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Young-OGEMID Author Interview Professor Luke Nottage - International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts (Elgar 2021) by P. Pusceddu

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Young-OGEMID Author Interview Professor Luke Nottage

Professor Luke Nottage, University of Sydney Law School

International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts (Elgar 2021)

Moderator: Dr. S.I. Strong

Interview reporter: Piergiuseppe Pusceddu[1]

Introduction

Young-OGEMID (YO) is proud to launch a new series for its members: the author interview. As part of this series, YO will invite both new and established authors to participate in a virtual (online) interview concerning their recent publications. The first such interview took place from 29 November to 3 December 2021 and featured Professor Luke Nottage of the University of Sydney.[2] Prof. Nottage holds the Chair of Comparative and Transnational Business Law at Sydney Law School and is Special Counsel at Williams Trade Law.[3] Prof. Nottage is also a founding director of the Australian Network for Japanese Law and Japanese Law Links Pty Ltd.

Prof. Nottage spoke about his latest book, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts*, which was published by Edward Elgar Publishing in 2021.[4]

An Overview of the Book

Professor Nottage began by providing an overview of his book: '*My 2021 Elgar book that Stacie kindly suggested we talk about brings together versions of 10 papers published since 2000, plus two new chapters, related to the trajectory of international arbitration (IA). Since the 1996 study by legal sociologists Dezalay and Garth, I have been struck by twin interlinked tensions: one between more or less formal approaches to arbitration ('in/formalisation') and the other between national/local and internationalist approaches ('glocalisation')*'.

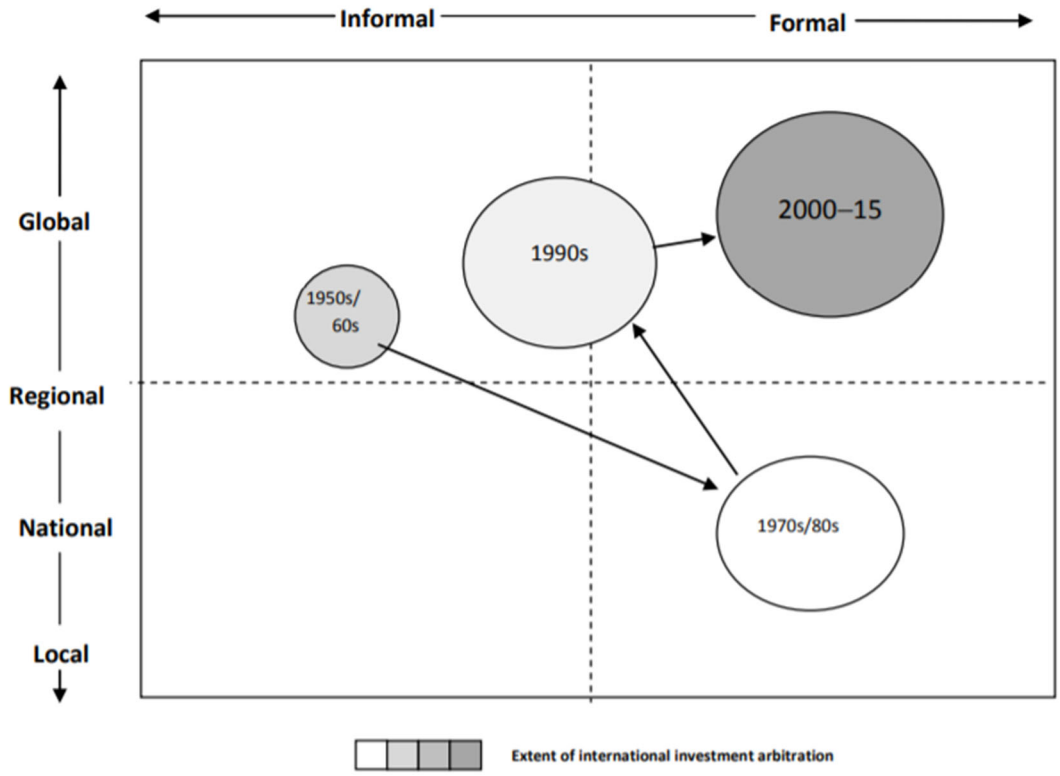
Dezalay and Garth's study[5] charted how, in the aftermath of the second world conflict, international arbitration (IA) presented more informal/global characteristics (1950-60s), but afterwards turned to be more formalised and less internationalist because of the influence of Anglo-American law firms and norms (70s-80s). This, eventually, led to concerns (1990s) about costs and delays. Continuing from where Dezalay and Garth left off, Professor Nottage's work highlights the efforts and achievements to make IA more global and less formalised (by around 2000). These efforts succeeded only in part, as from around 2005 IA has become more

[1] PhD candidate, Tilburg. LL.M. NYU, NUS. Qualified lawyer, Italy.
[2] https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html
[3] http://www.williamstradelaw.com/special_counsel.html
[4] https://japaneselaw.sydney.edu.au/2020/08/book-in-press-with-elgar/
[5] Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order, 1996).

formalised, and even more global. The author summarises the trajectory of IA in the following 'weather map' (see below).

From the map it is possible to infer that the trajectory of IA is also influenced by the growth of investment treaty arbitration (ITA) from around 2005, where issues related to cost and delay, linked to excessive formalisation, are particularly acute. Nevertheless, enhanced transparency in ITA has positive aspects, if compared to international commercial arbitration (ICA). Professor Nottage opines that confidentiality is a double-edged sword for costs and delays: on the one hand, it allows to issue concise decisions, hampers 'due process paranoia' and 'guerrilla tactics'; on the other hand, confidentiality brings in information asymmetries impinging on both the demand and supply side of arbitration. On the demand side, users may not be able to assess whether they are getting the best value for money from arbitrators, lawyers, and other services providers; on the supply side of IA, criticism is casted on the billable hours model, a worldwide spreading trend in law firm practice that is harming efficiency and creating resistance to innovation in the field (e.g., use of Arb-Med). These considerations should hence be factored in the (resurgent) discussion on costs and delays, which is not a mere result of the complexification of international disputes in recent times.

Figure 1: The Weather Map of International Arbitration



The last part of the book focuses on the (in)formalisation/glocalisation twin tensions in ITA, and considers Australia and Japan in a regional context. The very last chapter concludes the work with a normative consideration, and suggests forms of cooperation, and globalisation, to push back against formalisation. Additionally, the pandemic-induced shift towards remote

hearings and e-arbitration[6] may not necessarily sort the effect of reducing costs and delays on the long-run.

Professor Nottage concluded his opening presentation with an overview of the chapters' title,[7] leaving the floor open for questions and comments.

Questions

Piotr Wilinski – The 'Weather Map'

I noticed that your weather map 'ends' on 2015, and I was wondering if you would agree that the same (formal and global) trend extends until today? I would imagine that formalization continues to grow strong (e.g., the pace at which institutional rules are changing). Continuous formalization may also be a response to systemic legitimacy concerns raised outside the arbitration community. When it comes to global-regional-local, I wonder, however, if we do not observe shift towards regionalization, looking for example at changes in the landscape of preferred seats (in the last 5 years or so)?

Professor Nottage: On (in)formalisation after 2015, I do not think it is easy to say for a few years – we probably need at least a decade to pick a trend.

Secondly, the field is still coloured by investment treaty arbitration, which has become very formalised and, with more than three thousand treaties, is perhaps even more decentralised than ICA, and hence even harder to change course. For example, only now we start to see some treaties requiring investors to mediate before arbitration,[8] which may not take off and will not kick in anyway until disputes arise many years ahead. UNCITRAL and ICSID are having reform discussions, but even if some consensus is emerging (ICSID Rules getting close), it will take many years for some states, then the lawyers, to develop and apply new practices. The problems with investment treaty arbitration processes, coalescing by default into quite inefficient practices, are well explained by Prof Zachary Douglas in the 2020 Clayton Utz/University of Sydney IA Lecture.[9]

[6] E-arbitration is encompassed in the broad category of Online Dispute Resolution (ODR). The UNCITRAL Technical Notes on ODR define it as a 'mechanism for resolving disputes through the use of electronic communications and other information and communication technology' that 'can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing'. ODR can take several forms, including, to quote some, 'ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others'. E-arbitration is hence an arbitration that is conducted through the use of electronic communications and other information and communication technology means (for e.g., e-mail and electronic file management systems via the internet). *See*, United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP. 140, UNCITRAL Technical Notes on Online Dispute Resolution, Section I, paragraph 2, and Section V, paragraph 24.

[7] Summaries of the chapters are available at https://japaneselaw.sydney.edu.au/2020/08/book-in-press-with-elgar/

[8] James Claxton, Luke Nottage, and Ana Ubilava, 'Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT', Kluwer Arbitration Blog 5 September 2020. Available at http://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/.

[9] The lecture is available at https://www.claytonutz.com/ialecture/previous-lectures/2020.

Thirdly, the annual Queen Mary University of London (QMUL) surveys in recent years (more focused on ICA) are not particularly more encouraging as to resisting due process paranoia and related costs and delays.

Fourthly, I do not want to be just a Jeremiah. So I would acknowledge, for example, some improvements in case disposition times in arbitration-related proceedings in the Federal Court of Australia since 2016, compared to the previous decade (where no real change despite 2010 and more minor statutory amendments to the Australia's Model Law based regime).[10] Maybe the lawyers involved (who tend to be also involved in the arbitration) as well as the judges are understanding and applying ICA principles better, and these efficiencies are carrying over into ICA proceedings. But this is a small sample size, related to the enforcement of foreign awards and arbitration agreements (Australia still has few locally seated ICA cases), and it is just one jurisdiction (meaning that data is not readily available for all state courts) in one country.

Fifth, the pandemic forced arbitration practitioners to move to remote hearings, but that was heavily resisted beforehand (status quo bias?) and there will likely be at least a partial shift back (especially for witness examinations) after travel restrictions ease. We also do not see more documents-only arbitrations or many innovations in arbitral institutions' rule reforms lately, despite the uptick in case filings reported by institutions after the pandemic and related economic disruption worldwide. For example, Arb-Med was not included in the 2021 Australian Centre for International Commercial Arbitration (ACICA) Rules even on an opt-in basis and/or for smaller disputes (and even though allowed statutorily for domestic arbitration).[11]

As for the glocalisation tension, it is indeed evident from arbitral institution statistics and QMUL surveys that especially Hong Kong (HK) and Singapore continue to become more popular seats, suggesting some 'regionalisation'. But their practices do not seem to be very distinctive. For example, both have long had Arb-Med on the statute books, but those procedures are hardly ever used.

It is also true that there is growing cross-fertilisation of judicial reasoning across some Asia-Pacific jurisdictions. But this is particularly in the common law origin Model Law/NY Convention jurisdictions (e.g., HK taking an early lead, then Singapore, NZ, Australia from around 2010, and Malaysia to some degree).

In ITA we do not really see much regionalisation (except maybe the EU pushing its new investment court alternative to traditional ISDS); but rather a combination of mostly globalisation and some national idiosyncrasies (e.g., India's new Model BIT, New Zealand since 2018 eschewing ISDS for future treaties, like Australia did only for 2011-13).

[10] Luke Nottage, 'Comparing Case Disposition Times for Judgments related to International Arbitration (& Bibliography for Australia)', Japanese Law and the Asia-Pacific – Japanese Law in Asia-Pacific Socio-Economic Context, 1 November 2020. Available at https://japaneselaw.sydney.edu.au/2020/11/comparing-case-disposition-times/.

[11] Luke Nottage, 'Is Arb-Med Un-Australian?' Kluwer Arbitration Blog 1 May 2021. Available at http://arbitrationblog.kluwerarbitration.com/2021/05/01/is-arb-med-un-australian/. In the context of some measures to address costs and delays, Luke R. Nottage, Julia Dreosti and Robert Tang, Robert, 'The ACICA Arbitration Rules 2021: Advancing Australia's Pro-Arbitration Culture' (2021) 38 [6] 775, also available on SSRN: https://ssrn.com/abstract=3931086.

So (per chapter 12) I still think we do need more concerted or at least multi-level efforts to combine more globalisation along with less formalisation.

Mihaela Apostol – E-arbitration

You mentioned that remote hearings and e-arbitration may not necessarily lead to dramatic long-term reductions in costs and delays. Would you please give us further details why e-arbitration will not necessarily reduce costs and delays? Is this something characteristic for the regions covered or is it a general conclusion?

Professor Nottage: To elaborate, and this is general rather than region-specific: the pandemic-forced shift to remote hearings and more digitalisation for arbitration, have probably and thankfully reduced costs (depending though on how elaborate/expensive the e-hearing/documentation platforms are) and delays (though the pandemic may have created other unavoidable delays, for example, securing witnesses or evidence), but

a. there may be a shift back to physical hearings etc, as travel restrictions ease, so costs or delays resurface;
b. the lesson in how innovations can help reduce costs and delays, despite the general risk-averseness of the legal profession, may not lead to other innovations that could produce other very considerable efficiencies (e.g., more use of Arb-Med);
c. there are still other major contributors to costs and delays.

After all, some of the key drivers that can cause costs and delays remain in place. On the demand side, one is the advantage for international arbitration in terms of world-wide enforceability of agreements and awards – few states have so far ratified the Hague Choice of Courts or Singapore Mediation Conventions, which might help making cross-border litigation or mediation more competitive and attractive. On the supply side, the billable hours model for legal practice remains entrenched (although the Global Financial Crisis did lead for a while at least to law firms having to offer other forms of billing clients).

S.I. Strong – Follow-up on e-arbitration

Following on the question about the future of e-arbitration, one would assume that the most likely users of e-arbitration (as well as mediation, though that is a different topic) are small- and medium-sized enterprises (SMEs), since they will appreciate the cost benefits more than large companies. Interestingly, according to the Australian Bureau of Statistics,[12]

> **'*The majority of Australian merchandise (goods) exporters are small businesses (61%), which contribute only 1% of the total export value. While only 12% of merchandise exporters are large businesses, which accounted for 96% of the value.***

[12] Australian Bureau of Statistics, *Characteristics of Australian Exporters* (reference period 2018-19 financial year), released the 21 October 2020. Available at https://www.abs.gov.au/statistics/economy/international-trade/characteristics-australian-exporters/latest-release#data-download.

Of the 56,772 exporting businesses, only 328 businesses exported merchandise over $100m in the 2018-19 financial year, which accounted for 86% of the total export value.

For 2018-19 the typical exporter, based on the median of all exporters, had:

- ***two employees;***
- ***turnover of $700,000;***
- ***exports valued at $30,000;***
- ***three export transactions; and,***
- ***trade with a single export market (country of final destination).***'

Do you think that the special nature of Australian international commercial actors means that national arbitration institutes like ACICA should put more emphasis on facilitating and promoting e-arbitration as one of the dispute resolution mechanisms that are most responsive to the needs of a 'standard' Australian party, as opposed to the needs of large multinational corporations, which have conventionally been considered the typical party in international commercial arbitration? Do you think the failure to do so will drive Australian SMEs to international commercial mediation, particularly in light of the fact that Australia signed onto the Singapore Convention on Mediation on 10 September 2021?

Professor Nottage: That focus sounds like a good strategy. The Japan Commercial Arbitration Association (JCAA) has been quite successful in focusing education/seminars on SMEs over the years, although they obviously tend to have less bargaining power and/or agree on arbitration seated abroad (hence comparatively few Japan-seated ICArbs). This is helped by the growth of better qualified in-house corporate counsel in Japan over the last two decades. Australia's larger per capita legal profession should make it easier for SMEs to become familiar with negotiating/drafting clauses for arbitration, and mediation – Australian firms are much more familiar with multi-tiered DR clauses as well as 'formal' mediation for domestic disputes, compared to Japanese firms.

Anne-Marie Doernenburg – Australia's and Japan's Efforts to Increase their Presence as Arbitration Seats

Regarding Australia and Japan's recent efforts to establish themselves as an arbitration venue, and despite the challenges ahead, what do you consider are their key strengths and benefits (if any), particularly vis-à-vis the top Asian arbitration hubs? Also, what are the most pressing issues for Australia and Japan to tackle in order to increase their attractiveness?

Professor Nottage: Both countries are similar in attracting relatively few ICA cases, although Australia has been trying harder and longer (especially from around 2010) than Japan (since around 2018).

For Australia in 2018, prompted by a glossy brochure published by an Australian government (export) agency[13] for the ICCA Congress in Sydney, I co-authored a posting for the Kluwer Arbitration Blog (KAB),[14] which suggested that on the one hand Australia ticked all the boxes

> '*as a compelling "neutral forum for ICA between trading partners in the Asia-Pacific region" as "the ICA landscape has evolved considerably" over the last 5-10 years, through:*
>
> - *legislative reforms (including the 2006 revisions to the UNCITRAL Model Law, enacted in 2010 for international arbitration);*
> - *a supportive and independent judiciary (reiterating elsewhere that the World Bank in 2018 ranked "Australia's judicial processes as the world's best": p3);*
> - *expert arbitrators and more ICA specialisation among law firms (including a growing number of global firm offices) and barristers;*
> - *new arbitration centres and support facilities; and*
> - *"increased education and skills training offerings, from university level through to arbitrator training" (p5).*
>
> *Regarding further reasons as to 'why arbitrate in Australia?', a summary diagram adds 'proximity to Asia and time zone advantages' as well as 'stable political environment and resilient economy'.*
>
> *The last point may surprise readers even vaguely familiar with Australia's convoluted and unstable federal politics over the last decade (and indeed last month, resulting in another change of Prime Minister). Such political uncertainty might even be linked to Australia's piecemeal approach to amending ICA legislation evident since 2015. Readers may also wonder about the added complexity of State and Territory politics, which makes it harder and slower to implement uniform legislation nation-wide (such as Commercial Arbitration Acts now also based largely on the revised Model Law for domestic arbitrations, enacted over 2010-2017).*'

As disadvantages, on the other hand, we suggested the following (although geographical inconvenience has become less of a problem due to the pandemic-induced shift to remote hearings – for now) and I would also emphasise Australia's more decentralised system (although the case law across Federal and State courts has become more uniform over the last decade)[15]:

> '*the lack of an indemnity cost principle (as in Hong Kong) for failed challenges regarding ICA agreements and awards, despite several calls for reform. Generally, delays and costs remain major disincentives to choosing and especially later pursuing*

[13] Australian Trade and Investment Commission (AUSTRADE), 'Australia's Capability in International Commercial Arbitration' (2018). Available at https://www.austrade.gov.au/international/buy/australian-industry-capabilities/professional-services/professional-services.

[14] Luke Nottage and Nobumichi Teramura, 'Australia's (In)Capacity in International Commercial Arbitration', Kluwer Arbitration Blog, 20 September 2018. Available at http://arbitrationblog.kluwerarbitration.com/2018/09/20/australias-incapacity-international-commercial-arbitration/.

[15] See also the new book by Clyde Croft, Drossos Stamboulakis and Marilyn Warren, *International and Australian Commercial Arbitration* (LexisNexis, 2022), with a manuscript version of my review for the *Australian Law Journal* at https://japaneselaw.sydney.edu.au/2022/01/international-and-australian-commercial-arbitration-book-review/.

ICA. This may be particularly true for a country like Australia following the adversarial common law tradition, and with a growing population of lawyers.

A related challenge, not well addressed in the Austrade brochure, is Australia's geographical inconvenience. Why should Asian parties come to Australia's main cities for ICA when very popular regional venues like Singapore and Hong Kong are so much closer, as well as having all the advantages listed by Austrade? Matters could be resolved instead say in Darwin, but that northerly Australian city lacks ICA-experienced local counsel, facilities and (if matters end up in court) judges. An alternative would be to promote ICA for where the geography of Australia's larger cities becomes an advantage, for example transactions between South America and Asia (including China's new Belt and Road Initiative). Further niche marketing should focus on areas like the resources sector, where Australia has special expertise and the amounts in dispute are often large, so travel time and expense is not such an issue. (It is therefore unfortunate that the brochure does not mention the Perth Centre for Energy and Resources Arbitration.) Another way to combat 'the tyranny of distance' would be to focus more on e-arbitrations and/or expedited proceedings (without hearings), especially for smaller-value disputes.

A further challenge for seating ICA in Australia is the Australian Consumer Law. It sets mandatory rules not only for transactions involving individual "consumers" in the narrower sense used abroad, but also (indeed increasingly) for business-to-business transactions. Yet there is little legislative and even case law guidance as to their scope regarding forum selection, governing law and award enforcement. Statutory reform has fallen between the cracks (namely the Treasury with consumer law regulators, and the federal Attorney General's Department) and remains unlikely.

A final disincentive for legal advisors considering Australia as a seat for ICA may be the country's ambivalence about Investor-State Dispute Settlement (ISDS) since 2011. It may be seen as reflecting or potentially reviving ambivalence about arbitration generally, even though the Chief Justice of the Federal Court emphasised for the ICCA Congress audience that ICA and ISDS arbitration have some significant differences.'

In chapter 5 of my book, I suggest various further law reforms that do not get much legislative attention, including those summarised by Monichino and Teramura in a chapter of a book I co-edited, published by Wolters Kluwer in 2020.[16]

For Japan, I co-authored a summary assessment that appeared as another KAB posting,[17] prompted by a JCAA brochure promoting Japan. Since 2018 Japan has become more ambitious and less modest in promoting itself as a seat – hitherto stakeholders had a rather typical Japanese approach to ICA, focusing on substance over form, in the belief that a good product can speak for itself, but policymakers have realised from other countries that there needs to be

[16] Albert Monichino and Nobumichi Teramura, 'New Frontiers for International Commercial Arbitration in Australia: Beyond the 'Lucky Country' in Luke Nottage, Shahla Ali, Bruno Jetin and Nobumichi Teramura (eds) New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution (Wolters Kluwer 2020), also available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3946073.

[17] Nobumichi Teramura and Luke Nottage, 'Japan's (In)Capacity in International Commercial Arbitration', Kluwer Arbitration Blog, 17 November 2018. http://arbitrationblog.kluwerarbitration.com/2018/11/17/japans-incapacity-international-commercial-arbitration/.

both form (marketing through newly created arbitration and even mediation institutions plus legislative reform even if mostly focused on interim measures) and substance.

One of Japan's comparative disadvantages is that court proceedings and judgments are in Japanese, even if the judgments are usually pro-arbitration, and (ex-)judges from this (mostly still) civil law tradition do not actively promote arbitration in Japan, for example, in international conferences, or by serving as arbitrators after retiring from the courts.[18]

Both countries are struggling as latecomers, so probably need to try harder with novel initiatives, and better coordination among different stakeholders both domestically and indeed bilaterally – as I suggest in chapter 12 of my book.

Elisabeth Zoe Everson – Remote Proceedings

You mention the geographical inconvenience/tyranny of distance as being one of the challenges with respect to Australia becoming a more popular forum for ICA. You also mention that this could be to some extent combatted through focusing more on e-arbitrations and expedited proceedings. Do you believe that remote proceedings would place Australia in competition not only with the Asian ICA hubs but also for example the European ones (despite the time zone disadvantage)? If so, what do you believe would prompt parties to choose e-arbitration in Australia instead of say Europe? In this context, you state that being latecomers, both Australia and Japan need to try harder and propose novel initiatives if they wish to increase their attractiveness, and I was wondering if you could share with us any concrete suggestions, other than the bilateral coordination between the two countries you have already mentioned.

Moreover, is the possibility to e-arbitrate in Australia something that has been promoted by the government since the 2018 Austrade brochure (which I understand did not provide much guidance in this respect), considering for example the relevant 2021 amendments of the ACICA Rules? Are you aware of any new initiatives by the government to promote Australia as a suitable ICA forum, be it through another governmental publication or some other action taken on the federal level?

Professor Nottage: I think that the shift (so far) to remote hearings indeed exposes Australia to more competition worldwide (and not just from Europe), but it is better than having to compete on the physical hearing venue (which tends in practice to default to hearings at the seat). In chapter 12 of the book (which incorporates a KAB posting written last year)[19] I also point out that it depends on whether courts provide good access for e-hearings etc, if challenges arise that need to be heard at the seat. Australian courts were fortunately well-prepared, compared to, say, Japanese courts, when the pandemic hit.

However, the Australian government (through Austrade etc) has not been active in promoting this more level playing field, whereas Singapore or even HK governments would likely be weighing in. Australia also missed the boat of third-party litigation/arbitration funding – since

[18] See further James Claxton, Luke Nottage and Nobumichi Teramura, 'Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?' 47 *Journal of Japanese Law* (2019) 109-131, https://ssrn.com/abstract=3299097

[19] Luke Nottage, 'Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?', Kluwer Arbitration Blog, 16 July 2020. http://arbitrationblog.kluwerarbitration.com/2020/07/16/will-the-covid-19-pandemic-be-a-long-term-game-changer-for-international-arbitration/

a High Court of Australia[20] there was a much more liberal regime than those in other countries, but recently the matter has been regulated by the Australian Government.[21] There is some effort to (re)market Australia, factoring in the reduced comparative disadvantage of geography, for now at least, but at present there seems to be not so many arbitration cases actually filed in Australia.[22]

I have also suggested that Australia could focus on more niche markets, for example, disputes between parties in countries like Europe and South America, or southern Africa and North America – Australia as seat becomes geographically convenient! The seat in Australia would be also fit for specific areas. For example, the Perth Centre for Energy and Resources Arbitration (PCERA) was an interesting step in that direction, but now it is merged into ACICA so it may not have made much progress. Japan's new centre for IP-focused arbitration (with many ex-judges from around the region as potential arbitrators) is another good try. Australia might focus on smaller-value/less complex disputes (suitable for the Aussie 'can do' attitude) while Japan focuses on the bigger cases (suited for the Japanese eye for detail).

Other things summarised in chapter 12 of the book that the Australian Government could include legislative reforms, detailed further in chapter 5, both in terms of substantive issues and but also as a matter of more sustained and transparent process (over the last decade we have had rather piecemeal reforms that do tend to address some of the key concerns raised informally or in public by key stakeholders, but not others and instead sometimes quite peripheral matters). I suggest that there might even be scope for collaboration, i.e., parallel legislative reforms with Japan, since they share the Model Law regime. An example might be a similar set of Arb-Med provisions in the respective statutes (all Japan's Act says is that the parties can agree in advance on Arb-Med).

S.I. Strong – Reinventing Arbitration in Australia

At the beginning of chapter 5 of your book (international commercial arbitration in Australia) you quote former Attorney-General Hon Robert McClelland MP as suggesting "[w]e need to invent a form of arbitration that is tailored to the needs of the parties – to the needs of business. A form of arbitration that is prepared to do away with unnecessary formalities [...]". Do you agree with that statement? Elsewhere in that chapter you discuss some of the ways the Australian legal system could, and perhaps should, reform itself to make itself more amenable to international commercial arbitration, but I do not see you discussing that concept of reinventing arbitration (and apologies if I missed it).

Professor Nottage: I agree completely with his view, and keep reminding the persons concerned that this was the policy behind the 2010 Australia International Arbitration Act (IAA) amendments. Hence, I push in chapter 5 (updating on a paper written in 2013)[23] for various

[20] Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd [2006] HCA 41.
[21] Corporations Amendment (Litigation Funding) Regulations 2020 and 2021.
[22] See, for e.g., the information provided in the following ACICA survey report https://acica.org.au/australian-arbitration-report/. Australian respondents identified 223 separate arbitration cases, of which 111 were international, but the Australian connection was mostly parties, assistance, project or laws (Figure 5). It looks like only around 10-15% of the 111 ICA cases had Australian "venue", so even if all those were Australian seats (rather than say hearings for a foreign-seated arbitration), it looks around there were no more than 15 ICA cases afoot in Australia over those three years.
[23] Luke Nottage, 'International Commercial Arbitration in Australia: What's New and What's Next?' (2013) 30 [5] Journal of International Arbitration 465.

legislative reforms in and around the IAA regime to further reduce formalisation of international arbitration practice in Australia.

S.I. Strong – Follow-up on Reinventing Arbitration in Australia

As a corollary question, about a decade ago, Peter (Bo) Rutledge wrote a piece for a symposium edition of the *Journal of Dispute Resolution*[24] in which he discussed the need for arbitration to maintain certain differences from litigation in order to maintain a competitive advantage (it was a very law and economics analysis). He also suggested some divergence between the rules of different arbitral institutions was good for the same reason. Do you agree? And what unnecessary formalities do you think McClelland was contemplating? For example, should Australia do away with pre- and post-submission briefing? Have no oral hearings? Have only oral hearings? It is hard to contemplate what procedural steps could be done away with in the abstract and without the mutual agreement of the parties and still maintain compliance with necessary standards for procedural fairness.

Professor Nottage: He (and I) considered that Australian lawyers tended still to transpose litigation techniques into arbitral settings, e.g., lengthy submissions, procedural points or cross-examinations. One Australian lawyer coming back to practice in Sydney from many years in London found that our barristers were significantly more legalistic compared to counterparts there. We need to encourage more experimentation and less cookie-cutter approaches to arbitration, which after all is supposed to be more flexible than litigation. Some of the ideas you mention could be proposed, yet we see few documents-only arbitrations (and, perhaps, even fewer now that remote hearings have become commonplace!). Some lawyers and arbitrators are trying new things but they risk running into difficulties that might be chilling innovation – as, for example, in *Hui v Esposito Holdings* (2017), albeit quite borderline and rather out of step with growing deference of Australian courts to procedural decisions by tribunals.[25]

Naimeh Masumy – Japan's role in Shaping Trade and Investment Policy Initiatives in the Asia Pacific Region

Over the past few years, Japan has assumed a leadership role in shaping and implementing trade and investment policies in the Asia-Pacific region. In the CPTPP negotiation, Japan pressed hard to save and forge an Asia-Pacific trade pact after the U.S. pulled out of the agreement. Additionally, Japan continued to lead the way in holding the line on the global trade, through urging the conclusion of the EU-Japan Economic Partnership and the UK-Japan Comprehensive Economic Partnership Agreement (CEPA). These agreements represent a key milestone for international trade, accounting for nearly 40% of the world GDP and providing access to Japan's protected sectors, such as agricultural markets. Notably, they underline Japan's activism in trade and investment liberalization, providing a critical counter-narrative to its traditional posture

[24] Peter Rutledge, 'Convergence and Divergence in International Dispute Resolution', (2012) *Journal of Dispute Resolution* 49, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1123&context=jdr.

[25] Hui v Esposito Holdings Pty Ltd [2017] FCA 648. More on the case at https://disputescentre.com.au/hui-v-esposito-holdings-pty-ltd-2017-fca-648/. See generally Luke Nottage, 'Deference of Seat or Foreign Courts to International Commercial Arbitration Tribunals Concerning Procedural Issues: Australia in Regional and Global Contexts' (January 21, 2022), manuscript at SSRN: https://ssrn.com/abstract=4013970.

which was largely predicated on restricting international trade to boost domestic industries.

However, it appears that these significant instruments do not embody robust investment protection schemes, departing from traditional treaty practice. Although the objective and the concept of investment protection standards are alluded to in a number of provisions within these agreements, they failed to include a comprehensive set of rules identifying the parameters of different investment protection standards. Such an omission gives rise to the following three questions:

Q 1 – Do the current Economic Partnership Agreements (EPAs) and Free Trade Agreements (FTAs), including Australia-Japan FTA expand rules and strengthen regional economic architecture, in spite of the absence of a robust investment protection scheme?

Professor Nottage: I think, for example, that the EU-Japan EPA left out investment protection and dispute resolution because there was uncertainty whether even the EU investment court compromise would get approval from all EU governments (see for example the difficulties with the Canada-EU EPA), and anyway Japan prefers further incremental reform of conventional ISDS, as a major net FDI exporter. Meanwhile, Japanese investors into Europe remain protected thanks to quite a few Bilateral Investment Treaties (BITs) plus the Energy Charter Treaty (ECT) (e.g., a Japanese investor recently won a case against Spain in the matter of its energy policy shifts although, like many cases, the awarded amounts were considerably less than claimed).[26]Q 2 – Does leaving the investment protection framework from the scope of Australia-Japan FTA have significant long-term consequences for Australian investors seeking to invest in Japan?

Professor Nottage: No, ISDS-backed protections (and liberalisations) apply bilaterally anyway under CPTPP. Japan knew that was likely coming, so did not press hard for ISDS in the 2014 bilateral FTA, although in record for seeking ISDS – seemingly did not offer enough to Australia to make its government go to the hassle domestically of getting FTA with ISDS through parliament (small government majority and FTA tariff reductions need enabling legislation, and the Philip Morris Asia case was still pending vs Australia). Part III of the book has more on Australian and Japanese treaty practice and politics.

Q 3 – Does Japan court system provide a viable alternative for foreign investors to seek recourse? If so, do courts give primacy to domestic rules such as the Foreign Exchange Trade Act of 2019 over the international rules and standards?

Professor Nottage: Japanese courts are neutral and professional, and hence would provide a viable procedure if no ISDS were available. But of course that would be in Japanese (so also, would it be better for ICA if Japan set up international commercial court allowing proceedings in English, like we see sprouting up around Europe etc?) with potentially multiple appeals and (costly) questions about possible direct effect of preferential market access from FTAs if not

[26] For statistics on this point, see Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21 [4] International Arbitration Law Review 111, and Sydney Law School Research Paper No. 18/46. https://ssrn.com/abstract=3227401

sufficiently reflected in the Act or its regulations, plus some differences in other domestic public law if compared to investment treaty protections (e.g., fair and equitable treatment).

Naimeh Masumy – Japan's Support of ISDS

Japan has retained a rather unique position in the ISDS reform efforts being undertaken by UNCITRAL Working Group III, as well as the ECT Modernization process.

During WGIII sessions, Japan openly advocated for minimal changes offering a rather piecemeal solution, all in while expressing doubts about the necessity of replacing the current ISDS with a permanent investment court. Similarly, during the ECT Modernization process, Japan strongly supported the reinforcement of investment protections in the ECT. Such a strong stance has provoked some reactions from the EU delegates who have become impassioned with the lack of concrete reforms. They have raised concerns that Japan may block any substantive reform as the ECT reform process requires unanimous votes of all the 53 signatories.

To this end, I would like to get your views on the following questions:

Q 1 – What is the impetus for Japan to support this system, besides being one of the least frequent parties to ISDS?

Professor Nottage: Japan is a major net FDI exporter (stocks and flows). Also catching up with competitors such as Korea in concluding investment treaties especially with more developing/high-risk States. Like Australia, Japan had relatively few treaties, but it has been picking up over last two decades.

Q 2 – Do you think Japan's current policy toward investment treaties and investor-State arbitration is still shaped by a protectionist undertone, which could prevent it from taking an active role on the global stage and promoting rules-based global system?

Professor Nottage: I do not think Japan is protectionist (e.g., it has been actively encouraging inbound FDI especially since late 1990), and relies heavily on international trade (including quite active WTO engagement), which explains its interest in pressing for more investment treaties and doubts about the EU investment court approach. Caution about the latter alternative to conventional ISDS is also found in Korea, another large capital exporting country, whereas I think an investment court option or hybrid could be useful way forward for such Asia-Pacific countries including Australia.[27]

S.I. Strong – Should Japan Become Focused on Mediation/Med-Arb?

Chapter 4 on Japan's arbitration regime is quite interesting. In the YO Listserv there has been some discussion on some of the efforts that Japan has made to improve its standing in the world of arbitration. However, as you have noted in the discussion above, it can be very difficult for countries to 'break into' the top tier of arbitration seats. In your chapter, you briefly touch on the widely perceived notion that Japan is culturally disinclined to

[27] Amokura Kawharu and Luke Nottage, 'Models for Investment Treaties in the Asian Region: An Underview' 34(3) Arizona Journal of International and Comparative Law 462-528 (2017), also available on SSRN: https://ssrn.com/abstract=2845088.

adjudicative proceedings like litigation and arbitration. You also note that Japan makes relatively broad use of med-arb. As an expert in Japanese law, do you think it would be better for Japan to essentially give up on development of Japan as an arbitral seat, given existing legal and cultural issues, and try to focus on making Japan a leader in mediation (or arb-med) instead? One immediate obstacle would be that Japan has not yet signed the Singapore Convention on Mediation (which seems odd – any insights on that?), but it may be that Japan is still considering how domestic law might be affected by joining the convention?[28]

Professor Nottage: There are some elements of general culture, but also of organisational culture (structures of big companies, etc) and rational cost-benefit assessments behind Japanese practice. That has been primarily to either negotiate, and in worst case litigate, domestic commercial disputes. And for international disputes, agree on arbitration but not press too hard for the seat in Japan – on the assumption that disputes will likely be prevented or negotiated out, so better to get in return a concession on other contract terms (price term, etc). That assessment may be changing, as more Japanese firms see that disputes are arising and the forum for their settlement can be important. However, it is a slow change, compared to, for example, Korean firms. I think a metric for 'success' in law and institutional reform, in Japan, Australia, or elsewhere, should be actually whether making the State a more credible option for arbitration leads to better overall contract negotiation outcomes, rather than just 'does it lead to more ICA-seated cases filed in local arbitration centres?' (although that of course tend to be a key performance indicator and a more visible metric for law reformers, etc). So I think Japan (or Australia) should keep making legislative and institutional changes to improve their attractiveness as seat, even if it does not lead to many more case filings locally.

But it is also a good idea to promote new Dispute Resolution processes, like international mediation. Japan has not signed the Singapore Convention because ratification would mean some legislative reform, which may take time. I think there are also the practical points that mediation is not widely used for domestic commercial disputes, with comparatively few multi-tiered DR clauses for international transactions, plus mediated settlements, by definition, are mutually agreeable, so should be voluntarily enforced anyway. Yet, stakeholders in Japan are pushing for adoption of the Convention at least for marketing purposes, and to support the innovation of the Kyoto International Mediation Centre.[29]

S.I. Strong – Follow-up on Mediation in Japan

To follow up a bit on your last point, do Japanese firms avoid mediation because they tend to negotiate relatively well? In other words, is cooperation so imbued into the popular and legal culture that a third-party neutral is not typically necessary to assist the parties? Part of the reason why mediators are necessary in other countries is because the parties are unable to negotiate successfully on their own, even if it is in their best interests.

[28] The question made reference to Kimimasa Hata, 'Looking Toward the Establishment of the Singapore Convention on Mediation and the Ratification by Japan', ChuoOnline Research, Chuo University. https://yab.yomiuri.co.jp/adv/chuo/dy/research/20210527_en.php

[29] James Claxton, Luke Nottage, and Nobumichi Teramura, 'Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?' (2018) 47 Journal of Japanese Law 109, and Sydney Law School Research Paper No. 19/01. https://ssrn.com/abstract=3299097

Professor Nottage: Nice follow-up, there may be something to that but there are various other factors complicating the picture.

One reason Japanese parties put comparatively more emphasis on negotiations is that there is some 'face' lost if the deal can not be saved. That might lead to 'worse' (desperate) negotiations in some cases (bad outcomes)! Another reason is that Japanese firms have been quite risk averse and very cost-conscious, and see engaging lawyers (and in-house counsel time) as throwing good money after bad, although this is starting to change as they see the payoffs, sometimes, for engaging in more structured dispute resolution processes. Mediation could be attractive here for cost reasons, if Japanese companies can be persuaded of the cost as well as other advantages of trying a rather novel process (especially in its cross-border contemporary format). One reason for the comparative lack of mediation experience for commercial dispute resolution in Japan is that lawyer and court costs have remained comparatively low, whereas they started to ramp up over the 1990s in Australia, leading ex-judges and lawyers to move into promoting mediation services.

Closing Questions (S.I. Strong)

The long-time host of the PBS series, 'Inside the Actors Studio', James Lipton, used to conclude the formal interview with a series of questions he said were based on those asked by French talk-show host Bernard Pivot. Pivot's questions were themselves based on a questionnaire developed by Marcel Proust. After some debate with colleagues, I decided not to ask the Lipton questions of our authors, but have instead come up with our own list of questions that are in the same spirit. These questions will be asked of all our interviewees.

1. What is your favourite word?
2. What is your least favourite word?
3. Which fictional hero do you consider your own personal hero?
4. Which historical figure do you identify most with?
5. What sound or noise do you love?
6. What sound or noise do you hate?
7. What profession other than your own would you like to attempt?
8. What profession would you not like to do?
9. What is your own personal motto?
10. What do you hope your colleagues will say about you when you retire?

Professor Nottage: Thanks (?) Stacie for keeping the toughest questions until last! I am happy to be your guinea pig if you reciprocate next time we meet (haha).

1. Holidays.
2. Gentle reminder (… sorry, allow me two words!).
3. Samwise Gamgee (… for those who somehow missed the Lord of the Rings movies/ books: loyal supporter of the main character, Frodo Baggins, on a mission).
4. King David (… lately: flawed but sincere).
5. Waves on the beach (… closely followed, especially after today's lunch break in nearby national park, by wind in the trees).
6. Lorikeets or cockatoos (… but I also love them: raucous sound but beautiful birds).
7. Big wave surfer (… think of the adrenaline rush!).

8. Big wave surfer (… think of the fear! Actually, my family thinks I could not really be anything other than a jurist …).
9. Do not be timid, do not get discouraged.
10. He was collegial.

After the closing question, Dr. Strong thanked Professor Nottage for the insights into his character and for having made time available to discuss his book and provide insights thereof. This concludes the report of the very first YO author interview, and hopefully there will be more to come in the near future. *Vivat, crescat, floreat*.