BOOK REVIEW

***UNCITRAL Model Law and Arbitration Rules: The Arbitration Act 2005 (Amended 2011 and 2018) and the AIAC Arbitration Rules 2018,* Sundra Rajoo & Thomas R. Klotzel eds, Malaysia: Sweet & Maxwell. 2019. 1029 pp. + Proview eBook. ISBN 978-967-2187-59-2. ISBN 978-967-2187-60-8 (ProView eBook).**

There is perhaps no better way to start reviewing a book than to do so after having just referred to it in a live case. The litmus test of how useful a text is to a practitioner is whether the practitioner has found it of assistance when dealing with an issue she or he is facing in a case at hand. We have, at one end of the spectrum, the magnum opus of arbitration that is Professor Gary Born's three-volume treatise on *International Commercial Arbitration*, or, in the field of construction law, *Hudson's Building and Engineering Contracts*. The beauty of these texts is that if you have a slightly thorny problem at hand, or a somewhat esoteric point to chase down, the chances are that there will be something in these texts that will point you in the right direction. At the other end of the spectrum are texts that go by the title 'casebooks'. These are primarily reprints of court judgments, or sometimes extracts from arbitration awards, with some commentary added by the author to provide a road-map through the cases. The books at this end of the spectrum don't often make it to the shelves of practitioners. All other texts fall somewhere along this spectrum.

So when a book with a trippingly-on-the-tongue title *UNCITRAL Model Law and Arbitration Rules: The Arbitration Act 2005 (Amended 2011 and 2018) and the AIAC Arbitration Rules 2018* came across my desk, clocking in at 1,026 pages and accompanied with a lovely (handwritten, what a pleasure!) note from Datuk Professor Sundra Rajoo inviting me to review the book, my expectations immediately leant towards the Born/Hudson's end of the spectrum. And Datuk Sundra, and his co-author, Dr Klotzel, do not disappoint.

Datuk Sundra needs no introduction. A doyen of Malaysian arbitration, he has qualifications in building science, architecture, law, town planning, and an honorary doctorate in law from his *alma mater* for his work in the field of arbitration. A past President of the Chartered Institute of Arbitrators (CIArb) and of the Asian Pacific Regional Arbitration Group (APRAG), Datuk Sundra was instrumental in putting on the world map as an arbitration institution to be reckoned with the

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Kuala Lumpur Regional Centre for Arbitration (now, Asia International Arbitration Centre (AIAC)). A prolific author, this is his eighth book.

The book is divided into four parts.

Part I (about 40 pages in length) sets out the background to the adoption of the UNCITRAL Model Law in Malaysia and the matters leading up to the enactment of the Malaysian Arbitration Act 2005 and its subsequent amendments in 2011 and 2018. A useful summary of the road thus far.

Part II (a chunky 650 pages in length) traverses the current Arbitration Act 2005 section-by-section. It is on this part that I will concentrate my review.

Part III (about 130 pages long) is a commentary on the new (2018) AIAC Arbitration Rules (formerly the KLRCA Arbitration Rules) by Datuk's Sundra's co-author, Dr Thomas R. Klotzel. As this part is taken from another book by Dr Klotzel, and reproduced with his permission in Datuk's Sundra's book, I will not comment on this section save to say that it is very useful to have in a single book a commentary on both the procedural law that would apply to a Malaysia-seated arbitration (domestic or international) and the arbitration rules that are most likely to be used in such arbitration. Dr Klotzel refers to Malaysian jurisprudence relevant to several of the articles of the AIAC Arbitration Rules, which makes for a helpful read. However, for an in-depth examination of the UNCITRAL Arbitration Rules, other texts such as *The UNCITRAL Arbitration Rules: A Commentary* by David Caron and Lee M. Caplan, or *A Guide to the UNCITRAL Arbitration Rules* by Clyde Croft, Christopher Kee, and Jeffrey Waincymer, might be more appropriate.

Part IV (about 60 pages long) sets out the text of the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The inclusion of the former is perhaps more useful as a ready-reference to what is provided for in the UNCITRAL Model Law (from which, the Malaysian Arbitration Act 2005 does depart at times).

Where does this book sit amongst other books on Malaysian arbitration law? Until last year, books on the Malaysian Arbitration Act were essentially authored by one person: Datuk Sundra. The most prominent of his books was *Law and Practice of Arbitration*, with its first edition dating back to 2003, and a more recent second edition (in 2017). It was an excellent book and a very welcome first-port-of-call for all things to do with Malaysian arbitration. In 2019, in addition to Datuk's Sundra's present book, we were also treated to Mr Baskaran Thayananthan's *Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act*. At about half the length of Datuk's Sundra's book, Mr Thayanthan's book provides a very succinct introduction to each of the provisions of the Arbitration Act 2005, with reference to the most prominent Malaysian cases on the subject. Datuk's Sundra's book not only covers Malaysian decisions but also includes

extensive references to cases, journal articles, and textbooks from several other jurisdictions, making his book especially valuable to the avid researcher.

To probe Datuk Sundra's approach in this book in a little more depth, I reviewed the treatment by Datuk Sundra of two sections of the Arbitration Act 2005: section 14 on the grounds for challenging arbitrators, and section 20 on equal treatment of parties and giving parties an opportunity to present their cases. I did not pick these provisions at random. The first time I had cause to refer to Datuk Sundra's books was in 2015 when I was dealing with an arbitrator challenge application under section 14 of the Arbitration Act 2005. Co-incidentally, my reference to his present text also happened to be in the context of an arbitrator challenge, but this time under UAE law (hence my reference to 'a live case' at the outset of this review). Section 20 of the Arbitration Act 2005, on the other hand, provided an opportunity to compare Datuk Sundra's work to two other works on the UNCITRAL Model Law, as it is one of the provisions where the Malaysian legislation departs from the source provision in the UNCITRAL Model Law.

Section 14 of the Arbitration Act 2005 deals with a very important issue: the duty on an arbitrator to disclose matters that could give rise to justifiable doubts as to her or his independence and impartiality, and the consequences of the arbitrator's failure to do so. Datuk Sundra examines this issue (which is one of bias and not of conflict of interest, as was pointed out by Rix, J. in *Laker Airways v. FLS Aerospace* [1999] 2 Lloyd's Rep. 45, a case which also finds mention in Datuk Sundra's book) in significant depth by taking the reader through references in Indian textbooks (Malhotra's *Law and Practice of Arbitration and Conciliation*), case law from England, Germany, Singapore, Hong Kong, Canada, and Australia, journal articles from commentators in Europe, and the customary reference to Prof. Born's treatise on *International Commercial Arbitration*. A casual reader would come out very well informed about the relevant issues, while a practitioner consulting this chapter to research a point would likely find a valuable nugget or two. If one were allowed to nit-pick, one might propose a re-ordering of some of the concepts in this chapter (for instance, the sub-division of the concept of bias into actual, imputed, and apparent bias comes 59 paragraphs into the chapter, when it might have been better placed in the introductory parts), or suggest coverage of the issues surrounding an arbitrator and counsel being from the same Chambers, which sometimes arises in international arbitration involving the English Bar. But these are relatively minor points *in the Malaysian context* to which Datuk Sundra's text primarily relates.

The wealth of information in Datuk Sundra's book elevates it to beyond being of value only in Malaysian arbitrations to a text that can be a reference for practitioners working on UNCITRAL Model Law cases internationally. To test this, I compared Datuk Sundra's book to Dr Peter Binder's *International Commercial Arbitration and Mediation* (now in its Fourth Edition, 2019) and a newcomer to the scene, *UNCITRAL Model Law on International Commercial Arbitration* (Iljas Bantekas (ed.),

2020), in their respective treatments of the provision in the UNCITRAL Model Law which Lew, Mistelis & Kroll have termed the 'Magna Carta of Arbitration' – Article 18. This deals with the arbitrators' duty to act fairly, to treat the parties before them equally, and to give each party an opportunity to put its case.

This Article has been re-enacted as section 20 of the Arbitration Act 2005 but with one principal difference: where Article 18 of the UNCITRAL Model Law requires parties to be given a *full* opportunity to present their cases, section 20 of the Arbitration Act 2005 requires that parties be given a *reasonable* opportunity to present their cases. In this respect, the Arbitration Act 2005 is closer to the Hong Kong Arbitration Ordinance (Cap. 609) which, in section 46, amends the terms of Article 18 of the UNCITRAL Model Law in a similar fashion, than to the Singapore International Arbitration Act (Cap. 143A), which adopts the words of Article 18 of the UNCITRAL Model Law without any change.

Datuk Sundra's puts the distinction between *full* and *reasonable* opportunity at the centre of his discussion of section 20. Not only does he note the differing approaches taken in the legislation in Singapore and Malaysia, and the similarity between the approaches in the legislation in Hong Kong and Malaysia, he goes further to consider the position in New Zealand (with whose arbitration legislation the Arbitration Act 2005 is most closely connected), England, Switzerland, France, Canada, Spain, and Croatia. This is impressive. If one were to make any suggestions at all, I would propose that a future edition might benefit from a discussion of whether Popplewell, J.'s observations in *Reliance Industries Ltd. & another v. Union of India* [2018] EWHC 822 (Comm) (where he did not 'regard the difference [between full and reasonable opportunity] as imposing any higher burden on the Tribunal') now renders the distinction academic. However, the examples in Datuk Sundra's book of how various jurisdictions have interpreted this concept would nevertheless be of significant value to a practitioner looking for a 'similar fact situation' to persuade a tribunal.

In comparison to Datuk Sundra's treatment of this topic, Dr Binder's exploration of Article 18 of the UNCITRAL Model Law is briefer and, perhaps because he does not need to in the context of Article 18, does not comment on the differing approaches in certain jurisdictions as to the extent to which Article 18 has been modified. Mr Bantekas's commentary on Article 18 takes a European human rights approach to the issue, which may of less relevance to practitioners in international arbitration outside Europe or England.

Datuk Sundra's new book is a welcome work of scholarship that extends considerably the breadth of his analysis of the Arbitration Act 2005 from that in his previous books, and also provides practitioners outside Malaysia with a valuable reference book. Definitely one for the shelf of the busy international arbitration practitioner.

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