

## AN AUSTRALIAN INTERNATIONAL COMMERCIAL COURT – NOT A BAD IDEA OR WHAT A BAD IDEA?

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### Introduction

- 1 It is now trite to observe that we live in an age of globalisation. In commercial terms, such globalisation has gone arm in arm with the liberalisation of international trade and the opening up of new markets, both from behind what was once the Iron Curtain and in formerly closed economies such as China. Trading alliances and allegiances have shifted both in geographic terms and on account of products on offer. They are still shifting.
- 2 Much commercial activity transcends national boundaries, facilitated by e-commerce, new technologies and even new currencies. As Chief Justice Menon has observed, long gone are the days of “riotous fairs and bazaars in which merchants gathered to barter and trade”.<sup>1</sup> The marketplace of today is, as his Honour described it, “a metaphysical global interface for the exchange of goods and services, unbounded both in its reach and potential”.<sup>2</sup>
- 3 Cross-border disputes are an “inevitable incident[t]”<sup>3</sup> of this internationalisation of commerce. The pace and dynamic nature of change in the global

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<sup>1</sup> Chief Justice Sundaresh Menon, ‘Doing Business Across Asia: Legal Convergence in an Asian Century’ (Speech delivered at the Singapore Academy of Law’s International Conference, Singapore, 21 January 2016) [1].

<sup>2</sup> Ibid.

<sup>3</sup> Chief Justice James Spigelman, ‘International Commercial Litigation: An Asian Perspective’ (2007) 35 *Australian Business Law Review* 318, 318.

economy, including the phenomenon of “disruption”, have led to the growth of and changed the nature of transnational disputes.

- 4 From an Australian perspective, not only has there been an exponential growth in the quantity of transnational disputes, but the nature of those disputes has also changed with the realignment of Australia’s major trading partners. Increasingly, as Australia continues to strengthen its ties with the Asia-Pacific, those disputes will involve legal systems very different to our own. The United Kingdom has long ceased to be Australia’s primary trading partner.
- 5 The phenomenon of globalisation, in numerous different areas, finds reflection in a range of Australian cases in recent years concerning:
  - people working abroad;<sup>4</sup>
  - people travelling abroad;<sup>5</sup>
  - international capital raisings;<sup>6</sup>
  - the operation of multi-national corporations with foreign subsidiaries and the operation of double taxation treaties;<sup>7</sup>
  - the existence of international insurance and reinsurance markets;<sup>8</sup>
  - the rise of the internet;<sup>9</sup>

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<sup>4</sup> *Puttick v Tenon Ltd* (2008) 250 ALR 482; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; *McGregor v Potts* (2005) 68 NSWLR 109; *Michael Wilson and Partners Ltd v Emmott* [2019] NSWSC 218.

<sup>5</sup> *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Povey v Qantas Airways Ltd* (2005) 223 CLR 189.

<sup>6</sup> *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 1)* (1996) 64 FCR 1; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 2)* (1996) 64 FCR 44.

<sup>7</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>8</sup> *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance (in liq)* (2003) 254 ALR 29.

- international trade;<sup>10</sup>
- the import and export of goods<sup>11</sup> and services;<sup>12</sup>
- international distributorship<sup>13</sup> and franchising arrangements;<sup>14</sup>
- international investment arrangements;<sup>15</sup>
- the international sale of businesses;<sup>16</sup> and
- mixed nationality marriages.<sup>17</sup>

6 Against this background of increasing globalisation, it is unsurprising that an “ordered efficient dispute resolution mechanism”<sup>18</sup> has been considered “an essential underpinning of commerce”.<sup>19</sup> For many years, international commercial arbitration has been the “ordered efficient dispute resolution mechanism” of choice. With the framework supplied by the New York Convention, which came into effect in 1959,<sup>20</sup> it is really no surprise that the flourishing of international arbitration has tracked the growth of commercial globalisation over the last 50 years.

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<sup>9</sup> *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 351 ALR 584 (‘Valve’).

<sup>10</sup> *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 (‘Comandate’).

<sup>11</sup> *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1; *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724; *Mackellar Mining Equipment Pty Ltd v Thornton* [2019] QCA 77.

<sup>12</sup> *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2008) 249 ALR 458 (‘Clough Engineering’); *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033; *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61 (‘Hive’).

<sup>13</sup> *Armacel Pty Ltd v Smurfit Stone Container Corporation* (2008) 248 ALR 573; *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111; *Avwest Aircraft Pty Ltd v Bombardier Inc* [2018] WASC 139; *Vautin v BY Winddown Inc* [2016] FCA 632.

<sup>14</sup> *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 (‘Francis Travel Marketing’); *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1.

<sup>15</sup> *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383.

<sup>16</sup> *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1.

<sup>17</sup> *Henry v Henry* (1996) 185 CLR 571; *Du Bray v McIlwraith* (2009) 259 ALR 561.

<sup>18</sup> *Comandate* (2006) 157 FCR 45, 95 [192] (Allsop J).

<sup>19</sup> *Ibid.*

<sup>20</sup> Australia’s *International Arbitration Act*, which is based on the New York Convention, was passed in 1974.

7 There is, however, a growing recognition of the value of providing to, or at least offering, commercial parties to cross-border transactions a genuine alternative to arbitration for resolving their disputes, not least because, as Chief Justice Menon put it:

“... arbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an *ad hoc*, consensual, convenient and confidential method of resolving disputes. It was not designed to provide an *authoritative* and *legitimate* superstructure to facilitate global commerce.”<sup>21</sup> (emphasis in original)

8 There are also signs, as I shall suggest, that the allure of international arbitration is perhaps not what it once was.

9 Attention has therefore turned to international commercial courts (**ICCs**). Indeed, in recent years, there has been a proliferation of such courts around the world. The ever-growing list now includes: the Dubai International Financial Centre (**DIFC**) Courts; the Qatar International Court; the Singapore ICC; the Abu Dhabi Global Market Courts; the Astana International Financial Centre Court; the China ICCs; the Netherlands Commercial Court; the International Chambers of the Paris Courts; and the Chamber for International Commercial Disputes of the District Court of Frankfurt/Main. A further proposal to establish a Brussels International Business Court, which was intended to be operational by 2020, is reported to have stalled due to insufficient political support. With Brexit on the horizon, these new European ICCs, seeking to fill the gap that will be left by London, are no doubt vying for a share of the London Commercial Court’s work, which may dwindle without

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<sup>21</sup> Chief Justice Sundaresh Menon, ‘International Commercial Courts: Towards a Transnational System of Dispute Resolution’ (Speech delivered at the Dubai International Financial Centre Courts Lecture Series 2015, Dubai, 22 January 2015) [14]. See also Chief Justice Tom Bathurst, ‘The Importance of Developing Convergent Commercial Law Systems, Procedurally and Substantively’ (Speech delivered at the 15<sup>th</sup> Conference of Chief Justices of Asia and the Pacific, Singapore, 28 October 2013) [28]-[29]; Chief Justice Robert French, ‘Transnational Dispute Resolution’ (Speech delivered at the Supreme and Federal Court Judges’ Conference, Brisbane, 25 January 2016) 14-15; Justice Kannan Ramesh, ‘International Commercial Courts: Unicorns on a Journey of a Thousand Miles’ (Speech delivered at the Conference on the Rise of International Commercial Courts, Qatar, 13 May 2018) [6]-[8].

the benefit of a framework for the mutual recognition of judgments.<sup>22</sup> It has been suggested that London's withdrawal would be better compensated by a European Commercial Court, rather than these national European ICCs.<sup>23</sup>

10 The question whether an Australian ICC is necessary or desirable has been the subject of some debate.<sup>24</sup> A number of judges, including Chief Justice Allsop, have expressed their support for the establishment of such a court.<sup>25</sup> In 2016, Chief Justice Warren and Justice Croft stated that it was an "ideal time" for the introduction of an ICC in Australia, to the extent that it would complement and support an increasing number of trade agreements negotiated between Australia and the Asia-Pacific.<sup>26</sup> That same year, a spokesperson for the Commonwealth Attorney-General is reported as having confirmed that the idea was being considered by the government.<sup>27</sup> Nothing, however, appears to have resulted from this consideration.

11 An alternative model of a non-national, regional ICC was proposed by Chief Justice Bathurst.<sup>28</sup> His Honour suggested the establishment of:

"... an international commercial tribunal in [the Asia-Pacific] region, the members of which would be sitting judges. Such a tribunal could apply those transnational principles of international commercial law that exist, supplemented by the domestic law chosen by the parties. It could also develop its own procedure ... which to a degree harmonise dispute resolution procedures in civil and common law jurisdictions."<sup>29</sup>

12 This proposal is significantly more "international" than the existing ICC models. Seeking to overcome the "mistrust by parties from all countries of the

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<sup>22</sup> Sophie Hunter, 'Will European Initiatives to Create International Commercial Courts be Attractive Enough for Foreign Litigants Post Brexit?', *KSLR EU Law Blog*, 7 February 2019 <<https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1377>>.

<sup>23</sup> *Ibid.*

<sup>24</sup> See, eg, Tracy Albin, 'The Dispute Resolution Lag in Australia: The Time to be Aggressive is Now' (2017) 28 *Australasian Dispute Resolution Journal* 149, 153-4.

<sup>25</sup> Katie Walsh, 'Chief Justice Allsop Hints at Role for Federal Court in Global Company Stousses', *Australian Financial Review* (online), 27 October 2017 <<https://www.afr.com/business/legal/chief-justice-allsop-hints-at-role-for-federal-court-in-global-company-stousses-20171024-gz7iod>>.

<sup>26</sup> Chief Justice Marilyn Warren and Justice Clyde Croft, 'An International Commercial Court for Australia – Looking beyond the New York Convention' (Speech delivered at the Commercial CPD Seminar Series, Melbourne, 13 April 2016).

<sup>27</sup> 'Current Issues' (2016) 90 *Australian Law Journal* 451, 453.

<sup>28</sup> Bathurst, 'Convergent Commercial Law Systems', above n 21.

<sup>29</sup> *Ibid* [49].

judiciaries of other countries”,<sup>30</sup> the Chief Justice proposed that the tribunal, much like a three-member arbitration panel, be constituted of:

“... sitting judges, say for example one from each of the states a party to the contractual dispute and a third judge. The system would provide a de-localised and transparent system that was effectively neutral of the parties to the dispute.”<sup>31</sup>

- 13 Focusing, however, for the purposes of this paper, on the question of an Australian ICC, it is true that the establishment of such a court would, as Chief Justice Warren and Justice Croft stated, provide “the opportunity for the nation as a whole to present an integrated commercial court to the region and to the world”.<sup>32</sup> But as sceptics might say, “it’s marketing”.<sup>33</sup> The chair of the Hong Kong International Arbitration Centre (**HKIAC**), Ms Teresa Cheng, said as much in respect of the Singapore ICC, in addition to doubting the need for an Australian ICC.<sup>34</sup> Those sceptics might also question what role (if any) a court should play in marketing itself. Is that part of the judicial function?
- 14 So does Australia need an ICC? Is there in fact a gap in either the international dispute resolution landscape in Australia (including its existing commercial courts) or Australia’s capacity to accommodate international commercial disputes that would otherwise be serviced by an Australian ICC, were one to be established? Or is the rise of ICCs a trend that we should approach with at least some degree of scepticism?
- 15 Expressing a purely personal view, albeit as one who has spent most of his professional career specialising in transnational dispute resolution (both litigation and arbitration), I announce myself as something of a sceptic.

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<sup>30</sup> Ibid [50].

<sup>31</sup> Ibid.

<sup>32</sup> Warren and Croft, above n 26, 35.

<sup>33</sup> Lara Bullock, ‘Debate Over Need for International Commercial Court in Aus’, *Lawyers Weekly* (online), 28 October 2016 <<https://www.lawyersweekly.com.au/news/19850-debate-over-need-for-international-commercial-court-in-australia>>.

<sup>34</sup> Ibid.

- 16 The reality is that commercial parties can already secure most, if not all, of the benefits promised by an Australian ICC by the simple expedient of an exclusive jurisdiction agreement nominating an Australian state or territory Supreme Court with a commercial list. The rules of all of these courts governing the assumption of personal jurisdiction over foreign defendants do not require any further or other connection with the jurisdiction.<sup>35</sup> A jurisdiction or submission to suit clause is sufficient, and there are no relevant restrictions in terms of subject matter jurisdiction. This is the mechanism by which so many international cases with no connection whatsoever to the United Kingdom have come to be tried in the London Commercial Court for many decades.
- 17 Once this point is appreciated, it must be asked what would be the benefits, if any, of creating a new institution called an Australian ICC, and what might be the potential costs involved and pitfalls that may be encountered?
- 18 Before I explore these questions, it is useful to reflect upon not only the growth of international arbitration but also some of its perceived shortcomings, for it is these shortcomings that may have created the “space” for ICCs to emerge.

### **International commercial arbitration – whirlwind romance; second thoughts?**

- 19 What, it might reasonably be supposed, commercial parties most want is honest, quick, skilled dispute resolution by experienced, competent adjudicators.<sup>36</sup> Pausing there, this is precisely what an efficient court system should strive to deliver. The growth and popularity of international arbitration in the last 50 years has in part, however, been contributed to by a perception that traditional national court systems are slow, cumbersome and expensive,

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<sup>35</sup> See, eg, *Uniform Civil Procedure Rules 2005* (NSW) sch 6(k) ('UCPR'). There is no restriction on a foreign party *commencing* proceedings in an Australian Supreme Court so long as there is *in personam* or personal jurisdiction over the defendant.

<sup>36</sup> This sentiment was expressed by a number of users of the Commercial Division of the Supreme Court of the State of New York: see NYS Courts, 'A Forum for Business Disputes: The Commercial Division of the Supreme Court of the State of New York', 22 December 2016 <<http://www.nycourts.gov/courts/comdiv/PDFs/CommercialDivision2016Transcript.pdf>>.

weighed down and delayed by procedure and the encouragement and indulgence of interlocutory disputes.<sup>37</sup> As I shall explain later in this paper, that is not now a wholly accurate or fair picture of the contemporary Australian court system nor need it be (although it must be acknowledged that the position is not uniform throughout the various Australian jurisdictions).<sup>38</sup>

20 International commercial arbitration has long been favoured amongst the international dispute resolution community. The results of the 2018 Queen Mary University of London arbitration survey suggests that this remains the case, with an overwhelming 97 per cent of respondents indicating a preference for arbitration as their dispute resolution mechanism of choice.<sup>39</sup> The main attractions of arbitration are oft-cited and need only be mentioned: neutrality, confidentiality, flexibility, speed, cost efficiency and the enforceability of arbitral awards.<sup>40</sup>

21 The growth of international arbitration has been aided and abetted by the courts, not least Australian courts. So much is evident in decisions which:

- adopt a generous construction as to the scope of arbitration clauses;<sup>41</sup>
- have expanded the concept of arbitrability or the subject areas that are capable of settlement by arbitration;<sup>42</sup>

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<sup>37</sup> This was not an unprecedented phenomenon. In 1909, Earl Loreburn, as Lord Chancellor, reported to the Royal Commission on the King's Bench Division that businessmen were driven to arbitration by the "confusion and uncertainty" in the King's Bench Division of the High Court: see William Cornish et al, *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol XI, 829 n 191.

<sup>38</sup> Nor is this accurate of a number of other commercial courts around the world, such as the Commercial Division of the Supreme Court of the State of New York: see, eg, The Chief Judge's Task Force on Commercial Litigation in the 21<sup>st</sup> Century, 'Report and Recommendations to the Chief Judge of the State of New York' (Report, June 2012).

<sup>39</sup> Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) 5.

<sup>40</sup> See, eg, Menon, 'International Commercial Courts', above n 21, [7]; Kevin Lindgren, 'The Choice Between Litigation and Arbitration' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 209, 211-17.

<sup>41</sup> *Francis Travel Marketing* (1996) 39 NSWLR 160; *Comandate* (2006) 157 FCR 45.

<sup>42</sup> *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772; *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398; *Rinehart v Welker* (2012) 95 NSWLR 221; *Francis Travel Marketing* (1996) 39 NSWLR 160 (a *Trade Practices Act 1974* (Cth) claim for misleading or



- adopt restraint in the scrutiny of the quality of the reasoning process in the award;<sup>43</sup>
- adopt a relatively circumscribed view as to arbitral misconduct,<sup>44</sup> adequacy of notice,<sup>45</sup> and bias;<sup>46</sup> and
- take an extremely limited view as to when considerations of public policy will preclude enforcement of an award.<sup>47</sup>

22 According to the Queen Mary survey, enforceability continues to be the most valued characteristic of arbitration, reinforcing the success of the New York Convention.<sup>48</sup> Respondents also selected neutrality, flexibility and confidentiality as highly attractive features of arbitration.<sup>49</sup> Although many respondents valued the ability to select arbitrators,<sup>50</sup> it must also be recognised that the quality of available arbitrators varies greatly. I stress the word “available”. The very best arbitrators are in heavy demand (much like the best barristers) and constraints on availability may have a direct impact on the speed of dispute resolution.

23 Misconduct and bias are also consistent concerns in the arbitration space (of course, certain arbitrators may be of less than desirable quality without reaching this threshold).<sup>51</sup> True it is that the courts serve to “maintain the integrity of commercial arbitration processes”,<sup>52</sup> but in exercising this function,

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deceptive conduct); *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 (a statutory claim for contribution under the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)); *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (an *inter partes* claim under the *Corporations Act 2001* (Cth)); *Re Infinite Plus Pty Ltd* (2017) 95 NSWLR 282 (a shareholder oppression claim).

<sup>43</sup> *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 (‘*TCL Air Conditioner*’); *Sauber Motorsport AG v Giedo Van Der Garde BV* (2015) 317 ALR 786

<sup>44</sup> *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535.

<sup>45</sup> *International Relief and Development Inc v Ladu* [2014] FCA 887.

<sup>46</sup> *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.

<sup>47</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.

<sup>48</sup> Queen Mary University of London, above n 39, 7.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Menon, ‘International Commercial Courts’, above n 21, [13].

<sup>52</sup> Spiegelman, ‘International Commercial Litigation’, above n 3, 320.

they have shown significant restraint in interfering with the arbitral process and setting aside awards. As Chief Justice Hwang observed, “courts should supervise with a light touch but assist with a strong hand”<sup>53</sup> – they should “read awards generously and not look assiduously for defects in process, unless really serious violations of due process have occurred which have caused real prejudice”.<sup>54</sup>

24 When questioned as to the worst qualities of arbitration, respondents to the Queen Mary survey expressed their discontent with the cost and speed of arbitration, both of which are no doubt undermined by, among other things, the frequent use of three-member panels, availability constraints and, paradoxically, the absence of any appellate mechanism.<sup>55</sup> A number of other shortcomings were also identified by respondents, including the lack of effective sanctions during the arbitral process and the lack of power in relation to third parties and joinder.<sup>56</sup> Keeping in theme with this Conference, as I flagged earlier, the capacity of arbitration to contribute to the development and convergence of international commercial law is also limited.<sup>57</sup>

25 Most of these deficiencies and shortcomings are, at least in Australia, addressed by the superior courts: they are equipped with an established appellate structure, coercive powers and a broad scope for joinder of third parties, including joinder of those outside the jurisdiction; judicial independence and impartiality inhere in the office of the judge;<sup>58</sup> and, thanks to the principle of open justice and the operation of precedent, judicial decisions have the capacity to drive the harmonisation of the law. The courts are also able to accommodate those disputes that are simply better suited to

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<sup>53</sup> Michael Hwang, ‘Commercial Courts and International Arbitration – Competitors or Partners?’ (2015) 31 *Arbitration International* 193, 194.

<sup>54</sup> *Ibid.*

<sup>55</sup> Queen Mary University of London, above n 39, 7-8; Menon, ‘International Commercial Courts’, above n 21, [47]-[48]. See also Lucy Reed, ‘International Dispute Resolution Courts: Retreat or Advance?’ (2018) *McGill Journal of Dispute Resolution* 129, 132.

<sup>56</sup> Queen Mary University of London, above n 39, 8.

<sup>57</sup> Chief Justice Tom Bathurst, ‘Benefits of Courts such as the Singapore International Commercial Court (SICC)’ (Speech delivered at Sydney Arbitration Week, Sydney, 21 November 2016) [7]-[10].

<sup>58</sup> Justice Margaret Beazley and Chris Frommer, ‘The Distinctive Role of the Judge: ‘The Least Dangerous Branch of Government’ in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 3, 7; Bathurst, ‘Convergent Commercial Law Systems’, above n 21, [33].

resolution by way of litigation,<sup>59</sup> as well as those disputes that can only be resolved by the courts, such as disputes the subject matter of which is beyond the reach of arbitration<sup>60</sup> and disputes that raise novel legal issues.<sup>61</sup>

26 More than this, however, the courts have done much to improve their time and cost efficiency, characteristics historically (although, based on the results of the Queen Mary survey, perhaps no longer) associated with arbitration. Chief Justice Spigelman has observed that there is little evidence in Australia that arbitration is in fact cheaper than litigation.<sup>62</sup> In some Australian jurisdictions, delay is also not a pertinent consideration,<sup>63</sup> and indeed some Australian commercial courts hear and determine cases just as, if not more, quickly than they would be if they were referred to arbitration where there is, of course, no sanction or standard governing the speed of delivery of the award.

27 The positive characteristics of many Australian commercial courts can in part be attributed to what Chief Justice Allsop described as the “legal culture”<sup>64</sup> of our courts – that is, “the values and expectations of those who participate in commercial dispute resolution in the jurisdiction ... constituted and nourished ... by practice, custom, convention and attitude”<sup>65</sup> – which continues to evolve towards simplicity and expedition.

28 It can also be attributed to procedural innovations such as dynamic case management and the 2012 reforms to disclosure in the Equity Division of the Supreme Court of New South Wales. Conscious of the “cumbersome and

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<sup>59</sup> Spigelman, ‘International Commercial Litigation’, above n 3, 320.

<sup>60</sup> Hwang, above n 53, 195.

<sup>61</sup> Menon, ‘International Commercial Courts’, above n 21, [12].

<sup>62</sup> Spigelman, ‘International Commercial Litigation’, above n 3, 319. See also Justice John Middleton, ‘The Rise of the International Commercial Court’ (Speech delivered at the 2018 Hong Kong International Commercial Law Conference, Hong Kong, 21 September 2018) [9]-[10].

<sup>63</sup> Spigelman, ‘International Commercial Litigation’, above n 3, 319.

<sup>64</sup> Chief Justice James Allsop, ‘Australia – A Vital Commercial Hub in the Asia Pacific Region: The Importance of and Challenges for Australian Commercial Courts and Arbitral Institutions’ (Speech delivered at the National Commercial Law Seminar, Melbourne, 25 February 2015) [21].

<sup>65</sup> *Ibid.*

costly”<sup>66</sup> nature of discovery, the Court released Practice Note SC Eq 11, which requires that the Court not make an order for the disclosure of documents until the parties have served their evidence, except in exceptional circumstances. In effect, this inverted the usual practice of discovery followed by the service of evidence. The practice note also stipulates that there be no order for disclosure unless it is necessary for the resolution of the real issues in dispute. As Justice Bergin, the then Chief Judge in Equity, explained:

“Wide-ranging document review inevitably produces disagreements between parties and interlocutory applications about the nature and extent of production. The requirement to present evidence early will focus the parties on the substantive issues and circumvent the cumbersome procedural disputes that flow from unrestrained discovery.”<sup>67</sup>

29 The numbers tell a similarly encouraging story of the increasing efficiency of litigation in terms of the speed with which commercial matters are dealt with by Australian courts. For example, in 2018, 196 cases were filed in the Commercial List of the Equity Division of the Supreme Court of New South Wales.<sup>68</sup> 184 cases were disposed of and, as at 31 December 2018, 222 cases were pending. It is also worth mentioning the work of the New South Wales Court of Appeal. Appeals are given a hearing date on their first return and matters are usually set down for hearing within two to three months from the date of filing of the notice of appeal. Urgent matters are accommodated as a matter of course without the need for a formal application for expedition. This year, as at 30 June 2019, the Court has delivered 158 judgments, with an average turnaround time from hearing to judgment of approximately four to five weeks.

30 A number of existing Australian courts already have many of the attributes necessary to address the perceived shortcomings of or fill the gaps left by or indeed opened up by international arbitration. Before turning to consider what

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<sup>66</sup> Justice Patricia Bergin, ‘The New Regime of Practice in the Equity Division of the Supreme Court of New South Wales (Speech delivered at the Commercial Law Association of Australia June Judges Series, Sydney, 21 June 2013) [4].

<sup>67</sup> *Ibid* [45].

<sup>68</sup> Supreme Court of New South Wales, *Provisional Statistics (as at 26 February 2019)* (2019) <[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Provisional%20statistical%20data%20\(as%20at%2026%20Feb%202019\).pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Provisional%20statistical%20data%20(as%20at%2026%20Feb%202019).pdf)>.

an Australian ICC would add to the international or Australian dispute resolution landscape and what would be the costs of or downsides to the creation of such a body, assuming it was otherwise practicable, it is worth pausing briefly to consider the emergence of what is, on one view, the first ICC ever established, the London Commercial Court (although whether it should be so classified has been doubted).<sup>69</sup>

### **Bespoke commercial dispute resolution**

31 The notion of bespoke mechanisms of commercial dispute resolution is not novel. The London Commercial Court, in some respects the paradigm of a successful ICC, was established in 1895.

32 Following the discontinuance of Guildhall sittings in 1865, it is reported that:

“The City business houses were obliged to litigate their disputes in the Common Law Courts. This was not an attractive forum. Judges tended to disappear on circuit, dates for trial were uncertain and often not maintained and more often than not the cases came before judges who knew little or nothing about mercantile law or commercial disputes.

There was at this time a strong feeling amongst those trading in the City that the courts were not a satisfactory forum for the resolution of commercial disputes. Litigation was regarded as too slow and too expensive.”<sup>70</sup>

And so began the rise of commercial arbitration.

33 In 1892, the following comments of a judge were published in *The Times*: “[t]he bulk of the disputes of the commercial world seldom, in these modern days, finds its way into the Courts. Merchants are shy of litigation.”<sup>71</sup> Earlier that year, a joint committee set up by the Bar and the Law Society released a report calling for a separate list to be established for commercial actions.<sup>72</sup> A number of recommendations for the implementation of such a system were, however, obstructed by Lord Chief Justice Coleridge, on the basis that it

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<sup>69</sup> Reed, above n 55, 138.

<sup>70</sup> Sir Anthony Colman, Victor Lyon and Philippa Hopkins, *The Practice and Procedure of the Commercial Court* (informa, 6<sup>th</sup> ed, 2008) 1.

<sup>71</sup> *Ibid* 3.

<sup>72</sup> *Ibid* 4.

should not be suggested that all the judges of the Queen’s Bench were not equally fit and sufficiently experienced to try all civil disputes.<sup>73</sup>

34 In June 1894, Lord Chief Justice Coleridge passed away. His successor, Lord Chief Justice Russell, was highly supportive of the establishment of a commercial court. In February 1895, the judges of the Queen’s Bench published a notice as to commercial causes, which provided that:

“A separate list of summonses in commercial causes will be kept at chambers. A separate list will also be kept for the entry of such causes for trial, but no cause shall be entered in such list which has not been dealt with by a judge charged with commercial business, upon application by either party for that purpose or upon summons for directions or otherwise.”

35 The hallmark of this new list was “procedural innovation aimed at greater efficiency”.<sup>74</sup> The rest is history. The “Commercial List” was established as a “Court” by s 3 of the *Administration of Justice Act 1970* (UK) but it sits within and is comprised of judges of the Queen’s Bench Division of the High Court of Justice.

36 Unlike the ICCs of the 21<sup>st</sup> century, the London Commercial Court was “not a court newly and specially established to deal with international disputes”.<sup>75</sup> In 1987, it was estimated that in approximately 80 per cent of cases in the Court, at least one of the parties was not resident in the United Kingdom, and in approximately 50 per cent of cases, all parties were foreign.<sup>76</sup> In this regard, the position of the Court has been regarded as “unique”<sup>77</sup> in the ICC landscape, although it would be of interest to ascertain the degree of

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<sup>73</sup> Ibid 4-5.

<sup>74</sup> Ibid 7.

<sup>75</sup> Warren and Croft, above n 26, 16.

<sup>76</sup> A S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) 13 [1.29], citing the Right Honourable Lord Justice Kerr, ‘Commercial Dispute Resolution: The Changing Scene’ in Maarten Bos and Ian Brownlie (eds), *Liber Amicorum for Lord Wilberforce* (Oxford University Press, 1987) 111.

<sup>77</sup> Warren and Croft, above n 26, 17.

transnational dispute resolution that occurs, for example, in the United States District Court for the Southern District of New York (**SDNY**).<sup>78</sup>

- 37 With a characteristic flourish, the delectably named Lord Salmon of Sandwich observed in the 1978 decision of the House of Lords in *MacShannon v Rockware Glass Ltd*<sup>79</sup> that:

“The administration of justice in the United Kingdom is one of the few things which has not been devalued. There are undoubtedly many foreign courts which administer justice as satisfactorily as our own; but many which do not. The view that it is often a great advantage to have access to the Queen’s courts can hardly be attributed to insular pride. Hundreds if not thousands of commercial contracts, having nothing to do with the United Kingdom, are made all over the world every year between foreigners, containing a clause that the contract shall be governed by English law and that any difference or dispute between the parties shall be arbitrated in London. The awards in many such arbitrations are often stated in the form of a special case, and are thus finally decided in the Queen’s courts and sometimes in your Lordships’ House.”<sup>80</sup>

- 38 In 2017-18, international cases – namely cases other than those in which the subject matter of the dispute concerned property or events situated in the United Kingdom and the parties were “UK based relative to the dispute”<sup>81</sup> – accounted for 70 per cent of the London Commercial Court’s business.<sup>82</sup> 59.3 per cent of litigants were non-United Kingdom nationals and 69 countries were represented.<sup>83</sup> In order, the litigants that appeared most often in the Court hailed from (excluding the United Kingdom): Kazakhstan; the United States and Russia; Germany; the United Arab Emirates; Singapore; Cyprus

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<sup>78</sup> Statistics as to the number and nature of civil cases filed in the SDNY do not appear to be publicly available.

<sup>79</sup> [1978] AC 795.

<sup>80</sup> *Ibid* 819-20 (Lord Salmon).

<sup>81</sup> A party is “UK based relative to the dispute” if the part of its business relevant to the dispute is carried on in the United Kingdom, irrespective of whether it is incorporated, resident or registered overseas.

<sup>82</sup> Judiciary of England and Wales, *Business and Property Courts: The Commercial Court Report 2017–2018 (Including the Admiralty Court Report)* (27 February 2019) Courts and Tribunals Judiciary <[https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310\\_Commercial-Courts-Annual-Report\\_v3.pdf](https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf)>.

<sup>83</sup> Portland, *Commercial Courts Report 2018* (2018) <<https://portland-communications.com/pdf/Portland-commercial-courts-report-2018.pdf>>.

and Turkey; Panama and India; the Netherlands and Luxembourg; and Switzerland and Jersey.<sup>84</sup>

- 39 The success of the London Commercial Court in attracting international commercial work is evidence that it is not the existence of a discrete forum styled as an ICC that draws parties to a particular jurisdiction, but rather the quality of justice and the manner of its administration, and the hard won reputation of the institution. So much was recognised by Justice Potter (as his Lordship then was), who observed in 1995 that:

“Over half of the cases commenced in the Court involve foreign litigants on *both* sides. There are three main reasons for this. First, the location in London of various markets and exchanges which provide for litigation or arbitration of disputes in London; second, the worldwide incorporation into marine and other commercial contracts of English law and Jurisdiction clauses; and the attractions of the Commercial Court, applying English law and procedures as a forum for litigation.”<sup>85</sup>

- 40 Twenty years earlier, Lord Denning, in an unashamed and unabashed defence of forum shopping, famously said in *The Atlantic Star*<sup>86</sup> that “if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service”.<sup>87</sup> More recently, the success of the London Commercial Court has been attributed to “its long history of excellence ... in the hands of judges of impeccable ability and impartiality”.<sup>88</sup>

- 41 In this context, it is important to recall that in 1903, New South Wales followed suit with the passage of the *Commercial Causes Act 1903* (NSW), adopting the model of the London Commercial Court. The aim, as stated by the then Attorney General of New South Wales, Bernhard Wise, was to have

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<sup>84</sup> Ibid.

<sup>85</sup> Justice Mark Potter, ‘The Commercial Court’ (1995) 16 *Bar News: The Journal of the NSW Bar Association* 32, 32–3. See also Firew Tiba, ‘The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia’ (2016) 14 *Loyola University Chicago International Law Review* 31, 36-7. Dr Tiba cites the London Commercial Court’s “ability to understand the business and commercial world” as one of its significant advantages, as well as “the well-known reasons of judicial independence, respect for rule of law and the commercial friendliness of the English Common Law”.

<sup>86</sup> [1973] QB 364.

<sup>87</sup> Ibid 382.

<sup>88</sup> Warren and Croft, above n 26, 17.



commercial causes dealt with “under special provisions directed to securing rapidity of decision and cheapness”.<sup>89</sup> The Equity Division’s 2012 disclosure reforms to which I referred earlier reveal that these objectives remain imperative more than a century later, as does the current list judge’s antipathy towards unnecessary interlocutory disputation, a characteristic also shared by the former Chief Justice of Western Australia, Chief Justice Martin, in the management of Western Australia’s Commercial and Managed Cases List.

42 In addition to the commercial lists of New South Wales and Western Australia, the Supreme Court of Queensland has a Commercial List and one of the trial divisions of the Supreme Court of Victoria is the Commercial Court, which comprises a number of General Commercial Lists, as well as specialist lists.

43 Bearing in mind these existing specialist lists and the development of the London Commercial Court, I return to the question: what would an Australian ICC add to the international or Australian dispute resolution landscape?

### **An Australian perspective on ICCs – new packaging or something more?**

44 A number of different models have been adopted by the various ICCs that have sprung up around the world.<sup>90</sup> Two of these models, adopted by the DIFC Courts and the Singapore ICC respectively, were analysed by Chief Justice Menon in his address at the 2015 DIFC Courts Lecture Series.<sup>91</sup> What I will focus on in the next part of this paper are some of the chief

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<sup>89</sup> Justice Patricia Bergin, ‘Commercial Causes Centenary Dinner Welcome’ (Speech delivered at the Commercial Causes Centenary Dinner, Sydney, 6 November 2003).

<sup>90</sup> For a brief survey and comparison of a number of ICCs, see Gary F Bell, ‘The New International Commercial Courts – Competing With Arbitration? The Example of the Singapore International Commercial Court’ (2018) 11 *Contemporary Asia Arbitration Journal* 193. See also Ioana Knoll-Tudor, ‘The European and Singapore International Commercial Courts: Several Movements, a Single Symphony’, *Kluwer Arbitration Blog*, 6 March 2019 <<http://arbitrationblog.kluwerarbitration.com/2019/03/06/the-european-and-singapore-international-commercial-courts-several-movements-a-single-symphony/>>; Tiba, above n 85.

<sup>91</sup> Menon, ‘International Commercial Courts’, above n 21, [17]-[30]. For a useful summary of the key features of the Singapore ICC, see Andrew Godwin, Ian Ramsay and Miranda Webster, ‘International Commercial Courts: The Singapore Experience’ (2017) 18 *Melbourne Journal of International Law* 219. See also Hwee Hwee Teh, Justin Yeo and Colin Seow, ‘The Singapore International Commercial Court in Action’ (2016) 28 *Singapore Academy of Law Journal* 692; Man Yip, ‘The Resolution of Disputes Before the Singapore International Commercial Court’ (2016) 65 *International and Comparative Law Quarterly* 439; Tiba, above n 85; Gary F Bell, above n 90.

differences his Honour identified between municipal courts and ICCs: consent jurisdiction; foreign representation; and procedural flexibility.<sup>92</sup>

45 In addition to requiring that the action be “international and commercial in nature”,<sup>93</sup> the jurisdiction of the Singapore ICC is founded on the consent of the parties.<sup>94</sup> Consent is also, it should be noted, at the very fulcrum of international arbitration.<sup>95</sup> The Singapore ICC may decline to assume jurisdiction “if it is not appropriate for the action to be heard by the Court”.<sup>96</sup> However, it must not decline to assume jurisdiction solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written jurisdiction agreement between the parties.<sup>97</sup>

46 There is, however, nothing new or special about “consent jurisdiction”. As noted earlier in this paper, it is open to parties to cross-border transactions to agree to submit their disputes to, for example, the Supreme Court of New South Wales. In Australia, out of respect for party autonomy and holding parties to their bargain, the courts manifest a strong disposition towards the enforcement of such agreements.<sup>98</sup> The *forum non conveniens* test also requires a high bar to be met before an Australian Court can decline to exercise its jurisdiction – the proceedings must be oppressive (that is, seriously and unfairly burdensome, prejudicial or damaging) or vexatious (that is, productive of serious and unjustified trouble and harassment)<sup>99</sup> – and in the same way that the Singapore ICC is required not to decline to assume jurisdiction solely on the basis that the dispute is connected to a jurisdiction other than Singapore, the High Court of Australia has rejected the “clearly more appropriate forum” test.

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<sup>92</sup> Menon, ‘International Commercial Courts’, above n 21, [34]. See also Godwin, Ramsay and Webster, above n 91, 254; Middleton, above n 62, [27].

<sup>93</sup> See *Rules of Court* (Singapore, cap 322, 2014 rev ed) O 110 r 1(2) (*‘Rules of Court’*).

<sup>94</sup> *Ibid* O 110 r 7; *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18D(1).

<sup>95</sup> *TCL Air Conditioner* (2013) 251 CLR 533, 553-4 [28]-[29] (French CJ and Gageler J).

<sup>96</sup> *Rules of Court* O 110 r 8(1).

<sup>97</sup> *Ibid* O 110 r 8(2).

<sup>98</sup> See, eg, *Hive* [2019] NSWCA 61.

<sup>99</sup> *Voth v Manildra Flour Mills* (1990) 171 CLR 538, 555 (Mason CJ, Deane, Dawson and Gaudron JJ) (*‘Voth’*).

- 47 In this regard, it is worth noting that art 5 of the Hague Convention on Choice of Court Agreements (**Hague Convention**) provides that a court designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute and must not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state. The Convention, however, has struggled to gain traction thus far.
- 48 One perceived advantage of the Singapore ICC is its ability to accommodate disputes entirely disconnected with Singapore – that is, where neither the parties to nor the subject matter of the dispute has any connection with Singapore – thereby offering parties a neutral forum in which to resolve their dispute. Since its launch in 2015, the Court has handed down 35 judgments that relate to 12 cases.<sup>100</sup> Five cases have involved exclusively non-Singaporean parties.
- 49 The ability to entertain such totally international cases already exists in various Australian Supreme Courts by reason of the ability of parties to submit their disputes contractually to the jurisdiction of those courts.<sup>101</sup> There is no reason why Australian courts should not be able to attract work that is entirely disconnected with the jurisdiction in the same way that the Singapore ICC has done on five occasions. In my view, the way to achieve this is not the establishment of a new court with no “history of excellence” and which has the potential to fragment and undermine our existing, effective and well-respected commercial lists, but to strive to maintain commercial lists which, like the London Commercial Court, produce efficient and clear outcomes by capable judges who do not allow cases to become bogged down in procedural technicalities and where rights of appeal may be exercised expeditiously by appellate courts with experienced commercial judges.

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<sup>100</sup> See generally Godwin, Ramsay and Webster, above n 91, 241-53.

<sup>101</sup> This mechanism could not be used in respect of a court of statutory jurisdiction such as the Federal Court. Whilst personal jurisdiction may be conferred through agreement and submission, subject matter jurisdiction may not be so conferred.

- 50 In respect of foreign representation, in Singapore, a foreign lawyer may apply for either full or restricted registration to appear before the Singapore ICC.<sup>102</sup> The requirements for registration are admittedly much less demanding than those required by the municipal courts of Singapore.<sup>103</sup> The most prohibitive requirement for full registration requires the foreign lawyer to have had at least five years' experience in advocacy before any court or tribunal.
- 51 However, it is doubtful whether the establishment of a new forum is required to make room for foreign lawyers in international cases. Foreign lawyers have been given leave to appear in the Commercial List of the Supreme Court of New South Wales on questions of foreign law.<sup>104</sup> In any event, international work in the London Commercial Court has not been inhibited by the need to retain English lawyers, and there is a decent argument to be made that the regulation of local lawyers by the local Bar and Law Societies contributes to the maintenance of a court's reputation and the perception of the quality of justice attainable therein.
- 52 As for procedural flexibility, there is always scope for existing Australian courts to simplify and (where desirable) relax their processes. The key procedural innovations of the Singapore ICC include: the determination of questions of foreign law on the basis of submissions rather than proof; the application of rules of evidence other than those under Singapore law; the ability to conduct confidential proceedings; and the ability to limit any rights of appeal. In particular, Chief Justice Menon highlighted the absence of a general discovery process in the Singapore ICC.<sup>105</sup> Instead, parties are to provide any documents on which they rely within the time and in the manner ordered by the Court.<sup>106</sup> This is not dissimilar to the 2012 reforms to disclosure introduced by the Equity Division of the Supreme Court of New

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<sup>102</sup> *Legal Profession Act* (Singapore, cap 161, 2009 rev ed) s 36P.

<sup>103</sup> *Legal Profession (Representation in Singapore International Commercial Court) Rules 2014* (Singapore) r 4.

<sup>104</sup> See, eg, *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance* [2017] NSWSC 259.

<sup>105</sup> *Rules of Court* O 110 r 21.

<sup>106</sup> *Ibid* O 110 r 14(1).

South Wales to which I referred earlier and which I understand have been adopted in Singapore.

- 53 So also, there is no compelling reason why existing rules and practice with regard to the reception and proof of foreign evidence could not be modified to make that aspect of transnational litigation less cumbersome and more streamlined.<sup>107</sup> In New South Wales, that has already occurred in part by way of Memoranda of Understanding between the Supreme Courts of New South Wales, Singapore and New York.<sup>108</sup>
- 54 What is thus apparent is that the establishment of a new and discrete forum is not necessarily required to accommodate features of self-proclaimed ICCs. The London experience teaches us that. Modern courts are capable of flexibility.
- 55 The establishment of an Australian ICC also presents a number of unique challenges or hurdles not experienced by the existing ICCs. Before considering these, it is worth noting that what will be critical to the attraction of international commercial litigation, whether it is conducted in the commercial lists of municipal courts, in existing ICCs or in a new Australian ICC, is the enforceability of any resultant judgment.<sup>109</sup>
- 56 The nearly universal uptake of the New York Convention has been critical to the success of international arbitration. By comparison, it has been said of the Hague Convention on Choice of Court Agreements – art 8 of which

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<sup>107</sup> See, in this regard, the use of “foreign law notices” in New South Wales: UCPR pt 6 div 9. See also *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* (2017) 252 FCR 298 where a referee was appointed to report on foreign law.

<sup>108</sup> A S Bell, ‘Getting to the Forum: Witnesses in Transnational Commercial Litigation’ (2011) 85 *Australian Law Journal* 562; Chief Justice James Spigelman, ‘Proof of Foreign Law by Reference to the Foreign Court’ (2011) 127 *Law Quarterly Review* 208; Justice Paul Brereton, ‘Proof of Foreign Law: Problems and Initiatives’ (2011) 85 *Australian Law Journal* 554.

<sup>109</sup> The importance of an enforceable result, whether it be an arbitral award, judgment or otherwise, is underscored by the United Nations General Assembly’s adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation, otherwise known as the Singapore Convention on Mediation. A signing ceremony is expected to take place in Singapore on 1 August 2019. The Convention serves to create an international enforcement mechanism for mediated settlements.

provides that a judgment given by a court of a contracting state designated in an exclusive choice of court agreement shall be recognised and enforced in other contracting states – that “it is moving at the speed of an asthmatic ant with a heavy load of shopping”.<sup>110</sup> This is not promising for either municipal courts or ICCs, both of which are currently reliant on existing enforcement frameworks.<sup>111</sup> At present, there are only 31 states parties to the Convention: the member states of the European Union, Mexico, Montenegro and Singapore. China, Ukraine and the United States have signed the Convention, but have yet to ratify it. Australia has yet to accede to the Convention, notwithstanding the fact that, in November 2016, the Joint Standing Committee on Treaties supported Australia’s accession and recommended that binding treaty action be taken.<sup>112</sup>

57 On 2 July 2019, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters was concluded. It has yet to enter into force. Article 4 of the Convention is in substantially similar terms to art 8 of the Hague Convention, save that it is not limited to courts designated in an exclusive choice of court agreement. Indeed, the bases for recognition contained in art 5 are quite broad. Whether or not this Convention will have a higher accession rate than the Hague Convention, as well as the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, to which only five states are party, remains to be seen.

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<sup>110</sup> Public Hearing on the Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 6 (Stuart Robert MP). See also Justice Margaret Beazley, ‘Is the Hague Convention on Choice of Court Agreements a Game Changer? Part One’ (2018) 91 *IPBA Journal* 12; Justice Margaret Beazley, ‘Is the Hague Convention on Choice of Court Agreements a Game Changer? Part Two’ (2018) 92 *IPBA Journal* 16.

<sup>111</sup> Cf Reed, above n 55, 146; Ramesh, above n 21, [28]-[33].

<sup>112</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness – USA; Convention on Choice of Courts – Accession; GATT Schedule of Concessions – Amendment; Radio Regulations – Partial Revision* (Report No 166, November 2016) 23 [3.21]. See also Michael Douglas, ‘Will Australia Accede to the Hague Convention on Choice of Court Agreements?’ (2017) 17 *Macquarie Law Journal* 148.

58 Even assuming that the Convention takes off, however, there are some unique difficulties that may be faced by an Australian ICC that underlie my scepticism as to the value and utility of an Australian ICC.

*Unique challenges for Australia*

59 Australia's federal system distinguishes it from the jurisdictions in which ICCs currently operate. Chief Justice Warren and Justice Croft were optimistic about the strength of the Federation to "brin[g] together diverse thought and experience and the legal and economic environments and experience from throughout a diverse continent".<sup>113</sup> However realistic or otherwise that optimism may be, the practical difficulties – such as which state or territory Supreme Court should serve as the sovereign base for an Australian ICC, itself likely to be a heated and contentious question<sup>114</sup> – give rise to issues beyond those of mere practicality.<sup>115</sup> So too, questions arise as to how constituent members of such a court would be chosen and to whom an appeal would lie. Appeals from the Singapore ICC are heard by the Court of Appeal of Singapore. To which court would appeals from an Australian ICC lie? Could they lie to the High Court? Or would an appellate Australian ICC need to be established?<sup>116</sup> There is also the question of who would supply and fund the necessary administrative structure of such a court.

60 On the subject of who would constitute an Australian ICC, Chief Justice Warren and Justice Croft imagined "a forum populated by the best commercial judicial minds in the country".<sup>117</sup> In this regard, Ms Cheng of the HKIAC, when posed the question whether Australia needed an ICC, responded:

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<sup>113</sup> Warren and Croft, above n 26, 34.

<sup>114</sup> Chief Justice Spigelman, speaking of replicating a regional version of the London Commercial Court in Australia, was adamant that "[i]f any place in Australia is to acquire the level of international recognition as [a centre for dispute resolution], to a degree that becomes self-reinforcing, Sydney is the only location that can do so": Chief Justice James Spigelman, 'Commercial Causes Centenary Dinner Address' (Speech delivered at the Commercial Causes Centenary Dinner, Sydney, 6 November 2003).

<sup>115</sup> These issues may include constitutional questions if it were to be suggested that the Federal Court or Chapter III judges are to have any role to play in an Australian ICC, if created.

<sup>116</sup> See generally Warren and Croft, above n 26, 36-7.

<sup>117</sup> Ibid 36.

“I doubt it, because Australia has a sound commercial law background already ... Your judgments are very, not all of them, dare I say, but a large number of them are very well reasoned. So do you need to set up something to show that you in fact are not confident about the rest of your judicial system and laws? I would think not ... I probably would think you would not want to be seen to be like places which need a separate forum because you don't trust the rest of your law or your judiciary.”<sup>118</sup>

61 She compared Australia's position to the rationale underlying the establishment of the first true ICC, the DIFC Courts, stating that “[t]his idea of an international commercial court starts actually with the concept of one country, two systems”.<sup>119</sup> She explained the need for the DIFC Courts as follows:

“I think there are reservations about the Dubai legal system and in light of the development of business, instead of just relying on Islamic law and Dubai law, they said ‘Let's have common law because financial businesspeople are familiar with the common law’.”<sup>120</sup>

62 The opportunity to bring together the finest commercial judges from all around Australia sounds superficially attractive. However, Australian state and territory Supreme Courts regularly have regard to decisions of other Australian courts. In this way, albeit indirectly, the “best commercial judicial minds in the country” are brought together without requiring them to leave (even if temporarily) their existing commercial lists unattended and go, at least for most, on circuit to sit sporadically on an Australian ICC.

63 Although it may be conceded that an Australian ICC could potentially provide a forum for the inclusion of international judges – the Singapore ICC has 16 international judges from Australia (namely, Justice Bergin, Justice French, Justice Giles and Justice Heydon), the United States, the United Kingdom, France, Canada, Hong Kong and Japan – there is nothing to stop existing Australian courts from referring to and seeking guidance from the decisions of

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<sup>118</sup> Bullock, above n 33.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.



other courts around the world.<sup>121</sup> As Chief Justice Bathurst observed, a dialogue already exists between the courts of Singapore, Malaysia, Hong Kong, New Zealand and Australia, among which “there is a level of deference to and respect for one another’s decisions”.<sup>122</sup> In other words, returning to the theme of this Conference, a degree of cross-pollination and convergence can be achieved without the establishment of an Australian ICC.

- 64 A number of other mechanisms for facilitating and fostering collaboration and sharing experiences and best practice can be imagined and do exist, such as the Standing International Forum of Commercial Courts, of which the Federal Court and the Supreme Courts of New South Wales and Victoria are members. It is also worth noting that the absence of international judges on the London Commercial Court has not prevented it from flourishing.
- 65 Any international judge who sits on an Australian ICC is likely to be a retired judge who is not resident in the jurisdiction and sits part-time. The inclusion of such judges presents a number of potential difficulties. First, to the extent that commercial parties are drawn to courts that are consistent and uniform in their procedural approach, such benefits may not flow from a group of part-time judges from different jurisdictional backgrounds. Secondly, retired judges are often engaged in some form of private practice, including mediation and arbitration. There are good reasons why those in private practice, however distinguished or experienced, should not serve as judges, including issues of conflict of interest or perceived conflict of interest. True it is that some arbitrators are also in private practice, including as advocates, but the ability of parties to select their arbitrators is an important distinguishing factor. Thirdly, it is the experience of the Supreme Court of New South Wales that close collegiality between the judges drives efficiency. From time to time, a judge listed to hear a particular matter may become unavailable to do so. It is the willingness of other judges to step in on short notice that keeps the wheels

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<sup>121</sup> See generally Chief Justice Tom Bathurst, ‘Prying Open the Court Doors: Meeting the Challenges of International Commercial Litigation in Australia’ (Speech delivered at the 5<sup>th</sup> Judicial Seminar on Commercial Litigation, Hong Kong, 21 October 2016) [30].

<sup>122</sup> Bathurst, ‘Convergent Commercial Law Systems’, above n 21, [35].

turning. This practical collegiality may be more difficult to achieve with a large number of non-resident, part-time judges. Finally, there is the challenge of the supervision of ad hoc judges. Issues of delay, for example, may be more difficult to regulate.

*Australian commercial law – an elephant in the room*

66 One of the reasons the London Commercial Court has flourished in its handling of international commercial disputes is that parties have traditionally chosen not only English jurisdiction but English law to govern their disputes. It makes sense for a chosen or designated court to apply its own law to the resolution of a given commercial dispute. English contract and insurance law, moreover, has generally been admired for its relative certainty and predictability. Justice Potter alluded to this when he noted the “worldwide incorporation” of English law into commercial contracts and the “attraction” of the application of English law.

67 The law of Singapore as it applies to the resolution of commercial disputes, drawing heavily as it does on English common law principles, can also lay claim to the same qualities of certainty and relative predictability. Many leading Singapore lawyers have studied in England and for over 30 years, the renowned Professor Francis Reynolds of Oxford University, editor of the *Law Quarterly Review*, author of countless editions of *Bowstead on Agency* and expert in shipping law, spent the English summer vacation teaching at the National University of Singapore.

68 The same has also been said of New York law as a reason underlying the success of the Commercial Division of the Supreme Court of the State of New York. Former Chief Judge Kaye, who established the Commercial Division in 1995, observed that “New York law is so stable, so predictable, so sound and logical”.<sup>123</sup> Users of the Court share in this view. As the Managing Partner of Hancock Estabrook LLP, Ms Janet Callahan, said, “I also know that I’m going

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<sup>123</sup> NYS Courts, above n 36.

to be dealing with a deep history of commercial cases, which lends some predictability to how my particular situation is going to be resolved”.<sup>124</sup>

- 69 Unless the substantive law of Australia is sufficiently attractive to international commercial parties, an Australian ICC may see very little genuinely international work for there would be not much point in choosing Australia or an Australian state or territory as the forum if the relevant court was not to apply Australian law (although there is no difficulty in theory in choosing one forum but a different forum’s law).
- 70 Does “Australian” law (putting aside the difficulties associated with Australia’s federal system) have the same appeal as English or Singapore law to commercial parties who might otherwise be minded to designate an Australian court, even an Australian ICC, as the forum for the resolution of their disputes?
- 71 Much like any implied duty of good faith, the concept of unconscionability under Australian statute law and, in particular, the Australian Consumer Law (**ACL**), is unlikely to inspire confidence in commercial parties or supply the requisite certainty so as to make a choice of Australian law to go with a choice of Australian forum particularly attractive.<sup>125</sup> This is not to say that there is anything inherently wrong with Australian legislatures employing this concept but it is to make the blunt point that, from a commercial perspective, the standard lends itself to subjective judicial evaluation which is the very antithesis of the certainty and predictability many commercial parties seek in their contractual and commercial relations.
- 72 In *Clough Engineering*, in a contract governed by Indian law, Clough invoked the unconscionability provisions of the ACL to secure interim ex parte relief restraining the call on a performance bond in an international contracting contract. Even though the injunction was ultimately discharged, the

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<sup>124</sup> Ibid.

<sup>125</sup> See, eg, *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 356 ALR 440 where the New South Wales Court of Appeal found unconscionability in a classically commercial setting.

vagueness of the statutory unconscionability standard lent itself to the formulation of an “arguable” case which sustained the initial interlocutory relief.

73 The recent High Court decision of *Australian Securities and Investments Commission v Kobelt*<sup>126</sup> also illustrates the point. That case concerned a practice in rural and remote Indigenous Australian communities known as “book-up”, whereby a customer gives a storekeeper the debit card linked to their bank account to which their wages or Centrelink payments are credited and their PIN. The storekeeper is authorised to withdraw funds from the customer’s account in reduction of the customer’s debt and in return for the supply of goods in the interval between the customer’s pay days. The issue before the High Court was whether the supply of credit under this system constituted unconscionable conduct in contravention of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth).

74 The uncertainty that attends the concept of unconscionability is reflected in the procedural history of the case and its closely divided resolution. The primary judge found that the respondent’s conduct in connection with the book-up system was unconscionable. On appeal, the Full Court of the Federal Court set aside the primary judge’s orders. The High Court split 4:3 on the issue. Chief Justice Kiefel and Justices Bell, Gageler and Keane found that the Full Court did not err in finding that the system was not unconscionable. Justices Nettle, Gordon and Edelman reached the opposite conclusion.

75 It is also reflected in the High Court’s observations as to the meaning of “unconscionable”. As Justice Gageler noted, “[u]nconscionable’ is an obscure English word which centuries of use by courts administering equity

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<sup>126</sup> [2019] HCA 18 (*Kobelt*).

have transformed into a legal term of art.”<sup>127</sup> Seeking to give the term content, his Honour explained that:

“... conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience ...

... For a court to pronounce conduct unconscionable is for the court to denounce that conduct as offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society.”<sup>128</sup>

76 As Justices Nettle and Gordon acknowledged:<sup>129</sup>

“The doctrine of unconscionability was recently criticised by the Court of Appeal of Singapore for its vagueness and generality. The Court applied a distinction between "broad" and "narrow" unconscionability in an effort to address this issue. The utility of such distinctions, however, is questionable. Certainly, in any given case, a conclusion as to what is, or is not, against conscience may be contestable: so much is inevitable given that the standard is based on a broad expression of values and norms. However, efforts to address the "indeterminacy" of the doctrine by way of further distillations, categorisations or definitions may risk "disappointment, ... a sense of futility, and ... the likelihood of error". This is because evaluating whether conduct is unconscionable "is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules". Instead, at least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute. The problem of indeterminacy is addressed by close attention to the statute and the values derived from it, as well as from the unwritten law.” (Footnotes omitted)

77 Justice Edelman painted a particularly bleak image of the utility of the concept. His Honour stated:

“The legal issue underlying this appeal concerns the meaning and application of the statutory concept of 'unconscionability'. Professor Birks once compared the utility of the concept of unconscionability to a lawyer with the utility of the concept of a small brown bird to an ornithologist. In *Commonwealth Bank of Australia v Kojic*, I suggested that this concern would be ameliorated as analogies and comparisons emerged by application of the principles and values underlying the statute. Although conscience has no single, objective moral voltage, the moral baseline required by the courts would emerge by

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<sup>127</sup> Ibid [81] (Gageler J).

<sup>128</sup> Ibid [92]-[93] (Gageler J).

<sup>129</sup> Ibid [153] (Nettle and Gordon JJ).

incremental development in the long run through ‘very slow degrees and by very short steps’, and through the process of methodological reductionism.

Unfortunately, ‘[i]n the long run we are all dead’.<sup>130</sup> (Footnotes omitted)

- 78 The “evaluative judgment”<sup>131</sup> to be made in administering this “normative standard of conduct”<sup>132</sup> is one which commercial parties are, understandably, likely to want to avoid. Thus, in spite of the quality of Australia’s judiciary, the substantive law of Australia may leave an Australian ICC “with nothing to do, except market and pitch”.<sup>133</sup> It may be that, provided that the narrower view of unconscionability taken by the slender majority in the High Court in *Kobelt* prevails, the problem to which I have referred may be less pronounced although I suspect that we have not heard the last of this debate.
- 79 Further, even where parties have agreed on a governing law other than “Australian” law, this does not render the substantive law of Australia irrelevant. The parties’ choice may be overridden by mandatory forum laws or considerations of public policy. The *Clough Engineering* case referred to above was such a case. The overriding reach of the ACL<sup>134</sup> was also at play in the recent decision of *Valve*, where the Full Court of the Federal Court held that the consumer guarantee provisions of the ACL apply even where the proper law of a contract is not the law of Australia or part of Australia.<sup>135</sup>
- 80 In that case, Valve, a company based in the United States, operated an online game distribution network with over two million subscribers in Australia. The ACCC commenced proceedings against Valve, alleging that it had made misrepresentations concerning the existence, exclusion or effect of consumer guarantees in the ACL contrary to ss 18 and 29(1)(m) of the ACL. Valve contended that the guarantees did not apply to its supply, on the basis that they do not apply where a supply is made pursuant to a contract the proper

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<sup>130</sup> Ibid [267]-[268] (Edelman J).

<sup>131</sup> Ibid [47] (Kiefel CJ and Bell J).

<sup>132</sup> Ibid [87] (Gageler J).

<sup>133</sup> Reed, above n 55, 139.

<sup>134</sup> See generally M Davies, A S Bell and P L G Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2014) 459-60 [19.47]-[19.48].

<sup>135</sup> *Valve* (2017) 351 ALR 584, 618-19 [108]-[113] (Dowsett, McKerracher and Moshinsky JJ).

law of which is the law of a country other than Australia. It was accepted on the appeal that the law of Washington State was the proper law of the contracts between Valve and its Australian subscribers. The Court rejected this, finding that no provision of the ACL expressly limits the operation of the consumer guarantees to the supply of goods or services made pursuant to a contract the proper law of which is the law of Australia or of a part of Australia and that there is no sound basis upon which to draw such an implication.

- 81 For truly international parties whose dispute has no connection whatsoever with Australia (other than that the parties may wish to litigate here because of the attributes, including neutrality, that an Australian court can offer), it may be that such parties could choose Australian “common law” as the law to govern their contractual disputes, thus excluding the operation of the ACL. Whilst there are of course well-known cases that preclude contracting out of the ACL and its progenitor, the *Trade Practices Act 1974* (Cth), it may be doubted whether parties to whom that legislation would not otherwise apply (because of its territorial limits) could be in truth said to be contracting out of it by the adoption of a choice of law clause of the kind I have posited. In this context, it is not uncommon for commercial parties, when choosing New York Law, for example, to nominate “New York law other than its conflict of laws (or choice of law) rules” as the contract’s governing law. This is what I call an “anti-renvoi” clause but it illustrates the ability to fashion a choice of law clause in a way that contributes to greater certainty in terms of the identification of the legal regime that will govern the resolution of a commercial dispute.

## Conclusion

- 82 Addressing the Supreme and Federal Court judges in 2016, Chief Justice French observed that it was too early in the history of ICCs to predict whether they would evolve into major institutions for the resolution of international commercial disputes.<sup>136</sup> That remains true today. During this “experimental” phase, it is important that Australia critically examines whether it needs an

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<sup>136</sup> French, above n 21, 13.

ICC before jumping on the bandwagon, however flash it may be. In a world where ICCs are lauded as “unicorns”,<sup>137</sup> it is easy to be swept up by the trend.

83 In her 2017 John E C Brierley Memorial Lecture, Professor Lucy Reed of the National University of Singapore posed the following questions:

“How much are the proponents of courts-over-arbitration looking *backwards*, by which I mean romanticizing the aspects of domestic court systems with which they are most familiar? How much are they willing to look *forward*, and explore new, and innovative, court structures for international commercial justice?”

84 From an Australian perspective, looking forward does not, in my view, require us to divert our attention and resources to the establishment of a new court. This does not mean that we should not always be strengthening, streamlining and refining the workings of our already successful commercial lists. That remains an imperative. And to the extent that there is competition between them to attract the best work, just as there might be thought to be competition between the state and territory Supreme Courts and the Federal Court for corporations, class action and possibly, in the future, criminal work, such competition is a healthy thing.

85 Commercial parties, to the extent that they do not choose arbitration, will use those courts which can offer quick and clear justice delivered by conscientious and clever judges with a feel for the workings of commerce. In my opinion, such forums already exist in Australia, and well-advised, sophisticated commercial parties know where they are.

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<sup>137</sup> Ramesh, above n 21, [1]-[2]. Justice Ramesh draws an analogy between ICCs and technology companies which have been referred to as “unicorns” because of “their rarity and influence on the market; they have the power and influence to disrupt industry and affect national economies if not the global economy”.