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# ACICA NEWS

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BOOK REVIEW

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Malcolm Holmes Q.C and Chester Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis Butterworth's, Australia 2011);
ISBN: 978 0409 32 747 2 (pbk) RRP$120.00;

Luke Nottage and Richard Garnett, (Eds.), *International Arbitration in Australia*, (The Federation Press, Sydney, 2010); ISBN: 978 186287 805 1 (hbk) RRP$145.00;

Vivienne Bath and Luke Nottage, (Eds.), *Foreign Investment and Dispute Resolution Law and Practice in Asia,* (Routledge, London, 2011); ISBN 178 0 415 61074 2 (hbk) RRP$127.94.

The commentary text by Malcolm Holmes and Chester Brown is an excellent book, mainly addressed to legal practitioners who may become involved in international commercial arbitration. Whereas other areas of legal practice, which afforded profitable opportunities and remuneration in earlier decades, have lately receded, professional work before arbitrators, mediators and other dispute resolution mechanisms is on the increase. An investment in this book, and a willingness to grasp every opportunity, is obviously an attractive course for Australian legal practitioners to take today.

The book is one of three that have lately been published which together afford an extremely useful insight into the developing world of international commercial and investment arbitration. Overlapping to some extent the subject matter of the book by Holmes and Brown is a text, edited by Associate Prof. Luke Nottage (Sydney University) and Prof. Richard Garnett (Melbourne University), *International Arbitration in Australia.* Cross references are handily provided to this work in Holmes and Brown. Both of these texts are designed to guide practitioners and parties engaged in international arbitration concerning the effect of substantial amendments to the Australian legislative regime, introduced by the *International Arbitration Amendment Act* 2010 (Cth). Whereas Nottage and Garnett adopt a style of descriptive chapters, written by individual authors with specialised knowledge in the several subjects

dealt with, Holmes and Brown adopt an unabashedly practitioner-oriented approach. Theirs is essentially a highly detailed annotation of the governing Australian statute, with copious references to local and overseas authorities and cross references to other works, including international documents, foreign case law, local and international texts and legal commentaries.

The third book in the series: Vivienne Bath and Luke Nottage (Eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* is not specifically addressed to Australian international arbitrations. Substantially, it comprises chapters by the authors, both of whom are based in Sydney, as well as each of whom is an Associate Professor at the University of Sydney and by chosen collaborators, working in the field of international and Asia and Pacific law. The principal authors of this work also have practitioner experience.

For a rounded understanding of contemporary elements in, and arrangements for, international commercial and investment arbitration in Australia and its geographical region, each of these three books affords an up-to-date, accurate and detailed analysis of what is clearly a game-changing shift in the way large and serious disputes of an international character are now being resolved. Even in countries, like Australia, where the judiciary is respected, professional and uncorrupted and can usually rise above purely nationalistic and parochial attitudes, litigation and the court system have simply not proved capable of responding adequately to the disputes and conflicts that inevitably arise (often of great magnitude) between contracting parties based in different jurisdictions.

With the growth of modern means of communications and transport and the rapid expansion of financial markets and capital flows between jurisdictions, trade and services between nations have vastly increased. The parties to these expanded dealings have generally been unwilling to tolerate the cost, delay, legal uncertainty and sometimes unreliability that judicial resolution of disputes exacts. In consequence, the international community has responded by offering international legal regimes to support procedures involving speedy, cost effective and hopefully predictable outcomes to commercial and investment disputes. This is where international arbitration and mediation come in.

Australia is no exception to these pressures. Although its practitioners are aware of the merits of their litigious methods of dispute resolution, increasingly they are looking to the advantages of non-court

determination of contests. If this has been a relatively slow development on the national scene, it has produced substantial and relatively speedy mechanisms in the world of international commerce and investment. It is to these developments that the three recent Australian texts address themselves.

This review is mainly concerned with the annotated legislative text produced by Holmes and Brown. As with the other two texts, the authors bring to their approach both the background of a busy legal practice as barristers and the discipline of teaching aspects of international commercial arbitration in Australian and other universities. Malcolm Holmes, a senior counsel at the NSW and English Bar. He teaches at the University of Sydney and at UNSW and the University of Queensland. Chester Brown practises at the NSW and English Bar as well as in Singapore. Substantially, his day job is Associate Professor of Law at the University of Sydney. Clearly, that University, like others in Australia and elsewhere, has mapped out a strategy to expand rapidly the instruction of future legal practitioners in the opportunities, and the knotty problems, presented by international commercial and investment arbitration.

As Australia's Attorney-General Lionel Murphy said 40 years ago, "Lawyers are survivors. When one door closes, another is vigorously pushed open". Not all arbitrators, mediators and ADR practitioners are lawyers. But many are. And Holmes and Brown are at pains to demonstrate that the field of international arbitration presents many traps for new players. Their text, in particular, is designed to provide a readily accessible means whereby an intelligent person, venturing into the field, will have an instant resource of guidance on the statutory provisions that will govern them for Australia-based arbitrations and a sound background in the three important areas of international law that are now given effect by the Australian federal statute.

The most important comment to be made about the text by Holmes and Brown is that it has been produced with a particular reader in mind. Although on its cover the authors have declared, fairly, that it is "an essential inclusion in the library of anyone teaching, practising or working in international arbitration in Australia", the real target of this book is a busy Australian reader (probably a legal practitioner but possibly a company officer, consultant, academic or student) who needs to have an answer to the question: what does the recently amended federal statute, the *International Arbitration Act* 1974 (Cth), have to say

about a particular and specific subject that needs to be resolved. And needs to be resolved at once!

This is the added value of Holmes and Brown. The layout of their book is quite excellent. The structure follows the several Parts of the 1974 updated Australian statute. To those sections is added three separate parts dealing with the three international sources found in the Schedules to the federal Act:

- Schedule 1: *The New York Convention* (Convention on the recognition and enforcement of Foreign Arbitral Awards, made in New York on 10 June 1958);
- Schedule 2: *The Model Law:* (The 1985 United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration); and
- Schedule 3: *The ICSID Convention:* (Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature 1965 and entered into force 1966).

That the foregoing was the structure of this text was virtually inevitable, given that it is a commentary on the updated1974 federal statute. To this extent, the structure of the text does no more than to reflect the structure of the statute. However, the merits and advantages of the text extend beyond the structure:

- There is an excellent foreword by Justice James Allsop, President of the NSW Court of Appeal, a noted expert on international arbitrations. Many of his decisions are cited throughout the text (see e.g. *Comandate* (2006) in [s17-4] and *Lipman's* case (2011) [s7-11]). Justice Allsop, at the threshold, explains why international commercial arbitration is so important and of benefit not just to lawyers and disputants but to the nation, its economy and "high national public policy";
- There is a splendid and very detailed table of cases with excellent cross references to help a practitioner track down the many citations that, in a statutory commentary, necessarily contains references to the same cases in different contexts;
- The table of statutes is similarly well referenced;
- The description of the legislative background, given by the authors, is outstanding and essential because of the rapid changes that have been introduced to commercial arbitration, both international

and national in Australia by reforming federal, State and Territory legislation in recent years: The text of the federal legislation is then set out, with ensuing remarks after each provision, including detailed commentary after each provision of the international sources collected in the three Schedules;

* In the margin, a dark side heading identifies the Part or Schedule to the federal Act that is being dealt with. This used to be a feature, much loved by judges and practitioners, of the publications of CCH Limited. Obviously, it has now spread to other legal publishers, even the distinguished and formerly somewhat traditional English house of Butterworth's in Chancery Lane (now LexisNexis);
* The header to each page contains in bold type the precise part and section of the Act to which the page refers; and
* The index that brings the work to a close is also outstanding. It is detailed and extends in fine print over 10 pages with references to the appropriate paragraph numbers. There are tiny quibbles. For example, the Index refers, in the German language, to the jurisdictional principle "kompetenz-kompetenz", whereas in several points of the text the principle is identified in the French language. But this is unimportant. In a complex mass of legal data, a lengthy index covering the numerous repetitions of similar ideas (especially in the statute, the commentaries and the schedules) is absolutely imperative.

Not only do Holmes and Brown provide cross references to recent Australian works such as Nottage and Garnett. Correctly, they give references throughout to important and respected international commentaries on the Model Law (for example, HM Holtzmann and JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, 1989 and C. Schreuer et al, *The ICSID Convention: a Commentary* (Second ed 2009)). But the authors have recognised that many Australian practitioners will not have immediate access to these texts. They have endeavoured in their commentary to cover the bases that a practitioner will need to know, at least before getting too deeply enmeshed in an international commercial dispute, governed the federal statute.

At the heart of the rapid development of international commercial and investment disputes are a number of problems which, correctly, the authors have addressed in their commentary, by reference to the many cases and textual citations that need to be read. One of these relates the need to ensure quality, integrity, competence and lack of bias in the

arbitrator and the process. For all their imperfections of cost and delay, national judiciaries (at least in the most highly developed countries such as Australia) are chosen from a relatively small pool of lawyers, hopefully to ensure that these qualities are present. Without such pre-requisites, this is not invariable in the case of international arbitrators. In particular, a large number of those who are nominated by country parties to participate in investment disputes bring in decisions, almost inevitably, that are favourable to the nominator. The same has been true of Ad hoc judges of the International Court of Justice.

Shortly before Holmes and Brown's text was published, the High Court of Australia delivered its anxiously awaited decision in *Westport Insurance Corp v Gordian Runoff Ltd* [2011] HCA 37. This is dealt with in the commentary on Sch 2, 31-3. The authors put the best face on the decision, emphasising that a number of the judges expressly stated that "the proper construction of the federal Act and the Model Law may be left for determination on another occasion". But other commentators, including the Attorney General of Singapore in an address to the ICCA conference in 2012, have picked up the conclusion of the High Court that the arbitral tribunal had given "inadequate reasons bearing in the mind the nature of the dispute and the particular circumstances of the case". Finding the right balance between a domestic court's constitutional duties and a proper deference to international arbitration is vital to the economy and "high public policy". It is not always easy. Overseas commentaries have picked up and quoted Heydon J's remarks at [111] of *Gordian Runoff*, described as "scathing .... about the merits of arbitration". Needless to say, the Singapore Attorney noted this in the context of describing the balance generally observed in his own country.

As a textual commentary, Holmes and Brown is thus an excellent book. For those who thirst for a more discursive commentary and reflection on the big themes Nottage and Garnett can be accessed. For those who want a supplement on the approaches in Asia to investment disputes, Bath and Nottage will provide excellent additional reading.

Because of the rapid growth of international commercial and investment arbitrations, it can be expected that future editions of all three texts will appear before long. This is a fast moving field, ever expanding. One idea for the second edition of Holmes and Brown would be an even more detailed general index. Another could be the addition, in the statutory commentaries, of cross references to the equivalent provisions

of the legislation in force in the major trading partners and rivals in the region: including Hong Kong, Singapore, Malaysia and ROC.

Each publisher has done an excellent job with these books. However, in reprinting Holmes and Brown, it might consider printing the actual text of the legislative provisions in darker typeface so that it is more readily distinguishable from the commentary.

There are useful references in Holmes and Brown to the role of the Australian Centre for International Commercial Arbitration (ACICA) as a "specified authority" under the federal Act, by force of the International Arbitration Regulations 2011 (Cth). More details about the ACICA Rules could be beneficial. Given that the book, as printed, closes with 10 blank pages, my own preference would have been for a bit more white on the pages, to allow a rest for the eyes in absorbing the content and the layout. Dare I say it again; this has been a beneficial feature of CCH Ltd publications. While some lawyers might think this envisages 'dumbing down' legal texts, anything that can be done, particularly in statutory commentaries, to help the reader's comprehension would be appreciated.

Finally, in a future edition, Holmes and Brown, with their considerable knowledge and experience, should be encouraged to begin a shopping basket for any future amendments to the federal statute that will be needed, as experience is gathered on the operation of the Act and of any teething problems that may arise. One beneficial idea could be to annex a good illustration of documents in a typical international case: supplementing the model for the Arbitration Agreement [Sch 2 art7-1] with a good illustration of a Model Award, illustrating what parties and their lawyers should be looking for and thus able to help all those engaged in the process to reach the desired conclusive destination.

All three of the foregoing texts are excellent and useful additions to the practitioners' library. The commentary by Holmes and Brown is deliberately practical and practitioner-oriented. A knowledgeable and well armed legal profession is essential if Australia is to achieve its objective as a competitive venue for international commercial and investment arbitrations. Each of these books is an excellent contribution to achieving that worthwhile objective.

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