BOOK REVIEW

Commercial Arbitration in Australia. By Doug Jones. Law Book Co: Thomson Reuters Australia Limited, 2011. Paperback. ISBN 978-0-455-22858-7. 626 pp. (inc. Appendices, Index and Tables). A$150.00.

The growth of globalised commerce and law practice and the widespread, instantaneous communication made possible by the Internet and social media have produced seemingly limitless dialogue on binding arbitration and dispute resolution processes. We rub up persistently against the spheres of international arbitration, including investment arbitration, and the varied domestic laws and practices of different countries. Listservs and online opinion pages inundate us daily with an incessant stream of case decisions, empirical data, and personal ''perspectives''. What is sorely lacking, sadly, is depth, breadth and integration—tools that concisely and systematically describe and analyse evolving arbitration law and practice in a manner that provides a meaningful, valuable image of the whole. This is precisely what Doug Jones brings forth in *Commercial Arbitration in Australia*, a particularly welcome addition to the daunting onslaught of arbitration material now being produced.

Today, as construction lawyers the world over know well, even clients of moderate size are confronting the global marketplace. At this appropriate time, *Commercial Arbitration in Australia* details one leading economy's decision to embrace the leading template for national laws on *international* arbitration—the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration—as the foundation of its *domestic* arbitration law. Jones' painstaking, systematic commentary on the impact of Australia's new Commercial Arbitration Bill 2010, which at the time of Jones' book's publication had only been enacted in New South Wales but which should ultimately be the governing law of all Australia, offers a powerful argument for the benefits of harmonising domestic and international arbitration law. For those of us in jurisdictions like the United States that rely most heavily on judicial ''fleshing out'' of statutes governing arbitration, with mixed results, the ''modified UNCITRAL'' model offers a refreshing and instructive counterpoint.

It is hard to imagine anyone more ideally suited to produce *Commercial Arbitration in Australia* than Doug Jones. A distinguished, long-time practitioner of construction law (with Clayton Utz) with extensive experience as a domestic and international advocate and arbitrator, Jones is currently the President of the Chartered Institute of Arbitrators. He has actively led or participated in most of the organizations engaged in the development, administration and regulation of arbitration in Australia—a multi-hat midwife to the legal evolution he describes in this book.

Jones' special insight is evident in Chapter 1, which provides a foundation for the rest of the book. He details the history of commercial arbitration in Australia, the long legacy and intertwining jurisprudence of the United Kingdom, and the shortcomings of the 1984 Uniform Acts, which resulted in excessive formality, ''undue'' judicial intervention, and lost economy and efficiency. He summarises the special concerns associated with adapting the UNCITRAL Model Law for domestic purposes—a step taken by a growing number of jurisdictions, including most recently Hong Kong; the challenges of adaptation are reflected throughout the book.

Another important contribution of Chapter 1 is the concise but nuanced discussion and comparison of different ''ADR'' processes. Even experienced ''ADR'' practitioners should benefit from a close reading of this section, in which Jones among other things offers his own take on the distinction between mediation and conciliation. The most useful element, however, may be his careful parsing of the differences between arbitration and various forms of ''expert determination'', as well as the potential pitfalls associated with the latter (including the absence of a statutory foundation similar to that governing arbitration). (A future edition might also profitably treat ''non-binding arbitration''—an animal that rears its head occasionally but which arguably falls beyond the scope of national arbitration statutes. The subject has produced conflicting case law in the US.)

Chapter 2 emphasises the critical preliminary language which establishes the ''paramount object'' of the Commercial Arbitration Act 2010—''to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense''. According to Jones, the implications of this language are significant, and represent a dramatic departure from UK law (and, I might note, US law): if arbitrators conclude that the parties have chosen procedures that are too time-consuming or expensive, they may override the parties' choice and substitute their own alternative procedures. At the same time, Jones explains, ''unnecessary delay or expense'' is not a freestanding objective, but must be understood as that amount of process which exceeds that necessary to obtain a fair resolution of the dispute. (The latter essential insight, by the way, is nowhere to be seen in the recent US Supreme Court interpretation of the Federal Arbitration Act in *AT & T Mobility* v. *Concepcion.*[1]) It remains to be seen how strongly arbitrators will exert their apparent authority to second-guess parties' procedural choices in order to avoid delay or expense.

The general provisions of the Model Arbitration Act are covered in Chapter 3. There is a helpful discussion of the process of making sure domestic and international arbitration law were complementary in scope, so as to avoid inadvertent gaps in coverage as well as overlap. Another salient insight relates to provisions of the Act calling for the promotion ''so

[1] 2011 WL 1561965 (27 April 2011).

far as practicable'' of uniformity in the application of domestic and international arbitration law; Jones observes that this provision encourages Australian courts to take into account decisions of foreign courts applying the UNCITRAL Model Law. He also explains how statutory terms governing the receipt of communications may be superseded by the rules of arbitral organisations, and highlights specific provisions of the Act establishing the forms and boundaries of judicial involvement in arbitration. (Even though the Act contemplates a more limited judicial role in Australian arbitration than prior law, there are still opportunities for various forms of judicial intervention at all stages of arbitration.)

The succeeding chapters are organised in a fashion that corresponds roughly to the chronology of arbitration processes. They meld basic commentary on various provisions of the Model Arbitration Act with summary and analysis of judicial precedents under other statutes or the common law, and other sources to predict the operation of the Act in common factual scenarios. The commentary also draws attention to the interplay between the Act and standard institutional arbitration rules. Chapter 4 addresses arbitration agreements; Chapter 5, the composition of arbitration tribunals and grounds for challenge of arbitrators; Chapter 6, the treatment of issues relating to the jurisdiction of the arbitral tribunal; Chapter 7, interim measures such as temporary protective decrees or conservatory orders; Chapter 8, the conduct of arbitration hearings; Chapter 9, the making of an award and the termination of arbitration proceedings; Chapter 10, recourse against awards; Chapter 11, recognition and enforcement of awards; Chapter 12, miscellaneous provisions such as those addressing the death of a party, interpleader, and arbitral immunity; and Chapter 13, savings and transitional provisions related to bringing the Act into effect. The book's appendices include the text and commentary to the UNCITRAL Model Law on International Commercial Arbitration and leading Australian institutional arbitration procedures.

In these chapters construction lawyers will find discussions of numerous elements of relevance to practice. In embracing the UNCITRAL approach, for example, the Act gives recognition to the principle, already embodied in leading arbitration procedures, that arbitrators may rule on their own jurisdiction—competence-competence. At the same time, the Act permits parties to seek judicial review immediately of tribunal rulings on jurisdictional issues. And though Australian law favours liberal enforcement of agreements to arbitrate, there remain salient exceptions to enforceability of pre-dispute arbitration agreements, including, notably, provisions in contracts for residential construction (which are covered by a discrete statute referring claims to a Consumer, Trader and Tenancy Tribunal). The Act specifically authorises a wide range of interim measures on the part of arbitrators, and even specifically recognises that tribunals may make orders respecting, among other things, ''discovery of documents and interrogatories''. The Act may, as noted, give arbitrators greater leeway to promote

expedition and cost-saving; Jones suggests it could also enhance the ability of arbitrators to rely on their own knowledge or experience in lieu of parties' submissions.

One salient feature of the Act that has no counterpart in the UNCITRAL Law is a provision for consolidation of arbitral proceedings. The provision addresses concerns with resolution of multi-party disputes that arise with some frequency in the construction arena and lays a novel foundation for arbitrator-directed consolidation of proceedings or other appropriate measures. In cases where multiple tribunals have been empanelled in related proceedings, the Act provides for joint deliberations regarding consolidation issues. Jones offers extensive commentary regarding concerns associated with parallel proceedings and the practicalities of consolidation and joinder. (In discussing the option of court-ordered consolidation, Jones states that only Hong Kong and The Netherlands include such provisions. He overlooks pertinent US law on the subject, including terms of California arbitration law and of the 2001 Revised Uniform Arbitration Act—adopted as state arbitration law in many US states—specifically providing for court-ordered consolidation.)

One other important provision of the Act, empowering courts to address questions of law arising out of an award, is based not on UNCITRAL Law but on UK law. As in the UK, judicial action is conditioned upon agreement of the parties (an ''opt-in'') as well as leave of court. Again, Jones provides a backdrop carefully comparing the terms of the Act to their earlier counterparts and reflects on how the new provisions may operate in practice.

Generally speaking, one of the best things about *Commercial Arbitration in Australia*, despite the fact that it weighs in at over 500 pages, is moderation. Jones avoids the temptation to over-write and thus enhances clarity and comprehension. Instead of endless string cites, Jones offers short summaries and analysis of key decisions. Full citations are offered in each footnote (as opposed to cross-references), and the book is formatted for readability. Whether one is an advocate, counsellor, arbitrator or scholar, it is much better to be instructed than overwhelmed! While some topics could be usefully expanded, including further comparisons to other laws (including US law) this will be a natural consequence of future editions.

Commercial Arbitration in Australia will undoubtedly become the go-to source for guidance on Australian arbitration law—a role that will be reinforced in later versions reflecting the continuing evolution of law under the new Act as well as feedback from users. It will also serve as a touchstone for reformers considering the UNCITRAL Model Law as a template for domestic arbitration law and, for the rest of us, an increasingly important frame of reference for comparisons on many points of law and practice.

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