

# Arbitration in Australia - Rising to the Challenge

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## 1. Introduction

It is a great honour to be asked to deliver the Clayton Utz / Sydney University International Arbitration Lecture this year in Brisbane. Having been associated with the creation and development of the lecture over the past 17 years, and knowing the many distinguished persons who have delivered it, I consider it a privilege to follow in their footsteps. For me it is a special pleasure to be giving this lecture in Brisbane where I commenced my legal career and practiced for 20 years before moving to Sydney.

In the last century, until the 1980s, international arbitration was confined to a select few seats in the Northern Hemisphere. The concentration of business in centres such as London, Paris, Stockholm, Switzerland and New York supported the development of successful arbitral seats.<sup>1</sup> However, with the rapid growth of an interconnected global economy and the rise of regionalism, international dispute resolution has developed to meet the demands of shifting trade flows, resulting in the rise in international commercial arbitration to serve Asia's booming economies. This global marketplace presents attractive opportunities for Australian practitioners for an interesting and lucrative stream of work, in addition to providing the obvious economic and political benefits for Australia.

Australia has made significant efforts to promote and enhance international arbitration and is now well-positioned to be a leading arbitral seat. Australia has robust modern legislation, a supportive judiciary, a well-functioning arbitral institution, outstanding international arbitration legal expertise, and is a safe and accessible seat. Despite this, it is yet to meaningfully establish itself as a potential international dispute resolution hub. There are clear challenges which remain, in a competitive environment, arising from concerns of the impracticality of arbitrating and litigating in Australia. These include perceptions of Australia's geographical isolation and its fragmented legal framework across the states and territories. It will be my suggestion that these barriers can be overcome by addressing these perceptions and through a concerted effort to develop the complete package of international dispute resolution services. In a world-class international arbitration landscape, comprised of an attractive Australian commercial law and a commercial

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<sup>1</sup> Doug Jones, 'Overcoming the Tyranny of Distance: Australia as an Arbitral Seat' in Augusto Zimmermann (ed) *A Commitment to Excellence: Essays in Honour of Emeritus Professor Gabriel A. Moens* (Connor Court Publishing, 2018).

court specifically catering towards international disputes, we can be liberated from the twin tyrannies of distance and division.

I propose to address the challenges ahead for the development of international arbitration in Australia in two parts. First, I will discuss the development of the law of arbitration in Australia, increasing judicial support, and the local institutions that have been driving the growth of international arbitration over recent years. With that background, I will then turn to future challenges and look ahead to what may be achieved by, and for, the next generation of international arbitration practitioners in Australia. There is further work to be done to enhance Australia's attractiveness as a dispute resolution hub. I suggest two solutions that can combat these challenges: the development of an Australian commercial law for use by international parties and an international commercial court capable of applying this law. Ultimately, only by offering a complete framework for international disputes can Australia truly compete for international dispute resolution work in the future.

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## **2. The London Principles: Tracing the Development of Arbitration in Australia**

To mark its centenary, the Chartered Institute of Arbitrators developed the London Principles. These are not comprehensive rules, but are a set of guiding principles or key characteristics that make a seat an appropriate and effective forum in which to conduct international arbitration.<sup>2</sup> The London Principles were intended to provide encouragement to existing, and new, seats for international arbitration by identifying the characteristics necessary for a safe and attractive arbitral seat. The characteristics identified were: the law, the judiciary, legal expertise, education, right of representation, accessibility and safety, facilities, ethics, enforceability and immunity. Of course, the choice of a seat is of critical importance as it establishes the applicable arbitration law and sets the framework in relation to the challenging and enforcement of arbitral awards.<sup>3</sup>

I will outline the Australian position in the context of a number of these principles, starting with the first and arguably one of the most critical principles: the law. By "*the law*", I refer to whether there is effective international arbitration law that facilitates the fair and just resolution of disputes through arbitration, limits court intervention and strikes an appropriate balance between confidentiality and transparency.<sup>4</sup>

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<sup>2</sup> The London Centenary Principle Drafting Team, 'The Chartered Institute of Arbitrators London Centenary Conference, July 2015' *CI Arb Journal* 81(4) 404.

<sup>3</sup> Janet Walker, 'The London Principles and their Impact on Law Reform' 2018 84(2) *The International Journal of Arbitration, Mediation and Dispute Management* 174.

<sup>4</sup> The London Centenary Principle Drafting Team (n 2) 405.

## 2.1 The Law

In 1985, the United Nations established the Model Law for International Commercial Arbitration ("Model Law"),<sup>5</sup> which provided countries with a robust and effective framework for the regulation of international arbitration.<sup>6</sup> Australia was one of the first countries to adopt the Model Law through the enactment of the *International Arbitration Amendment Act 1989*,<sup>7</sup> which incorporated Model Law provisions into Schedule 2 of the *International Arbitration Act 1974* ("IAA"). When UNCITRAL revised the Model Law in 2006 and in 2010, amendments were made to the IAA which adopted nearly all of these revisions.<sup>8</sup> It can thus be seen that the Commonwealth Government has made a long-standing commitment to the development of international commercial arbitration.

The enhancement of the IAA continued over the years through many amendments, of which I will refer only to some recent changes. In 2015, key amendments were introduced<sup>9</sup> which confirmed that confidentiality in international arbitration applies on an opt-out basis (effectively reversing the decision of *Esso v Plowman*).<sup>10</sup> The amendments also improved enforceability by providing for the enforcement of international awards made in jurisdictions that are not party to the New York Convention<sup>11</sup> by Australian courts.<sup>12</sup> Most recently, in late 2018, the Commonwealth Parliament introduced amendments that incorporated the UNCITRAL Rules on Transparency into the IAA, clarified requirements for enforcing foreign awards and gave arbitrators more flexibility in awarding costs.<sup>13</sup> These amendments strike a balance between preserving confidentiality in commercial arbitration while increasing the legitimacy of Investor-State Dispute Settlement (ISDS) arbitration. They have maintained the consistency of Australian law with international best practice.

In order to understand the law governing arbitration in Australia, it is important to recognise that as Australia is a constitutional federation, the Commonwealth Parliament has power to legislate for international arbitration and the states for domestic arbitration. Despite this separation, Australia has done well to ensure uniformity, to a large degree, between its domestic and international regimes. Previously, the States were reluctant to reform the existing uniform law of

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<sup>5</sup> *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc (A/40/17) (21 June 1985) (amended on 7 July 2006) ("*Model Law*").

<sup>6</sup> Doug Jones, 'International and Domestic Arbitration Regimes – Should They be Combined or Separated?' (Paper presented at the CCA Taipei Conference on Arbitration and Mediation, Taipei, 27 August 2018), 3.

<sup>7</sup> *International Arbitration Amendment Act 1989* (Cth).

<sup>8</sup> Albert Monichino and Luke Nottage, 'Country update: Australia' in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, (Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2018, Volume 20 Issue 3) 131, 132

<sup>9</sup> *Civil Law and Justice (Omnibus Amendments) Act 2015* (Cth).

<sup>10</sup> (1995) 183 CLR 10.

<sup>11</sup> New York Convention, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

<sup>12</sup> *International Arbitration Act 1974* (Cth) s 7.

<sup>13</sup> *Civil Law and Justice Legislation Amendment Bill 2017* (Cth) sch 7.

domestic arbitration.<sup>14</sup> However, in 2009, in a bold move, the Standing Committee of Attorneys-General agreed to adopt a series of *Uniform Commercial Arbitration Acts* based on the Model Law for the domestic arbitration regimes.<sup>15</sup> These acts were enacted in all states and territories, starting with NSW in 2010 and finishing with the ACT in 2017.<sup>16</sup> Thus, despite the separation of powers for legislation in relation to arbitration, Australia is in the special position among federal states of having the same legislative regime for both domestic and international arbitration based on the UNCITRAL Model Law.

It is interesting to note the different approaches taken by major economies between the development and growth of domestic arbitration on the one hand and international arbitration on the other. Take for example, the system in the United States, in which the *Federal Arbitration Act*<sup>17</sup> (which is not based on the Model Law) governs (some) domestic and international arbitration proceedings, and all fifty states have adopted their own arbitration statutes for domestic arbitration,<sup>18</sup> with only some of these states having adopted the Model Law. Similarly, in Canada, all provinces and territories, aside from Quebec, have enacted separate statutes for domestic and international arbitrations, with only the international regime incorporating the Model Law. In contrast to the Australian system, the Canadian domestic arbitration regime varies significantly according to the particular province.<sup>19</sup> Thus, Australia is unique insofar as it has legislation common to both domestic and international arbitration based on the UNCITRAL Model Law.

Notwithstanding the international focus of this lecture, Australia's domestic regime is relevant because the practice of domestic arbitration inevitably influences the way in which practitioners and arbitrators approach international arbitration. Training and experience in domestic arbitration is useful preparation for international arbitration, particularly where both regimes have adopted the Model Law.<sup>20</sup> It is therefore important for domestic arbitration in jurisdictions that seek to promote themselves as centres for international arbitration, to be as international as possible. And the capacity for Australia to do so has been significantly enhanced by the amendments to the domestic legislation which uniformly adopt the Model Law.

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<sup>14</sup> *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA).

<sup>15</sup> Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2013) 16, 18.

<sup>16</sup> *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2017* (ACT).

<sup>17</sup> *Federal Arbitration Act 9 USC Sections 1-16, 201-208 and 301-307*

<sup>18</sup> Mark W. Friedman and Floriane Lavaud, 'Arbitration Guide: United States' *International Bar Association*, January 2018. <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Arbcountryguides.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx)>.

<sup>19</sup> Pierre Bienvenu and Martin Valasek, 'Arbitration Guide: Canada' *International Bar Association*, February 2018 <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Arbcountryguides.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx)>.

<sup>20</sup> Roger Gyles AO QC, *Report on Enhancing International Arbitration Opportunities* (Inquiry, Australian Bar Association, 9 July 2019) ("Gyles Report") [58].

Thus the legislative framework within which both domestic and international arbitration occurs in Australia is as good if not better than that available in any other jurisdiction in the world, serving to enhance Australia's attractiveness as a seat for arbitration.

## 2.2 The Judiciary

Legislation alone is insufficient to develop international arbitration in a particular jurisdiction. As practitioners, we recognise that judicial support for the arbitral process is critical to the success of arbitration. I will therefore now consider another London Principle that is of vital importance – the judiciary.

An effective arbitral seat has two qualities when it comes to its courts:

1. an experienced judiciary capable of dealing with matters relating to international arbitration; and
2. courts that respect the parties' choice to refer their disputes to arbitration by adopting a non-interventionist approach to enforcing awards.

This principle is succinctly encapsulated in Art 5 of the Model Law, which provides that:<sup>21</sup>

In matters governed by this Law, no court shall intervene except where so provided in this Law.

While this is an issue with which some jurisdictions still grapple, Australian courts are at the leading edge when it comes to judicial support for arbitration.

### Specialist Judges

First, in most jurisdictions, specialist judges deal with matters relating to international arbitration. A particular example of this can be seen in the Federal Court of Australia. Similarly, the Supreme Court of New South Wales, which championed reform to the Uniform Commercial Arbitration Acts, has jurisdiction to deal with all arbitration matters, international and domestic, offering parties a specialist Commercial Arbitration List in its Equity Division. Earlier this year, here in Queensland, the *Uniform Civil Procedure (Commercial Arbitration) Amendment Rule* amended the Uniform Civil Procedure Rules to incorporate harmonised rules for international and domestic commercial arbitration.<sup>22</sup> The creation of specialist lists and harmonised practices for arbitration assures parties that their commercial arbitration matters will be dealt with efficiently and fairly by arbitration-experienced Judges. It also affords parties greater certainty and predictability. As the Hon Justice Clyde Croft stated:<sup>23</sup>

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<sup>21</sup> Model Law art 5.

<sup>22</sup> *Uniform Civil Procedure (Commercial Arbitration) Amendment Rule 2019 — Explanatory Note*.

<sup>23</sup> Justice Clyde Croft, 'Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court - Supreme Court of Victoria' (Speech delivered at the Seminar of the Commercial Bar Association of the Victorian Bar, Victoria, 24 May 2010), 5.

One of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or a group of judges. This should provide parties with greater certainty when judicial intervention or support is required.

The Australian judiciary's support of arbitration is also obvious outside the courtroom, with the Federal Court of Australia hosting this lecture for many years, and an International Arbitration Lecture series alongside the CI Arb. Indeed, the Chief Justice of the Federal Court, the Hon James Allsop AO, is a staunch supporter of international arbitration and an intellectual leader in this area (and many others) within the Australian judiciary. He is also the chair of ACICA's Judicial Liaison Committee.<sup>24</sup>

### Judicial Support and Decisions

This brings me to the second quality, judicial support for arbitration as demonstrated by Australian jurisprudence. Australian judges have commented on the shift of Australian courts towards "a significantly more positive, pro-arbitration, position".<sup>25</sup> The courts' former apprehensions concerning arbitration,<sup>26</sup> stemming from historical tensions between judges and arbitrators, are a thing of the past.<sup>27</sup>

In 1995, a controversial Australian decision on confidentiality became internationally notorious. In *Esso v Plowman*,<sup>28</sup> the Australian High Court expressed views about confidentiality which were the subject of vigorous, and often negative debate in the international arbitral community. However, as time has passed and as issues of transparency have become far more important in international commercial dispute resolution, many have realised that the Australian High Court decision had considerable merit. This is not the place to debate the merits of confidentiality and transparency, but merely to note that the recent amendments to the *IAA* mentioned above have made the debate in Australia moot, as confidentiality now applies on an opt-out basis to commercial arbitration.

Australian courts have, through numerous decisions, created an environment that strongly supports the process of international and domestic arbitration. The non-interventionist attitude of Australian courts is evident in the decision of *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, in which the High Court upheld the constitutionality of the *IAA* and confirmed the court's inability to refuse enforcement of an arbitral award for an error of law.<sup>29</sup> There are numerous Australian decisions that confirm the high threshold for setting aside or

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<sup>24</sup> *Gyles Report* [65].

<sup>25</sup> Chief Justice Allsop and the Justice Clyde Croft, 'Judicial Support of arbitration' (Paper presented at the APRAG Tenth Anniversary Conference, Melbourne, 28 March 2014).

<sup>26</sup> Patrick A Keane, *The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules* (2013) 79(2) Arb 195.

<sup>27</sup> James Spigelman AC, 'Foreword' in L Nottage and R Garnett (ed), *International Arbitration in Australia* (The Federation Press, 2010) viii.

<sup>28</sup> *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 183 CLR 10.

<sup>29</sup> *TCL Air Conditioner (Zhongshan) v Judges of the Federal Court of Australia* (2013) 251 CLR 533.

denying enforcement of arbitral awards.<sup>30</sup> There is also no general discretion to refuse enforcement in Australia, and the public policy ground for refusing enforcement under the *IAA* is to be interpreted narrowly and without residual discretion.<sup>31</sup>

Similar approaches exist with respect to the interpretation of arbitration agreements. Australian courts have held that arbitration clauses are to be construed flexibly and liberally, confirmed by the Federal Court's decision in *Comandate Marine Corp v Pan Australia Shipping*.<sup>32</sup> The courts' pro-arbitration approach can be seen in the recent decision in *Rinehart v Hancock Prospecting Pty Ltd*,<sup>33</sup> in which the High Court construed the arbitration clause having regard to its language and context, to capture disputes relating to the validity of the arbitration clause.<sup>34</sup> Admittedly, while the issue of the conflicting approaches to interpretation under the *Rinehart v Welker* and *Fiona Trusts* cases was not finally decided, the decision confirms that Australian courts will construe arbitration clauses broadly.

Finally, in the Federal Court case of *Uganda Telecom v Hi-Tech Telecom*,<sup>35</sup> Foster J identified the enforcement of arbitral awards as the key rationale of Australian public policy. Courts have recognised that discrete parts of awards infected by a breach of natural justice may be severed from the balance of the award.<sup>36</sup> The courts can then enforce part of an award, preventing it from being declared void in its entirety if the void portion is separate and divisible,<sup>37</sup> as confirmed by the NSW Court of Appeal in *Aircraft Support Industries Pty Ltd v William Hare*.<sup>38</sup> It is evident, therefore, that the enforceability of awards (another London Principle) is clearly adhered to in Australia. It is safe to assume that what Foster J described as a "pro-enforcement bias"<sup>39</sup> toward the recognition and enforcement of arbitral awards will continue. The Australian judiciary has demonstrated its clear support for the practice and procedure of international and domestic arbitration in a manner wholly consistent with the London Principles.

## 2.3 Facilities

In addition to its legislative framework and judiciary, Australia has the necessary facilities and infrastructure in place to support arbitration, driven largely by practitioners themselves. When discussing "facilities", I am referring firstly to access to leading arbitral institutions with modern

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<sup>30</sup> *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.

<sup>31</sup> *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.

<sup>32</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [164].

<sup>33</sup> [2019] HCA 13.

<sup>34</sup> *Ibid* [43].

<sup>35</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 [126].

<sup>36</sup> *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, affirmed on appeal in [2015] NSWCA 229.

<sup>37</sup> *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229 [57] [60] (Bathurst CJ) (Special Leave to appeal to the High Court refused).

<sup>38</sup> *Ibid*.

<sup>39</sup> *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 [90] (Foster J).

rules, and second, world class facilities that ensure the smooth conduct of proceedings and the administration of international arbitrations. It is safe to say that these are features possessed by Australian Centre for International Commercial Arbitration (ACICA).

To provide some history, in 2001, the IBA held its annual arbitration day in Sydney. This event provided a catalyst for reviving ACICA. A coalition of senior practitioners from a number of the national firms joined with the then president of a largely moribund ACICA to revitalize the institution and transform it into a truly effective international arbitration institution. These practitioners included the late Keith Steel, of Freehill Hollingdale & Page (now Herbert Smith Freehills), David Fairlie of Mallesons Stephen Jaques (now King & Wood Mallesons), Tim L'Estrange, then of Allens Arthur Robinson (now after a period as a banker, a partner in Melbourne of Jones Day) and me, of Clayton Utz.

ACICA introduced arbitration rules in 2005 which were revised in 2011 and 2016. These revisions included provisions for emergency arbitrators and expedited arbitrations.<sup>40</sup> ACICA's commitment to ongoing reform ensures arbitration in Australia remains consistent with international best practice.<sup>41</sup>

Australia also offers excellent infrastructure to support international arbitration through its world class facilities. After ACICA's revival, with the support of the then Attorneys General the Hon John Hatzistergos in New South Wales and the Hon Robert McClelland of the Commonwealth, the Australian Disputes Centre ("ADC") was established in Sydney. The ADC works closely with ACICA to provide a venue with all the features of the best dispute resolution centres that can be customised to the needs of the arbitration to maximise cost effectiveness for the parties.<sup>42</sup>

In recent years with the flourishing of international dispute resolution associated with the resources industry, the Perth Centre for Energy & Resources Arbitration (PCERA) has been established to promote Australia as a place for the resolution of resources disputes. It is gratifying and encouraging to see PCERA now working under the ACICA umbrella to promote international arbitration as a national endeavour, rather than merely as a regional activity. Meeting the challenge faced by federations such as Australia with far-flung places and regional interests is one that calls for a national vision and persistent effort in order to succeed.

Also associated with ACICA is a specialist commission, the Australian Maritime and Transport Arbitration Commission (AMTAC), establishing ACICA as an umbrella organisation for the

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<sup>40</sup> *ACICA Rules 2011* (2011) <<https://acica.org.au/acica-rules-2011/>>; *ACICA Arbitration Rules Incorporating the Emergency Arbitrator Provisions 2016* (As at 1 January 2016); *ACICA Rules 2016* (As at 1 January 2016); *ACICA Expedited Arbitration Rules* (As at 1 January 2016) < <https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Expedited-Arbitration-Rules-2016.pdf>>.

<sup>41</sup> Jones (n 1), 276.

<sup>42</sup> Doug Jones and Bjorn Gehle, 'Australian Centre for International Commercial Arbitration (ACICA) (2010) *World Arbitration Reporter*.

development of international commercial arbitration in the areas of general commercial arbitration, maritime arbitration, and resources arbitration. The shared objective of these organisations, that being to further arbitration within Australia, has resulted in high-quality service and facilities for use by commercial parties.<sup>43</sup>

Thus so far as facilities and institutions are concerned, Australia certainly satisfies the London Principles.

## **2.4 Legal Expertise**

Successful seats are home to skilled and experienced legal practitioners who are able to administer, and provide support for, international arbitration.<sup>44</sup> The high quality of Australian lawyers is amply demonstrated by their success and prominence as practitioners by all the major common law jurisdictions of the world and many civil law jurisdictions as well. Recent times have seen the establishment of international arbitration practices within international and domestic law firms in Australia. Examples include firms such as Corrs Chambers Westgarth, King & Wood Mallesons, Herbert Smith Freehills, Clayton Utz, Allens, Ashurst, Baker McKenzie, DLA Piper, Clifford Chance, Allen & Overy, HFW, Norton Rose Fulbright, Clyde & Co, White & Case and Jones Day.

For there to be such an interest by these firms in the practice of international arbitration in Australia is a testament to the number of positive characteristics that Australia possesses. First, the practice of law in Australia is much more open to international practitioners than in some other jurisdictions. Law firms practising international commercial dispute resolution have the capacity to operate both in the domestic courts here and in international arbitration. This cannot be said of a number of other prominent jurisdictions in the region. Secondly, the cost to legal practitioners and firms of operating in Australia is lower than in a number of other leading centres in the region. Australia provides a very economically sustainable base from which international arbitration practices can develop. As these firms continue to practice and grow in Australia, the financial interest that they have in seating arbitrations in Australia is obvious.

The State Bars have had a continuing interest in the growth of international arbitration as attested to by the corporate membership of the New South Wales and of the Victorian Bars in ACICA. There has been a recent revival of interest by the ABA in the development of the practice of international commercial arbitration, no doubt encouraged by the number of international arbitral disputes which have been spawned by oil and gas and mining disputes arising in recent times due to changing economic conditions in those industries.

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<sup>43</sup> Jones (n 1), 277.

<sup>44</sup> Lord Peter Goldsmith, 'The London Principles 2015' (2015) 81(4) *The International Journal of Arbitration, Mediation and Dispute Management* 407.

At the recent ABA conference in Singapore, a debate took place on increasing opportunities for Australian barristers to practice international disputes, which had been the subject of a report by the Hon Roger Gyles AO QC. This discussion was significant in furthering the interests of the Australian Bar in developing a competitive practice in Australia and more importantly in the Asia Pacific region. The skills of Australian dispute resolution practitioners interested in international arbitration, including those from the independent Bars of the States and Territories, is equal to that of the London Bar whose capacity to win work in the region has been and continues to be demonstrated regularly. Some Australian barristers are also associated with overseas chambers, in England or Singapore. Indeed, a group of prominent barristers from Sydney and Brisbane have taken chambers in Maxwell Suites in Singapore to create “Maxwell 42”, specialising in international arbitration.<sup>45</sup> Thus I suggest that Australia is not only well placed to be an effective centre for international commercial arbitration, it is in many respects *uniquely* well placed.

## 2.5 Other Principles

It can safely be said that Australia satisfies all other criteria of the London Principles, indicating that it is a safe and attractive seat for international arbitration. It is apposite to mention of a few of them here.

### Education

Closely linked with the competency of the legal profession is education, another of the London Principles. Educational institutions providing undergraduate and postgraduate study in international arbitration proliferate in Australia, with many of the leading Australian universities providing courses in international commercial arbitration (including a host of this lecture, the University of Sydney). The Resolution Institute provides arbitrator accreditation and grading in Australia, run in conjunction with the University of Adelaide Law School.<sup>46</sup> In terms of practical experience, ACICA offers an internship program for law students or law graduates with an interest in commercial arbitration.<sup>47</sup> CIArb Australia also provides a number of training courses for accreditation and professional development as well as an Asia Pacific Diploma in International Arbitration.<sup>48</sup>

The involvement of Australian universities in the Willem C. Vis Moot has been long and sustained and the success enjoyed by Australian teams in the Vis Moot has been consistent. In recent years, the Australian Catholic University, Monash University, the University of New South Wales,

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<sup>45</sup> *Gyles Report* [73].

<sup>46</sup> Resolution Institute, ‘Arbitrator accreditation and grading in Australia’ *Accreditations* (Web page, 2019) <<https://www.resolution.institute/accreditations/arbitration-australia>>.

<sup>47</sup> Resolution Institute, ‘Arbitrator accreditation and grading in Australia’ *Accreditations* (Web page, 2019) <<https://acica.org.au/internship-programme/>>.

<sup>48</sup> CIArb Australia Branch, ‘2019 CIArb Asia Pacific Diploma In International Arbitration’ *Training* (Web page, 2019) <<https://www.ciarb.net.au/training/diploma2019/>>.

the University of Queensland and the University of Sydney all received honourable mentions, and the University of Sydney was awarded the Pieter Sanders Award for Best Claimant Memorandum in 2019.<sup>49</sup> In addition, a number of international arbitration moots are also available to Australian students, including the Alfred Deakin International Commercial Arbitration Moot and the CIArb/New South Wales Young Lawyers International Arbitration Moot. It is therefore safe to say that the education of international arbitration in Australia is widespread and of a high quality.

### Right of Representation

Another of the London Principles is the right of representation. The entitlement of parties to be represented by their counsel of choice in international arbitrations in Australia is enshrined in Commonwealth legislation. Section 29(2) of the *IAA* relevantly provides:

- (2) A party may appear in person before an arbitral tribunal and may be represented:
  - (a) by himself or herself;
  - (b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or
  - (c) by any other person of that party's choice.

This legislative provision precludes any attempt by the State Bars of Australia to preserve their "patch" in this space.

### Summary

It is therefore clear that Australia satisfies all of the London Principles. Collectively, the prevalence of these characteristics in Australia makes this country a safe and effective seat for disputing parties in the Asia-Pacific region.

Nevertheless, arbitration in Australia has not yet reached its full potential. One would assume that, given the prevalence of these characteristics, more international arbitrations would be seated in Australia. There are several reasons for this. These represent challenges that remain to be overcome to ensure the continued growth of international arbitration in Australia in a highly competitive international market. Further developments must be made to enhance Australia's potential as an international dispute resolution hub.

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<sup>49</sup> The Annual Willem C. Vis International Commercial Arbitration Moot, '26<sup>th</sup> Vis Moot Results' *Previous Moots* (web page 2018) <<https://vismoot.pace.edu/site/previous-moots/26th-vis-moot>>.

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### 3. Challenges facing Arbitration in Australia

This brings me to the challenges that lie ahead. In exploring the future of commercial arbitration in Australia, we must ask: what can practitioners, legislators and judges do to raise the profile of Australia as a regional hub for international disputes?

The challenges I will focus on today are threefold: first, the Tyranny of Distance; second, regional rivalries within our Federation; and finally, Australia's fragmented legal framework. What becomes clear from this discussion is that some of these challenges are misconceptions about Australia that need correction, while others will require significant effort on the part of Australia's legal community.

I would also like to raise two potential avenues for advancement: an Australian Commercial Law and an International Commercial Court. My intention in this address is to contribute to the conversation on these issues. A more detailed roadmap must await another occasion.

#### 3.1 Tyranny of Distance

The Tyranny of Distance, a phrase coined by Blainey,<sup>50</sup> has been a feature of the Australian scene since European settlement. For Blainey, it was Australia's geographical remoteness, combined with a lack of attractive trade goods, that left the European imperial powers disinterested throughout much of the 18th century.<sup>51</sup> Distance also served to isolate Australian cities, particularly before the railroads were built, making domestic trade in wheat and wool an expensive and laborious proposition.<sup>52</sup>

In the context of arbitration, the same brush that paints this grim picture of Australian history potentially provides a similarly pessimistic perspective on present-day Australia as a choice for an arbitral seat.<sup>53</sup> But how real is this? The challenges of the geographic location of Australia will not be solved in our lifetimes, but the inconveniences of Australia's location that characterised its history have become considerably less pronounced. These inconveniences have been, to a large degree, ameliorated by technology and by the flight connections that Australia now enjoys from its major cities to many parts of the world.

Technology is reducing the need for international arbitration participants to gather together physically for the purpose of procedural and substantive hearings. Many such hearings are now conducted remotely: 60% of 2018 QMUL Survey respondents confirmed they often use video-conferencing, and the majority of respondents agreed that virtual hearing rooms should be

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<sup>50</sup> Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (Macmillan Publishers, 1966).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* 125, 129.

<sup>53</sup> Jones (n 1).

used more often.<sup>54</sup> Thus, physical travel to Australia for the purpose of hearings may not be as necessary as it has been in the past, thus reducing the impact of the distance from which we have suffered throughout our history.

When travel to and within Australia *is* necessary, the flight connections are numerous. The perception of Australia's isolation is worse than the reality: the travel time from New York to Sydney compares favourably to the travel time from New York to Singapore; and Qantas is soon to commence a direct flight from Chicago to Brisbane (saving six hours of travel time on a return trip),<sup>55</sup> and making a direct flight from New York to Sydney is just over the horizon,<sup>56</sup> so to speak. There are already direct flights from Dallas and Houston to Sydney. Where once there were few airline connections available there are now many and the introduction of non-stop flights from major centres of economic activity to Australia is expanding. Perth has taken advantage of the direct flights available from London, a flight that I, in fact, caught on my way to Brisbane for the beginning of this international arbitration week. Moreover, despite Australia's location, evidence shows that the cost of arbitrating in Australia, including administration fees, professional fees and facilities can make any additional time and cost to reach Australian centres quite competitive in comparison with other seats in the region such as Singapore and Hong Kong.<sup>57</sup>

Thus, the relevance of the tyranny of distance, has faded and will in my opinion continue to fade, justifying the effort to change perceptions in the promotion of international arbitration in Australia. As the Hon Roger Gyles said, "geography cannot be changed, but hopefully perceptions can be".<sup>58</sup> These perceptions need to be addressed head on, admitted and dealt with. They cannot be ignored if Australia is to meet this challenge.

### **3.2 Regional rivalries**

The next challenge: regional rivalries and the problem of competing voices in our Federal system.<sup>59</sup> The regional rivalries of the States are well known to Australians, but the success of international arbitration in Australia, and international dispute work more generally, depends on pursuing it as a national initiative.

#### Australia's national character

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<sup>54</sup> Paul Friedland and Stavros Brekoulakis, '2018 International Arbitration Survey: The Evolution of International Arbitration' (Research Survey, White & Case and Queen Mary University of London, 2018) 32.

<sup>55</sup> Qantas Newsroom, 'QANTAS SETS SIGHTS ON DIRECT FLIGHTS FROM BRISBANE TO CHICAGO AND SAN FRANCISCO', viewed 31 October 2019 <<https://www.qantasnewsroom.com.au/media-releases/qantas-sets-sights-on-direct-flights-from-brisbane-to-chicago-and-san-francisco/>>.

<sup>56</sup> Qantas Newsroom, 'QANTAS' NEW YORK TO SYDNEY NON-STOP RESEARCH FLIGHT SET FOR TAKE-OFF', viewed 31 October 2019 <<https://www.qantasnewsroom.com.au/media-releases/qantas-new-york-to-sydney-non-stop-research-flight-set-for-take-off/>>.

<sup>57</sup> *Gyles Report* [67].

<sup>58</sup> *Ibid* [108].

<sup>59</sup> *Ibid* [110].

When the major law firms came together to promote international arbitration, the national character of the law firms was a critical part of this development. By that time, firms had joined together in nationwide partnerships. This brought the national business needs of these law firms to the forefront and reduced regional jealousies. Of course, although this occurred in law firms, no similar change could occur in the State Bars. However, the fact that this annual event, Australian Arbitration Week, has now been held in Perth, Melbourne, Sydney and Brisbane is a testament to the commitment of those involved in the development of international arbitration to be as inclusive as possible.

It is worth recognising that equivalent Federations have all failed to meet this challenge. One only has to look at the competitive approaches of the various regions in the United States, Canada, India and indeed in Switzerland, to see how difficult it is to avoid division in the successful promotion of diverse nations as centres for international arbitration. Where the population and economy are also large, such as in the United States, it may be possible to promote several centres, such as New York, Miami, Atlanta, Houston, Los Angeles and San Francisco, to the limited benefit of each, but that is simply not a reality to which we can aspire in Australia. We must all work together as Australians to promote Australia as the venue for international arbitration and thus allow the facilities available in all of our major economic centres to benefit.

Prioritising our national interests over regional interests will prove crucial in ensuring the development of international arbitration in Australia. Initially, the promotion of Australia was concentrated through the lens of Sydney. This is no longer necessary, and while Sydney remains a major centre of professional activity, as is this city, Perth and Melbourne. We still need to focus on finding ways to increase the pie rather than the shares of it enjoyed by each centre.

The regional rivalries of courts and laws also present challenges.

### Courts

When the IAA was amended in 2006 and 2010, debate arose over whether jurisdiction over arbitration should be vested in the Supreme Courts of each state, the Federal Court, or all of them.<sup>60</sup> This was a bruising process for those involved. The State Chief Justices established a working group to oppose exclusive jurisdiction being given to the Federal Court. Section 18 of the IAA is a product of their efforts, with supervisory jurisdiction for international arbitration vested in the State and Territory Supreme Courts, as well as the Federal Court.<sup>61</sup> This outcome is still controversial, and perhaps cannot be regarded as finally settled. There is however a broader

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<sup>60</sup> See for example: Attorney-General Robert McClelland, "Simply resolving disputes, International Commercial Arbitration Conference: Making it Work for Business" (Speech delivered at Intercontinental Hotel, 21 November 2008); Chief Justices of the States and Territories, Submission to Attorney-General's Department, Review of the International Arbitration Act 1974 (Cth), 10 December 2008, 1.

<sup>61</sup> *International Arbitration Act 1974* (Cth) s 18.

issue that bears upon Australia being regarded as an obvious choice for international commercial dispute resolution.

There is a symbiotic character between the development of international arbitration and the development of court dispute resolution for international commercial disputes. For example, in London, the relationship between the Commercial Court and international arbitration is close. Each supports the other. Indeed, approximately 25% of the claims before the English Commercial Court relate to matters arising out of arbitration.<sup>62</sup> Further, 70% of the English Commercial Court's caseload are international cases, demonstrating international parties' preference for English law, or for English courts as the forum to resolve their disputes, or both.<sup>63</sup> This is a situation that Australian courts should emulate, noting however the obvious advantages London possesses: its history as a commercial hub for centuries and its ability to offer English law, an advantage both enhanced and adversely impacted by Brexit. However, one feature that could be emulated in Australia, is that of the combined benefit of international arbitration, a commercial court capable of handling international disputes, and of course, an attractive, unified law. This symbiotic relationship is another method through which courts contribute to the development of international dispute resolution. This brings me to my final topic: the need for Australia to transcend its state and territory borders to create an Australian commercial law and an international commercial court.

### **3.3 Australian Commercial Law**

I have long been an advocate for the development of an international commercial law in Australia. In the international arbitrations in which I have sat, I have seen a clear trend toward parties selecting a law that is neutral, predictable and commercially logical, such as Singaporean, Swiss, or English law. Singapore and England offer experienced judges, efficient court systems and a high quality of justice, and are therefore no different from Australia in that regard. However, where Australia falls short is the perception of the applicable law as fragmented.

Having tried to promote the adoption of "Australian law" in my days as a transactional lawyer, I have failed to interest international parties in a debate about whether one should adopt the law of New South Wales, Victoria, Western Australia, Queensland, or some other State or Territory. International parties are simply not interested. They think, until corrected by Australian lawyers, that there is a law of Australia. We have the problem of the United States and of Canada where the law of the States and Provinces is the relevant law to be chosen. Australia's federal legal

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<sup>62</sup> Commercial Court Annual Report 2017-2018, *Judiciary of England and Wales* (Judicial Office, 2018) [https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310\\_Commercial-Courts-Annual-Report\\_v3.pdf](https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf)

<sup>63</sup> *Ibid.*

system deters international parties from selecting Australian law. What then, should be done about this?

One idea that has been suggested as a means of transcending state and territory borders is to apply “Australian common law” rather than the laws of a particular state. In the landmark case of *Lange v Australian Broadcasting Corporation*, the High Court noted that:<sup>64</sup>

...There is but one common law in Australia which is declared by this Court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations...

This seemingly simple solution is unlikely to solve the issue of fragmentation. The interpretation of the common law of Australia differs across states and is often reflective of State and Territory statute law. Take for example the contract law question of whether ambiguity is a threshold issue on which the admissibility of extrinsic evidence turns.<sup>65</sup> In NSW, it is not necessary to demonstrate the existence of ambiguity before looking at extrinsic evidence,<sup>66</sup> but the caselaw in Western Australia indicates that in that State it is.<sup>67</sup> This discrepancy will likely continue until resolved by the High Court.<sup>68</sup> There is of course even greater diversity in state and territory statutes. The East-West Coast divide in the security of payments regime is just one.<sup>69</sup> For international parties unfamiliar with these nuances, choosing a state or territory law is neither simple nor desirable. Transactional lawyers are not law reformers but creators of contracts, the interpretation of which can be confidently predicted. The choice currently offered is the law of a particular state, presenting all of the undesirable competitive tensions between practitioners of the States. It would in my view be delusional for any particular State to aspire to the status of New York which certainly enjoys amongst US States a clear choice of law advantage.

The introduction of an Australian Commercial Law, for international commercial contracts, is the only effective option to create the first of the building blocks that I suggest – a law international parties can adopt for transactions unrelated to Australia with ease and apply with certainty. In devising this body of law, it is also worth considering whether the Australian Consumer Law (ACL) should be included, given that it has been identified as a deterrent for international parties

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<sup>64</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 [51] (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>65</sup> Justice John Bond, ‘The use of extrinsic evidence in aid of construction: a plea for pragmatism’ (Paper delivered at the Current Legal Issues Seminar Series 2016, Queensland, 26 May 2016) <http://www.austlii.edu.au/au/journals/QldJSchol/2016/9.pdf>

<sup>66</sup> See for example, *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633 [72] (Leeming JA).

<sup>67</sup> See for example, *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* (2014) 48 WAR 261 (McLure P, Newnes and Murphy JJA) [215].

<sup>68</sup> Bond (n 65) [45].

<sup>69</sup> Peter Wood and Phillip Graham, “Australia” in James Pickavance, ‘A Practical Guide to Construction Adjudication’ (Wiley Blackwell, 1<sup>st</sup> ed, 2016) 446.

considering the choice of any branch of Australian law.<sup>70</sup> Of course, some provisions in the ACL can be excluded by contract; the mandatory provisions (e.g. those prohibiting misleading or deceptive conduct), however, may continue to apply, even in circumstances where an Australian branch of law is not the agreed law.<sup>71</sup> The risk of a potential ACL claim being brought presents uncertainty that cautious commercial parties would seek to avoid. This is an issue that should be given careful consideration.

The value of a uniform body of Australian law (and of an international commercial court) have been raised by prominent members of the Australian judiciary, and warrant further serious consideration among the profession as a whole. It is my suggestion that an Australian Commercial Law would address international commercial parties' reluctance to choose Australian law in their contracts. It would also prevent the bleeding out of Australian-based projects to other jurisdictions, which is an unfortunate but common occurrence, notwithstanding the fact that the parties or the project itself are closely connected with Australia. Absent a widely accepted branch of State or Territory law, which is unlikely to emerge, there needs to be a cooperative approach between the States and the Commonwealth that can be supported by all stakeholders without it being a perceived as a threat to any of them. If parties could select a unified 'Australian Commercial Law' as their substantive law, it follows that they would be more inclined to select Australian courts or arbitrations seated in Australia to apply this law.

### **3.4 International Commercial Court**

This brings me to my final suggestion: that Australia establish an international commercial court. The topic has divided the Australian legal community in recent years, despite the emergence in the last decade of international commercial courts in Singapore, Dubai, China, Kazakhstan Netherlands, Qatar and Abu Dhabi.

Many prominent members of the Australian judiciary are proponents for such a court, including Chief Justice Allsop, Chief Justice Warren and Justice Croft,<sup>72</sup> to name a few. There are also opponents of an Australian ICC, most recently addressed by the Hon Justice Andrew Bell, President of the NSW Court of Appeal, at the ABA Conference in Singapore earlier this year.<sup>73</sup> While it is recognised that fleshing out a roadmap for implementing an Australian ICC is beyond

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<sup>70</sup> *Gyles Report* [118].

<sup>71</sup> See *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2008) 249 ALR 458; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 351 ALR 584; *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* [2018] VSC 246.

<sup>72</sup> Chief Justice Marilyn Warren and Justice Clyde Croft, 'An International Commercial Court for Australia – Looking beyond the New York Convention' (Speech delivered at Commercial CPD Seminar Series, Melbourne, 13 April 2016). Shortly to be published will be a paper by Chief Justice Allsop as to the Constitutional Foundations of such an Australian court.

<sup>73</sup> Justice Andrew Bell, 'An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?' (Speech delivered at the ABA Biennial International Conference, Singapore, 12 July 2019).

the scope of this lecture, it is my view that the implementation of this proposal is critical to ensuring Australia's regional competitiveness as place for international commercial dispute resolution.

The purpose of an Australian ICC is to provide international parties with choice of an alternative forum to international arbitration for dispute resolution with a specialised focus on international commercial law. It is not intended to replace nor undermine the excellent work of the Australian judiciary who effectively and efficiently resolve commercial disputes. Indeed, the recognised intellectual competence and independence of the Australian judiciary is the reason for Australia's potential to become a leading dispute resolution hub. I support the comments of Justice Craig Colvin earlier this year that an Australian ICC is "an opportunity that arises...by reason of the quality of Australia's judicial system. A new forum may be required for Australia to participate fully in that opportunity".<sup>74</sup> Equally, such a court would be a companion, rather than a competitor, to international commercial arbitration, with each filling any gaps in the services offered by the other.<sup>75</sup>

Ensuring Australian judicial resources are recognised, and more importantly, used, as an option for regional international commercial dispute resolution cannot be done effectively through the commercial lists of the Australian state and territory courts.<sup>76</sup> The same challenge exists in relation to exclusive choice of court agreements designating Australia. While these are recognised and enforced in Australia, the challenge is encouraging commercial parties to choose an Australian state court in the first place. International parties do not have the appreciation of, nor enthusiasm to choose among the qualities of particular state or territory courts, and none has achieved, or is likely to achieve, a sufficiently preeminent reputation such as that enjoyed (to a limited degree) by the New York State and Federal courts, to provide a compelling basis for choice. Moreover, the effort to achieve such a singular reputation is likely to engender the kind of internal competition that I have argued will undermine the united national purpose critical to the development of Australia as a regional international commercial dispute resolution hub.

To the contrary, Australia needs a single institution operating nationally, and comprised of the very best commercial judicial talent from across the country. This is important both for users and for the Australian profession. We do have such an institution: the Federal Court of Australia, the host of this lecture. However, at the risk of appearing an ungrateful guest and with all due respect to the talent on the court, it would in my view be a mistake to limit the commercial bench to members of this Court. An Australian ICC must consist of the brightest and the best from the

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<sup>74</sup> Comment by Justice Craig Colvin on Justice Andrew Bell's paper, 'An Australian International Commercial Court - Not A Bad Idea or What a Bad Idea?' (ABA Conference 2019, Singapore, 11-12 July 2019).

<sup>75</sup> Chief Justice Tom Bathurst, 'Benefits of Courts such as the Singapore International Commercial Court (SICC)' (Speech delivered at Sydney Arbitration Week, Sydney, 21 November 2016).  
[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst\\_20161121.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20161121.pdf)

<sup>76</sup> Bell (n 73) [16].

entire Australian judiciary, thus drawing for its membership from the State and Territory Courts as well.

Offering parties one forum, supported by all states and territories, is far more attractive than any current offering. As Australians, we cannot afford to fragment our international effort by giving into what Justice Colvin describes as “competitive federalism”.<sup>77</sup>

Realising that a complete roadmap would need many more details, may I mention just two. There are constitutional challenges which need to be addressed in the creation of an Australian ICC. However, solutions can and should be found to them. Secondly, careful thought should be given to judges being sessionally appointed and compensated (rather than removed from the courts to which they are appointed), and the cost of the Court’s establishment being limited largely to its administration with physical facilities shared nationally either with the Federal Courts or the State Courts.

The proliferation of International Commercial Courts around the world cannot be regarded as a phenomenon with a common objective. At the risk of some simplification three categories of International Commercial Courts can be identified. Firstly, those established in Europe seeking to draw work away from the London Commercial Courts as a result of Brexit: the Brexit “wannabes”. Secondly, regional International Commercial courts in the Middle East and Central Asia seeking to offer an English common law-style of justice<sup>78</sup> and procedure to those trading in those regions who lack confidence in the effectiveness of local courts. Thirdly, the real International Commercial Courts which form an integral part of the existing State Court systems based in centres of international trade whose local law is regularly adopted as a “neutral” law to govern contracts having no geographic connection with that country. There are only two of these: London and Singapore. To characterise the establishment of International Commercial Courts as a bandwagon misses the point that there are a variety of reasons for their establishment, the relevant reasons for an ICC in Australia being demonstrated in just two other highly successful examples.

My thesis is simple. Although the development of Australia as a seat, and venue, for International Arbitration is not dependant on adopting an Australian Law and establishing an Australian International Court, these are necessary for Australia realise its full potential as a regional international commercial dispute centre, and the implementation of either, and certainly both, will greatly enhance the development of international arbitration in Australia.

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<sup>77</sup> Colvin (n 74) [9].

<sup>78</sup> E.g. Astana International Financial Court *AIFC Constitutional Legislation 2015* Art 13(5); Abu Dhabi Global Market Courts (ADGM) *Application of English Law Regulations 2015*; Dubai International Financial Centre Court (*DIFC Law No.3 of 2004*) Art (8)(2)(e).

Participation by Australians in the international dispute centres in our region is critical to the development of international dispute practices by Australian practitioners. Cooperation regionally between centres, and courts should also be regarded as the norm. Thus the establishment of Maxwell 42, in which several Australian barristers based in Singapore contribute to international arbitration, is a very welcome development, as is the participation of Australians as International Judges in the Singapore International Commercial Court. This should however not be considered as a substitute for pressing on with realising the potential of Australia as a regional centre for international dispute resolution.

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## 4. Conclusion

Although there have been many positive developments that have allowed Australian arbitration to flourish, Australia is yet to realise its potential as a hub for international dispute resolution. There is however a strong foundation upon which to build. When one puts Australian arbitration to the test of the London principles, it is clear that the current legal landscape is one in which international arbitration can thrive. In my view, international arbitration will benefit from increased opportunities if Australia is able to promote itself as an desirable forum for international dispute resolution.

In order to position itself as an international dispute hub, Australia needs the complete package: first, a robust international arbitration framework (which it has), second, an international commercial law that parties can choose and finally, an international commercial court. There are challenges which must be addressed and developments which ought to be pursued if Australia is to compete. As the relevance of Blainey's Tyranny of Distance continues to fade, accelerated by technology and the emergence of regionalism, Australian arbitration is becoming increasingly accessible.<sup>79</sup> Australian regional rivalries remain, but are also diminishing and will continue to do so if the states and territories cooperate to offer an Australian Commercial Law or an International Commercial Court.

In this address I have sought to move from the past to the future and to sketch some streams of potential development for international dispute resolution generally.

This week is a testament to the continuing debate of issues in international and domestic arbitration which is now a constant in Australia. The activities for many years of ACICA and CI Arb Australia in the promotion of debate on topics of interest in international arbitration have been a feature of the Australian scene. It has been my experience that a long term and sustained passion for the development of international commercial arbitration in Australia is both necessary and

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<sup>79</sup> Richard Weinstein SC, 'General Editor's Introduction' *Alternative Dispute Resolution Law Bulletin* 1(3) (2014) 46.

sustainable as we move forward in the development of the practice of international dispute resolution in this country. I would encourage all of you to recommit to this passion and sustain it.