An Australian International Commercial Court -

Not A Bad Idea or What a Bad Idea?[1]

Comment by Justice Craig Colvin[2]

1 In his paper, President Bell makes a persuasive case against the establishment of a specialist Australian International Commercial Court. I will venture an opposing view. I do so with some trepidation for two reasons. First, his Honour speaks with considerable knowledge and experience as to the subject matter of international dispute resolution. Second, in presenting the alternative argument I do not intend to suggest any deficiency with the existing Australian courts that requires remedy by establishing a new Australian forum. Rather, I see an opportunity that arises, in part, by reason of the quality of Australia's judicial system. A new forum may be required in order for Australia to participate fully in that opportunity.

2 There is force in the observation that there are a number of courts in Australia to which international commercial disputes may be (and are already) submitted by agreement and that, for over a century, the London Commercial Court has attracted work in this way.

3 The unstated assumption behind that observation is that it is a good thing that Australian courts are attractive to parties seeking to resolve international commercial disputes and that those courts are resorted to for the resolution of such disputes by sophisticated parties. I agree with that assumption. It rests on a view that there may be long lasting

[1] Paper delivered by the Hon Justice A S Bell President, New South Wales Court of Appeal at the 2019 ABA Biennial International Conference 12 July 2019, Singapore.
[2] Justice of the Federal Court of Australia.

economic and political advantages if Australia is able to attract such work without compromising existing court resources. Those advantages are why the United Kingdom is unlikely to abolish the London Commercial Court and Singapore is unlikely to reverse its investment in the Singapore International Commercial Court.

4 His Honour also persuasively makes the case that (a) many Australian courts have modern efficient procedures to deal with commercial cases; (b) by and large decisions in commercial cases in Australia are well reasoned and command respect; (c) Australian courts can and do draw upon their collective wisdom in commercial matters through published decisions; (d) prompt avenues of appeal are available; and (e) competition between Australian courts for adjudication of international disputes is a good thing. As to the last point, the common law courts have a history of development through competition.[3]

5 The paper also demonstrates how in a globalised and internationalised market system there is a need for authoritative and consistent determination of international commercial disputes. Further, there is both reason for possible dissatisfaction with private arbitration and an appreciation that many courts now offer modern procedures for disputes to be resolved as quickly, inexpensively and efficiently as possible.[4] Judicial determination may be preferred due to, amongst other things, institutionalised independence, the ability to bring in third parties where appropriate, the discipline provided by the availability of appeals and the shared benefit of a coherent publicly

[3] Daniel Klerman, 'Jurisdictional Competition and the Evolution of the Common Law: A Hypothesis', (2004) 8 Australian Journal of Legal History 1. There were times in the past where such competition was incentivised by the entitlement of judges to share in the revenue from additional filing fees.

[4] In Australia, the High Court has brought to account overall objectives expressed in legislation for court procedures to be directed to resolving matters in a manner that is 'just, quick and efficient' and 'just, efficient, timely and cost-effective' when deciding the recent cases of *Rozenbilt v Vainer* [2018] HCA 23; (2018) 262 CLR 478 and *UBS AG v Tyne* [2018] HCA 45.

available set of rules through published reasons for judgment which can be applied to govern future international commercial dealings.

6 Long standing legal institutions in Australia mean that it is particularly well suited to providing judicial determinations for the resolution of commercial disputes. The independence of its judiciary is not questioned.[5] It is recognised as having high quality judicial and court administrative resources. It is a common law jurisdiction, the rules of which are familiar to, and preferred by, many in international commerce. Its legal and constitutional institutions, which include its legal profession, deeply embed the rule of law. These characteristics are all well-established and supported and may be expected to be sustained for the foreseeable future. These are rare and valuable attributes. These and other considerations mean that Australia has the foundation for attracting the work.

7 Also, in recent decades, Australia has moved to an economic policy position that is outwardly focussed, with a history of supporting free trade and a dependence upon maintaining effective and open international markets.[6] It would be consistent with that focus for it to seek to participate in the provision of the adjudication and rule making infrastructure necessary to support international commercial dealings as well as seek to share in the economic benefits from providing those services.

8 Putting these matters together there is, to put it plainly, the potential for Australia to supply more judicial dispute settlement services into what may be an emerging and

[5] The World Justice Project Rule of Law Index 2019, ranked the absence of corruption in the judiciary of 126 countries according to a system where 1 was the highest rank and zero the lowest. The score for Australia was 0.97, Canada 0.95, China 0.57, India, 0.49, Singapore 0.90, the United Kingdom 0.96 and the United States 0.89.

[6] Since 1983 Australia has entered into 11 bilateral or multilateral free trade agreements with 18 countries and has concluded 4 more that are not yet in force: https://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx. The economic benefits for Australia of a reform agenda through 'sustained liberalisation of trade barriers and reduced industry protection' were analysed by the Centre for International Economics in a report prepared for the Australian Department of Foreign Affairs and Trade published in October 2017. It concluded that one in five Australian workers are employed in a trade-related activity and trade has increased GDP by 5.4 per cent over the 1986 to 2016 period.

growing international market for such services. It is a potential that if realised would bring economic and political benefits.

9 However, I suggest there are four significant reasons why the opportunity may be lost by staying with the status quo. First, there is a lack of any sustained and targeted marketing or promotion of Australia and its judiciary as a forum for resolution of international commercial disputes. Second, to match the prominence of existing players like the London Commercial Court requires a focussed effort which is not encouraged by competitive federalism in Australia.[7] Third, diffuse effects across different states discourages investment by State governments in such initiatives. Fourth, the outsider's perspective of the Australian federal system of courts as being somewhat fractured and fragmented and lacking a clear and coordinated focus when it comes to international disputes works against the effectiveness of any promotion that might be undertaken.

10 Each of these obstacles would be addressed by the establishment of a national forum with a consensual jurisdiction for resolution of international commercial disputes.

11 So I suggest that there are good reasons for Australia to consider the addition of a new forum where disputes that are international and commercial in nature may be determined. It should be a forum that is able to harness the strength of existing judicial expertise from across the country within a structure that is capable of ready international promotion. It needs to have the assurance of permanence such that parties can confidently choose the forum for resolution of disputes that may occur well into the

[7] There is a large literature on the way a federal governmental structure affects the development of its institutions of government in areas as diverse as its taxation systems, its regulatory practices and its court systems. Comparisons are often made between the federal government systems of the United States, Canada, Australia and Germany and the extent to which there are similarities and differences between them. A distinction has been drawn between competitive and cartel federalism. For an interesting, discursive and somewhat emphatic take on the topic, see Michael S Greve, *The Upside Down Constitution* Harvard University Press, 2012.

future. It should have flexibility of process and procedure that enables it to be innovative and efficient thereby being able to be a competitive alternative.

12 However, as President Bell has quite properly indicated, there are some complexities involved in establishing within the Australian federal constitutional structure a specialist commercial court for dealing with international disputes. There is little practical relevance in advocating for the establishment of an Australian Commercial Court if it has no prospect of being established having regard to constitutional complexities and political realities. Therefore, the proposal I am about to outline has been formulated with an imperfect eye on such matters to avoid my comments being of no possible practical relevance. However, I do not seek to speak definitively about such matters today. Instead, I leave for another occasion, the keener consideration as to whether there may be constitutional land mines lurking in the proposal.

13 The model I advance for consideration is that of a federally funded independent Australian International Commercial Tribunal where the Tribunal members are all sitting judges of the Supreme Courts and the Federal Court with recognised commercial expertise. Judges would be brought in to sit in the Tribunal when work in the Tribunal requires, but would otherwise continue as judges in their own court.[8] Such an approach would enable the Tribunal to be established from the outset with a panel of well qualified and experienced commercial judges and without considerable cost associated with their appointment. It would provide immediate access to the core values of independence, impartiality, integrity, fairness, transparency and diligence that are embedded within a quality judiciary.[9]

[8] Of the 14 judges of the London Commercial Court all but one also sit as judges of the Queens Bench, The Commercial Court Report, 2017-2018, p22. The exception is Mr Justice Jacobs. However, the work of the Court is such that they spend most of their time sitting in the LCC: at p8-9.

[9] See the analysis of these qualities in Rares, Justice Stephen 'What is a Quality Judiciary' [2010] FedJSchol 44; (2011) 20 JJA 133.

14 It would then be a matter for the head of each jurisdiction as to whether a particular judge would be made available to sit on a particular matter when matters are listed. If thought necessary, federal funding arrangements could be put in place to cover the cost of releasing judges from Supreme Courts to sit on the Tribunal.

15 There may also be the potential to appoint judges from other jurisdictions or retired judges from Australian courts as part-time Tribunal members to sit on particular cases if that was thought to be desirable.[10]

16 Although I will refer to the forum as a tribunal, I do so only to distinguish its character from the kind of institution in which the Constitution vests judicial power. It appears that the institution could be named the Australian Commercial Court, even though it would not be a Chapter III Court.[11] It could have many of the attributes of such a court, but there may be advantages in it being established as a tribunal.

17 As a tribunal, the forum would not be bound to apply the rules of evidence and would have considerable flexibility in procedure. A Tribunal with a special focus upon resolving international commercial disputes may be expected to develop innovative practices and procedures that particularly suit disputes of that kind. For example, there would be no difficulty in allowing relevant matters of foreign law to be established by submission to the Tribunal.

18 The jurisdiction of the Tribunal would be consensual but would require that any application be in respect of a dispute that is both international and commercial in nature.

[10] A practice followed in the LCC, The Commercial Court Report, 2017-2018 at p23.

[11] In *Lane v Morrison* [2009] HCA 29; (2009) 239 CLR 230, the Australian Military Court was held not to be a Chapter III Court because of an express statement to the contrary in the legislation establishing the court. In *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Tramways (No 1)* [1914] HCA 15; (1914) 18 CLR 54 at 70-1 the court in that case was found not to be a court in which the Constitution vests judicial power. See also the views in *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501.

19 Arrangements could be made so that the Tribunal could allow representation by foreign lawyers. Those arrangements may be less complex given that they would not relate to appearances in an established Australian court.

20 There would be the potential, as is the case with the Australian Competition Tribunal, for funds for registry and other administrative support to be appropriated to the Federal Court of Australia. This would enable efficient access to the existing electronic filing and national infrastructure of the Federal Court and avoid the need to duplicate these facilities. There would be the potential for existing state and federal court facilities to be used for hearings and any associated mediation services. By those means arrangements could be made for the Tribunal to sit in different places in Australia depending upon the dispute.

21 The Tribunal could be established initially with a President (who was a sitting judge) and a small full-time staff with the responsibility of preparing practice notes, materials on submitting disputes to the Tribunal and on the process for convening the Tribunal and, importantly, to have the carriage of promoting the Tribunal. The significance that would flow from being able to coordinate such efforts through a single Australian institution that provides access to independent decision making by experienced judges drawn from across the country should not be understated. I suggest that it is far more likely to generate greater international commercial dispute resolution work in Australia than fragmented efforts by State courts with very little funding. More importantly, the establishment of a specialist Tribunal for international commercial disputes could facilitate the institutions of the legal profession in Australia focussing their support in promoting Australia as a forum for resolving international disputes in a single coordinated effort. Those efforts could be coordinated with promotion of international

commercial arbitration in Australia. A new Australian International Commercial Court could invigorate those efforts.

22 Importantly, the Tribunal would publish reasons. In doing so it would provide both a dispute resolution service and a rule formulation service. The availability of well-reasoned, authoritative determinations would provide valuable information for the international marketplace that could be used to provide advice as to the likely outcome of similar disputes in the future. It is to be expected that the Tribunal could consider, draw upon and develop a body of determinations that had regard to decisions in other international commercial forums applying common law. It would be a valuable participant in developing alignment in the principles to be applied. Its decisions would be collected together, be easily accessible and could readily be the focus of debate and comment in international conferences where such matters are considered. These are advantages for commerce generally that are not available through international commercial arbitration.

23 Although the decision would be that of a Tribunal, provision could be made for a procedure by which there could be an application for leave for a determination of the Tribunal to be given effect as a judgment of the court. For example, there are various alternatives by which the decision of an adjudicator under construction industry security of payment legislation in the various states and territories may be given such effect.[12] Declaratory orders could be given effect as judgments in the same way that arbitral awards of that character can be enforced as judgments.[13]

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[12] *Building and Construction Industry Security of Payment Act 1999* (NSW), s 25 and *Construction Contracts Act 2004* (WA), s 43. Before 2016, in Western Australia the legislation provided for an application for leave to enforce the decision of the adjudicator as a judgment of the court. In a number of cases, the question whether there should be leave was heard at the same time as an application for review of the decision for jurisdictional error: see, for example, *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2016] WASCA 130; (2016) 50 WAR 399. Historically, it is a process familiar in its application to certain arbitral awards.

[13] *West Tankers Inc v Allianz SPA & Generali Assicurazione Generali SPA* [2012] EWCA Civ 27.

24 Decisions of the Tribunal would be administrative in character and would be amenable, at least, to review for jurisdictional error. That may be enough. However, provision could be made for a statutory right of appeal. Where an appeal is provided for in respect of an administrative decision then the Court will exercise original, not appellate, jurisdiction and do so in proceedings which are in the nature of judicial review.[14] However, the scope of review could be wide or narrow. It could be confined to an error of law.[15] It could be confined to a question of law.[16] It could be confined to a consideration of the record before the Tribunal.[17] It could be by way of rehearing. There are many options. There is the potential to craft an appeal right that is appropriate for the nature of the jurisdiction.

25 As is the case for other tribunals, where there is provision for a statutory right of appeal from tribunal members who must be a judge in order to qualify for appointment, the appeal could be required to be heard by an appellate bench. Ultimately, there would be oversight by the High Court.

26 Where the overall dispute means that the jurisdiction to be invoked extends beyond the consensual terms of submission to the Tribunal, the use of sitting judges would enable matters to proceed in which dual commissions as a judge of a court and as a member of the tribunal would establish jurisdiction. By this means additional admiralty, intellectual property or other jurisdiction may be established. Third party jurisdiction might be dealt with in the same way or possibly, to some extent, could form part of the powers conferred upon the Tribunal itself.

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[14] *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* [2001] HCA 49; (2001) 207 CLR 72 at [15].
[15] *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)*.
[16] *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 at [53]-[57].
[17] *Australian Competition & Consumer Commission v Australian Competition Tribunal* [2006] FCAFC 83; (2006) 152 FCR 33 at [43]-[44], [170].

27 The establishment of an international commercial tribunal in Australia would also signal the commitment of a further Government in the region to supporting international commerce through providing the highest quality institutionally independent decision making for international commercial disputes. It would reinforce the approach initiated through the establishment of the Singapore International Commercial Court. It is an instance where the availability of an additional alternative could help increase the market for the provision of such services by reinforcing its credibility as a product. There is a well-established body of economic literature that recognises how a public system of adjudication of disputes may develop through competition.[18]

28 Writing on the competing jurisdictions of international courts and tribunals, Yuval Shany has said:[19]

> It can be alleged that the anarchic state of the institutions comprising the international legal system and the growing competition between different international courts and tribunals might also result in procedural reforms and development of equitable and efficient legal rules, as happened in England. According to this view, jurisdictional competition would encourage the ICJ, for example, to innovate its rules of procedures in order to escape from being marginalized by competing and more flexible fora…A jurisdiction-regulating regime providing for rigid allocation of competences would arguably take away the incentive for courts and tribunals to do better. In the same vein, an excessively rigid rule of judicial harmonization (e.g. according *stare decisis* to first-in-time judgments) might sterilize potential jurisprudential discourse and entrench conservative positions.
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> (citations omitted)

29 Recently, the market aspects by which a competent judiciary in one jurisdiction might be seen to attract investment were recognised in a research paper by Professor Isidro of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law:[20]

> The essential task of public courts of resolving disputes among private parties has traditionally been conceived as a service of the State, and not as a commercial product involving competition among suppliers. That perspective must not be overlooked: the first objective of any jurisdictional system governed by the rule of law must be the resolution of the cases, in a framework that guarantees the fundamental rights of access to justice and equality of arms. At the same time, it not possible to ignore any longer that how a judiciary works can attract desirable foreign investment: thus the label

[18] See, for example, the influential article by William M Landes and Richard A Posner 'Adjudication as a Private Good' (1979) 8 (2) Journal of Legal Studies 235.
[19] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford 2003) at 123.
[20] Prof Dr Marta R Isidro, 'International Commercial Courts in the Litigation Market', Research Paper (2019).

> of 'litigation market'. Independent, efficient courts known for the quality of their decisions, and staffed with skilled personnel, are an essential component of the trust-building which is essential to investments and trade.
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> In fact, in international commerce the idea of competition between the courts of different States is novel, although it has intensified since the new millennium, as shown by the 2007 booklet published by the Law Society London, 'England and Wales, The jurisdiction of choice', and the German reaction thereto 'Law-made in Germany': both documents tend to promote recourse to their respective judicial systems.
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> Expressions such as *forum selling* or *forum shopping* epitomize the consequences of the competition between jurisdictions in terms that evoke the selection or the promotion of a consumer product: 'international litigation is increasingly perceived as a competitive market where litigation centres promote themselves through intensive marketing and improved quality and speed of their court services'.
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> (citations omitted)

30 The concern I have is that keeping with the status quo may result in the loss to Australia of the opportunity to fully participate in the market for provision of international dispute resolution as it develops. In particular, I wonder how likely it is that those involved in advising sophisticated international commercial parties will over time, in increasing numbers, recommend to those parties that they should submit any dispute that may arise in connection with their agreement to the general jurisdiction of an Australian Supreme Court in preference to a dedicated international commercial court in another jurisdiction.

31 However, the proposal I have outlined would not alter the jurisdiction of Australian Supreme Courts to entertain applications in matters concerning international commercial disputes through the consensual process described by President Bell. Indeed, the Tribunal would become an additional competitor to whom well advised sophisticated commercial parties might agree to submit their disputes for resolution. The advantage is that it would be an institution focussed upon promoting Australia as a provider of such services and would harness those efforts in an effective way. Australia has considerable advantages to promote. It also would support a wider focus upon the development of such institutions as necessary infrastructure to support international

trade. If a specialist forum dedicated to resolving international commercial disputes was established in Australia then international commercial parties and those who advise them would know what it is, how it works, how to find it, and, most importantly, why it might be a good idea to go there.