D S Jones, *Commercial Arbitration in Australia*,
Pyrmont, Thomson Reuters, 2011

FOREWORD

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This publication requires no recommendation from a person who has made no contribution to its contents. Even on a cursory examination it bears its quality on its face. It is a comprehensive and detailed analysis of the statutory provisions, case law and practice for domestic commercial arbitration. Its focus is the new, hopefully uniform, Australian legislation, the model for which has already been enacted in New South Wales. This legislation is placed in its historical context, which will assist in its future interpretation and in determining the applicability of prior case law.

The author refers in the first chapter to the address I made at the Opening of Law Term dinner of the Law Society of New South Wales in February 2009[1] in which I advocated the adoption of the UNCITRAL Model Law as the domestic Australian arbitration law. It is appropriate for me to outline some of the background to that address.

It had been clear for some time that the 1984 *Uniform Commercial Arbitration Acts* had become embarrassingly out of date. The significant advances in arbitration practice, that had been heralded by the Arbitration Act 1996 (UK) and further developments, had not been adopted in Australia until now. In March 2002 the Standing Committee of Attorneys General decided that a fundamental review of the uniform legislation should be undertaken. The New South Wales Attorney General's Department undertook this task.

In 2008 I made inquiries as to why nothing had emerged from this process and was given access to the files. It became clear to me that the process had become bogged down, primarily by reason of the fact that because of the significant divergence of views in the arbitral community, a consensus on reform could not be reached.

Seven drafts of an Amendment Bill had been developed between May 2003 and May 2004. An Expert Working Group, comprising a number of senior arbitration and ADR practitioners, was convened to review the drafts. The Expert Working Group met seven times between August 2005 and November 2006 and made a number of

recommendations. Reform did not proceed due to the differing views of the stakeholders.

It became clear to me that the only way to achieve a breakthrough in this context was to stop using the existing legislative scheme as a base line and adopt the UNCITRAL Model Law as the core of the new Australian scheme. It would be subject to appropriate modifications, but the scope for differences of view was considerably reduced.

I raised this proposal with the Attorney General of New South Wales, John Hatzistergos, who in turn raised it with the Commonwealth Attorney-General, Robert McClelland. They both indicated support for the proposition. I raised the issue publicly in the February 2009 Opening of Law Term address. I am very pleased with how this initiative has developed. The creation of a seamless regime between domestic and international commercial law will, I am sure, enhance Australian practice in both.

As a serving judge, it is appropriate that I refer to the criticism that is often directed to the judiciary to the effect that judges are too prone to interfere with the arbitral process and thereby fail to respect the autonomy of the parties reflected in the contract. Sometimes, but not always, those criticisms are valid.

The confidence of the commercial community in arbitration depends, in large measure, on the belief that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the process are assured. The primary role in this respect is served by the process of selecting arbitrators and agreeing on the rules.

Sometimes, however, the exercise of a supervisory jurisdiction by a court is required. Indeed, the very existence of a supervisory jurisdiction assists in maintaining confidence in the system. So long as they restrict intervention to matters of integrity, judges serve the fundamental objectives of the system.

Arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind as, on any view, to justify intervention by a court. The fundamental commercial concept underlying arbitration agreements is respect for the autonomy of the parties. The parties' choice was not, however, to select arbitration per se. It was to select arbitration by persons and by procedures that manifest a high degree of integrity. Recognition that any system is fallible, and may need to be corrected in retrospect, is not an insight unique to arbitration.

In the jurisdictions with which I am most familiar, the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch, supervisory jurisdiction directed to maintaining the integrity of the system. Insofar as arbitrators sometimes express dissatisfaction in this respect, such commentary is, or at least should be, diminishing in frequency. This book will play a significant role in ensuring that this development in judicial attitudes is reinforced.

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[1] Now published as "The Challenge of the Global Financial Crisis" *Opening Law Term: Opening of Law Term Speeches Chief Justice James Spigelman AC 1999-2010*, Law Society of New South Wales, Sydney, 2010.