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"Australian & Canadian Perspectives on Arbitration: A Joint Discussion"

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1. Introduction

In the world of international arbitration, Canada and Australia are newer seats – to be contrasted with the traditional seats of Paris, London, Geneva and Zurich. As Toronto and Sydney begin to establish themselves as hubs for international arbitration in their regions, the legal systems and arbitral practices of Canada an Australia are attracting more attention.

In considering the prospects and challenges that are faced by newer seats of arbitration, a number of questions arise: What are the characteristics of a good seat of arbitration? What is the relationship between the development of a seat of arbitration and the proliferation of arbitral institutions? Can newer seats compete with more traditional seats? This paper examines the experiences in Australia and Canada, which show that newer seats can certainly compete with the more traditional seats.

2. The Legal Systems

(a) Australia

Having had a long history of indigenous population, Australia was occupied by Europeans as a penal colony for England. After the Americans escaped from the yoke of colonial rule from London, the English had nowhere to send their convicts. As a result, they decided to send them to Australia. To a significant degree, the culture of Australia has been built around that convict heritage. If one can now claim some distant relationship to a convict sent from London, it is often a matter of pride in Australia.

Australian culture has subsequently been enriched by immigration. This includes from Italy and other southern European countries following the Second World War and thereafter by waves of immigration from Asia, and now from the Middle East. Australia is thus a substantially multicultural country.

Because Australia was colonised by the English, the legal system is very much a common law system inherited from England. The colonisation of Australia took place disparately, and being a fairly large continent, these colonies developed as little sovereign entities. This is similar to the United States where there is a very strong legal and cultural history within each of the states of the US. In Australia, it was not until 1900 that the states combined constitutionally into a federation of Australia.

There are still very significant constitutional responsibilities and governance structures for each of the Australian states. Under the Australian Constitution, the federal parliament, also known as the Commonwealth Parliament, has responsibility for only defined areas of legislative authority, such as defence,[2] foreign affairs,[3] and the like. There are a number of these powers that are given specifically to the Commonwealth Parliament.[4] Where the Commonwealth Parliament is given those powers, they have capacity to legislate to the exclusion of the states' responsibilities.[5] Outside those defined areas of power, the states have full sovereign responsibility for legislation. There are separate elected representatives in a Westminster type system of parliaments in each of the Australian states and territories, as well as in the Commonwealth.

Australia's legal history is derived from the English common law system, where commercial law was largely developed by the law of precedent. Judge's decisions have filled the common law over time, so that Australian law in the commercial context is significantly influenced by old English authorities. More

[2] *Australian Constitution*, s 51(iv).

[3] *Australian Constitution*, s 51(xxix).

[4] For the complete list of powers that are given to the Commonwealth Parliament, see *Australian Constitution*, s 51

[5] *Australian Constitution*, s 109.

recently, we have seen the common law in the commercial context being filled by Australian legal authorities.

Each of the states in Australia has superior courts of unlimited jurisdiction. Then there is the Federal Court, which is responsible for federal matters and commercial matters. There is also an effective cross-vesting system between the various courts in Australia, which has eliminated battles of jurisdiction between the courts of the sort that have been ongoing in the United States. Sources of commercial law made by judges in Australia can be found in the commercial courts of the significant states, mainly New South Wales and Victoria, and also in the Federal Court, where some of the best legal minds take appointment as judges and who produce leading decisions. Of course there is the overlay of statute, but Australia does not have overarching legal codes as in civil law systems.

The historical influences that have built the Australian legal system have come not just from England but from other common law jurisdictions in the Asia-Pacific region. There are significant influences in the development of Australian commercial law, from the United States, Canada, Singapore, Malaysia, Hong Kong, and other common law systems in the region. There is also a significant awareness of other legal systems, due to the huge trade flows with China, Japan and Korea, all of which have traditional civil law legal systems.

The Australian legal community is well trained, as can be seen by the many Australian lawyers around the world. Jurisdictions around the world are replete with Australian lawyers, and it almost seems to be a rite of passage for Australians to travel overseas after they have graduated. The legal training at Australian law schools is of a very high standard, which makes Australian lawyers attractive for law firms all around the world.

In the international arbitration context, there are many Australians as partners in law firms, including in New York, Madrid, London, and Stockholm. Australia is also a great place to live and, even though it is a little distant from Europe and suffers from the "tyranny of distance", quite a number of these Australians who travel overseas to work eventually want to come home. When they come home with their families to live in Australia, that enriches the Australian legal community. Within the Australian legal community, there is therefore a diverse level of experience with respect to international work. In so far as international arbitration is concerned, Australia certainly enjoys a sophisticated legal community.

In terms of where international arbitrations are held in Australia, there would be more international arbitrations in Sydney and Perth than anywhere else in Australia. Melbourne is also a major commercial centre for Australia, and the Melbourne bar is a very strong centre of excellence. However, the logic of seating in Australia seems to favour Perth, as it is the centre of natural resources activity, oil and gas industries and the like, and Sydney. Perth is also quite close to Singapore and other parts of Asia. Further, significant volumes of trade occurs between Western Australia and Africa, particularly in the mining sector. Sydney and Perth are thus the two major centres for international arbitration, where there are more international arbitration practitioners than any other cities of Australia.

(b) Canada

Canada’s history is rather different from that of Australia. Canada became a "place" – one that would ultimately become a country – when three founding nations, the English, the French, and the Native peoples, came together in a spirit of compromise. They needed to find ways to live together in peace in order to survive the harsh weather from the north and the pressure to be governed from the south by the Americans. Much later, in 1867, not very long before the county of Italy was created out of its many parts, so too did four of the Canadian colonies join together in a "confederation" to become a country.

Today, Canada has ten provinces and three territories. Legislative power is divided between the provinces and the federal government so that most of the matters relating to private law are within the authority of the provinces and many of the matters relating to public law, such as criminal law, are within the authority of the federal government. Each of the provinces has a superior court administered by the province, but presided over by judges from the province who are appointed and remunerated by the

federal government. These courts have plenary and inherent jurisdiction. Appeals in commercial matters can be made from the courts of appeal in each of the provinces to the Supreme Court of Canada, but only with permission of the Supreme Court. As a result, the courts of appeal of the nine common law provinces frequently rely upon precedents from one another.

Like Australia, Canada also has a Federal Court, but Canada's Federal Court has a limited statutory jurisdiction relating to matters of maritime law, immigration law, intellectual property law and aboriginal law. This court also hears claims against the Federal Government and applications for judicial review of decisions by federal administrative tribunals. Thus, the provincial superior courts have the primary responsibility for commercial matters and there are virtually no jurisdictional conflicts between them and the Federal Court of Canada.

Unlike Australia, Canada has one province that is not a common law jurisdiction. The substantive law of Quebec is civil law jurisdiction that developed from its history as a French colony. In 1866, the year before Confederation, Quebec adopted the *Civil Code of Lower Canada* and in 1994, this Civil Code was replaced by the *Civil Code of Quebec*. Although Quebec's substantive law is based on civilian traditions, its procedural law has many features based on the common law. For example, the civil justice system is an adversary system with cases being developed through the principle of party prosecution and presented before judges who are not career judges, but are appointed from the senior ranks of the legal profession. Accordingly, Quebec has a hybrid legal system, and Canada is a bi-jural country.

Just as Canada's common law provinces rely on precedents from one another, so too do the appellate courts regularly draw from a wide variety of sources, both legal and academic, from across the country and beyond in order to develop new areas of the law. This open and outward-looking approach to the law may, in part, be a product of the fact that we have long been a highly multicultural country in which immigration has long played a significant role in our growth and development. One measure of the rich diversity of a population is the number of groups of more than 10,000 who identify themselves as having a distinct cultural origin from another country. Toronto has more such groups than any other city in the world, supporting its claim to be the most multicultural city in the world.

Canada's distinctive legal system, operating within a highly diverse and multicultural population, has a legal profession that is also extremely unusual. For more than half a century, until very recently, access to the legal profession has been extremely limited. This is because the only readily feasible way to obtain a license to practise law in Canada was to graduate from a Canadian law school, and the number of Canadian law schools and places available in them changed very little from the 1950's until today. As a result, over the years, the competition to gain admission to law schools became steadily more intense, and those who gained admission to the profession were increasingly among the most talented and motivated of their generation.

This ever more capable and hard-working legal profession, comprising an ever smaller proportion of the population, meant that the legal services they provided continued to increase in quality as they decreased in availability. Two things happened as a result. First, a supply of informal legal services provided by non-lawyers began to emerge. Ultimately, this resulted in a decision by the regulatory body governing the legal profession to regulate paralegals as well so as to protect the public and to maintain the integrity of the profession.[6] Second, offshore law schools began to emerge. These law schools, most of which are located in Australia and England, offer courses on Canadian law (that would otherwise be required for the onerous conversion process for foreign qualified lawyers) to Canadians who could not gain access to Canadian law schools but wish to practise law in Canada. All in all, the restrictions on access to the legal profession in Canada are changing just as the legal profession itself is evolving and adapting to a globalised world of legal services.

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[6] Ontario became the first jurisdiction in North America to regulate paralegals by the *Access to Justice Act*, SO 2001, c 21 amending the *Law Society Act*, RSO 1990, c L-8.

With such a highly capable legal community operating in a country of such rich cultural diversity, it may come as no surprise that Canadians are disproportionately recognised as active members of the international arbitration community, and that there is strong growth in interest and participation in international arbitration in the Canadian legal community. Over the past two decades what was once a small group of specialists, located mostly in Montreal, has become an active and growing community spread across the major Canadian commercial centres – Toronto, Calgary and Vancouver.

3. Legislative Framework for Arbitration

In Australia, there are separate constitutional responsibilities for the Commonwealth Parliament and the state parliaments. International arbitration is the responsibility of the Commonwealth Parliament because it involves the carrying into force of the external affairs power under the Australian Constitution.[7]

The *International Arbitration Act 1974* is indeed a federal statute that has force throughout the whole of Australia. Australia, along with Canada, was one of the very first countries to enact the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**").[8] The *International Arbitration Act 1974* annexes the Model Law,[9] and adopts the Model Law as having "the force of law in Australia".[10] This is often called the "vanilla approach" to the adoption of the Model Law, which is in distinction to other Model Law countries such as Malaysia, India and New Zealand. These jurisdictions have enacted their own provisions and it is not always easy to find out how they differ from the Model Law. Whereas in Australia, the Model Law is simply an annexure to the legislation, and the divergences from the Model Law are clearly specified. For example, the Australian legislation does not adopt the contentious provisions in the Model Law dealing with interim relief relating to ex parte applications.[11]

An arbitration that is "international" is defined in the legislation, and in fact by the Model Law, to be arbitrations that involve a range of international characteristics.[12] This includes arbitrations between parties from different nationalities, arbitrations involving contracts governed by laws that are not the laws of Australia, and arbitrations that involve transactions which are to be performed outside Australia. The domestic legislations deal with any arbitration that is not international as defined by the legislation.

Domestic arbitration in Australia is the responsibility of the state parliaments. Legislative cooperation between the Australian states is rather rare because each of the parliaments have a view that they can do it better than the others, and each of the lawyers living in each of the states think they know they can do things better than the lawyers in the other states. As a result, the tension between the state laws is often quite significant. Rather unusually however, in the context of domestic arbitration there has been a history of uniform legislation between the states. For many years, the domestic arbitration legislations in Australia were based on the English arbitration legislation. Significantly, almost all of the Australian

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[7] *Australian Constitution*, s 51(xxix).

[8] Australia first adopted the Model Law in 1989, and then in 2010 adopted the Model Law as amended in 2006. Canada adopted the Model Law in 1986. See UNCITRAL, *Status - UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

[9] *International Arbitration Act 1974* (Cth), Schedule 2.

[10] *International Arbitration Act 1974* (Cth), s 16.

[11] *International Arbitration Act 1974* (Cth), s 18B. See also Model Law, Chapter IVA.

[12] *International Arbitration Act 1974* (Cth), Schedule 2, Art 1(3).

states and territories have now adopted domestic arbitration legislation based on the Model Law as amended in 2006.[13]

It is worth noting that, in relation to the domestic arbitration laws, there had been a long tradition of judicial review of arbitrator's decisions, primarily based on the English model of review. For this reason, when adopting the Model Law for domestic arbitration, there were concerns surrounding the level of judicial review to be made available to parties. Ultimately, judicial review was made available on an opt-in basis,[14] which has proved to be the death knell of judicial review as parties seldom opt into judicial review. It thus follows that the position in Australia regarding judicial review, both domestically and internationally, is the practically the same as the Model Law.

In Canada, the provincial legislative authority over matters of private law is not superseded by that of the federal government when it enters into an international treaty.[15] As a result, treaties in areas of private law, such as the New York Convention must be implemented through legislation in each of the provinces. Having said that, Canada was not only one of the first jurisdictions to adopt the Model Law, it was *the* first jurisdiction.[16]

The ten Canadian provinces followed soon afterwards. The nine common law provinces each have an International Commercial Arbitration Act,[17] with some implementing provisions and a schedule that attaches the Model Law. Any features customising the provisions of the Model Law can easily be identified in the provisions of these implementing statutes. Quebec, like a number of other civil law jurisdictions, has not adopted the Model Law verbatim but, instead, has incorporated the substance of the Model Law in Book X of its *Civil Code*[18] and in its *Code of Civil Procedure*.[19]

Perhaps because reforms to legislative initiatives of this sort must be accomplished on a province-by-province basis, Canada has not yet adopted the 2006 revisions to the Model Law. Nevertheless, the Uniform Law Conference of Canada Working Group on Arbitration Legislation International Commercial Arbitration, has just completed its Final Report on new uniform legislation following

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[13] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2012* (WA).

[14] See, eg, *Commercial Arbitration Act 2010* (NSW), s 34A.

[15] *Attorney-General of Canada v. Ontario Attorney-General of Ontario Attorney-General of Ontario (Labour Conventions)* (Ontario, Canada), [1937] A.C. 326 (P.C.)

[16] See, above n 8.

[17] *International Commercial Arbitration Act*, RSBC, 1996, c 233 (British Columbia); *International Commercial Arbitration Act*, RSA, 2000, c 1-5 (Alberta); *International Commercial Arbitration* Act, SS, 1988, c I-10.2 (Saskatchewan); *International Commercial Arbitration Act*, CCSM, c C-151 (Manitoba*); International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario); *International Commercial Arbitration Act*, SNB, 1986, c I-12.2 (New Brunswick); *International Commercial Arbitration Act*, RSNS, 1989, c 234 (Nova Scotia); *International Commercial Arbitration Act*, 1988, c I-5 (Prince Edward Island); *International Commercial Arbitration Act*, RSN, 1990, c I-15 (Newfoundland and Labrador). Also the territories: *International Commercial Arbitration Act*, RSNWT, 1988, c I-6 (Northwest Territories, and Nunavut under the Nunavut Act (SC 1993 c 28, s 29)); *International Commercial Arbitration Act*, RSY, 2002, c 123 (Yukon Territory).

[18] *Civil Code of Quebec*, SQ, 1991, c 64, Articles 2638-2643, 3121, 3133, 3148 and 3168.

[19] *Code of Civil Procedure*, RSQ, c C-25 (as am), Articles 940-952.

extensive consultation on possible reforms.[20] Canadians may soon have new uniform legislation on international commercial arbitration.

4. Party Autonomy

Party autonomy is central feature found in the Model Law, and in particular, enshrined in Article 19. As previously mentioned, the Australian international arbitration legislation attaches the Model Law, with additional provisions clearly specified in the legislation. Some of these additions are reflective of the party autonomy concept, as they are provided for on an opt-in or opt-out basis. For example, provisions in relation to court assistance in obtaining evidence are provided for on an opt-out basis.[21] Similarly, parties may opt-out of provisions relating to the power of arbitral tribunals to award interest and costs,[22] which are provisions not provided for by the Model Law.

On the other hand, there is a sophisticated confidentiality regime contained in the Australian international arbitration legislation, which parties can opt into.[23] Interestingly for domestic arbitrations in Australia, the confidentiality provisions are provided for on an opt-out basis.[24] Confidentiality thus applies on an opt-out basis in domestic arbitrations, but on an opt-in basis in international arbitrations. Contrary to the often heated debate surrounding confidentiality in the international arbitral community, for some users of international arbitration, confidentiality is not of paramount importance. The fact that the Australian legislation adopted confidentiality on an opt-in basis in the international context is reflective of these varying attitudes.

In Canada, taking Ontario's *International Commercial Arbitration Act* as an example, you will find that the party autonomy that is encouraged by Article 19 of the Model Law has been expanded upon in various ways. Recognising that there are, in any event, very few ways in which the parties are prevented from adapting the Model Law to suit their own needs, the legislation in Canada explicitly endorses a number of adaptations that may be desirable. For example, the Act provides that parties may ask their arbitrator(s) to mediate their dispute at any stage of the arbitration and, with their agreement, the arbitrator(s) are not, as a result, precluded from subsequently returning to their roles as arbitrators.[25] In addition, the parties may decide for themselves what procedure should be adopted following the replacement of an arbitrator, such as whether the matter should begin afresh, or whether it may continue from where it left off.[26] Further, the Act provides that the parties may agree, at any stage of the arbitration, to remove an arbitrator.[27] Finally, the Act contains provisions that explicitly endorse court-facilitated consolidation of arbitrations, where this is desired by the parties.[28]

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[20] Uniform Law Conference of Canada Working Group On Arbitration Legislation International Commercial Arbitration, *Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation*, <www.ulcc.ca>.

[21] *International Arbitration Act 1974* (Cth), ss 22(2), 23, 23A, 23J

[22] *International Arbitration Act 1974* (Cth), ss 22(2), 25-27.

[23] *International Arbitration Act 1974* (Cth), ss 22(3), 23C-G.

[24] See, eg, *Commercial Arbitration Act 2010* (NSW), s 27E.

[25] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 3.

[26] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 4(1).

[27] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 4(2).

[28] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 7.

Interestingly, in the consultations concerning possible revisions to the Model Law, having considered a wide range of possible refinements to the 2006 Model Law, the drafters of the Report in virtually every case recommended that uniformity be maintained.[29] While it is true that many of these areas of customisation are addressed in the rules of a number of arbitral institutions, or may be addressed by the arbitration agreement of the parties, some of them such as confidentiality were thought by some as worth inclusion in the national arbitral law, if only to indicate the importance placed on them in Canada.

5. Leading Institutions and Organisations

There are a number of arbitral institutions and organisations in Australia, including the Australian Centre for International Commercial Arbitration (ACICA). ACICA is an arbitral institution with its own modern set of arbitration rules, taking a "light touch" approach to administering arbitrations. There have been a significant number of cases under the ACICA Rules, not nearly as many as Singapore and Hong Kong, but an increasing number. ACICA does not of itself have physical facilities, as the physical facilities for international arbitration in Sydney are provided by the Australian International Disputes Centre (AIDC). The AIDC is a physical arbitration hearing centre, similar to the International Dispute Resolution Centre (IDRC) in London, which facilitates arbitrations of any institution to be heard. It provides what is often called "concierge arbitration", where if parties are seeking to hold an arbitration in Sydney, the AIDC will assist with hearing rooms, provision of transcript facilities, hotel accommodation, document handling, storage facilities, restaurant bookings, and so on.

Another organisation in Australia that is closely aligned with both ACICA and AIDC is the Institute of Arbitrators and Mediators Australia (IAMA), which deals with domestic arbitration and domestic mediation. There is also a very active branch of the Chartered Institute of Arbitrators (CIArb) in Australia. All of these ADR organisations in Australia have a very close cooperation, which, instead of competing against each other, seek to play to their individual strengths and support. For example, CIArb, the premier international accreditation and training body, conducts most of the training for other institutions except for mediation training, which is conducted by AIDC. The offices of all the organisations are in the same place at the AIDC, with a number of shared administrative personnel. In this way, the somewhat negative effect of competitive behaviour is eliminated and the institutions and organisations in Australia work together in the interests of domestic and international ADR.

The Canadian international arbitration community does not have, as the focal point of its energy and activities, arbitral institutions. Rather, it is the various professional organisations, such as the Canadian National Committee of the ICC (ICC Canada) that are the active forces in promoting the understanding of international arbitration and interest in its use among commercial parties and legal practitioners.

ICC Canada developed from a small closed panel of arbitrators at the end of the 1990s based mainly in Montreal and Toronto to a much larger diverse and open group that spans the country. In addition to ICC Canada, a group of 10 Toronto arbitrators, called The Arbitration Roundtable of Toronto (ART), which was soon complemented by a counterpart in Western Canada known as the Western Canadian Arbitration Roundtable (WCART), have been so successful in promoting arbitration that they have since given way to much larger organisations known as the Toronto Commercial Arbitration Society (TCAS) and the Western Canadian Commercial Arbitration Society (WCCAS).

Mention should also be made of a very impressive group for the promotion of arbitration among younger lawyers known as the Young Canadian Arbitration Practitioners (YCAP) who also regularly hold conferences and other events for discussing recent developments and promoting the understanding of international arbitration.

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[29] Uniform Law Conference of Canada Working Group On Arbitration Legislation International Commercial Arbitration, *Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation*, <www.ulcc.ca>.

It should be acknowledged that there are some small Canadian organisations for the administration of arbitration, such as the Canadian Commercial Arbitration Centre (CCAC), the Pacific Centre for Dispute Resolution, and the Alternative Dispute Resolution Institute of Canada (ADRIC), which manages domestic arbitrations. More recently, though, has been the emergence of specialised arbitration "chambers", perhaps the most prominent of which is Arbitration Place in Toronto. These centres provide not only office facilities for their members, but also world-class hearing facilities for those who wish to hold their arbitrations in Canada. These services include hearing rooms, transcript production, simultaneous interpretation, tribunal secretarial support, concierge facilities for accommodations and meals in Toronto. They also include support for ad hoc arbitrations, which are very common in domestic commercial matters in Canada, such as service as an appointing authority and financial management.

Centres such as this are making Toronto an increasingly attractive alternative for hearings to New York for matters where parties are located on opposite sides of North America, or where one party is overseas and prefers to come to Canada rather than the United States and the American party regards Canada as "just next door".

6. Institutional Rules

In Australia, ACICA has a set of modern arbitration rules, in which one will find everything including emergency arbitrator provisions and expedited rules. Interestingly, ACICA is the default appointing authority as prescribed under the Australian legislation.[30] The default appointing authority is crucial where the parties have not provided a mechanism for appointing an arbitrator, for example by failing to nominate a set of institutional rules, and the Model Law requires the local legislation to appoint a responsible authority for appointing the arbitrator. Having ACICA as the appointing authority is similar to the position in Singapore and Hong Kong, but interestingly not in India or New Zealand, or indeed in London where the default position requires an application to a court. The courts are not always in the best position to perform these appointing functions. In contrast, ACICA has a very transparent method of appointment of arbitrators both under its rules and the act, with a supervisory committee consisting of a number of representatives of senior commercial organisations and senior members of the judiciary.

Canada is in a similar situation in that there are no prominent local rules or administering bodies for international arbitrations, but instead Canadian parties and practitioners welcome and support arbitrations conducted in accordance with a range of well-established institutions and in cooperation with those institutions. Accordingly, for example, Arbitration Place has established formal affiliations with the ICC and the LCIA; and many arbitrations between Canadian and American parties are held in Canada according the rules of the International Centre for Dispute Resolution (ICDR), which is the international arm of the AAA.

7. National Courts

So far as national courts are concerned, the Model Law establishes jurisdiction for the courts to deal with a limited range of matters. In Australia, both the state Supreme Courts and the Australian Federal Court are granted jurisdiction. Parties may choose the court in which they make the applications, as available in the Model Law, such as for supporting an arbitration, seeking to remove an arbitrator, or for a limited review of an award. Particularly in Victoria, New South Wales, and in the Federal Court, there are appointed specialist arbitration judges who hear all of the arbitration matters brought before the courts.

In addition, ACICA has established a judicial liaison committee, where all of the judges in all of the jurisdictions in Australia who deal with international arbitration meet regularly to discuss issues of international arbitration. The committee has established a network, which has allowed the members to contact colleagues in other jurisdictions if they need advice on a particular issue. This has developed expertise amongst that courts in Australia that deal with international arbitration. In addition, there have

[30] *International Arbitration Act 1974* (Cth), s 18; *International Arbitration Regulations 2011* (Cth).

been a series of judgments in Australia, including from the High Court of Australia, the highest appellant court, that are strongly supportive of international arbitration.

In Canada there are no specialist judges for judicial proceedings relating to arbitration but there are a number of judges who are very experienced in the field and the courts are frequently willing to hear interveners from the international arbitration community on important questions of law. Indeed, Canadian courts, under the leadership of the Supreme Court of Canada, have a very strong tradition and continuing commitment to supporting arbitration by refraining from inappropriate interference in arbitral proceedings, and by giving appropriate deference to arbitral agreements and arbitral decisions. On a number of occasions in recent years, the Supreme Court of Canada has made important pronouncements on the need to respect party autonomy in the selection of arbitration as a means of dispute resolution in international commercial dealings. These pronouncements have been in the areas of arbitrability, competence, competence, the enforcement of arbitral awards, to mention just a few.

8. Procedural Distinctions

The divide between civil law procedure and common law procedure has been dealt with many years ago by the *IBA Rules on the Taking of Evidence in International Arbitration*.[31] In most jurisdictions, the way in which arbitrations are conducted usually differ from the way in which court proceedings would be conducted. There is nevertheless a difference in the way in which counsel from a particular jurisdiction deal with arbitrations compared to counsel from another. For example, one might find an English bar approach to arbitrations in London, which will be different in significant respects to the way in which lawyers from Geneva, Milan or Rome might deal with these matters.

In Australia there is an emerging practice in the way in which international arbitrations are conducted that is clearly distinct from the way in which court proceedings are conducted domestically. Because of the "coming home" of arbitration lawyers from around the world to practice in Australia, local Australian counsel have brought with them an internationalisation of procedures. I have found that arbitration proceedings in Australia are less inclined to be under the local court procedure influence, as compared to Singapore or Hong Kong where local counsel are yet to leave their domestic procedural baggage at the door. That being said, this is an evolving process that should be observed on a case-by-case basis, and one ought to resist the temptation of drawing overall conclusions.

With respect to the rights of representation in international arbitration in Australia, the Australian legislation includes a specific provision, as an addition to the Model Law, which entitles the parties in international arbitration to be represented by whoever they wish, notwithstanding any bar rules to the contrary.[32] There is therefore no question regarding party representation in Australia, compared to say the United States. In addition, there have been some discussion in Australia regarding the possibility of giving rights of appearance to foreign practitioners in court in respect of international arbitration matters, rather than local counsel.

In Canada there is also a clear distinction between domestic arbitration and domestic litigation in the sense that the parties are much more likely to take initiative to customise and tailor their procedures in arbitration. However, it is probably fair to describe this as a continuum between domestic arbitration and international arbitration in the following way. At one end of the spectrum, in some domestic arbitrations, retired judges who have been popular and well respected among commercial lawyers conduct matters in ways that are very similar to litigation. Counsel are satisfied merely to have their choice of judge and a schedule for the determination of the matter that suits the needs of their client.

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[31] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

[32] *International Arbitration Act 1974* (Cth), s 29

Similarly popular has been the availability of arbitration in lieu of a review of a trial decision by an appellate court, particularly in matters that are highly technical. The judges in the superior courts in Canada are of a very high quality, but they are generalists and must be prepared, to a certain extent, to hear cases of all sorts – criminal law, family law, etc. – in addition to commercial matters. Under these circumstances, parties may well respect the courts, but still prefer to choose their decision maker or their tribunal of three decision makers and to be able to set their own timetable.

Having said that, counsel in domestic arbitrations are becoming increasingly aware of the flexibility and the benefits of practices that are typically found in international arbitration, such as those based on the *IBA Rules for the Taking of Evidence*, and they are adopting many of them in their ongoing efforts to streamline proceedings and make them more efficient and more effective. Recent trends are away from arbitration that is like "litigation only sitting down" to something that much more closely resembles international arbitration. This may be contrasted with the challenges faced by the international arbitration community in the United States that struggles against strong local traditions, such as those based on extensive discovery and hearings designed for juries.

In Canada, this range of practice in arbitration makes for a healthy competition between litigation and arbitration in which each is well respected. All in all, the expectations of the business community for the quality of dispute resolution is steadily increasing.

9. Efficiency

The issue of efficiency in international arbitration is an issue that is truly international. The influence of the seats and places of arbitration is limited because it is the international rules, with the assistance of the institutions, that dictate how arbitrations are conducted.

Domestically, Australia has had the same issues as England, and domestic arbitration has been lacking in terms of efficiency. It has also failed to keep up with the efficiency of the commercial courts. For example, a large commercial dispute in the Federal Court of Australia can be finished within ten months from start to finish. This can be an issue in Australia where many judges specialise in commercial cases, giving parties no reason to choose domestic arbitration over the courts.

As the experience in England will show, despite the shortcomings in the domestic arbitrations, London is a thriving centre for international commercial arbitration. International arbitrations in London are completely different to the domestic arbitrations that happen there. Likewise, so far as international arbitration is concerned, cases that are run by Australian arbitrators or by Australian counsel are no less efficient than those that are run elsewhere. The next challenge for Australian arbitrators from the domestic context is to learn more from the international procedures in order to be good international arbitrators.

A very similar situation can be seen in Canada. Certainly in international arbitration there is a very advanced and sophisticated approach to streamlining and customising the procedure. Compared to the United States, arbitral proceedings in Canada can be more efficient, as there is no major tradition of extensive discovery in international arbitration in Canada.

In terms of the domestic approach in Canada, there is a healthy competition between the commercial courts and arbitration. Courts themselves seek to be more efficient and flexible to be in competition with domestic arbitration, and vice versa. Also, the judges in the national courts are of very high quality. However, they are generalists that need to hear cases on various areas of law. Because it is not possible to select a judge, parties will often seek to choose their own path by opting to arbitrate. Arbitration in this sense is attractive as the parties can choose the tribunal and set their own timetable.

10. Conclusion

On closing, we wish simply to say that we hope this discussion has encouraged you to reflect on the capacity of newer seats to compete with the more traditional seats. In the case of Toronto and of Sydney,

we see an increasing pattern of parties recognising the choice available between New York and Toronto and between Singapore and Sydney as seats for arbitration. We wonder whether that might also be true among the traditional seats in Europe and the newer seats emerging as popular alternatives. While the traditional seats will probably continue for some time to maintain their attractiveness, we hope that the colloquium has helped to provoke further discussion of the many reasons why parties may wish to choose other places for their arbitration, what is involved in developing the local legal system, and the local capacity of arbitrators and of counsel to promote this trend.