenge of commercial arbitration. He has attributed to the commercial courts of the world 'a common duty, working together, to innovate and to lead', in relation to procedures, personnel and administration, process and the use of technology.

The Pilot Financial Market Test Case Scheme operated in the Chancery Division and the Commercial Court in London is an example of the innovation of which Lord Thomas spoke. The Scheme applies to claims which 'raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed.'[42] A person who is or was active in business in a relevant market may, by mutual agreement, issue proceedings against another such person, provided the other person has opposing interests as to how the law of England and Wales raised by the qualifying claim should be resolved.[43] Trade or professional associations or regulatory bodies or associations may be joined.[44] The Practice Direction setting up the Scheme does not specify the form of relief, but it is evidently likely to be declaratory in character. At the time of its expiry and extension in November 2017, no cases had been submitted to the courts under the Scheme. The judges nevertheless maintained the potential value of the Scheme particularly in light of questions which are likely to arise in connection with Brexit.

To Australian eyes, the Pilot Financial Market Test Case Scheme might appear tantamount to an advisory jurisdiction which could face constitutional difficulties if undertaken in the exercise of federal jurisdiction. However, the availability of declaratory relief to determine

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42 Practice Direction 51M, 'Financial Markets Test Case Scheme', cl 2.1.
43 Ibid cl 2.3.
44 Ibid cl 2.5.

concrete, contested legal questions is supported in the Australian courts.[45] There does not seem to be any reason why a scheme analogous to the test case scheme could not be framed to take account of Australian constitutional requirements particularly in State courts.

X JUDICIAL COOPERATION – THE STANDING FORUM

Lord Thomas argued, and it is not contentious, that the rule of law in international markets is supported where commercial courts learn from each other and develop the law to take into account the decisions of commercial courts in a variety of jurisdictions. To that end, in February 2016, he proposed the establishment of a Standing International Forum of Commercial Courts.[46] In this may be seen a manifestation of the 'organisational field' discussed earlier. The object of the Forum was 'to build on and develop a more systematic approach to providing a common approach to the resolution of disputes.'[47] It was first convened on 5 May 2017. Commercial courts from many jurisdictions, including Australia met in London. Sixteen of those jurisdictions were represented by their Chief Justices.[48] A media release following the meeting indicated that the Forum would seek to:

1. produce a multi-lateral memorandum explaining how, under current rules, judgments of one commercial court may most efficiently be enforced in the country of another;

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45 *Australian Gas Light Company v Australian Competition & Consumer Commission* (2003) 137 FCR 317, 419 [604]. See also *Australian Gas Light Company [No 2]* [2003] FCA 1229 [39], [40], [43]; *CGU Insurance Ltd v Blakeley* (2017) 259 CLR 339.

46 Lord Chief Justice Thomas, 'Commercial Justice in the Global Village: The Role of Commercial Courts' (Speech delivered to the Dubai International Financial Centre Academy of Law, 1 February 2016).

47 Ibid.

48 Jurisdictions represented included Abu Dhabi, Australia, Bahrain, Bermuda, Canada (Ontario), Cayman Islands, Delaware, Dubai, Eastern Caribbean, European Courts, Hong Kong, Ireland, Kazakhstan, New English Language Netherlands Court, New York, New Zealand, Nigeria, Qatar, Rwanda, Sierra Leone, Singapore and Uganda.

2. establish a working party to examine how best practice might be identified and litigation made more efficient – with a view to the production of a further multi-lateral document to be discussed at the next meeting of the Forum.
3. establish a structure under which the judges of the commercial court of one country could spend short periods of time as observers in the commercial court of another; and
4. consider issues such as practical arrangements for liaison with other bodies including arbitral bodies to identify and resolve areas of difficulty.

The next meeting will be hosted in New York in 2018.

The Standing Forum is a vehicle for judicial cooperation in the penumbral extra-constitutional area. If effective, it should facilitate convergence in commercial law and practice between the participant courts. The degree of convergence will be subject to the constitutional dimensions under which each court operates. The Forum is in its early days. Given the evident support for it at its first meeting there is a reasonable prospect that it will have an important role to play in fostering cooperation across national borders.

XI CONCLUSION

The phenomenon of transnational judicial cooperation and assistance in relation to transnational commercial dispute resolution is multidimensional and growing in significance. It may have interactions yet to be discerned with the emergence of domestically-based international commercial courts, such as those established in Abu Dhabi, Qatar, Dubai and Singapore. It may also have an interaction with the European preference for standing bodies and, perhaps ultimately, a permanent investment court to determine investor/State disputes arising under international investment agreements. There may be an argument that for the purposes of the general topic of this paper a permanent investment

court would be a court operating in the field of transnational dispute resolution as discussed earlier. The wavefront is moving. Although courts operate under constitutional and legislative constraints on their jurisdiction and powers these are open to interpretive development and law reform to facilitate convergence and cooperation.