Book review

INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS

International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions by Dr Peter Binder (3rd ed, Sweet & Maxwell, 2010). Preface v-vii, contents ix-xxvii, table of cases ix-xxxviii, table of national legislation xxxix-xliv, table of conventions, model laws and rules xlv-xlvii, table of references to the UNCITRAL model law on international commercial arbitration xlviii-liii, table of references to the UNCITRAL model law on international commercial conciliation liv, bibliography of United Nations documents lv-lix, appendices 603-696, index 697-716.

Australia's arbitration community caught in the rush to the Model Law, (inter)nationally and in at least New South Wales, will be grateful for the help afforded by this splendid text. Principle and precedent are comprehensively set out, not only according to the Model Law but in connection with adopting states. Included are extensive illustrations from the case law on UNCITRAL texts (CLOUT), of which Australian users will particularly appreciate the generous material from the courts of Hong Kong and Canada.

Australia's version of Article 4's waiver of the right to object leaves open the dilemma where a party does not take the point but also does not proceed with the arbitration. Dr Binder provides the answer by reference to Article 34.

Australia's definition of "arbitration agreement … relationship, whether contractual or not" may puzzle some. The learned author points to torts. The statutory note in the Australian definition acknowledges Option I but Dr Binder tells us not only what Option II is, but also the states which adopted it.

Whereas the Australian legislation moves from impartiality or independence to bias, the learned author explains important aspects and differences. Not only does he point out that impartiality is a subjective test, whereas independence is an objective one but he gives us the explanation of independence made famous by Professor Lalive:

> Independence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator.

Controversy and concern about Australia's provision for security for costs will benefit from Dr Binder's explanation about the debate and resolution according to preservation of assets for enforcement of the award being more important than costs of the arbitration.

Although Australia's Article 19 contains procedural additions for the obtaining of evidence, Dr Binder very helpfully gives an adopting state's important addition:

> Every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court.

The learned author identifies a serious and substantial difference in the Model Law (especially in view of the fact that the Australian legislative note says no more than "is substantially the same"). More particularly, the provisions for default of a party in Article 25 are mandatory for the arbitral tribunal to terminate for default in the statement of claim and to continue for default in the statement of defence. Almost perversely, the Australian legislation is reduced to facultative, even though it does employ the opportunity which Dr Binder (correctly, it is submitted with respect) points out has already been afforded as to showing that the default was not without sufficient cause.

Users of arbitration are often very concerned about not only the place but also the date of the award. Despite Dr Gavan Griffith's efforts on behalf of Australia, only the place was made irrebuttable. In practice, some arbitrators require some flexibility about the date the award was actually rendered.

The arbitration community has debated long and hard the true concept of "award". Dr Binder very helpfully gives us explanations of "final award", such as:

Settles the dispute in full

and

Final award constitutes or completes the disposition of all claims submitted to arbitration

and

Constitutes a final disposition of the substance of the dispute.

Also very helpful is Dr Binder's provision of Mr Holtzmann's distinction between interlocutory awards and interim awards.

Technically, the publication is very generous. The comparative charts, especially on adoption, are amongst the best of such material. Unfortunately, the index, although conceded to be based on the publisher's taxonomy, will probably disappoint many. Not only those from common law jurisdictions but others would appreciate being able readily to find such important items as "bias", "impartiality", "independence".

John Dorter