

BOOK REVIEW

THE INTERNATIONAL ARBITRATION ACT 1974: A COMMENTARY

BY MALCOLM HOLMES AND CHESTER BROWN

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‘In law context is everything.’¹

If only one thing could be said about Holmes’ and Brown’s commentary on the *International Arbitration Act 1974* (Cth) (the Act), it would surely be that it does an excellent job of placing its analysis in context.

An appreciation of context is important in any area of law, but especially so in the case of international arbitration. Complaints are not infrequently made about those who treat international arbitration as equivalent to domestic litigation or even domestic arbitration.² International arbitration is a specialised area. *The International Arbitration Act 1974: A Commentary* provides a contextualised and accessible insight into the operation of the key piece of federal legislation regulating international arbitration in Australia.

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¹ *R v Secretary of State for the Home Department; Ex parte Daly* [2001] 2 AC 532, 548 [28] (Lord Steyn).

² See, eg Lisa Bench Nieuwveld, ‘How and How? The Two Most Commonly Asked Questions’ (16 March 2012) *Kluwer Arbitration Blog* <<http://kluwarbitrationblog.com/blog/2012/03/16/how-and-how-the-two-most-commonly-asked-questions>>.

The authors' attentiveness to context is demonstrated in several ways. From the very outset in the section titled 'Legislative Background',³ Holmes and Brown provide an illuminating but appropriately concise summary of key developments in the modern law of international arbitration at an international and (Australian) domestic level. As they note in the text's first sentence, '[t]he starting point when considering the proper construction of the provisions of [the Act] is to construe the language of the Act in its natural and ordinary meaning but the language used in the Act, and the Act itself, *must be put in context*'.⁴ Reference is made immediately to the *New York Convention*,⁵ the *UNCITRAL Rules 1976*,⁶ the *UNCITRAL Model Law on International Commercial Arbitration 1985*⁷ (and its 2006 amendments),⁸ the *Washington Convention*,⁹ and the work of the International Bar Association in the area of international arbitration.¹⁰ Perhaps the only (curious) omission is reference to the *UNCITRAL Rules 2010*.¹¹ Attention is also given to the Commonwealth Attorney-General's review of the Act initiated in 2008 and the various instruments which followed — the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth), the *International Arbitration Amendment Act 2010* (Cth) and the *International Arbitration Regulations 2011* (Cth). In just six pages, the authors provide a solid foundation for their commentary which follows — as noted in the 'Legislative Background's'

³ Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis Butterworths, 2011) 3–8.

⁴ *Ibid* 3 (emphasis added).

⁵ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 19 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

⁶ *Arbitration Rules formulated by the United Nations Commission on International Trade Law*, adopted 28 April 1976 <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>>.

⁷ *UNCITRAL Model Law on International Commercial Arbitration*, adopted 11 December 1985 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf>.

⁸ *UNCITRAL Model Law on International Commercial Arbitration*, adopted 11 December 1985, as amended 7 July 2006 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

⁹ *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

¹⁰ In particular, the *IBA Rules on the Taking of Evidence in International Arbitration*, adopted 29 May 2010 <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence> and the *IBA Guidelines on Conflicts of Interest in International Arbitration*, adopted 22 May 2004 <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest>.

¹¹ *Arbitration Rules formulated by the United Nations Commission on International Trade Law*, effective 15 August 2010 <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>.

concluding sentence, '[i]t is against this legislative background ... that each provision in the Act must now be considered'.¹²

What follows is a provision-by-provision and Schedule-by-Schedule commentary on the *International Arbitration Act 1974* (Cth). The only exclusion from the text's scope is commentary concerning sch 1, which reproduces the *New York Convention*. This exclusion is sensible, given that (as the authors explain in their 'Preface') commentary has been included on the provisions of pt II which implement the *New York Convention* in Australia.¹³ In any event, a multitude of other authoritative commentaries exist concerning the *New York Convention* which could be resorted to if required.¹⁴ Notwithstanding its exclusion from the commentary's scope, the text of the *New York Convention* is helpfully included for reference.¹⁵

Context remains an important theme throughout the text's commentary. As it moves through its consideration of each provision, *The International Arbitration Act 1974: A Commentary* draws upon reference to legislative histories (both domestic and the relevant international instruments' *travaux préparatoires*), the effect of amending legislation, the Act's interaction with other pieces of Australian legislation, and importantly relevant case law.

In relation to case law, Holmes and Brown strike an appropriate balance between the domestic context of the Act and the international origin of its constituent instruments by considering both local and foreign jurisprudence. Important international cases, such as *Dallah Real Estate and Tourism Company v Ministry of Religious Affairs of the Government of Pakistan*,¹⁶ feature where relevant. In addition, discussion of two key 2011 Australian decisions – *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*¹⁷ and *Westport Insurance Corp v Gordian Runoff Ltd*¹⁸ – has been included despite their late delivery (relative to publication) on 22 August 2011 and 5 October 2011 respectively. Other key post-*International Arbitration Amendment Act 2010* (Cth) decisions such as *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*,¹⁹

¹² Holmes and Brown, above n 3, 8.

¹³ Ibid ix.

¹⁴ See, eg, International Council for Commercial Arbitration (ed), *ICCA's Guide to the Interpretation of the 1958 New York Convention* (ICCA, 2011) <http://www.arbitration-icca.org/media/0/13341651436910/iccas_guide_to_the_1958_ny_convention_april2012.pdf>.

See also the classic text: Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer, 1981).

¹⁵ Holmes and Brown, above n 3, 135–8.

¹⁶ [2011] 1 AC 763.

¹⁷ (2011) 282 ALR 717.

¹⁸ (2011) 244 CLR 239.

¹⁹ (2011) 277 ALR 415.

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2),²⁰ *ESCO Corp v Bradken Resources Pty Ltd*,²¹ *Lightsources Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB*²² and *McConnell Dowell Constructors (Aust) Pty Ltd v The Ship 'Asian Atlas'*²³ feature as well.

While the attention to context is a commendable attribute of *The International Arbitration Act 1974: A Commentary*, several other features are also worthy of mention. First and foremost, this text is one about international arbitration — not simply international commercial arbitration. Much has been made of international commercial arbitration in Australia given the federal government's policy position to promote Australia as a regional dispute resolution centre.²⁴ However, Holmes and Brown's text is broader and includes consideration of international investment arbitration through its discussion of pt IV of the Act²⁵ and the *Washington Convention* contained in sch 3.²⁶

Secondly, the text is practical. The writing style is accurate but not unnecessarily complicated; it is easy to navigate with useful paragraph numbering, internal cross references to related provisions, and a handy 'Quick Reference Directory' separating out the commentary into sections relating to each Part and each Schedule of the Act. Finally, for the purposes of this review (but certainly not the only other virtue of the text), *The International Arbitration Act 1974: A Commentary* does not share the same impractical size that unfortunately characterises many other Australian annotated Acts. The work is contained in a single, relatively slender volume which will fit in one's briefcase (or sit in one's library) with ease.

The main downfall of the text, which proclaims on its back cover to be '[a]uthoritative and up-to-date', is that it may be at risk of suffering from the momentum currently enjoyed by international arbitration in the Australian legal system. At the time of writing a number of international arbitration related decisions had been handed down since the text's recent publication in December

²⁰ (2011) 277 ALR 441.

²¹ (2011) 282 ALR 282.

²² (2011) 250 FLR 63.

²³ [2011] FCA 174.

²⁴ See, eg Robert McClelland, 'Australian Government Moves to Modernise International Arbitration' (Media Release, 21 November 2008) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Mediareleases/Pages/2008/Fourthquarter/21November2008AustralianGovernmentMovestoModerniseInternationalArbitration.html>>.

²⁵ Holmes and Brown, above n 3, 125–32.

²⁶ *Ibid* 241–338.

2011,²⁷ and it is entirely possible that more will have followed by the time of this review's publication. However, notwithstanding this point, Holmes and Brown have thoroughly dealt with the state of the law as at the time of writing and those with experience in the area and newcomers alike will benefit immensely from their efforts to present the Act as a piece of annotated legislation.

In summary, *The International Arbitration Act 1974: A Commentary* is a valuable addition to the body of literature dealing with international commercial arbitration and international investment arbitration in Australia. The authors have effectively drawn upon their combined practical and academic experience to present an authoritative exposition of what Justice James Allsop describes (it is submitted without exaggeration) in the text's 'Foreword' as 'one of Australia's most important pieces of legislation'.²⁸

²⁷ See *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209; *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 287 ALR 315; *Passlow v Butmac Pty Ltd* [2012] NSWSC 225; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2012] WASC 228; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.

²⁸ Justice James Allsop, 'Foreword' in Holmes and Brown, above n 3, vii.