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Book Reviews: International Commercial Arbitration & Principles of Dispute Resolution

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BOOK REVIEWS

Laurence Boulle

**Rashda Rana and
Michelle Sanson**
*International Commercial
Arbitration*
Lawbook Co, 2011

Rumours about arbitration's demise with the rise of ADR were, of course, largely exaggerated. Arbitration has in the last decade modernised itself, both in many domestic jurisdictions and internationally. This modernisation has led to a steady growth of arbitration practice in many countries. This book deals with legal and practical aspects of these developments, with particular reference to the Asia-Pacific region.

The text deals with all the standard aspects of arbitration such as the agreement to arbitrate, applicable laws and the arbitral seat, different forms of arbitration and the main arbitral institutions in the Asia-Pacific region, the formation and jurisdiction of the tribunal, procedures and confidentiality, and arbitral awards and their enforcement. There is a chapter on court involvement in arbitration—always a controversial topic—and a welcome concluding section on specialist forms of arbitration in sport, investment, intellectual property and the WTO.

Each chapter provides a preliminary list of key issues, case examples, a fact scenario with questions, and a list of further reading. There is a useful glossary and, instead of a comprehensive bibliography, a list of further readings at the conclusion of each chapter. The overall presentation of the material is attractive and stimulating—an important requirement in a field that can occasionally become technical and stodgy.

In an era of globalisation, it is inevitable that arbitration will become more and more internationalised in response to the movement of goods, services and capital across national borders. Here, the text makes good references to international instruments such as the New York Convention, the

UNCITRAL Model Law on Arbitration and the International Convention on the Settlement of Investment Disputes (ICSID). Australia has always been a significant participant in international developments such as these and the recent modernisation of its arbitration laws has kept it in touch with countries as diverse as Singapore and Scotland. While the text inevitably focuses predominantly on the arbitral laws and rules emanating from the region, it also invokes those from other relevant jurisdictions, such as the rules of the International Chamber of Commerce originally established in Paris.

As this book is aimed at students, it is a pity that there is not greater critical reflection on some aspects of international arbitration. Its use in cross-border investment disputes is a case in point. While both ICSID and UNCITRAL make provision for the arbitration of these disputes this is an area of substantial controversy. Not only do bilateral investment treaties allow corporations to assume a quasi-international status and bring actions against sovereign states in binding procedures, they also effectively insulate the dispute resolution procedures from domestic policy and constitutional imperatives. They are highly controversial within developing countries where the magnitude of some arbitral awards has had serious domestic budget implications. Not only have some countries withdrawn from the ICSID Convention, but there has been a reappraisal of FDI policy in countries as different as Tunisia and South Africa. UNCITRAL itself instituted an investigation into alternatives to investor-state arbitration in 2010 and the Australian Government (admittedly too late for this publication) indicated in its 2011 trade policy that it would no longer include standard arbitration clauses in investment treaties with developing countries. (They had already been excluded in the Australia-US Trade Agreement). This is just one of the many

areas of dynamic change in relation to international arbitration.

However such treatment might extend beyond the proper ambit and objectives of the authors' publication. International commercial arbitration is a topic of considerable future importance and activity and *International Commercial Arbitration* will undoubtedly be part of this in its future iterations.

David Spencer
Principles of Dispute Resolution
Lawbook Co, 2011

David Spencer is one of the foremost scribes in Australian ADR and his regular case commentaries in the *Australasian Dispute Resolution Journal* provide an excellent source of information and insight on the topic.

This book has evolved out of the author's previous editions of *Essential Dispute Resolution* and, after the standard definitional treatments, it deals *seriatim* with negotiation, mediation, arbitration and other dispute resolution processes. There are chapters on court-annexed dispute resolution, ethics and standards, and legal issues.

The style of the text is to provide in each chapter descriptive material, followed by relevant extracts from legislation or regulations, policy bodies such as NADRAC and case law. The legislation is particularly well-represented and a four-page fold-out in Chapter 6 provides a comparative schema of regulatory regimes in terms of their main features. While this approach is useful for teaching purposes in that students can interpret and compare original sources of regulated ADR, the sad reality of the times is that ADR legislation is now so prolific that it is probably best accommodated in loose-leaf or on-line services!

Significant attention is given to what may well be two sides of the same coin—namely, the growth in 'court-annexed' dispute resolution schemes and the relative decline of the civil trial. The former might well be regarded as the centre of gravity in contemporary Australian ADR, while the latter is a topic that the author has canvassed extensively elsewhere. As regards the 'other' dispute resolution processes,



there is reference *inter alia* to collaborative practice, ENE and adjudication, and a somewhat perfunctory treatment of the specialised topic of restorative justice in criminal justice systems. There is an up-to-date treatment of standards and ethics in ADR, including the NMAS, but surprisingly few references to the available survey evidence on ADR which both confirms and challenges many of the cherished ethical assumptions in the field.

While much of this material is standard fare, the author has provided a very topical text in a fast-moving area. The book provides extensive references to relevant legislation and rules. The content is presented in a lively fashion, though it comes as a surprise to find relatively little reference to the literature in several of the chapters (there is neither a bibliography nor a list of further readings in each chapter). However, the eye is inevitably drawn to the final chapter on the future of dispute resolution, where the author is freed of the shackles of ‘regulation’ definitions, processes and systems and can speculate more freely on the future.

Here the author’s suggestions are that DR Future will be characterised by three phenomena. The first is the vanishing trial syndrome which is dealt with in comparative context and with reference to empirical evidence on the topic. The second is the use of technology in the development of dispute resolution, with future services provided through a range of mainly electronic platforms on a global basis. The third is the changing role of the dispute resolution practitioner, which, as Judy Macfarlane has reminded us,

will involve a broader range of functions for professional problem-solvers, well beyond the conventional paradigm of the mediator, to encompass many facets of expertise in the prevention and management of disputes. It is in respect of the second phenomenon that the reader will come to share the author’s enthusiasm as he draws on the literature distinguishing between ‘digital natives’ and ‘digital immigrants’. The basis of the distinction is easily imagined, though it might be more PC to suggest that it has less to do with age and more to do with individuals’ predispositions—this is sadly not the case as it has very much to do with age! For digital natives, the accustomed use of technology and social media in all other facets of their lives will lead to demands for dispute resolution and conflict management services to be delivered in the same formats, and where there is demand there will be supply. Some of the possibilities are breathtakingly provocative. For example there is speculation on:

“... a future that could go well beyond on-line dispute resolution to second life dispute resolution where parties send their avatars to mediation in cyberspace only to be returned to the people themselves with the dispute fully resolved. In 2011 this sounds like a science fiction movie, but given the advances in technology and the take up rate of high-end portable technology by the digital natives, it is not an altogether an unrealistic prediction.”

Even avid Twitterers will realise they have a way to travel to reach DR Future, and they may well begin this book with the concluding chapter.

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