COMMERCIAL ARBITRATION IN AUSTRALIA UNDER THE MODEL LAW, 3RD EDITION

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Reviewed by Anthony Daimsis, FCIArb[*]

The UNCITRAL Model Law now holds sway across more than 100 jurisdictions worldwide. While compilations of judicial and arbitration rulings that invoke the Model Law are readily available, it's rare to find a resource that delves as deeply and thoughtfully into these cases as *Commercial Arbitration in Australia Under the Model Law* does.

At first blush, one might be forgiven to believe that this book is inward-looking, that is, of interest only within Australia. However, this would be a mistake. Although the book focuses on Australia's Commercial Arbitration Acts (CAAs), what is soon revealed is that Australia has a somewhat unique approach to domestic and international arbitration. It has taken the Model Law at its word and transformed its domestic (commercial acts) and international acts to reflect a global understanding of commercial arbitration and apply it throughout Australia. Hence, the book, which discusses both commercial arbitration cases in Australia and cases outside of Australia that have interpreted the Model Law, is a treasure trove of insight and analysis for lawyers, arbitrators, judges, teachers, and all students of international commercial arbitration. As Canada is a Model Law jurisdiction and all its provinces have Model Law legislation, this work is of direct relevance to Canadian lawyers.

Now, in its third edition, this work stands out for providing readers with profound insights and analyses of commercial arbitration in action in Australia, thereby continuing to set the standard for commentary in the field.

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The third edition welcomes a new author, Professor Janet Walker, a renowned expert in arbitration and conflicts of law. Indeed, her work on conflict of laws is the standard in her home country of Canada. As the Honourable James Alsop AO, who penned the foreword to the third edition, notes, Professor Walker adds a new dimension to the previous two editions, which were already highly praised, by imbuing the third edition with an elegant prose style.

In this meticulous examination of commercial arbitration within Australia, the text unfolds across thirteen well-structured chapters, accompanied by two appendices. The initial chapter serves as a gateway into the realm of commercial arbitration in Australia, explaining its historical evolution and embedding it within the broader spectrum of alternative dispute resolution methods. This narrative doesn't merely recount history; it reifies the legal framework of arbitration, demonstrating how arbitration has taken root in Australia. This section is pivotal, as it brevets the reader with the knowledge required to navigate the intricacies of Australia's arbitration infrastructure.

Chapter Two embarks on a discourse on Part 1A of the Commercial Arbitration Acts (CAAs), laying the foundational principles and objectives aimed at ensuring a fair and final dispute resolution. Through an exacting one-to-one correspondence with the Model Law provisions, the ensuing chapters elucidate the alignment and deviations of Australia's Commercial Arbitration Acts with the Model Law, maintaining an admirable fixity to the original structure, thereby facilitating ease of comprehension and ease of application to other Model Law jurisdictions.

For example, Part 1, Section 1(5), which addresses the arbitrability of the dispute, is also the provision of the Model Law (Article 1(5), found in Chapter 1) that speaks to arbitrability. The text's architecture mirrors the compartmentalized nature of the CAAs and Model Law, with each segment dissecting the provisions, highlighted by a comparative analysis that spans across jurisdictions, notably referencing seminal decisions like the United

States Supreme Court's ruling in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.*[1]

This comparative lens extends to discussions on arbitration agreements, the nuanced interpretations of phrases within these agreements, and the exploration of doctrines and legal principles that influence arbitration. In this section, an interesting discussion on particular forms of words used in arbitration agreements, like "arising out of", "arising in connection to", and "arising under", and a comparison between the English House of Lords's decision in *Fiona Trust & Holding Corporation v Privalov*[2] and the Australian High Court decision in *Rinehart v Welker*,[3] reveals some asymmetry between the Australian and English approaches.

This Part further offers interesting insights on topics like non-signatories, the Group of Companies Doctrine, and novation and succession, to name only a few.

Part 3 begins with an explanation of why the CAAs decided to omit the equivalent to Model Law Article 11(1). This provision permits parties to exclude potential arbitrators based on their nationality. Interestingly, in its first statutory iteration of the Model Law, the province of Ontario in Canada also omitted this section, believing (incorrectly) that this provision sought to sanction discrimination based on nationality. However, its updated statute, which adopts the 2006 Model Law amendments, brought it back, perhaps understanding that the Model Law's phrasing was a response to those jurisdictions that required parties to appoint an arbitrator who was a national of the State of the seat of arbitration.

The book progresses to dissect pivotal aspects of the arbitration process, such as competence-competence, separability, and arbitrator-ordered interim measures, in Parts 4 and 4A, with a commendable depth that brings clarity to the often complex judicial

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[1] 473 US 614 (1985).

[2] [2007] 4 All ER 951.

[3] (2012) 95 NSWLR 221.

review standards applicable to jurisdictional challenges. The historical trajectory of interim measures is traced from their judicial origins to their current embodiment within arbitration frameworks, reflecting the evolution toward a more modern arbitration ethos as envisaged by the 2006 amendments to the Model Law.

This section contains one of the most cogent explanations I have seen of the thorny question of what standard of review inures to a challenge under Section 16 of the Model Law. Although the general position globally is that a hearing *de novo* is appropriate, given that it should be a court that has the last word on a tribunal's jurisdiction, the question is more complex. Indeed, as the authors note, the Australian position, as expressed in *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd*, adopts a *de novo* approach but defers to the tribunal's reasoning where the latter is cogent.[4] In justifying the *de novo* approach, this section cites authorities and cases from multiple jurisdictions.

Part 4A provides an excellent historical overview of interim measures, beginning from the era when only courts could issue them to early arbitration rules that contemplated arbitrator-issued interim measures, and then the 1985 Model Law approach with its inherent limits. The book explains that although the CAAs adopt the more modern approach to interim measures envisioned by the 2006 amendments to the Model Law, they do not adopt the latter's provisions permitting preliminary orders on an *ex parte* basis.

In addressing the conduct of arbitral proceedings, the text delves into the principles of fairness and equal opportunity, offering a critical interpretation of the Model Law and CAA provisions that ensure a balanced approach to case presentation.

The Model Law's equivalent to Section 18 of the CAAs has created some (albeit exaggerated) uncertainty with its use of the phrase "full opportunity of presenting his case". Although Model

[4] (2018) 57 VR 576.

Law Article 18 does not require, in fact, a full opportunity (whatever that would mean), but rather a fair and equal opportunity amongst the parties to present their cases, it is helpful that the CAAs have clarified this language by adopting the phrasing "each party must be given a reasonable opportunity of presenting the party's case". This section of the book provides a clear discussion of the matter and is informative.

The discourse extends to the assistance of courts in evidence-gathering, shedding light on the detailed provisions within the CAAs that enhance procedural clarity. This section is particularly enlightening given the deliberately general terms in which the Model Law is drafted, whereas the CAAs are far more comprehensive. In this way, readers have an excellent opportunity to consider how Australian authorities view the questions that may arise under this section, and readers are exposed to practical approaches to real-life procedures.

The book's penultimate section (comprising chapters 9, 10, and 11) focuses on the award phase, the termination of proceedings, and nuances of the law applicable to the merits of the dispute.

Chapter Nine finds one of the better discussions on the rules of law that apply to the merits of a dispute. Here, we see the extensive knowledge and experience of the authors on full display as they clarify this thorny question. Indeed, the difference between rules of law, laws, and applicable conflict of laws rules are comprehensively explained. This Part is a must-read for anyone sitting as an arbitrator or acting as counsel in cases where the parties to the dispute have not chosen a law to govern the merits of their dispute.

Other important aspects of arbitration falling within this Part include provisions regarding settlement and consent awards and the limited ability of the tribunal to correct calculation or similar errors in an award.

Additional provisions absent in the Model Law are addressed in Part 6. These include provisions authorising the tribunal to order specific performance of a contract in circumstances where the court would have the power to do so. Section 33B provides, consistent

with many arbitration rules, that unless otherwise agreed by the parties, the tribunal will determine the costs of the arbitration at its discretion. It also adds the ability of a tribunal to limit an award for costs to a specified amount.

The culmination of this scholarly work addresses critical facets of setting aside awards and the recognition and enforcement of awards, emphasizing the New York Convention's role and the specific procedural nuances of the Australian context.

While the CAAs largely enact the Model Law, differences exist. For example, a distinctive feature of recourse in the CAAs is the regime for appeals on questions of law from arbitral awards in Section 34A. This section makes an appeal available, but only with both the agreement of the parties and leave of the court.

Another helpful feature is the clear distinction drawn between procedural objections and jurisdictional objections. Here, the book references cases that make this difference somewhat clearer than it too often becomes. As the Model Law proper specifies no formal standard of review, whether for procedural or jurisdictional questions, the CAAs in this respect are superior. The authors offer constructive comments to guide the reader in understanding the differences.

Chapter 10 addresses the setting aside of awards and, to an extent, appeals from awards. Chapter 11, which addresses recognition and enforcement, focuses more on the New York Convention and should be read in conjunction with Chapter 10.

Quite helpfully, the commentary goes on to explain the burden of proof and the distinction between awards and orders (with the latter not subject to enforcement via the New York Convention), suspension of awards, arbitrability and associated enforcement issues, and enforcement against a company in voluntary administration. This last point remains a thorny one around the world. Canada's own Supreme Court has tackled a related issue in *Peace River Hydro Partners v Petrowest Corp.*, albeit under

domestic arbitration and in a receivership context.[5] The clash of policies between arbitration and insolvency varies from jurisdiction to jurisdiction, and domestic arbitration approaches may not neatly graft onto international arbitration approaches. This section of the book explains the policy choices Australian courts have addressed.

The final chapter (Chapter 12, titled Part 9 – Miscellaneous) considers a range significant provisions from beyond the Model Law, offering a comparative perspective with other jurisdictions. As just one example, this chapter has a provision for which there is no equivalent in the Model Law specifying what to do upon the death of a party. Where other jurisdictions have equivalent provisions, this chapter highlights them. Another interesting discussion is on general and specific arbitrator immunity.

This book is a testament to the authors' assiduous efforts, providing an indispensable resource for understanding commercial arbitration in Australia—and in other Model Law jurisdictions. Through thorough research and comparative analysis, it offers a reified understanding of the legal principles at play, ensuring its readers are well-equipped to navigate the complex arbitration landscape within Australia and beyond.

Commercial Arbitration in Australia Under the Model Law does more than merely add to the current literature on the Model Law. It provides its reader with a coherent and comprehensive resource written in an easily digestible format. It is an essential addition to any arbitrator's, lawyer's, law school's library and will undoubtedly become the "go-to" book of reference on implementation of the Model Law.

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[5] 2022 SCC 41.