

## BOOK REVIEW

**Commercial Arbitration in Australia under the Model Law**, Doug Jones AO & Janet Walker CM, Lawbook Co: Thomson Reuters (Professional) Australia Limited, 2022, ISBN 978-0-455-50227-4, 697 pp., \$242.00

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Professor Doug Jones' *Commercial Arbitration in Australia* (the First<sup>1</sup> and the Second<sup>2</sup> Edition) has been an authoritative work on the domestic arbitration structure in Australia; a guidebook and a commentary on the Commercial Arbitration Acts ["CAAs"] for those with a background in arbitration, and those who may be approaching the subject matter for the first time.

While the Federal Government of Australia had adopted the United Nations Commission on International Trade Law ["UNCITRAL"] Model Law on International Commercial Arbitration in 1974 to govern international arbitrations, it was not until 2010 that the Commercial Arbitration Bill, 2010<sup>3</sup> was introduced in the Legislative Council for domestic arbitrations. At the time of the first edition, the Commercial Arbitration Bill, 2010 had only been enacted in New South Wales ["NSW"] and the erudite discussions by Professor Jones on the future implications of adopting the UNCITRAL Model Law in domestic arbitrations in Australia had many practitioners calling the text 'ahead of its time'.<sup>4</sup> Even at the time of the publication of the second edition, the Model Law was new to many states and the remaining states were yet to adopt the Model Law which led to the second edition primarily discussing the evolution of the laws and projections of what would lie ahead.

In fact, it was only in 2017 when the final bill was enacted in the Australian Capital Territory ["ACT"], which made all international and domestic arbitrations at the Federal and State levels governable by the UNCITRAL Model Law. This has led to the third edition, now renamed *Commercial Arbitration in Australia under the Model Law* to emphasise the

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<sup>1</sup> PROFESSOR DOUG JONES AO, *COMMERCIAL ARBITRATION IN AUSTRALIA* 677, (Lawbook Co. 2011 Thomson Reuters Australia Ltd 2010).

<sup>2</sup> PROFESSOR DOUG JONES AO, *COMMERCIAL ARBITRATION IN AUSTRALIA* 685, (Lawbook Co. Thomson Reuters Australia Ltd. 2013).

<sup>3</sup> Commercial Arbitration Bill 2010, available at: <<https://www.parliament.nsw.gov.au/bill/files/976/First%20Print.pdf>>.

<sup>4</sup> 16 BENJAMIN HAYWARD, *BOOK REVIEW - COMMERCIAL ARBITRATION IN AUSTRALIA* 569-577, (Deakin Law Review 2011)

influence of the Model Law on international and domestic arbitration in Australia. This third edition is an up-to-date guide which covers the recent judicial pronouncements, not only in Australia, but also across other leading common and civil law jurisdictions in arbitration, making this a must-read for practitioners where Model Law is followed in totality or in its adapted form. This book also sees the addition of Professor Janet Walker as a co-author along with Professor Jones, making this a brilliant read, especially with both the authors being leading figures in the field of International Arbitration with their truly global footprint as academics and practitioners. The Foreword<sup>5</sup> to this third edition eloquently sums up the invaluable nature of this text:

*“This Third Edition has brought the work to another level. It remains the definitive and invaluable annotation of the Uniform Acts, but it has become a text on commercial arbitration the equal of any other from any part of the world.”*

Given the authors’ credentials, the authoritative nature of this text should not be surprising. Professor Jones is a leading independent international commercial and investor-state arbitrator with over 40 years’ prior experience as an international transactional and disputes project lawyer. He is also an International Judge of the Singapore International Commercial Court. He holds professorial appointments at Queen Mary College, University of London, and Melbourne University Law School. In addition, he has held appointments at several international professional associations, including serving as the President of the Chartered Institute of Arbitrators [“CIArb”] and the Australian Centre for International Commercial Arbitration [“ACICA”].

Professor Walker is an independent arbitrator with chambers at Toronto Arbitration Chambers, Atkin Chambers in London, and Sydney Arbitration Chambers. She has served in commercial and treaty investment arbitrations as sole, presiding, and co-arbitrator in International Chamber of Commerce [“ICC”], International Centre for Dispute Resolution [“ICDR”], Delhi International Arbitration Centre [“DIAC”], Hong Kong International Arbitration Centre [“HKIAC”], Permanent Court of Arbitration [“PCA”], Singapore International Arbitration Centre [“SIAC”] administered, and in ad hoc arbitrations in a variety of seats. She is the Chair of ICC Canada, a member of the CIArb Canada Board and of the International Construction Law Association, and a member of the Toronto Commercial

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<sup>5</sup> THE HON JAMES ALLSOP AO, FOREWORD TO THE THIRD EDITION: COMMERCIAL ARBITRATION IN AUSTRALIA UNDER THE MODEL LAW 697, (Lawbook Co. Thomson Reuters Australia Ltd. 2022).

Arbitration Society and the Society of Construction Law, North America. She is also a professor of law and past associate dean of Osgoode Hall Law School, York University.

The insight provided by these doyens in the field is evident right from Chapter 1 which starts off with a history of Arbitration in Australia, the developments and reforms which led to the enactment of the Superseded Uniform Acts and the *clarion call* that was the Hon'ble Chief Justice Spigelman AC's address which led to the Commonwealth Attorney-General's Department announcing that a domestic arbitration act was to be drafted based on the Model Law. The Chapter also covers and compares the arbitration reforms in other common law jurisdictions with the reforms and judicial pronouncements in Australia to showcase that Australia may well be on its way to becoming the next preferred seat for arbitration. Chapter 1 also discusses 'Arbitration in the context of Alternative Dispute Resolution' ["ADR"] which is broadly divided into two sub-parts, non-binding ADR and binding ADR. These sub-heads provide a succinct and clear understanding of topics like mediation, facilitation, mini-trials, statutory adjudication, expert determination, etc. which is beneficial for all those who read this book. These topics are intermixed with case laws and detailed footnotes to further expand upon the understanding of the reader. This chapter in itself provides an insight into the academic minds of the authors, the eloquence with which topics have been elaborated upon for the clear understanding of the reader.

The succeeding chapters are arranged in a manner which follows the structure of the NSW. The sections are set out with the relevant notes wherever the language of the particular section differs from the corresponding article in the UNCITRAL Model Law. While explaining the provisions directly drawn from the Model Law, the authors have taken into consideration and referenced the *travaux préparatoires* of the UNCITRAL Model Law<sup>6</sup>, the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*,<sup>7</sup> *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*<sup>8</sup> and the Case Law on

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<sup>6</sup> Travaux préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985), available at: <[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/travaux](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux)>.

<sup>7</sup> UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement>>.

<sup>8</sup> Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, available at: <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf)>.

UNCITRAL Texts [**“CLOUT”**]<sup>9</sup> making this text a thoroughly referenced stand-alone authority.

The authors have dealt with topics such as ‘Arbitrability of the dispute’ which have conflicting viewpoints across common law countries in a clear and precise manner. Arbitrability of disputes in the field of competition law, patents, trademarks and copyright, trusts, taxation, etc. have been analysed and discussed with great clarity in light of the judicial pronouncements of courts across various common law countries with particular focus on Australian courts.

An important provision which has been incorporated by the legislation makers of the CAAs and as has been noted by the authors is that Section 2A(3) allows courts to reference extrinsic material of UNCITRAL and its Working Groups which allows Australia’s domestic legislation to have an ‘international provenance’.<sup>10</sup> This further goes on to reinforce the modern view on arbitration i.e. even a domestic arbitration and court proceedings surrounding it often have transnational impact.

The text also delves into the importance of virtual hearings which has become the new normal post the COVID-19 pandemic. The CAAs have left the choice of conducting the proceedings up to the arbitrators, with most of them opting for virtual/hybrid hearings, especially in light of guidance notes issued by various arbitral institutions such as AAA-ICDR, ICC, HKIAC, etc. on virtual hearings. Another interesting provision which has been incorporated in the CAAs and is not in the UNCITRAL Model Law, is Section 27C ‘Consolidation of Arbitral Proceedings.’ The legislation makers have taken guidance from the Superseded Uniform Acts to empower the arbitral tribunals to consolidate two or more ‘related’ arbitration proceedings, if the party to the proceedings applies for the same. The grounds for such an application have been enumerated in the section itself and elaborated upon with relevant illustrations by the authors, which definitely helps the reader learn both theoretically and practically. The text also discusses a provision, which is said to have been called “the most controversial section in the CAA” i.e., Section 27D which provides an armed framework which is a practical and modern take on Article 30 of the UNCITRAL Model

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<sup>9</sup> Case Laws on UNCITRAL Texts, available at: <[https://uncitral.un.org/en/case\\_law](https://uncitral.un.org/en/case_law)>.

<sup>10</sup> Janet Walker CM & Doug Jones AO, ‘Australian Domestic Arbitration: One Country United under the Model Law’, 2022, Kluwer Arbitration Blog, available at: <<http://arbitrationblog.kluwerarbitration.com/2022/09/01/australian-domestic-arbitration-one-country-united-under-the-model-law/>>.

Law as it not only highlights the need for exploring an amicable settlement between the parties, but also provides a definite mechanism for it. The Australian provision has been cross-referenced and related with similar provisions which exist in jurisdictions such as Singapore and Hong Kong.

The authors have very articulately dealt with various widely debated and extremely relevant topics such as enforcement of an emergency award by analysing the recent judgement of the Indian Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*<sup>11</sup> which has legitimised an emergency award and its enforcement in India. The authors in their analysis indicate the need of such progressive steps to be taken by the judiciary or the legislature especially when Model Law is silent on the same.

As the reader continues to traverse the entire book, the academic prowess of the authors becomes quite evident, especially since complex topics have been comprehensively dealt with in a lucid manner. I have no doubt that this authoritative text on the commercial arbitration law in Australia will provide necessary guidance to judges, practitioners and academics.

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<sup>11</sup> *Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd.*, (2022) 1 SCC 209.