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Dr Shiro Armstrong  
Director, Australia-Japan Research Centre  
Australian National University, Canberra

Dear Shiro and AJRC colleagues

Re: Submission for the AJRC *Reimagining the Australia-Japan Relationship* project:<sup>1</sup>  
Leveraging cooperation for international arbitration and business dispute resolution

Please find appended the manuscript version of the concluding chapter of my newly-published book: *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Elgar, 2021).<sup>2</sup> The book tracks the historical evolution of international arbitration, as the primary mechanism for resolving cross-border business disputes nowadays, in the direction of more globalisation but also more formalisation – reflecting in growing costs and delays. The COVID-19 pandemic has belatedly forced international arbitration mostly online, and new practices will likely persist as travel restrictions are eased (Part I below). However, to maximise those possibilities and keep reducing costs and delays, there should be more structured and sustained bilateral cooperation between governments, law reform initiatives, arbitral institutions, judges, lawyers and academics (Part II).

I hope this is helpful and am happy to elaborate these ideas. You or colleagues are also welcome to attend the book launch by Federal Court Chief Justice James Allsop, likely mid-June 2021 live in Sydney and online, which should attract many interested in international business dispute resolution including developments in Australia and Japan.<sup>3</sup>

Yours sincerely,

*Luke R Nottage*

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<sup>1</sup> <https://ajrc.crawford.anu.edu.au/reimagining-japan-relationship>

<sup>2</sup> See <https://japaneselaw.sydney.edu.au/2020/08/book-in-press-with-elgar/>

<sup>3</sup> See also Claxton, Nottage & Teramura (2019, <https://ssrn.com/abstract=3299097>) updated in: <https://japaneselaw.sydney.edu.au/2020/07/new-frontiers-in-asia-pacific-international-arbitration-and-dispute-resolution-luke-nottage-shahla-ali-bruno-jetin-nobumichi-teramura-eds-wolters-kluwer-end-2020-abstracts-keywords-webin>

## Chapter 12. Beyond the Pandemic: Towards More Global and Informal Approaches to International Arbitration

**Abstract:** Overall, this Book traces the trajectory of both international commercial arbitration [ICA] and investor-state arbitration [ISA, based especially on investment treaties], especially since the 1990s, focusing on Australia and Japan in regional and global contexts. It demonstrates the usefulness of the dual themes or vectors of 'in/formalisation' and 'glocalisation' for understanding the past and for assessing future developments in international arbitration. Part I of this Chapter considers the longer-term impact of the COVID-19 pandemic from 2020. It speculates about the future for the observed proliferation of webinars, and the pandemic's push towards virtual hearings or e-arbitrations, as well as further diversification of arbitral seats – including potentially for Australia and Japan. Part II ends rather normatively with recommendations for more productive cooperation, bilaterally but also regionally, among academics, lawyers and arbitrators, judges and governments. It identifies some key organisations and opportunities for promoting a global and somewhat more informal approach to international arbitration into the 21<sup>st</sup> century.

### I. Current and Long-Term Impact on International Arbitration from the COVID-19 Pandemic<sup>4</sup>

The COVID-19 pandemic that spread world-wide from early 2020 has had dramatic short-term impacts on public health as well as socio-economic ordering. Travel and other restrictions due to the COVID-19 pandemic meant that virtual hearings suddenly became the 'new normal' for international commercial arbitration, and even for investor-state arbitrations.<sup>5</sup> Economic disruption is expected to lead to a significant increase in cross-border disputes, and legal advisors and arbitrators will have to adapt.<sup>6</sup> Yet it remains unclear what will be the longer-term prospects for virtual hearings or 'e-arbitration' more

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<sup>4</sup> This Part elaborates on Luke Nottage, 'Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?' *Kluwer Arbitration Blog* (16 July 2020), <[arbitrationblog.kluwerarbitration.com/2020/07/16/will-the-covid-19-pandemic-be-a-long-term-game-changer-for-international-arbitration](https://arbitrationblog.kluwerarbitration.com/2020/07/16/will-the-covid-19-pandemic-be-a-long-term-game-changer-for-international-arbitration)>.

<sup>5</sup> ICSID, 'The Art and Science of a Virtual Hearing', *ICSID Webinar* (5 May 2020), <<https://icsid.worldbank.org/resources/multimedia/webinar-art-and-science-virtual-hearing>>.

<sup>6</sup> See eg Joerg Risse and Antje Baumann, 'Thinking Ahead: Dispute Resolution After the Corona Crisis' (2020) 18(4) *German Arbitration Journal (SchiedsVZ)* 165; Klaus Peter Berger, 'Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruption: Three Salient Problems', (2020) *Journal of International Arbitration* forthcoming.

generally, and even for the relative popularity of arbitral seats, in the wake of the pandemic.

During the early phase of the pandemic, in March 2020, one well-known practitioner suggested that some arbitration filings and hearings would be delayed, with conferences or meetings often being cancelled.<sup>7</sup> He also saw the shift already to remote hearings a 'sea change' that could be a turning point in bringing online dispute resolution to international arbitration. By August 2020, it was possible to take stock and consider some further predictions. In light of the themes of this Book, will this brave new world generate a permanent significant shift towards more time- and cost-effective procedures, and therefore a more informal approach to international arbitration, as well as further globalisation of the field?

### **I.A Proliferating Webinars**

Larger arbitration-related events have mostly indeed been cancelled or deferred, or occasionally moved completely online, but we have witnessed a plethora of webinars offered by arbitral institutions or associations. At least so it seems. It could be rather that we are more aware of such seminars ('availability bias') or want to join even online community events during our worrisome times, quite apart from the intrinsic importance of their subject matter. Many webinars have in fact focused on the logistical and legal aspects of virtual hearings.<sup>8</sup> These all typically cover the common question of whether arbitrators can require a virtual hearing even if one party objects. Some also touch upon the interesting conceptual problem of whether they can do so even if all parties prefer to await a physical hearing.

Interestingly, such webinars, and sometimes other expert-led discussions or virtual networking opportunities, are almost always free of charge, thereby expanding accessibility for the younger generation or those from lower-income countries.<sup>9</sup> This should make us wonder why pre-pandemic arbitration-related events were quite often charged for, especially the larger ones, directly or via annual fees for members. Was that to defray the costs of refreshments or physical venue space, and/or because participants pay more for the opportunity to network in person? It is also intriguing to compare how active different institutions are in offering webinars, their scope, and diversity in the

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<sup>7</sup> Gary Benton, 'How Will the Coronavirus Impact International Arbitration?', *Kluwer Arbitration Blog* (13 March 2020).

<sup>8</sup> Velislava Hristova and Malcolm Robach, 'Legal and Practical Aspects of Virtual Hearings During (and After?) the Pandemic: Takeaway From the SCC Online Seminar Series', *Kluwer Arbitration Blog* (16 May 2020).

<sup>9</sup> Ibrahim Godofa and Mercy Okiro, 'The Dark Cloud of the Global Pandemic: Silver Linings for Young Arbitrators in Africa', *Kluwer Arbitration Blog* (4 July 2020).

presenters. For example, the Asian International Arbitration Centre in Malaysia has recorded remarkable numbers and breadth, out of 49 events over April-June 2020.<sup>10</sup> By contrast, the Australian Centre for International Arbitration ('ACICA') organised five over that period,<sup>11</sup> while the Japan Commercial Arbitration Association ('JCAA') only publicised one in English.<sup>12</sup>

Another great benefit of such webinars is that many are recorded and then made publically available. This provides a valuable and enduring resource not only for arbitration practitioners, but also for learners and researchers. Recordings and live-streaming of webinars reduce information asymmetries in the field, highlighted in Part II of this Book, by providing potential users with further insights into arbitrators and other key players in international arbitration. But will this new practice endure beyond the pandemic, or will future webinar content start to disappear behind members-only paywalls? Arbitration institutions and organisations need to fund their activities. ACICA has reduced registration filing fees for arbitrations over May-October 2020,<sup>13</sup> but the Australian government's comparatively large support package for pandemic-affected businesses was reduced in scope from October.<sup>14</sup>

Alongside the various webinars around virtual hearings, many organisations are issuing provisions or guidelines on how to manage 'e-arbitrations'. Many of those, and a brief overarching Joint Statement on 'Arbitration and COVID-19' issued in April 2020 by major arbitral institutions to urge flexibility and collaboration, are listed in a Protocol for Online Case Management in International Arbitration.<sup>15</sup> This Protocol was released for public consultation by a consortium of large international law firms in July 2020, although an earlier draft pre-dated the pandemic.

Such documents are often much more detailed than some early initiatives. Greater specificity partially increases formalisation, even in the service of trying to create efficiencies. A similar tension was earlier evident in the increasingly detailed amendments to Arbitration Rules and the proliferation of soft law in arbitration, including various rules or guidelines from the International Bar Association ('IBA'). There is also a parallel in the development of the 'substantive *lex mercatoria*' (with UNIDROIT Principles becoming overlaid on the 1980 UN Sales Convention, as mentioned in Chapters 2-3 of this Book).

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<sup>10</sup> See <<https://www.aiac.world/events>>.

<sup>11</sup> See <<https://acica.org.au/acica-webinars/>>.

<sup>12</sup> See <<https://www.jcaa.or.jp/en/news/index.php?mode=show&seq=59>>.

<sup>13</sup> ACICA, 'Important Information for ACICA Users — COVID-19 Update', (2020).

<sup>14</sup> Matthew Cranston, 'Australia's Rescue Package the World's Biggest, Bar One', *Australian Financial Review* (6 May 2020).

<sup>15</sup> Available via <<https://protocol.techinarbitration.com>>.

In addition, and quite disturbingly in terms of assessing long-term impact, many documents and initiatives relevant to e-arbitrations flew largely under the radar in the pre-COVID era. For example, the world-wide arbitration community seems to have been largely unaware of or uninterested in the ACICA draft Procedural Order for the Use of Online Dispute Resolution Technologies, finalised in 2016 and now being updated.<sup>16</sup> There had been some commentary around the Seoul Protocol on Video Conferencing in International Arbitration,<sup>17</sup> when unveiled in 2018 for discussion at the 7<sup>th</sup> Asia Pacific ADR Conference,<sup>18</sup> but hardly any detailed analysis in the main refereed arbitration law journals.

### **I.B Long-term Legacy from E-Arbitration Experiences**

Nonetheless, if and when this pandemic passes and travel restrictions ease, what will be the long-term impact of this dramatic shift towards holding virtual hearings and meetings in and around international arbitration? The most optimistic view is that stakeholders will realise that it is possible to embrace new approaches that can dramatically reduce delays and especially costs – concerns that had re-emerged over the last decade – despite the growth of arbitration around Asia which otherwise promises a lower cost base for services compared to Europe and North America (as outlined in Chapter 6). Parties may therefore push their lawyers, arbitrators and arbitral institutions to adopt other procedures to make arbitration more time- and cost-effective.

Some procedures are already found in most Rules, such as documents-only arbitrations, but perhaps only as an option after proceedings commence. Other innovations are only found in some or none, such as Arb-Med (allowing or even requiring arbitrators to actively promote settlement) or the 2018 Prague Rules on the Efficient Conduct of Proceedings in International Arbitration<sup>19</sup> as an alternative to the IBA Rules on evidence-taking. As mentioned in Chapter 4, the JCAA's Interactive Arbitration Rules 2019 (art 56) already go beyond the Prague Rules (art 2.4) by requiring the tribunal to express preliminary views on key facts and legal issues before deciding on whether to hold hearings, rather than just trying to reduce challenges around the neutrality of arbitrators choosing to do so.<sup>20</sup>

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<sup>16</sup> See <<https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf>>.

<sup>17</sup> Jiyeon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', *Kluwer Arbitration Blog* (6 April 2020).

<sup>18</sup> Sue Hyun Lim, '7th Asia Pacific ADR Conference Review: Innovating the Future of Dispute Resolution', *Kluwer Arbitration Blog* (20 December 2018).

<sup>19</sup> Sol Argerich, 'A Comparison of the IBA and Prague Rules: Comparing Two of the Same', *Kluwer Arbitration Blog* (2 March 2019).

<sup>20</sup> David Gilmore et al, 'New 2019 JCAA Rules: Is Three a Crowd?', *Kluwer Arbitration Blog* (8 February 2019).

However, a second possibility is that lawyers in particular will resist such further innovations. This may be because lawyers become very risk-averse when it comes to their own clients, and carry over such conservatism when serving on Arbitration Rules drafting committees or boards of arbitral institutions. They (and some arbitrators) may also suffer from ‘change fatigue’, after being forced to move to virtual arbitrations during the 2020 pandemic, and even be worried about associated declines in fee revenues. Nonetheless, especially if the travel restrictions continue for many more months or even years, so many (including users) gain knowledge and experience concerning virtual hearings, these may indeed become the norm rather than exception – at least for smaller and mid-sized international arbitration proceedings.

A third scenario, also quite possible, is a partial but significant ‘reversion to the mean’ – to physical hearings and even some paper-based arbitrations. There may be similar supply-side pressures and incentives pushing in that direction. On the demand side, at least some users (perhaps more risk averse and/or occasional parties to arbitrations, including say larger Japanese corporations) may also be willing to pay again a premium for that more traditional style of arbitration.

A fourth and most pessimistic outcome would be a complete reversion to the (current) norm, with virtual hearings becoming again an exception. This seems improbable, given so much ‘show and tell’ already regarding e-arbitrations. Yet it is not completely inconceivable. Many disaster studies show how communities do largely go back to the comfort of old ways.<sup>21</sup> International arbitration also retains a built-in advantage over litigation as a potential competitor, given the enforceability of arbitration agreements and awards under the New York Convention – with little uptake yet of the 2005 Hague Choice of Courts Convention, despite the recent establishment of various international commercial courts.<sup>22</sup> The 2018 Singapore Convention on Mediation<sup>23</sup> will only come into force from 12 September 2020 for a few smaller economies, and anyway does not cover enforcement of agreements for cross-border mediation, as mentioned in Chapter 1. In addition, the confidentiality still often associated with arbitration, but with variants for

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<sup>21</sup> Luke Nottage, Hitoshi Nasu and Simon Butt, ‘Disaster Management: Socio-Legal and Asia-Pacific Perspectives’ (2013) 13(36) *Sydney Law School Research Paper*. <<http://ssrn.com/abstract=2263953>>.

<sup>22</sup> Luke Nottage and Bruno Jetin, ‘Introduction: New Frontiers in Asia-Pacific trade, Investment and International Business Dispute Resolution’ in Luke Nottage et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, forthcoming end-2020), manuscript at <<https://ssrn.com/abstract=3635795>>.

<sup>23</sup> Available via <[https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements)>.

example around the Asia-Pacific region (illustrated in Chapter 8), is a double-edged sword. As explained in Chapters 6 and 7, confidentiality can encourage more robust decision-making in arbitration. Yet it can also make it harder for users to assess the quality of services provided by lawyers and (perhaps now less so) arbitrators,<sup>24</sup> and thus reduce the incentive for them to maintain innovations.

### I.C Long-Term Legacy for Arbitral Seats

A related question is: what will be the impact on arbitral seats, including across the Asia-Pacific region?<sup>25</sup> One possible scenario is a dramatic shift, because physical hearings often took place at the seat (although this was not required, and a different location could be agreed upon), but virtual hearings are essentially delocalised. More geographically remote seats, like Australia or even Japan, may become a more attractive choice.

However, a second outcome seems more likely: these seats will become more popular if their local courts are similarly capable of holding virtual hearings and generally managing proceedings remotely. This aspect will be crucial in the short-term, where for example parties may need to approach seat courts for assistance in their arbitrations (eg for interim measures or, more rarely, arbitrator challenges). But it will also be important after the pandemic passes, allowing parties again to approach the courts in person. In particular, the seat court's experience itself with virtual hearings (including for regular litigation) may colour its assessment of any challenges relating to due process during an e-arbitration, even at the award enforcement stage. This suggests that more geographically challenged seats may gain in popularity in the subset of jurisdictions where courts are well-funded and/or organised for information and communication technology – including perhaps Australia, say compared to Japan.<sup>26</sup>

A third scenario is an even more subdued relative rise in popularity or diversity in arbitral seats. Some emerging jurisdictions may even see a reversal in fortunes, if for example their courts are less open for virtual hearings. Broader political developments, perhaps related to the pandemic but not necessarily, may also dwarf significant shifts in arbitral

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<sup>24</sup> Catherine Rogers, 'The Market for Arbitrators and The Market for Lemons', *Kluwer Arbitration Blog* (10 June 2020).

<sup>25</sup> Nottage and Jetin (n 19).

<sup>26</sup> Reegan Grayson-Morison and Stacey Steele, 'Judicial Responses to COVID-19: Japanese and Victorian Courts' Use of Technology', *Asian Legal Conversations — COVID-19* (23 June 2020), <[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0003/3413046/Reegan-Grayson-Morison\\_Japanese-courts-and-technology.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3413046/Reegan-Grayson-Morison_Japanese-courts-and-technology.pdf)>.

seat popularity related to the current emergence of e-arbitrations. A case in point is the upheaval in Hong Kong from mid-2019.<sup>27</sup>

The fourth possible scenario is also quite plausible: no significant change in relative popularity of seats. After all, arbitral institutions and practitioners across all credible arbitral seats are all busily presenting themselves as viable candidates in our brave new COVID-19 narrative world.<sup>28</sup> Pandemic responses provide a new field for arbitral institutions to engage in a curious and evolving mixture of cooperation (to keep expanding the arbitration pie) and competition (trying to gain a bigger slice).<sup>29</sup> Surveys and other research also tell us that many factors impact on the choice of seat, even path-dependence or 'status quo bias'.<sup>30</sup> More broadly, entropy may be particularly common in legal environments.

In conclusion, the prognosis for international arbitration is further complicated because the two main questions raised above (impact from e-arbitration and impact on preferred seats), each generating four possible scenarios, are clearly inter-connected. They still bear thinking about as the COVID-19 pandemic unfolds, even though as various sages (including possibly Niels Bohr, Mark Twain and Yogi Berra) have warned us over the decades: 'It's tough to make predictions, especially about the future'.<sup>31</sup>

## II. Collaborating to Promote More Informal and Global Approaches

The COVID-19 pandemic has already created additional complexity as well as opportunities for the arbitration world. Evolving practices intersect with the perennial tensions of in/formalisation and glocalisation highlighted throughout this Book. From a more normative perspective, how could we promote a more informal and global approach to international arbitration – especially for Australia, Japan and indeed the wider Asian region?

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<sup>27</sup> See generally updates via *East Asia Forum*, <<https://www.eastasiaforum.org/category/countries/hong-kong/>>.

<sup>28</sup> Luke Nottage and Tom van Laer, 'COVID-19 in Asia and Beyond: We Are Story Characters Living in a New Story World', *Sydney Business Insights* (2020) <<https://sbi.sydney.edu.au/covid-19-in-asia-and-beyond-we-are-story-characters-living-in-a-new-story-world/>>.

<sup>29</sup> Stéphanie Papazoglou, 'The Battle for Survival Among Arbitral Institutions', *Kluwer Arbitration Blog* (19 June 2020).

<sup>30</sup> Dipen Sabharwal and Mona Wright, 'What Do Users Want From Seats and Institutions?', *Kluwer Arbitration Blog* (2 November 2015).

<sup>31</sup> See <<https://quoteinvestigator.com/2013/10/20/no-predict/>>.

Particular attention probably needs to be paid yet again to reducing delays and especially costs, particularly for ISA given the greater public interests involved. However, those interests also push treaty negotiators and drafters towards adding more detail to the underlying treaty provisions, to meet concerns about lack of clarity and certainty. Fortunately, the procedural provisions around ISA are easier to draft clearly, compared to the underlying substantive commitments made through investment treaties. A key for both types of provisions is consistency, so a model treaty or provisions would be useful to develop and display for both Australia (as noted in Chapter 11) and Japan. Even then, of course, what ends up being agreed in specific treaties may end up being varied because of different interests or model provisions brought forth by counterparty states. Governments in Australia and Japan already consult informally about investment treaties with various stakeholders within their respective jurisdictions, but could make some consultations more public and indeed consider some joint consultations (or encourage those involved in one state to get involved or collaborate with others involved in the other state's consultations). After all, their recent treaties share a mostly common (contemporary US-style) core, and they even have some similar experiences now in their investors initiating ISA claims, although Japan has not yet been subjected to an inbound claim like Australia (as discussed in Part III of this Book).

Both states, especially now that they anyway have become more aware of arbitration issues and cases through investor-state arbitration, should also keep a closer eye on international commercial arbitration case law and other developments within their own and comparable jurisdictions. Governments should be willing to engage in law reform to ensure that courts defer to party and arbitrator autonomy, in accordance with the underlying international instruments and so as not to turn arbitration into litigation (or even 'litigation-lite', as cautioned by Australia's former federal Attorney-General in 2009 cited at the outset of Chapter 5). In particular, legislators should intervene to ensure that arbitral proceedings themselves as well as court-related proceedings remain time- and cost-effective.<sup>32</sup>

The federal Attorney-General's Department ('AGD') has been sporadic and not very transparent in amending the *International Arbitration Act 1974*, with some public consultation for the 2010 amendments but nothing structured for the 2015 and 2018 amendments (as outlined in Chapter 5). The Department could learn from Japan's Ministry of Justice, which coordinates a standing law reform deliberative council (*hosei shingikai*) that systematically reviews different areas of law. It involves various stakeholder groups and publically releases summaries of meetings, and even of prior

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<sup>32</sup> See also Albert Monichino and Nobumichi Teramura, 'New Frontiers for International Commercial Arbitration in Australia: Beyond the 'Lucky Country'' in Luke Nottage et al (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, forthcoming early 2021).

'study group' meetings (as mentioned at the end of Chapter 4, regarding deliberations underway in 2020 with a view to amending the *Arbitration Act 2003*). The Attorney-General should even consider referring arbitration law reform (along with stalled revisions of private international law) to the independent Australian Law Reform Commission for a law reform inquiry and report.<sup>33</sup> Unfortunately, however, Australian political leaders nowadays seem more prone to keeping law reforms within the control of their respective departments, or to refer some larger and more controversial topics to the ostensibly more technocratic Productivity Commission.

If the Attorney-General does embark on further and more far-reaching reforms to arbitration law, or (preferably) refers such an inquiry to the Australian Law Reform Commission perhaps in conjunction with stalled AGD consultations over reforming private international law and contract law, Japan's Ministry of Justice should be approached to try to collaborate in identifying and phrasing such 'Model Law Plus' amendments. Such cooperation could be formal by involving simultaneous reforms and regular discussions among officials coordinating the respective processes, or informal by encouraging stakeholders (such as bilingual experts in law firms or academia) to make public submissions to both inquiries. In addition, although this may be complex enough to arrange bilaterally, there is scope to reach out to other ML jurisdictions in the Asian region to coordinate with arbitration law reformers there too.

There also exists wider scope for greater collaboration among judges to keep promoting internationalist interpretations of Model Law ('ML') based statutes, and in particular to promote interpretations (and court processes) that help reduce costs and delays to restore a more informal approach to arbitration. Australian judges already cite extensively judgments from other common law jurisdictions in Asia (notably Hong Kong and Singapore), and also still English as well as sometimes US case law (as indicated in Chapter 5). Yet they need to be exposed to case law from other ML jurisdictions in the region, including from Japan despite the language barrier. Australian judges do have contact with counterparts in Japan by supporting early-career judges coming to Sydney and Melbourne for year-long research programs, but the latter study many fields of Australian law, and there have only been limited structured opportunities for Australian judges to visit Japan to exchange views regarding specialist fields such as arbitration law.<sup>34</sup> Japanese judges are also less prone to attend and certainly speak at major international arbitration conferences, within their own country or abroad, compared to both current and past Australian judges. This may reflect different career paths into, during and after the judiciary, with Japan's former judges notably less likely to be

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<sup>33</sup> See my recommendation picked up by (but so far to no avail) by the New South Wales Law Society, *Future of Law and Innovation in the Profession* (Inquiry Report, 2017).

<sup>34</sup> Compare generally <<https://www.anjel.com.au/people>> and JJ Spigelman, 'Judicial Exchange Between Australia and Japan' (2006) 22 *Journal of Japanese Law* 225.



appointed arbitrators. As well as encouraging the Japanese judges to give more extra-judicial speeches on arbitration law, they could become more involved in Singapore's Asian Business Law Institute (established in 2016,<sup>35</sup> with considerable input from Australian judges).

By contrast, Japanese law firms have grown significantly and *bengoshi* lawyers have also become leaders in many large international law firms in Japan since 2004 (as mentioned in Chapters 4 and 6), including some quite active international arbitration practice groups. Such Japan-based lawyers have also started to figure quite prominently in international arbitration conferences and other initiatives, including the IBA (headed over 2011-12 by prominent *bengoshi* and University of Sydney alumnus, Akira Kawamura). They play more central roles in Japan's arbitration centres and professional associations, such as JCAA, the newer Arbitrators' Association (*chusainin kyokai*) focused on arbitrator training and networking, and recent institutional initiatives aimed at putting Japan on the regional and global map for arbitration.<sup>36</sup>

Partly through these organisations, Japan-based lawyers also have an impact on regional professional organisations such as LAWASIA (established in 1966 with strong backing from both Australia and Japan, and including a track for judges that generates an annual conference led by Chief Justices throughout Asia and Oceania),<sup>37</sup> the Inter-Pacific Bar Association (established in Tokyo in 1991),<sup>38</sup> and the Asia-Pacific Regional Arbitration Group (established in 2004 among regional arbitration centres, following a proposal by Meijo Professor Kaoru Matsuura and well-known Australian arbitrator Dr Michael Pryles).<sup>39</sup> However, there is scope also for more collaboration in case law comparisons and law reform initiatives among Australian and Japanese lawyers, arbitrators and centre staff through such organisations as well as peak associations for lawyers in both countries: the Law Council of Australia (with interest in arbitration somewhat dispersed among sections focused on International Law, ADR and Business Law) and the Japan Federation of Bar Associations.

Last, but certainly not least, there are multiple opportunities for university researchers and teachers to coordinate more closely with each other in Australia and Japan, as well as regionally, to promote consistently internationalist understandings of underlying

<sup>35</sup> See generally <<https://abli.asia/Introduction/>>.

<sup>36</sup> See further James Claxton, Luke Nottage and Nobumichi Teramura, 'Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?' (2019) 47 *Journal of Japanese Law* 109; and Chapter 4.

<sup>37</sup> Law Association for Asia and the Pacific, <<https://www.lawasia.asn.au/about-us/history>>.

<sup>38</sup> See generally <<https://ipba.org/about-us/about-ipba/history/165/160/>>.

<sup>39</sup> See further Chapter 2 and generally <<http://www.apraq.org/#aboutus>>.

arbitration law instruments that also help reduce costs and delays to restore a more informal approach to arbitration. Law professors probably maintain a comparatively stronger influence in commercial arbitration circles in Japan, reflecting its roots in the civil law tradition, but their impact may decline as in Australia as arbitration becomes more lawyer-driven and formalised. However, the role of law professors is likely to remain strong in investment treaty arbitration, as concerns keep growing about this field (especially in Australia, detailed in Chapter 13) and it also becomes increasingly transparent (as discussed especially in Chapters 8 and 9). Professors specialising in investment treaty arbitration from Japan and Australia are active in the International Law Association,<sup>40</sup> as well as the Academic Forum for ISDS providing input since 2019 into UNCITRAL's multilateral reform deliberations.<sup>41</sup> Some have already collaborated in joint projects.<sup>42</sup>

Academics have different although overlapping motivations and perspectives in examining and promoting arbitration. Compared to lawyers, they have greater freedom in what and how they research, and are not subject to 'billable hours' pressures increasingly prevalent especially in large law firms, thus able to push harder for changes to law and practice that reduce costs and delays as well as formalisation more generally. Compared to judges, they are not limited mainly to what topics percolate up through litigated cases. Compared to government officials (especially in Australia, where job rotation has become quite common), let alone politicians, academics can take a longer-term perspective in what they research, write about, and advocate in terms of law reform. A unique forum for promoting collaboration among academics and legal practitioners, and government officials to a lesser extent, is the Australian Network for Japanese Law. Since 2002 it has built up a membership of over 500 individuals interested in comparing Japanese law,

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<sup>40</sup> For example, the Committee on the International Law on Foreign Investment (2003-8) including Professor Vivienne Bath, while the current Committee on the Rule of Law and International Investment Law includes Professor Junji Nakagawa: see <<https://www.ila-hq.org/index.php/committees>>. Kyoto University expert Professor Shotaro Hamamoto also helped host the ILA's major conference in Kyoto in 2020.

<sup>41</sup> See generally <<https://www.cids.ch/academic-forum>>. Professor Hamamoto from Japan joins me and several other academics from Australia contributing to this Forum.

<sup>42</sup> Elorating a Concept Paper on arbitrator neutrality for the Forum, see Chiara Giorgetti, Steven Ratner, Jeffrey Dunoff, Shotaro Hamamoto, Luke Nottage, Stephan Schill and Michael Waibel 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) 21 *Journal of World Investment and Trade* 441. Professor Shotaro Hamamoto also contributed a report on Japan for the Centre for International Governance Innovation project comparing (for which I contributed the report on Australia, adapted as Chapter 11 of this Book). See also eg Shotaro Hamamoto and Luke Nottage, 'Japan' in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (Cambridge University Press, 2013) 347.

based mainly in Australia and Japan but also in Europe, North America and various parts of Asia.<sup>43</sup>

The COVID-19 crisis can provide an extra opportunity to bring stakeholders together in Australia, Japan and wider afield to reconsider how to better develop both ICA and ISA, as arbitration's pre-eminent position is already starting to be challenged by initiatives such as international commercial courts or mediation.<sup>44</sup> There has been a supply side shock, as lawyers and arbitrators have had to rethink how they provided and therefore charged for their services. There was also a demand shock, as cash-strapped clients called for practical and cost-effective arbitrations of both existing disputes and the many new ones caused by the widespread economic dislocation.

Although Part I above shows that long-term transformation is far from assured, novel pandemic-induced practices and norms could help trigger a new wave of reform for arbitration rules and even legislation. Key regional venues could be displaced or eclipsed, especially given the extra geopolitical tensions around Hong Kong. Australia and Japan, as more remote venues (geographically and/or in perception), therefore have a reasonable new opportunity to become more active and attractive hubs for international arbitration and other dispute resolution services. Work towards that goal will benefit from more concerted efforts involving various stakeholders, bilaterally and in a regional context as outlined above, and this Book hopefully provides a better platform for such collaboration.

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<sup>43</sup> See <<https://www.anjel.com.au>>, and (regarding the *Journal of Japanese Law*, a key periodical ANJeL helps with) <<https://japaneselaw.sydney.edu.au/2020/06/commemorating-prof-dr-harald-baums-25-year-general-editorship-of-the-journal-of-japanese-law/>>.

<sup>44</sup> See generally eg Luke Nottage et al (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, forthcoming early 2021).