

Chapter 10

Revising Investor-State Arbitration Rules in Australia and Japan to Meet Public Interests

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I The International Commercial Arbitration Backdrop: Delays and Costs

International commercial arbitration (ICA) is facing another round of soul-searching, the current focus of which is the increasing costs and delays of proceedings.¹ As with waves of civil procedure reforms carried out since the late 1990s in states such as the United Kingdom and Japan, speeding up proceedings does not necessarily translate into major cost savings.² A common response by lawyers, for example, is to 'front-load' the work and expenses to meet tougher timetables. Perhaps unsurprisingly, then, cost savings have not readily followed efforts to expedite ICA by revisions in the late 1990s to the Rules of the world's major arbitration institutions and other efforts by the broader arbitration world.³

Consequently, a number of proposals are emerging to counter the over-formalisation of ICA. And ICA is well-placed to reinvent itself in this way for the 21st century. Not only is commercial arbitration rooted primarily in the economic interests of private parties and in private autonomy, but it can also draw on a broader pool of experiences and expectations, now that more countries have come in from the 'periphery' of the arbitration world.⁴

At its 'core', for example, the International Chamber of Commerce (ICC) published a report on 'Techniques for Controlling Time and Costs in Arbitration'.⁵ Noting that 2 per cent of costs comprised the administration

1 Marriott A, 'Breaking the Deadlock' (2005) 22(3) *Arbitration International* 411 at 413-414, also via <www.ialecture.com> accessed 27 June 2010; Mistelis L, 'International Arbitration - Corporate Attitudes and Practices' (2004) 15 *American Review of International Arbitration* 525 and <www.pwc.com/arbitrationstudy/> accessed 27 June 2010.

2 Zander M, *The State of Justice* (Sweet and Maxwell, London, 2000); Nottage L, 'Civil Procedure Reforms in Japan: The Latest Round' (2005) 22 *Ritsumeikan Law Review* 81.

3 See Nottage and Garnett, Chapter 1 of this volume, Part I.A; and the emergence of fast-track arbitration rules, introduced and compared in DeBoos et al, Chapter 5.

4 Nottage L, 'The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery' (2005) 16 *Arbitration International* 53.

5 (2007) Publication No 843 <www.iccwbo.org/uploadedFiles/TimeCost_E.pdf> accessed 27 June 2010.

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