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**THE ‘JUDICIALIZATION’ OF INTERNATIONAL
COMMERCIAL ARBITRATION: PITFALL OR
VIRTUE?**

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THE ‘JUDICIALIZATION’ OF INTERNATIONAL COMMERCIAL ARBITRATION: PITFALL OR VIRTUE?

ABSTRACT

This article critiques the global concern that international commercial arbitration (ICA) is becoming increasingly ‘judicialized’, addressing the growing sentiment in ICA that arbitral proceedings are too lengthy, expensive and complex. Assuming a contrarian perspective, it argues that attempts to address the cost and length of arbitration proceedings ought not to undermine the value of finely reasoned arbitral decisions grounded in law and justice. It also argues for a contextual assessment of ICA that extends beyond the debate over ‘judicialization’.

Using global illustrations and ICA developments in Australia as an initial guide, it suggests that balancing party autonomy, accountability, efficiency *and* fairness in ICA can help to resolve these growing criticisms of ‘judicialization’. Ultimately, the reform of international arbitration should take place within a framework of ‘international best practice’ that is both analytical in nature and functional in operation. As such, ICA should not only be affordable and expeditious, it should serve as a legitimate and effective method of resolving international commercial disputes. In addition, it should also balance the virtue of transparent proceedings against the need to respect the confidences of the parties.

KEY WORDS: international commercial arbitration, dispute resolution, judicialization, best practice, Australia

1. Introduction

Recently within international commercial arbitration (ICA) circles, a growing concern has emerged amongst critics, arbitrators and commentators alike about the formalization and ‘judicialization’ of international arbitration. Critics have suggested that ICA laws and procedures increasingly replicate national judicial procedures, national laws and their legal intricacies. Rather than provide a cost-efficient and

internationally accessible method of alternative dispute resolution, the concern is now that ICA is increasingly formalistic, expensive, and indeed, merely another step private parties must undertake before litigation. For example, Professor Luke Nottage suggests that there is now a new phase of development in ICA that ‘will likely remain characterized by ever-growing formalization of international commercial arbitration’.¹

Given these growing concerns about the formalization and ‘judicialization’ of ICA, the question arises: is ICA still a viable option for resolving international disputes expeditiously, or is it now a source of costly and protracted conflict between commercial parties?

These concerns are undoubtedly important to any assessment of the future success of ICA. However, in focusing on the need for increasingly cheap and efficient arbitral awards, commentators and arbitration practitioners risk the danger of searching for the ‘El Dorado’ of ICA, in which every arbitral award is quick, efficient and streamlined. Although such qualities are desirable in some cases, they should not portray simplicity in ICA decision-making as an end in itself, in disregard of the potentially diminished quality of those decisions.²

As a result, the value of ICA ought to transcend a single and determinative pathway, such as streamlined, quick and timely awards, or even the converse of exhaustive case analyses, voluminous written proceedings and meticulously reasoned awards. The nature of arbitration should rather be contextually determined, taking account of the dispute, jurisdiction, applicable law, and reasonable expectations of the parties. In this way ‘best international practice’ can provide a more *situational* way of looking at

¹ L. Nottage, ‘A Weathermap for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms’, 2015 *Sydney Law School Research Paper* 15/62, at 1. Available at <<http://ssrn.com/abstract=2630401>>.

² See Justice C. Croft, ‘Commercial Arbitration in Australia: The Past, The Present and the Future’, (2011) *Research Discussion Paper: Chartered Institute of Arbitrators*, at 28. Available at <<http://www.austlii.edu.au/au/journals/vicjschol/2011/59.pdf>>. See also L. Trakman, ‘International Commercial Arbitration: An Australian Perspective’, in A. Rayes and W. Gu (eds.), *International Commercial Arbitration in Asia* (2016), forthcoming. See R. Ge, ‘Australia and International Arbitration: Rising to the Challenge of Improving Regional Competitiveness’, (2014) *CI Arb Australia Essay Competition*, at 1. Available at <<https://www.ciarb.net.au/wp-content/uploads/resources/essay.pdf>>.

ICA, rather than trying to promote the one-size-fits-all model of the ‘ideal’ arbitration often promoted in the narrative of ‘judicialization’.

Furthermore, whilst the confidential nature of ICA precludes extensive quantitative analysis of unpublished awards, there is also real doubt whether international arbitration is in fact becoming increasingly ‘judicialized’. For example, an empirical study conducted by Christopher Drahozal suggests that the dissatisfaction of parties with allegedly costly and dilatory ‘judicialized’ ICA may be anecdotal, with ‘little evidence of any significant move away from international arbitration’³ in past years. In support of Drahozal’s argument, it is apparent that attacks on ‘judicialized’ ICA proceedings are often based on rhetorical or anecdotal perceptions of supposed delays and increasing costs. For example, Rémy Gerbay’s empirical assessment of the ‘judicialization’ of international arbitration refutes such catastrophic assessments as ‘international arbitration is on the brink of extinction!’⁴ Gerbay’s analysis also argues that ‘empirical evidence does not support the assumption that international arbitration has recently become more judicialized’.⁵ He proposes instead that ‘the increased formality and sophistication of international arbitration procedure is partly due to the evolution of the dispute types referred to international arbitration’.⁶ As international commercial disputes become increasingly large and complex, the increased costs and delays of proceedings often merely signal the adaptability of ICA to accommodate increasingly multifaceted and procedurally complicated disputes.⁷ All this affirms the contextual nature of ICA, as arbitral awards acclimate to the particular circumstances of each dispute.

Ultimately, even if expedited ICA proceedings are sometimes desirable, streamlined proceedings are not truly expeditious if they oversimplify the applicable law, gloss over material facts, exclude expert testimony that can assist in clarifying both the facts and applicable law, and raise the spectre of judicial review. Adding value to ICA ought to surpass criticism of its ‘judicialization’ in favour of a more contextual

³ C. R. Drahozal, ‘Disenchanted? Business Satisfaction with International Arbitration’, (2008) 2(5) *World Arbitration & Mediation Review* 1, at 15.

⁴ R. Gerbay, ‘Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration’, (2014) 25(2) *The American Review of International Arbitration* 223, at 223.

⁵ *Ibid* 226-227.

⁶ *Ibid* 247.

⁷ *Ibid* 247.

framework that includes the pursuit of greater coherence in ICA, as well as more authoritative, well reasoned and streamlined awards. What constitutes such ‘best practice’ in ICA will vary from case to case, something that is obscured by overly generalized criticisms of ICA.

2. ICA in Australia and beyond

Australia provides a useful model in which to explore the relationship between perceived judicial formalism in arbitral decision-making and the case for a more streamlined and efficient arbitration landscape. Firstly, a study of the Australian model can help to understand the complexities and nuances involved in promoting ICA as an attractive method of dispute resolution. Secondly, the study can assist in demonstrating that arbitration cases that are subject to rigorous reasoning and detailed awards may still be both cost-effective and fair to parties. Thirdly, using Australia as a case study can also reflect on the state of commercial arbitration internationally.

In seeking to attract ICA to Australia, both national legislatures and international arbitration centres in the nation have sought to promote a gold standard of idealized arbitration in which arbitration proceedings are presented as cost-effective and expeditious. This aspiration is demonstrated by the current ‘overriding objective’⁸ of the Australian Centre for International Commercial Arbitration’s (ACICA) of achieving ‘quick, cost-effective and fair’⁹ dispute resolution. This overriding objective also takes centre stage in the ACICA’s new ‘Arbitration Rules 2016’, which aim to ‘build on ACICA’s established practice of providing an effective, efficient and fair arbitral process’ to its users.¹⁰ The wording of these phrases is derived in part from the institutional rules of other arbitration associations,¹¹ but also from civil procedure and judicial rules in Australia.

⁸ <www.acica.org.au/resources/faqs>.

⁹ Ibid.

¹⁰ <<http://acica.org.au/assets/media/Events/2015/Launch-of-ACICA-Arbitration-Rules-2016.pdf>>.

¹¹ See generally <www.hkiac.org/en/arbitration>. Article 13.5 of the HKIAC Administered Arbitration Rules 2013 likewise stipulates that the ‘arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration’. See <www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013/10-domain-name-dispute-resolution-aodr/12-hong-kong-international-arbitration-centre-administered-arbitration-rules-2013-3#01>. As does the Singapore International Arbitration Centre stipulate in rule 16.3 that arbitration will involve a

Australia's pursuit of this gold standard is now also expressed in section 39(2) of the 2010 amendments to the *International Arbitration Act* in Australia, which describes arbitration as an 'efficient, impartial, enforceable and timely method by which to resolve commercial disputes',¹² reflecting the views of Justice Foster of the Federal Court¹³ and Justice Croft of the Victorian Supreme Court.¹⁴ Globally, the International Chamber of Commerce (ICC) likewise emphasizes developing international arbitrations that 'focus on the time and cost efficiency of arbitration'.¹⁵

However, this gold standard of idealized ICA often contends with the continuing apprehension in Australia that, in practice, the nation's arbitration regime is actually convoluted and cumbersome, a result of Australia's judicial tradition of rigid common law reasoning.

Currently these criticisms of undue formalization in the conduct of ICA in Australia remain, notwithstanding Australia's early adoption of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law in 1989,¹⁶ and adoption of the revised Model Law in 2010, both aiming to unify and simplify ICA.¹⁷ The consternation among those who criticize the 'judicialization' of ICA is that, despite Australia's legislated endorsement of the Model Law, directed at reducing 'foreign

preliminary case management meeting so as to ensure what procedures 'will be most appropriate and efficient for the case'. See <www.siac.org.sg/our-rules/rules/siac-rules-2013>.

¹² *International Arbitration Act 1974* (Cth) s 39(2). See also R. Garnett and L. Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?', (2011) 7(1) *Asian International Journal* 1, at 2.

¹³ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 [90].

¹⁴ Justice Croft likewise invokes the 'goal of efficient, effective and appropriate dispute resolution'. See Justice C. Croft, 'Arbitration Law Reform and the Arbitration List of the Supreme Court of Victoria', (2010) *Discussion Paper: Building Dispute Practitioners' Society and Business Law Section of the Law Council of Australia*, at 25.

¹⁵ International Chamber of Commerce, 'Techniques for Controlling Time and Costs in Arbitration', (2015) *ICC Publication No 861-1: International Chamber of Commerce*, at 4.

¹⁶ <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

¹⁷ Whilst Australia was quick in adopting the UNCITRAL Model Law, there still remain concerns that continued, ongoing legislative and policy reforms are needed. For example, Justice Croft recommends frequent, rolling reviews of the 'UNCITRAL Rules' governing ICA. See Justice C. Croft, 'The Revised UNCITRAL Arbitration Rules of 2010: A Commentary' (2010) 29(1) *The Arbitrator & Mediator* 17, at 28. Importantly, Nottage likewise urges rolling reviews of the *International Arbitration Act* and all related legislations that could influence ICA in Australia. See L. Nottage, 'International Commercial Arbitration in Australia: What's New and What's Next?' in N. Perram (ed.), *International Commercial Law and Arbitration: Perspectives* (2013), 287 at 313. This view can be contrasted to the perspective of Solicitor-General Justin Gleeson, who focuses further on the power of case law to incrementally improve the effectiveness of ICA.

and unfamiliar provisions and procedures’,¹⁸ ICA in Australia remains overly complex and falls short of ‘international best practice’. These criticisms of ICA in Australia are discussed immediately below.

3.1 The case for ‘judicialization’

A preliminary survey of critics and commentators recently writing on ICA in Australia suggests that most believe that Australia’s ICA regime is still predominantly formal and complex in nature. Their criticisms are that arbitrators (including many ex-judges, unlike in non-common law jurisdictions especially in Asia) accept lengthy briefs, adopt formal proceedings, produce awards that resemble detailed common law decisions, and are subject to the cost, delay and destabilization of judicial review. Exacerbating their concern is the perceived history of over-intervention by the judiciary in arbitration processes, namely through the judicial review of arbitration awards.¹⁹

Typifying these criticisms are comments made by Neil Kaplan, a leading Hong Kong-based international arbitrator, at the centenary of the Chartered Institute of Arbitrators in Australia on March 2015. Kaplan commented on the need for arbitrators to provide arbitral awards that are much shorter and succinct, and that avoid resembling typical common law judgments that set out the procedural histories and legal submissions of the parties.²⁰ He encouraged the use of head notes in arbitral awards, the shortening of legal submissions and arguments in arbitration, as well as the provision of low-cost hearing rooms for arbitrators.²¹

Referring to Australia’s adoption of international instruments, Professors Richard Garnett and Luke Nottage substantiate these general criticisms of the formality and ‘judicialization’ of arbitration currently in Australia, and by extension, internationally. They contend that Australia’s particularized adoption of the revised Model Law in

¹⁸ <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

¹⁹ See Croft, *supra* note 2, at 4.

²⁰ A. Maher and A. Price, ‘Past and Future of International Arbitration in Australia’, *Lawyers Weekly*, 16 March 2015. Available at <<http://www.lawyersweekly.com.au/opinion/16275-past-and-future-of-international-arbitration-in-australia>>.

²¹ *Ibid.*

2010 erred towards conservatism and formalism.²² For example, they assert that Australia rejected the UNCITRAL's carefully crafted compromise power permitting a tribunal to make *ex parte* preliminary orders in support of interim measures.²³ They claim further that Australia has restricted the scope for opting out of the Model Law,²⁴ and that it has maintained the *status quo* in regard to the rules governing the enforcement of foreign awards.²⁵

Nottage and Garnett conclude 'that a bolder and more progressive stance would highlight Australia as a distinctive and forward-looking player in the field, compared to the slightly crusty and complacent forums in some more traditional venues'.²⁶ They also identify a consistent trend in Australia's ICA regime to opt for safe and more limited arbitral provisions that prevent any 'broader *cultural reform*'²⁷ from occurring, despite the contention of the then Attorney General Robert McClelland that the 2010 amendments to the International Arbitration Act would enhance ICA.²⁸ Garnett and Nottage also challenge the 'seemingly perennial tension between informality and formality'²⁹ in ICA. They conclude that delays and costs in arbitrating are escalating in Australia and also globally, due to the allegedly continuing 'judicialization' of ICA.³⁰

Garnett and Nottage are not alone in their criticisms. Australian judges have also criticized the 'localization' of ICA in Australia, arguing that doing so undermines its transnational application. Whilst some judges acknowledge the need to strike a balance between 'court support and court intervention in the arbitration process',³¹ the overriding concern is that the Australian judiciary applies localized standards in

²² See also R. Garnett and L. Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?', (2011) 7(1) *Asian International Journal* 1, at 2.

²³ *Ibid* 8.

²⁴ *Ibid* 5.

²⁵ *Ibid* 3-4.

²⁶ *Ibid* 2-3.

²⁷ Nottage, *supra* note 17, at 288.

²⁸ Justice C. Croft, 'Defining "Best Practices of International Arbitration": Perspectives from Australia (Part 1)', (2009) 11(5) *ADR Bulletin* 1, at 2.

²⁹ L. Nottage, 'In/formalisation and Globalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia', in J. Zekoll, M. Bälz, and I. Amelung (eds.), *Formalisation and Flexibilisation in Dispute Resolution* (2014), 211 at 214.

³⁰ *Ibid*.

³¹ Justice C. Croft and Chief Justice J. Allsop, 'Judicial Support of Arbitration' (Paper presented at the APRAG Tenth Anniversary Conference, Melbourne, 28 March 2014) at 1.

dealings with arbitral awards, without reflecting on the international values and codes that support ICA.

These criticisms about the length and costs of ICA in Australia resonate internationally. For example, Nottage challenges ‘legal reasoning, beloved of legal professionals everywhere but particularly within the English (and hence Australian) legal tradition’.³² In support of his contentions, he highlights the comments of Patrick Atiyah and Robert Summers, who critique the formal characteristics of English common law (as opposed to the more substantive flavour of law practiced in the United States).³³

The emphasis on the need for *cultural reform* of ICA is also echoed in the reports of leading international arbitration institutions. The 2015 report of ICC on ‘Controlling Time and Costs in Arbitration’ stresses that the ‘increasing and, on occasion, unnecessary complication of the proceedings seems to be the main explanation for the long duration and high costs of many international arbitrations’.³⁴

In a recent United Kingdom symposium overseen by *Commercial Dispute Resolution*, Matthew Weiniger, a specialist in international commercial arbitration at Linklaters, suggested that delays in publishing arbitral awards are currently the ‘hottest of hot topics’³⁵ in ICA. Weiniger elaborates that ‘if you can solve this problem [of delay and inefficiency] then you could solve what 80% of people to believe to be the biggest problem in arbitration today’.³⁶

³² L. Nottage, ‘Addressing International Arbitration’s Ambivalence: Hard Lessons from Australia’ in V.K. Bhatia, C. N Candling, and M. Gotti (eds.), *Discourse and Practice in International Commercial Arbitration* (2012), 11 at 20.

³³ See generally P. S. Atiyah and R. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (1987). This work, distinguishing between English ‘formal’ common law and American ‘substantive’ common law reasoning, is continued in the work of Nottage, as well. See L. Nottage, ‘Form and Substance in US, English, New Zealand and Japanese Law: A Framework For Better Comparisons of Developments in the Law of Unfair Contracts’, (1996) 26 *Victoria University of Wellington Law Review* 247; L. Nottage, ‘Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, US, Japanese and International Sales Law and Practice’, (2007) 14 *Indiana Journal of Global Legal Studies* 375; Nottage, *supra* note 1, at 2.

³⁴ International Chamber of Commerce, ‘Techniques for Controlling Time and Costs in Arbitration’ (2015) *ICC Publication No 861-I: International Chamber of Commerce*, at 6.

³⁵ A. Bilbow, ‘The Hottest of Topics in International Arbitration’, *Commercial Dispute Resolution*, 17 February 2016. Available at <<https://www.cdr-news.com/categories/third-party-funding/6169-the-hottest-of-topics-in-international-arbitration>>.

³⁶ *Ibid.*

Given this international criticism directed against the ‘judicialization’ of ICA, well beyond Australia, two related questions remain. Is the formality and complexity of institutionalized ICA *itself* perceived as the key source of protracted ICA proceedings? Or is the duration and spiralling costs of ICA attributable more directly to the conduct of the disputing parties and the lawyers who represent them?

3.2 Improving ICA beyond ‘judicialization’

Critics ordinarily attribute time and cost inefficiency in administering ICA to institutional and structural rules that facilitate complex and dilatory proceedings, such as the conservative application of the UNCITRAL Model Law as discussed in section two above. However, the perceived cost and protraction of ICA may also derive significantly from international companies that engage lawyers to prepare for ICA proceedings.³⁷ For example, the majority of expenditures associated with ICA are party costs, especially the costs of lawyers who are accustomed to using carefully prepared briefs and searching for legal intricacies in making or responding to claims.³⁸ A total of 85% of costs associated with arbitration are estimated as being *party costs* that both parties incur in hiring their own lawyers and experts.³⁹ Thus, even if arbitration institutions could offer more efficient and cost-effective services, they would require the cooperation of the parties to proceedings to significantly reduce the costs of the entire arbitration process, including the review of extensive documentation filed by the parties.⁴⁰

An underlying target of criticism is also the allegedly ‘billable hours’ culture within commercial law firms and other service providers, which protracts arbitral proceedings and renders them more expensive.⁴¹

³⁷ L. Nottage, ‘International Arbitration and Commercial Law Education for an International World’ in M. Deguchi and M. Strome (eds.), *The Reception and Transmission of Civil Procedural Law in the Global Society* (2008), 1 at 14. Available at <<http://ssrn.com/abstract=838030>>. See also Nottage, *supra* note 27, at 215.

³⁸ Nottage, *supra* note 1, at 9.

³⁹ L. Flannery and B. Garel, ‘Arbitration Costs Compared: The Sequel’, (2013) 8(1) *Global Arbitration Review* 4. Available at <<http://globalarbitrationreview.com/journal/article/31092/arbitration-costs-compared-sequel/>>.

⁴⁰ *Ibid.*

⁴¹ *Ibid* 14. See also Nottage, *supra* note 29, at 215.

Highlighting this concern is the perception that parties to ICA may misunderstand how it functions, ascribed in part to the confidentiality of ICA proceedings, but also to the failure of lawyers to adequately inform their clients about the nature and operation of ICA. A perceived consequence of this failure is that ICA may degenerate into a ‘market for lemons’, in which poorer quality arbitration products thrive due to limited information on arbitration services being made available to the consumers of those services.⁴²

Further accentuating the concern over rising ICA costs is the perceived lack of understanding among both lawyers and arbitrators regarding how arbitration should differ from civil litigation.⁴³ This concern includes a perceived need to educate younger arbitrators about the distinctiveness of ICA, and to appoint arbitrators from areas of legal or other practice that are less influenced by a pervasive culture of civil litigation.⁴⁴

Finally, the disparagement of complex and overly ‘judicialized’ ICA proceedings is also attributed to intrusive legal conservatism that encourages parties to ICA to seek formal and protracted proceedings in the pursuit of self-preserving legitimacy and certainty. As Joerg Risse aptly observes, companies engaging in dispute resolution may fear that, if a case is lost, they will be criticized for not having tried everything to win it (even if this means lengthy and protected proceedings).⁴⁵

All this suggests that the formality and complexity of ICA may be attributed to causes beyond the ‘judicialization’ of arbitration. In particular, the narrative of ‘judicialization’ may simplify criticism of ICA to ‘blaming’ arbitration itself as a process, obscuring broader questions about how best to ensure that parties to disputes are committed to resolve their disputes both prudently and efficiently. Whilst ICA

⁴² Nottage, *supra* note 29, at 234.

⁴³ L. Nottage and R. Garnett, ‘The Top Twenty Things to Change in or Around Australia’s International Arbitration Act’ in L. Nottage and R. Garnett (eds.), *International Arbitration in Australia* (2010) 32. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1378722>.

⁴⁴ Nottage, *supra* note 37, at 12.

⁴⁵ J. Rise, ‘Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings’, (2013) 29(3) *Arbitration International* 453, at 454.

understandably needs to be cost-effective and streamlined, these ideals need not obscure the influence of extravagant legal and commercial practices on international dispute resolution. Criticizing ICA solely for being ‘judicialized’ should not ignore the bigger picture in which legal culture and commercial perceptions contribute to growing dissatisfaction with ICA.

4.1 Determining ‘best international practice’

Given the problems and simplification which the narrative of ‘judicialization’ entails, what other grounds may provide a platform for functionally and productively reforming ICA?

At a conceptual level, developing a model of ‘international best practice’ may provide a more defensible and flexible way in which to critically assess the success of ICA.

Firstly, central to determining *what* constitutes ‘best international practice’ is a functional assessment on *how* best to employ a practice that: both attracts and adds value to ICA, that promotes ICA as a sustainable alternative to civil litigation, and that facilitates the implementation of emerging and viable standards of ‘international best practice’. In this way, this standard of ‘best practice’ in ICA can avoid relying solely on arguments of expedition and efficiency, thereby challenging the pejorative assessment of the ‘judicialization’ of ICA.

On more careful assessment however, making reference to ‘best practice’ may obscure the potentially ambiguous nature of that very term. For example, Neil Kaplan aligns the term ‘best practice’ with the simplification of arbitral proceedings, the shortening of arbitral awards and submissions, the use of headnotes in arbitration awards, and the simplification of legal arguments in arbitral proceedings.⁴⁶ But is simplification synonymous with decontaminating and purifying impurities in the standards ascribed to ‘best practice’?⁴⁷ Or does ‘best practice’ promote a balance between formal and functional reasoning, beyond such simplification?

⁴⁶ Maher and Price, *supra* note 20.

⁴⁷ Ibid.

In response, arbitrator and barrister Albert Monichino contends that ‘to speak about “*best practice*” in international commercial arbitration is somewhat contentious ... [It] is an illusive concept and not an objective, measurable standard’.⁴⁸ In response, Monichino posits a three-part conceptualization of a legal system that he sees as successfully adopting ‘best practice’, seeking to define ‘international best practice’ in ICA. These encompass:

- a) A legal system with a single arbitration Act (covering both domestic and international arbitration);
- b) A single court supervising arbitrations; and
- c) A single, well-resourced arbitration institution within the nation.⁴⁹

Applying this conceptualization to the case study at hand, it is arguable that Australia does not comprehensively satisfy any of these three criteria. Australia does not have a single arbitration Act. Nor does it have a single court designated for supervising arbitration, such as the Federal Court of Australia.⁵⁰ Rather, numerous courts oversee both domestic and international arbitration, thereby potentially impeding the development of a truly distinctive ‘international best practice’ for ICA.

Australia also does not have a single, well-resourced arbitration institution regulating ICA, notwithstanding the presence of the ACICA.⁵¹ Despite publishing new, efficiency-focused arbitration rules, such as its release on 26 November 2015, the ACICA has limited facilities at its premises at 1 Castlereagh Street, Sydney. Other institutions, such as Resolution Institute⁵² and the recently established Perth Centre for Energy and Resources (PCERA) also produce their own arbitration rules and services, demonstrating the variety of arbitration institutions within the nation.⁵³

⁴⁸ A. Monichino, ‘Arbitration Reform in Australia: Striving for International Best Practice’, (2010) 29(1) *The Arbitrator & Mediator* 29, at 31.

⁴⁹ *Ibid* 46.

⁵⁰ A. Monichino, ‘International Arbitration in Australia: The Need to Centralise Judicial Power’, (2012) 86 *Australian Law Journal* 118; A. Monichino, L. Nottage and D. Hu, ‘International Arbitration in Australia: Selected Case Notes and Trends’, (2012) 19 *Australian International Law Journal* 118.

⁵¹ <<http://www.acica.org.au/>>.

⁵² <<https://www.iaama.org.au/resources/adr-rules-guidelines/iaama-arbitration-rules>>.

⁵³ <<http://pcera.org/>>. See generally M. Nathan, ‘Important Arbitration Centre Open for Business’, *Government of Western Australia*, 12 March 2015. Available at

Given both the difficulty of defining ‘best practice’ and the challenges nations like Australia have in attaining a standard of ‘international best practice’ for ICA, it is clear that there are broader problems with ICA than its disparate ‘localization’ in one or another jurisdiction.

These broader problems, extending beyond Australia, do not suggest that courts, faced with different arbitration legislation in different jurisdictions, are likely to steadfastly resist the formulation of ‘international best practice’ in relation to ICA. Nor is the contention that different ICA centres, with their own rules and procedures, will inherently undermine such ‘best practice’. Indeed, different specialized ICA services offered under a single centre’s rubric may well enhance ‘best practice’ in ICA. What is suggested is that such diverse practices across courts and arbitration centres are likely to undermine the continuing need for consistent and predictable ICA practices. What is also suggested is that ‘international best practice’ may support not only accessible ICA proceedings, but also analytically rigorous ICA awards.

4.2 ‘Best practice’ innovations

Given this preliminary assessment, one way of promoting a standard of ‘international best practice’ is to identify innovations to ICA which balance efficiency with the need to offer due process, sound reasoning and transparent decision-making in ICA. A purposive approach can be taken to identify these potential ICA innovations, such as in response to user concerns about the dilatory nature of ICA and ultimately, to implement them in a stable, reliable and proficient manner. There are ways of adding value to ICA not limited to solving the presumed ‘judicialization’ of arbitration.

Accomplishing these aims involves answering several key questions. Using Monichino’s argument as an illustration, are there exemplars of ‘best international practice’ in ICA that warrant analysis? How can one rebut the criticism that ICA will stagnate in the absence of large scale and flashy structural innovations? As Welser and De Berti identify, what more can be done to ‘provide users of arbitration with the

<<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Important-arbitration-centre-open-for-business.aspx>>.

highest possible level of efficiency and fairness in the resolution of their business disputes’?⁵⁴ Importantly, how can one respond to concerns that ICA institutions are too under-resourced to innovate substantively, reliably, and in a sustained manner?

4.3 ‘Best practice’ as transparency and accountability

Rather than defining ‘best practice’ solely as the pursuit of efficiency and cost-effectiveness, ICA also needs to be improved so as to better respond to the concerns of its users for transparency and accountability. Exemplifying these concerns is Michael McIlwrath, who in his October 2015 post on the Kluwer Arbitration Blog highlights the dissatisfaction users of arbitration have with arbitration institutions for not publishing accurate or transparent information on the efficiency of arbitrator performance.⁵⁵ Quoting from the Queen Mary University of London’s recent 2015 International Arbitration Survey, he notes that ‘interviewees felt that more information about the average length of time institutions’ cases would allow them to make more informed choices’.⁵⁶

Likewise, Lord Peter Goldsmith, in his speech on investor state dispute settlement, exposes current debates and complaints ‘that international arbitration for international disputes amounts to an undemocratic secret court system’,⁵⁷ a problem that he attributes to lack a transparency and accountability.

One practical development that attempts to counteract this dearth of information is the online informational network, *Arbitrator Intelligence*. This resource of information provides users with web-based information, data from past awards by arbitrators, and information generated through feedback questionnaires, all directed at increasing the

⁵⁴ I. Welser and G. De Berti, ‘Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices’, in C. Klausegger et. al. (eds.), *Austrian Arbitration Yearbook 2010* (2010), 79 at 79.

⁵⁵ M. McIlwrath, ‘Survey Says: Institutions Could Do A Lot To Improve’, *Mediate*, October 2015. Available at <<http://www.mediate.com/articles/McIlwrathMbl20151012.cfm>>.

⁵⁶ Ibid; Queen Mary University of London and School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015) <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>>.

⁵⁷ Lord P. Goldsmith, ‘CIARB Centenary Celebrations: 3rd International Arbitration Conference Keynote Address’, *CIARB Australia News: December 2015* (2015), at 17.

transparency, fairness, accountability and diversity in selecting arbitrators.⁵⁸ This information network could be utilized more expansively to redress inaccuracy or inefficiency in the conduct of arbitration. It could advise users about protracted arbitration proceedings and awards, including where these protracted proceedings take place and under which arbitration centre's supervision. It could also help to reduce information asymmetries in the current ICA market.

Another innovation could be to provide for client satisfaction reporting, such as was adopted by the Hong Kong International Arbitration Centre in July 2015.⁵⁹ This may well constitute a credible way to encourage well-resourced and effectively managed ICA proceedings, consistent with the third element in Monichino's conception of 'best practice'.⁶⁰ Such client satisfaction reporting is also consistent with the consensual nature of arbitration. It also affirms the view that party feedback after an arbitration can help to improve arbitration processes in the future, so long as knowledge of its availability after an award does not encourage patronage, harassment or intimidation in proceedings. In this way, ICA innovations can focus on bolstering accountability and transparency as an integral part of 'best practice' (not limited to cost and expedition). Feedback on the operation of arbitration can highlight the diverse attributes of a successful arbitration, without regressing into a system of dispute resolution that focuses solely on efficiency.

4.4 'Best practice' as flexibility and balance

Given these possible innovations identified in the previous section, there remains the concern that seeking innovation solely by replicating the 'best practice' of ICA market leaders may simply lead to the formalization of standard 'international practice'. If all arbitration centres adopt feedback questionnaires or client satisfaction reporting, will this become simply the status quo that does little to improve the actual accountability or transparency of arbitration?

⁵⁸ <<http://www.arbitratorintelligence.org/>>.

⁵⁹ K. Tan, 'Rate Your Experience – HKIAC Launches Arbitration Evaluation System', *HKIAC*, 23 July 2014. Available at <<http://www.hkiac.org/en/news/530>>.

⁶⁰ *Ibid.*

Accordingly, the potential result of resistance to market leadership in ICA is to retain the status quo and not truly to add value to ICA services. This formalization may also undermine the potential flexibility of ICA proceedings, especially if arbitration centres do no more than follow formulaic innovations of ‘international best practice’ such as by issuing these client satisfaction reports or comparable documentation. As Welser and De Berti observe, such market directed replication of ‘best practices’ innovation might ‘render arbitral proceedings less flexible’.⁶¹

As such, it is necessary to avoid stultifying ‘best practice’ through homogenisation and to reemphasize the need for ICA procedures to be sufficiently tractable and flexible to adapt to the needs of different cases.

Accordingly, there is need for ICA reform to take into account market differences by addressing ICA impediments both systemically *and* contextually. This entails placing greater emphasis on the entire management of arbitral cases, such as in ensuring that arbitrators deliver timely awards with impartiality, experience, professionalism and above all flexibility. Simply filling out a feedback questionnaire will fall short of a flexible and contextually-informed solution to the perceived problems of ICA (including the failure to take account of different styles and requirements of arbitral awards in different contexts).

This emphasis on the multifaceted attributes of ICA is reflected in the growing importance placed on the case management of arbitration services. For example, in identifying the emergence of a new generation of arbitration, particularly the generation of ‘professional dispute managers’,⁶² Thomas Schultz and Robert Kovacs both highlight how arbitrators are now being expected by users to offer *more* than just simplified, predictable or fair awards.⁶³ Rather, they stress that adaptability in case management is essential in promoting and developing ‘international best practices’

⁶¹ Welser and De Berti, *supra* note 56, at 79.

⁶² T. Schultz and R. Kovacs, ‘The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay and Garth’, (2012) 28(2) *Arbitration International* 171, at 172. Case management is also important in the work of Fortese and Hemmi, who likewise see case management as an increasingly important aspect of offering effective ICA. See F. Fortese and L. Hemmi, ‘Procedural Fairness and Efficiency in International Arbitration’, (2015) 3(1) *International Arbitration and Procedure* 110, at 118.

⁶³ *Ibid* 166; 169.

that balance the values of fairness and efficiency. In issue is the contextual need to reconcile different interests in an adaptable manner, such as to reconcile confidentiality with transparent ICA proceedings, not unlike the need to reconcile a drug manufacturer's right to commercial in-confidence and the public's right to know about the health implications of using attendant drugs in investor-state arbitration.⁶⁴

4.5 Specialized and expedited arbitration

A further measure for improving ICA services contextually is to adopt expedited arbitration rules in certain cases only, such as on lines comparable to the ACICA's 'Expedited Arbitration Rules'.⁶⁵ For example, rules can be developed to render specific kinds of arbitration cases more streamlined and affordable, such as in expediting cases involving claims below five million dollars.⁶⁶ Such expedited arbitration rules have been endorsed by a number of East Asian arbitration centres, as noted by Joongi Kim in assessing how the 'leading jurisdictions in Asia have taken the lead in adopting provisions concerning expedited procedures'.⁶⁷ However, setting limits based on the quantum in dispute, ought not to imbed a narrow rule of thumb determination, but ought rather to be re-examined and where appropriate, modified to meet changing contextual needs.

A seemingly more resilient alternative is to establish a mandatory maximum length for ICA proceedings. For example, domestic legislation directed at regulating ICA could replicate recent Indian legislation by restricting arbitral proceedings to a twelve-month period, unless the parties expressly agree otherwise.⁶⁸ One problem is that not all ICA cases fit this mould: some cases are complex and require more than such a specified period in which to be resolved. A time-constrained period can also force

⁶⁴ L. Trakman and D. Musaleyan, 'The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration', *ISCID Law Review* (2015, forthcoming); L. Trakman, 'Deciding Investor States Disputes: Australia's Distinctive Approach', *Journal of World Investment and Trade* (2013) 15(1) 1. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331790>. See also L. Trakman, 'Rejecting Investor-State Arbitration in Favor of Domestic Courts: The Australian Example', (2011) 46(1) *Journal of World Trade* 83.

⁶⁵ *International Arbitration Act 1974* (Cth); Croft, *supra* note 28, at 3.

⁶⁶ <<http://acica.org.au/acica-services/acica-rules-2016>>.

⁶⁷ Joongi Kim, 'International Arbitration in East Asia: From Emulation to Innovation', (2014) 4(1) *The Arbitration Brief* 1, at 15.

⁶⁸ <http://www.hpacs.com/news_events_details.aspx?event=164>.

arbitrators to expedite decisions under pressure when more time-consuming and deliberative proceedings are justified in the interests of justice. However, the mandatory maximum length of ICA could be extended, such as in response to delays arising from *force majeure* circumstances beyond the reasonable control of the parties.

A more radical structural transformation of ICA includes a country creating a commercial court with jurisdiction to resolve international commercial disputes, including those ordinarily destined for ICA, as was recently established in Singapore.⁶⁹ Such a structural ‘retro-fitting’ to the judicial system could affirm the beneficial role which domestic courts have in deciding international commercial disputes. It could offer the continuity of legally reasoned decisions and the application of judicial precedent. It could lead to the ‘encouragement, facilitation and support of international commercial’⁷⁰ by a single commercial court, which could develop specialized capacity and knowledge in deciding cases associated with ICA, albeit by moving away from ICA as a private system of justice.

Certainly, there are risks to such innovations. Structural reforms, such as the creation of an international arbitration court, might accentuate existing qualms about the unwieldy ‘judicialization’ of ICA. Managing cases according to the size of a claim, or setting limits on the duration of case, can become rigid and unyielding. Conversely, permitting exceptions to avoid such rigidity can destabilize the clarity of arbitration proceedings. Just as hard rules can invite exceptions, exceptions can overly displace instructive rules (whether by design or osmosis).

Nevertheless, these specialized and expedited arbitration regimes provide a useful starting point for further discussing and critically examining the best ways to promote ICA globally. Such innovations also offer diverse but balanced ways of developing

⁶⁹ K. C. Lye and D. Chan, ‘Launch of the Singapore International Commercial Court’, *Norton Rose Fulbright*, April 2015. Available at <<http://www.nortonrosefulbright.com/knowledge/publications/127746/launch-of-the-singapore-international-commercial-court>>.

⁷⁰ Justice C. Croft, ‘How to Minimise Disruption and Delay in Arbitral Proceedings’ (speech delivered at the Arbitrators’ and Mediators’ Institute of New Zealand, Auckland, 16 November 2009). Available at <<http://www.austlii.edu.au/au/journals/VicJSchol/2009/34.pdf>>.

‘international best practice’ for ICA without being mired in a confined search for the ‘El Dorado’ of speed and cost-efficiency.

5.1 Broadening the case for ‘best practice’

What the search for ‘best practice’ in ICA also does is present ways of thinking more broadly and critically about the standing and operation of arbitration in discrete legal and arbitral contexts. It asks the question: what about the continued quality and reasoning of arbitral awards? Beyond improving the structural accountability, flexibility and efficiency of ICA, how can the *quality* and *fairness* of arbitration be assessed?

As Fortese and Hemmi imaginatively propose, there is the need for an arbitral ‘magic triangle’ which integrates the values of party autonomy, due process and efficiency, rather than reduce them to discrete and competing requirements imposed through formally judicialized rules.⁷¹ To focus too narrowly on the ‘judicialization’ of arbitration is to ignore the continued importance of ICA in delivering reasoned decisions, quality awards and enforceable rulings that are functionally sound as well. As Jennifer Kirby suggests in her essay ‘Efficiency in International Arbitration: Whose Duty Is It?’,⁷² ‘the issue of efficiency in international arbitration is often misunderstood to be a matter of time and cost, when it is really a question of the relationship between time, cost and quality’.⁷³ She aptly adds that, ‘in trying to increase efficiency, we’re at best standing on the shoulders of giants to tinker with a well-oiled prosperity machine’.⁷⁴ ‘International best practice’ may provide a way to achieve this tinkering objective, by striving to ensure that the ‘judicialized’ and procedural requirements of ICA are framed within a conceptual Iron Triangle of time, cost and quality.

Adopting such a contextual framework for ‘international best practice’ inevitably means moving beyond the restrictive narrative of ‘judicialization’. ICA reform instead

⁷¹ Fortese and Hemmi, *supra* note 64, at 122.

⁷² J. Kirby, ‘Efficiency in International Arbitration: Whose Duty Is It?’, *Journal of International Arbitration* (2015) 32(6) 689, at 690.

⁷³ *Ibid* 689.

⁷⁴ *Ibid* 695.

ought to occur within a framework of rigorous legal reasoning, transparency and accountability, whilst still taking account of the cost and delays often emphasized by ICA critics. As posited in a recent interview with Gabrielle Kaufmann-Kohler, an international arbitrator from the Geneva-based firm of Levy Kaufmann-Kohler, the push for efficiency in arbitral awards should be accompanied by reforms that *also* push towards increased transparency, disclosure and (importantly) quality in arbitration.⁷⁵ As aptly summed up by Kaufmann-Kohler: ‘I would hope that quality also plays a role, and not only speed’.⁷⁶

Whilst Kaufmann-Kohler’s focus is on the ICC’s updated rules that require arbitral tribunals to submit draft awards within three months of the last substantive hearing or submission, the same concern for efficiency is evident beyond the ICC.⁷⁷ The Singapore International Arbitration Centre (SIAC), for example, requires its arbitrators to submit draft awards within 45 days of the last substantive proceeding.⁷⁸ The key contextual issue is to ensure that these reforms pursue efficiency and the elimination of protracted ‘judicialization’ in accordance with, not at the expense of, the quality of awards produced by arbitrators.

5.2 Transnational versus national ‘best practice’

One caveat that should be noted, however, is that the search for ‘international best practice’ in ICA ought not to invite the opening of ‘Pandora’s Box’ to every new insight ascribed to due process, or to natural justice. Nor ought it simply invite a new conception of arbitral efficiency or lead to a codification of arbitral ‘practice’ that stymies the need for arbitration to also be adaptable.⁷⁹ Rather, ‘international best practice’ should be predicated on the specific rationale that ICA offers a valuable form of private justice that is dispensed fairly by an expert tribunal, empowered by the disputing parties (including through their choice of law clauses). Reform of such

⁷⁵ Caroline Simson, ‘Arbitrator Deadlines May Tip Balance, Kaufmann-Kohler Warns’, *Law360*, 3 March 2016. Available at <<http://www.law360.com/articles/766535/>>.

⁷⁶ *Ibid.*

⁷⁷ ICC, ‘ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency’, 5 January 2016. Available at <<http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>>.

⁷⁸ Simson, *supra* note 79.

⁷⁹ Justice Croft, for example, warns of the UNCITRAL ‘Arbitration Rules’ becoming overly prescriptive. See Croft, *supra* note 17, at 27.

practice should therefore also focus on developing an *international* body of principles, standards and rules to govern dispute resolution. This global accessibility and uniformity is another key element in developing a viable standard of ‘international’ best practice.

Whilst there are inevitably problems associated with developing and applying a privatized body of international principles, standards and rules to govern transnational disputes,⁸⁰ the process of international commercial arbitration is grounded in the traditions of a trans-regional ‘Law Merchant’. In effect, merchant judges decide disputes based on commercial usage and practice, including the pursuit of expeditious proceedings.⁸¹ Parties that adopt these Law Merchant tenets recast into a ‘Twenty First Century Law Merchant’⁸² subordinate (to varying degrees) restrictive national legal systems and domestic court procedures in favour of transnational arbitration practices and procedures. These practices and procedures, in turn, are based on merchant customs and usages that are ascribed to international arbitration as the modern incarnation of the medieval Law Merchant.⁸³

Hence, the perceived benefit of developing an *international* standard of ‘best practice’ to govern ICA is in generating a more harmonious, predictable and responsive body of law to resolve transnational commercial disputes. Such benefits are reflected in efforts to harmonize the interpretation of arbitration rules not only internationally, but also through domestic legislation. As Australian judge Justice Croft suggests, specialist arbitration lists and judges within national jurisdictions can further enhance the uniformity and predictability of ICA.⁸⁴ Among the ‘enumerated advantages’ of such harmonizing developments in ICA, according to Welser and De Berti, are ‘predominantly, the increased predictability and fairness of the proceedings.’⁸⁵

⁸⁰ Stephen Ware notes the possible problems associated with the emergence of privatized law, but notes above all that, as an alternative method of dispute resolution, ‘arbitration deserve[s] to flourish’. See S. J. Ware, ‘Arbitration and Assimilation’, (1999) 77(4) *Washington University Law Review* 1053, at 1063.

⁸¹ See generally L. Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983).

⁸² See L. Trakman, ‘From the Medieval to the Twenty First Century Law Merchant’, (2011) 28(4) *American Business Law Journal* 775-834;

⁸³ See L. Trakman, ‘A Plural Account of the Law Merchant’ (2011) 2(3) *Transnational Legal Theory* 309-345; Croft, *supra* note 28, at 1.

⁸⁴ Croft, *supra* note 3, at 18.

⁸⁵ Welser and De Berti, *supra* note 56, at 79.

What is suggested is therefore that arriving at models of ‘international best practice’ for ICA, now and in the future, be undertaken against the background of party autonomy in selecting arbitrators and in determining the rules governing the arbitral process, following the traditions of the Law Merchant. That is, ultimately, the most sustainable attribute of a 21st century ‘Lex Mercatoria’ as an order driven by, and for, transnational merchants.⁸⁶ As such, the narrative of the ‘judicialization’ of ICA, in which arbitrators replicate the rules and practices of common law courts, ought not to obscure the transnational history of international arbitration which functions beyond the domain of national judiciaries.

However, acknowledging the transnational character of commercial law does not infer that 21st century ICA should disregard national law or the decisions of national courts. As the New York Convention recognizes, ICA is constrained by domestic legal systems, and reflected in the parties’ choices of law. It is also conceivable that some national courts might challenge arbitration agreements that empower arbitral tribunals to decide disputes *ex aequo et bono*, namely, in accordance with the arbitrator’s conception of ‘justice and fairness’ that operates beyond the choice of domestic law.⁸⁷

Nevertheless, a national court would be hard pressed to disregard choices which disputing parties freely make, including by placing their trust in an arbitral system of justice, rather than in a national judicial system. The preferred role is for national courts therefore to support ICA, balancing judicial support for independent party-selected arbitration processes, and providing protection from undue judicial intrusion. This is something that judges recognize in stressing the global need to enforce the New York Convention.⁸⁸

However, more needs to be done to reconcile the tension between ICA’s reliance on common law traditions with transnational methods of dispute resolution that are both

⁸⁶ Welser and De Berti, *supra* note 56, at 95.

⁸⁷ L. Trakman, ‘Ex Aequo et Bono: De-mystifying An Ancient Concept’, (2008) 8(2) *Chicago Journal of International Law* 621-642.

⁸⁸ Justice Croft suggests ‘Australian courts, broadly, recognize the necessity for arbitration, particularly in the context of the desirability of increased prospects for global enforcement under the New York Convention’. See Croft, *supra* note 2, at 5.

streamlined and modernized, such as by granting parties autonomy to rely on transnational over national rules of evidence and procedure. Illustrating this tension between national and transnational dispute resolution is the ongoing debate in the ICA community over the validity of *ex parte* hearings.⁸⁹

Resolving this tension does not entail the triumph of trans-nationalization over nationalization. Nor, too, does it suggest that ICA awards that diverge from decisions by national courts invariably lead to the unfair or inconsistent treatment of disputing parties. Indeed, the ‘judicialization’ of arbitration offers a potential benefit to ICA regimes in promoting carefully constructed reasons that comply with respect for the rule of law that operates *transnationally*, not only as applied to national law courts in domestic cases.

For example, arbitration in Hong Kong is identified with ‘both the independence of its highly-regarded judiciary and the strength of its rule of law tradition’, seeing ‘judicialized’ proceedings that comply with these traditions as attracting international arbitrations to its venue.⁹⁰ More controversially and increasingly equivocally, Chinese courts are criticized for ‘avoid[ing] their obligation in enforcement cases’⁹¹ and on generalized grounds that ‘few foreign legal persons or partners have trust in Chinese litigation rules’.⁹²

These normative assessments of the ‘rule of law’ traditions across judicial jurisdictions, by watchdogs such as Transparency International,⁹³ are inevitably both circumstantially determined and variable in their intensity. National ‘rule of law’ traditions are not fixed in time or place. China’s commitment to encourage inbound investment is a sound reason for the Chinese government to contain disputes over allegations that it has engaged in the *de facto* expropriation of foreign investments. Whether investor rights are best protected by investor-state arbitration or by domestic Chinese litigation may be subject to debate; however, the perceived virtue of either

⁸⁹ Justice C. Croft, ‘Defining “Best Practices of International Arbitration”: Perspectives from Australia (Part 2)’, (2009) 11(6) *ADR Bulletin* 1, at 1.

⁹⁰ K. Sanger and Y. Shek, ‘Hong Kong’, [2016] *The Asia-Pacific Arbitration Review* 38, at 42.

⁹¹ H. Yong and X. Xiaowen, ‘Incorporation of UNICTRAL Model Law on International Commercial Arbitration: In Perspective of China’, (2014) 9(1) *Frontiers of Law in China* 82, at 90.

⁹² *Ibid* 83.

⁹³ <<http://www.transparency.org/>>.

resort is likely to vary according to the kind of dispute, parties and quantum in dispute, and not be determined on *a priori* principled and decontextualized grounds.

Ultimately, the transnational needs of ‘best practice’ in ICA are dynamic, not static in nature. Typifying the evolving nature of transnational arbitration practice is the European Union’s recent proposal to create an International Investment Court to preside over disputes for possible adoption in in the Transatlantic Trade and Investment Partnership.⁹⁴ The key rationale for the EU’s proposal is that international investment disputes should be resolved by internationally appointed judges deciding disputes in accordance with international investment law. While such an international court diverges from ICA, it reflects a move to ‘judicialize’ arbitration internationally, through a global trial and appellate judicial process operating beyond the confines of domestic laws and their judicial systems.⁹⁵

A somewhat different system of transnational dispute resolution is reflected in the 2015 China-Australia Free Trade Agreement,⁹⁶ which provides that both China and Australia will establish a roster of arbitrators for the resolution of investor-state disputes.⁹⁷ The China-Australian Agreement is also unusual in providing for a standing panel in such arbitration.⁹⁸ It is also distinctive in adopting a detailed process for managing the appointment and conduct of investor-state arbitrators, by requiring that the arbitrators avoid any appearance of partiality, and that they make disclosures of actual or perceived conflicts of interest before and during proceedings.⁹⁹ This management of standing panels of investor-state arbitrators, while arguably ‘judicializing’ such arbitration in part, reflects a potential shift towards more transparent arbitral appointments and proceedings than are ordinarily associated with

⁹⁴ <http://europa.eu/rapid/press-release_IP-15-5651_en.htm>.

⁹⁵ <<https://www.asil.org/blogs/eu-publishes-proposal-international-investment-court-under-ttip-november-12-2015>>.

⁹⁶ <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3453>>.

⁹⁷ Ibid. See specifically article 9.15(5).

⁹⁸ <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3453>>. See Annex 9-A.

⁹⁹ The agreement is ambiguous as to who constitutes the standing panel. According to it, the Joint Committee on Investment establishes and maintains a roster. However, it appears that the words ‘establish’ and ‘maintain’ do not include appointment of arbitrators to the roster. Article 9.15(6) provides that the state parties to the Treaty select five arbitrators each, while 10 additional arbitrators who are not nationals of either party are chosen jointly. Thus, while the Joint Committee has oversight over the standing panel, China and Australia each intend to retain a high degree of control over the appointment of arbitrators. See L. Trakman and D. Musayelyan, ‘Arguments for and against Standing Panels of Arbitrators in Investor-State Arbitration: Evidence and Reality’ (2016, forthcoming).

the *ad hoc* appointment of investor-state arbitrators. It also promotes a balance between supervising standing panels of arbitrators and still providing the disputing parties with the autonomy to appoint arbitrators from the list.¹⁰⁰

Importantly, this example identifies the potential benefits of adopting a modified form of ‘judicialization’ in reforming ICA. It also demonstrates the attempt by two states to achieve a balance between adaptable and uniform ‘international best practice’ directed at invigorating and sustaining a more transparent system of international arbitration.

6. Opportunities for ICA reform

Nevertheless, what can be done to add value specifically to the nature and content of ICA services? There are a number of potential reforms, consistent with ‘international best practice’, beyond the narrative of ‘judicialization’.

6.1 Specialization

One initial suggestion is to promote particular kinds of arbitration, such as centres that focus on expedited arbitration proceedings, or target specific commercial needs that vary according to the nature of the industry and dispute involved.

Following Monichino’s proposal for a single national ICA institution,¹⁰¹ one viable avenue for reform is to ensure that there is an overarching institution which controls and regulates ICA. Under the structural supervision of this centre, subset specialist division with specialist arbitrators could focus on discrete industries (such as energy and resources), on particular kinds of disputes (such as intellectual property), or on selected aspects of arbitration (such as expedited proceedings).

¹⁰⁰ See Leon E. Trakman and D. Musayelyan, ‘The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration’ (2016) 43(1) *ICSID Review Foreign Investment Law Journal* 194.

¹⁰¹ Monichino, *supra* note 50, at 46

In this way, consolidating centres in national jurisdictions could promote particular kinds of arbitration internationally, whilst harmonizing arbitral procedures that are mutually compatible across specialized fields of arbitration in a manner that is accessible to their users. The result could be the provision of ‘best practice’ in particular specialty fields, such as energy arbitration on the one hand, and intellectual property on the other, based on the capacity of the centre and its sub-set specialty divisions to deliver such services transparently and efficiently.

As mentioned previously, the Perth Centre for Energy and Resources Arbitration, or PCERA, could typify such a development in the energy and natural resources sector, albeit evolving independently of the ACICA. Commencing operations in early 2015, the PCERA advertises its ability to offer specific, experienced and industry-oriented services in the energy and resources industry, emphasising the ‘specialized skill set of the arbitrators’.¹⁰² As Adel van de Walt, Peter Wiese and Dipesh Jasmat of Clayton Utz argue, that Centre has instilled a sense of opportunity within the arbitration market, directed at enabling companies in the energy and resources industry globally to ‘begin to consider seriously what PCERA offers during the contract-drafting stage’.¹⁰³ If these aspirations are affirmed over time, it is reasonable to infer that arbitrators affiliated with PCERA will have a higher commercial understanding of their industry compared to arbitrators with more general arbitral backgrounds. In addition, the availability of such specialized services is more likely to contribute to a dynamic and evolving ‘international best practice’ as identified in section four above.¹⁰⁴

¹⁰² D. McKimmie, ‘Western Australia: The Case for an Arbitration Centre in Perth’, *Norton Rose Fulbright*, November 2013. Available at <<http://www.nortonrosefulbright.com/knowledge/publications/108982/western-australia-the-case-for-an-arbitration-centre-in-perth>>.

¹⁰³ A. Walt, P. Wiese and D. Jasmat, ‘Clayton Utz Insights: Will Australia’s First Dedicated Energy and Resources Arbitration Centre Meet the Needs of Industry?’, *Clayton Utz*, 19 March 2015. Available at <http://www.claytonutz.com/publications/edition/19_march_2015/20150319/will_australias_first_dedicated_energy_and_resources_arbitration_centre_meet_the_needs_of_industry.page>.

¹⁰⁴ <<http://pcera.org/>>; M. Nathan, ‘Important Arbitration Centre Open for Business’, *Government of Western Australia*, 12 March 2015. Available at <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Important-arbitration-centre-open-for-business.aspx>>.

Moving forward, further focus could be given to particular kinds of arbitration services, such as expedited arbitration services with online features. For example, online intellectual property services could be provided in copyright, trademark and domain name cases that meet pre-determined and advertised criteria. Again, these services could be offered in accordance with local capabilities and perceived international need. They could also be provided in partnerships with global arbitration centres such as the World Intellectual Property Organization (WIPO), which also offers *expedited* arbitration proceedings (including online) in an intellectual property market that is increasingly concerned with costs and delays.¹⁰⁵

The more such arbitration service centres cater to the specific needs of their clients, the more value that can add to ICA services nationally and also, internationally.

However, there is a cautionary argument, raised by Albert Monichino in his tripartite conception of ‘best practice’, about the importance of having a ‘single, well-resourced arbitration institution within the nation’.¹⁰⁶ According to his line of reasoning, to offer numerous and distinctive national arbitration centres, each offering their own rules and procedural codes, could over-complicate the nation’s arbitral landscape, reducing the international accessibility to ICA in particular. Consequently, the presence of overarching centres and affiliations among arbitration centres in a national jurisdiction is important, not least of all to promote stability and avoid duplication in the provision of ICA services.

6.2 Court supported arbitration

Another issue for ICA reform is the potential to develop a single court that supervises arbitrations in each national jurisdiction, rather than rely on multiple courts with concurrent jurisdiction over ICA.¹⁰⁷ This problem is also highlighted by Monichino, who suggests of the Australian ICA experience, that the Federal Court of Australia should be established as the *only* intermediate appellate court that hears arbitration matters in Australia, thereby promoting the uniform interpretation of Australia’s

¹⁰⁵ <<http://acica.org.au/acica-services/acica-rules-2016>>.

¹⁰⁶ Monichino, *supra* note 50, at 46.

¹⁰⁷ Ibid 118.

International Arbitration Act.¹⁰⁸ Rather than rely on the fragmented court system, this single court could be staffed by judges who are conversant with applicable legislation governing international arbitration and aware of the ‘tightrope act’¹⁰⁹ involved in supporting arbitration (not too little or not too much). Such a development highlights the need to cultivate a cadre of judges, arbitrators and lawyers who have the expertise and experience to respond to the potential diversity of ICA cases, including variable ICA processes that are subject to judicial review. In this sense, specialization is again the key to adding value to the recognition and enforcement of ICA awards domestically.

A more ambitious national judicial option is to create a commercial court to oversee international commercial arbitration, such as the Singapore International Commercial Court (SICC) launched on 5 January 2015.¹¹⁰ Significantly, the SICC has jurisdiction over claims of an *international* and *commercial* nature, despite being a division of the Singapore High Court and part of the Supreme Court of Singapore.¹¹¹ The creation of the specialized SICC potentially extends the highly regarded Singapore International Arbitration Centre.¹¹² It also offers a potential response to the criticism that national courts of general jurisdiction sometimes lack the requisite commercial expertise to review arbitration awards, and sometimes lead to lengthy delays and spiralling court and party costs.

In effect, specialized commercial courts, in the tradition of the English Commercial Court or the SICC could add further value to the review of ICA awards in other jurisdictions.¹¹³ Richard Southwell, who recommended the creation of a specialist commercial court in Singapore in 1990, fittingly stated that: ‘the greater the experience of the Judge, the less time needs to be spent in educating the Judge in particular cases ... savings in court time can be made as a result of a case being tried

¹⁰⁸ Ibid.

¹⁰⁹ Croft, *supra* note 2, at 2.

¹¹⁰ Y. Tay, M. Shaw and C. Yap, ‘International Arbitration Newsletter’, *DLA Piper*, 30 March 2015. Available at <<https://www.dlapiper.com/en/hongkong/insights/publications/2015/03/international-arbitration-newsletter-q1-2015/singapore-launches-international-commercial-court/>>.

¹¹¹ Ibid.

¹¹² B. Giaretta, K. McMenamin, ‘Singapore: A Global Dispute Resolution Centre?’, *Ashurst*, June 2014. Available at <https://www.ashurst.com/doc.aspx?id_Content=10506>.

¹¹³ R. Southwell, ‘A Specialist Commercial Court in Singapore’, (1990) 2(2) *Singapore Academy of Law Journal* 274, at 275.

by a Judge already familiar with the commercial background against which the particular dispute has arisen'.¹¹⁴

Viewed as promoting a continuum from arbitration to litigation, courts like the SICC can respond more efficiently and transparently to the discrete needs of ICA users, while also addressing applicable legal and public policy requirements.

6.3 Recent developments and examples of ICA reform

In addition to reforms focused on providing specialized arbitration services and court supervision of arbitral awards, there are a number of recent ICA innovations that, suggest, again, of the value of moving away from the narrow narrative of 'judicialization'. Beyond the undoubted need to improve the speed and cost of ICA are also developments that can improve the reputation of ICA as an internationally uniform method of delivering *fair* and *quality* decisions.

For example, the newly established Commercial Arbitration Centre (CAC) in Lisbon has not focused on speed or cost-efficiencies so much as on developing an arbitration centre focused on ensuring party autonomy and input into arbitral awards. In particular, the CAC of Lisbon has introduced a system of guidelines and ethics for the appointment of its arbitrators, attempting not only to increase the perceived efficiency of arbitration, but also to enhance the perceived *legitimacy* of arbitral awards. Parties are given increased input into the decision of which arbitrator they will have, and arbitrators are required, under increasingly stringent guidelines under the CAC, to demonstrate their proof of training and experience in arbitration.¹¹⁵ Rather than allowing inadequately qualified or underperforming arbitrators to rely on the confidentiality of proceedings to insulate themselves from bad reputations, the CAC provides another example of reforms in ICA focused on improving the quality and perceived legitimacy of awards.

¹¹⁴ Ibid.

¹¹⁵ <<http://kluwerarbitrationblog.com/2015/07/10/innovative-new-criteria-for-appointment-of-arbitrators-at-commercial-arbitration-centre-of-lisbon/>>.

In opening the new headquarters of the Sharjah International Commercial Arbitration Centre in the United Arab Emirates, proponents of arbitration in that region focused not solely on efficiency or speed, but on the need for ICA centres to accord to highest global standards of confidentiality, transparency, impartiality and professionalism.¹¹⁶ This particular Centre organized training courses on its opening, suggesting again of the need to provide high quality education to new arbitrators, beyond simply a focus on expedited or one-size-fits-all proceedings.¹¹⁷ Likewise, the newly established Bucharest International Arbitration Court (BIAC) heralded its opening as an opportunity to instil ‘best practices’ into the quality of ICA services.¹¹⁸ Undoubtedly, ‘best practices’ or ‘quality’ are rhetorical devices used by proponents of these new centres to promote their recent establishment, and these recent centres should be judged on their records. Nevertheless, as highlighted by the banner heads of the well-established Japan Commercial Arbitration Centre, ICA practitioners do indeed recognize the need to promote the continued value of providing ICA as a ‘global standard’ enshrining such best practice precepts as ‘party autonomy’, ‘confidentiality’, ‘freedom to select arbitrators’ and ‘predictability’, not solely cost-effectiveness and efficiency.¹¹⁹

Extending this survey of arbitration institutions and centres to less developed countries, the Lahore-based Centre for International Investment and Commercial Arbitration (CIICA), formally inaugurated on April 2016, also represents the recent trend for creating arbitration centres focused on *geographic* specialization. The Pakistani CIICA aims not only to promote ICA as a method of dispute resolution within the Centre, but arguably represents the growth of arbitration centres into regions wishing to attract and build investor confidence.¹²⁰

Other new centres focus on building confidence and capacity across regions. For example, the new China Africa Joint Arbitration Centre (CAJAC) was established to resolve commercial disputes particularly between Chinese and African parties,

¹¹⁶ <<http://ameinfo.com/money/economy/sharjah-international-commercial-arbitration-centre-opens-new-headquarters/>>.

¹¹⁷ Ibid.

¹¹⁸ <<http://associationarbitri.com/?p=1174>>.

¹¹⁹ <<https://www.jcaa.or.jp/e/arbitration/docs/brochure.pdf>>.

¹²⁰ <<http://tribune.com.pk/story/892149/importance-of-international-arbitration/>>.

while also seeking new avenues through which ICA can promote global ties and economic legitimacy.¹²¹

Arbitration centres such as those identified above reflect broader principles of economic innovation and building the dispute resolution capacity of businesses.¹²² In this way, ICA adheres to prodigious imperatives, rather than offering zero-sum methods of resolving global disputes quickly. As a result, these recent examples reflect the need for ‘clear, concise and coherent’ ICA proceedings¹²³ even if lengthy or costly awards do arise. They emphasize how arbitrators provide quality, specialized and internationally-respected awards, not inexpensive band aid solutions to complex disputes.

Innovations such as continuing education of arbitrators, party feedback questionnaires, guidelines for appointing arbitrators, and geographically specialized arbitration centres, all aim to improve ICA beyond the perceived ‘judicialization’ of these innovative methods of alternative dispute resolution. Taking into consideration the need for accountability in arbitration, global accessibility and ‘best practice’ in arbitration, these new centres and examples demonstrate the diverse ways in which arbitrators can add value to the services they offer.

7. Conclusion

What can be done to encourage ‘best practice’ in ICA proceedings and combat the perception that ICA is unduly ‘judicialized’?

Rather than support overbroad and general contentions that ICA is inherently flawed for being ‘judicialized’, or arguing that ICA arbitrators consistently fail to focus sufficiently clearly on material issues, commentators and practitioners alike need to realize that the quality of an ICA award relies on many factors. Efficiency and cost are important considerations in evaluating ICA, but they need not be the *only*

¹²¹ <<http://www.lexology.com/library/detail.aspx?g=4c1631fe-5a5b-4be9-847f-b1418340067f>>.

¹²² Ibid.

¹²³ S. I. Strong, ‘Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy’ (2015) 37(1) *Michigan International Law Journal* 1, at 3.

considerations: accountability, fairness, transparency and sound reasoning are all salient attributes of a respected ICA award.

As such, the future success of ICA may depend not only on redressing the cost, delay and complexity of proceedings, but on reforming ICA to better acknowledge the functional diversity of arbitration cases and to arrive at more adaptable standards of ‘international best practice’. This reform of ICA does not entail dismissing the use of inductive methods of reasoning that inhere in common law decision-making, nor rejecting deductive methods of reasoning inherent in civil law systems.¹²⁴

Rather, ICA should invite a purposeful, well designed and ultimately serviceable analysis of what constitutes ‘international best practice’ in the applicable commercial context. That context, in turn, includes giving due account to the diverse parties, industries, arbitrators and legal entities that define the landscape of ICA. The aspiration is to demonstrate how ‘efficient arbitration processes can be equivalent to good case management and thereby result in a correct outcome’.¹²⁵ The objective is also to recognize that such a ‘correct outcome’ is as much a product of the process from which that outcome derives, as is the outcome itself. Merely seeking to simplify arbitral awards and streamline proceedings may ignore the other important benefits that ICA can provide international parties, not least of all, contextually informed, and carefully reasoned awards that achieve a ‘balance between the requirements of due process and efficiency within international arbitration’.¹²⁶

In responding to the need for a contextual assessment of ICA, an historical and functional conceptualization of ‘international best practice’ may respond most tenably to the criticism that ICA is unduly nationalized and overly ‘judicialized’ in the image of common law reasoning. The prospective result is the development of more balanced, coherent and autonomous methods of dispute resolution than prevail within inward-looking national law and judicial traditions. This result can highlight the virtue of developing a more autonomous and transnational ICA regime without

¹²⁴ See generally, *ibid.*

¹²⁵ *Ibid* 110.

¹²⁶ Fortese and Hemmi, *supra* note 64, at 116.

denying the value of national law or decision-making.¹²⁷ Importantly too, it can build on the promising trend of judges from different national regimes supporting the development of an international body of arbitration jurisprudence, which affirms the consistency and predictability of ICA.¹²⁸

Although Australia provides a useful example of ICA practice,¹²⁹ the development and challenges of ICA in Australia resonate globally. Like Australia, jurisdictions such as Hong Kong and Singapore have well developed legal systems and established rule of law traditions. They also have highly regarded international arbitration centres. Moreover, the reform of ICA across the Asia-Pacific region as elsewhere, will necessarily vary across national jurisdictions in accordance with each jurisdiction's distinctive arbitral capabilities, national interests, and capacity to accommodate the demands of 'international best practice'.

In viewing ICA globally, the purpose of 'international best practice' is to preserve the autonomy of the parties, to seek timeliness and efficiency in deciding disputes between them, and to do so fairly and in accordance with applicable laws. In this sense, rather than completely abandon the narrative of 'judicialization', this article presents a critical reassessment of this narrative to determine the extent to which ICA reform takes account of broader historical and contextual aspirations of ICA.

Ultimately, the cogency of ICA reform will depend on whether innovations are implemented reflectively, strategically and functionally. Such reforms are most likely to be achieved only if the institutions undertaking them establish realistic parameters by which to determine, implement and measure a 'quality' arbitration. The qualitative and quantitative assessment of ICA reforms will need to be conducted on a continuing basis. While initiating and measuring the ongoing viability of these reforms will inevitably be challenging, this article argues that such reforms are already underway, not only incrementally but systemically. The challenge ahead will be in supplementing these reforms creatively, aided by the tenacity to sustain them. ICA should not go gently into that good night, nor should it succumb to the over-broad

¹²⁷ Croft, *supra* note 2, at 7.

¹²⁸ Ibid 4.

¹²⁹ <<http://acica.org.au/acica-services/acica-arbitration-rules>>.

criticism that it has been 'judicialized'. There are innovative ways to improve this mode of dispute resolution, beyond fixating on the the cost and time it takes to produce awards.