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President of the Administrative Appeals Tribunal
Judge of the Federal Court of Australia

Comment on papers by Justice John Saunders of the High Court of Hong Kong and Judge Xingue Yang of the Supreme People's Court of China

I wish to begin by congratulating both speakers for presenting, in their papers and today, a complementary comparative analysis of two perspectives of China, the jurisdiction which, for the foreseeable future, will continue its expansion towards becoming the major source of world trade and necessarily of international commercial dispute generation and resolution.

We have been presented, particularly from the papers, with a picture of statutory regimes governing international arbitration in their modern form. For ten years, in the 1990s and the first decade of this century, I watched the new regimes develop from the perspective of an accredited observer to the United Nations Commission on International Trade Law (UNCITRAL) in Vienna and New York and of a member of the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris.

In addition to watching the irresistible advance of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards I

was able to watch the early growth and then rapid development of the 1976 UNCITRAL Rules of Arbitration and their logical development in the 1985 UNCITRAL Model Law on International Commercial Arbitration. It is pleasing to see that the last of these instruments now guides arbitration in most parts of our region and, indeed, most parts of the world.

Today's presentations have shown the completion of the progress of the Model Law, for Australia and Hong Kong, from tool regulating international arbitration to tool regulating all arbitration.

All trade and commerce benefits from certainty. Trade without dispute is the most desirable kind of trade. However, accepting the inevitability of dispute, what is required is certainty in the form of mechanisms of dispute resolution which are "fair, just, economical, informal and quick" to quote from the statute which governs my day job.[1] Justice Saunders has given us illustrations of judicial endorsements of the principle from the United States. The imperative is attracted especially by international trade and commerce, where shipping delays can quickly give rise to substantial costs, increasing exponentially, and where goods can deteriorate or perish and become worthless before their ownership is determined. I will call these needs for certainty – for early finality of disputes in international trade and commerce – "the arbitration imperatives".

The preference for those in international trade who refer their disputes to arbitration must be a preference for the arbitration process over national courts. Dispute resolution by mutually agreed neutrals is preferred to resolution by national courts. This is why the New York Convention has been so effective, yet we still await an effective convention on the enforcement of foreign judgments. It is not surprising, therefore, that the arbitration imperatives call for national courts to intrude into international arbitration rarely and then only to enhance the process and to emphasise the imperatives. Insisting, with resulting cost and delay, on arriving at the precise

[1] Section 2A *Administrative Appeals Tribunal Act 1975* (Cth)

construction of a contract in accordance with the learning of national courts is not always effective dispute resolution.

I want to take as my theme for this brief comment an observation made by Lord Diplock more than 25 years ago, when dealing with newly enacted legislation in the United Kingdom which played a very important role in securing the arbitration imperatives for common law countries. [2]

Lord Diplock said in *The Antaios*[3], echoing what he had earlier said in *The Nema*[4]:

> *'Unless judges are prepared to be vigilant in the exercise of the discretions conferred upon them by sections 1 and 2 of the Arbitration Act 1979… they will allow to be frustrated the intention of Parliament, as plainly manifested by changes in procedure that these statutes introduced, to promote speedy finality in arbitral awards rather than that insistence upon meticulous semantic and syntactical analysis of the words in which business men happen to have chosen to express the bargain made between them, the meaning of which is technically, though hardly commonsensically, classified in English jurisprudence as a pure question of law.'*

What Lord Diplock was saying, and this is my theme for today, is that judges, construing and applying legislation regulating arbitration in its context, should be constantly mindful of the arbitration imperatives.

Not all of the arbitration imperatives are always present in domestic litigation. Not all judges have a background in the imperatives. Not all judges have brought them to their deliberations in international arbitration cases.

The legislation governing international arbitration nowadays contains mandatory elements. There is much less scope for judicial discretion. One thinks of stays pending arbitration and challenges to awards. However, there is still some scope for discretion – even with challenges to awards.

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[2] *Arbitration Act 1979* (UK) s 1
[3] [1985] 1A.C. 191 at 199
[4] [1982] A.C. 724

The Nema and the *Antaios* were not wholeheartedly embraced in New South Wales when they were first decided. This was understandable, because they were decided in connection with core components of international trade, namely charterparties, where the question was whether the charterparty had come to an end. Much litigation about arbitration in New South Wales at the time was concerned with domestic building disputes. Nevertheless, both cases had a significant effect on challenges to awards in arbitrations in Australia. The new mood no doubt assisted the development of the thinking which has led to the present legislative schemes.

Just as attitudes have changed to challenges to awards, so also they have changed to stays, even while stays continued to be discretionary. The New South Wales Court of Appeal, with then Chief Justice Gleeson presiding, led the way in 1996, in *Francis Travel v Virgin Atlantic Airways*[5] in which the Court held that a statutory claim under the *Trade Practices Act 1974* (Cth) should be arbitrated in England. I apprehend that such a decision would have been unlikely 20 years earlier. The Hi-Fert litigation[6], a little later in the Federal Court is another example, although that litigation, which gave rise to at least six reported decisions, was somewhat more problematic. There the problem largely lay, however, with one party and its lawyers who did not understand or would not adhere to the ideals of the arbitration imperatives, rather than with the judges hearing their claims. Nevertheless, the final limitation on the stay granted in those proceedings disappointed many observers.

The new statutory regimes clearly recognise the arbitration imperatives. They generally appear or are encompassed in objects inserted into the Acts[7]. They present an occasion for a fresh analysis of the role of courts in arbitration when that role is not merely facilitative.

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[5] (1996) 39 NSWLR 160

[6] *Hi-Fert Pty Ltd v Keukiang Maritime Carriers Inc* (No. 1) (1996) 71 FCR 172; (No. 2) (1997) 75 FCR 583; (No. 3) (1998) 86 FCR 374; (No. 4) (1998) 86 FCR 399; (No. 5) (1998) 90 FCR 1

[7] Eg s 2D of the *International Arbitration Act 1974* (Cth); s 1C *Commercial Arbitration Act 2010* (NSW)

The High Court, in *Westport Insurance Corp v Gordian Runoff Ltd*[8] is presently looking at the issue in connection with the regime now supplanted in New South Wales. It is to be hoped that a result occurs in that case which will enhance the effectiveness of arbitration – which will attract, rather than alienate, the international commercial community. The decision of the High Court in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, on confidentiality, sent shockwaves through the international arbitration community. It is to be hoped that the decision in *Gordian Runoff* does not have a similar effect.

The new regimes throughout the Asia Pacific region create new systems for domestic courts to deal with. The regimes are firmly based in the arbitration imperatives. Justice Saunders has spoken of the desirability of developing a uniform jurisprudence relating to the schemes. While endorsing that sentiment, I would add that the fewer the cases it takes to develop such a jurisprudence, the better. And I would like to suggest that judges should have the arbitration imperatives firmly in mind as they respond to applications which might challenge, delay or otherwise interfere with the arbitration process.

[8] In the NSW Court of Appeal *Gordian Runoff Ltd v Westport Insurance Corp* [2010] NSWCA 57