International arbitration in Australia: The need to centralise judicial power

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The arbitral legislative regime in Australia has recently undergone substantial reform with a view to positioning Australia as a hub for dispute resolution in the Asia-Pacific region. Underlying both the domestic and international arbitration regimes is the UNCITRAL Model Law It is universally accepted that the success of the new arbitration regime in Australia depends upon uniform interpretation of the Model Law by the various superior courts. The proposal raised during the reform process to confer exclusive jurisdiction under the International Arbitration Act 1974 (Cth) upon the Federal Court was not implemented. Instead, concurrent jurisdiction was conferred on the State and Territory Supreme Courts and the Federal Court. The opponents of this proposal argued that uniformity in judicial approach could be achieved by non-legislative means – in particular, by encouraging superior courts to establish panels of specialist arbitration judges. The author argues that timely, uniform interpretation of the Model Law will be difficult to achieve under the present arrangements. He advocates that more is required to establish truly specialist arbitration lists, and that the Federal Court should be established as the single intermediate appellate court to hear and determine international arbitration matters.

I. INTRODUCTION

A Canadian academic has suggested that New York Convention countries[1] can be divided into three groups.

1. The first-rate jurisdictions (the "A List"):

> [owing], to a great extent, their prestige, influence and huge appeal as seats of international arbitration to judiciaries who understand the system, who understand the responsibilities they have to support the system, and who more often than not render decisions which are of a very high quality.[2]

2. A middle group of jurisdictions (striving to join the A List):

> which, typically, do not have a very rich or developed international arbitration culture, but who are showing a clear and sincere desire to join the global bandwagon, to support the system and to send to parties shopping for a seat of arbitration the message that they are open for business and have a good product to offer. *Court decisions* coming out of those countries will sometimes be of a very high quality, but they *will also occasionally be worryingly out of step with the key principles and rules of international arbitration*; for that reason, parties will – quite understandably – tend to remain somewhat reluctant to choose one of those countries as the seat of their arbitration [emphasis added].[3]

3. Jurisdictions where the courts hinder rather than support the international arbitration system.[4]

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[1] The expression "New York Convention countries" is a reference to the 146 countries that have implemented the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*: see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[2] Bachand F, "The Canadian Court's Contribution to the International Arbitration System – A Brief Assessment" (2009) 18 *Canadian Arbitration and Mediation Journal 18* at 18.

[3] Bachand, n 2 at 18.

[4] See also n 89, below.

It can be said fairly that Australia belongs to the middle group, while Singapore and Hong Kong belong to the A List.

Australia has recently undergone substantial reform of its legislative framework regulating arbitration (domestic and international). The reforms modernise Australia's arbitral law and are welcome. The avowed purpose of the reforms is to position Australia as a desirable seat for international arbitration in the Asia-Pacific region.

My thesis is that the present regulatory arrangements in Australia (following the reforms), whereby concurrent jurisdiction is conferred on eight State and Territory Supreme Courts, and also on the Federal Court, are not conducive to the development of a consistent body of jurisprudence in respect of the interpretation of the *UNCITRAL Model Law on International Commercial Arbitration* (Model Law) and, in particular, the *International Arbitration Act 1974* (Cth) (IAA). If there is any hope for Australia to be perceived as a first-rate arbitration jurisdiction, it is imperative for it to develop a consistent body of jurisprudence in relation to the Model Law, and, in particular, the IAA. For this to be achieved there needs to be a centralisation of judicial decision-making power in respect of the interpretation of the Model Law, and, in particular, the IAA. This, in my view, involves establishment of:

(a) truly specialist arbitration lists in the superior courts across the country; and
(b) the Federal Court as the single intermediate appellate court to hear and determine matters arising under the IAA.

II. PRESENT ARRANGEMENTS

On 6 July 2010, the IAA was amended by the *International Arbitration Amendment Act 2009* (Cth) (as amended; "revised IAA"). This was a culmination of a reform process that commenced in November 2008.[5] The *Commercial Arbitration Act 2010* (NSW) ("revised CAA") came into operation in New South Wales on 1 October 2010.[6] The revised IAA and the revised CAA seek to implement a regime that is substantially similar for domestic and international arbitrations. Both Acts seek to align Australia's domestic laws with international standards as expressed in the Model Law (as amended in 2006).[7]

Since the enactment of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth), the Federal Court and the State and Territory Supreme Courts have had concurrent jurisdiction in all matters arising under the IAA.[8] On the other hand, only the Supreme Courts have jurisdiction in matters arising under the relevant uniform domestic arbitration Acts.[9] In other words, the Federal Court does not have any primary jurisdiction in matters arising under the uniform domestic arbitration Acts.[10]

Section 2A of the revised CAA mandates that in interpreting the Act, regard should be had to the need to promote, so far as practicable, uniformity between the application of the CAA to domestic

[5] See Monichino A, "Reform of the Australian domestic arbitration Acts – it's time" (2009) 28 *Arbitrator & Mediator* 83.

[6] Uniform domestic arbitration Acts were enacted by the six States and two Territories in about 1984 and were progressively reformed until about 1990, such that from that time they had uniform status, although there were some subtle nuances between them (CAAs). On 28 June 2010, NSW introduced a revised CAA to replace the earlier domestic arbitration Act enacted in that State in 1984. The other States and Territories are in the process of enacting identical (or at least substantially identical) legislation to replace the existing uniform arbitration Acts. At the time of writing, a similar Act has been passed by the Parliaments of Victoria, South Australia and the Northern Territory. A Bill is currently before the Western Australian and Queensland Parliament. No Bill has yet been into the ACT Parliament.

[7] The UNCITRAL Model Law has been implemented in over 60 nation-states around the world.

[8] When the IAA was first enacted in 1974, the Federal Court did not exist. It was created in 1976. Nevertheless, it is somewhat curious that the Federal Court was not conferred with jurisdiction under the IAA until late 2009 (when the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) received Royal Assent on 7 December 2009).

[9] See n 6.

[10] The Federal Court does, however, have some ancillary jurisdiction under the domestic arbitration Acts, by virtue of *Judiciary Act 1903* (Cth), s 79. In particular, it has jurisdiction under s 53 of the CAAs to grant a stay of proceedings brought in the court when the parties have by an earlier agreement agreed to refer future disputes to arbitration and the matter sought to be ventilated

commercial arbitrations and the application of the Model Law (as given effect by the IAA) to international commercial arbitrations. In turn, the IAA contains interpretation provisions (ss 39 and 2D) which require regard to the international origins of the provisions applied by the IAA.[11] Thus, it is highly desirable that Australian superior courts interpret the revised IAA and CAA in light of jurisprudence in other nation-states which have adopted the Model Law:

> it is critically important that the IAA and CAA are not treated as standalone pieces of legislation devoid of the international jurisprudence … The Model Law and the *New York Convention*, are … instruments which have been drafted internationally and which were intended by the drafters to apply to international disputes, between entities from different countries … It is beneficial to all countries which have adopted the Model Law … and the *New York Convention* if a harmonised system is maintained. In a practical sense, this means that *Australian courts should have regard to decisions of overseas courts applying and interpreting the* Model Law. In my view, the CAA and the IAA encourage this approach, as the interpretative provisions specifically direct judges to have regard to the international origins of the provisions applied by the IAA and to the desirability of the uniform application of these provisions internationally. The same result is contemplated with respect to the Model Law provisions adopted in the CAA provisions [emphasis added].[12]

The recent reforms to arbitration law in Australia reflect a political compromise: "[They] reflect the realities of the division of legislative powers in the Australian federation – a notion that may cause a degree of puzzlement for those who live and work in unitary States."[13]

I have argued elsewhere during the recent reform process that the Commonwealth Government should enact a single arbitration Act covering the field of domestic and international arbitration, utilising its corporations and interstate trade powers under the Australian *Constitution*.[14] I note that the new Hong Kong *Arbitration Ordinance 2010* (which came into effect on 1 June 2011) provides for a unitary regime regulating domestic and international arbitration and confers jurisdiction on a single court.[15]

III. EXCLUSIVE JURISDICTION

By far the most controversial question raised by the federal Attorney-General's discussion paper in respect of the review of the IAA, released on 21 November 2008,[16] was whether exclusive jurisdiction should be conferred on the Federal Court in all matters arising under the IAA (the "exclusive jurisdiction proposal"). This was a vexed question, giving rise to a number of difficult issues and considerations.[17]

The primary argument in favour of the exclusive jurisdiction proposal was that it was more likely to lead to consistent jurisprudence in respect of the IAA. Its opponents rightly pointed out the spectre

before the court is such a matter: see *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 193 at 207; *Saizeriya Co Ltd v Peregrine Management Group Pty Ltd* [2003] FCA 1483 at [43]. Arguably, the Federal Court has similar jurisdiction to grant a stay under s 8 of the revised CAA (which is based on Art 8 of the Model Law).

[11] See also Art 2A of the Model Law as amended in 2006.

[12] Croft C, *The Development of Australia as an Arbitral Seat – A Victorian Supreme Court Perspective* (paper presented at the ICCA 50th Anniversary Conference, Geneva, 19-20 May 2011) at 29-30.

[13] Croft, n 12 at 6.

[14] Monichino, n 5 at 100.

[15] See D'Agostino J, Chapman S and Cartwright-Finch U, "New Hong Kong Arbitration Ordinance comes into effect" (2011) 16 *Australian ADR Reporter* 61. On the other hand, Singapore continues to maintain separate Acts regulating domestic and international arbitration, although the provisions of the Singapore domestic arbitration Act are largely similar to those contained in its international arbitration Act.

[16] *Review of the International Arbitration Act 1974*, http://www.ag.gov.au/internationalarbitration (submissions made in response can also be accessed).

[17] See Monichino A, "Arbitration Reform in Australia: Striving for International Best Practice" (2010) 29 *Arbitrator & Mediator* 29 at 33-34, where I considered the arguments for and against conferral of exclusive jurisdiction on the Federal Court.

of jurisdictional skirmishes involving stay applications under s 7 of the IAA if the State and Territory Supreme Courts were deprived of jurisdiction under the IAA.[18]

Some of the submissions opposing the proposal pointed out that uniformity could be achieved (or at least promoted) by non-legislative means – in particular, by encouraging State and Territory Supreme Courts to establish panels of specialist arbitration judges.[19] Some argued further that it ignored the existence of an integrated judicial system in Australia, whereby intermediate appellate courts and single judges are required to follow the decisions of other intermediate appellate courts in respect of the interpretation of federal legislation, as well as the fact that the High Court of Australia sits as the ultimate court of appeal.

In the end, the exclusive jurisdiction proposal was shelved by the federal government. Instead, concurrent jurisdiction under the IAA was conferred on the State and Territory Supreme Courts and on the Federal Court (a total of nine superior courts). There is lingering doubt as to whether this was the right solution:

> there does remain a residual concern that a *single port of call* has not been established for international arbitration matters that come before the courts, and the success of the reforms made under the [IAA] Amending Act will depend, in part, on the judicial approach adopted [emphasis added].[20]

IV. THE IMPORTANCE OF UNIFORMITY

It is universally accepted that the success of the new arbitration regime in Australia depends upon uniform interpretation of the Model Law by the various superior courts.

Australia has had an unhappy record of unfortunate judicial decisions in the arbitration sphere. Justice James Allsop, in a recent paper, acknowledged that: "Arbitration in Australia has at times not functioned consistently with the principles upon which it is founded."[21] In a similar vein, Justice Clyde Croft has commented:

> At times, there has been a perception that the courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way.[22]

Indeed, part of the objective of the recent reform process was to reverse the effect of some of those unfortunate decisions, in particular, *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461 and *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406.[23] In *Eisenwerk*, the Queensland Court of Appeal held that by adopting *International Chamber of Commerce Arbitration Rules* (ICC Rules), the parties had opted out of the

[18] For example, Party A may commence proceedings in the NSW Supreme Court in respect of a dispute involving Party B. Party B may contend that the dispute is the subject of an international arbitration agreement. Under a concurrent jurisdiction regime, Party B could apply to the Supreme Court for a stay of the proceedings pursuant to *International Arbitration Act 1974* (Cth), s 7. If, on the other hand, the Federal Court were to be given exclusive jurisdiction, how is the Supreme Court proceeding to be dealt with? Is it contemplated that application would be made by Party B to the Federal Court to enjoin Party A from taking any further step in the Supreme Court proceeding? An alternative course would be to confer limited jurisdiction upon the State Supreme Courts to deal with stay applications under s 7: see Monichino, n 17 at 34.

[19] Other pragmatic measures designed to promote uniformity of approach between different Australian courts to the interpretation of the Model Law include judicial education and the establishment of a Judicial Liaison Committee. The latter was established in October 2010.

[20] Megens P and Peters A, "International Arbitration Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration" (2011) 30 *Arbitrator & Mediator* 43 at 50.

[21] Allsop J, *International Arbitration and the Courts: The Australian Approach* (Paper presented at the 2011 CIArb Asia-Pacific Conference, Sydney, 27-28 May 2011) at 5.

[22] Croft C, "Can Australian Courts get their Act Together on International Commercial Arbitration?" (2011) 15 *Australian ADR Reporter* 30 at 30-31.

[23] In *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, the Supreme Court of Queensland interpreted *International Arbitration Act 1974* (Cth), s 8, as conferring on an Australian court a residual discretion to refuse enforcement of a foreign arbitral award even if none of the specified grounds for refusal are made out; s 8 of the revised IAA confirms the position that a court may *only* refuse to recognise and enforce a foreign arbitral award if one of the specified grounds listed in subs (5) or (7) is made out.

Model Law for the purposes of s 21 of the IAA.[24] This decision has been universally criticised on the grounds that the parties' choice to adopt procedural rules of arbitration in an arbitration agreement is different in character and nature from, and has no direct bearing on, the choice of the arbitral law (or the lex arbitri). Under the revised IAA, it is no longer possible for parties to opt out of the Model Law and choose an alternative arbitral procedural law. The *Eisenwerk* problem has thus been "killed off".[25]

In *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887, Ward J of the NSW Supreme Court, held that the adoption of arbitration rules (in that case, ICC Rules) did not constitute an implied exclusion of the Model Law for the purposes of s 21 of the IAA (prior to its recent amendment). In reaching this conclusion, Ward J held unequivocally (at [91]) that *Eisenwerk* was wrong in principle. On the other hand, nine days following the handing down of *Cargill*, the Queensland Court of Appeal in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 had the opportunity to overrule *Eisenwerk* but declined to do so, stating that it was unnecessary to make a finding as to the correctness or otherwise of its earlier decision. More recently, a judge of the ACT Supreme Court[26] applied *Eisenwerk* (without referring to either *Cargill* or *Wagner*), holding that by agreeing to arbitrate in accordance with the Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce, the parties[27] had impliedly opted out of the Model Law under s 21 of the IAA.[28]

In an article published in 2010, Peter Megens and Beth Cubitt argued that several Australian court decisions pre-dating the recent reforms of the IAA had the effect of working against Australia promoting itself as a venue of choice for parties to resolve their disputes.[29] They then discussed three recent arbitration-related decisions of the Australian State Supreme Courts, all handed down in December 2009, which, according to the authors, "demonstrate judicial ingenuity in surmounting arbitration clauses".[30] The three decisions in question are *AED Oil Ltd v Puffin FPSO Ltd [No 2]* [2009] VSC 534,[31] *TCL Air Conditioner Zhongshan (Co) Ltd v Castel Electronics Pty Ltd* [2009] VSC 553, and *Viridian Noosa Pty Ltd v Neumann Contractors Pty Ltd* [2009] QSC 398.

Recently, in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9; [2011] VSCA 248, the Victorian Court of Appeal reversed the decision of Croft J (the specialist Arbitration List judge of the Supreme Court of Victoria). This case involved an application to enforce a foreign arbitral award made in Mongolia against an Australian company (IMC Solutions) which was not a signatory to the arbitration agreement. However, IMC Solutions was related to one of the signatories to the agreement, a British Virgin Islands company (IMC Mining), and performed some of the relevant

[24] Prior to the recent amendments to the IAA, s 21 provided: "If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute."

[25] But see n 28, below.

[26] *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2011) 250 FLR 63 at [175]-[179]; [2011] ACTSC 59 (Refshauge J).

[27] An Australian party and a Swedish party.

[28] While s 21 of the revised IAA removes the ability of a party to opt out of the Model Law in an international arbitration seated in Australia, there is uncertainty as to whether the revised IAA applies only to international arbitration agreements entered into after 6 July 2010 when the amending Act came into force. One may reasonably expect that there are numerous extant international arbitration agreements entered into before 6 July 2010. Therefore, the *Eisenwerk* problem may remain alive in Australia; see Nottage L and Garnett R, *International Arbitration in Australia* (Federation Press, Sydney, 2010) pp 59-61.

[29] Megens P and Cubitt B, "The Continuing Role of the State Supreme Courts in Domestic and International Arbitration in Australia" (2010) 21 ADRJ 124.

[30] See Megens and Cubitt, n 29 at 133, where the authors label December 2009 as "a bleak month for arbitration in Australia". Of course, the reform process was still underway at that time. The authors went on to argue that there is ample evidence to support the proposition that the federal government should legislate at both international and domestic levels to create a single Australian arbitration Act, administered by the Federal Court, and that this would promote a nationally consistent approach to this area of the law (at 133).

[31] Since reversed on appeal: *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22; [2010] VSCA 37.

services contemplated by the agreement. The Court of Appeal refused to enforce the award on the basis that the Australian company was not a party to the arbitration agreement. It held that on the proper interpretation of ss 8 and 9 of the IAA, the evidential onus was cast on the party seeking to enforce the award (the award creditor) to establish that the party against whom the award is sought to be enforced (the award debtor) is a party to the arbitration agreement.[32]

In doing so, the Court of Appeal departed from the approach taken by courts in other leading arbitration jurisdictions to the enforcement of foreign arbitral awards under Arts IV and V of the *New York Convention*.[33] The conventional position is that the applicant for enforcement need only provide evidence of the arbitral award and the arbitration agreement pursuant to which the award is purportedly made. The onus is then cast on the respondent to prove a defence under Art V of the Convention, such as lack of a valid arbitration agreement. The applicant relied on three particular cases to support the conventional position. The first case, *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] SGHC 78, a decision of the Supreme Court of Singapore, was given extensive attention in Croft J's judgment at first instance.[34] *Aloe Vera* would seem to be a particularly important decision because Singapore has substantially identical enforcement provisions to Australia.[35] While this case was acknowledged in passing by the Victorian Court of Appeal, it was not dealt with in any detail. More attention was given to two English decisions which supported the applicant's submission.[36] The Court of Appeal relied on linguistic differences between ss 8 and 9 of the IAA and the equivalent enforcement provisions in the *Arbitration Act 1996* (UK) as justifying departure from the approach taken in the English decisions.[37]

The leading authority on the *New York Convention*, Professor Albert Jan van den Berg of Hanotiau & Van den Berg in Brussels,[38] has been quoted as saying that the Victorian Court of Appeal "got it wrong".[39] He went on to say:

> In essence, the court ruled that, if the arbitration agreement does not name the award debtor, the party seeking enforcement has the burden of proving that the award debtor is a party to the arbitration agreement. That is not the manner in which the *New York Convention* is structured and operates … under Article IV(1) of the Convention, the petitioner needs to submit the arbitration agreement and award when it applies for enforcement. Submission of those documents alone entitles the petitioner to leave for enforcement, unless the respondent asserts and proves that one of the grounds for refusal of enforcement listed in Article V(1) exists. One of those grounds is the lack of capacity of a party and a valid arbitration agreement – which … most courts in the contracting states interpret to cover a situation where the award debtor is not a party to the arbitration agreement … The Court of Appeal reversed this fundamental principle of the Convention by requiring the petitioner to prove that a respondent is a party to the arbitration agreement.[40]

[32] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [134]; [2011] VSCA 248 (Hansen JA and Kyrou AJA). In a separate judgment, Warren CJ appeared to go even further, stating that the applicant has the full legal onus of proving, on the balance of probabilities, that the respondent was a party to the arbitration agreement (at [62]).

[33] Sections 8 and 9 of the IAA reflect (respectively) Arts V and IV of the *New York Convention*.

[34] *Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47 at [47]-[52]; [2011] VSC 1.

[35] *International Arbitration Act* (Cap 143A) (Sing), s 30(1), is substantially identical to s 9(1) of the IAA. Likewise, s 31 of the Singaporean Act reflects s 8 of the IAA. One point of difference is that while s 29(2) of the Singaporean Act provides that "[a] foreign award … shall be recognised as binding … upon the persons between whom it has made, s 8(1) of the IAA provides that 'a foreign award is binding … on the parties to the arbitration agreement in pursuance of which it was made'".

[36] *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543.

[37] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9; [2011] VSCA 248 at [37], [42] (Warren CJ).

[38] See van den Berg AJ, *The New York Arbitration Convention of 1958: towards a uniform judicial interpretation* (Kluwer Law & Taxation, 1981). This classic text is still considered the most important work on the *New York Convention*.

[39] Ross A and Epstein M, "Australian court forges own path on enforcement", *Global Arbitration Review* (online), 31 August 2011, http://www.globalarbitrationreview.com/news/article/29792/australian-court-forges-own-path-enforcement.

[40] Quoted in Ross and Epstein, n 39. See also Born G, *International Commercial Arbitration* (Kluwer Law International, Austin, 2009) Vol II, pp 2705-6.

Irrespective of the onus question, the Court of Appeal held (reversing the trial judge) that the award debtor had established a ground for refusal of the foreign award under s 8(5)(b) of the IAA, on the basis that IMC Solutions was not privy to the arbitration agreement and that therefore the arbitral tribunal had no jurisdiction over it.

The Court of Appeal decision is also notable for its treatment of the costs order made by Croft J. His Honour awarded costs to the applicant (for enforcement) on an indemnity basis, relying on case law from Hong Kong to the effect that a party successfully seeking enforcement of a foreign arbitral award is entitled to indemnity costs. Croft J's decision gave rise to a new category of special costs and was in line with the policy objective of the revised IAA of creating a pro-enforcement environment in Australia.[41] Having allowed the appeal, the Court of Appeal did not need to address this issue, but chose to do so anyway. It disapproved of the learned trial judge's approach, effectively determining that the Hong Kong jurisprudence should not be followed.[42]

Justice James Allsop, speaking extra-curially, recently made the following telling observations:[43]

> The central concepts that affect the success of arbitration procedures and the degree to which courts will assist or impede arbitration are open to a significant degree of interpretation. Depending upon the court's intellectual predisposition or predilection, *widely different approaches are possible to the same problem* at hand.
>
> …
>
> Arbitration depends for its success on the informed and sympathetic attitude of the courts to concepts such as the construction of arbitration agreements, arbitrability, public policy and separability. These concepts *depending on their interpretation can see arbitration flourish or suffocate* [emphasis added].

The principle of comity requires that intermediate appellate courts and trial judges in Australia should not depart from decisions of other intermediate appellate courts in respect of the interpretation of federal legislation or uniform national legislation, unless they are convinced that the earlier interpretation is plainly wrong.[44] Yet, up until recently, there was a conflict between intermediate appellate courts in Australia in respect of the interpretation of the requirement in s 29 of the CAAs for domestic arbitrators to state the reasons for their award.[45] In *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 at [57], the Victorian Court of Appeal held that in the case before it (involving a high dollar, complex domestic arbitration) the arbitrators' reasons called for "reasons of the judicial standard". In *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74 at [223]; [2010] NSWCA 57, the NSW Court of Appeal held that to the extent the Victorian Court of Appeal so decided, that view was plainly wrong and should not be followed: "This is because … that so to equate the responsibilities of arbitrators and judges is not in accordance with the content of either s 29(1)(c) [of the CAAs] or the Model Law." The result was to produce inconsistency in approach between appellate courts, which the NSW Court of Appeal acknowledged was regrettable. It noted, however, that "the issue is of such importance as to require exposure" (*Gordian* at [223]).

[41] Section 2D(c) of the IAA. See also Croft, n 12 at 24.

[42] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 at [335] (Hansen JA and Kyrou AJA); see also Warren CJ at [58] who said that it was unnecessary to express a view on whether the Hong Kong approach should be followed.

[43] Allsop, n 21 at 6-7; see also Megens P and Cubitt B, "Meeting Disputants' Needs in the Current Climate: What Has Gone Wrong with Arbitration and How Can We Repair It?" (2009) 28 *Arbitrator and Mediator* 115 at 127: "The extent to which a court will intervene in the arbitral process depends on how widely or narrowly the courts interpret these provisions and *it is in the interpretation*, rather than the provisions themselves, that the problem lies" (emphasis added).

[44] This principle was reaffirmed by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

[45] *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74; [2010] NSWCA 57; cf *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346. See Keane PA, "Judicial support for arbitration in Australia" (2010) 34 Aust Bar Rev 1 at 2; see also Monichino A, "Adequacy of Reasons Revisited" (2011) 15 *Australian ADR Reporter* 49.

Shortly following *Gordian*, Croft J attempted to reconcile the two appellate decisions, concluding that there was no relevant inconsistency between the two.[46] On 3 September 2010, the High Court granted leave to appeal from the NSW Court of Appeal decision in *Gordian*. The appeal was heard on 3 February 2011, and the High Court's decision, *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 85 ALJR 1188, was handed down on 5 October 2011. Relevantly, the High Court held:

(a) there was nothing in s 29(1)(c) of the CAA to suggest that an arbitrator's reasons should be of a judicial standard. The reference in *Oil Basins* to reasons of a "judicial standard" was an "unfortunate gloss" (at [53] (French CJ, Gummow, Crennan and Bell JJ), [169] (Kiefel J));

(b) the statement by the English Court of Appeal in *Bremer Handelsgesellschaft mbH v Westzucker GmbH [No 2]* [1981] 2 Lloyd's Rep 130 at 132-133 to the effect that arbitrators are required to "explain succinctly why, in the light of what happened, they have reached their decision and what their decision is", is apt to describe the content of the obligation in s 29(1)(c) (at [54], [169]);[47]

(c) what is required by way of reasons in a given case will depend upon the circumstances (at [53], [170]).[48]

Gordian and *Oil Basins* concerned the interpretation of domestic arbitration legislation. It would be extremely unfortunate if similar inconsistencies developed between intermediate appellate courts in respect of the interpretation of the Model Law, particularly in the context of the IAA.[49]

In my respectful view, the unfortunate decisions of the past are (at least in part) a product of a judicial system that enables judges without any, or any significant, arbitration expertise (or a proper understanding of arbitration norms) – particularly in the international arbitration sphere – to preside over cases involving arbitration issues. The result is that those judges arrive at decisions which do not give proper weight to the primacy of the parties' agreement to resolve their disputes by arbitration.[50]

In a federation such as Australia, the quality of the contribution of our courts to international arbitration jurisprudence is by no means consistent across the country. Some States, more than others, have been responsible for the more egregious arbitration law decisions of the past. On the other hand, some court decisions – particularly in recent times – have, if I may say so, displayed an excellent understanding of international arbitration norms and a clear desire to support international arbitration.[51]

While it is a function of the High Court to resolve differences of judicial opinion between lower courts, the reality is that this often involves considerable delay.[52] Indeed, to date the High Court has only considered the IAA in one case.[53] It should be borne in mind that it may take only one or a limited number of adverse, high-profile arbitration-related judicial decisions to substantially damage the aspiration of positioning Australia as a regional hub for international commercial arbitration in the

[46] *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139 at [58]. I have argued elsewhere (Monichino, n 45 at 51) that once it is appreciated that the Victorian Court of Appeal in *Oil Basins* held that arbitrators may be required to provide reasons of a judicial standard (as indeed it held that the arbitrators in the case before it were so required), there is a necessary inconsistency between the two appellate decisions.

[47] The *Bremer* test was applied by the NSW Court of Appeal. In the High Court, both parties were content to rest on the *Bremer* test as articulating the relevant standard under s 29 of the CAA.

[48] In this respect, the observations of the Victorian Court of Appeal that what is required to satisfy s 29(1)(c) will depend upon "the nature of the dispute and the particular circumstances of the case" were accepted by the High Court as correct.

[49] For example, it remains to be seen whether *Altain Khuder* will be followed by other intermediate appellate courts in Australia.

[50] See Pryles M, "Rivalries cost business", *Australian Financial Review*, 21 October 2011, p 40: "Many involved in arbitration hesitated to go to Australia because … [of court] decisions that suggested judges did not understand the complexities of international arbitration."

[51] In the latter category, I would respectfully put Allsop P's decision in *Commandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192.

[52] Moreover, not all unsuccessful parties at the intermediate appellate level seek leave to appeal to the High Court. Therefore, it is possible under the present regulatory system for conflicts between intermediate appellate courts to linger without any timely resolution by the High Court.

[53] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (application for a stay of proceedings under s 7 of the IAA).

Asia-Pacific region.[54] As Professor Michael Pryles, Chairman of the Singapore International Arbitration Centre and a former President of the Australian Centre for International Commercial Arbitration, recently said: "if there's a bad decision anywhere, word gets out … one poor decision [can tar] the reputation of all Australian courts".[55]

V. SPECIALIST ARBITRATION LISTS

One of the major arguments put forward in opposing the exclusive jurisdiction proposal was that there were less drastic measures that could be adopted to promote consistency of judicial decisions in international arbitration matters. The primary measure advanced was the establishment of specialist arbitration lists.[56] Justice Clyde Croft has described the benefits of establishing specialist arbitration lists (with a single judge or select number of judges) as follows:

(a) they promote consistent and predictable outcomes in arbitration-related matters;

(b) they facilitate the development of a reasonably consistent body of arbitration-related jurisprudence by a single judge or select number of judges with expertise in arbitration, in line with global arbitration jurisprudence;

(c) they facilitate consistent and expeditious procedures in arbitration-related matters;

(d) courts with specialist Arbitration Lists are well placed to communicate and receive feedback from commercial arbitration stakeholders;

(e) the existence of specialist Arbitration Lists promotes dialogue between courts in a federal system so that they may develop and share arbitration expertise and experience; and

(f) finally, the existence of specialist Arbitration Lists with specialist judges provides a focus for the purpose of educating arbitrators and practitioners.[57]

It is opportune to consider the status of specialist arbitration lists as at July 2011, some 12 months on from the amendment of the IAA.

Victoria

On 1 January 2010, the Supreme Court of Victoria established an Arbitration List of its Commercial Court (List G). Justice Croft is the judge in charge of List G. The operation of List G is described in Supreme Court of Victoria Practice Note 2 of 2010 – Arbitration Business. It is the only truly specialist Arbitration List in Australia; that is, it is presided over by a nominated judge with (international and domestic) arbitration expertise. As will be seen below, other courts (notably, the NSW Supreme Court and the Federal Court) have recently published arbitration Practice Notes, but the decision-making power in arbitration matters in those courts is not confined to a single judge or select number of judges.

The Victorian Practice Note provides that all arbitration proceedings, including any applications in arbitration proceedings and any urgent matters with respect to arbitration matters, should be directed to Justice Croft's Associate. Where an arbitration matter arises in proceedings allocated to the Technology, Engineering and Construction List of the Supreme Court of Victoria (TEC List), the proceeding will continue to be managed within that list by the judge in charge of the TEC List, but may be transferred to List G.

[54] There are an ever-increasing number of international arbitration conferences held around the world each year, in which recent arbitration developments are discussed. Cases like *Oil Basins* have attracted substantial attention on the international arbitration stage. See also Croft, n 12 at 3-4: "Potential seats take active measures to promote their approach to arbitration; otherwise they risk marginalisation in the competitive global marketplace … Australia has not developed a high-volume of commercial arbitration business … there are many reasons for this, which no doubt include the role and impact, both perceived and real, of the national and State legislatures, courts and arbitral bodies."

[55] Pryles, n 50. Professor Pryles was speaking at the *Engaging the Asian Economies, Law and Practice* conference, Melbourne, 20 October 2011.

[56] See Monichino, n 17 at 33-34.

[57] Croft, n 12 at 14-15.

Between January 2010 and July 2011, nine arbitration-related judgments (four of them international) were handed down by the Supreme Court of Victoria.[58] Almost all of those arbitration matters have been decided at first instance by Croft J as part of List G. The only exceptions are the *AED Oil cases* (No 5 and No 6), which were heard at first instance by Judd J prior to the establishment of List G. Croft J was a member of the Victorian Court of Appeal which heard the appeal in 2010 from Judd J's decision in *AED Oil* in December 2009.[59]

The Victorian Arbitration List model (involving a single judge, with relevant expertise, hearing all arbitration-related matters) is, I believe, the benchmark to which other Australian superior courts should aspire.

New South Wales

The Supreme Court of New South Wales published Practice Note SC Eq 9 – Commercial Arbitration List, on 15 December 2009, which commenced operation on 1 February 2010. It applies to proceedings entered in the Commercial Arbitration List of the Equity Division of that court concerning any international or domestic commercial arbitration. The Practice Note sets out the case management procedures for proceedings entered into the Commercial Arbitration List and provides that all such proceedings will be case-managed by a Commercial List judge.

I have not been able to identify any particular judges of the Commercial List of the NSW Supreme Court who have been assigned to administer proceedings in the Commercial Arbitration List. It would appear that any judge of the Commercial List can hear arbitration matters. I understand from anecdotal evidence that the Arbitration List judge will usually be the duty judge for the Commercial List on the particular day the arbitration-related matter is listed for directions or hearing.

Between February 2010 and July 2011, 11 arbitration matters (two of them international) have been decided by six judges of the NSW Supreme Court; namely, Ball,[60] Einstein,[61] Ward,[62] Hammerschlag,[63] Slattery,[64] and Price JJ.[65] Of the nine domestic arbitration matters, three of those matters concerned the revised CAA.[66]

Between January 2010 and July 2011, the NSW Court of Appeal published judgments in two domestic arbitration-related matters[67] and one international arbitration-related matter.[68] In total, seven different appellate judges of the NSW Court of Appeal have been involved in judgments in three arbitration-related matters in the stated timeframe.

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[58] *Arnwell Pty Ltd v Teilaboot Pty Ltd* [2010] VSC 123; *Oakton Services Pty Ltd v Tenix Solutions* [2010] VSC 176; *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139; *Winter v Equuscorp Pty Ltd* [2010] VSC 419; *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1; *Altain Khuder LLC v IMC Mining [No 2]* [2011] VSC 12 (a decision on costs where Croft J awarded indemnity costs against an award debtor which was unsuccessful in resisting enforcement of a foreign arbitral award); *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22; [2010] VSCA 37; *AED Oil Ltd v Puffin FPSO Ltd [No 5]* [2011] VSC 60; *AED Oil Ltd v Puffin FPSO Ltd [No 6]* [2011] VSC 115.

[59] See n 31.

[60] *Adrian Beard v Cargill Australia Ltd* [2011] NSWSC 142; *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195.

[61] *Barry Smith Grains Pty Ltd (in liq) v Riordan Group Pty Ltd* [2010] NSWSC 1072.

[62] *ABB Service Pty Ltd v Pyrmont Light Rail Co Ltd* [2010] NSWSC 831; *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 (the latter an international arbitration-related matter).

[63] *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394 (an international arbitration-related matter); *Barry Smith Grains Pty Ltd (in liq) v Riordan Group Pty Ltd* [2010] NSWSC 1291; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268; *Cargill Australia Ltd v Oroonka Pty Ltd* [2011] NSWSC 620.

[64] *Gilgandra Marketing Co-operative Ltd v Australian Commodities & Marketing Pty Ltd* [2010] NSWSC 1209.

[65] *Murrumbidgee Irrigation Ltd v Goodwood Services Pty Ltd* [2010] NSWSC 914.

[66] *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268 (Hammerschlag J); *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195 [2011] NSWSC 195 (Ball J); *Gilgandra Marketing Co-operative Ltd v Australian Commodities & Marketing Pty Ltd* [2010] NSWSC 1209 (Slattery J).

[67] *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57 (Spigelman CJ, Allsop P and Macfarlan JA); *Leveraged Equities Pty Ltd v Huxley* [2010] NSWCA 179 (Allsop ACJ, Macfarlan JA and Handley AJA).

Federal Court

On 8 December 2009, the Federal Court published Practice Note ARB 1 – Proceedings under the *International Arbitration Act 1974*, which sets out arrangements for proceedings before the Federal Court in which orders are sought under the IAA.[69]

The Federal Court Practice Note provides for each Registry to have an Arbitration Co-ordinating Judge "who has general responsibility for the management of matters under the [IAA]". Proceedings under the IAA are to be listed before the Arbitration Co-ordinating Judge. That judge will not necessarily be the same judge who will hear and determine the matter. The Federal Court Practice Note states that the identity of the Arbitration Co-ordinating Judges can be found on the court's website.[70]

Between January 2010 and July 2011, the Federal Court heard and determined three international arbitration-related matters. Two were heard by Foster J, the Arbitration Co-ordinating Judge for New South Wales (namely, the *Uganda Telecom* cases).[71] The third case was heard by Besanko J, a judge of the South Australian Registry of the Court – namely, *McConnell Dowell Constructors (Aust) Pty Ltd v The Ship "Asian Atlas"* [2011] FCA 174.[72] This is notwithstanding that Lander J is nominated as the Arbitration Co-ordinating Judge in South Australia. Between January 2010 and July 2011, no international arbitration-related judgments were published by the Full Court of the Federal Court.

Other States and Territories

Since 1 July 2010, no other State or Territory of Australia (that is, other than Victoria and New South Wales) has published an arbitration Practice Note, let alone established a specialist Arbitration List to be presided over by a single judge, or select number of judges. What follows is a summary of the number of domestic and international arbitration-related judgments published by the remaining four States and two Territories in the period between January 2010 and July 2011.

In the Supreme Court of Western Australia, five domestic arbitration matters were the subject of published judgments, by three judges in the Trial Division: Kenneth Martin,[73] Mazza,[74] and Blaxell JJ.[75] The Full Court of the Supreme Court of Western Australia did not publish any judgments in arbitration-related matters during this time.

In the Supreme Court of South Australia, three domestic arbitration matters were the subject of published judgments by two judges in the Trial Division: Sulan[76] and Layton J.J[77] One of those cases went on appeal – it was heard by Doyle CJ, White and Peek JJ.[78]

[68] *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 222 (Basten and Young JJA and Lindgren AJA) (which is currently on appeal to the High Court). There was also a decision on costs in *Nicholls v Michael Wilson & Partners* [2010] NSWCA 100, which I have not included.

[69] As previously stated, the Federal Court does not have primary jurisdiction under the uniform domestic arbitration Acts.

[70] The Federal Court website reveals that the Arbitration Co-ordinating Judges are: NSW (Foster J), ACT (Stone J), Vic (Middleton J), Qld (Dowsett J), SA (Lander J), Tas (Middleton J), WA (Gilmour J), NT (Mansfield J), http://www.fedcourt.gov.au/how/practice_notes_arb1_judges.html.

[71] *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 206. These cases involved an application to enforce a foreign arbitral award.

[72] This case involved an unsuccessful application for a temporary stay of proceedings pending the outcome of related arbitration proceedings in Singapore.

[73] *McKay v Western Australian Planning Commission* [2011] WASC 109; *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2010] WASC 385; *Koolan Iron Ore Pty Ltd v Rizhao Steel Holdings Group Co Ltd* [2010] WASC 384.

[74] *Gold City Developments Pty Ltd v Portpride Pty Ltd* [2010] WASC 148.

[75] *D & M (Australia) Pty Ltd v Crouch Developments Pty Ltd* [2010] WASC 130.

[76] *Viterra Operations Ltd v Ewing International Ltd Partnership* [2010] SASC 328; *Viterra Operations Ltd v Ewing International Ltd Partnership [No 2]* [2011] SASC 83.

[77] *Ewing International LP v Ausbulk Ltd* [2010] SASC 142.

[78] *Viterra Operations Ltd v Ewing International Ltd Partnership* [2011] SASCFC 13.

In the Supreme Court of Queensland, three domestic arbitration matters were the subject of published judgments, by three separate judges in the Trial Division: Daubney,[79] Ann Lyons,[80] and Martin JJ.[81] Meanwhile, the Queensland Court of Appeal (comprising six different judges) published two judgments in domestic arbitration matters.[82] A separately constituted Court of Appeal published a judgment in an international arbitration-related matter – namely, *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219 (McMurdo P, Muir and White JJA). In total, three trial judges and seven appellate judges[83] were involved in judgments in arbitration-related matters in the Supreme Court of Queensland.

In the Supreme Court of Tasmania, only one domestic arbitration-related matter proceeded to judgment.[84] This was a Full Court decision by Evans, Tennent and Wood JJ.

In the ACT Supreme Court, one international arbitration-related matter was the subject of a published judgment of a judge in the Trial Division during the relevant period.[85] Otherwise, neither the ACT Supreme Court nor the NT Supreme Court produced any arbitration-related judgments during the relevant period.

Summary

Attached to this article are two tables which summarise the statistics referred to above.

Appendix 1 contains a review of Australian arbitration-related judicial decisions, both domestic and international, during the period between January 2010 and July 2011. It shows that:

(a) 35 first-instance arbitration-related judgments were published during this period by 19 trial judges;

(b) 11 of those first-instance judgments came out of New South Wales and were delivered by six judges; and

(c) nine appellate arbitration-related judgments were published during this period by five separate intermediate appellate courts comprised of 22 appellate judges.

Appendix 2 concentrates attention on the international arbitration-related decisions. It shows that:

(a) 10 first-instance international arbitration-related judgments were published during this period by seven trial judges; and

(b) three appellate international arbitration-related judgments were published by three separate intermediate appellate courts comprised of eight appellate judges.

In short, the promise of the establishment of a co-ordinated set of specialised Arbitration Lists across the country, made up of a select number of trial judges (with arbitration expertise), has not eventuated. Moreover, at the appellate level, a considerable number of judges have been involved in producing arbitration-related judgments.[86]

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[79] *Vantage Holdings Pty Ltd v JHC Developments Group Pty Ltd* [2011] QSC 155.

[80] *Thiess v Queensland Power Co Ltd* [2010] QSC 461.

[81] *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 097.

[82] *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2010] QCA 363 (McMurdo P, Muir JA and Cullinane J); *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2010] QCA 7 (Holmes and Fraser JJA and Fryberg J).

[83] One of those judges, Fryberg J, was seconded from the Trial Division.

[84] *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3.

[85] *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* [2011] ACTSC 59 (Refshauge J).

[86] Namely, 22 judges, if one has regard to both domestic and international arbitration-related matters; or eight judges, if one has regard to only international arbitration-related matters.

With respect, the above statistics do not engender confidence in the development of a single, consistent body of jurisprudence under the IAA and the Model Law. Put bluntly, too many judges are hearing arbitration-related matters in Australia. The fragmentation of judicial decision-making power in relation to arbitration matters gives rise to the serious risk of inconsistent jurisprudence in relation to the Model Law. In contrast, in Singapore[87] and Hong Kong (both unitary legal systems) a select number of judges (with arbitration expertise) hear arbitration-related matters at first instance and on appeal. This promotes the perception (as well as the reality) of uniformity of judicial interpretation of the relevant arbitration legislation.[88]

Foreign parties considering whether to submit a dispute to arbitration in Australia will no doubt take into account the supervisory jurisdiction of the relevant court(s).[89] As far as foreign parties are concerned, the perception (as well as the reality) of uniformity in the judicial interpretation of the IAA is important.

VI. MODIFIED APPEAL PROPOSAL

My separate contention is that the present arrangements conferring intermediate appellate jurisdiction under the IAA on eight State and Territory Supreme Courts, and also on the Federal Court, is not conducive to achieving consistent jurisprudence under the IAA.

I do not advocate resurrection of the exclusive jurisdiction proposal, but a middle ground that so far has not been explored; in particular, I raise for consideration amendment of the IAA to provide that all appeals from State and Territory Supreme Court judges in international arbitration-related matters be heard by the Full Court of the Federal Court.

Such a proposal can be accommodated by s 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth), which confers jurisdiction on the Federal Court to hear and determine appeals from judgments of State or Territory[90] courts (other than Full Courts) exercising federal jurisdiction, where a right of appeal is provided by another statute.[91]

A system of appeals from State Supreme Courts to the Federal Court in federal matters was in place in taxation matters between 1977 and 1991,[92] and also in intellectual property matters (copyright, patents, and trademarks).[93] Indeed, the Federal Court continues to hear appeals from State and Territory Supreme Court single instance decisions in intellectual property matters; namely, under the *Copyright Act 1968* (Cth), ss 131A, 131B, *Patents Act 1990* (Cth), ss 154-156, 158, *Trade Marks Act 1995* (Cth), ss 190-193, 195, and *Designs Act 2003* (Cth), ss 83-85, 87. Therefore, there is ample precedent for a single intermediate appellate court to hear appeals in relation to a federal matter.

[87] The leading arbitration jurisdiction in the Asia-Pacific region. See n 89, below.

[88] In particular, the *International Arbitration Act* (Cap 143A) (Sing) and the *Arbitration Ordinance 2010* (HK).

[89] The *2010 International Arbitration Survey: Choices in International Arbitration*, produced by Queen Mary, University of London, School of International Arbitration, sponsored by White & Case LLP, revealed that the most important factor in the choice of an arbitration seat is the "formal legal infrastructure" at the seat (at 17). It also revealed that Singapore was the most popular arbitration seat in Asia (p 20). See http://www.arbitrationonline.org/research/2010/index.html.

[90] Limited to the Australian Capital Territory and the Northern Territory.

[91] I am, of course, advocating that the right of appeal should be enshrined in the IAA.

[92] See *Income Tax Assessment Act 1936* (Cth), s 196(4), (5), as amended by the *Income Tax Assessment Amendment (Jurisdiction of Courts) Act 1976* (Cth). The system was changed in 1991 to the current system, which provides for a decision of the Commissioner to be reviewed by the Administrative Appeals Tribunal or, alternatively, appealed to the Federal Court: see *Taxation Administration Act 1953* (Cth), s 14ZZ, which came into force on 24 December 1991.

[93] See Gibbs H, "Developments in the Jurisdiction of Federal Courts" (1982) 12 UQLJ 3 at 7-8; Bowen N, "The Federal Court of Australia" (1977) 8 Syd LR 285 at 289.

At the time of the establishment of the Federal Court, Sir Nigel Bowen, the first Chief Justice of the Federal Court, offered the following opinion as to the intention behind conferring on the Federal Court appellate jurisdiction in appeals from State Supreme Courts in income tax matters and certain intellectual property matters:

> The intention here no doubt is to establish in the [Federal Court] a specialist expertise in these areas governed by Commonwealth legislation. It may well be that *the Federal Court, being the first court of appeal in these areas will, in the future*, and subject to the ultimate appellate jurisdiction of the High Court, *play the predominant role* in the development of doctrine and principle *in these areas* [emphasis added].[94]

It was thus intended that the Federal Court would, pragmatically, be the authoritative exponent of the law, and would promote uniformity of interpretation of the law in those special federal areas. An equal, if not stronger, argument can be made for a similar appeal system in international commercial arbitration matters, for it is incontrovertible that international arbitration is an area of federal jurisdiction which is significant for Australia's national interest.

If appeals were to lie to a single intermediate appellate court (instead of nine courts), conflicts in intermediate appellate court decisions in arbitration matters would be avoided.

It would be desirable for the Full Court of the Federal Court hearing appeals in international arbitration matters to be comprised of a panel of judges (preferably with international arbitration expertise), who would be responsible for developing the relevant jurisprudence. The argument for change is diminished if appeals to the Federal Court were to be heard by any number of Federal Court judges. The High Court of Australia may be less inclined to grant special leave to appeal from a decision of the Full Court of the Federal Court comprised of a specialist panel of judges.

In the short-term, consideration might be given to appointing a select number of State Supreme Court judges with arbitration expertise as judges of the Federal Court to sit on Full Courts hearing appeals in international arbitration-related matters. In other words, those judges would have dual federal-State appointments.[95] This would be a move towards creating a truly national judiciary, allowing both the federal and State polities to jointly utilise the expertise of relevant appointees.[96]

The spectre of jurisdictional skirmishes does not arise under my proposal. The State and Territory Supreme Courts would continue to have jurisdiction to entertain applications for stays under s 7 of the IAA.

An argument against the exclusive jurisdiction proposal was that Supreme Court judges have dealt with international arbitration matters for many years and therefore it is undesirable to deprive those courts of jurisdiction under the IAA. My proposal accommodates that concern. That is, the State Supreme Courts would continue to have jurisdiction under the IAA, but not appellate jurisdiction.

I envisage an argument might be put against my proposal that it is undesirable to deprive the State and Territory Supreme Courts of appellate jurisdiction in matters arising under the IAA in circumstances where those courts have jurisdiction under the revised CAA (based on the Model Law). I accept, as Justice Allsop recently put it: "The domestic as well as the international legislative regimes need to function smoothly if arbitration in Australia is to succeed."[97] But that is not to say that one intermediate appellate court should not assume leadership in relation to the development of the jurisprudence in respect of the IAA and, in turn, the Model Law.

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[94] Bowen, n 93 at 292.

[95] *Australian Constitution*, s 72, would appear to preclude the appointment by the Federal Court of Acting Justices, as occurred at the State level in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1.

[96] See McClelland R (Commonwealth Attorney-General) and Hulls R (Victorian Attorney-General), *Sharing Expertise in the Judiciary* (Press Release, 23 October 2009).

[97] Allsop, n 21 at 29.

VII. Conclusion

As compared with its Asia-Pacific neighbours (notably, Singapore and Hong Kong), Australia has competitive disadvantages in the field of international commercial arbitration – particularly its geographic location.[98] It does not help that we have a fragmented legislative and judicial regulatory system governing domestic and international arbitration.

We must ask whether the present regulatory regime in Australia is likely to deliver consistent international arbitration-related judicial decisions that satisfy globally accepted international arbitration norms. In my view, while the recent reforms modernise Australia's arbitral law and are to be applauded, timely, uniform interpretation of the Model Law under the CAA and the IAA under the present regulatory scheme will be difficult to achieve.

In this article I have put forward a proposal for change which, I believe, will promote uniformity in the interpretation of the Model Law, and the IAA in particular.

The question is: should we make these changes now, or should we wait and see whether the present regulatory system produces the desired results? In pondering that question, it may be worthwhile to remember the observation of the famous economist, John Maynard Keynes, that the future can be divided into the short-run and the long-run, and that *in the long run, we are all dead*.[99] In short: we do not have unlimited time to get the regulatory system right in Australia if we are to aspire to being a hub for international dispute resolution in the Asia-Pacific region.

Appendix 1: Review of Australian arbitration-related decisions (domestic and international) – January 2010 - July 2011

Jurisdiction	First instance decisions		Appellate decisions	
	No of judgments	No of judges	No of judgments	No of judges
Vic	9	2	1	2*
NSW	11	6	3†	7
Qld	3	3	3	7
WA	5	3		
SA	3	2	1	3
Tas			1	3
ACT	1	1		
NT				
Fed Crt	3	2		
TOTAL	35	19	9	22

* Croft J was seconded to the Victorian Court of Appeal, which heard and determined the appeal in *AED Oil* (see n 31).
† I have excluded the decision on costs in *Nicholls v Michael Wilson & Partners* [2010] NSWCA 100.

[98] Kirby MJ, "Do Australians have a future in international commercial arbitration?" (1999) 18(2) *The Arbitrator* 103

[99] Keynes JM, *A Tract on Monetary Reform* (MacMillan, London, 1923), p 80.

Appendix 2: Review of Australian arbitration-related decisions (international) – January 2010 - July 2011

Jurisdiction	First instance decisions		Appellate decisions	
	No of judgments	No of judges	No of judgments	No of judges
Vic	4	2	1	2*
NSW	2	2	1	3
Qld			1	3
WA				
SA				
Tas				
ACT	1	1		
NT				
Fed Crt	3	2		
TOTAL	10	7	3	8

* Croft J was seconded to the Victorian Court of Appeal, which heard and determined the appeal in *AED Oil* (see n 31).