Book review

INTERNATIONAL COMMERCIAL ARBITRATION – AN ASIA-PACIFIC PERSPECTIVE

International Commercial Arbitration – An Asia-Pacific Perspective by Simon Greenberg, Christopher Kee and J Romesh Weeramantry (Cambridge University Press, 2011) 543 pp, RRP $A120 (soft cover)

GROWTH OF INTERNATIONAL ARBITRATION IN THE ASIA-PACIFIC REGION

There has been exponential growth in international arbitration in the Asia-Pacific region in the past 15 years. Evidence of this can be seen in the caseload statistics of the major arbitral institutions in the region, including, but not limited to, the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the China International Economic and Trade Arbitration Commission.

Not surprisingly, this has been accompanied by exponential growth in trade and investment in the Asia-Pacific region. Particular mention should be made of the economies of Japan, China, Korea and India which have experienced, and continue to experience, rapid economic development. Increased trade and investment is invariably accompanied by increased disputation. International commercial arbitration is the preferred method of resolving cross-border disputes.[1] One major reason is that enforcement of international arbitration awards under the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention) is superior to enforcement of foreign judgments of national courts. Hence, the growth in international arbitration in the Asia-Pacific region is perfectly explicable and can be confidently expected to continue into the future.

Recognising this growth, in November 2008 the International Court of Arbitration (ICC) opened an Asia office of its secretariat in Hong Kong. This was the first office opened by the ICC outside of Paris for the purpose of administering ICC arbitrations. The office has a case management team to administer cases in the Asia-Pacific region under the ICC rules of arbitration.

REFORM OF ARBITRATION LEGISLATION IN THE ASIA-PACIFIC REGION

According to published statistics,[2] there have been relatively few international commercial arbitrations seated in Australia in the past 10 years.[3] Yet there is a hope that Australia may be able to position itself as a regional hub for international commercial arbitration in the Asia-Pacific in the 21st century, and thereby compete with the two major powerhouses in the region: Singapore and Hong Kong.

To that end, Australia's arbitral legislative regime has undergone a reform process since November 2008. That reform process is continuing. Most relevantly for present purposes, the Australian Federal Parliament recently passed legislation to amend the *International Arbitration Act 1974* (Cth).[4] The legislative reforms have been touted by politicians and others as creating an international best practice legal framework for international commercial arbitration in Australia.

Reform of the arbitral legislative regime in Australia is a necessary, but not sufficient, condition for the achievement of the aspiration stated above. For one thing, there needs to be appropriate

[1] That is, international commercial arbitration is preferred to litigation before national courts as a means of resolving cross-border disputes.

[2] See, for example, the PriceWaterhouseCoopers survey entitled *International Arbitration: Corporate Attitudes and Practices* (2008) p 15. Although it must be said that these statistics capture institutional arbitrations, which in Australia are administered by the Australian Centre for International Commercial Arbitration, but not ad hoc arbitrations (that is, arbitrations that are not conducted under the auspices of an arbitration institution).

[3] According to the statistics, even Mongolia has attracted more institutionally administered international commercial arbitrations than Australia in recent years.

[4] Also, at the State and Territory level, the *Commercial Arbitration Act 2010* (NSW), adopting the UNCITRAL Model law, was enacted in New South Wales on 28 June 2010 to replace the former *Commercial Arbitration Act 1984* (NSW) which was a uniform piece of legislation with counterparts (enacted by other State and Territory parliaments) applying throughout Australia

infrastructure to support international arbitration. It was therefore pleasing that on 3 August 2010 an international dispute resolution centre was opened in Sydney. In launching the centre, a joint media release by the federal and New South Wales Attorneys-General stated:

> Australia is poised to become a major player in the lucrative cross-border dispute resolution market, with the opening of the Australian International Disputes Centre in Sydney today … recent reforms to arbitration laws, at both the State and Federal level, have created an international best practice legal framework for arbitration in Australia.

Most importantly, Australia (or more precisely, the Australian government and judiciary) needs to project, to potential foreign litigants and international arbitrators, a pro-arbitration persona. Otherwise, it is unlikely that an Australian city will be chosen as the seat for international arbitration. In the past, unfortunately, there have been some erratic decisions of Australian courts which have misapplied well-established arbitration principles and have undermined the projection of Australia as an arbitration-friendly venue.[5] In more recent times, however, Australian courts have demonstrated an increasingly sophisticated understanding of international commercial arbitration.[6]

Elsewhere in the Asia-Pacific region, other countries have been reforming their arbitral legislative regimes. In early 2010, Singapore amended its *International Arbitration Act (Cap143A)*.[7] In mid-2010, Vietnam passed a new arbitration law inspired by the United Nations Commission on Trade Law (UNCITRAL) Model Law, which took effect from January 2011. On 11 November 2010, after years of debate and consideration, Hong Kong introduced the *Arbitration Ordinance (Cap 609)* to replace the previous legislation.[8] The new Ordinance introduces a unitary legislative regime, based on the Model Law, regulating both domestic and international arbitrations seated in Hong Kong. Moreover, it incorporates most of the 2006 revisions to the Model Law. The stated purpose of the reform is to make the Hong Kong arbitration law more user-friendly.[9] Further, the Malaysian *Arbitration Act 2005* and the Indian *Arbitration and Conciliation Act 1996* are presently both under review.

There is also steady growth in the number of international arbitration courses that are being held by universities and other institutions in the Asia-Pacific region.[10]

THREE NEW AUSTRALIAN BOOKS ON INTERNATIONAL ARBITRATION

Against this background, it is not surprising that in the past 12 months three new books have been published in Australia on the subject of international commercial arbitration, with an Australian or

regulating (for the most part) domestic arbitration in Australia. There is a hope and expectation that the other States and Territories will follow New South Wales's lead in the near future in jettisoning the old uniform domestic arbitration Act and replacing it with a new arbitration Act adopting the Model Law as its backbone.

[5] For example, *Eisenwerk v Australian Granites Pty Ltd* [2001] 1 Qd R 461 in which the Supreme Court of Queensland held that by adopting ICC arbitration rules the parties had "opted-out" of the Model Law for the purposes of s 21 of the *International Arbitration Act 1974* (Cth). This decision has been universally criticised on the grounds that the parties' choice to adopt procedural rules of arbitration in an arbitration agreement is different in character and nature from the choice of the arbitral law. Section 21 was amended in June 2010 to remove the ability of a party to "opt-out" of the Model Law, so that *Eisenwerk* is now no more than a historical curiosity.

[6] See, for example, the judgment of Allsop P in *Gordian Runoff Ltd v Westport Insurance Corp* (2010) 267 ALR 74 which interpreted the requirement to provide reasons for an award under s 29 of the uniform Arbitration Acts in the context of a substantially identical requirement under Art 31 of the Model Law.

[7] The Singapore amending Act made amendments in three major areas: first, re-defining an "arbitration agreement" to capture "electronic communications"; secondly, confirming the power of Singapore courts to grant interim measures in aid of foreign arbitrations; and, thirdly, empowering the Minister for Law in Singapore to designate entities to authenticate, on a non-mandatory basis, arbitration awards made in Singapore (to address problems which had been encountered when seeking to enforce Singapore arbitration awards in some foreign jurisdictions). Significantly, the Singapore amending Act did not incorporate all of the 2006 revisions to the Model Law.

[8] Under the former Arbitration Ordinance, the Model Law only applied to international arbitrations seated in Hong Kong.

[9] For further discussion, see Caldwell P, "The New Hong Kong Arbitration Ordinance" (2011) (Jan) *Asian Dispute Review* 14.

[10] The reviewer has over the past four years lectured and/or tutored in the Diploma of international commercial arbitration offered by the Chartered Institute of Arbitrators (Australian branch) in conjunction with the University of New South Wales. The course has been held in Sydney and Malaysia, and is proposed to be held in China and India in the near future.

Asia Pacific perspective. They are: *International Arbitration in Australia* edited by Luke Nottage and Richard Garnett (Federation Press, 2011); *International Commercial Arbitration*, by Rashda Rana and Michelle Sanson (Thomson Reuters, 2010); and *International Commercial Arbitration – an Asia-Pacific perspective* by Simon Greenberg, Christopher Kee and J Romesh Weeramantry (Cambridge University Press, 2011).

The purpose of this article is to review the latter work by Greenberg and others. In my opinion, it is the best of the three books, certainly from a practitioner's perspective. That is not to say that the other two books are not worthy additions to one's library.[11]

WHO ARE THE AUTHORS?

The authors are thirty-something academics and practitioners. All three of them were born and/or educated in Australia. Simon Greenberg is the Deputy Secretary General of the ICC, stationed in its head office in Paris. He has represented parties in international commercial arbitrations with law firms in Melbourne and Paris, with a focus on Asia-Pacific cases. Christopher Kee is currently a senior researcher at the University of Basel in Switzerland. He is a former Adjunct Professor at the City University of Hong Kong. Romesh Weeramantry is an Associate Professor at the City University of Hong Kong. All three authors have been heavily involved in teaching and practising international commercial arbitration. Notwithstanding their relative youth, collectively, they have a wealth of experience.

STRUCTURE OF THE BOOK

The book contains 10 chapters covering the principal aspects of international commercial arbitration: an introduction to international arbitration and its place in the Asia-Pacific, the law governing the arbitration and the role of the seat, the applicable substantive law, the arbitration agreement, arbitral jurisdiction, the arbitral tribunal, procedure and evidence, the award: content and form, the award: challenge and enforcement, and investment treaty arbitration.

The table of cases contains references to leading arbitration cases in many parts of the world, including Australia, China, England, France, Hong Kong, India, Japan, Malaysia, New Zealand, the Philippines, Singapore and the United States. There is also reference to International Centre for the Settlement of Investment Disputes arbitration awards and published (but redacted) ICC arbitration awards.

The book contains five appendices and a useful Glossary of Terms. The first appendix contains a table providing an overview of the major arbitral institutions in the Asia-Pacific region, complete with details of each institution's current arbitration rules and the default appointment process. Appendix 2 contains website details of the major arbitral institutions and other organisations in the Asia-Pacific region. Appendix 3 contains a list of some 60 countries that have adopted the UNCITRAL Model Law (highlighting those countries, like Australia, which have adopted the 2006 revisions to the Model Law). Appendix 4 contains a list of the 144 countries that were, as at 4 July 2010, parties to the New York Convention. Appendix 5 contains a select list of Asia-Pacific arbitration legislation and instruments.

The Foreword to the book is written by Professor Michael Pryles, chairman of SIAC and a leading, renowned international arbitrator. Dr Pryles speaks in glowing terms about the book, congratulating the comparatively young authors on producing a well-written volume with a unique regional focus.

A GROWING ASIAN ARBITRATION CULTURE AND JURISPRUDENCE

Greenberg and his co-authors examine the influence of Asian culture on international arbitration. There is an increasing awareness and discussion of the importance of recognising cultural differences in international dispute resolution, and in particular the impact of East Asian cultural influences on

[11] In particular, the book by Rana and Sanson seems more suited to university students studying international commercial arbitration. It contains questions designed to test knowledge through all stages of an arbitration, from drafting an effective arbitration agreement to enforcement of an arbitral award.

arbitration in the Asia Pacific region. In considering this impact, it is well to remember that Europe is the ultimate source of the framework for international arbitration culture worldwide, with substantial contributions coming from UNCITRAL, the International Council for Commercial Arbitration (ICCA), the ICC and the International Bar Association (IBA).

While general reference is often made to an Asian culture, the authors acknowledge that the Asian countries and cultures that are the focus of the book are extraordinarily diverse – in terms of political or economic systems, religious systems, legal systems,[12] languages and social mores. Indeed, the authors note that Asia is probably more diverse than Europe. The diversity between Asian cultures has in turn created substantial corresponding diversity in dispute resolution and legal systems. Notwithstanding these differences, there does seem to be a general preference in Asia for a softer, conciliatory dispute resolution process.[13] The authors caution practitioners, however, to be wary about generalisations and emphasise the need to identify, appreciate and be sensitive to relevant cultural differences in the particular international arbitrations in which they are involved.

As many of the significant countries in the Asia-Pacific adopt the UNCITRAL Model Law, there appears to be scope for the development of harmonised jurisprudence in the Asia-Pacific region. As the authors note (p 35), the widespread adoption of the Model Law has been an essential ingredient for the growth of arbitration in the Asia-Pacific region. Indeed, the Asia-Pacific now stands out as the principal Model Law region of the world, with the highest concentration of Model Law countries (p 36). There is now a considerable body of arbitration practitioners within Asia, both arbitrators and counsel. There is scope for the Asia-Pacific to develop its own flavour or brand of international commercial arbitration. Indeed, the authors acknowledge that the evolution of such a flavour was a key inspiration for the book (p 53).

Altain Khuder LLC v IMC Mining Inc[14] is a recent case concerning the recognition and enforcement in Australia of an international arbitration award made in Mongolia. It considered the interpretation of provisions in the Australian *International Arbitration Act* (as amended).[15] In the course of his judgment, Croft J, the Arbitration List Judge of the Supreme Court of Victoria, referred to a number of Singaporean and Hong Kong court decisions, which considered similar provisions. This judicial practice will, I think, become an increasing trend in the region as court judgments become more accessible.

The book assists in promoting harmonised jurisprudence concerning the Model Law and the development of a particular brand (or flavour) of international commercial arbitration in the Asia-Pacific region.

TARGET AUDIENCE

It is targeted to legal practitioners practising, or aspiring to practise, in the area of international commercial arbitration, and also to postgraduate students studying the subject. It would also be useful to corporate counsel, especially those employed by multinational corporations involved in cross-border trade in the Asia-Pacific region. Indeed, the book can either be read from cover to cover; or can be dipped into as the need arises to address any particular issues.

[12] Several Asian countries were British colonies or otherwise saw a strong influence from the common law (for example, Singapore, Hong Kong, Malaysia and India). Other Asian countries inherited civil law traditions (for example, Japan, South Korea, China, Indonesia, Thailand and Vietnam). Some countries have a combination of common law and civil law (for example, the Philippines).

[13] In Asia, unlike the Western world, there is no bright dividing line between arbitration and mediation (or conciliation). Indeed, the combination of the two processes is often combined in the same proceeding, especially in China. In Australia, this topic is usually referred to as Med-Arb. It excited some attention in the New South Wales Parliament at the time of the introduction of s 27D of the *Commercial Arbitration Act 2010* (NSW). The Standing Committee of Attorneys General has recently invited submissions on the possible amendment of s 27D of the *Model Commercial Arbitration Bill 2010* (NSW).

[14] *Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47.

[15] More particularly, ss 8 and 9 of the *International Arbitration Act* (Cth) which implement Arts IV and V of the New York Convention.

WHAT DIFFERENTIATES THIS BOOK FROM OTHERS?

As the authors note in the Preface, while there are several practitioners' guides to specific Asia-Pacific jurisdictions,[16] no single book addresses the region in a subject by subject text book style. This is what the authors have set out to achieve, and if I may say so, have done so most effectively. This book enables a practitioner (or student) to investigate relatively easily the comparative law in relation to a particular topic. Often different legal approaches are compared and contrasted. It puts one on a train of enquiry into jurisprudence in other countries, which otherwise might be impenetrable. Frequent attention is drawn to particular arbitration rules of arbitration institutions in the region. The book is also replete with references to other scholarly works, including textbooks and journal articles – from both the Asia-Pacific region as well as English, American and European authorities.

Take for example the topical question of adequacy of arbitral reasons (pp 383-385). The authors outline three different approaches that exist in international arbitration rules as to the giving of reasons, referring to the various Asia-Pacific countries' sets of arbitration rules. The authors note that even if arbitration rules are silent on the issue of reasons (as in the case of the SIAC rules) the *lex arbitri* usually require reasons to be given. In support of this proposition, the learned authors refer to mandatory requirements to give reasons in various national laws. Thus, in Singapore, while the SIAC rules are silent on the question of the giving of arbitral reasons, an arbitrator in an international arbitration seated in Singapore is required to provide reasons under the Singapore *International Arbitration Act* which incorporates the Model Law (in particular, for present purposes, Art 31). The authors then turn their attention to the first instance and appeal decisions in the controversial case of *BHP Billiton Ltd v Oil Basins Ltd*.[17] *Oil Basins* stands for the proposition that in at least certain cases, arbitrators may be required to provide reasons of the same standard as the reasons of a superior court judge. The learned authors disapprove of *Oil Basins* contending that there are compelling arguments in support of the proposition that the standard of reasons required of an arbitrator is less onerous than that required of a judge:

> If the *Oil Basin's* approach is adopted in a Model Law state in relation to an international arbitration, it would effectively be augmenting the extensive setting aside grounds listed in Article 34(2) (of the Model Law) … this could ultimately weaken the finality of arbitral awards and/or reduce the efficiency of international arbitration because arbitrators would be required to develop extensive reasoning.

In a footnote, the authors note that just prior to publication of their book, the New South Wales Court of Appeal in *Gordian Runoff* rejected the reasons stated in *Oil Basins*. Indeed, the High Court heard a further appeal in the case and is expected to hand down a decision in the near future. It will hopefully resolve the conflict in approaches of the Victorian Court of Appeal and the New South Wales Court of Appeal in respect of the requirement of an arbitrator (albeit in a domestic arbitration context) to provide reasons for his or her arbitral award.

In summary, this is a major work. I confidently expect that it will become an authoritative text on international commercial arbitration in the Asia-Pacific region, and that like other renowned works[18] there will be future editions to come.

Albert Monichino SC
Aickin Chambers, Melbourne

[16] For example, Pryles M, *Dispute Resolution in Asia* (2nd ed, Kluwer Law International, 2002). There are also several works which provide an annotated commentary to the arbitral law in the relevant country; for example, Rajoo S and Davidson WSW, *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia* (Sweet & Maxwell Asia, 2007).

[17] *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402; on appeal in *Oils Basins Ltd v BHP Billiton Ltd* [2007] 18 VR 346.

[18] The two most renowned works in this area are *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press, 2009) and Born G, *International Commercial Arbitration* (3rd, ed, Wolters Kluwer, 2009).