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SYMPOSIUM ON GLOBAL LABS OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

INTERNATIONAL COMMERCIAL COURTS IN THE UNITED STATES AND AUSTRALIA: POSSIBLE, PROBABLE, PREFERABLE?

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As worldwide interest in international commercial courts grows, questions arise as to whether individual nations can or should seek to compete in the "litigation market" by developing their own cross-border business courts.[1] This essay compares the prospects of the United States and Australia in this regard, focusing on whether it is possible (Section II), probable (Section III), and preferable (Section IV) for one or both of these two federalized, common law nations to develop an international commercial court as part of their national judicial systems. The inquiry is particularly intriguing given that one country (the United States) has had a somewhat uneven relationship with international engagements while the other (Australia) is maintaining or increasing its connections to the rest of the world. Although this discrepancy could be used to explain the relative status of the debate about international commercial courts, which is much more advanced in Australia[2] than in the United States,[3] it is also possible that the distinctions between the United States and Australia are motivated by other factors. While neither country appears poised to create an international commercial court at the moment, the current analysis helps identify the types of factors that policy-makers can and should consider when contemplating reforms of this nature.

The Possibility of an International Commercial Court

To begin with, is it even possible for the United States and Australia to develop international commercial courts given the countries' current constitutional regimes? Some might view the United States as beyond these types of fundamental concerns since twenty-one U.S. states have already developed specialized business courts.[4] However, none of those courts focuses exclusively on cross-border disputes, and multinational commercial actors typically

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[1] *See* Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227, 262 (2020).

[2] *See* Tracy Albin, *The Dispute Resolution Lag in Australia: The Time to Be Aggressive is Now,* 28 AUSTRALASIAN DISP. RESOL. J. 149, 153–54 (2017); A.S. Bell, *An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?*, 94 AUSTRL. L.J. 24 (2020); Craig Colvin, *Comment: An Australian International Commercial Court: Not a Bad Idea or What a Bad Idea?*; Jerome Doraismy, *Australia Does Not Need a "Unicorn" International Commercial Court*, LAW. WEEKLY (Aug. 20, 2019); John Middleton, *The Rise of the International Commercial Court*, FED. CT. AUSTRL. paras. 14, 31 (Sept. 21.2018).

[3] *But see* S.I. Strong, *International Commercial Courts and the United States: An Outlier by Choice and by Constitutional Design?*, *in* INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE 255 (Xandra Kramer & John Sorabji eds., 2019).

[4] *See* John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1918 (2012).

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prefer to appear in U.S. federal courts. Proponents of a U.S-based international commercial court should, therefore, focus on the federal court system.

Development of a federal court dedicated to cross-border business disputes is problematic at both the constitutional and sub-constitutional levels.[5] The biggest constitutional concern involves jurisdiction. While difficulties involving personal jurisdiction could be overcome on the basis of consent, subject matter jurisdiction would have to be addressed legislatively through the creation of a new tribunal under either Article I or Article III of the Constitution. This is not impossible, since the U.S. federal system is already home to a number of specialized Article I courts, most notably the U.S. Bankruptcy Courts, and one specialized Article III first-instance court, the U.S. Court of International Trade. However, Congress is generally loath to create specialized tribunals, preferring instead to rely on generalist judges.[6]

Various sub-constitutional concerns also exist. Unless the new court adopts its own unique procedural rules, disputes will be subject to the Federal Rules of Civil Procedure, including Rule 26 on discovery. While U.S. practitioners characterize broad discovery as a necessary evil, international actors view U.S.-style discovery with horror and will likely avoid any dispute resolution mechanism that incorporates such procedures. Individual litigants could adopt bespoke procedures as a matter of contract, but U.S.-style discovery is inextricably linked to U.S. substantive law, which makes it difficult to eliminate discovery altogether or to limit it severely. Concerns about discovery could therefore prove fatal to the development of a U.S.-based international commercial court, since one of the main purposes of such courts is to take advantage of the substantive law of the forum state.[7]

Australia faces similar challenges, although these obstacles do not appear insurmountable. For example, Australia has already facilitated specialization within courts of general jurisdiction by adopting commercial "lists" that are staffed by judges with expertise in business disputes.[8] State and territorial courts have long used the list system to facilitate and improve the resolution of particular types of disputes, which has led Justice Andrew Bell, President of the New South Wales Court of Appeal, to suggest that any international commercial court developed in Australia should be lodged within a state or territorial judicial system.[9] However, this approach raises a number of practical and constitutional questions, including those relating to the choice of the state or territory that would act as home to such a court and the court to which an appeal would lie.[10]

State and territorial courts are also problematic because they currently focus primarily on local matters. Interestingly, the Federal Court recently moved to improve Australia's approach to multijurisdictional national disputes by adopting the National Court Framework,[11] which created a number of National Practice Areas (NPAs), including one focused on commercial and corporate disputes.[12] While the Framework offers a more specialized system of federal-level dispute resolution than is available in the United States, the NPA on commercial and corporate matters still does not focus exclusively or even primarily on international disputes.[13]

[5] *See* Strong, *supra* note 3, at 265.

[6] *See id.* at 263.

[7] *See id.* at 271.

[8] *See* Bell, *supra* note 2, at 27.

[9] *See id.* at 32.

[10] *See id.* at 36; Middleton, *supra* note 2, paras. 14, 31.

[11] *See* Central Practice Note: National Court Framework and Case Management (CPN-1), FED. CT. AUSTRL. (Dec. 20, 2019); *see also* The National Court Framework, FED. CT. AUSTRL.

[12] *See* Commercial and Corporations Practice Note, FED. CT. AUSTRL. (Oct. 25, 2016); *see also* Commercial and Corporations National Practice Area, FED. CT. OF AUSTR.

[13] Bell has suggested this is not problematic, given that the most successful and longstanding commercial court—the English Commercial Court—does not focus exclusively on international matters. *See* Bell, *supra* note 2, at 31–32.

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This is not the only option, however. Justice Craig Colvin of the Federal Court of Australia has suggested the development of a new, federally funded tribunal comprised of sitting judges of the Federal Court and the Supreme Courts of the various states and territories who have significant commercial expertise.[14] Although Justice Colvin's proposed tribunal would not technically qualify as a court under Chapter III of the Australian Constitution,[15] his approach would allow the tribunal to adopt various types of procedural innovations and operate outside the normal rules of evidence, thereby allowing the tribunal to compete more readily with other international commercial courts and with international commercial arbitration.[16]

The Probability of an International Commercial Court

The next option to consider is the probability that the United States or Australia will develop some type of international commercial court within their national judicial systems. At this point, there does not appear to be much support for an international commercial court based in the United States. Certain sectors of the United States reflect a high degree of isolationism,[17] suggesting that efforts to increase international connections may be difficult, even in matters involving private international law. Courts in the United States have also abdicated their once-leading role in international commercial matters.[18] Taken together, these elements reduce the likelihood that the United States would seek to create an international commercial court.

However, there is another, more insidious reason why the United States is unlikely to act in this field, namely, the pervasive belief that the United States is not operating under any sort of competitive disadvantage when it comes to transnational litigation. To the contrary, many within the United States believe that U.S. courts, particularly U.S. federal courts, are "among the best, if not the best, of any nation in the world," even though observers from outside the United States do not necessarily share that view.[19] If the global impetus towards international commercial courts is driven by the desire to attract litigation business, then the perception that one's legal system is optimal or at the very least adequate will likely thwart nascent reform efforts.

Australia again shares several similarities with the United States, most notably with respect to domestic views about the quality of its judicial system.[20] This perspective has been bolstered by the number of Australian judges who have been asked to sit on international commercial courts in other jurisdictions,[21] which evidences international recognition of their expertise.

Australia differs from the United States with respect to its engagement with the rest of the world. For example, the Australian government has touted the outward-looking culture of the country,[22] and Australian courts have developed several memoranda of understanding with foreign courts to facilitate the resolution of cross-border disputes.[23] Australian judges (unlike U.S. judges) are also experienced comparatists who draw heavily on foreign

[14] *See* Colvin, *supra* note 2, para. 13.

[15] *See* AUSTRL. CONST. art. III (noting subject matter limitations on federal courts in Australia).

[16] *See* Colvin, *supra* note 2, paras. 16–26; *see also* Bell, supra note 2, at 27–30.

[17] *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

[18] *See* Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 259 (2012).

[19] *See* Peter M. Koelling, *Appellate Practice: The Next 50 Years*, 53 JUDGES' J. 15, 17 (2014); Strong, *supra* note 3, at 262.

[20] *See* Bell, *supra* note 2, at 39.

[21] *See* Judges, DUBAI INT'L FIN. CTR. (listing one American and four Australians among the international judges).

[22] *See* Our Country, AUSTR. GOV'T.

[23] *See* Bell, *supra* note 2, at 34–35; Bookman, *supra* note 1, at 244.

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sources when deciding commercial and other matters.[24] Commentators have used the proficiency of Australian judges in international and comparative law to argue that Australia does not need an international commercial court because litigants can already take advantage of Australian expertise by adopting an exclusive jurisdiction agreement.[25]

Ultimately, the deciding factor may be more practical than ideological. Courts are notoriously underfunded, even in the best of times, and even before the recent pandemic, questions were being asked as to which government entity (state or federal) could or should fund an Australia-based international commercial court.[26] The economic impact of COVID-19 makes it highly unlikely that Australia will invest in a new court, particularly since it is unclear whether such an investment would generate any trade or financial benefits to the host jurisdiction.

The Preference for an International Commercial Court

Although neither the United States nor Australia seem likely to develop an international commercial court in their national legal systems, the wisdom of this approach is unclear. It is therefore useful to consider whether an international commercial court would be preferable to a number of alternative options/scenarios.

The first comparison involves international commercial arbitration, which is currently considered the preferred means of resolving cross-border business disputes. On the surface, international commercial litigation and international commercial arbitration are becoming increasingly similar as a result of various initiatives from the Hague Conference on Private International Law, including the Hague Principles on Choice of Law in International Commercial Contracts (Principles),[27] the Hague Convention on Choice of Court Agreements (COCA),[28] and the recently promulgated Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention).[29] All three instruments seek to emulate the personal autonomy and procedural efficiency generated by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in the area of international commercial arbitration.[30] However, the Hague initiatives have failed to garner anywhere near as much state support as the New York Convention, which has 156 signatories as compared to 32 signatories for COCA (including the 28 member states of the European Union as part of a regional economic integration unit), two signatories for the Hague Judgments Convention, and one country that has implemented the Principles at the domestic level.

This phenomenon raises questions about the actual depth of state support for international commercial litigation in national courts. If states are not willing to embrace international instruments like the Principles, COCA, and the Judgments Convention, there appears to be little reason for the United States and Australia to develop specialized international commercial courts, since the legal regime in which international litigation operates may not be robust enough to generate widespread use among parties, especially as compared to international commercial arbitration.[31]

[24] *See* Bell, *supra* note 2, at 36–37.

[25] *See id.* at 27.

[26] *See id.* at 36; Colvin, *supra* note 2, paras. 13–14, 20–21.

[27] *See* Hague Principles on Choice of Law in International Commercial Contracts.

[28] *See* Convention on Choice of Court Agreements, 30 June 2005, 44 I.L.M. 1294.

[29] *See* Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

[30] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 UNTS 3.

[31] *See* Bell, *supra* note 2, at 28.

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The second comparison involves international commercial courts seated in other countries. Australia has already considered the strength of competing courts as part of its analysis on whether to enter the international litigation market.[32] While new international courts may not be as useful in practice as they are in theory in generating direct economic benefits, these tribunals may provide indirect benefits to host states in the form of increased prestige and use of the substantive law of the forum state. Since the majority of cases heard by an international commercial court use the law of the forum, a successful court would generate increased demand for lawyers qualified in that particular jurisdiction to assist with both transactions and litigation.

This phenomenon may not be sufficient to convince the United States and Australia to establish an international commercial court in their national systems, since the benefits are somewhat speculative. Furthermore, it may be too difficult at this point for U.S. and Australian courts to overcome the "first mover advantage" enjoyed by international commercial courts that are already in existence.[33] Thus, the creation of an international commercial court in the United States or Australia does not appear to be clearly preferable to international commercial courts seated elsewhere.

The third comparative analysis involves international commercial mediation, which has been receiving a great deal of positive attention recently as a result of the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation).[34] Not only did an unprecedented forty-six countries sign the instrument on its opening day in August 2019, but the convention went into force a mere thirteen months later, an extraordinarily rapid feat. Although conventional wisdom regarding mediation focuses on its appeal to parties, there are public benefits as well, including reduced judicial expenses, management of ever-increasing dockets, and high rates of user satisfaction. State interest in this type of mechanism is illustrated not only by the number of countries that have adhered to the Singapore Convention on Mediation but also by the increasing number of countries, including the United States and Australia, that have adopted pro-mediation measures in domestic disputes.[35]

The international momentum toward mediation and away from litigation suggests that the United States and Australia might benefit not from creating new international commercial courts but by finding a way to capitalize on their current expertise in consensual modes of dispute resolution. Up until recently, the Netherlands has been the leader in this regard, having created the means to provide global enforcement of settlement agreements relating to large-scale (class or collective) disputes.[36] However, the Dutch procedure may become less important in the wake of the Singapore Convention on Mediation, paving the way for another jurisdiction to innovate in this field. Singapore signaled its desire to take on that role during the signing ceremony for the Singapore Convention on Mediation, but there is still time for the United States, Australia or both to become "first movers" in this regard.

Conclusion

Although international commercial litigation is witnessing something of a resurgence, Lucy Reed has suggested that much of the recent focus on international commercial courts may be the result of a romanticized view of judicial proceedings.[37] She has therefore encouraged judicial and commercial actors to think more broadly

[32] *See id.* at 25–26.

[33] *See* Fernando Suarez & Gianvito Lanzolla, *The Half-Truth of First-Mover Advantage*, Harv. Bus. Rev. 121, 122 (2005).

[34] *See* UN Comm. on Int'l Trade Law, Report, Fifty-first session, UN Doc. A/73/17 at Annex I (2018).

[35] *See* 28 U.S.C. §§ 651–58; Civil Procedure Act 2005 (NSW) §§25–34, 56–60 (Austrl.); Uniform Civil Procedure Rules 2005 (NSW) rr. 20.1-20.7 (Austrl.).

[36] *See* Ianika Tzankova & Eric Tjong Tjin Tai, *The Netherlands*, Focus on Collective Redress, Bri. Inst. Int'l & Comp. L.

[37] *See* Bell, *supra* note 2, at 40.

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about what constitutes an optimal dispute resolution system in the twenty-first century.[38] While that solution may be found in international commercial courts, it seems at least equally likely that it will be found in international commercial mediation. Alternatively, the online innovations developed in response to the COVID-19 pandemic may inspire entirely new thinking about cross-border forms of dispute resolution.[39] Given these factors, future scholarship concerning international commercial courts may benefit most from comparative analyses across both jurisdictional and procedural lines.

[38] *See id.*

[39] *See* S.I. Strong, *Australian Courts and COVID-19: Rules and Responses*, *in* LEGAL RESPONSES TO THE CORONAVIRUS PANDEMIC 203 (Cláudio Jannotti da Rocha et al. eds., 2020).

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