

BOOK REVIEW

COMMERCIAL ARBITRATION IN AUSTRALIA

BY DOUG JONES

(Lawbook Co, 2011) 626 pages

ISBN 978-0-455-22858-7 (paperback)

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I INTRODUCTION

Doug Jones's *Commercial Arbitration in Australia* is one of several Australian texts recently published concerning arbitration, a subject-matter said to be the 'new black'.¹ While others address the topic of *international* commercial arbitration,² *Commercial Arbitration in Australia* is unique in that it analyses the rapidly evolving *domestic* commercial arbitration landscape in Australia. The text makes an outstanding contribution to the material in this field, fulfilling its purposes in a well-researched, logically structured and accessible manner.

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¹ Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29, 31. Of course, arbitration has a long history. See generally Gary Born, *International Commercial Arbitration* (Kluwer, 2009) 7–64.

² Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration — An Asia-Pacific Perspective* (Cambridge University Press, 2011); Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Lawbook Co, 2011).

This is perhaps unsurprising given the author's credentials. Doug Jones is a leading figure in both the Australian and international arbitration environments, a fact reflected in his membership of the Order of Australia 'in recognition of his services to construction law and dispute resolution'.³ Jones is an Adjunct Professor of Law at Murdoch University, a Professorial Fellow in the University of Melbourne's Law School, as well as an Adjunct Professor of the Graduate School of Law at the University of Notre Dame.⁴ Currently, he is perhaps best known in his capacities as President of both the Chartered Institute of Arbitrators ('CI Arb') and the Australian Centre for International Commercial Arbitration ('ACICA').⁵

In addition to Jones's professional standing, the author has played an important role in educating the next generation of arbitration scholars and practitioners. For example, Jones sat as the presiding arbitrator in the Grand Final argument of the Willem C Vis International Commercial Arbitration Moot in Vienna in 2010, as well as in the Grand Final of the Vis (East) Moot in Hong Kong the following year. These factors position Jones to make a distinctive contribution to the domestic arbitration literature in this country, which he does through *Commercial Arbitration in Australia*.

II BACKGROUND TO THE TEXT

Before discussing *Commercial Arbitration in Australia's* key features, it is useful to appreciate the context surrounding its publication.

Prior to 2010, commercial arbitration was regulated in Australia by uniform state and territory legislation dating back (with one exception) to the 1980s.⁶ Chief Justice Spigelman's address to the profession in February 2009 proved an important impetus for reform to this regime when his Honour described it as 'now hopelessly out of date and requir[ing] a complete rewrite' with the delay in action 'now embarrassing'.⁷ Chief Justice Spigelman proposed that

³ Murdoch University, *Professor Doug Jones* <<http://www.law.murdoch.edu.au/staffs/d.jones.html>>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA). These Acts are referred to below as the 'old uniform legislation'.

⁷ Chief Justice Spigelman, 'Address to the Law Society of New South Wales' (Speech delivered at the Opening of Law Term Dinner, Sydney, 2 February 2009) <<http://www>.

the *UNCITRAL Model Law on International Commercial Arbitration*,⁸ the regime adopted in Australia for international commercial arbitration,⁹ be used as a basis for reforming the domestic arbitration law.¹⁰ This proposal was subsequently adopted in an April 2009 decision of the Standing Committee of Attorneys-General,¹¹ following which a SCAG Model Bill based on the *Model Law* was produced.¹²

New South Wales was the first jurisdiction to take action on the SCAG Model Bill, passing the *Commercial Arbitration Act 2010* (NSW) which came into force on 1 October 2010. *Commercial Arbitration in Australia* was published in March 2011, a time when New South Wales was the only Australian jurisdiction having revised commercial arbitration legislation in force. Since that time action has been taken in other jurisdictions, with Victoria most recently (at the time of writing) passing the *Commercial Arbitration Act 2011* (Vic) which was assented to on 18 October 2011 and which will come into force on a day to be proclaimed or, at the latest, 1 May 2012.¹³

III THE KEY FEATURES OF COMMERCIAL ARBITRATION IN AUSTRALIA

In light of the law reform context surrounding *Commercial Arbitration in Australia*, it is easy to appreciate the manner in which the text has been presented.

Commercial Arbitration in Australia is a section-by-section commentary on the *Commercial Arbitration Act 2010* (NSW). It comprises 12 substantive

lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman020209.pdf/\$file/Spigelman020209.pdf>.

⁸ United Nations Commission on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration 1985* (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33).

⁹ *International Arbitration Act 1974* (Cth) Sch 2, art 1, cl 1 and s 16(1).

¹⁰ Chief Justice Spigelman, above n 7.

¹¹ Standing Committee of Attorneys-General, *Summary of Decisions – April 2009* (16-7 April 2009) 6 <[http://www.scag.gov.au/lawlink/SCAG/ll_sc.nsf/vwFiles/SCAGApril2009Communique-versionCth2.doc/\\$file/SCAGApril2009Communique-versionCth2.doc](http://www.scag.gov.au/lawlink/SCAG/ll_sc.nsf/vwFiles/SCAGApril2009Communique-versionCth2.doc/$file/SCAGApril2009Communique-versionCth2.doc)>.

¹² Standing Committee of Attorneys-General, *Current Projects and Achievements* (15 September 2011) <http://www.scag.gov.au/lawlink/SCAG/ll_sc.nsf/pages/scag_achievements#Commercial%20arbitration>.

¹³ *Commercial Arbitration Act 2011* (Vic) s 1AB.

chapters,¹⁴ each dealing in turn with the *Act's* content. In chapters 2 to 12, each of the *Act's* Parts are analysed, with the relevant provisions extracted and commentary provided on their history, scope and operation. Chapter 13 reproduces the Schedules to the Act.

Jones's analysis of the legislation is careful and meticulous, but remains user-friendly. One immediately apparent feature of the commentary is that its depth varies significantly across provisions. In some cases, the discussion is very detailed — such as when dealing with interim measures.¹⁵ Elsewhere, the discussion is brief — such as that part of the discussion accompanying section 6, which Jones describes as being included in the *Act* 'arguably for clarity and consistency with the *Model Law*'.¹⁶ In all cases however, the detail is appropriate for the provisions under consideration, with the text striking a sensible balance between content and accessibility.

In *Commercial Arbitration in Australia* the author is careful to identify each provision's place in the legal context outlined in Part II above. While strictly a commentary on the revised New South Wales legislation, the text consistently identifies whether the *Act's* provisions correlate with (or vary from) the SCAG Model Bill, whether they have analogues in the *Model Law*, and whether they vary from the old uniform legislation's equivalent provisions.

Further, Jones's analysis refers to a wide range of primary and secondary materials. Reflecting the fact that the domestic *Commercial Arbitration Act 2010* (NSW) is based on an international instrument (the *Model Law*), frequent reference is made to international case law, including CLOUT Cases¹⁷ which are freely accessible from the UNCITRAL website.¹⁸ Comparisons are made throughout the text with the law of several other jurisdictions, including the United Kingdom, New Zealand, the United States, India, the Netherlands, Hong Kong and Switzerland. At the same time, *Commercial Arbitration in Australia* thoroughly reviews the relevant Australian case law. Where appropriate, the author also refers to arbitral

¹⁴ These are chapters 2 to 13 of the text. As to chapter 1, see below.

¹⁵ Doug Jones, *Commercial Arbitration in Australia* (Lawbook Co, 2011) 180–221.

¹⁶ *Ibid* 53 [3.220].

¹⁷ 'CLOUT' stands for 'Case Law on UNCITRAL Texts' and UNCITRAL's CLOUT Case project involves the co-ordination of an international network of professionals who identify, report and summarise case law on a range of UNCITRAL's instruments (including the *Model Law*) across various jurisdictions. CLOUT Cases are published abstracts of these decisions and are identified by a case number. At the time of writing, there were 1096 published CLOUT Cases.

¹⁸ See generally UNCITRAL, *CLOUT Abstracts* (2011) <http://www.uncitral.org/uncitral/en/case_law/abstracts.html>.

awards¹⁹ as well as model arbitration clauses²⁰ and submissions made by key arbitral bodies to the law reform process discussed in Part II above.²¹ Overall, Jones's consideration of the *Commercial Arbitration Act 2010* (NSW) is supported by a wealth of research.

Commercial Arbitration in Australia also steps outside the confines of the *Act* and considers its relationship with other bodies of law. For example, Jones considers the issue of whether a court has inherent power to stay litigation in favour of arbitration independently of the *Act*,²² the *Act*'s interplay with civil procedure rules,²³ and the implications of limitation period legislation.²⁴ The author also considers practical procedural matters not regulated by the *Act*, including issues concerning evidence and witnesses.²⁵

In addition to the 12 substantive chapters dealing with the *Commercial Arbitration Act 2010* (NSW), chapter 1 provides background and context to the commentary through an introduction to commercial arbitration in Australia. In this chapter, a broad-ranging review of commercial arbitration in Australia is undertaken, with local, international and historical focuses. This introductory chapter concludes by assessing arbitration's place within the broader ADR landscape, with reference to various forms of binding and non-binding ADR processes.

Following the text's 13 chapters are four further appendices. These reproduce various instruments referred to throughout the body of the text, namely the

¹⁹ For example, in relation to the *Commercial Arbitration Act 2010* (NSW) s 33, reference is made to an unreported award rendered through the Singapore International Arbitration Centre: Jones, above n 15, 400 [9.440].

²⁰ Jones considers the ACICA and IAMA model arbitration clauses in the context of discussing the *Commercial Arbitration Act 2010* (NSW) s 19: Jones, above n 15, 250 [8.340].

²¹ For example, Jones refers to the submissions of ACICA and CIArb/IAMA in relation to the definition of 'domestic' commercial arbitrations in the *Commercial Arbitration Act 2010* (NSW) s 1(3): Jones, above n 15, 44–5 [3.130].

²² Jones, above n 15, 113–17 [4.710]–[4.720].

²³ Jones makes reference to the *Uniform Civil Procedure Rules 2005* (NSW) in the context of court-ordered interim measures: *ibid* 217–18 [7.500]. Reference is also made to the various state and territory civil procedure rules in the context of court-ordered subpoenas: at 307–8 [8.1250].

²⁴ *Ibid* 260 [8.470].

²⁵ *Ibid* 364–75.

Model Law, the *ACICA Arbitration Rules*,²⁶ the *ACICA Expedited Arbitration Rules*²⁷ and the *IAMA Arbitration Rules*.²⁸

IV THE TEXT IN REVIEW

Commercial Arbitration in Australia is an impressive text. It has many strengths and, conversely, only limited bases on which it can be critiqued.

A Strengths

The main strength of *Commercial Arbitration in Australia* lies in its comprehensive treatment of its subject matter. It is an excellent self-contained resource, providing commentary on most of the *Commercial Arbitration Act 2010* (NSW)'s provisions. In addition, it extracts all sections of the Act (along with the legislative notes), whether or not they are the subject of individual commentary. As indicated in Part III above, it contains extensive reference to domestic and international case law, as well as a range of other supporting materials. Where appropriate, the text points out particular issues of detail. An excellent example of this is its identification (in analysing the *Commercial Arbitration Act 2010* (NSW) section 16) of language differences between the equivalent provisions of the Act ('of itself'), the *Model Law* ('*ipso jure*') and the SCAG Model Bill ('necessarily').²⁹

While only dealing in terms with the new arbitration legislation of New South Wales, *Commercial Arbitration in Australia* will inevitably have a broader influence. Commercial arbitration law reform has now progressed (or is progressing) in other Australian jurisdictions. As this process continues, the text will be an essential reference point for new legislation, particularly given the High Court's emphasis in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* on the importance of interpreting uniform state and territory legislation

²⁶ Australian Centre for International Commercial Arbitration, *ACICA Arbitration Rules 2005* <http://www.acica.org.au/downloads/ACICA_Arbitration_Rules.pdf>. These rules were adopted July 2005..

²⁷ Australian Centre for International Commercial Arbitration, *ACICA Expedited Arbitration Rules* <<http://www.acica.org.au/assets/media/rules/ACICA-Expedited-Rules-2010.pdf>>. These rules were adopted August 2010.

²⁸ The Institute of Arbitrators and Mediators Australia, *The IAMA Arbitration Rules (Incorporating the IAMA Fast Track Arbitration Rules)* <http://www.iama.org.au/pdf/IAMAAR_FastTrack07.pdf>. These rules were effective as of 1 June 2007.

²⁹ Jones, above n 15, 171 [6.320].

consistently.³⁰ Further, where there are jurisdictional differences, the text consistently identifies whether provisions of the Act correspond with the SCAG Model Bill and the *Model Law*, allowing the reader to easily assess the commentary's relevance outside New South Wales on a section-by-section basis.

Being so comprehensive, *Commercial Arbitration in Australia* also illuminates key policy issues underlying the Act. For example, referring to the *Commercial Arbitration Act 2010* (NSW) section 12, Jones notes that the grounds for challenging arbitrator appointments are 'another example of the balancing act between the rights of the parties to a fair hearing and the potential for an unwarranted appeal against an award by a party displeased with the result'.³¹ In this way, the reader is taken beyond the black-letter law and given an insight into why the Act is framed as it is.

Another key strength of *Commercial Arbitration in Australia* is its capitalisation on Jones's extensive practical experience. The text raises several practical points, for example in its observations relating to voluntary compliance with awards,³² its discussion of issues arising from the use of lay representatives,³³ and its reference to procedural orders.³⁴ In this respect, the text once again provides the reader with insights beyond those evident from a black-letter law analysis.

B Critiques

It is difficult to critique *Commercial Arbitration in Australia*. However, two main points can be made in relation to what is otherwise an excellent text.

The first point of critique is that the text arguably suffers from the fact that it was ahead of its time. As outlined in Part II, *Commercial Arbitration in Australia* was published when only New South Wales had enacted new commercial arbitration legislation. Other jurisdictions have since enacted (or are in the process of enacting) revised statutes. Further, since the text's publication earlier this year, the High Court has handed down its highly anticipated decision in *Westport Insurance Corp v Gordian Runoff Ltd*,

³⁰ (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

³¹ Jones, above n 15, 132 [5.175].

³² *Ibid* 493 [11.100].

³³ *Ibid* 274–5 [8.750]–[8.760].

³⁴ *Ibid* 230 [8.180].

concerning the standard of reasoning required in arbitral awards rendered under the old uniform legislation.³⁵

However, neither development impairs the value of the text. As noted above, the reader seeking guidance on legislation in other Australian jurisdictions is significantly assisted by the book's identification of the *Commercial Arbitration Act 2010* (NSW) provisions which depart from the SCAG Model Bill and the *Model Law*. As to *Gordian Runoff*, the (then pending) High Court decision is adverted to in the text,³⁶ and the book does discuss the equally significant issue of the applicability of the 'standard of reasons' case law (decided under the old uniform legislation) to the new statutory regime.³⁷

The second point of critique, which is much more a matter of personal preference, is that the inclusion of the text's four appendices is arguably unnecessary. While arbitration-related texts frequently reproduce relevant laws, rules and conventions in appendix form,³⁸ all four of the texts reproduced in *Commercial Arbitration in Australia* are freely available from their authoring organisations on-line. Further, even in the short period since the text's publication, the *ACICA Arbitration Rules* set out in Appendix B have been superseded by a new version.³⁹ Nonetheless, the text's physical size is not burdensome and some readers may find the appendices' inclusion convenient.

V CONCLUSION

Commercial Arbitration in Australia is an authoritative and comprehensive text that will be useful to those with a background in arbitration, yet still accessible to those who may be approaching the subject matter for the first time. Its articulation of commentary concerning the *Commercial Arbitration*

³⁵ [2011] HCA 37 (French CJ, Gummow, Heydon, Crennan, Kiefel & Bell JJ).

³⁶ Jones, above n 15, 393–4 [9.320].

³⁷ *Ibid.*

³⁸ See, eg, Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford, 5th ed – Practitioner Version, 2009); Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 2009); Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed, 2010); Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer, 3rd ed, 2010).

³⁹ Australian Centre for International Commercial Arbitration, *ACICA Rules Incorporating the Emergency Arbitrator Provisions 2011* <<http://acica.org.au/assets/media/Rules-inc-emergency-provisions.pdf>>. These rules are effective as of 1 August 2011.

Act 2010 (NSW) is clear and useful; detailed but not unnecessarily technical; and shifts effectively between domestic and international focuses.

Commercial Arbitration in Australia further makes an effective contribution towards the bridging of the gap between domestic and international commercial arbitration in Australia. For those familiar with the old uniform laws, *Commercial Arbitration in Australia* is a potential stepping-stone into the world of international commercial arbitration. It achieves this through its clear exposition of those of the Act's provisions which are based on the *Model Law*. An example is the new section 28 of the *Commercial Arbitration Act 2010* (NSW), which is based on Article 28 of the *Model Law*, and which 'significantly clarifies' issues concerning the applicable substantive law.⁴⁰ For those with a background in international commercial arbitration, Jones's analysis of those provisions in the Act with no *Model Law* equivalents will be equally welcomed,⁴¹ as will the author's explanation of the Act's key points of departure from the *Model Law*.⁴²

As the modernisation of Australia's domestic commercial arbitration legislation continues to spread across the states and territories, *Commercial Arbitration in Australia* will prove an increasingly important reference point for dispute resolution practitioners and others with an interest in arbitration. Jones's text makes an important and timely contribution to the literature concerning commercial arbitration law in Australia.

⁴⁰ Jones, above n 15, 377 [9.110].

⁴¹ For example, the *Commercial Arbitration Act 2010* (NSW) ss 27E–27I deal with confidentiality, which is not regulated by the *Model Law*: see *ibid* 336–61 [8.1590]–[10.650].

⁴² For example, the text's discussion of the *Commercial Arbitration Act 2010* (NSW) s 34A is likely to be of assistance to international commercial arbitration specialists who will be very familiar with the position that international arbitral awards are generally not subject to review on the merits. See Jones, above n 15, 467–92 [10.350]–[10.650].