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**THE REFORM OF COMMERCIAL  
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PROSPECTIVE DEVELOPMENTS**

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## The Reform of Commercial Arbitration in Australia: Recent and Prospective Developments

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### 1. Introduction

International commercial arbitration (ICA) in Australia is growing, albeit not geometrically. These developments are attributable in part to new legislation adopted by the federal, state and territory governments that make arbitration in Australia more attractive to domestic and foreign parties. These include the preservation of the autonomy of the parties to choose their preferred form of arbitration, whether institutional or not, the fact that Australian courts are firmly committed to the principles of the rule of law, and that ICA awards are enforced consistent with international standards and laws that are incorporated into Australian federal, state and territorial law.

Australia has ratified both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards and the ICSID Convention in its domestic law. Both are included in section 40 of the International Arbitration Act 1974 (Cth) (IAA). Australia's accession to the New York Convention is without reservation and extends to all States and Territories within the country.

Australia has an established record of recognising international commercial arbitration. It was one of the first to adopt the 2006 amendments to the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law).<sup>1</sup> It has long endorsed the principles embodied in that Model Law, including protection of the autonomy of parties to arbitration, flexibility in the conduct of arbitration and greater uniformity in arbitration across national jurisdictions. These tenets of arbitration were incorporated into the IAA by the 2010 amendment, as a

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<sup>1</sup> Luke Nottage, 'Addressing International Arbitration's Ambivalence: Hard Lessons from Australia' in Vijay K Bhatia, Christopher N Candlin and Maurizio Gotti (eds), *Discourse and Practice in International Commercial Arbitration* (Farnham, Ashgate, 2012) 11, 19.

reflection of international best practice.<sup>2</sup> In accordance with the 2010 amendments to the IAA, disputing parties can no longer choose to exclude the application of the Model Law insofar as it is incorporated into the IAA.

The IAA affirms the finality of arbitration awards and limits the grounds for judicial review. It also builds on the authority of arbitrators to grant interim awards and creates a regime to ensure confidentiality. The core principles regarding commercial arbitration embodied in the 2010 amendment are also reflected in uniform legislation across all Australian jurisdictions.<sup>3</sup> They affirm the legitimacy of arbitration as a mechanism for dispute resolution and the significance of Australia as a centre for the resolution of disputes.

However, ICA in Australia continues to face concern over what are sometimes perceived to be protracted arbitral proceedings that are both dilatory and costly.<sup>4</sup> The author has responded to these criticisms in a co-authored article which argues that comprehensive proceedings are often necessary in deciding complex arbitrations and the allegedly 'judicialisation' of the arbitral process is often misconceived and over-stated.<sup>5</sup>

In addition, there has been a significant increase in resort to institutional arbitration in ICA proceedings, notably with the adoption of new Arbitration Rules by the Australian Centre for International Commercial Arbitration (ACICA) and the establishment of the Australian International Dispute Centre (AIDC). There have also been increases in arbitrations since the revision of the IAA in June 2010 and recent amendments to domestic Commercial Arbitration Acts (CAAs).

While Article 1(3) of the UNCITRAL Model Law stipulates that it only applies to international commercial arbitration, and not to domestic arbitration, the recently revised CAAs of states across Australia now replicate the Model Law with some variations.<sup>6</sup>

This chapter will focus on the Australian legal system and its role in arbitration. It will examine the development of ICA in Australia and the 2010 amendment to the IAA. It will consider the role of the Australian Centre of International Commercial Arbitration (ACICA) as an exemplary centre governing commercial arbitration. It will focus on Australia's role in promoting arbitration within the Asia Pacific region, of which it is an integral part. It will explore Australia's whole-hearted embrace of international arbitration as a viable alternative to court proceedings. Finally, it will support the conservative and formalist underpinnings of current arbitration reforms, including the need to elaborate on them, and render them more dynamic in operation.

<sup>2</sup> International Arbitration Act 1974 (Cth) ('IAA'). See further Doug Jones, *Commercial Arbitration in Australia* 2nd edn (Pyrmont, Thomson Reuters, 2012); Richard Garnett and Luke Nottage, *International Arbitration in Australia* (Annandale, Federation Press, 2010).

<sup>3</sup> See LexisNexis Australia, 'Australian Commercial Arbitration', available online: [www.lexisnexis.com.au/sites/en-au/products/australian-commercial-arbitration.page](http://www.lexisnexis.com.au/sites/en-au/products/australian-commercial-arbitration.page).

<sup>4</sup> For criticisms of the 'judicialisation' of ICA, see Richard Garnett and Luke Nottage, 'What Law (if any) Now Applies to International Commercial Arbitration in Australia?' (2012) 35(3) *UNSW Law Journal* 953–78.

<sup>5</sup> See Leon E Trakman and Hugh Montgomery, 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' (2017) 30(2) *Leiden Journal of International Law* 1–30, available online: <https://doi.org/10.1017/S0922156517000024>.

<sup>6</sup> See s 2.1.1 below.

## 2. Background

### 2.1. Legislative and Regulatory Framework

Certain features of the Australian legal system distinguish it from other systems, based on its historical origins, development and attributes.

It is important to appreciate that Australia is a federation of six states and two territories, with two levels of government: the federal and the states (and equivalent territories). Each state and territory government exercises jurisdiction over commercial disputes within its jurisdiction. State and territory courts have jurisdiction to review decisions of tribunals in accordance with the applicable Uniform Commercial Arbitration Act.<sup>7</sup> The federal government has jurisdiction over federal matters. This includes judicial review of decisions of tribunals which are subject to federal law. The federal legislation governing arbitration is the IAA, as amended in 2010,<sup>8</sup> and it is a significant source of analysis in this chapter.

There are various attributes ordinarily ascribed to Australian courts. They are, unavoidably, generalisations and subject to exceptions. One such generalisation is that Australia is a 'rule of law' jurisdiction, which is accurate insofar as its Judiciary subscribes to the principles of 'natural justice' or procedural justice. These principles, in turn, circumscribe the function of arbitrators that are subject to state, territorial or federal jurisdiction: namely, to decide cases in accordance with principles of due process, which essentially include: providing the parties with the right to a fair and impartial hearing, and reaching determinations according to law. This description of Australia as a 'rule of law' jurisdiction is subject to challenge when a party alleges that an arbitrator or court has failed to ensure procedural justice in an arbitration.

Another attribute of Australian courts is the independence of the Judiciary from the legislature and executive at both the federal and state (or territory) levels. Arbitral awards are subject to review by courts whose decisions, in turn, are subject to review by higher courts, but not to interference by parliament or the executive. The overriding principle is that courts are required to decide disputes without intervention from other branches of government, so long as they exercise their jurisdiction in accordance with the applicable legislation or other source of law.<sup>9</sup>

There have been claims that courts that enforce arbitration awards do not act independently of the parties who choose the forum and applicable law. However, the High Court has unanimously rejected this contention. The power of an arbitrator is contingent on agreement between the parties and is therefore not a judicial power. However, a court acts independently of the parties' arbitration agreement in determining whether or not to recognise an arbitration award.<sup>10</sup>

<sup>7</sup> Commercial Arbitration Act 2010 (Cth) (CAA).

<sup>8</sup> IAA.

<sup>9</sup> IAA s 35.

<sup>10</sup> See *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

The test of whether Australia is a ‘rule of law’ jurisdiction and whether a court has failed to act independently of the executive or legislature is not determined by the violation of either principle. In issue is rather whether the alleged violation is properly redressed and whether an appropriate remedy is granted.

It is important to note that Australian federal courts exercise concurrent jurisdiction with state and territory courts in regard to arbitration. This means that a party to arbitration may submit a claim to a federal, state or territory court and any of those courts may hear the claim. If an action is lodged in a court with jurisdiction to hear a dispute, a court with concurrent jurisdiction will ordinarily decline to hear that case. To a similar effect, Australian courts generally give more weight to prior decisions of courts at the seat of arbitration dealing with common issues, so long as the enforcing court complies with the New York Convention, to which Australia is a party, relating to international arbitration awards.<sup>11</sup>

International law is also binding on Australian courts and, in turn, upon arbitrators. This is reflected in Australia’s adoption of the New York Convention.<sup>12</sup> In particular, Section 7(2)(b) of the IAA implements Australia’s treaty obligations embodied in Article 11(3) of the New York Convention.<sup>13</sup> This will be discussed later.

### 2.1.1. Australian Law Governing ICA

As a federal system, the Federal, state and territorial governments provide for arbitration. As a result, international arbitration is dealt under separate legislation to domestic arbitration laws.

Acting through the Federal Government, Australia was one of the first countries to adopt the 2006 amendments to the Model Law in its 2010 amendment to the IAA. In effect, ‘Australia has a “dual track” system for international and domestic commercial arbitrations. International arbitrations are governed by the IAA, whereas domestic arbitrations are governed by State or Territory-based arbitration legislation.’<sup>14</sup> However, following federal legislation adopting the Model Law, most states have followed suit. In particular, the states of New South Wales, Victoria, South Australia, Tasmania and Western Australia and the Northern Territory have adopted the new CAA regime that largely follows the Model Law.

The result is that, despite slight variations, both domestic and international arbitration regimes are closely aligned. ‘The new uniform CAAs which have been implemented in all States and Territories except the ACT much more closely follow the Model Law provisions with a few important additions and departures of which practitioners need to be aware.’<sup>15</sup> At the same time, as Richard Garnett notes, ‘there are some differences, including the stance

<sup>11</sup> See *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109. See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the ‘New York Convention’), available online: [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.htm](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.htm).

<sup>12</sup> IAA.

<sup>13</sup> IAA s 7(2)(b).

<sup>14</sup> See Geoffrey Hansen, ‘International Dispute Resolution in the Asia-Pacific—Arbitration in Australia Revisited’ *Kluwer Arbitration Blog* (24 April 2014) available online: <http://kluwerarbitrationblog.com/2014/04/24/international-dispute-resolution-in-the-asia-pacific-arbitration-in-australia-revisited/>.

<sup>15</sup> *ibid.*

on confidentiality, reasons for the right of appeal and inclusion of med-arb provision.<sup>16</sup> There is also ‘a clarification that the Model Law applies to international arbitrations in Australia to the exclusion of the state Commercial Arbitration Acts (s 21)’<sup>17</sup>

In particular, the 2011 legislative amendments to the International Arbitration Act (IAA) sought to promote greater consistency between domestic and international arbitrations. Prior to this amendment, domestic arbitrations were ordinarily treated differently from international arbitration under Australian law. Only the International Arbitration Act 1974 (Cth) applied to an international commercial arbitration.<sup>18</sup> Only the relevant State or Territory statute applied to a domestic arbitration. As a result, parties to an arbitration agreement governed by Australian law could choose whether to opt out of the Model Law if the applicable CAA in the state or territory permitted them to do so. This led to uncertainty over the application of the IAA. The 2011 amendment, coupled with amendments to state and territory CAAs, has significantly redressed this issue, rendering arbitration rules and proceedings more predicable in relation to ICA.<sup>19</sup> This unification in the treatment of domestic and international arbitration is also likely to grow further as the CAAs in the various States come into force and are interpreted by the courts.<sup>20</sup> The attendant result is likely to be that domestic ‘best practice’ will increasingly replicate international ‘best practice’, even though domestic arbitration has traditionally been a matter of state law, governed by the applicable state or territorial CAA.<sup>21</sup>

This unification between the treatment of domestic and international commercial arbitration is already evident in recent decisions by Australian courts that support ICA. First, Australian courts endorse international arbitration practice in compliance with arbitration law. Second, they recognise the need to render Australia into a responsible legal regime in which to recognise and enforce ICA.<sup>22</sup> Their guiding policy is to ‘enhance Australia’s position as an attractive jurisdiction within which private parties can effectively conduct international arbitral disputes.’<sup>23</sup> This growing judicial endorsement of ICA is also

<sup>16</sup> See Richard Garnett, ‘Australia’s International and Domestic Arbitration Framework’ in GA Moens and P Evans, *Arbitration and Dispute Resolution in the Resources Sector* (New York, Springer, 2015) 9, available online: [www.springer.com/cda/content/document/cda\\_downloaddocument/9783319174518-c2.pdf?SGWID=0-0-45-1507878-p177329726](http://www.springer.com/cda/content/document/cda_downloaddocument/9783319174518-c2.pdf?SGWID=0-0-45-1507878-p177329726).

<sup>17</sup> See Allens (2010), ‘Focus: International Arbitration Laws Overhauled’, available online: [www.allens.com.au/pubs/arb/foarb1jul10.htm](http://www.allens.com.au/pubs/arb/foarb1jul10.htm). This article notes that the purpose of this difference in s 21 of the IAA is to avoid the problem in distinguishing between Federal and State law, that arose in *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461, by clarifying that the Model Law applies to international arbitrations in Australia, to the exclusion of the state Commercial Arbitration Acts.

<sup>18</sup> See IAA s 21(1) which provides: ‘If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.’

<sup>19</sup> See Gordon Smith and Andrew Cook, ‘International Commercial Arbitration in Asia–Pacific: A Comparison of the Australian and Singapore Systems’ (2011) 77(1) *Arbitration* 77 108–15, available online: [www.kennedyslaw.com/files/Uploads/Documents/IntArb\\_February2011.pdf](http://www.kennedyslaw.com/files/Uploads/Documents/IntArb_February2011.pdf).

<sup>20</sup> *ibid.*

<sup>21</sup> See Benjamin Hayward, ‘The Australian arbitration framework’, 2016, in the *Notes from the 2016 Resolution Institute CPD Seminar*, Melbourne, 1–24, available online: <http://dro.deakin.edu.au/eserv/DU:30082985/hayward-australianarbitration-2016.pdf>.

<sup>22</sup> See further s 3.2 below.

<sup>23</sup> See Corrs, ‘High Court Upholds Constitutional Validity of Australia’s International Arbitration Act which Gives the UNCITRAL Model Law Force of Law in Australia’, 2013, available online: [www.corrs.com.au/publications/corrs-in-brief/high-court-upholds-constitutional-validity-of-australias-international-arbitration-act-which-gives-the-uncitral-model-law-the-force-of-law-in-australia](http://www.corrs.com.au/publications/corrs-in-brief/high-court-upholds-constitutional-validity-of-australias-international-arbitration-act-which-gives-the-uncitral-model-law-the-force-of-law-in-australia).

demonstrated by the fact that ‘the Federal Court is willing to take a more active role in matters involving international arbitration, by being the gatekeepers to the pro-enforcement bias of the New York Convention’.<sup>24</sup>

A related result of this statutory and judicial adoption of international ‘best practice’ is that Australian law has placed limits on the authority of commercial arbitrators, consistent with international arbitration standards. For example, applicable federal and state statutes in Australia specify that arbitration proceedings are ordinarily private and confidential.<sup>25</sup> Neither arbitration proceedings nor awards are placed on the public record, except in matters of public interest.<sup>26</sup>

Conversely, Australian courts sometimes construe the authority of arbitrators expansively, to ensure that they have the necessary powers to decide cases expertly and fairly, such as to grant interim measures of protection to the parties.<sup>27</sup>

### 2.1.2. Arbitration Agreement

The New York Convention adopts a wide definition of ‘arbitration agreement’ and imposes a strict obligation on Australian courts to stay proceedings brought in breach of an obligation to arbitrate. The same principles regarding the conduct of arbitration and the appointment and disqualification of arbitrators now apply under the revised IAA and CAAs.

An arbitration agreement is required to be in writing for both international and domestic arbitrations. Under the IAA, the term ‘agreement in writing’ has the same meaning as under the New York Convention.

In particular, the CAAs have adopted the expansive definition of an arbitration agreement contained in Article 7 of the Model Law, specifically that ‘[a]n arbitration agreement is in writing if its content is recorded in *any form* that provides a record of the agreement, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means’. The CAAs also provide that an arbitration agreement can arise from an electronic communication, an exchange of statements of claim and defence, or be incorporated by reference into that agreement.

However, legislation adopting the IAA and the CAAs across Australia does not mandate the content of an arbitration agreement. The terms of an arbitration agreement are rather governed by the principles of contract law in Australia, including the choice of laws of the parties which permit them to agree on the substantive law governing their dispute. Article 28(1) of the IAA, based on the Model Law, provides that any designation of the law or legal system of a particular state shall be regarded as referring directly to the substantive law of that state and not its conflict of law rules, unless otherwise expressed by the parties. In the absence of an express or implied choice by the parties, Article 28(2) provides that the arbitral tribunal shall apply the conflict of law rules applicable at the seat of the arbitration to determine the substantive law governing the dispute.

<sup>24</sup> *ibid.* This practice is reflected by the Federal Court in upholding Justice Murphy’s two first instance judgments in favour of enforcing ICA awards. On the judicial support for ICA in general in Australia, see Garnett (n 16).

<sup>25</sup> See for example, IAA s 23C.

<sup>26</sup> See *ibid.*, s 23D.

<sup>27</sup> On these developments, see further Garnett and Nottage (n 4) 953. See also Allens (n 17); Corrs (n 23).

Also consistent with free choice, the parties to an arbitration agreement can enter into multi-tier dispute resolution agreements in which arbitration operates as one tier among others, in resolving a dispute.

Such an arbitration agreement is ordinarily binding and enforceable; and can only be nullified on limited grounds, such as in being induced by a fraudulent misrepresentation, subject to a material mistake, unconscionable, or unable to be performed due to frustration.

An arbitration agreement is ordinarily limited to the parties to it and is not binding upon third parties who do not enjoy privity of contract. A limited exception arises when a parent company engages in a sham in which it relies on a subsidiary to act as a signatory to the agreement in order to disguise the material interest of the parent company in the agreement. However, it is arguable that this is not a true exception to privity of contract, on grounds that the parent company is an implied or ostensible party to the contract, and/or is estopped from denying that it is a party.

Further consistent with the free choice of the parties, Article 8 of the Model Law provides for a stay of judicial proceedings when there is a valid arbitration agreement. However, the IAA varies from Article 8 of the Model Law by requiring, in section 7(5) of the IAA, that courts decline to grant a stay of proceedings only if they find that the arbitration agreement is null, void, inoperative or incapable of being performed. In contrast, the CAAs fully replicate Article 8 of the Model Law, according primacy to the arbitration agreement concluded by the parties and denying judicial discretion not to enforce it.

Reaffirming the freedom of choice of the parties to an arbitration agreement, the Full Court of the Federal Court of Australia, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,<sup>28</sup> decided that courts must strive to give a broad and flexible interpretation to an arbitration agreement, with the purpose of referring as many of the parties' claims to arbitration as possible. This approach, arguably, is justified, not only by the autonomy of the parties to the arbitration agreement, but also by the needs of international commerce which require greater certainty and efficiency in the resolution of disputes.<sup>29</sup>

## 2.2. Institutional Framework

Both institutional and ad hoc arbitration are allowed in Australia. This permits disputing parties to tailor the procedural rules to their particular circumstances and needs. In particular, it permits them to adopt the rules of an arbitration association in whole or part, such as the rules of the Australian Centre for International Commercial Arbitration (ACICA), or to adopt ICA without resort to the rules of any arbitral association, or to choose an option between institutional and ad hoc arbitration.<sup>30</sup>

However, it should be noted that there has been an increase in institutional arbitration in deciding ICA disputes in Australia since the enactment of ACICA's new Arbitration Rules,

<sup>28</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [165].

<sup>29</sup> Garnett (n 16).

<sup>30</sup> See Peter Wood, Phillip Greenham and Roman Rozenberg, 'Arbitration in Australia', *CMS Guide to Arbitration* 1 (2012): 52, available online: [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_AUSTRALIA.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_AUSTRALIA.pdf).

the establishment of Australian International Dispute Centre (AIDC), and the revisions to the IAA and various CAAs.

ACICA remains the most prominent international arbitration institution in Australia.<sup>31</sup> ACICA is responsible for the administration of ICA and is the only centre with such a comprehensive mandate in Australia.<sup>32</sup> It is also the sole default appointing authority under the IAA to perform the functions under Article 11(3) and 11(4) of the Model Law that deal with the appointment of arbitrators as prescribed by the International Arbitration Regulations 2011 (Cth). As a result, the ACICA can appoint arbitrators to international arbitrations seated in Australia where the parties have not agreed upon an appointment procedure. This 'removes the requirement for parties to commence proceedings in one of the State or Territory Supreme Courts or in the Federal Court to have an arbitrator appointed under the IAA.'<sup>33</sup>

ACICA has an Advisory Board, an Appointments Committee and an Executive. ACICA rules and proceedings are overseen by its advisory board, comprising representatives of the Attorney-General of Australia, the Chief Justices of the High Court and Federal Court, the President of the Australian Bar Association, the President of the Law Council of Australia and industry representatives.<sup>34</sup> ACICA's Appointments Committee is responsible for the nomination of arbitrators; however, the Executive has the authority to make such appointments.

ACICA has adopted comprehensive rules and procedures governing ICA proceedings. In 2011, it devised rules for expedited arbitration as well as emergency arbitration and emergency interim measures of protection. On 26 November 2015, it launched new, efficiency-focused arbitration rules that came into effect on 1 January 2016.<sup>35</sup> These rules also deal with, among other issues, rules and procedures for expedited arbitration. ACICA also provides for mediation, including through a model mediation clause.<sup>36</sup> In March 2011, ACICA adopted the ACICA Appointment of Arbitrators Rules 2011, to streamline the process by which a party can apply to have an arbitrator appointed to a dispute with its seat in Australia.

ACICA is affiliated with dispute resolution centres across Australia, such as the Australian Disputes Centre,<sup>37</sup> and the Melbourne Commercial Arbitration and Mediation Centre,<sup>38</sup> It also provides seminars and other forms of continuing arbitration education and runs international conferences on current issues in ICA.<sup>39</sup>

<sup>31</sup> See Smith and Cook (n 19).

<sup>32</sup> See the website of Australian Centre for International Commercial Arbitration at [www.acica.org.au](http://www.acica.org.au).

<sup>33</sup> See Doug Jones, 'The Asia-Pacific Arbitration Review' (2013) *Global Arbitration Review* 22, available online: [www.dougjones.info/wp-content/uploads/2012/07/gar-2013-australia-jones.pdf](http://www.dougjones.info/wp-content/uploads/2012/07/gar-2013-australia-jones.pdf).

<sup>34</sup> See ACICA Rules Booklet 2016, available online: [https://acica.org.au/wp-content/uploads/2016/02/ACICA\\_Rules\\_2016\\_Booklet.pdf](https://acica.org.au/wp-content/uploads/2016/02/ACICA_Rules_2016_Booklet.pdf).

<sup>35</sup> On the new ACICA Rules, see <http://acica.org.au/acica-services/acica-rules-2016>.

<sup>36</sup> See ACICA Mediation Rules 2007, available online: <http://acica.org.au/assets/media/Rules/Mediation-Rules.pdf>.

<sup>37</sup> See Australian Disputes Centre at <https://disputescentre.com.au>. See also <https://acica.org.au/australian-disputes-centre/>.

<sup>38</sup> See Melbourne Commercial Arbitration and Mediation Centre at <https://acica.org.au/melbourne-commercial-arbitration-and-mediation-centre-mcamc/>.

<sup>39</sup> See, for example, the 4th International Arbitration Conference on 22 November 2016, <https://acica.org.au/wp-content/uploads/2016/08/Save-the-Date-Int-Arbitration-Conf-2016.pdf>.

ACICA maintains a panel of international arbitrators, which are known as ACICA Fellows. Applicants must have:

1. Extensive arbitration experience, including practical experience either as counsel or arbitrator in an international arbitration context.
2. Good standing in the international arbitration community.
3. Fellow membership in the Chartered Institute of Arbitrators or comparable professional arbitration institute.

There is also an annual membership fee for ACICA Fellows of AUD 400.<sup>40</sup>

The ACICA Rules do not require arbitrators to have particular qualifications, except to be impartial and independent.<sup>41</sup> Nor are disputing parties required to appoint an arbitrator from the ACICA panel.<sup>42</sup> However, appointed arbitrators must have an appropriate level of experience in order to serve on an ACICA panel.<sup>43</sup> In particular, Rule 16.3 provides:

Before appointment, a prospective arbitrator shall sign a statement of availability, impartiality and independence and return the same to ACICA. The prospective arbitrator shall disclose in writing to those who approach him or her in connection with his or her possible appointment any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.<sup>7</sup>

ACICA nevertheless faces several challenges which also represent opportunities. ICA in Australia is sometimes depicted as unduly protracted. However, much of this criticism is not substantiated. Nor is it peculiar to ICA in Australia. The length of arbitral proceedings will ordinarily vary from case to case, depending on the governing arbitration agreement, the complexity of the issues in dispute, the location of the parties, the number of arbitrators appointed, and the cooperation of the parties with the tribunal and one another in resolving their dispute. Parties who opt for expedited proceedings, not limited to emergency proceedings, under the ACICA Arbitration Rules, can further redress costs and delays in proceedings.

A further criticism is that ACICA's facilities at 1 Castlereagh Street, Sydney are unable to service multiple arbitration proceedings concurrently. However, this supports the case for extending these facilities, including hearing and meeting rooms, together with support staff in response to the growth in ICA conducted under the auspices of ACICA.<sup>44</sup>

Another apprehension is that ACICA faces competition from other arbitration centres in Australia with their own arbitration rules and services, such as the Institute of Arbitrators and Mediators Australia (IAMA) at the Resolution Institute. However, it is arguable that these services can be complementary to those provided by ACICA and strengthen the case for parties to opt for ICA in Australia including under the auspices of ACICA.<sup>45</sup> The same argument applies to new arbitration centres that have evolved that are not directly

<sup>40</sup> See ACICA, 'Fellow Membership—ACICA Panel of Arbitrators', available online: <https://acica.org.au/fellow-panel-of-arbitrators-membership/#join>.

<sup>41</sup> See ACICA rules, s 16.3.

<sup>42</sup> *ibid.*

<sup>43</sup> See Doug Jones and Bjorn Gehle, 'Australian Centre for International Commercial Arbitration' in Loukas A Mistelis and Laurence Shore, *Arbitration Rules—National Institutions* 2nd edn (Huntington, Juris Publishing, 2010) [ACICA-1]–[ACICA-60].

<sup>44</sup> See ACICA Rules 2016 at <https://acica.org.au/acica-rules-2016/>.

<sup>45</sup> See Institution of Arbitrators and Mediators Australia at [www.iama.org.au](http://www.iama.org.au).

affiliated with ACICA, such as the Perth Centre for Energy and Resources (PCERA) that have specialised capabilities which the ACICA understandably, cannot, nor should attempt to, replicate.<sup>46</sup>

ACICA and other ICA arbitration centres in Australia also benefit from the presence of further established arbitration associations in Australia, such as the Australian Institute for Commercial Arbitration (AICA)<sup>47</sup> and the Chartered Institute of Arbitrators.<sup>48</sup>

These various associations gain further benefit from recent Australian federal, state and territory legislation and judicial decisions that model ‘best practice’ in ICA. The result is therefore ‘a growing variety of arbitration institutions within the nation, some of which have evolved independently of the ACICA.’<sup>49</sup> There is also a growing advantage to choosing ICA in Australia because of these varied and enriching arbitration opportunities for parties to resolve their disputes. This is also reflected in the increasing number of judicial decisions on ICA that predominantly support it. As an illustration of case load, from 1989 to March 2013 the Supreme Court of New South Wales heard 28 cases on ISA, while the Supreme Court of Victoria heard 14 cases.<sup>50</sup>

A limitation about having Australia as the venue for ICA which cannot easily be addressed is location. Australia is not a geographic hub like Singapore and Hong Kong; and the time and cost involved in transportation to and from Australia is significant. In addition, Sydney as the locus of ACICA is an expensive city in which to hold arbitrations. However, given the significance of ICA in the Asian region and Australia’s place in Asia, the obstacles to holding arbitrations in Australia involving regional parties are significantly less than obstacles faced by global parties holding arbitrations in Australia. Innovations in communication through digital media and developments in transportation are likely to further redress these concerns over time.

### 2.3. Judicial Framework

There is encouraging evidence that Australian courts generally support ICA, as a matter of established judicial practice, including practice prior to the enactment of the IAA and the recent CAAs across Australia. This includes the fact that federal and state courts have lists from which judges with experience in arbitration are chosen to preside over disputes involving arbitration. Furthermore, Australian courts generally appreciate the value of arbitration in resolving disputes expeditiously and fairly in light of the expertise of commercial arbitrators in arriving at sustainable awards.<sup>51</sup> As a result, courts tend to regulate commercial arbitration proceedings only to the extent that they deem necessary, such as to redress a challenge to an arbitrator on grounds of a lack of independence.

<sup>46</sup> See Perth Centre for Energy and Resources Arbitration at <https://pcera.org/>.

<sup>47</sup> See Australian Institute for Commercial Arbitration at [www.aica.asn.au/](http://www.aica.asn.au/).

<sup>48</sup> See Chartered Institute of Arbitrators at [www.ciarb.net.au/](http://www.ciarb.net.au/).

<sup>49</sup> See Trakman and Montgomery (n 5).

<sup>50</sup> See Albert Monichino, Luke Nottage and Diana Hu, ‘International Arbitration in Australia: Selected Case Notes and Trends’ (2012) 19 *Australian International Law Journal* 181–211.

<sup>51</sup> *TCL v Judges* (n 10) [10]; PA Keane, ‘The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules’ (2013) 79 *Arbitration* 195–207; PWC and Queen Mary University of London School of International Arbitration, ‘2013 International Arbitration Survey’, [www.arbitration.qmul.ac.uk/docs/123282.pdf](http://www.arbitration.qmul.ac.uk/docs/123282.pdf) and other years’ surveys. But see *QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd* [1991] FCA 637; [1991] 33 FCR 227.

Conversely, courts have demonstrated their readiness to assist arbitration tribunals by enforcing interim awards, or otherwise facilitating the arbitration process. This judicial guidance includes an interest in not protracting judicial oversight of arbitral proceedings and awards, nor to subvert the arbitration process by subjecting the minutia of arbitral awards to a judicial microscope.

Consequently, Section 8 of the IAA restricts available defences to the enforcement of an arbitration award, to promote the finality of those awards, to provide consistent processes for their review, and to limit delays in enforcement proceedings. The Section also limits the authority of national courts to review arbitration awards, to retry cases on their merits, or to act as an appellate court that rules on errors of law or fact. Section 8 also avoids adopting an expansive conception of national public policy, limiting review on such grounds to international standards of public policy, such as related to fraud or other criminal conduct.<sup>52</sup>

The decisions of Australian courts have expanded on the recognition and enforcement of ICA awards, including prior to the 2011 amendment to the IAA. This judicial approach is evident in the Federal Court decision of *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*.<sup>53</sup> There, the Court confirmed its commitment to enforce the arbitral process and the finality of the award, to construe judicial review of the award restrictively, and not set it aside for minor or technical breaches of the rules of natural justice. However, the case involved protracted and costly litigation due to the lack of clarity in section 18 of the IAA as to whether the Federal Court, in addition to the State and Territory Courts, was a ‘competent court’ to enforce an award under the Model Law. The Civil Law and Justice Amendment Legislation Bill 2017 has addressed this drafting issue in the IAA, and confirmed the competence of the Federal Court to enforce such awards.<sup>54</sup>

In the more recent case of *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*<sup>55</sup> the Federal Court took a further pro-enforcement approach to the finality of an ICA award. It held that it did not have a general discretion to refuse to enforce a foreign arbitral award, other than on specific grounds provided for in the IAA.<sup>56</sup> It held further that the public policy ground for refusing to enforce a foreign award in the IAA<sup>57</sup> should be read restrictively, in light of the pro-enforcement purpose of the New York Convention and the objects of the IAA.<sup>58</sup>

### 3. Reform

#### 3.1. Legislative and Regulatory Initiatives

The 2010 Amendment to the IAA was intended to encourage the selection of Australia as the location for international commercial arbitration. Section 39(2) of the IAA seeks to

<sup>52</sup> See generally Garnett (n 16).

<sup>53</sup> *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2014] FCAFC 83.

<sup>54</sup> [www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=s1057](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1057). On this amendment, see Federal Attorney-General’s Explanatory Memorandum to the 2017 Bill, para 307.

<sup>55</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.

<sup>56</sup> See IAA ss 8(5), 8(7).

<sup>57</sup> See IAA s 8(7)(b).

<sup>58</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131, [132].

provide ‘an efficient, impartial, enforceable and timely method by which to resolve commercial disputes.’<sup>59</sup> The amended IAA also aims to guide courts in exercising their powers to assist arbitrators,<sup>60</sup> including enforcing awards, appointing or removing an arbitrator, or staying judicial proceedings brought in breach of an arbitration agreement.<sup>61</sup>

### 3.1.1. *New York Convention*

The IAA was first enacted in 1974, with the purpose of giving effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention serves as the global law governing ICA and was adopted by 149 state parties as at 10 January 2014.

Consistent with the global stature of the New York Convention, the IAA includes that Convention in Schedule 1. In addition, and compliant with Article 2 of that Convention, section 7 of the IAA provides for the mandatory stay of judicial proceedings that are brought in breach of an arbitration clause or agreement. Consistent with Article 8 of the Convention, section 8 of the IAA provides for the enforcement of foreign arbitral awards in Australia.

The IAA, in turn, imposes a duty on Australian courts to act in accordance with the New York Convention insofar as it is incorporated into Australian law, including in particular, in recognising and enforcing ICA awards.

ICA awards in Australia are also subject to recognition and enforcement in foreign courts in jurisdictions that adopt the New York Convention. Conversely, ICA awards rendered outside Australia that meet these same requirements are enforceable before Australian courts. The result is that the New York Convention serves as the legal framework for the enforcement of ICA awards globally.<sup>62</sup>

The New York Convention also serves as the legal foundation for the recognition and enforcement of domestic arbitration. This is the case in regard to the Australian states and the Northern Territories that have enacted new Commercial Arbitration Acts, generically identified as the Commercial Arbitration Act 2011.

As discussed in section 2.1.1 above, the CAAs mirror the New York Convention, with limited exceptions, such as by permitting an appeal from an arbitration award on the merits, subject to the agreement of the parties and the willingness of the court to grant leave to appeal.

Finally, it is more likely that domestic arbitration will be subject to greater judicial scrutiny than ICA, in accordance with the wider grounds provided by state legislation for the judicial scrutiny of domestic awards. However, given the extent to which the new CAAs adopt the New York Convention’s pro-enforcement position on arbitration awards, state courts across Australia are increasingly likely to enforce domestic arbitration awards.

<sup>59</sup> IAA s 39(2).

<sup>60</sup> See Garnett (n 16).

<sup>61</sup> On staying proceedings, see *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332.

<sup>62</sup> See generally Hayward (n 21).

### 3.1.2. Model Law Impact and Legislative Reform

The IAA also endorses the UNCITRAL Model Law. Section 21 of the IAA accords exclusive jurisdiction to the Model Law in applying international commercial arbitration to a dispute with an Australian seat.<sup>63</sup> Section 21 also precludes ‘opting out’ of the Model Law.<sup>64</sup>

The exclusivity of the Model Law has the benefit of adopting internationally recognised rules to govern international commercial arbitration. However, a question arises as to whether it denies party autonomy in cases where the parties expressly provide for an alternative to the Model Law, such as for domestic law. A related question is whether the exclusivity of the Model Law undermines the prospect of review under domestic law.

### 3.1.3. Impartiality and Independence of Arbitrators

There are no restrictions as to who represents the parties to an arbitration conducted in Australia, including the right of parties to represent themselves in arbitral proceedings.

There is also no restriction on the right of parties to appoint foreign lawyers to act as ICA arbitrators. This is consistent with the Model Law which expressly provides that no person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed to by the parties.

However, section 18 of the IAA provides for the independence of arbitrators.<sup>65</sup> Section 18A specifies that an arbitrator can be challenged if there are ‘justifiable doubts as to the impartiality or independence’ of the person serving as an arbitrator.<sup>66</sup>

These provisions are consistent with international practice in arbitration. However, interpretive issues arise in determining the requisite nature of impartiality and independence required of arbitrators. What constitutes ‘justifiable doubts’ about an arbitrator’s impartiality? Should such ‘doubts’ be construed expansively or restrictively? Will an expansive interpretation of ‘justifiable doubts’ lead to a flood of challenges to the appointment and service of arbitrators? In the absence of case law and *opinio juris* in interpreting a code of arbitral conduct in Australia, much will depend on the extent to which an Australian court interprets the Model Law, including in determining whether and how it is ought to be interpreted in answering the questions above.

### 3.1.4. Confidentiality

Section 22 of the IAA stipulates that parties to an arbitration may provide expressly for confidentiality,<sup>67</sup> and sections 23C–23G prescribe the rules which govern confidentiality.<sup>68</sup> Section 23G(1)(a) provides a ‘public interest’ exception to such confidentiality.<sup>69</sup> Several questions arise as to the confidentiality: what is the status of confidentiality if the parties fail

<sup>63</sup> IAA s 21.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*, s 18.

<sup>66</sup> *ibid.*, s 18A.

<sup>67</sup> *ibid.*, s 22.

<sup>68</sup> *ibid.*, ss 23C–23G.

<sup>69</sup> *ibid.*, s 23G(1)(a).

to provide for it expressly? In such circumstances, does the arbitration tribunal have some discretion in determining the nature and scope of confidentiality? Should confidentiality be applied expansively, to the existence of a dispute, the parties involved, the conduct of proceedings and the award reached? Should all participants in proceedings, including third party witnesses, be bound by such confidentiality? Should the 'public interest' exception to confidentiality be construed broadly or restrictively? Again, the answers to these questions may depend on the application and interpretation of the Model Law.

In response to these questions, the IAA did not create a presumption in favour of the confidentiality of international arbitration proceedings with their seat in Australia, but instead granted parties the right to opt into a confidentiality regime. This is inconsistent with both the Model Law and the CAAs that include a presumption in favour of confidentiality of arbitration proceedings. This omission from the IAA has since been addressed by the Civil Law and Justice (Omnibus Amendments) Act 2015 which creates a presumption in favour of confidentiality, with the right of the parties to opt out of it.<sup>70</sup>

### 3.1.5. Writing Requirement

Part II of the IAA requires that 'agreements [relating to arbitration are] in writing'.<sup>71</sup> This varies from the Model Law, which proposes recognition of both oral and written agreements.<sup>72</sup> The law in some member countries, notably in Europe, recognises both oral and written agreements, consistently with the Model Law.

A potential concern is whether oral agreements that modify written agreements ought to be recognised, subject to the terms of that written agreement. This would provide the parties with greater flexibility, particularly as they are often located in different jurisdictions, and arbitration agreements may warrant modification to suit their altered circumstances.

The countervailing view is that written agreements demonstrate the seriousness of the parties' intention to arbitrate, and provide certainty and predictability. Written agreements may also avoid ex post disputes over the terms of an oral agreement. Moreover, technological capabilities include the capacity to engage in instant written communications electronically, including through e-contracting.

### 3.1.6. Immunity of Arbitrators and Entities Appointing Arbitrators

Section 28(1) of the IAA provides that 'an arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator'.<sup>73</sup> This provision is laudable on its own terms. The problem arises in determining the nature and scope of 'good faith.' Does the perception that an arbitrator conducts proceedings in a dilatory manner or cancels hearings on short notice without explanation constitute 'bad faith'? Or is 'bad faith' co-extensive with fraudulent acts that are *mala fide*?

Section 28(2) specifies that 'an entity is not liable for failing or refusing to appoint an arbitrator if done in good faith'.<sup>74</sup> Here, questions arise over when a refusal to appoint an

<sup>70</sup> [www.legislation.gov.au/Details/C2015A00132](http://www.legislation.gov.au/Details/C2015A00132).

<sup>71</sup> *ibid*, Part 2.

<sup>72</sup> See UNCITRAL Model Law on International Commercial Arbitration, Art 7.

<sup>73</sup> IAA s 28(1).

<sup>74</sup> IAA s 28(2).

arbitrator constitutes ‘bad faith.’ For example, does failure to appoint an arbitrator constitute bad faith when the person acting for the appointing entity decides based on unsubstantiated comments about a candidate’s alleged lack of good manners?

### 3.1.7. Recognition and Enforcement of Arbitration Awards

In supporting the recognition and enforcement of ICA awards, the IAA includes an exhaustive, rather than open-ended, list of grounds upon which a court may decline to enforce a foreign arbitral award.<sup>75</sup> It also permits courts to enforce such awards and award costs against a party seeking adjournment who is not acting in good faith or who acts without reasonable diligence.<sup>76</sup> Conversely, it permits a court to set aside an award on limited grounds, namely fraud, corruption, the denial of natural justice, or the violation of public policy.<sup>77</sup>

In key respects, these provisions in the IAA affirm provisions on the enforcement of international arbitral awards before the 2010 amendment. What remains at issue is how Australian courts are likely to interpret the applicable provisions on enforcement. The question as to when a person acts in ‘bad faith’ in seeking an adjournment is potentially contentious: would a person seeking adjournment be acting in bad faith if the primary reason for that request is that person’s knowledge that a material witness for the other side would be unavailable to testify following the adjournment? Similarly, when is the violation of ‘public policy’ sufficiently material to justify a court setting aside an arbitral award? What is generally noted is that Australian courts tend not to exercise a broad discretion to refuse enforcement of an arbitration award on grounds of public policy.<sup>78</sup>

### 3.1.8. Concurrent Jurisdiction

Section 18(3) of the IAA provides that the Federal Court and state and territory superior courts have concurrent jurisdiction.<sup>79</sup> This continues the status quo and is generally consistent with international practice.

The benefit of this provision is that it provides the parties with greater flexibility and, insofar as their agreements expressly or impliedly provide, for concurrent jurisdiction. However, the challenge is to impede parties from forum shopping between federal and state or territorial courts, and to avoid the duplication of proceedings. The assumption is that, if a claim is pending in the Federal Court, a state or territorial court will stay proceedings unless there are legal reasons not to do so. The converse also applies.

### 3.1.9. Interim Measures

The IAA provides more extensive interim measures than are stipulated for in the Model Rules. Section 23 of the IAA provides that a party to arbitral proceeding may apply to

<sup>75</sup> See generally IAA Part 2.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

<sup>78</sup> See *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276, [105].

<sup>79</sup> IAA s 18(3).

a court to issue a subpoena to compel a person to attend for examination or produce documents.<sup>80</sup> Section 23J allows a tribunal to make an order allowing the tribunal, a party or an expert to inspect evidence that is in a party's possession.<sup>81</sup> Section 23K gives the tribunal the power to award security for costs.<sup>82</sup> Courts may also grant 'anti-suit' injunctions to prevent parties from bringing court proceedings in breach of their agreements.<sup>83</sup>

Essentially, the benefit of these interim measures is to render arbitration proceedings more effective, empowering arbitrators to require the parties to comply with the specific measures ordered. One response however, is that, taken to extremes, such empowerment may undermine due process in the conduct of an ICA and encroach on the authority of courts to redress such violations.

### 3.1.10. *The Scope of the CAAs*

The new CAAs, adopted in states across Australia, adhere largely to the Model Law.<sup>84</sup> Even where they vary from the Model Law, their variance from it is less pronounced than in earlier CAAs. For example, the new CAAs provide for confidentiality in domestic arbitration in the absence of exceptional circumstances such as where all the parties agree to waive confidentiality.<sup>85</sup> They preserve a right of appeal on questions of law, but require the consent of all parties, leave of the court to appeal, and that the court is persuaded that the arbitral decision is obviously wrong and of general public importance.<sup>86</sup> The new CAAs also contain a 'med-arb' provision by which the appointed arbitrator(s) may conduct arbitration if mediation fails.<sup>87</sup>

Finally, consistent with the autonomy of the parties to choose the rules and procedures governing arbitration, the CAA's provide that the parties may expressly agree to disallow one or more of the interim measures identified above.

## 3.2. Judicial Initiatives

The support of Australian courts for international commercial arbitration awards is reflected in the Australian High Court's decision to unanimously uphold the constitutional validity of Australia's international arbitration laws. In *TCL Air Conditioner (Zhongshan) v The Judges of the Federal Court of Australia*,<sup>88</sup> the High Court rejected a constitutional writ which sought to prevent the Federal Court from making orders to enforce an international

<sup>80</sup> *ibid*, s 23.

<sup>81</sup> *ibid*, s 23J.

<sup>82</sup> *ibid*, s 23K.

<sup>83</sup> *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 392.

<sup>84</sup> The new CAA regime has been adopted by New South Wales, Victoria, South Australia, Tasmania, Western Australia and by the Northern Territory.

<sup>85</sup> CAA ss 27E, 27F.

<sup>86</sup> *ibid*, s 34A.

<sup>87</sup> *ibid*, s 27D. See further generally Garnett (n 16).

<sup>88</sup> *TCL v Judges* (n 10). See too Chief Justice Bergin of the New South Wales Supreme Court who confirmed that 'commercial courts [in Australia] respect commercial parties' decisions to proceed to arbitration of their dispute', in *Kaspersky Lab UK Ltd v Hemisphere Technologies Pty Ltd* [2016] NSWSC 1476, [25].

arbitration award. The High Court held that it was inherent in the arbitration agreement that the parties agreed to accept the arbitrator's decision. Once the arbitrator had decided upon the legitimacy of the disputed rights, the exercise of that authority replaces the parties' rights to address the applicable issue directly. In effect, the arbitrator exercised powers conferred by the parties to decide the nature of their rights. The Federal Court had the power to review that arbitrator's decision and in doing so, was not merely endorsing the arbitration award. Therefore, the constitutional validity of the requirement that the parties comply with the arbitrator's decision was upheld.

Australian courts generally support the virtue of consistency in international arbitration processes. As Chief Justice James Allsop and Justice Clyde Croft noted:

From an economic point of view, a country where the courts are inconsistent in their approach and unpredictable in their treatment of international arbitral processes and awards does not, and is not likely to, attract any significant arbitration work.<sup>89</sup>

As a result, Australian courts affirm ICA proceedings and awards under the New York Convention. They exercise powers to appoint arbitrators, take evidence, and order and enforce interim measures. They recognise the value of ordering measures in support of ongoing arbitration, without duplicating or subverting it.<sup>90</sup> They also enforce arbitral awards to maintain certainty and finality in international dispute resolution.<sup>91</sup>

Australian courts also recognise the autonomy of the parties to agree to have their disputes resolved through arbitration rather than litigation. For example, they stay judicial proceedings if they find that there is a valid and enforceable arbitration agreement.<sup>92</sup>

However, an Australian court may decline to stay judicial proceedings if it finds that the issue in dispute is not arbitrable, or is otherwise incapable of being arbitrated.<sup>93</sup> In a recent Federal Court decision, *WDR Delaware Corporation v Hydrox Holdings Pty Ltd*, the Court held that the ultimate decision whether a corporation should be wound up under the Corporations Act rested with the Court.<sup>94</sup> The Court nevertheless stayed proceedings pending a determination by the Arbitral Tribunal on the related issue of whether a declaration of oppressive conduct should be made.<sup>95</sup>

The challenge here is to determine the circumstances in which the agreement is not arbitrable, for example, to avoid subjecting sensitive domestic policies to international commercial arbitration. As such, Australian courts are more likely to treat a matter as not being arbitrable such as on public policy grounds, than to stay arbitration proceedings or set aside an award on grounds of arbitral incapacity. However, in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*,<sup>96</sup> the Federal Court accepted that challenges under

<sup>89</sup> See Chief Justice James Allsop and Justice Clyde Croft, 'Judicial Support of Arbitration' (FCA) [2014] *FedJSchol* 5, paper presented at the *APRAG Tenth Anniversary Conference*, Melbourne, 28 March 2014, available online: [www.austlii.edu.au/au/journals/FedJSchol/2014/5.html](http://www.austlii.edu.au/au/journals/FedJSchol/2014/5.html).

<sup>90</sup> IAA s 7.

<sup>91</sup> See *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131, [126].

<sup>92</sup> *ibid.*

<sup>93</sup> IAA s 7(5).

<sup>94</sup> *WDR Delaware Corporation v Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd* [2016] FCA 1164, [112].

<sup>95</sup> *ibid.*, [1] per Justice Foster.

<sup>96</sup> *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131.

Article 34 of the UNCITRAL Model Law do not constitute litigation in the ordinary course, and that public policy considerations warrant adverse cost orders in order to discourage unmeritorious challenges to a valid arbitral award.<sup>97</sup>

### 3.3. Other Factors

There is a limited competitive market for ICA services in Australia. ACICA is the premier body providing such services.<sup>98</sup> However, a recently created specialist arbitration centre, the Perth Centre for Energy and Resource Arbitration (PCERA), provides for domestic and international commercial arbitration in relation to energy and resources which are primary sectors in Western Australia.<sup>99</sup> No foreign arbitration centres, other than the Chartered Institute of Arbitrators and to a limited extent, the International Chamber of Commerce, has an established presence in Australia at the time of writing.<sup>100</sup> However, collaboration among such institutions does occur, such as in the training of arbitrators, and in the conduct of conferences and workshops. Organisations such as the Australian Disputes Centre and the Australian Commercial Disputes Centre provide ADC training and advice on procedures for resolving disputes, in collaboration with mediators, experts and arbitrators. The Australian Commercial Disputes Centre in particular engages across commercial fields, such as by providing training and advice on building and development applications, commercial and industrial disputes, law, accounting and franchising.<sup>101</sup>

### 3.4. What Drives Reform?

#### 3.4.1. *Legislative, Judicial and Institutional Elements*

Australian legislatures, courts and arbitration institutions have progressed significantly in promoting ICA in the resolution of cross-border commercial disputes. The Australian experience highlights how its comprehensive adoption of the Model Law by legislatures and courts across the Federation has helped to promote uniformity and to create an arbitration-friendly legal environment. There is the perception, however, of continuing problems with the allegedly formalist and conservative approach of Australian law makers and courts to ICA, although these perceived deficiencies have countervailing advantages of encouraging rigorous reasoning and detailed awards, as will be discussed in section 4.1 below.

Viewed critically, Australia's legislative promotion of international commercial arbitration has tended to maintain the status quo, more than to innovate to truly encourage a timely and cost-effective means of dispute resolution. When compared to established ICA jurisdictions like Singapore, Hong Kong and the developing arbitration centre of South Korea,

<sup>97</sup> *ibid*, [4] and [28] per Justice Beach.

<sup>98</sup> IAA; also see s 2.2 above.

<sup>99</sup> See Perth Centre for Energy and Resources Arbitration at <http://pcera.org>.

<sup>100</sup> On the Chartered Institute of Arbitrators, see [www.ciarb.net.au](http://www.ciarb.net.au); on the International Chamber of Commerce, see [www.iccaustralia.com.au](http://www.iccaustralia.com.au).

<sup>101</sup> Available online [www.disputescentre.com.au/](http://www.disputescentre.com.au/).

Australian jurisdictions could be well served by embarking on bolder legislative frameworks that strive, not only to be arbitration-friendly, but also more arbitration-innovating.

Australian law-makers and courts are undoubtedly cognisant that Australia has *not* attracted a large number of international arbitration cases. For example, it is reported that no more than 40 cases had been registered with ACICA between the time when the Australian International Disputes Centre (AIDC) opened in 2010 and until 2014.<sup>102</sup> However, ACICA's caseload increased dramatically between 2012 and 2014. By 2013/2014, more than two thirds of ACICA cases involved two foreign parties who had no other affiliation with Australia.<sup>103</sup>

However, these numbers are scant compared to the 259 new arbitrations conducted by the Singapore International Arbitration Centre (SIAC) in 2013,<sup>104</sup> 156 cases conducted by the Kuala Lumpur Regional Centre for Arbitration,<sup>105</sup> 260 cases conducted by the Hong Kong International Arbitration Centre,<sup>106</sup> and more than 1000 cases each year since 2007 by the China International Economic and Trade Arbitration Commission (CIETAC).<sup>107</sup>

Some of these differences are not comparable to ICA in Australia, such as the cases heard by Chinese arbitration centres like CIETAC. However, in the case of the centres in Hong Kong, Singapore and Kuala Lumpur, the volume of their caseload demonstrates a significant competitive advantage over ACICA. At the same time, Australian commercial arbitrators are regularly appointed as arbitrators at these regional centres, as they are in global centres such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution of the American Arbitration Association (ICDR).

#### 3.4.2. *Top-down Versus Bottom-up Reform*

The reform of ICA in Australia has been both 'top-down', emanating from legislation and the highest courts, and 'bottom-up', notably arising ad hoc or more formally, as administered according to the rules and procedures of ACICA. The 'top-down' approach is evident in the 2010 revisions to the IAA.<sup>108</sup> The 'bottom-up' approach is evident in the new 'Arbitration Rules 2016' released by the ACICA which came into effect on 1 January 2016.<sup>109</sup> These 'top-down' and 'bottom-up' approaches are discussed above.

#### 3.4.3. *Special Considerations*

The most prevalent attributes in the development of ICA in Australia inhere in the influence of the common law legal tradition and culture within a federal rather than a unitary

<sup>102</sup> See Nottage (n 1) 24.

<sup>103</sup> *ibid.*

<sup>104</sup> Singapore International Arbitration Centre, 'Total Number of Cases Handled by the SIAC as of 31 December 2013', 2017, available online: [www.siac.org.sg/component/content/category/64-why-siac](http://www.siac.org.sg/component/content/category/64-why-siac).

<sup>105</sup> See Kanishk Verghese, 'Arbitration in Asia: The Next Generation?' (2014) *Asian Legal Business*, available online: [www.legalbusinessonline.com/reports/arbitration-asia-next-generation](http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation).

<sup>106</sup> See Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2012/2013 in Review' (2013) 24 *Australasian Dispute Resolution Journal* 209–10.

<sup>107</sup> See Leon E Trakman, 'Legal Traditions and International Commercial Arbitration' (2006) 17 *American Review of International Arbitration* 1–36.

<sup>108</sup> See n 2.

<sup>109</sup> See ACICA Rules 2016 (n 44).

jurisdiction. Despite a strong ‘rule of law’ tradition in courts across the Federation, critics assert that ICA proceedings are unduly ‘judicialised’, allegedly replicating complex judicial proceedings, and limiting innovation in ICA practice. As the author and co-author Hugh Montgomery observed of these criticisms:

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 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.<sup>110</sup>

However, in defence of ICA in Australia, the revision of the IAA in 2011 and the ACICA Rules in 2015 demonstrate an institutional capacity to innovate at both the levels of federal legislation.<sup>111</sup> The author and co-author Hugh Montgomery have so advocated:

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’, reflecting the views of Justice Foster of the Federal Court and Justice Croft of the Victorian Supreme Court.<sup>112</sup>

ICA innovations in Australia extend beyond the IAA to include institutional developments, such as ACICA new Rules directed at promoting expeditious proceedings. As Malcolm Holmes, Luke Nottage and Luke Tang recently proposed:

Arts 3.1 and 3.2 of the 2016 ACICA Rules bind the parties to the ‘*overriding objective*’ of these Rules, and its application by the tribunal, namely ‘to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved’.<sup>113</sup>

However, innovation in ICA in Australia must necessarily recognise that a one-size-fits-all time and cost efficient model of ICA is ill-fitting, given the divergent nature of ICA disputes and proceedings. As the author and Hugh Montgomery have contended:

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. Rather, ICA should invite a purposeful, well designed and ultimately serviceable analysis of what constitutes ‘international best practice’ in the applicable commercial context.<sup>114</sup>

<sup>110</sup> See Trakman and Montgomery (n 5): ‘The case disposition times, even in the Federal Court, remained largely unchanged in the three years after and before enactment of the 2010 amendments. In addition, concerns about delays and costs in international arbitration resurfaced in many other parts of the world’.

<sup>111</sup> See s 2.2 above.

<sup>112</sup> See Trakman and Montgomery (n 5).

<sup>113</sup> Malcolm Holmes, Luke Nottage and Luke Tang, ‘The 2016 Rules of the Australian Centre for International Commercial Arbitration: Towards Further “Cultural Reform”’ (2016) 12(2) *Asian International Arbitration Journal* 211–34.

<sup>114</sup> Trakman and Montgomery (n 5).

## 4. The Future

### 4.1. Legislative, Judicial and Institutional Reform

In general, Australia has been successful in integrating international commercial arbitration into the legal regimes of the region. As demonstrated, Australia was one of the first countries to adopt the 2006 amendments to the Model Law in its 2010 amendment to the IAA. This swift adoption of the Model Law was accompanied by Australia's strong reputation within the Asia Pacific Region as a prospective situs for ICA, including such facilities as are provided at the ACICA. In addition, in 2004 Australia joined in creating the Asia-Pacific Forum for International Arbitration (AFIA); this Forum provides workshops and events designed to promote awareness and education on commercial arbitration.<sup>115</sup>

A complicating factor in determining the growth of commercial arbitration in Australia is the absence of reliable data on the performance of domestic arbitration under the Commercial Arbitration Acts since 2010. There is data confirming that between 1 September 2012 and 1 September 2014, Australian courts delivered 35 decisions relating to arbitration awards which included a little more than half (19) relating to domestic arbitration. While the number of decisions, not limited to reviews of awards, are generally limited, the data does demonstrate that Australian courts are addressing arbitration issues. This includes a decision by the High Court which dismissed the assertion that Australian courts lack independence in upholding arbitration awards.<sup>116</sup>

Australia also has a number of internationally recognised arbitrators. They have served as luminaries in arbitration reform globally, as well as in leadership roles in various international and regional arbitration associations.

The final tier of Australia's successes in adopting international commercial arbitration in the region lies in its legal system, which ensures judicial oversight of arbitration decisions. As explained, courts are empowered to assist in appointing arbitrators, taking evidence and enforcing interim measures. In general, the Australian Judiciary also understands the value and function of commercial arbitration with respect to the need to limit the time and cost associated with judicial oversight.

What remains in contention, however, is whether and to what extent, the development and application of ICA is restricted in Australian law, such as by the restrictions in the Trade Practices Act ('TPA) directed at protecting consumers. As Richard Garnett argues:

The question for the court in *Nicola* was whether s 52 and other provisions of Part V of the TPA amounted to statutory provisions which had the effect of invalidating the foreign exclusive jurisdiction clause. The court rejected the argument, noting that s 86 of the TPA conferred jurisdiction in respect of a number of courts in respect of breaches of Part V and was not expressed in the same terms as ss 67 and 68 ... Such a view must surely be correct or else a plaintiff could defeat a foreign exclusive jurisdiction clause in every case merely by commencing an action in an Australian court for breach of Part V of the TPA. The court's reasoning would equally apply in the context of the ACL.<sup>117</sup>

<sup>115</sup> Nottage (n 1) 27.

<sup>116</sup> See *TCL v Judges* (n 10).

<sup>117</sup> See Richard Garnett, 'Jurisdiction Clauses since *Akai*' (2013) 87(2) *The Australian Law Journal* 134–49, available online: [www.austlii.edu.au/au/journals/UMelbLRS/2013/6.htm](http://www.austlii.edu.au/au/journals/UMelbLRS/2013/6.htm). See also Jan Paulsson, *The Idea of Arbitration* (Oxford, Oxford University Press, 2013) 223.

Problematic, too, is the prospect of parties concluding arbitration agreements that include a choice of foreign law and then subsequently sublimate that choice by invoking statutory rights that diverge from their prior agreement. This issue arose in the *Comandate* case<sup>118</sup> and related to whether parties who agreed on a foreign choice of law and arbitration clause should be bound by their choices, even if doing so precluded them from relying on Australian statutory law, such as the Australian Consumer Law (ACL) which the foreign arbitrator declined to apply.

Given the importance of party autonomy in the choice of arbitration, parties seeking access to the ACL should expressly so provide in their contract. This development under the ACL is most welcomed: it plainly does nothing for the reputation of Australia as a centre of international arbitration if parties are allowed to circumvent their arbitration agreements by post-contract appeals to novel Australian statutory rights.<sup>119</sup>

#### 4.2. Enhancing Competitiveness, Independence and Professionalism

There are several reform measures that could further promote ICA in Australia.

International companies and their lawyers sometimes perceive commercial arbitration as a less known and less desirable method of dispute resolution than civil litigation. They worry about arbitration proceedings prolonging commercial disputes that ultimately lead to litigation. Alternatively, they have misgivings that arbitration can lead to awards which are not subject to appeal. They also have qualms about courts declining to review arbitration awards in deference to the arbitration process and to avoid a flood of complex commercial cases entering the court system.

These negative views of arbitration are based, to some degree, on limited understanding among commercial parties about the nature of arbitration and how to resort to it in a time- and cost-effective manner. Nor does the fact that their contracts provide for arbitration imply either that they appreciate the significance of those clauses, or how best to employ arbitration in the event of a dispute.

The disapproval of arbitration among Australian lawyers, as in comparable legal systems, reinforces rather than redresses the negative view of arbitration held by many of their commercial clients. Arbitration, not least of all ICA, is not a core university course that law students are required to take in order to receive a degree in law, but a somewhat lower enrollment elective. Arbitration courses are viewed as being less evidently attractive to prospective employers than courses in evidence, civil procedure and civil trial practice. Extending this issue, arbitration is not generally required in practical legal training directed at gaining admission to the Law Society as a solicitor, or gaining admission to the Bar as a barrister.

There is also a limited culture of educating corporate lawyers in Australia about the value and suitability of incorporating arbitration clauses in their contracts. This is in contradistinction to the widespread practice of incorporating institutionalised arbitration clauses

<sup>118</sup> See n 28.

<sup>119</sup> Garnett (n 16).

across the EU, inter alia, under the rules of the ICC and to a lesser extent, in the United States under the rules of ICDR of the American Arbitration Association. A valuable further development in Australia, therefore, is to follow global, and, to some extent, regional leaders, such as SIAC and HKIAC, that promote the adoption of arbitration clauses in commercial contracts.

Coupled with this proposed development is the need for lawyers to be encouraged to take continuing legal education courses in arbitration, provided by bodies such as the Chartered Institute of Arbitrators in Australia, to better understand the function and virtue of arbitration and how to incorporate it into commercial contracts.<sup>120</sup> These courses are available, but the number of lawyers who attend them is limited, and the costs are sometimes high in the absence of reasonably clear evidence that they will lead to an increase in billable hours. However, such courses can provide exposure to key issues arising in arbitration practice, and how to deal with them. They can also provide mock arbitration training that addresses illustrative arbitration disputes and how to resolve with them. Such arbitration exercises can also be assessed by professional arbitrators.

On the one hand, therefore, is the perception that, in ‘shaking off the shackles of the traditional English approach’,<sup>121</sup> Australian courts need to transcend conservative and formalist constructions of law such as in interpreting arbitration clauses in ICA contracts.<sup>122</sup> In doubt is: the English approach whereby an arbitration clause is to be construed, irrespective of the language used, in accordance with a presumption that all disputes will be decided by the arbitral tribunal. As a result, where the parties use restrictive words of reference in their arbitration clause, a stay of the parties’ entire dispute will not be granted.<sup>123</sup>

On the other hand, there is evidence of significant legislative amendments to Australia’s international arbitration regime and of Australian courts interpreting arbitration clauses expansively.<sup>124</sup>

Nevertheless, there is room for improving the culture of arbitration to achieve more practical, effective and cost-efficient dispute resolution. Legislation needs to continue to promote innovation in both arbitration practice and the legal construction of that practice. At the same time, such reform ought not to eliminate either rigorous reasoning in presenting and defending arbitration claims, or deny the utility of comprehensive arbitration awards, including on efficiency grounds.

Australian legislatures have responded transparently to the need to make Australia more attractive as a site for international commercial arbitration within the Asia Pacific region. The fact that such measures are already significantly underway is commendable.

Nevertheless, whilst Australia adopted the Model Law expeditiously, there are perceived limitations in the amended IAA. These have included the allegation of ‘limited public consultation’ prior to its enactment,<sup>125</sup> and that it ‘omitted or watered down many suggested

<sup>120</sup> See the Chartered Institute of Arbitrators website at [www.ciarb.net.au](http://www.ciarb.net.au).

<sup>121</sup> See Luke Nottage, ‘International Commercial Arbitration in Australia: What’s New and What’s Next?’ in Nye Perram, *International Commercial Law and Arbitration: Perspectives* (Sydney, Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2014) 287, 314.

<sup>122</sup> On this English approach, see s 4.3; also see Trakman and Montgomery (n 5).

<sup>123</sup> Garnett (n 16).

<sup>124</sup> See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [165].

<sup>125</sup> Nottage (n 1) 37.

reforms that would have promoted greater informality and hence potential cost of time savings in ICA.<sup>126</sup>

The 2010 amendment to the IAA is also subject to criticisms for requiring solely written submissions to arbitrators, doubts about the extent to which ICA awards are recognised and enforced, and whether parties can amend confidentiality provisions introduced by the Model Law.<sup>127</sup> The IAA is also perceived as having gaps, such as for not providing for med-arb.<sup>128</sup> In question, too, is the possibility that some arbitration decisions will not be subject to either the Uniform Commercial Arbitration Act or the IAA due to the temporal operation of the Commercial Arbitration Act (which only applies to *domestic* commercial arbitrations).<sup>129</sup>

However, med-arb is provided for in section 27D of the Commercial Arbitration Act 2011 (SA) in NSW, Tasmania, Victoria and South Australia and in Commercial Arbitration Bill 2011 (QLD). In addition, effective from 1 January 2012 onwards, the Australian Commercial Dispute Centre provides that an arbitrator may act as a mediator during the course of the arbitration, but only if the parties have agreed to that appointment in accordance with the relevant legislative provisions.<sup>130</sup>

However, there is a more pervasive concern about the scope of the revised IAA beyond those raised above. It entails the overriding apprehension that ‘the content of the amendments keeps somewhat to the safe and conservative path rather than taking a radical and innovative approach.’<sup>131</sup> Highlighting this concern is unease: that the IAA permits only written submissions,<sup>132</sup> that section 21 of the IAA prohibits opting out of the Model law,<sup>133</sup> and that the IAA in general preserves pre-existing Australian law to govern the enforcement of foreign arbitration awards.<sup>134</sup>

These misgivings are by no means peculiar to Australia. Nor are reservations about a culture of ‘billable hours’ that can exacerbate the cost of ICA peculiar to Australia. In issue is the difficulty in differentiating the costing of ICA from litigation when both specialties are lumped together as ‘arbitration and litigation’ practice.<sup>135</sup>

The need to promote international best practice is not limited to legislatures and courts. Contracting parties can also promote best practice through their choice of contract provisions to govern ICA. So too, can arbitration associations like ACICA facilitate change, as they have done, through the revision of their rules governing arbitration proceedings. In particular, party representatives can be required to provide their submissions and arguments

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*, 37–38.

<sup>128</sup> *ibid.*, 23.

<sup>129</sup> *ibid.*, 16.

<sup>130</sup> See Georgia Quick, Deborah Tomkinson, Lorraine Hui and Harriet Lenigas (2012), ‘Med-arb: Do we embrace the new section 27D?’ *AIDC E-News Bulletins: AIDC Summer Bulletin—Edition 1 Volume 6*, available online: <https://disputescentre.com.au/wp-content/uploads/2015/05/February-2012-Edition-1-Volume-3-2.pdf>.

<sup>131</sup> Richard Garnett and Luke Nottage, ‘The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?’ *Sydney Law School Research Paper No. 10/88*, 1–2, available online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1676604](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1676604). This article was later published in (2011) 7(1) *Asian International Journal* 29–53.

<sup>132</sup> *ibid.*, 3.

<sup>133</sup> *ibid.*, 5.

<sup>134</sup> *ibid.*, 3–4.

<sup>135</sup> Nottage (n 1) 3.

in more succinct form, focusing on the material issues and arguments in support of them. Arbitrators can be encouraged to eliminate lengthy recitals of procedural histories in their awards, and be less engaged in recapitulating briefs submitted by the disputing parties. As Neil Kaplan, a leading Hong-Kong based international arbitrator, proposed at the centenary of the Chartered Institute of Arbitrators in March 2015, arbitration awards can be made more user-friendly, such as by using headnotes, summaries of the key determinations and simplified proceedings and procedural recitations.<sup>136</sup> However, in fairness, these proposals apply to ICA globally, particularly to common law jurisdictions in which arbitration proceedings replicate, to different degrees, the complexity, formality, cost and protraction of judicial proceedings.

In striving for best international practice, one final acknowledgment has to be made of the need for codifying and clearly elucidating upon a cogent standard of ‘efficient’ and ‘streamlined’ arbitral proceedings. This view is reflected in the remarks of Albert Monichino, the Immediate Past President of the Chartered Institute of Arbitrators in Australia. He acknowledges that, ‘to speak about “*best practice*” in international commercial arbitration is somewhat contentious ... [it] is an *elusive* [sic] *concept* and *not* an objective, *measurable standard*.’<sup>137</sup> While Monichino stresses the need for cultural reform within Australia’s ICA regime, he advises caution in determining the procedures and methods by which the growth of arbitration should take place in Australia, and the region. To this end, he provides a checklist of ideal requirements for the continuing development of best international practice in ICA, including:

1. A legal system with a singular arbitration Act (covering domestic *and* international arbitration),
2. A single court supervising arbitrations, and
3. A single, well-resourced arbitration institution within the nation.<sup>138</sup>

It is clear that Australia could benefit from targeted, substantive reform of its ICA regime, beyond the rhetoric of criticising broader conceptions of ‘cultural reform’ of ICA. Australia could also develop distinctive ICA capabilities to supplement developments elsewhere, such as the establishment of new, distinctive commercial courts in Singapore,<sup>139</sup> or the introduction of client satisfaction reports by the Hong Kong International Arbitration Centre.<sup>140</sup>

Such targeted reforms are perhaps more pressing now, given the controversy that followed the Australian government’s 2010 repudiation of investor-state dispute arbitration, which included controversial claims that investor-state arbitration can be unfair, secretive and (perhaps less remarkably) costly.<sup>141</sup>

<sup>136</sup> Andrew Maher and Alex Price, ‘Past and Future of International Arbitration in Australia’ *Lawyers Weekly* (16 March 2015) available online: [www.lawyersweekly.com.au/opinion/16275-past-and-future-of-international-arbitration-in-australia](http://www.lawyersweekly.com.au/opinion/16275-past-and-future-of-international-arbitration-in-australia).

<sup>137</sup> Albert Monichino, ‘Arbitration Reform in Australia: Striving for International Best Practice’ (2010) 29(1) *The Arbitrator & Mediator* 31 (emphasis added).

<sup>138</sup> *ibid.*, 46.

<sup>139</sup> KC Lye and Darius Chan, ‘Launch of the Singapore International Commercial Court’, *Norton Rose Fulbright*, April 2015, available online: [www.nortonrosefulbright.com/knowledge/publications/127746/launch-of-the-singapore-international-commercial-court](http://www.nortonrosefulbright.com/knowledge/publications/127746/launch-of-the-singapore-international-commercial-court).

<sup>140</sup> HKIAC, ‘Rate Your Experience—HKIAC Launches Arbitration Evaluation System’, 23 July 2015, available online: [www.hkiac.org/news/rate-your-experience-hkiac-launches-arbitration-evaluation-system](http://www.hkiac.org/news/rate-your-experience-hkiac-launches-arbitration-evaluation-system).

<sup>141</sup> See Leon E Trakman, ‘Choosing Domestic Courts Over Investor-State Arbitration: Australia’s Repudiation of the Status Quo’ (2012) 35(3) *UNSW Law Journal* 979–1012.

In short, in striving to improve Australia's international commercial arbitration regime within the Asia Pacific region, there needs to be a continued and directed conversation about *what* 'best international practice' means, and *how* regulators, arbitrators and parties to ICA can best accomplish it.

## 5. Conclusion

International commercial arbitration is well recognised in Australia, with a lengthy history of ICA. It is a 'rule of law' jurisdiction, with a recently revised International Arbitration Act that embodies best international practice. Australia has also adopted and followed the UNCITRAL Model Law, while adapting it slightly through macro-legislation and applying it more piecemeal, through judicial decisions.

Australian courts are generally supportive of ICA, and have lists of judges with expertise in both commercial matters and arbitration. In addition, Australia has an established international arbitration centre, ACICA, with recently revised rules and procedures that are directed at facilitating ICA proceedings.

No system is perfect, and there are areas in which the IAA could be more expansive in scope and more innovative in direction. There is limited case law in Australia on ICA, particularly given the recent legislative reforms. As a result, provisions in recent arbitration legislation, including both the IAA and the CAAs across Australia, which have barely been tested, or remain untested.

What has impeded the development of international commercial arbitration, beyond Australia, is growing concern over its perceived 'judicialisation'. This has included: the alleged tendency of arbitrators to adopt increasingly formal proceedings and for arbitration to reflect the weaknesses associated with litigation. More troubling, perhaps, are challenges to the confidentiality of commercial arbitration before courts of law across domestic jurisdictions, the neutrality of arbitrators notably in the *sui generis* case of investor-state arbitration,<sup>142</sup> and the cost and time associated with enforcing arbitration awards in domestic jurisdictions. These concerns, including in relation to the confidentiality of arbitration proceedings, are accentuated by Australia's choice not to ratify the Transparency Convention on investor-state arbitration, preferring to address transparency issues on a treaty by treaty basis.<sup>143</sup> This approach is material, *inter alia*, in light of the suit brought by Philip Morris against Australia under the Hong Kong-Australia Free Trade Agreement, over Australian legislation providing for the plain packaging of cigarettes.<sup>144</sup>

<sup>142</sup> See Leon E Trakman and David Musaleyán, 'The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration' (2016) 31(1) *ICSID Law Review* 194–218, available online: <https://academic.oup.com/icsidreview/article-abstract/31/1/194/2356747/The-Repudiation-of-Investor-State-Arbitration-and?redirectedFrom=fulltext>.

<sup>143</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the 'Mauritius Convention on Transparency'), [www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html).

<sup>144</sup> See *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, Permanent Court of Arbitration, case number 2012-12, available online: [www.pccases.com/web/view/5](http://www.pccases.com/web/view/5).

Coupled with the concerns about the perceived 'judicialisation' of commercial arbitration is the view that arbitration, all too often, is a stage following negotiation and possibly mediation, and concludes with protracted and complicated judicial hearings. What arguably, is overlooked is the benefit of the judicial review of an arbitration award that avoids the often intricate and multifaceted features of a judicial appeal.

In attempting to address global doubts about the benefits of ICA, Australia will need to consider how its system of international arbitration fits into the standards of truly 'international best practice', and how best to redress procedural inefficiencies in Australia's current arbitral regime.

A particular challenge ahead is that many lawyers who advise corporate clients are more familiar with negotiation and litigation and less so with ICA. Reform measures are needed, not only for such lawyers to appreciate the potential cost and time advantages of ICA, but also how to maximise them.

Meeting this challenge will include continuing to ensure that the practice of ICA in Australia evolves in accordance with 'best international practice'. It will also entail continuing to demonstrate how the stability associated with Australia's 'rule of law' traditions can foster greater confidence in ICA in Australia.

