A COMMITMENT TO EXCELLENCE

Essays in Honour of
Emeritus Professor Gabriël A. Moens

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Overcoming the Tyranny of Distance: Australia as an Arbitral Seat

Doug Jones AO[1]

• Introduction

It was not so long ago that international arbitration was confined to a select few seats within Europe and North America. The concentration of business within these regions gave birth to well-established arbitral seats including London, Paris and New York. Indeed, Europe was home to the very first arbitral institutions, the London Court of International Arbitration (LCIA) established in 1892,[2] and later, The Hague's Permanent Court of Arbitration (PCA) in 1899.[3] Historically, many would argue that international arbitration is restricted to these few seats. However, international arbitration is moving away from its Eurocentric roots. The past century has witnessed the growth of an interconnected global economy, the product of accessible transport, technological development and free trade. Transactions are becoming increasingly cross border, and inevitably, as are the ensuing disputes. Asia is now a rapidly growing commercial centre, resulting in the demand for effective dispute resolution mechanisms in the Asia-Pacific region. To accommodate this, arbitration diversified and parties

[1] I gratefully acknowledge the assistance provided in the preparation of this paper by my legal assistant, Sara Pacey. This paper is an adaptation of my earlier published speech, 'Australia as a Global Hub' (Speech delivered at LCIA Symposium, Sydney, 8 October 2017) <https://disputescentre.com.au/wp-content/uploads/2017/10/LCIA-Keynote-Address-.pdf>.

[2] Tomas Kennedy-Grant, 'Transnational Litigation and Arbitration' (1998) 7 *New Zealand Law Journal.*

[3] Permanent Court of Arbitration, *History* (2013) <https://pca-cpa.org/en/about/introduction/history/>.

are now offered a greater array of developed arbitral seats than ever before. Thus, as arbitration has flourished across the globe, much of its recent development has occurred in close proximity to Asia's booming economies.

Nestled within this Asia-Pacific region is Australia, a nation that has emerged as a competitive commercial centre. According to the 22nd Global Financial Centres Index, the competitiveness of Sydney as a commercial centre is ranked eighth in the world. In March 2017, Australia took the record for the longest run of uninterrupted GDP growth in the developed world, enjoying 26 years or 104 financial quarters since its last technical recession.[4] Australia's growth as a global commercial hub has inevitably driven the need for advanced commercial dispute resolution mechanisms. Foremost among these is international arbitration, an effective means of resolving disputes that is efficient, discrete, flexible, and importantly, legally binding. In catering to the growing demand for arbitration, Australia has developed into a sophisticated seat. While the factors to consider in electing an arbitral seat are numerous and different parties will have different priorities, some needs are universal. Robust legislation, a supportive judiciary, and effective institutions are often the key to the success of arbitration and in many respects, Australia is at the leading edge.

Many would agree that the growing significance of Australia in the international business and legal world is unprecedented given its roots as a convict settlement whose survival was nearly entirely dependent on England for the majority of its early history. One cannot forget the 'tyranny of distance'[5] which has so characterised Australian history, the phrase itself coined in 1966 by the renowned Australian historian Geoffrey Blainey. In light of Australia's growing position within the international commercial sphere, the validity of Blainey's phrase today should be questioned.

[4] Australian Bureau of Statistics, *5206.0 – Australian National Accounts: National Income, Expenditure and Product, Sep 2017* (2017) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5206.0>.

[5] Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (Macmillan Publishers, 1966).

In celebration of Professor Gabriël Moens' 70th birthday, I am therefore delighted to share this paper advocating for the rising prominence of Australia as a seat for international commercial arbitration. The current trajectory of arbitration in Australia is positive, aided by recent developments in both arbitration laws and facilities. To echo the sentiments of Professor Moens, the widespread adoption of the *New York Convention* and *Model Law* principles into domestic law has provided 'a strong foundation for international commercial arbitration in Australia'.[6] I join with the authors of this book to commemorate Professor Moens' outstanding contributions to the field through his role as an arbitrator, lawyer, academic and the Deputy Secretary General of ACICA.

This paper is structured as follows:

- First, I will begin with a discussion of the Australian context, starting with a brief note on Geoffrey Blainey's seminal history, 'The Tyranny of Distance',[7] followed by a discussion of Australia's arbitration origins.
- Second, I will continue by highlighting the many practical benefits which make Australia a favourable venue for international arbitration.
- Third, I will examine the existing legislative framework by which international arbitration has become embedded in the Australian legal system.
- Fourth, I will analyse the commendable judicial support for arbitration which has characterised the non-interventionalist, pro-enforcement approach to recognising arbitral awards.
- Finally, I will conclude with a discussion of Australia's excellent arbitration institutions and their rules, which serve to ensure commercial parties are provided with the very best service.

[6] Gabriël Moens and John Trone, 'The International Arbitration Act 1974 (Cth) as a Foundation for International Commercial Arbitration in Australia' (2007) 4, *Macquarie Journal of Business Law* 295.

[7] Blainey, above n 5.

• Background

• Historical Origins

Blainey's book 'The Tyranny of Distance'[8] recently turned fifty, and despite its age remains a vivid and unique insight into Australia's history, mainly due to its focus on distance, an often accepted but unexplored part of Australian life. Distance has shaped Australian history in the movement, communication, and economy of its peoples.

For Blainey, it was Australia's remoteness, combined with a lack of attractive trade goods that left the European imperial powers disinterested throughout much of the 18th century.[9] Australia's early colonial history was characterised by its inherent isolation from the rest of the world. This isolation was exacerbated by supply voyages and journeys that took months and were often beset by icebergs, wild seas, and scurvy.[10]

Not only is Australia distant from many regions of the world, but its urban centres are also distant from one another. Early settlers were confined to the east coast by the wall of mountains and immense harsh inland that lay to their west.[11] The distance inland made domestic and international exporting of commodities such as wheat and wool a time-consuming and expensive task, rendering these Australian products uncompetitive until the railroad was built, itself an arduous task given the distance to cover.[12]

To return to arbitration, the same brush that provides this grim recount of Australian history often paints a similarly pessimistic outlook of present-day Australia as a place inaccessible to the rest of the world, and an unlikely choice for an arbitral seat. The writer respectfully disagrees. Unbeknownst to many, the use of arbitration in Australia has a rich history. Australia's relationship with arbitration

[8] Ibid.

[9] Ibid.

[10] Ibid 40-45.

[11] Ibid 121-123.

[12] Ibid 125, 129.

pre-dates Western civilisation. Indigenous Australians have, for many millennia, implemented their own dispute resolution system that closely resembled arbitration to resolve disputes between members within a community.[13] As noted by Dr Diane Bell, indigenous customary law is comprised of 'rules backed by sanctions and a set of dispute resolution mechanisms'.[14] The arbitrators in these disputes were the elders of the communities. This practice has survived the passages of both culture and time. Mirroring Australia's customary law practices, Australia's common law system also has developed effective dispute resolution mechanisms. Today, arbitration is widely used to solve disputes of a commercial nature, enabled by Australia's pro-arbitration legislation and supportive judiciary.

Australia's struggles, plagued by the tyranny of distance, therefore seem to be concerns of the past. Today, travel is swifter. Markets are better connected. Communication is immediate, and business between Sydney, London, New York, Beijing, Tokyo and many other commercial hubs has never been more convenient.[15] What was tyrannical in the days of yore has become a lot less, attributable to technological developments such as the introduction of the A380 aeroplane and access to state of the art teleconferencing. Emerging from this commercial climate is the growth of interconnected and interdependent economies, particularly within the Asia-Pacific region, giving Australia access to Asia's rapidly growing market.

- **Practical Benefits**

Overcoming the challenges posed by distance, Australia has developed itself as an attractive seat for international arbitration with many practical benefits to compliment the pro-arbitration legal framework.

First, with the emergence of the economies of Asia, Australia is

[13] Australia Law Reform Commission, *Traditional Aboriginal Society and Its Law,* Dispute Resolution in Australia 2nd ed (2002) 11.

[14] Diane Bell, 'Aboriginal Women and the Recognition of Customary Law in Australia' (1983) 1 *Papers of the Symposium on Folk Law and Legal Pluralism* 491, 503.

[15] Blainey, above n 5, 350.

geographically well-positioned as a regional seat. The recognition of Asia as home to the world's fastest growing economies has catalysed a shift in trade and commerce patterns.[16] Asia is currently enjoying unprecedented influence in international markets, which is set to increase with trade arrangements such as the ASEAN alliance and the latest form of the Trans-Pacific Partnership.[17] This increase in cross-border transactions[18] will inevitably result in greater demand for arbitration as an effective means of resolving commercial disputes between parties residing in different legal jurisdictions.[19] Australia's geographical proximity to the Asia-Pacific region gives this country a distinct advantage as a seat compared to its European counterparts.

In 2016, parties from India, China and Singapore featured significantly in the caseload of the prominent Asian arbitral institutions of SIAC and HKIAC,[20] while Asian countries were featured in over 10% of the LCIA's caseload.[21] In 2016, the International Chamber of Commerce (ICC) saw a 22% increase in parties from South and East Asia.[22] While a party or legal representative in Hong Kong would face a seven-hour time difference to reach London, a hearing in Sydney would be only two or three hours ahead (and the same time zone in

[16] Akrur Barua, 'Packing a mightier punch: Asia's economic growth among global markets continues' *Deloitte Insights* (online), 18 December 2015, <https://www2.deloitte.com/insights/us/en/economy/>

[17] Ibid.

[18] Marilyn Warren, 'Australia as a 'safe and neutral' arbitration seat' (Speech delivered at ACICA's 'The Australian Option' Chinese Tour, People's Republic of China, 6 June 2012).

[19] Justice Steven Rares, 'The Modern Place of Arbitration - Celebration of the Centenary of the Chartered Institute of Arbitrators' (Speech delivered at the Chartered Institute of Arbitrators, Sydney, 22 April 2015), 17.

[20] Singapore International Arbitration Centre, 'SIAC Annual Report 2016' (Annual Report, Singapore International Arbitration Centre, 2016) 14; Hong Kong International Arbitration Centre, 'HKIAC Annual Report 2015' (Annual Report, Hong Kong International Arbitration Centre, 2015) 8.

[21] London Court of International Arbitration, 'LCIA Annual Report 2016' (Annual Report, London Court of International Arbitration, 2016) 8.

[22] International Chamber of Commerce, 'ICC Reveals Record Number of New Cases filed in 2016', *International Chamber of Commerce* (online) 18 January 2017 <https://iccwbo.org/media-wall/news-speeches/>

Perth). Similarly, the flight from Singapore to Sydney is shorter than the flight from Singapore to London. The growth of the arbitration industry in Asia has gifted Australia with the advantage of geographic proximity to many parties and to flourishing arbitration practices.

Australia's proximity to the Asia-Pacific also provides parties with access to a myriad of high quality arbitration practices across the region. Nearly all major international firms have developed arbitration practices in Asia and many have highly experienced and specialised teams operating in the region.[23] Many of these firms have also expanded their arbitration practices to Australia, bringing with them the experience and expertise accrued from practice in many jurisdictions. Further, numerous Australian law firms have established arbitration practices and some have formed international partnerships, facilitating the growth and development of their local teams.

However, these practical benefits would mean nothing in the absence of a strong legal framework for arbitration. Accordingly, the remainder of this paper will discuss Australia's appeal as a seat with reference to the existing legal features that make Australia well-suited to respond to the growing demand for arbitration in the Asia-Pacific region.

• Legal Framework

When deciding upon an arbitral seat, a country's legal framework will often inform the party's decision. Echoing the sentiments of Justice Clyde Croft, the success of arbitration is dependent on the legislature passing laws that create a favourable environment for arbitration.[24] Relevantly, an article[25] co-authored by Professor Moens cited *HIH Casualty & General Insurance Ltd (in Liq) v Wallace,*[26] noting that:

[23] The Legal 500, 'Asia Pacific: Regional International Arbitration' *The Legal 500* (online) 2018 <http://www.legal500.com>

[24] Justice Clyde Croft 'Commercial Arbitration in Australia: the Past, the Present and the Future' (2011) 59 *VicJSchol* 1, 3.

[25] Moens and Trone, above n 6.

[26] (2006) 204 FLR 297.

> [T]he enforceability of the arbitration agreement is determined in light of applicable state and federal legislation and the common law…the court's power to order such measures derives from its domestic law…[27]

It is therefore essential to turn to the applicable laws governing arbitration in Australia, an examination of which clearly demonstrates this nation's commitment to respecting party autonomy and the right to arbitrate.

• Current Legislation

Australia's pro-arbitration stance is evident in the laws regulating international and domestic arbitration. Through legislative reform, the principles arising from leading international instruments have been given the force of law in Australia.[28] The laws governing arbitration incorporate the *UNCITRAL Model Law*,[29] the result of which is uniformity and consistency of arbitration laws the nation over, in line with international best practice. A product of this uniformity has been the development of consistent Australia-wide jurisprudence and precedent. Australian arbitrators and counsel have become familiar with the *Model Law,* equipping them to compete for arbitration work, internationally and locally. The expertise of local judges and support from the Australian judiciary is equally impressive.

Australia's modern arbitration laws are, of course, the product of centuries of reform since English colonisation in 1788. Like most Commonwealth nations, Australia derived many of its initial arbitration laws and general laws from those enacted in England. Starting with the English *Act for Determining Differences by Arbitration 1698*,[30] the

[27] Ibid 2-5, citing *HIH Casualty & General Insurance Ltd (in liq) v Wallace* (2006) 204 FLR 297 [44].

[28] Justice Steven Rares, 'The Role of Courts in Arbitration' (Speech delivered at the 2012 ADR in Australia and Beyond, the New South Wales Bar Association and ACICA Seminar, The Westin Hotel Sydney, 4 August 2012).

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

[30] 9 & 10 Wm 3, c 15.

first *Arbitration Act* was passed by the New South Wales Parliament in 1867, regulating domestic arbitration. More recently, *Uniform Commercial Arbitration Acts*[31] have been adopted by every state and territory, and they now incorporate the 2006 Amended *Model Law* after undergoing substantial reform in the 2010. This reform was championed by the New South Wales Supreme Court, bringing Australia in line with international best practice, and is illustrative of the Australian commitment to continual refinement of its arbitral mechanisms.

The life of the federal *International Arbitration Act*[32] *(IAA)* which governs Australian international arbitration law is much shorter by comparison. Upon its enactment in 1974, this Act incorporated both the 1958 *New York Convention*[33] and the 1965 *ICSID Convention*,[34] and in 1989 it was amended to incorporate the *Model Law*. In 2010, it was reformed again to incorporate the 2006 Amended *Model Law*, along with a repeal of provisions that had previously allowed parties to opt out of the *Model Law*. The amended *IAA*[35] goes so far as to give primacy to the *Model Law* in international arbitration matters,[36] bringing Australia in line with the leading international arbitral procedure adopted by 78 states in 109 jurisdictions.[37] Parliament's express intention to promote and enforce international arbitral awards is evident in the object of the *IAA*. Section 2D stipulates that the object of the Act is to encourage the use of arbitration, to facilitate

[31] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (VIC); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2012* (WA; *Commercia Arbitration (National Uniform Legslation Act 2011* (NT); *Commercial Arbitration Act 2011* (TAS); *Commercial Arbitration Act 2013* (QLD); *Commercial Arbitration Act 2017* (ACT).

[32] *International Arbitration Act 1974* (Cth).

[33] *New York Convention*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

[34] *ICSID Convention,* opened for signature 18 March 1965 (entered into force 14 October 1966).

[35] *International Arbitration Act 1974* (Cth).

[36] Ibid s 21.

[37] UNICTRAL, *Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* (2018) <http://www.uncitral.org>

the use of arbitration agreements and to recognise and enforce arbitral awards, while giving effect to Australia's obligations under the *New York Convention* and *Model Law.*[38] Parliament's willingness to amend domestic law to reflect changing international standards and *Model Law* emphasises the pro-arbitration position adopted by the Australian legal system.

• Legislation Features

These enactments have brought Australia's domestic and international arbitration regimes in line with international best practice, and provide a strongly supportive environment for arbitration.

To quote the Hon Marilyn Warren AC, (Former Chief Justice of the Supreme Court of Victoria):

> The Australian Legislative Architecture is now one which has been significantly enhanced so as to be more effective and facilitative to International Arbitration.[39]

The accuracy of this statement is made obvious by an analysis of the latest amendments to the *IAA*. The Act supplements and goes beyond the *Model Law* in many respects. Division 3, for example, contains several provisions that mandatorily apply on an 'opt out' basis that aim to improve the arbitral process.[40] These provisions allow parties to obtain subpoenas from the court,[41] apply to the court for orders compelling persons to attend examination before the arbitral tribunal,[42] and provide that confidentiality of information in proceedings must be observed.[43] They also give tribunals the power to continue proceedings and make an award where a party fails to assist the tribunal after being ordered to do so,[44] the power to order a party

[38] *International Arbitration Act 1974* (Cth) s 2D.
[39] Warren, above n 18.
[40] *International Arbitration Act 1974* (Cth) s 22(2).
[41] Ibid s 23.
[42] Ibid s 23A.
[43] Ibid s 23C
[44] Ibid s 23B.

to provide security for costs,[45] to award interest up to the making of an award[46] and on award debts,[47] and to award costs with orders in respect of their taxation.[48] A very robust and detailed provision dealing with the consolidation of proceedings applies on an 'opt in' basis,[49] providing multiple grounds which may give rise to a consolidation of proceedings or an alternative action,[50] such as a joint hearing[51] or stay of proceedings.[52] Importantly, the *International Arbitration Act*[53] restricts the meaning of 'public policy' for the purpose of articles 34 and 36 of the *Model Law* to situations where the relevant interim measure or award was affected by fraud,[54] corruption,[55] or a breach of natural justice.[56]

Thus in review, arbitration legislation in Australia has clearly followed a narrative of pro-arbitration guided reform. This narrative, however, is not limited to legislation alone.

- **Judicial Support**

- **Generally**

It is well established that the success of international arbitration requires unwavering judicial support. An advantage of selecting Australia as a seat is the state and federal courts' willingness to adopt an arbitration-friendly approach. Indeed, the Federal Court in *Elders International Australia Pty Ltd v Beijing BE Green Import & Export*

[45] Ibid s 23K.
[46] Ibid s 25.
[47] Ibid s 26.
[48] Ibid s 27.
[49] Ibid s 22(5); s 24.
[50] Ibid s 24(1); 24(2)(a).
[51] Ibid s 24(2)(b).
[52] Ibid s 24(2)(c).
[53] Ibid.
[54] Ibid s 19(a).
[55] Ibid s 19(a).
[56] Ibid s 19(b).

Co Ltd[57] interpreted the role of courts under the *IAA* as to facilitate the encouragement and enforcement of international arbitral awards in a manner that is proper, efficient and impartial.[58]

A key feature of Australia's judicial system is the emphasis placed on ensuring consistency across state and federal jurisdictions. Presently, state and federal courts have concurrent jurisdiction over matters arising from the *International Arbitration Act.* This facilitates the consistent enforcement of arbitral awards, the result of which is the creation of a uniform body of arbitration jurisprudence over time.[59]

While the Federal Court of Australia has jurisdiction over international arbitration matters, the Supreme Courts preside over both domestic and international arbitration disputes.[60] A court that has played a leading role in catalysing positive reform is the Supreme Court of New South Wales. The Court championed reform to the *Uniform Commercial Arbitration Acts,* and offers parties a specialist Commercial Arbitration List in its Equity Division. This specialist list assures parties that their commercial arbitration matters will be dealt with efficiently and fairly by arbitration-experienced Judges. The Victorian Supreme Court offers a similarly specialised practice through its Arbitration List in the Commercial Court.[61] Many judges are in support of these Arbitration Lists. Indeed, the Hon Justice Croft, the Judge responsible for the Victorian Supreme Court List, stated:

> One of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or a group of judges. This should provide parties with greater certainty when judicial intervention or support is required.[62]

[57] [2014] FCAFC 185.

[58] Ibid 197 [14].

[59] Warren, above n 18, 3.

[60] Ibid 5.

[61] Ibid.

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

Extra-curially, senior Australian judges have also noticed increasing judicial support for arbitration in general. The Hon James Spigelman AC wrote, in his time as Chief Justice of New South Wales, that:

> the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch of supervisory jurisdiction directed to maintaining the integrity of the system.[63]

His successor, The Hon Thomas Bathurst AC, noted the same in his opening address to the *4th International Arbitration Conference* in 2016.[64] Similarly, in the Federal Court case of *Uganda Telecom v Hi-Tech Telecom,*[65] Foster J delivered this passage in support of international arbitration in Australia:

> The whole rationale of the [International Arbitration] Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution.[66]

These comments demonstrate the judiciary's clear support for arbitration, positioning Australia as an ideal seat with a favourable climate for international arbitration.

- **Non-Interventionist Approach**

Critical to the success of arbitration is respect for the arbitral process, and a non-interventionist approach to enforcing arbitral awards. Drawing on Professor Moens' reading of *Model Law* provisions,

[63] James Spigelman AC, 'Foreword' in L Nottage and R Garnett (ed), *International Arbitration in Australia* (The Federation Press, 2010) viii.

[64] Tom Bathurst AC, 'Opening Address at the 4th International Arbitration Conference' (Speech delivered at the 4th International Arbitration Conference, Sydney, 22 November 2016) [27].

[65] *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.

[66] Ibid [126].

'judicial intervention should be exceptional'.[67] These principles lie at the heart of the *New York Convention* and the *Model Law*.[68] The ever-increasing body of case law that has developed since Australia's modern arbitration laws were reformed demonstrates that these are principles that the Australian courts understand and abide by.

A cornerstone principle of international arbitration is the need to preserve party autonomy and the freedom to contract. The judiciary in Australia understand this principle, exemplified by *Comandate Marine Corp v Pan Australia Shipping Pty Ltd,*[69] where the Federal Court of Australia found that arbitration clauses must be construed liberally, giving proper regard to the 'broad and flexible meaning'[70] of the agreement. Their Honours gave consideration to the significance of the parties' agreement to submit to arbitration[71] and the need to respect party autonomy.[72]

Several years later, this non-interventionist approach to enforcement was affirmed by the High Court of Australia in its landmark 2013 decision *TCL Air Conditioner v The Judges of the Federal Court of Australia*.[73] In this case, the Court cemented in law that the final and conclusive nature of an arbitral award is a consequence of the parties' agreement to have their dispute referred to arbitration.[74] A non-interventionist approach to the enforcement of awards was therefore warranted, and importantly, the Court confirmed that the grounds of appeal of awards are limited to those provided for in the *Model Law*. This application of the law is consistent with Parliament's legislative

[67] Moens and Trone, above n 6.

[68] Paul Friedland and Professor Loukas Mistelis, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (Research Report, White & Case and Queen Mary University of London, 6 October 2015) 6.

[69] (2006) 157 FCR 45.

[70] Ibid [165].

[71] Ibid [164].

[72] Ibid [165].

[73] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

[74] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 [40], [111].

intention that courts should give weighting to the existence of an arbitration agreement, and subsequently, the parties' choice to refer their dispute to arbitration.[75]

Pro-Enforcement Bias

A feature which contributes to the appeal of arbitration is the finality of awards. Article III of the *New York Convention* asserts that member states must recognise foreign arbitral awards as binding, and enforce them accordingly. Consistent with international arbitration law, Australian law provides limited grounds for arbitral awards to be appealed.[76] In an Australian case considering an appeal for breaches of natural justice, the Full Court of the Federal Court set a high threshold for setting aside or denying enforcement of arbitral awards under the *Model Law*.[77] Not only is a breach of the rules of natural justice required, but it must also result in real unfairness or real practical injustice in the conduct of the dispute resolution process.[78]

This decision is one of many Australian decisions that confirms the limitations on the appeal and review of arbitral awards. An error in fact or law is insufficient grounds for a Court to set aside an award.[79] There is also no general discretion to refuse enforcement in Australia, and the public policy ground for refusing enforcement under the *IAA* is to be interpreted narrowly without residual discretion.[80] To quote Foster J of the Federal Court of Australia, the 'pro-enforcement bias'[81] of the *New York Convention* is mirrored in Australia's *IAA*. In *Traxys Europe SA v Balaji Coke*,[82] Foster J recognised the importance of restricting public policy grounds, warning:

[75] Rares, above n 28.

[76] Ibid 15.

[77] *TCL Air Conditioner (Zhongstan) Co Ltd v Castel Electornics Pty Ltd* [2014] FCAFC 83.

[78] Ibid.

[79] Moens and Trone, above n 6, 8.

[80] *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.

[81] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 [90] (Foster J).

[82] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276.

> If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.[83]

Aside from sitting as a Judge in the Federal Court of Australia, Foster J is the Arbitration Co-ordinating Judge in the New South Wales Registry of the Federal Court.[84] The Federal Court plays a large role in the enforcement of international arbitral awards. For instance, the Court encourages parties to include 'pre-litigation protocols' in contracts that direct parties to arbitration or other forms of alternative dispute resolution. On an institutional level, the Federal Court's inclusion of international arbitration as a National Practice Area within the National Court Framework is in itself indicative of the Australian judiciary's high regard for international arbitration.[85]

On a state level, the New South Wales Supreme Court goes so far as allowing specific parts of awards infected by a breach of natural justice to be severed from the balance of the award.[86] The *IAA*[87] does not restrict the circumstances in which an award can be severed. Therefore, Australian courts have powers to partially enforce an award, even where part of the award is void. This prevents the award from being declared void altogether if the void portion is separate and divisible.[88] This application of the Act was confirmed in the 2015 case *Aircraft Support Industries Pty Ltd v William Hare UAE LLC*.[89]

By narrowing the grounds on which arbitral awards can be appealed, Australian courts provide international commercial parties

[83] Ibid [90] (Foster J).
[84] Federal Court of Australia, *The Hon Lindsay Graeme FOSTER* (2017) FedCourt <http://www.fedcourt.gov.au>.
[85] Rares, above n 28.
[86] *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, affirmed on appeal in [2015] NSWCA 229.
[87] *International Arbitration Act 1974* (Cth) s 8(7A).
[88] *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229 [57] [60] (Bathurst CJ).
[89] Ibid.

with efficiency and finality, benefits which encourage many to turn to arbitration as a means of resolving disputes.[90]

• Arbitration Agreements

Australia's pro-arbitration stance can also be seen in the drafting of arbitration agreements. The *IAA*[91] requires a stay where parties have undertaken to submit to arbitration any or all differences that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not.[92] The definition of an arbitration agreement under the *IAA*[93] accords with Article II of the New York Convention, thus ensuring that Australian courts are construing agreements in a manner consistent with international law. Further, the use of ambiguous terminology such as 'may' as opposed to 'must' or 'shall' in arbitration agreements are common sources of disputes over the validity of the agreement, not only in Australia, but the world over. However, Australian courts will enforce arbitration agreements containing the word 'may' where a proper interpretation of the clause demonstrates that the parties intended that arbitration be mandatory.[94] By broadly construing the language of arbitration agreements, Australian courts give effect to parties' intention to arbitrate, again demonstrating the pro-arbitration attitudes of the Australian legal system.

Arbitrability

Arbitrability, being whether a dispute is capable of settlement by arbitration,[95] is another area often subject to dispute. Admittedly it is an issue not fully resolved, with general jurisprudence being that

[90] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR [63] [90].
[91] *International Arbitration Act 1974* (Cth).
[92] *International Arbitration Act 1974* (Cth) s 3(1) (definition of 'arbitration agreement').
[93] Ibid.
[94] *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301.
[95] Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2nd ed, 2013) 161.

some commercial matters warrant the kind of close public scrutiny that only courts can provide.[96] Broadly speaking, matters deemed non-arbitrable include anti-trust and competition disputes, securities transactions,[97] insolvency, taxation,[98] insurance,[99] workplace[100] and domestic building disputes.[101] However, the courts have refrained from taking a categorical approach. Instead, the question of arbitrability is first considered with reference to domestic law and public interest, and secondly, as a matter of construction.[102] The courts will give regard to the construction of the arbitration agreement, considering whether the scope of the agreement is broad enough to include such disputes. Notably, disputes arising from private contractual interaction between two commercial entities are more likely to be considered arbitrable.[103] The balance of case law suggests that courts are increasingly treating disputes as arbitrable, showing a liberal approach to arbitrability in Australia.[104]

Thus, overall, Australian courts have a strong history of promoting and supporting the autonomy of arbitral proceedings, limiting their involvement to those situations in which they have been specifically

[96] *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 279 ALR 759; Michael Mustill and Stewart Boyd, *Commercial Arbitration* (Butterworths, 2nd ed, 1989) 149.

[97] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [97]-[98] (Allsop J) (concerning an international commercial arbitration governed by the Model Law); *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1.

[98] *AED Oil v Puffin FPSO Ltd* [2009] VSC 534 [45].

[99] *Insurance Contracts Act 1984* (Cth) s 43(1).

[100] *Metrocall Inc (Successor by Merger to Pronet In) v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1.

[101] Some domestic building disputes are barred from arbitration by statute, see for example *Home Building Act 1989* (NSW) s 7C. See generally Jones, above n 95, 152-161.

[102] Warren, above n 18.

[103] See, *inter alia*, *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Rinehart v Welker* [2012] NSWCA 95.

[104] Jones above n 95, 162.

requested to do so by parties or tribunals, and to the limit provided by the applicable laws.

Arbitral Institutions

Australia's appeal as a seat is enhanced by the existence of the premier international arbitration institution, the Australian Centre for International Commercial Arbitration (ACICA). The effectiveness of arbitral institutions can be measured by two primary factors: first, modern institutional rules that deal with complex contemporary arbitration issues, and second, world class facilities that ensure the smooth conduct of proceedings.

Arbitration Rules

ACICA plays a pivotal role in maintaining the high standard of arbitrations in Australia, enabled by its sophisticated Arbitration Rules. In 2005, ACICA introduced official Arbitration Rules designed to bring Australia in line with international best practice.[105] Notably, Professor Moens played a significant role in the release of the 2005 ACICA Rules, by providing official commentary on the Rules in collaboration with Dr Samuel Luttrell. The ACICA Rules were inspired by long-standing international arbitration laws and practices, combined with the rules of leading international arbitration institutions.[106] The 2005 Rules also included provisions specifically tailored to the needs of Australia as a seat.[107] For example, Article 17.3 authorised any member of the tribunal to make procedural decisions alone, providing the parties with greater efficiency by eliminating the delay arising from arbitrators needing to consult with one-another on procedural questions.[108] It is this flexibility that has allowed ACICA to effectively support and facilitate international arbitrations in Australia.

[105] Professor Doug Jones, 'The Australian Centre for International Commercial Arbitration (ACICA) and its Rules' (2009) *Dusseldorf International Arbitration School,* 1.

[106] Ibid.

[107] Ibid.

[108] Australian Centre for International Commercial Arbitration, *ACICA Rules* (At 1 August 2005) Article 17.

While the 2005 Rules have since been superseded by the 2016 Rules, many provisions from the 2005 Rules, including Article 17.3, are still reflected in the Rules today.

The ACICA Rules have undergone significant reform to ensure arbitration in Australia remains consistent with international best practice. Following the emergence of the amended UNCITRAL Arbitration Rules in 2010, ACICA released revised Arbitration Rules in 2011 and 2016 respectively. The main feature of the 2011 revision was incorporating emergency arbitrator provisions. The introduction of these provisions differentiated ACICA from many international institutions, as it was one of the first institutions to introduce such provisions.[109] These revisions gave parties greater flexibility, such as the ability to seek emergency interim measures of protection from an emergency arbitrator prior to the creation of the tribunal.[110] Emergency arbitration has, in recent years, become a topical point of discussion for the international arbitration community, and the ACICA Rules provide a solid emergency arbitration framework dealing with matters such as emergency arbitrator appointment, emergency interim measures, and the binding and enforceable effect of emergency decisions.[111] 2011 also witnessed the introduction of the Appointment of Arbitrator Rules, providing parties with greater ease when applying for arbitrator appointments for disputes seated in Australia.[112] These rules have also been superseded by the 2016 Rules, however many key features of the 2011 Rules, including the emergency arbitrator provisions, remain an important aspect of ACICA's current rules.

The current ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions came into force on 1 January 2016. One of the major objectives of the 2016 revisions has been to address increasingly vocal public concern over the time and cost of international arbitrations. Thus the ACICA Rules include an 'overriding objective' to conduct

[109] ACICA, *ACICA Rules 2011* (2011) <https://acica.org.au/acica-rules-2011/>

[110] ACICA, *ACICA Rules (Incorprating Clauses for Arbitration and Mediation)* (At 1 August 2011).

[111] Ibid Sch 1.

[112] Ibid.

proceedings with fairness and efficiency in proportion with the value and complexity of a given dispute.[113] The 2016 Rules place greater emphasis on party and tribunal autonomy.[114] Under these Rules, arbitrators are mandated to adopt certain case management practices, such as case management conferencing, and to encourage settlement by the parties.[115] ACICA has also sought to facilitate effective consolidation and joinder,[116] and to protect arbitrators in the discharge of their functions through a robust immunity.[117]

ACICA also provides a separate set of Expedited Arbitration Rules that operate on an opt-in basis to manage arbitration in a quick, cost effective and fair manner where time is of the essence. These were initially introduced in 2008 to maximise cost efficiency and minimise delay, giving consideration to the scope and complexity of the dispute itself.[118] In 2016, ACICA released revised Expedited Arbitration Rules, ensuring Australian standards remain consistent with international best practice. Further, ACICA's commitment to demonstrating leadership in the field can be seen with the publication of its Tribunal Secretary Panel and Guidelines, which came into effect on 1 January 2017. The object of the Guidelines is 'to encourage transparency with respect to the appointment, duties and remuneration of tribunal secretaries'.[119] Evidently, the conception of the ACICA Rules represents a landmark event in ACICA's history as a leading institution.

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[113] ACICA, *ACICA Arbitration Rules Incorporating the Emergency Arbitrator Provisions* 2016 (At 1 January 2016) Article 3 ('*ACICA Rules*').

[114] Malcolm Holmes et al, 'The 2016 Rules of the Australian Centre for International Commercial Arbitration: Towards Further Cultural Reform' (2016) *Asian International Arbitration Journal* 211, 212.

[115] ACICA, *ACICA Rules 2016* (At 1 January 2016) Article 21.3.

[116] Ibid art 14.

[117] Ibid art 49.

[118] Ibid.

[119] ACICA, *ACICA Guideline on the Use of Tribunal Secretaries* (1 January 2017) Australian Centre for International Commercial Arbitration <https://acica.org.au/acicaguidelineontheuseoftribunalsecretaries/>.

- **Features and Facilities**

The development of excellent infrastructure to support international arbitration has set Australia apart as a regional seat. In Australia, international firms have a clear right to practice domestic litigation, which cannot be said for other seats, such as Singapore or Hong Kong. Australia is also home to institutions which offer high-quality administrative services including custom-designed ADR venues, world-class technology, complimentary refreshments, security access and translation services.[120] In addition to ACICA, Australia has numerous arbitration institutions and centres, including the Chartered Institute of Arbitrators (CIArb), the Resolution Institute, Australian Maritime and Transport Arbitration Commission (AMTAC), Australian International Disputes Centre (AIDC) and the Australian Disputes Centre (ADC).[121]

The Australian Disputes Centre, established in 2010, is the centrepiece of Sydney's local arbitration framework and provides world class dispute resolution services. This custom designed venue for arbitration is located in the heart of Sydney's central business district, in close proximity to counsel chambers, most of Australia's largest (and in many cases international) law firms, state and federal government offices, and first class accommodation. It offers all the features of the best dispute resolution centres, including conference rooms, breakout rooms, and excellent interpretation services and can be customised to the needs of the arbitration to maximise cost effectiveness for the parties. It should be noted that ACICA has a close relationship with ADC, allowing the two organisations to promote arbitration together whilst offering an extensive range of commercial dispute resolution services.[122] The shared objective of these organisations, that being to further arbitration within Australia, has resulted in high-quality service and facilities for use by commercial parties.

[120] ACICA, *Australian Disputes Centre International* <https://acica.org.au/australian-disputes-centre/>.

[121] Doug Jones and Bjorn Gehle, 'Australian Centre for International Commercial Arbitration (ACICA) (2010) *World Arbitration Reporter.*

[122] Ibid.

A cornerstone feature of arbitration institutions such as ACICA is their role in implementing initiatives designed to promote and improve arbitration practices in Australia. A prime example of this is ACICA's collaboration with the judiciary to form the ACICA Judicial Liaison Committee. The committee, currently chaired by Chief Justice of the Federal Court James Allsop, was established in 2010 with the objective of creating consistency in arbitration-related court proceedings.[123] In terms of members, the committee is comprised of ACICA representatives and judges from the Federal and Supreme Courts of Australia. Through cooperation with the judiciary and other arbitral organisations, ACICA has played an integral role in the continuing success of international arbitration in Australia.

The facilities of Australian arbitral institutions are enhanced by the use of leading technology. In August 2016, ACICA published their 'Draft Procedural Order for the Use of Online Dispute Resolution Technologies,' which provides a framework for using new technologies for arbitration in accordance with the ACICA rules.[124] In the introduction to the Draft Procedural Order, ACICA outlines video conferencing and WebEx Meeting Centre Online Product as examples of tools that can assist in cross-border arbitration, particularly during preliminary conferences.[125] Similarly, in Australian domestic courts, the Federal Court of Australia has provided for the use of electronic filing, hearings and virtual courtrooms for case management.[126] The Victorian Supreme Court has also adopted a Practice Note favouring the use of predictive coding to streamline the process of

[123] ACICA, *Judicial Liaison Committee* (2018) Australian Centre for International Commercial Arbitration <https://acica.org.au/judicial-liaison-committee/>

[124] ACICA, *Draft Procedural Order for the Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations* (2016) ACICA <https://acica.org.au/wp-content/uploads/2016/08>

[125] Ibid.

[126] Federal Court of Australia, *General Practice Note – Technology and the Court*, 25 October 2016. See also Damian Sturzaker, 'Technical Innovations in International Arbitration – Why Australia needs to move to Arbitration 2.0' (2014) *CIArb* <https://www.ciarb.net.au/resources/international-arbitration/>

discovery of large volumes of electronically stored information.[127] The appearance of witnesses in arbitration by video-conference is also now commonplace.[128] With the growing acceptance of technology by the courts and ACICA, it is likely that the technology capabilities of Australia will continue at the leading edge of international best practice.

Australian arbitration institutions have also developed a focus on diversity in arbitration, which is increasingly important today.[129] In terms of gender diversity, ACICA has demonstrated real leadership. Between 2011 and 2016 a quarter of ACICA's appointments have been female arbitrators,[130] and in 2016 its president signed the Equal Representation in Arbitration Pledge committing to encouraging greater female representation and diversity in arbitration.[131]

Evidently, arbitration institutions have played a large role in promoting, regulating and enabling international arbitration in Australia. The continual development of arbitration rules and facilities has positioned Australia as a leading arbitral seat in the Asia-Pacific region.

• Conclusion

Australia's legal framework supporting international arbitration is world-leading, characterised by a willingness to adapt to meet, and frequently, to lead international best practice.

Australia's appeal as a seat is well summarised by the Hon Marilyn Warren AC's comment that:

[127] Supreme Court of Victoria, *Practice Note General No 5 – Technology in Civil Litigation Practice Note,* 30 January 2017*,* 8.9.

[128] Damian Sturzaker, 'Technical Innovations in International Arbitration - Why Australia needs to move to Arbitration 2.0' Chartered Institute of Arbitrators (online) 2014, <https://www.ciarb.net.au/resources/international-arbitration/>

[129] Berwein Leighton Paisner, 'International Arbitration Survey: Diversity on Arbitral Tribunals: Are We Getting There' (Research Report, Berwein Leighton Paisner, 10 January 2017) 7.

[130] Lara Bullock, 'ACICA aims for equality in arbitration', *Lawyers Weekly* (online) 27 June 2016, <https://www.lawyersweekly.com.au/news/>

[131] ACICA, *Media Release Equal Representation in Arbitration Pledge* (20 June 2016) ACICA <https://acica.org.au/wp-content/uploads/>

> [o]ur Australian brand of arbitration is one that looks to reduce transaction costs, ensure certainty and efficiency [for] parties, and one that provides a neutral and safe seat to dispute resolution.[132]

The combination of a pro-arbitration legislature, an independent and supportive judiciary, and effective arbitral institutions and centres makes Australia an ideal option for both domestic and international arbitration. Having a stable political landscape and being cost effective, culturally sensitive, and proximate to many of the Asia Pacific's economic hubs supports the notion that the tyranny of distance no longer plagues Australia in the commercial context. Rather, Australia is in a prime position to lead international arbitration in the Asia Pacific given all of these qualities. Thus, the tyranny of distance now appears to be outmatched by the real capabilities provided by Australian arbitration, as commercial parties look to Australia as a seat of arbitration, safe in the knowledge of its numerous practical and legal benefits.

[132] Warren, above n 18, 17.