

Books

“Commercial Arbitration in Australia”

Commercial Arbitration in Australia

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Gavan Griffith reviews Doug Jones' book on the new commercial arbitration legislation in Australia

led Australia's delegation to UNCITRAL upon the adoption of the UNCITRAL Model Law in 1985 and worked for its adoption, verbatim, as the applicable Australian law regulating international commercial arbitrations as augmented by complementary provisions enacted as amendments to the *International Arbitration Act 1974*.

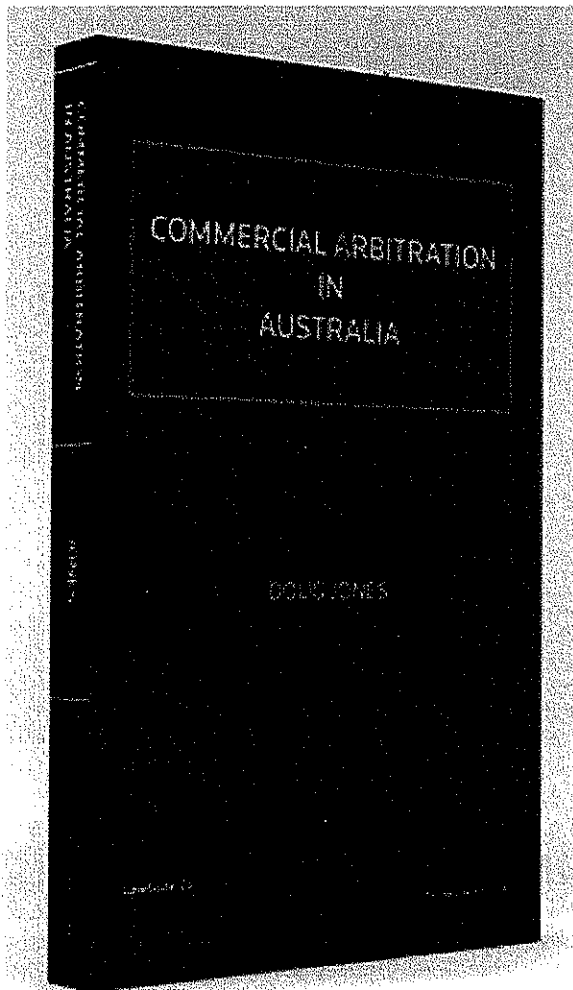
Domestic arbitrations continued to be regulated as State law under the terms of the various "uniform" State Commercial Arbitrations Acts enacted between 1984 and 1990.

In early 2009, the recently resigned Chief Justice of New South Wales, Jim Spigelman QC revived languishing proposals at SCAG to update the laws by adapting the Model Law as the core of new Uniform Acts to create, as he puts it "a seamless regime between domestic and international commercial law" first enacted in the *NSW Commercial Arbitration Act 2010* and followed by like laws in the other States.

And in doing so, the Uniform Acts embrace some improvements to the Model Law settled by working Groups of UNCITRAL over many sessions at New York and Vienna (particularly as to the ordering of interim measures) as well as enacting many provisions intended to be complementary to, and to improve, the application of the Model Law regimes to domestic disputes.

In the context of this root and branch reconstitution of the Australian laws applicable to domestic arbitrations, Doug Jones, currently President of the Chartered Institute of Arbitrators, has led a team to compile a complete commentary of the new Laws referenced to the NSW Act.

Usefully the format is that of Annotations without being sub-joined to the provisions of the Act (cf Miller's annual annotations to trade practices laws).



This commentary is readily accessed by its Chapters to cross-reference the corresponding parts of the Act.

In as much as the most experienced commercial lawyers touching upon arbitration laws and practice will need to re-calibrate their practice to conform with the new uniform Acts, to my mind, the Jones' commentary is an indispensable guide to be held in the left hand as a reference to the reading of the bare text of the laws in the right.

The point of particular transition to the Model Law is Part 7 of the Act providing for Recourse Against Award, essentially limited to ensuring that a Tribunal acts honestly and within jurisdiction and accords a fair procedure to the exclusion of a right of appeal on a question of law unless the parties so agree and the Court grants leave by reference to what are plainly limited criteria under Section 34 of the Act.

It is unfortunate that even such qualified exception was drawn into the last draft, as it came to be enacted, as it defies the philosophy of the Model Law that the parties choose their Tribunal wisely and thereby opt for certainty by abrogating an appeal for error of law.

But what is done is done, and it maybe that the courts will, as they have not done before, come to exercise restraint in review in the very few disputes where review may be possible.

A lawyer uninstructed in the Model Law will find that the corresponding Jones' Chapter 10, lays out the pathway to explain the almost 40 pages of the qualified, but clear, new provisions for review, and how they may work in practice.

These pathways to review may be as usefully read by the judiciary applying
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(l-r) Michael Sanig, Michelle Sindler and John Wakefield discuss a chapter of his book with Doug Jones (seated) at the launch of *Commercial Arbitration in Australia* at the Sydney offices of Clayton Utz on 4 May.

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them as by the practitioner invoking them. Under the pre-existing Uniform laws, there are some low points in examples of inappropriate judicial interventions to the intended finality of regularly conducted arbitral disputes, and probably none lower than by the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346, which pulled off the, no doubt unintended, double bill of bringing the Supreme Court of Victoria for the first time to the attention of the international commercial disputes community who formed an universal opinion, for cause shown, that Victoria was a jurisdiction to be avoided as an arbitral seat by any competent arbitrator, former judge or not, anxious for his or her reputation not to be shredded for acting in conformity with universal off-shore practice as to the detail required to be addressed in a valid award.

The NSW Court of Appeal in *Gordian Runoff* [12010] NSWCA 57 has convincingly demonstrated the shortcomings and errors of that unfortunate decision. To my mind, the judgment of Allsop P earns the nomination as the best exercise in judicial method to

establish the case for departure from an insupportable decision of an Appeal Court in a co-ordinate jurisdiction.

Although, Croft J in *Thoroughvision v Skyvision* [2010] VSC 139 has attempted to hone its brutal edges, the shadow of Oil Basins casts a continuing shadow on any tribunal unfortunate enough to have a seat in Victoria.

The High Court has given special leave in the NSW case, and for the moment this controversy remains work in anxious progress. As Wellington said of his Spanish Generals, "I do not know whether they frighten the French. But ... they frighten me!". As Croft J has, delicately, put it "...it would have to be conceded that there were some 'unfortunate' decisions".

Various early provisions of the Act express its paramount object "to facilitate the fair and final resolution of commercial disputes without unnecessary delay and expense" (section 1AC) and exhort the courts to those objects of the Act: see Sections 1AA and 2D and to strive for consistency in interpretation, including by reference to offshore references expounding the Model Law (section 2D).

The judges have enough signposts not to get it wrong this time and to limit judicial interventions to facilitating rather than frustrating the expectations of the parties to arbitrated disputes. In this regard, Jones exegesis of these formative provisions should be mandatory preliminary reading for all judges on the Arbitration lists of the Courts of the States.

However the point of this reference to current controversy is to underline the extent to which Jones Commentary on the NSW Act has hit the ground running in complete exposition of laws yet to be enacted and brought into force in the other States.

I certainly do not know my way around the new Uniform Laws, which I have not yet had course to apply. When I do, I will turn to Jones for confirmation as to whether habits and practice from a superceded legislative scheme are required to be modified or improved.

In summary, no shortcomings as the Every[persons] Guide to Arbitration in Australia. I add that the Overviews in Chs 1 to 3 are an informative and, for me, an essential, scene-setter to grappling with the new laws.