

## LCIA Sydney Symposium Keynote Address

### "Australia as a Global Hub"

8 October 2017

Professor Doug Jones AO<sup>1</sup>

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## 1. Introduction

It is an honour to have been invited to deliver this keynote to my friends and colleagues of the international arbitration community present on the occasion of this LCIA event in Sydney. I'd like to begin by acknowledging the Traditional Owners of the land on which we meet today, the Gadigal people of the Eora nation, and pay my respects to their Elders past and present.

A number of you are probably still recovering from the lingering jetlag of your lengthy flights into Sydney, and indeed where better to do so than at this splendid office of Herbert Smith Freehills, participating in interactive arbitration working sessions, and listening to a proud Australian speak on "Australia as a Global Hub" in the knowledge that I am the last commitment before lunch.

It is often said that Sydney is Australia's gateway to the world. In March this year the competitiveness of Sydney as a commercial centre was ranked 8th in the world in the 21st Global Financial Centres Index.<sup>2</sup> In the Asia-Pacific Region, Sydney was ranked 4th, behind Singapore, Hong Kong and Tokyo.<sup>3</sup> And also in March, Australia took the record for the longest run of uninterrupted GDP growth in the developed world, enjoying 26 years or 103 financial quarters since its last technical recession, now 104 as of June.<sup>4</sup> These assessments indicate that whilst Sydney may be Australia's gateway to the world, that gateway is nowadays a two-way street, and indeed, Sydney is also the world's gateway to Australia and the Asia Pacific.

In my view, there is no better time in history to be an Australian arbitration practitioner, and many would agree that the growing significance of Australia in the international business and legal world is unprecedented given our country's roots as a convict settlement whose survival was nearly entirely dependent on England for the majority of our early history. One cannot forget the tyranny of distance which has so characterised Australian history, the phrase itself coined in 1966 by the renowned Australian historian Geoffrey Blainey.

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<sup>1</sup> International Arbitrator, CArb ([www.dougjones.info](http://www.dougjones.info)). The author gratefully acknowledges the assistance provided in the preparation of this address by my legal assistants, Jason Corbett and Jonathon Hetherington.

<sup>2</sup> China Development Institute and Z/Yen, *Global Financial Centres Index 21* (March 2017), pg 4.

<sup>3</sup> *Ibid*, pg 18.

<sup>4</sup> Australian Bureau of Statistics: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5206.0>

I thought that this phrase would make a good springboard for my speech today. I intend to broadly explore the developing international arbitration scene in Australia and I will do so in three parts, beginning first with a brief note on Geoffrey Blainey's seminal history, "The Tyranny of Distance", to set the scene for the challenges that Australia has overcome in achieving its international aspirations. From there I will explore some of the practical observations which I believe will continue to ensure that international arbitration thrives in Australia, before finishing with a discussion of the legal framework by which international arbitration has become embedded in our legal system.

The message that I would like to leave you with today is that Australia has positioned itself as an attractive venue for international arbitration in the Asia Pacific and global stage.

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## 2. Tyranny of Distance - Background

Blainey's book "Tyranny of Distance" 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 this remoteness combined with a lack of attractive trade goods that left the European Imperial Powers disinterested throughout much of the eighteenth century.<sup>5</sup> When the European crops failed, no British supplies were sent on the long and difficult journey. The settlers were forced to send ships on supply voyages to Cape Town, and other ports in South-East Asia, journeys that took months and were often beset by icebergs, wild seas, and scurvy.<sup>6</sup>

Not only is Australia distant from many regions of the world, 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.<sup>7</sup> 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.<sup>8</sup>

To return to arbitration, many of you may be hearing this grim assessment of distance as confirmation of an underlying concern that you all have with Australia as a seat, being of course just how far away you think we are from the rest of the world. I respectfully disagree. 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 easier.<sup>9</sup> What was tyrannical in the days of yore

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<sup>5</sup> Geoffrey Blainey, *The Tyranny of Distance* (Pan MacMillian Australia, 21st Century Edition, 2001)

<sup>6</sup> Ibid 40-45.

<sup>7</sup> Ibid 121-123.

<sup>8</sup> Ibid 125, 129.

<sup>9</sup> Ibid 350.

has become a lot less so on a muscle-relaxer cushioned direct flight in business class on an A380; or as more often the case, by state of the art teleconferencing.

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### 3. Practical Benefits

Overcoming the challenges posed by distance Australia has developed itself as an attractive seat for international arbitration with many practical benefits.

First, with the emergence of the economies of Asia, Australia is geographically well positioned in the region as a seat. In 2016, parties from India, China and Singapore featured significantly in the caseload of the prominent Asian arbitral institutions of SIAC and HKIAC,<sup>10</sup> while Asian countries were featured in over 10% of the LCIA's caseload.<sup>11</sup> The ICC also recently identified that in 2016 it saw a 22% increase in parties from South and East Asia.<sup>12</sup> 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.

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 Perth). Similarly, as many of our European friends here today can attest, the flight from Singapore to Sydney is shorter than the flight from Singapore to London. Sydney is significantly closer to North America than Singapore. Sydney's Kingsford Smith Airport is also convenient as an international hub serviced by thirty-eight international airlines and allows for direct travel between Sydney and most Asian destinations.<sup>13</sup> The airport sees on average eight to ten flights a day to Singapore and London.<sup>14</sup> These benefits are more than mere conveniences – they can enhance the energy and enthusiasm of participants of the arbitration and assist in their coordination. Comparable connections are available to Melbourne and Perth (which is soon to see a nonstop service from London).

Australia's proximity to the Asia-Pacific also provides parties access to a myriad of high quality arbitration practices across the region. Nearly all major international firms have expanded their arbitration practices into Asia and many have highly experienced and specialised teams operating in the region.<sup>15</sup> Australia has seen international law firms expand their regional arbitration practices here, bringing with them the experience and expertise accrued from practice in many jurisdictions (we are meeting in the Sydney office of one such firm). Many Australian law firms have also established arbitration practices and some

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<sup>10</sup> SIAC, *SIAC Annual Report 2016*, pg 14; HKIAC, *HKIAC Annual Report 2015* pg 8.

<sup>11</sup> LCIA, *LCIA Annual Report 2016*, pg 8.

<sup>12</sup> International Chamber of Commerce, *ICC Reveals Record Number of New Cases filed in 2016* (18 January 2017) International Chamber of Commerce <<https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/>>.

<sup>13</sup> Sydney Arbitration Advantage, *Travel and Transport*, Sydney Arbitration Advantage <<http://www.sydneyarbitration.com/Travel-and-transport/>>.

<sup>14</sup> *Ibid.*

<sup>15</sup> The Legal 500, *Asia Pacific: Regional International Arbitration*, The Legal 500, <<http://www.legal500.com/c/asia-pacific-regional-international-arbitration/regional-international-arbitration>>.

have formed international partnerships, facilitating the growth and development of their local teams. Australia has also developed excellent infrastructure to support international arbitration. There is a clear right for international firms to practice local domestic litigation, which cannot be said of Singapore or Hong Kong. The Australian Disputes Centre, established in 2010, is the centrepiece of our local framework and provides world class dispute resolution services. This custom designed venue for arbitration is ten minutes' walk from here, in the heart of Sydney's CBD, close 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 translation services and can be customised to the needs of the arbitration to maximize cost effectiveness for the parties.

Australia also has several cost advantages over other seats. Indeed, while it is common for Sydneysiders to lament the cost of living, Sydney outperforms both Hong Kong and Singapore, which top the Cost of Living Index.<sup>16</sup> Sydney Arbitration Advantage estimates that the average rate of hotel accommodation in Sydney is, up to 200 dollars less a night than other major hubs, including London, New York, Hong Kong, and Singapore.<sup>17</sup> Further, in recent times the Australian Dollar's depreciation in relative terms has improved Australia's cost efficiency for overseas travellers, particularly those from Europe and the United States.

Australia is a multicultural and diverse society. Census data from the Australian Government indicates that as of June 2016, 28% of Australia's population was born overseas.<sup>18</sup> Thus, in turn, Australia has developed a focus on diversity in arbitration, which is so important today.<sup>19</sup> In terms of gender diversity, ACICA, The Australian Centre for International Commercial Arbitration has demonstrated real leadership. Between 2011 and 2016 a quarter of ACICA's appointments have been of female arbitrators,<sup>20</sup> and in 2016 its president signed the Equal Representation in Arbitration Pledge committing to encouraging greater female representation and diversity in arbitration.<sup>21</sup>

Also of real practical significance is Australia's leadership in technology. The Federal Court of Australia in a recent Central Practice Note has provided for the use of electronic filing, hearings and virtual

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<sup>16</sup> Economists Intelligence Unit, *Measuring the Cost of Living Worldwide* (21 March 2017) The Economist <<https://www.economist.com/blogs/graphicdetail/2017/03/daily-chart-13>>.

<sup>17</sup> Sydney Arbitration Advantage, *Significant Cost Savings*, Sydney Arbitration Advantage <<http://www.sydneyarbitration.com/Travel-and-transport>>.

<sup>18</sup> Australian Bureau of Statistics, *Migration Australia 2015-2016* (30 March 2017) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3412.0/>>.

<sup>19</sup> Berwein Leighton Paisner, 'International Arbitration Survey: Diversity on Arbitral Tribunals: Are We Getting There' (Research Report, Berwein Leighton Paisner, 10 January 2017) 7.

<sup>20</sup> Lara Bullock, 'ACICA aims for equality in arbitration', *Lawyers Weekly* (online) 27 June 2016 <<https://www.lawyersweekly.com.au/news/18842-acica-aims-for-equality-in-arbitration>>.

<sup>21</sup> ACICA, Media Release Equal Representation in Arbitration Pledge: <<https://acica.org.au/wp-content/uploads/2016/06/Media-Release-Equal-Representation-in-Arbitration-Pledge.pdf>>.

courtrooms for case management.<sup>22</sup> The Victorian Supreme Court has also adopted a Practice Note favouring the use of predictive coding to streamline the process of discovery of large volumes of electronically stored information.<sup>23</sup> The appearance of witnesses in arbitration by video-conference is now commonplace.<sup>24</sup> 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 the arbitration in accordance with the ACICA rules.<sup>25</sup> 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.<sup>26</sup> 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.

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## 4. Legal framework

Turning from logistical matters to the legal framework for arbitration, the law in Australia demonstrates the nation's commitment to respecting party autonomy and the right to arbitrate. Legally, there are many factors to consider in choosing an arbitral seat. Different parties will have different priorities, but some needs are universal. The need for robust legislation, a supportive judiciary, and effective institutions are common to all arbitrations and in many respects, Australia is at the leading edge.

### 4.1 Legislation Origins

The use of arbitration on these lands has a rich history. Australia's relationship with arbitration pre-dates Western civilisation. Aboriginal Australians have, for many millennia, implemented their own dispute resolution system that closely resembled arbitration to resolve disputes between members within a community.<sup>27</sup> The Arbitrators in these disputes were the elders of the communities - a practice that has survived the passages of both culture and time.

The current laws regulating both domestic and international arbitration incorporate the *UNCITRAL Model Law*, the result of which is uniformity and consistency of arbitration laws the nation over, in line with

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<sup>22</sup> 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) CI Arb <<https://www.ciarb.net.au/resources/international-arbitration/technical-innovations-in-international-arbitration-why-australia-needs-to-move-to-arbitration-2-0/>>.

<sup>23</sup> Supreme Court of Victoria, *Practice Note Gen 5 of 2017 - Technology in Civil Litigation Practice Note*, 30 January 2017, 8.9.

<sup>24</sup> Damian Sturzaker, 'Technical Innovations in International Arbitration - Why Australia needs to move to Arbitration 2.0 (2014) CI Arb <<https://www.ciarb.net.au/resources/international-arbitration/technical-innovations-in-international-arbitration-why-australia-needs-to-move-to-arbitration-2-0/>>.

<sup>25</sup> ACICA, *Draft Procedural Order for the Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations*: <<https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf>>

<sup>26</sup> Ibid.

<sup>27</sup> Australia Law Reform Commission, 'Traditional Aboriginal Society and Its Law' in H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edn, LexisNexis Butterworths, 2002) 11.

international best practice. A product of this uniformity has been the development of consistent Australia-wide jurisprudence and precedent. The familiarity with the *Model Law* that Australian arbitrators and counsel have gained has equipped them to compete for arbitration work, internationally and locally. The expertise of local judges is equally impressive.

Australia's modern arbitration laws are, of course, the product of centuries of reform since English colonization in 1788. Like most Commonwealth states, 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*,<sup>28</sup> the first *Arbitration Act* was passed by the New South Wales Parliament in 1867 regulating domestic arbitration. More recently, *Uniform Commercial Arbitration Acts* 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 NSW Supreme Court, bringing Australia in line with international best practice and positioning Australia as a competitive international arbitration seat.

The life of the federal *International Arbitration Act* 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* and the *1965 ICSID Convention*, 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*.

## 4.2 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. The *International Arbitration Act* supplements and goes even 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.<sup>29</sup> These provisions allow parties to obtain subpoenas from the court,<sup>30</sup> apply to the court for orders compelling persons to attend examination before the arbitral tribunal,<sup>31</sup> and provide that confidentiality of information in proceedings must be observed.<sup>32</sup> 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,<sup>33</sup> the power to order a party to provide security for costs,<sup>34</sup> to award interest up to the making of an

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<sup>28</sup> 9 & 10 Wm 3, c 15.

<sup>29</sup> IAA 1974 (Cth) s 22(2).

<sup>30</sup> *International Arbitration Act* 1974 (Cth) s 23 ('IAA').

<sup>31</sup> IAA 1974 (Cth) s 23A.

<sup>32</sup> IAA 1974 (Cth) s 23C

<sup>33</sup> IAA 1974 (Cth) s 23B.

<sup>34</sup> IAA 1974 (Cth) s 23K.

award<sup>35</sup> and on award debts,<sup>36</sup> and to award costs with orders in respect of their taxation.<sup>37</sup> A very robust and detailed provision dealing with the consolidation of proceedings applies on an 'opt in' basis,<sup>38</sup> providing multiple grounds which may give rise to a consolidation of proceedings or an alternative action,<sup>39</sup> such as a joint hearing<sup>40</sup> or stay of proceedings.<sup>41</sup> Importantly also, in my view, is that the *International Arbitration Act* 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,<sup>42</sup> corruption,<sup>43</sup> or a breach of natural justice.<sup>44</sup>

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.

### 4.3 Judicial Support

#### (a) Generally

Australian state and federal courts have followed a similar arbitration friendly trajectory. The Supreme Court of NSW has played a leading role in positive reform. The Court championed reform to the *Uniform Commercial Arbitration Acts*, and it has jurisdiction to deal with all arbitration matters, international and domestic, offering 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.

Extra-curially, senior Australian judges consistently note increasing judicial support for arbitration. The Hon James Spigelman AC wrote, in his time as Chief Justice of NSW, 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

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<sup>35</sup> IAA 1974 (Cth) s 25.

<sup>36</sup> IAA 1974 (Cth) s 26.

<sup>37</sup> IAA 1974 (Cth) s 27.

<sup>38</sup> IAA 1974 (Cth) s 22(5); s 24.

<sup>39</sup> IAA 1974 (Cth) s 24(1); 24(2)(a).

<sup>40</sup> IAA 1974 (Cth) s 24(2)(b).

<sup>41</sup> IAA 1974 (Cth) s 24(2)(c).

<sup>42</sup> IAA 1974 (Cth) s 19(a).

<sup>43</sup> IAA 1974 (Cth) s 19(a).

<sup>44</sup> IAA 1974 (Cth) s 19(b).

statutory powers with respect to commercial arbitration by a light touch of supervisory jurisdiction directed to maintaining the integrity of the system.<sup>45</sup>

His successor, The Hon Thomas Bathurst AC, noted the same in his opening address to the *4th International Arbitration Conference* just last year.<sup>46</sup>

The Hon James Allsop AO, in his capacity as then President of the NSW Court of Appeal, noted at the 2011 Chartered Institute of Arbitrators Asia Pacific Conference that:

The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support...In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts.<sup>47</sup>

Justice Allsop is now Chief Justice of the Federal Court of Australia, a Court which has had extensive involvement in the promotion and support of arbitration for some time both prior to and during his tenure. 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. And Justice Lesley Foster in the Federal Court case of *Uganda Telecom v Hi-Tech Telecom*<sup>48</sup> 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...<sup>49</sup>

(b) *Enforcement - TCL in the HCA*

As practitioners, we understand that critical to the success of arbitration is a respect for the arbitral process, and a non-interventionist approach to enforcing arbitral awards. These lie at the heart of the

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<sup>45</sup> The Hon JJ Spigelman AC, 'Foreword' in L Nottage and R Garnett (eds), *International Arbitration in Australia* (The Federation Press, 2010) viii.

<sup>46</sup> The Hon TF Bathurst AC, *Opening Address at the 4th International Arbitration Conference* (22 November 2016) [27].

<sup>47</sup> Justice James Allsop, International Arbitration and the Courts: the Australian approach in CIArbs Asia Pacific Conference 2011, *Investment & Innovation: International Dispute Resolution in the Asia Pacific* (2011), 1 and 7, cited in Justice James Allsop, "Judicial Support of Arbitration" (FCA) [2014] FedJSchol 5.

<sup>48</sup> *Uganda Telecom v Hi-Tech Telecom* [2011] FCA 131.

<sup>49</sup> *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [126].

New York Convention and the Model Law.<sup>50</sup> The record of cases since Australia's modern arbitration law reforms demonstrate that these are principles that the Australian courts understand and abide by.

The High Court of Australia, being the Court of highest judicial authority in the country, has laid significant foundation for a non-interventionist approach to enforcement in its landmark 2013 decision of *TCL Air Conditioner v The Judges of the Federal Court of Australia*.<sup>51</sup> In this case, their Honours 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.<sup>52</sup> 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*.

(c) *Non-interventionist approach/Breach of natural justice*

In a later case considering an appeal for breaches of natural justice, The Full Court of the Federal Court set a high threshold for setting aside or deny enforcement of arbitral awards under the *Model Law*. 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.<sup>53</sup>

This decision is one of many Australian decisions that confirm the limitations on the appeal and review of arbitral awards. These include no general discretion to refuse enforcement in Australia, and that the public policy ground for refusing enforcement under the Act is to be interpreted narrowly without residual discretion.<sup>54</sup> The NSW 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 that is otherwise enforced under the *International Arbitration Act*.<sup>55</sup>

All in all, the cases demonstrate the pro-arbitration attitude of Australian courts to enforcing arbitral awards, an attitude that can also be seen in addressing other aspects of the arbitral process.

(d) *Arbitration Agreements*

The drafting of arbitration agreements is one such area. The *International Arbitration Act* requires a stay where parties have undertaken to submit to arbitration all or any differences that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not.<sup>56</sup> The use of

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<sup>50</sup> Queen Mary University of London and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (6 October 2015) 6.

<sup>51</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

<sup>52</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 [40], [111].

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

<sup>54</sup> *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.

<sup>55</sup> *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, affirmed on appeal in [2015] NSWCA 229.

<sup>56</sup> *IAA 1974* (Cth) s 3(1) (definition of 'arbitration agreement').

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 just 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.<sup>57</sup>

(e) *Arbitrability*

Arbitrability is another area often subject to dispute. Admittedly it is an issue not fully resolved, with general jurisprudence being that some commercial matters warrant the kind of close public scrutiny that only courts can provide.<sup>58</sup> Broadly speaking, that includes the usual suspects, namely issues involving anti-trust and competition disputes, securities transactions,<sup>59</sup> insolvency, taxation,<sup>60</sup> insurance<sup>61</sup>, workplace<sup>62</sup>, and domestic building disputes.<sup>63</sup> However, the Courts have refrained from taking a categorial approach, instead preferring to consider whether the scope of the arbitration agreement is broad enough to include such disputes, with disputes arising from private contractual interaction between two commercial entities are more likely to be considered arbitrable.<sup>64</sup>

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

#### 4.4 Arbitral Institutions

That brings me to our institutions and institutional rules. There are of course Australian seated international arbitrations under ICC, LCIA, and other rules, as well as ad hoc, which are most welcome. Australia also has its own international arbitration institution being ACICA, the Australian Centre for International Commercial Arbitration. It is in fact the default appointing authority under the Legislation and maintains an international panel of arbitrators from whom appointments may be made. The effectiveness of arbitral institutions can be measured, amongst others by modern institutional rules that

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<sup>57</sup> *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301.

<sup>58</sup> *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 279 ALR 759; Mustill & Boyd, *Commercial Arbitration*, 2nd ed (1989) Butterworths at 149.

<sup>59</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 97-98 per Allsop J (concerning an international commercial arbitration governed by the Model Law); *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1.

<sup>60</sup> *AED Oil v Puffin FPSO Ltd* [2009] VSC 534 at [45].

<sup>61</sup> Statute-barred; see *Insurance Contracts Act 1984* (Cth) s 43(1).

<sup>62</sup> *Metrocall Inc (Successor by Merger to Pronet In) v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1.

<sup>63</sup> Some domestic building disputes are barred from arbitration by statute, see for example *Home Building Act 1989* (NSW) s 7C. See generally Doug Jones, *Commercial Arbitration in Australia*, 2011, pp 152-161.

<sup>64</sup> 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.

deal with the complex arbitration issues of our time. The latest ACICA Arbitration Rules came into effect last year on 1 January 2016.

One of the major objectives of the 2016 revisions has been to encourage the containment of the time and cost of international arbitrations. Thus the *ACICA Rules* include an "Overriding Objective" to conduct proceedings with fairness and efficiency in proportion with the value and complexity of a given dispute.<sup>65</sup> Under these Rules arbitrators are mandated to adopt certain case management practices, such as case management conferencing, and to encourage settlement by the parties.<sup>66</sup> ACICA has also sought to facilitate effective consolidation and joinder,<sup>67</sup> and to protect arbitrators in the discharge of their functions through a robust immunity.<sup>68</sup> 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.<sup>69</sup> Also provided by ACICA are a separate set of *Expedited Arbitration Rules* that operate on an opt-in basis to manage arbitration in a quick, cost effective and fair way where time is of the essence. Finally, ACICA's commitment to demonstrate 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".

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## 5. Conclusion

Australia's legal framework supporting international arbitration is a world-leading one, characterized by a willingness to adapt to meet and frequently to lead international best practice. The combination of a pro-arbitration legislature, an independent and supportive judiciary, and an effective arbitral institution 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 goes a long way to promoting it as a global hub for international arbitration, and to all that may be added our pristine beaches, excellent restaurants, wonderful coffee and welcoming people. I do not hesitate to say that Australia is in a prime position to lead international arbitration in the Asia Pacific given all of these qualities. I am delighted therefore that international networking events such as *Australian International Arbitration Week* (in Perth this year), the *IBA Conference*, and *ICCA Sydney 2018*, offer the opportunity to spread the word to the world. In my view, the tyranny of distance is outmatched by the real capabilities provided by Australian Arbitration, and I am delighted to have had the opportunity to share them with you.

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<sup>65</sup> *ACICA Arbitration Rules Incorporating the Emergency Arbitrator Provisions* 2016 art 3 ('ACICA Rules').

<sup>66</sup> *ACICA Rules* 2016 art 21.3.

<sup>67</sup> *ACICA Rules* 2016 art 14.

<sup>68</sup> *ACICA Rules* 2016 art 49

<sup>69</sup> *ACICA Rules* 2016 Sch 1.

