

Arbitration and Public Policy

2016 Goff Lecture

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Introduction

The man in whose name this Annual Lecture is presented, Lord Goff of Chieveley, has an honoured place in the pantheon of great lawyers of the common law world. I thank the City University of Hong Kong for inviting me to present this address, which is the 21st in the series, the first having been delivered by Lord Goff in 1990. The involvement of the University and the sponsors of the Lecture, King & Wood Mallesons and the Building and Construction Industry Council, reflect the worlds of the Academy and practice as well as that of the judiciary in all of which Lord Goff made signal contributions.

This Lecture concerns the external public policy environment which underpins and informs the legal regimes which govern arbitration and the internal public policy constraints expressly and impliedly embedded in the legal criteria for setting aside and refusing recognition and enforcement of awards.

The external public policy environment

Commercial arbitration is contractually based and, to that extent, underpinned by private law. It derives efficacy from public law which provides for the recognition and enforcement of awards and a degree of judicial supervision. That is because it is seen as serving a legitimate public interest in the efficient resolution of commercial disputes. That 'external public policy' support also renders it susceptible to scrutiny and challenge about its costs and benefits. New and evolving applications of arbitration may enliven debates about its proper scope and the criteria for its legislative support. Changes in its scale and volume alongside litigation may also enliven public policy concerns. One very large question in that category is the effect of commercial arbitration upon the development of commercial law in the courts.

In *Westport Insurance Corp v Gordian Runoff Ltd*¹ the High Court of Australia set aside an award for inadequacy of reasons in proceedings under the former *Commercial Arbitration Act 1984* (NSW). Four Justices observed that the provisions of that Act giving final and binding effect to an award indicated that the making of the award was more than the contractual outcome of private contractual arrangements. Their Honours said:

That statutory regime involves the exercise of public authority, whether by force of the statute itself or by enlistment of the jurisdiction of the Supreme Court. It also ... displays a legislative concern that the jurisdictions of the courts to develop commercial law not be restricted by the complete insulation of private commercial arbitration.²

There is a basis for legislative concern about the development of commercial law. Arbitration, by its very nature, has a limited capacity to contribute to the open and public development and coherence of international and domestic commercial law. Militating against its influence is the absence of a doctrine of precedent and generally private nature of arbitral processes.

There is little evidence that arbitrators in commercial arbitration make much reference to past awards. In the 2006 Freshfields Lecture on the topic of 'Arbitral Precedent', Dr Gabrielle Kaufmann-Kohler concluded, by reference to empirical evidence, that there was no meaningful precedential value attached to international commercial awards. The position is different with sports arbitration and investment arbitration in which arbitral awards are frequently published.³

My predecessor as Chief Justice, the Hon Murray Gleeson, stated the position with respect to precedent with his customary clarity in a lecture he delivered to the Chartered Institute of Arbitrators in October 2014 on writing awards in international commercial arbitration. Contrasting the function of arbitrator and judge he said:

¹ (2011) 244 CLR 239.

² Ibid 261 [19] (French CJ, Gummow, Crennan and Bell JJ).

³ Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 *Arbitration International* 357, 372–73.

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. They do not create precedents, and because they are almost always intended to remain private, they have no educational function.⁴

There is pressure for greater transparency and consistency in international commercial arbitration. In a book of essays published in 2013 and making the case for at least anonymous publication of arbitral awards, one of the contributors, Alexis Moure, warned:

If arbitration is to remain, according to the sacramental formula the *mode commun de règlement des différends du commerce international*, it needs to provide the business community with greater predictability of the possible outcome of trade disputes. In turn, better knowledge of arbitral jurisprudence would allow the business community to have a clearer idea of the realities and advantages of arbitration.⁵

The position with respect to commercial arbitration may be contrasted with that of investment arbitration. ICSID awards can be, and frequently are, published with the agreement of the parties. Awards of the Court of Arbitration in Sport are also public. Awards so published provide precedential guidance although whether they engender consistency and predictability may be another matter.

It must be said, however, that even if all international commercial arbitral awards were to be published in full and a comity-based convention analogous to *stare decisis* evolved, there would still be a fundamental difference between arbitral and judicial decision-making. Judicial proceedings and arbitration have the common function of determining particular disputes between particular parties. But the courts have a special and constitutional role in publicly maintaining and affirming the rule of law as they make their decisions. It is an aspect of that role that, in publishing their judgments, they facilitate the flow of information about legal questions and their resolution within their home jurisdictions.

⁴ The Hon Murray Gleeson AC, 'Writing Awards in International Commercial Arbitrations' (Speech delivered at the Chartered Institute of Arbitrators (Australia) Ltd, Sydney, 31 October 2014).

⁵ Alexis Moure, 'The Case for Publication of Arbitral Awards' in Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration — The Case for Anonymous Publication of Arbitral Awards* (Huntington, New York, 2013) 62.

Importantly, they can also contribute to the development of the law on similar questions arising in other national jurisdictions. Chief Justice Bathurst, the Chief Justice of New South Wales, made the point in an address he delivered in Singapore in 2013, when he observed that the lack of transparency in arbitration can act as a counterweight to legal convergence in the development of transnational commercial law.⁶ Lord Neuberger made the same point in a speech he delivered at the Chartered Institute of Arbitration Centenary Conference in Hong Kong in March 2015.⁷ And in a speech made in March this year, Lord Chief Justice Thomas in similar vein made specific reference to the effect of arbitration on the role of the commercial courts in the United Kingdom:

As arbitration clauses are widespread in some sectors of economic activity, there has been a serious impediment to the development of the common law by courts in the UK, particularly through the Commercial Courts in London ... and on appeal from them.⁸

There are legitimate concerns held by jurists about the impact of commercial arbitration on the development of the law. Those concerns do not displace the unarguable benefits of arbitration. They are mitigated, albeit to a limited extent, by provisions for judicial involvement in questions of law arising in arbitral proceedings as with s 27J of the *Commercial Arbitration Acts* of the Australian States or by the limited provisions for appeal on questions of law in s 34A of those Acts reflecting the terms of s 69 of the *Arbitration Act 1996* (UK).

Another path is to ensure that the judicial process offers commercial disputants in appropriate cases benefits which equal or exceed those of arbitration in speed, efficiency, economy, neutrality and expertise. Enhanced provision for party autonomy under an international agreement enabling and giving effect to the choice of court agreed to by parties to a contract and enforcing the judgment of that court is another positive measure. The

⁶ 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).

⁷ 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].

⁸ The Right Hon The Lord Thomas of Cwmgiedd, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration (Speech delivered at The BAILII Lecture 2016, London, 9 March 2016) [5].

Hague (Choice of Courts) Agreement Convention offers that possibility. And if a significant multilateral agreement on the recognition and enforcement of foreign judgments can be achieved through the Hague Judgments Project, the gap may be narrowed between the enforceability of arbitral awards and the enforceability of judgments in which arbitral awards enjoy an advantage.

Another more ambitious response to concerns about the development of international commercial law is the creation of international commercial courts hosted by national jurisdictions but offering commercial adjudication to all comers. Examples are the Dubai International Finance Centre Courts, the Qatar Court, the Singapore International Commercial Court and the new Abu Dhabi Global Market Courts. The Dubai Courts and the Singapore Court allow parties to opt into their jurisdictions to resolve disputes. Both incorporate certain features of international arbitration including limited disclosure processes, the ability of parties to use foreign counsel and panels comprising local and foreign judges.

Also of interest in this connection is the recent proposal in Europe, potentially transformative of the arbitral process between investors and States, for the establishment of an Investment Court. The Court would have jurisdiction to hear investor-State disputes arising under free trade agreements, such as the proposed Transatlantic Trade and Investment Partnership.⁹

The interactions between external public policy and arbitral regimes established by law are not necessarily in stable equilibrium. Public policy changes according to shifting societal values and priorities. Changes in public policy or policy responses to developments in the arbitral process may be expressed in alterations to the legal rules governing arbitration and the enforceability of awards. New applications of the arbitral process with public policy implications unimagined when existing legal regimes were put into place, may also lead to changes in those regimes.

A particular area of contention at the present time concerns compulsory arbitration clauses in common form consumer contracts which preclude resort to the courts or other forms of dispute resolution. Here the important element of party autonomy may be present in

⁹ European Commission, *European Union's Proposal for Investment Protection and Resolution of Investment Disputes*, (12 November 2015), European Commission
http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf

a formal sense but in substance may be much diminished, if not entirely absent on the consumer side of the bargain. A considerable literature and passionate debate has developed on the topic, particularly in the United States. The judgment of an Alabama court reflected a deeply felt position about such clauses with the following statement:

The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic.¹⁰

The scope of the debate about such provisions was set out in an article in the *Stanford Law Review* in 2005 by Professor Jean Sternlight, who acknowledged the advantages of voluntary binding arbitration and the benefits of international arbitration, but made two important points about compulsory arbitration in contracts of adhesion:

- there is a problem in permitting the most powerful actors in a society to craft a dispute resolution system that is best for them but not necessarily their opponents or the public at large;
- justice requires that disputants should have access to a dispute resolution process that is transparent and open to public scrutiny. While they may, in particular situations resort to private processes, it would be improper for a society to establish entirely private dispute resolution processes.¹¹

The two sides of the policy debate were reflected in the closely divided decision of the Supreme Court of the United States in *AT&T Mobility LLC v Concepcion*.¹² AT&T's standard cellular telephone contract provided for arbitration of all disputes and precluded a class-wide arbitration. The *Federal Arbitration Act*, which was enacted in 1925, makes

¹⁰ *Knepp v Credit Acceptance Corp* 229 BR 821, 827 (Bankr ND Ala 1999) cited in Jean R Sternlight, 'Creeping Mandatory Arbitration: Is it just?' (2005) 57 *Stanford Law Review* 1631, 1632.

¹¹ Ibid 1635.

¹² 31 S Ct 1740 (2011).

arbitration agreements irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. The Concepcions sued AT&T and their suit was consolidated with a class action claiming false advertising involving the charging of sales tax on allegedly 'free' phones. The Ninth Circuit Court of Appeals held that the *Federal Arbitration Act* did not pre-empt a State Court ruling that the preclusive clause was unconscionable. The Supreme Court overturned that decision by a 5/4 majority. The late Justice Scalia, for the majority, described the Federal Act as embodying a national policy favouring arbitration and also observed that there were difficulties in adapting arbitration to class action procedures.

Justice Breyer, for the dissentients, argued that when the *Federal Arbitration Act* was enacted it may have been directed to disputes of fact between merchants under the customs of their industries where the parties possessed roughly equivalent bargaining power. He posed the pointed question:

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim? ... In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims.¹³

It has been suggested that, in reliance upon *Concepcion* and other decisions,¹⁴ firms in the United States are engaging in arbitration 'boot strapping' — inserting into arbitration clauses provisions shortening limitation periods, reducing recoverable damages and preventing recourse to injunctive relief.¹⁵ Ultimately, exploitation of expansive interpretations to the disadvantage of consumers and employees may lead to a public reaction giving rise to a change in the law. Such a reaction would be no more than a particular example of the way in which public policy plays a part in the history of arbitration.

There are many published accounts of the history of arbitration which demonstrate the significance of public policy to its development. It is perhaps sufficient for present purposes to refer to the early connections between arbitral and judicial processes developed in the 17th

¹³ Ibid 9–10.

¹⁴ *American Express Co v Italian Colors Restaurant* 133 S Ct 2304 (2013); *D'Antuono v Service Road Corp* (2011) 789 F Supp 2d 308; *Kaltwasser v AT&T Mobility LLC* (2011) 812 F Supp 2d 1042.

¹⁵ CR Leslie, 'The Arbitration Boot Strap' (2015) 94 *Texas Law Review* 266.

century.¹⁶ While the enforceability of arbitral awards could be supported by covenants on indenture, conditional obligations and parol contracts, it seems the most effective mechanism was to commence a proceeding in the court and have it referred to arbitration. Thus the submission to arbitration was a rule of court and a party not abiding by the award could be prosecuted for contempt. That form of submission was made easier by the *Arbitration Act 1698*¹⁷ which did not require the prior commencement of proceedings in the Court. It was described by Lord Mansfield in 1759 as designed 'to put submissions to Arbitration in cases where there was no cause depending upon the same foot as those where there was a cause depending.'¹⁸ The early close connection between the efficacy of arbitration and the judicial system is striking.

By the 17th century a system of arbitration law had emerged. Its elements were outlined by G Malynes in *Consuetudo, vel, Lex Mercatoria*, published around 1670. An award had to be given in writing within the time limited by the agreement made between the parties.¹⁹ The arbitrators had to determine all the points of difference referred to them. They could not require any of the parties to perform any unlawful act nor could they make an award inconsistent with any court order or judgment. The character and purpose of arbitration was described in terms reflecting an enduring public policy as a means of resolving disputes between merchants:

by way of Arbitrement, when both parties do make choice of honest men to end their causes, which is voluntarie and in their own power, and therefore called Arbitrium, or free will, whence the name Arbitrator is derived; and these men (by some called Good men) give their judgments by Awards, according to Equitie and Conscience, observing the Custome of Merchants, and ought to be void of all partialitie or affection more nor lesse to the one, than to the other, having onely care that right may take place according the truth, and that the difference may bee ended with brevitie and expedition ...²⁰

¹⁶ An elegant and succinct history was set out in a lecture delivered by Lord Parker in 1959: Lord Parker, *The History and Development of Commercial Arbitration: Recent Developments in the Supervisory Powers of the Courts over Inferior Tribunals: Lectures* (Magnas Press, Hebrew University, 1959) 14.

¹⁷ 9 & 10 Will III c 15.

¹⁸ *Lucas ex de Markham v Wilton* (1759) 2 Burr 701 cited in Parker, above n 16, 14.

¹⁹ Parker, above n 16, 14.

²⁰ G Malynes, *Consuetudo, vel, Lex Mecatoria* quoted in Doug Jones, *Commercial Arbitration in Australia* (Lawbook Co, 2nd ed, 2013) [1.160].

That rationale has informed public policy down the centuries and across many different national jurisdictions. The consensual character of arbitration and its associated flexibility was recognised by the General Assembly of the United Nations in its Resolution on the UNCITRAL Model Law in 1985, as supporting its acceptability to States with different legal and social economic systems. Also recognised in that Resolution were the indispensable requirements of fairness and efficiency.

An important question in the history of arbitration has been who should decide contested questions of law? In an age where non-consensual review for error of law is precluded or restricted, the question is still of importance. It feeds into the larger debate about the function of arbitration in connection with the rule of law and the place of judicial power.

Historically, the Courts of England developed the notion of judicial review of awards for error of law on the basis that they were the ultimate arbiters of the content of the common law and the interpretation of statutes. The review jurisdiction was definitively asserted by the Kings Bench Judges sitting in banc in *Kent v Elstob*²¹ in 1802. An arbitral award could be set aside for mistake of law if it were apparent on the face of the award or from a statement of reasons in writing given by the arbitrator at the time of the award.²² That power was seen as an aspect of the inherent power of the Court.

The *Arbitration Act 1889* (UK), established a 'systematic code of law ... amending and consolidating previous practice'.²³ It provided a statutory basis for courts to require an arbitrator to state the award in the form of a special case so that point of law arising in the reference could be determined.²⁴ The inherent power to review for error of law on the face of the award was left in place.

History demonstrates the practical difficulties that could arise when arbitrators decided questions of law and judges reviewed them. The answer to those difficulties sometimes depended upon institutional perspectives. In 1958, Lord Goddard pointed out that a matter could go to an arbitrator, then to the Appeal Committee of the relevant Association which could reverse the arbitrator, then to a judge who could reverse the Appeal Committee

²¹ (1802) 3 East 18; [102 ER 502].

²² Ibid, approved in *Hodgkinson v Fernie* (1857) 140 ER 712.

²³ Parker, above n 16, 19.

²⁴ Ibid.

and then to the Court of Appeal which could reverse the judge.²⁵ He said sardonically, and perhaps revealing an antipathy to arbitration, 'that is one of the beauties, and shows the "economy", of going to arbitration.'

In the new era of the *Arbitration Act 1979* (UK), which abolished judicial review for error of law on the face of the award²⁶ and withdrew the power of an arbitrator to accede to a party request to state a case for the court, appeal from an arbitral award was limited by a leave requirement with constraints on successive appeals to the Court of Appeal and the Houses of Lords. The new regime was first considered by the House of Lords in 1981 in *Pioneer Shipping Ltd v BTP Tioxide Ltd*²⁷ concerning a charterparty for the ship Nema. The arbitrated dispute in that case involved a question of frustration and what was characterised in the House of Lords as a 'one-off clause' in the charterparty. Lord Diplock emphatically set a new direction of public policy in favour of arbitral finality which significantly limited the scope for judicial review:

it is not self-evident that an arbitrator or arbitral tribunal chosen by the parties for his or their experience and knowledge of the commercial background and usages of the trade in which the dispute arises, is less competent to ascertain the mutual intentions of the parties than a judge of the Commercial Court, a Court of Appeal of three Lords Justices or even an Appellate Committee of five Lords of Appeal in Ordinary.²⁸

That observation reflected the earlier comment of Lord Denning in the Court of Appeal in the same proceedings, that a commercial arbitrator was better placed to interpret the contract than a Judge.²⁹

It was Robert Goff J who had granted leave at first instance in the *Nema Case* and had also granted leave to appeal to the Court of Appeal from his own decision. He was reversed in the Court of Appeal and the House of Lords upheld the decision of that Court. Lord Diplock did not spare the Judge at first instance in whose honour this lecture is given.

²⁵ *Kyprianou v Cyprus Textiles Ltd* (1958) 2 Lloyds List Rep 60.

²⁶ *Arbitration Act 1979* (UK), s 1(1).

²⁷ [1982] AC 724.

²⁸ *Ibid* 736.

²⁹ *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1980] QB 547.

Not only should he have not granted leave, but he had got the construction question wrong. Lord Diplock raged on:

it is one of the ironies of the instant case that if the judge's initial error in granting leave to appeal to the High Court had not been compounded by his also giving a certificate and leave to appeal to the Court of Appeal ... (which a fortiori in such a "one off" case he never should have done), the owners would have been left with a decision against them which, although it is not one of general public importance, both the Court of Appeal and this House have held unanimously to be wrong.³⁰

Speaking of that decision in his speech delivered in March 2016, Lord Chief Justice Thomas, who regarded it as a wrong turning prejudicial to the role of the commercial courts in the development of commercial law, said:

Before the case reached the House of Lords, a very great commercial judge, Robert Goff J (later Lord Goff) pointed out in unanswerably correct terms the fallacies in the approach of Lord Denning. It was to no avail. In the House of Lords Lord Diplock set out guidelines for the very strict approach by what was clear judicial legislation implementing the ideas which he had foreshadowed in his Alexander Lecture.³¹

There is no doubt that judicial involvement in the arbitral process can lead to procedural complexities and delays of the kind adverted to by Lord Goddard and Lord Diplock. Whether there is a binary choice between enhanced finality for the arbitrator or disposition by a commercial court, may depend upon institutional perspectives. The remarks of Lord Goddard and Lord Diplock, which seem to have come at the problem from different directions, may be compared with those of Heydon J in *Westport Insurance Corporation v Gordian Runoff Ltd.*³² Those proceedings had begun with points of claim in an arbitration commenced in 2004 and ended with a judgment of the High Court in 2011. Heydon J observed:

³⁰ [1982] AC 724, 740.

³¹ Thomas, above n 8, [19] (footnotes omitted).

³² (2011) 244 CLR 239.

A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater *relevant* expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three. Comment on these melancholy facts would be superfluous.³³

Arbitration cannot be quarantined from the judicial system. It relies upon the courts to enforce its awards. The law sets limits on enforcement. But the more intrusive the courts are, the greater the risk that the legitimate benefits which parties seek from arbitration will be compromised. On the other hand, as already observed, the displacement of the courts from commercial dispute resolution will diminish their role in the development of commercial law with implications for transparency, consistency and predictability.

It may be a case of horses for courses. The extent to which arbitration is adapted to particular kinds of disputes informs party choices. The PwC and Queen Mary University of London 2013 Survey of Corporate choices in International Arbitration showed that across all sectors respondents referred as many disputes to arbitration as they did to litigation. The incidence of choices for arbitration varied across industry sectors. For entirely understandable reasons, arbitration was overwhelmingly favoured by the construction industry and preferred by the energy sector. On the other hand, the courts tended to be favoured by the financial services sector.

There was a general background concern noted in the Report about costs and delay and increasing formality tending to make arbitral proceedings more like litigation, a phenomenon referred to in the Report as the 'judicialisation of arbitration'. Such concerns can engage the choice-making mechanisms of the free market. It should not be thought, however, that market trends affected by private judgments about the utility of arbitration can be quarantined altogether from the public policy underpinnings of the regimes which support it. Arbitration which continues to serve its historic purposes, will no doubt continue to be seen as serving the public interest in the fair and efficient conduct of commercial transactions. To the extent that any of those benefits are diminished, the market may respond and, in extremis,

³³ Ibid 288 [111] (emphasis in original).

regulatory or supervisory measures invoked to protect the process itself and to ensure that it continues to serve the public interest.

There is nothing particularly novel in that observation. Lord Parker, former Lord Chief Justice of England and Wales, in a very fine lecture in 1959, on history and development of commercial arbitration, reflected upon the changeable character of public policy and the public interest when he said 'laws and legal systems are not immutable systems of logic, but the living creatures of the society whose functioning they have to serve.'³⁴ He described the history of commercial arbitration as a reminder that:

the task of lawyers of any generation is not only to administer and apply the law, but to reflect on it, and to mould it to the needs of the time and to leave it vigorous and flexible for the accommodation of problems which are to come.³⁵

The High Court considered the policy basis of Australia's statutory support for international commercial arbitration in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.³⁶ Castel Electronics Pty Ltd had applied under the *International Arbitration Act 1974* (Cth) to the Federal Court of Australia to enforce an arbitral award in its favour. TCL applied to the High Court to quash a decision of the Federal Court that it had the requisite jurisdiction and for a constitutional writ of prohibition against the Judges of the Federal Court.

The High Court dismissed TCL's application. Enforcement of the arbitral award gave effect to the parties' agreement to submit their dispute to arbitration. It did not therefore involve the enforcement of the rights and liabilities which were the subject of the dispute submitted to arbitration. Contrary to TCL's submission, the award by the arbitral tribunal was not an exercise of judicial power. Its authority was founded on the agreement of the parties. The inability of the Federal Court to review the award for error of law was not incompatible with the institutional integrity of that Court.

³⁴ Parker, above n 16, 24.

³⁵ Parker, above n 16, 24.

³⁶ (2013) 251 CLR 533.

The joint judgment of Hayne, Crennan, Kiefel and Bell JJ acknowledged the modern policy, reflected in the objects of the *International Arbitration Act*, of recognising and encouraging private arbitration as a valuable method of settling disputes arising in international commercial relations. Their Honours also recognised the way in which parties from different legal systems could agree to arbitration and in so doing choose both the law or laws to be applied and the processes to be followed.³⁷

Gageler J and I referred to the way in which 'at every stage' of its development, English law and the law governing arbitration in Australia, approached the relationships between the parties to arbitration, inter se, and between those parties and the arbitrator, unequivocally in terms of private law.³⁸ We also stated, however, that arbitration was not purely a private matter of contract and that it was not 'wholly divorced from the exercise of public authority'.³⁹

The external public policy so far discussed informs legislative support for arbitration as reflected in objects provisions and the schemes of international and legislative regimes. Another less altruistic strand, not necessarily reflected in the stated objects of the statutes, is recognition of the benefit of attracting commercial dispute resolution business to national jurisdictions. That object was made explicit in the consultation paper published by the Department of Justice of Hong Kong on the draft Arbitration Bill, which became the Arbitration Ordinance 2011 unifying the international and domestic commercial arbitration regimes. The purposes of the reform were described in the consultation paper as:

- to make the law of arbitration more user-friendly to arbitration users, both in and outside Hong Kong;
- to enable the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development as the Model Law is familiar to practitioners from both civil law and common law jurisdictions;

³⁷ Ibid 559 [45].

³⁸ Ibid 546 [9] citing Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd ed, 1989) 4.

³⁹ Ibid 546 [9] citing *Westford Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 261–62 [20].

- to attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings, as Hong Kong will be seen as a Model Law jurisdiction; and
- to promote Hong Kong as a regional centre for dispute resolution.

There are two ways of looking at those objectives. One is that they are an appropriate response to the requirements of international markets for legal and dispute resolution services. Another is that if given undue priority they may elevate the demands of private actors in the market placed for dispute resolution services above what is best for the development of the law — a theme reflected in Lord Chief Justice Thomas' speech.

Internal public policy criteria

This paper has been concerned largely with what I have called public policy external to the operation of arbitral regimes. Public policy criteria internal to the operation of arbitration regimes are embedded in important conventions and domestic statutes giving effect to them. Articles 34 and 36 of the UNCITRAL Model Law provide for applications for setting aside arbitral awards and for the grounds upon which recognition or enforcement of arbitral awards may be refused. Article 34(2)(b) provides that an arbitral award may be set aside by the relevant court if the court finds that:

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

Article 36(1)(b) sets out the same criteria as grounds for refusing to recognise or enforce an arbitral award. It is said to set neither standards nor limits for the courts of the State where the award was rendered for their decision-making process as to setting aside or suspending the award. Applications to set aside an award in its country of origin under the New York Convention are governed by the domestic law of the seat State.⁴⁰ Article 5 of the Convention

⁴⁰ Wolff (ed), *The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (Beck/Hart, 2012) [379].

sets out grounds for refusal to recognise and enforce an arbitral award in terms similar to those in Article 36(1)(b) of the UNCITRAL Model Law. The first ground upon which an award may be set aside or recognition refused under those Articles necessarily involves such public interest considerations as are embraced in the concept of arbitrability. The second ground extends to potentially wider ranging considerations.

The term 'public policy' is not defined in either Convention. There are few domestic statutes which expand upon it. The content given to it may understandably vary from jurisdiction to jurisdiction. Perhaps the most important question to be asked with respect to any jurisdiction is the extent to which public policy criteria, whether going to arbitrability or enforcement, are applied restrictively or expansively.

In October 2015, the International Bar Association's Sub-committee on the Recognition and Enforcement of Arbitral Awards released a Report on the public policy exception in Article 5 of the New York Convention.⁴¹ The first observation in the Report was that in none of the 44 reporting jurisdictions which it covered was public policy statutorily defined apart from Australia and the United Arab Emirates.

The IBA reporters concluded that in the vast majority of national jurisdictions a violation of public policy implies a violation of fundamental or basic principles. In many jurisdictions it covers both procedural and substantive matters. The ground is differently expressed by courts and academic commentators in civil law and common law jurisdictions. Civil law jurisdictions refer to the basic principles or values upon which the foundations of society rest. Common law jurisdictions are said to invoke broad values such as justice, fairness or morality. In most of the countries surveyed it was not enough to say that an award offended or violated public policy. The violation had to be of a certain nature or level. A colourful array of intensifying epithets used in the various jurisdictions was set out. They included 'clear', 'concrete', 'evident', 'patent', 'blatant', 'manifest', 'obviously manifest', 'flagrant', 'particularly offensive', 'severe', 'intolerable', 'unbearable' and 'repugnant to the legal order'. Perhaps encouragingly from the point of view of arbitrators, the intensifying epithets do suggest a general acceptance that public policy criteria are to be applied with restraint

⁴¹ International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report of the Public Policy Exception in the New York Convention* (October 2015) http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognitn_Enfrcemnt_Arbitl_Awr_d/publicpolicy15.aspz.

consistently with the objectives of the New York Convention and the UNCITRAL Model Law.

Against that background, some reference should be made to the concept of arbitrability expressed in the terminology 'subject matter incapable of settlement by arbitration...!'.⁴²

Arbitrability

The history of the term 'subject matter incapable of settlement by arbitration under the law of the country in which the award is sought to be relied upon' goes back to the Geneva Convention on the Execution of Foreign Judicial Awards 1927. It was discussed by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*.⁴² He identified as non-arbitrable matters in which there was a sufficient legitimate public interest rendering the enforceable, private extra-curial resolution of disputes concerning the matter inappropriate. That judgment made the important distinction, reflected in a number of other judgments between arbitrable subject matter and non-arbitrable remedies, which may arise out of that subject matter.

Judgments about what is arbitrable and what is not vary from jurisdiction to jurisdiction, although there seems to be a significant degree of overlap or common ground. The arbitration law of China, in Article 3, expressly provides that certain disputes will not be submitted to arbitration. They are:

1. Disputes over marriage, adoption, guardianship, child maintenance and inheritance; and
2. Administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.

These are not altogether dissimilar from grounds of non-arbitrability developed in the courts of other jurisdictions.

⁴² (2006) 157 FCR 45.

Generally speaking Australian courts have taken a narrow approach to arbitrability.⁴³ Recently Bathurst CJ in the New South Wales Court of Appeal in *Rinehart v Welker*⁴⁴, which concerned arbitrability of disputes under a trust deed, reaffirmed that it was 'only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will [be] held to be non-arbitrable'. The mere fact that a dispute involves statutory rights subject to a statutory regime does not take it out of the scope of arbitral matters. By way of example, in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*⁴⁵, Hammerschlag J held that while an arbitrator could not grant a patent or make a declaration of eligibility in relation to an inventor, he or she could be authorised to resolve disputes about rights and entitlements in relation to a patent application or invention. He identified as non-arbitral matters, criminal prosecutions, determinations of status such as bankruptcy or divorce, the winding up of incorporations in insolvency and disputes about intellectual property such as whether or not a patent or trade mark should be granted. As he said '[t]hese matters are plainly for the public authorities of the state. Patents and trade marks are monopoly rights that only the state can grant'.⁴⁶

The distinction between arbitrable subject matter and non-arbitrable remedies was considered by the Court of Appeal of the United Kingdom in *Fulham Football Club (1987) Ltd v Richards*.⁴⁷ The question was whether a member of the football club could bring oppression proceedings under the *Companies Act 2006* (UK) against the Club chairman or was constrained to arbitration by an arbitration clause in the Club Rules.

Patten LJ observed that the *Arbitration Act 1996* (UK) left open the possibility of an application for a stay on the ground of lack of arbitrability, but did little to identify the basis of any such application. He observed, quoting Mustill and Boyd, that English law has never arrived at a general theory for arbitrability. I interpolate that given the way in which arbitrability is informed by the numinous concept of public policy, that it is hardly surprising. Patten LJ accepted that there were public policy limits on the remedies which an arbitrator appointed by private parties could award. Those limits were expressed in terms similar to

⁴³ *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, 246–47 (Mason J); *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 167 (Gleeson CJ).

⁴⁴ [2012] NSWCA 95 [16].

⁴⁵ (2011) 279 ALR 772.

⁴⁶ *Ibid* 783 [64] (citation omitted).

⁴⁷ [2012] Ch 333, 343 [38].

those expressed in the Australian cases. His Lordship held that members of a company could submit disputes inter se to a process of arbitration. He said:

A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholder's agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties.⁴⁸

However the question whether a company should be wound up was not arbitrable because it was within the exclusive jurisdiction of the courts.

Longmore LJ in the same case reaffirmed the public policy purposes of the *Arbitration Act 1996* that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest' and concluded that public policy had a part to play only as a 'safeguard ... necessary in the public interest'.⁴⁹ Lord Justice Rix agreed with both Lord Justices Patten and Longmore.⁵⁰ The Supreme Court of the United Kingdom dismissed an application by the petitioner for permission to appeal against that decision.

The distinction between arbitrable disputes about rights and obligations and non-arbitrable remedies restricted to the courts or other public institutions is well illustrated by cases involving intra-company disputes of the kind considered in the *Fulham Football Club* decision. There have been a number of such cases in Singapore, Hong Kong and Australia.⁵¹

Questions of arbitrability sometimes involve the reconciliation of the fields of operation of arbitration legislation and some other statutory scheme. This is reflected in the judgment of VK Rajah JA in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*,⁵² when he said:

⁴⁸ Ibid 355 [77].

⁴⁹ Ibid 361 [98].

⁵⁰ Ibid 362 [106].

⁵¹ *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170; *Trident Inc v Trident Australia Pty Ltd* [2002] NSWSC 896; *Re Quicksilver Glorious Sun JV Ltd* [2014] HKLRD 759; *Tomolugn Holdings Ltd v Silicor Investors Ltd* [2015] SGCA 57.

⁵² (2011) 3 SLR 414.

we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or the legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.⁵³

A legislative intention to preclude arbitration may appear from the text, context and purpose of a statute specifically dealing with a particular subject matter and making exhaustive provision for resolution of disputes arising out of it.

Public policy grounds

The express public policy grounds for setting aside or refusing to recognise or enforce an award have already been discussed in general terms. They embrace, under the Australian Acts, unfairness and fraud or corruption. The concept of unfairness gives effect to Article 18 of the Model Law which requires that: '[T]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.' As Allsop CJ pointed out in a paper presented in November 2014, fairness involves both the hearing rule and the bias rule. The hearing rule requires that the arbitrator hears from a party before making a decision on an issue affecting that party's interests. There may be a question whether it imports a requirement of diligent attention to all the claims made and material advanced by each party. However, as he also pointed out judicial restraint applies. The hearing rule cannot be invoked as a means of revisiting the factual merits of an arbitration decision.

And the bias rule requires that the arbitrator be impartial as between the parties. It is also important that arbitral tribunals not conduct themselves so as to compromise the appearance of neutrality. A question of that kind arose in Hong Kong in *Gao Haya v Keeneye Holdings Ltd.*⁵⁴ In that case, Saunders J held that basic notions of morality and justice in Hong Kong could not permit private communications between a member of the Tribunal and a party when the arbitration had commenced. In so doing, the Judge had regard to the leading authority in *Hebei Import and Export Corp v Polytek Engineering Co Ltd*⁵⁵

⁵³ [2012] Ch 333, 354 [75] citing *Larson Oil and Gas Pte Ltd v Petroprod Ltd* (2011) 3 SLR 414, [44].

⁵⁴ [2010] HKEC 1694.

⁵⁵ (1999) 2 HKCFAR 111.

which equated the term 'contrary to public policy of that country' with 'contrary to the fundamental considerations of morality and justice in the Forum'.

Conclusion

The decisions of courts applying concepts of arbitrability and public policy have sometimes been designated as pro-arbitration or anti-arbitration depending upon the outcome. It is necessary to be cautious about those designations, which can be indicative of advocacy rather than assessment. Arbitration is not like a football code attracting the rule that if you are not for us you are against us. And while healthy competition between jurisdictions is important for the development of innovative approaches to dispute resolution, public policy should not just be about attracting business. Nor can judicial decision-making be about attracting labels such as 'pro-arbitration' or 'arbitration friendly' and thereby attracting non-judicial business to the jurisdiction. Clearly, there is a lot of room for movement in the public policy judgments which inform the structure and content of legal regimes supporting and governing arbitration and their interpretation and application. There is a powerful international public policy reflected in that of many countries which strongly support arbitration as a dispute resolution mechanism. In such countries there is, for the most part a recognition that countervailing public policy considerations may properly limit the scope of the arbitral process and require a degree of supervision of it. Coupled with that is a recognition that public policy criteria in relation to arbitrability recognition and enforcement must be applied with care and restraint.

It is, of course, a responsibility of all those engaged in the practice of commercial arbitration to ensure that they and the process in which they engage not only serves its users but continues to be sensitive to and to respect the public interest. That is its greatest assurance of its long term future.