

OPENING OCEANIA: REFORMING INTERNATIONAL ARBITRATION REGIMES ACROSS THE PACIFIC ISLANDS

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Owing to its small population and remoteness, Oceania has historically underperformed relative to its peers. This paper will consider the key obstacles to trading with this developing region, before arguing that international arbitration, particularly as envisaged by the United Nations Commission on International Trade Law (UNCITRAL), can address many of these obstacles. In parallel, this paper will review the ongoing work of various organisations to modernise international arbitration laws across the region. Finally, a co-ordinated strategy for developing international arbitration in Oceania will be proposed, with the aim of building upon existing proposals for reform in this region.

1. INTRODUCTION

Across the Pacific Ocean lie a number of small island nations that can broadly be categorised into three ethno-cultural sub-regions: Melanesia, Micronesia and Polynesia. Together, these sub-regions form ‘Oceania’, and include the independent nations of Fiji, Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu. Several non-independent territories are also located in the region, including American Samoa, the Cook Islands, French Polynesia, New Caledonia, Niue, Tokelau and Wallis and Futuna.

The region contains some of the fastest-growing economies in the world.¹ However, foreign investment is critical in order for the region to sustain its economic potential. Additional capital and expertise from foreign investors can fund new industries and expand existing ones, lift infrastructure and productivity, and establish employment opportunities. With almost one third of exclusive economic zones globally,² there are significant opportunities in the region for the exploration and use of marine resources, including energy production from water and wind, and deep seabed mining.

Foreign investment in Oceania is inhibited by laws in the region that lack clarity and are poorly enforced.³ One solution to this is to develop the practice of international arbitration, which allows foreign investors to resolve private disputes before foreign arbitrators, under foreign laws, instead of before local judges, under local laws.⁴ Most regions around the world have developed international arbitration regimes, but Oceania is an exception. In

¹For example, Nauru’s gross domestic product is forecast to expand by 15.0% in 2017. See: Asian Development Bank, *Asian Development Outlook 2016 Update: Meeting the Low-Carbon Growth Challenge*, (Manila: Asian Development Bank, 2016).

²Henrike Seidel and Padma N. Lal, *Economic value of the Pacific Ocean to the Pacific Island Countries and Territories*, (Switzerland: IUCN Oceania, 2010).

³Anita Jowitt, “The Future of Law in the South Pacific,” *Journal of South Pacific Law* 12, no. 1 (2008), 45 and 47.

⁴Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, (London: Queen Mary University of London, 2015).

order to attract foreign investment, countries in Oceania should therefore enact updated legislation for international arbitration.

There is a lack of discourse on the applicability of international arbitration to Oceania. By analysing how international arbitration can facilitate greater cross-border trade with Oceania, this paper seeks to fill a void in discourse, and serve as a platform for necessary international arbitration reforms within the region.

2. OBSTACLES TO FOREIGN INVESTMENT IN OCEANIA

1. Inadequacy of dispute resolution

A successful dispute resolution system is necessary in order to facilitate cross-border trade, as it assures foreign investors that contractual rights and obligations will be upheld.⁵ If such rights and obligations are not upheld, foreign investors will invest into other countries where they will be upheld, or will import their own labour and resources to manage the greater risks of a country lacking fair and balanced dispute resolution.⁶

Oceania does not currently have a dispute resolution framework in place that encourages foreign investment:

a. Litigation in Oceania

Many countries in Oceania face issues with corruption and rule of law.⁷ For example, Papua New Guinea's Attorney-General, a Supreme Court judge and the Prime Minister's lawyer were all charged with corruption and fraud in 2016.⁸ This creates a perception that claims heard by local courts may not always be treated fairly.

b. Litigation in an overseas jurisdiction

Given the limited number of reciprocal enforcement agreements in place for foreign court judgments, a judgment of a foreign court may not be enforceable in Oceania. If a losing party under a foreign court judgment only had assets which were located in Oceania, this would render the foreign court judgment effectively worthless.

c. International arbitration

Some countries in Oceania have not yet enacted arbitration legislation.⁹ Many other countries in the region have not reformed their arbitration legislation for several decades.¹⁰ As a result, many widely adopted

⁵Chief Justice Robert French AC, "International Commercial Dispute Resolution and the Place of Judicial Power," (Speech, International Commercial Law and Arbitration Conference, Law Courts Building, Sydney, August 22, 2013).

⁶Asian Development Bank, *Reforming Pacific Contract Law* (2009 report), (Manila: Asian Development Bank, 2009), 17.

⁷Peter Larmour and Manuhia Barcham, *National Integrity Systems: Pacific Islands* (2004 report), (Victoria, Australia: Transparency International, 2004), 5.

⁸"PNG's Attorney-General Ano Pala arrested by country's fraud squad over misuse of funds." *ABC News*. Apr. 12, 2015. <http://www.abc.net.au/news/2016-04-12/png-justice-minister-ano-pala-arrested/7320984>.

⁹For example, as of December 2016, the Marshall Islands and Tonga have no arbitration law.

¹⁰Asian Development Bank, *Technical Assistance Report: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific* (2016 report), (Manila: Asian Development Bank, 2016), 2.

reforms which have improved the practice of international arbitration in other regions are not yet available in Oceania.

d. Others

Other forms of alternative dispute resolution do not always produce final and binding outcomes.¹¹ In particular, mediation lacks the safety net of an institutional structure, with control over its outcome being held by the parties. This does not satisfy desire of foreign investors for certainty and predictability.¹²

II. Lack of law reform

Foreign investors prefer to invest in countries that maintain efficient and modern laws, instead of outdated laws that are poorly understood. For example, jurisdictions that regularly reform their laws on international arbitration, such as Hong Kong and Singapore, are among the top recipients of foreign investment globally.¹³

Oceania has a long history of colonialism, the legacy of which is demonstrable in the laws that govern the region today.¹⁴ Many laws that were introduced pre-independence were saved post-independence, to plug any gaps until they could be replaced by locally enacted laws. However, locally enacted laws have often been slow to emerge in the region. For example, the current arbitration law of Papua New Guinea was passed in 1951.¹⁵

A law reform agency could assist in modernising Oceania's colonial-era laws. Such reform would make the region more attractive to foreign investment. However, according to Peter MacFarlane and Chaitanya Lakshman, "there is little commitment to law reform by South Pacific states."¹⁶ Many countries in Oceania only have inactive or informal law reform agencies, due to limited expertise and low financial resources.¹⁷

Law reform instigated by international organisations has also been limited. Such organisations have taken a generalist approach, pursuing reforms in a multitude of areas, including governing business operations (company law), closure (bankruptcy law), transactions (contract law) and dispute resolution.¹⁸ However, certain reforms have been prioritised over others, given limited resources. As a result, although reforms have been achieved in certain areas,¹⁹ reforms in many other areas, like international arbitration, have not.²⁰

III. Prevalence of customary law

¹¹Kim M. Rooney, "Conciliation and Mediation of International Commercial Disputes in Asia and UNCITRAL's Working Group on the International Enforcement of Settlement Agreements," *Asian Dispute Review* 2016, no. 4 (2016), 196.

¹²Amanda Perry, "An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality," *American University International Law Review* 15, no. 6, (2000), 1628.

¹³United Nations Conference on Trade and Development, *World Investment Report 2015* (2015 report), (Geneva: UNCTAD, 2015), 5.

¹⁴For further context, see: Jennifer Corrin Care, "Contract law – The South Pacific: customary and introduced law," *Amicus Curiae*, no. 23 (2000), 26.

¹⁵Arbitration Act 1951 (PNG).

¹⁶Peter MacFarlane and Chaitanya Lakshman, "Law reform in the South Pacific," *Journal of South Pacific Law*, 9, no. 1 (2005).

¹⁷*Ibid.*

¹⁸For example, the Asian Development Bank's Pacific Private Sector Development Initiative, which is analysed below.

¹⁹For example, see: Asian Development Bank, *Pacific Private Sector Development Initiative: Progress Report* (2013-2014 report), (Manila: Asian Development Bank, 2014).

²⁰*Technical Assistance Report: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific* (see footnote 10 above), 1.

Customary laws include traditional social, religious and economic values and understandings carried on by an identifiable community.²¹ Such laws are recognised by many jurisdictions in Oceania as a source of law.²² In certain jurisdictions in the region, customary law also holds a higher status than common law and equity.²³

Courts in Oceania have applied customary law often.²⁴ For example, a court in Tonga has implied customary terms into an employment contract such that, because of established customs within local workplaces, it is now permissible for a replacement worker to work the shift of another worker who is unavailable.²⁵ Customs have also been cited in decisions on whether an agreement has been concluded,²⁶ and misrepresentation.²⁷

As there is not yet a uniform code on the applicability of customary law to contracts in Oceania,²⁸ the existence of customary law introduces an element of unpredictability for foreign investors operating in the region.

IV. Limited local legal profession

There is a shortage of lawyers in Oceania. For example, it was suggested in 2011 that there was just one lawyer for every 13,616 people in the Solomon Islands, in comparison to one lawyer for every 351 people in Australia.²⁹ It has also been reported that some islands in the region, such as Kiribati, have no resident legal professionals at all.³⁰ The cost of legal services in Oceania is therefore higher than it is in other regions.³¹ This restricts foreign investment, as foreign investors are attracted to countries that offer low transaction costs.³²

The quality of legal services in the region is also inhibitive for foreign investment. As Carolyn Penfold notes, “many South Pacific countries experience considerable difficulty with unethical and unprofessional behaviour within the legal system.”³³ With “inadequate supervision and support structures” and “poor pay and conditions,”³⁴ foreign investors may question the ability of local lawyers to advocate complex points of law.

The capacity of the region to develop a larger and higher quality legal profession is prohibited by a lack of locally-based tertiary-level institutions,³⁵ and institutions to supervise, support and discipline legal professionals.³⁶

²¹Bob Hughes and Peter MacFarlane, “The Application of Custom in South Pacific Contract Law and as a Basis for an Estoppel,” *Journal of Contract Law* 20, no. 1 (2004), 36.

²²*Ibid.*

²³Jennifer Corrin Care, “Cultures in Conflict: the Role of the Common Law in the South Pacific,” *Journal of South Pacific Law* 6, no.2 (2002).

²⁴Desley Horton, “International Commercial Arbitration in Pacific Island States,” (Speech, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, May 20, 2016).

²⁵*Vaiotei v Cross and The Commodities Board* [1990] Tonga LR 108.

²⁶“International Commercial Arbitration in Pacific Island States” (see footnote 24 above).

²⁷*John To’Ofilu v Oimae*, Unreported, High Court, Solomon Islands, CAC 5/96, 19 June 1997.

²⁸Many countries in the region have not yet introduced a code of contract law, despite the possibility that it could work to address the applicability of customary law to particular contracts. See: “Contract law – The South Pacific: customary and introduced law,” (see footnote 14 above), 30.

²⁹South Pacific Lawyers’ Association, *Needs Evaluation Survey for South Pacific Lawyer Associations* (2011 report), (Canberra: South Pacific Lawyers’ Association, 2011).

³⁰“Justice delayed, justice denied on Pacific’s remote Kiribati.” *Reuters*. Apr. 26, 2016. <http://www.reuters.com/article/us-pacific-justice-idUSKCN0XN2VN>.

³¹*Reforming Pacific Contract Law* (see footnote 6 above), 17.

³²“An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality” (see footnote 12 above), 1630.

³³Carolyn Penfold, “Teaching Legal Ethics and Professionalism in a South Pacific Context,” *Legal Education Review* 23, no. 1 (2013), 19.

³⁴*Ibid.*, 22.

³⁵For many countries in Oceania, the only accessible tertiary-level institution is The University of The South Pacific, which is jointly owned by the governments of 12 member countries. See: “About the University.” *The University of The South Pacific*. Date unknown. http://www.usp.ac.fj/index.php?id=usp_introduction.

³⁶“Teaching Legal Ethics and Professionalism in a South Pacific Context” (see footnote 33 above), 15.

3. INTERNATIONAL ARBITRATION TO FACILITATE FOREIGN INVESTMENT IN OCEANIA

International arbitration could address a number of the concerns of foreign investors doing business in Oceania, such as:

a. Quality of local legal system

In international arbitration, foreign arbitrators and counsel are largely permitted to oversee a dispute in place of local judges and counsel. This allows foreign investors to manage risks of corruption and inadequate supervision within Oceania's legal profession. Foreign arbitrators and counsel may also offer industry-specific expertise, which would otherwise be unavailable in the region.

b. Prevalence of colonial-era and customary laws

International arbitration largely allows parties to select their own procedural rules and substantive law, to govern their disputes. For example, parties could agree to have a dispute seated in Singapore, but determined for the most part, in accordance with Hong Kong law. This reduces the risk of inefficient colonial-era or unpredictable customary laws applying to a dispute in a jurisdiction in Oceania.

c. Unenforceability of foreign court judgments

Most countries have acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).³⁷ Under the New York Convention, countries must recognise and enforce arbitral awards made in other contracting countries. This addresses the limited number of reciprocal enforcement agreements in place in Oceania for foreign court judgments.

However, many of these benefits of international arbitration are not available in Oceania. This is because some jurisdictions in the region have not yet enacted arbitration legislation,³⁸ while many others have not updated their arbitration legislation for several decades. Accession to the New York Convention has also been limited (though the New York Convention has been extended to some non-independent Oceanic territories).³⁹

I. Legislative frameworks

The United Nations Commission on International Trade Law (UNCITRAL) has developed a model law to govern the practice of international arbitration (Model Law).⁴⁰ The Model Law has successfully been enacted by states in its full form, and therefore requires a low level of scrutiny by law-making bodies.

³⁷"Contracting States." *New York Arbitration Convention*. Date unknown. <http://www.newyorkconvention.org/countries>.

³⁸Mele Tupou, "Setting the Scene," (Speech, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, May 19, 2016).

³⁹"Status of signatories." *SICE*. Date unknown. http://www.sice.oas.org/DISPUTE/comarb/uncitral/nysig_e.asp.

⁴⁰UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006 (Vienna, United Nations, 2006).

By enacting the Model Law and other reforms, countries in Oceania will address many shortcomings in their current arbitration legislation, including:

a. Jurisdiction

The Model Law provides for a tentative competence of arbitral tribunals to decide on their own jurisdiction, either as a preliminary question or in an award on the merits.⁴¹ Answering a preliminary question such as “is there an agreement to arbitrate this dispute,” may consume as many resources as resolving the underlying dispute itself.⁴² Therefore, shifting such questions from judges to arbitrators can improve the efficiency of a legal system.⁴³ This would be useful in Oceania, where it has been suggested that more than 10,000 court judgments are waiting to be delivered in Papua New Guinea, and that some disputes are still before Vanuatu’s courts that were filed prior to 2001.⁴⁴

b. Procedure

Due to the limited number of legal professionals in Oceania, industry specialists such as engineers have often been appointed to act as arbitrators, regardless of whether they are familiar with common practices in arbitral procedure.⁴⁵ Importing articles 10 to 24 of the Model Law would address this. These articles act as a safeguard for instances where parties cannot agree between themselves as to arbitral procedure, including as to the form of oral hearings and written submissions.

c. Interim relief

The current arbitration laws of Oceania make limited reference to interim relief. Although Samoa’s arbitration law does make provision for arbitrators to render an interim award, it does not define what this is.⁴⁶ In contrast, the Model Law provides for both a court-ordered interim measures in support of arbitration, as well as for an arbitral tribunal-ordered interim measures regime.⁴⁷ By enacting the Model Law, countries in Oceania would give arbitrators explicit powers to preserve the status quo, prevent prejudice to the arbitral process, preserve assets and evidence, and make preliminary orders.⁴⁸

d. Interest

In early common law legal provisions, arbitrators possessed limited authority to award interest on arbitral awards.⁴⁹ Many jurisdictions have since amended their laws to include express powers for arbitrators to award simple or compound interest in respect of any period up to payment under an arbitral award.⁵⁰ However, Oceanic jurisdictions have not. This was identified in a recent Papua New Guinean case, where

⁴¹Ibid, art 16.

⁴²Amokura Kawharu, “Arbitral jurisdiction,” *New Zealand Universities Law Review* 23 no 2 (2008), 239.

⁴³Gary B. Born, “International Arbitration Agreements and Competence-Competence,” in *International Commercial Arbitration (Second Edition)* (London: Kluwer Law International, 2014), 1074-1075.

⁴⁴“International Commercial Arbitration in Pacific Island States,” (see footnote 24 above).

⁴⁵For example, *Samoa National Provident Fund v Apia Construction and Engineering Ltd* [2008] WSSC 1, 102 and 113.

⁴⁶Arbitration Act 1976 (Samoa), s 6 and Sch 1.

⁴⁷UNCITRAL Model Law (see footnote 40 above), arts 17 and 17J.

⁴⁸Ibid, arts 17A – 17H.

⁴⁹*Evaluation Consult (New Zealand) Ltd v Independent State of Papua New Guinea* [2016] PGNC 50, 3.

⁵⁰See, for example: International Arbitration Act (Cap 143A) (Singapore), s 12(4).

Kandakasi J expressed that Papua New Guinea should “take steps to review and introduce reforms to our Arbitration Act”.⁵¹ By enacting a rate and timeframe within which arbitrators can award interest, countries in Oceania will encourage compliance with arbitral awards.

e. Court intervention

Arbitration laws in Oceania do not provide for the same degree of certainty as that of Model Law jurisdictions. For example, if a party in Samoa alleges fraud, a court is immediately granted authority to determine the dispute in place of the arbitral tribunal.⁵² Parties in the region can also challenge arbitral awards merely for arbitrator ‘misconduct’ and without any time limits.⁵³ In contrast, the Model Law sets out an exhaustive list of high-threshold situations which warrant recourse to a court to set aside an arbitral award.⁵⁴ It also sets a strict time limit within which such applications must be made.⁵⁵ By enacting the Model Law, countries in Oceania would therefore improve the certainty and finality of arbitral awards.

II. Institutional support

In developed jurisdictions, institutional bodies support the development of foreign investment. In Oceania, there are only a limited number of such institutions that are active.

a. Arbitral institutions

The most accessible arbitral institutions for parties operating in Oceania are the Australian Centre for International Commercial Arbitration (ACICA), based in Sydney, Australia, and the Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ), based in Wellington, New Zealand. ACICA has heard disputes involving parties from Fiji and Papua New Guinea.⁵⁶ It has also administered mediator training courses in Fiji.⁵⁷ Other than these activities, information on the presence of arbitral institutions in the region is limited.

b. Pacific Private Sector Development Initiative

The Asian Development Bank’s Pacific Private Sector Development Initiative (PSDI), based out of Sydney, Australia, promotes commercial law reform in Oceania. Although dispute resolution is part of PSDI’s mandate, PSDI has had limited success in overseeing arbitration-related developments in Oceania: the only reference to arbitration in its ‘Progress Report’ for 2014-2015 was in respect of an Arbitration Bill for Tonga, which it referred to as still being on hold,⁵⁸ as it was in its 2013-2014 report.

⁵¹[2016] PGNC 50 (see footnote 49 above), 38.

⁵²Horton, “International Commercial Arbitration in Pacific Island States,” (London, UK, 2016).

⁵³See, for example: Arbitration Act 1976 (Samoa), s 13.

⁵⁴UNCITRAL Model Law (see footnote 40 above), art 34(2).

⁵⁵UNCITRAL Model Law (see footnote 40 above), art 34(3).

⁵⁶Deborah Tomkinson and Margaux Barhoum. “Australian Centre for International Commercial Arbitration.” In *Arbitration World (Fifth Edition)*, edited by Karyl Nairn QC and Patrick Heneghan. (London: Thomson Reuters, 2015).

⁵⁷“Mediator Training – Fiji.” *Australian Disputes Centre*. Date unknown. <https://disputescentre.com.au/events/mediation-training-fiji/>.

⁵⁸Asian Development Bank, *Pacific Private Sector Development Initiative: Progress Report* (2014-2015 report), (Manila: Asian Development Bank, 2015), 73.

c. *Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific*

In 2016, the Asian Development Bank established an arbitration-specific project, called Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific (Project).⁵⁹ The Project will assist countries in Oceania with acceding to the New York Convention and enacting arbitration laws that implement the New York Convention.⁶⁰ The initial target nations of the Project are Fiji, Papua New Guinea and Tonga.⁶¹ Further expansion of the Project will depend on additional funding.

d. *Pacific Judicial Development Programme*

The Pacific Judicial Development Programme (PJDP) was established to strengthen the rule of law in Oceania through judicial training programmes.⁶² Court users in the region have noted an improvement in the standard of judicial conduct, as a result of PDJP's activities.⁶³ This is a positive development, as the growth of international arbitration depends on the quality of the judiciary overseeing it.⁶⁴ Although PDJP has not focused on international arbitration specifically, a series of recent court decisions from the region support the view that courts in Oceania are becoming increasingly pro-arbitration.⁶⁵

e. *South Pacific Seminars*

UNCITRAL's Regional Centre for Asia and the Pacific has also been active in the region. It hosted a 'South Pacific Seminar' in Papua New Guinea in 2015 and 2016. These seminars have included sessions in respect of the New York Convention and the Model Law.⁶⁶ UNCITRAL's efforts have been effective to some degree, with Papua New Guinea announcing its intention to move forward with accession to the New York Convention at the 2016 seminar.⁶⁷

4. PROPOSALS FOR INTERNATIONAL ARBITRATION REFORM IN OCEANIA

I. Legislative frameworks

In order to become a more acceptable place for the practice of international arbitration, countries in Oceania must first accede to the New York Convention, as most countries around the world have done. This requires the deposit

⁵⁹“Regional: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific.” *Asian Development Bank*. Date unknown. <https://www.adb.org/projects/50114-001/main>.

⁶⁰*Technical Assistance Report: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific* (see footnote 10 above).

⁶¹*Ibid.*, 5.

⁶²“Pacific Judicial Development Programme - About Us.” *Federal Court of Australia*. Date unknown. <http://www.fedcourt.gov.au/pjdp/about-us>.

⁶³“Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.” *United Nations Commission on International Trade Law*. Date unknown. <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>.

⁶⁴Chief Justice Allsop, “Australia – a vital commercial hub in the Asia Pacific region: the importance of and challenges for Australian commercial courts and arbitral institutions,” (Speech, Melbourne, Feb. 25 2015).

⁶⁵For example, see: *SNPF v Westerlund Construction Joint Venture* [2016] WSSC 26.

⁶⁶“2015 UNCITRAL South Pacific Seminar – Programme.” *UNCITRAL Regional Centre for Asia and the Pacific*. Date unknown. <http://www.uncitral.org/images/RCAP/Image.1439368216598.jpg>.

⁶⁷*Technical Assistance Report: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific* (see footnote 10 above), 3.

of a notice of accession with the New York Convention's Secretariat.⁶⁸ New arbitration legislation based on the Model Law should then be enacted by these countries, to implement the New York Convention.

The Model Law is universally recognised as representing the best practice in international arbitration. UNCITRAL's formal Explanatory Note to the Model Law comments on the substance of the Model Law as follows:

"The Model Law" ... "covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law."⁶⁹

In order to optimise the positive perception that the adoption of the Model Law will have on countries in Oceania, the Model Law should be enacted without significant change. However, further reforms to assist the region in becoming an acceptable place for international arbitration should also be considered, including:

a. Arbitrability

Under the New York Convention, arbitration agreements must deal with a "subject matter capable of settlement by arbitration."⁷⁰ However, some jurisdictions have recently removed restrictions on what types of disputes can be arbitrated.⁷¹ Countries in Oceania may wish to do the same in respect of certain types of insurance, intellectual property and shareholder disputes. Trust arbitration may also be relevant to the region, given that countries like Samoa have developed offshore financial centres.⁷²

b. Arbitrator and counsel appointments

Countries in Oceania should eliminate visa requirements for arbitrators and requirements as to arbitrators' backgrounds. These measures would uphold the principle of party autonomy, by providing parties with a wide scope to select the arbitrator that they feel is best determined to hear a dispute. Restrictions on rights of audience in arbitration-related court proceedings should also be relaxed. This is because a larger pool of counsel to select from would reduce transaction costs for foreign investors.

c. Arb-Med

⁶⁸Gary B. Born, "Integration and international dispute resolution in Small States - Keynote Speech," (Speech, London, May 19 2016).

⁶⁹"Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006" (see footnote 63 above).

⁷⁰Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York: United Nations, 1958), art 2(1).

⁷¹For example, Hong Kong has recently introduced amendments to its arbitration legislation, clarifying that disputes over intellectual property rights can be resolved by way of arbitration. See: "Hong Kong confirms IP rights are arbitrable." *Herbert Smith Freehills*. Dec. 7, 2016. <http://hsfnotes.com/arbitration/2016/12/07/hong-kong-confirms-ip-rights-are-arbitrable/>.

⁷²"Overview of Samoa." *Samoa International Finance Authority*. Date unknown. http://sifa.ws/index.php/aboutus/overview_of_samoa/.

Arb-Med is a procedure where an arbitral tribunal assumes the role of a mediator or conciliator in order to facilitate settlement of the dispute referred to arbitration. It has become increasingly popular in Asian jurisdictions,⁷³ and should therefore be facilitated in Oceania too. Without statutory recognition of an Arb-Med process, there is currently a risk that enforcement of an international arbitral award made in Oceania following a failed Arb-Med procedure would be refused.

d. Confidentiality

As confidentiality does not feature in a number of arbitration laws within Oceania,⁷⁴ arbitration-related court proceedings may become published. This goes against the expectations that parties have for an arbitral process to be confidential. Countries in Oceania should therefore address this issue, with public interest in any arbitration-related court proceedings being provided for by limited or redacted publications, or publication in full only in exceptional cases.

e. Indemnity costs

Countries in Oceania should introduce a default cost rule in respect of arbitration-related court proceedings. In such a framework, debtors who unsuccessfully apply to stay arbitrations or set aside an arbitral award would be required to pay the costs of the arbitration-related court proceedings on an indemnity basis.⁷⁵ This would improve the certainty and finality of arbitral awards, by deterring the use of court-based guerrilla tactics to challenge such awards.

f. Third party funding

Some jurisdictions have abolished the common law torts of champerty and maintenance, and now permit the use of third party funding in international arbitration. In light of the limited resources of local parties in the region, countries in Oceania may wish to consider similar reforms. Such reforms may need to be accompanied by detailed regulations in respect of conflicts of interest, disclosure and eligibility requirements for funders.

II. Institutional support

Besides legislative reform, there are a number of other ways in which governments in Oceania can encourage the development of international arbitration and facilitate greater foreign investment, including:

a. Arbitral institutions

⁷³Albert Monichino, "The Future of International Arbitration in Australia," *Victoria University Law and Justice Journal* 5, no. 1 (2015), part G.

⁷⁴For example, see: Arbitration Act 1976 (Samoa).

⁷⁵"The Future of International Arbitration in Australia" (see footnote 73 above), part H.

Most users of international arbitration prefer institutional rather than ad hoc arbitration.⁷⁶ This is because arbitral institutions articulate arbitral proceedings comprehensively from start to finish and are better suited to cater for contingencies.⁷⁷ No international arbitral institution is based in Oceania. Oceanic governments should therefore support nearby institutions such as ACICA in establishing sub-commissions across the region. This could involve subsidised premises or tax incentives.

b. Supranational court

A supranational court vested with compulsory and exclusive jurisdiction on certain matters could help to create a more unified pool of locally rendered arbitration-related jurisprudence. There would be administrative difficulties in the establishment of such a court, but the concept is not without precedent. For example, the Caribbean Court of Justice — a supranational entity — has itself delivered binding decisions in respect of the enforcement of arbitral awards.⁷⁸

c. Taskforce

A regional taskforce of arbitration practitioners should be created, in order to address the lack of law reform agencies in Oceania. Through annual conferences or symposia, such a taskforce would be well placed to hold governments to account on the progress of arbitration reforms. The taskforce could also consider opportunities for Oceania to develop arbitration-specific expertise in particular industries, like deep sea mining.

d. University course

As of December 2016, the most widespread university in Oceania only teaches “Foreign Trade and Investment Law,” but not any dedicated course on international arbitration.⁷⁹ There are a large number of arbitration practitioners in Australia and New Zealand who could establish and teach such a course. This would create a pool of bicultural and bilingual lawyers capable of promoting the benefits of international arbitration to local businesses, in a culturally appropriate manner.

5. CONCLUSION

The aim of this paper has been to demonstrate how international arbitration can assist Oceania in attracting foreign investment. If countries in the region accede to the New York Convention and enact the Model Law, Oceania will offer foreign investors a dispute resolution system with greater enforceability, finality and neutrality. This will address the perceived risks of investing into the region, including the prevalence of colonial-era and customary laws, and the unenforceability of foreign court judgments.

⁷⁶2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration* (see footnote 4 above), 17.

⁷⁷“International Arbitration: Which institution?” *Ashurst*. Jan. 3, 2017. <https://www.ashurst.com/en/news-and-insights/legal-updates/qg-international-arbitration-which-institution/>.

⁷⁸Winston Anderson, “Keynote Panel – International B2B Dispute Resolution” (Speech, Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom, May 20, 2016).

⁷⁹“Course Finder: Faculty of Arts, Law & Education – School of Law.” *The University of South Pacific*. Date unknown. <http://sols3.usp.ac.fj/cfinder/parsedb.pl>.

There are economic benefits for Oceania in becoming an acceptable place for the practice of international arbitration. It will promote more travel to, and business in, the region. This will generate revenue for the region's airlines, hotels and other service providers. The increased number of arbitral and related court proceedings may also create opportunities for the local legal profession. Therefore, countries across the region should prioritise international arbitration reform.

In order to meet the challenges of such reform, a greater degree of co-ordination is needed. ACICA, AMINZ, the Asian Development Bank and UNCITRAL must work more closely with each other and local stakeholders. The use of a unified taskforce, as proposed by this paper, would expedite such co-ordination. By the opening of the 24th ICCA Congress in Sydney in April 2018, it is hoped that regional arbitration-related reform will have commenced, 'Opening Oceania' to the world.