REZENSIONEN/REVIEWS

LUKE NOTTAGE

International Commercial and Investor-State Arbitration Australia and Japan in Regional and Global Contexts

Asian Commercial, Financial and Economic Law and Policy series,
Edward Elgar 2021, 424 p., € 115 (Hardbound), ISBN: 978 1 80088 081 8

LUKE NOTTAGE / SHAHLA ALI / BRUNO JETIN / NOBUMICHI TERAMURA (eds.)

New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution

Wolters Kluwer (Kluwer Law International), Alphen aan den Rijn 2020,
374 p., € 181 (Hardbound), ISBN: 978 9 40352 855 7

International arbitration in the Asia-Pacific region is booming. This became particularly noticeable amidst the recent COVID-19 pandemic. International commercial arbitration ("ICA") has been the subject of significant efforts to increase informality and efficiency. Equally, investor–state arbitration ("ISA") is undergoing innovative changes in Asia despite a recent backlash in other parts of the world, including in Europe and the United States. Addressing such important trends and developments, two recent books provide interested readers with detailed and expert insight into the evolution of international arbitration and dispute resolution in the Asia-Pacific region.

The book "International Commercial and Investor-State Arbitration – Australia and Japan in Regional and Global Contexts" is authored by Professor Dr Luke NOTTAGE of Sydney Law School, a prolific scholar, writer, and expert of the Australian and Japanese legal systems. The book has its origins in Prof. NOTTAGE's postgraduate work at the Kyōto University Law Faculty in the 1990s, builds on ten chapters he has authored since then at universities in Japan, New Zealand, and Australia, and adds two new chapters contextualising his work.

In his book, Prof. NOTTAGE examines Japan's and Australia's developments in ICA and ISA as well as their investment treaty practices. The book's underlying theme is the ongoing tension between (what Prof. NOTTAGE refers to as) "localised globalism" (or "glocalisation"), on the

one hand, and "in/formalisation", on the other. The former describes the conflict between globalisation and national (or local) influences, whereas the latter refers to the level of (in-)formality in international arbitration. Whereas ICA was originally informal and global, Prof. NOTTAGE provides fascinating and at times empirical background on its continuous formalisation and adoption of common law-style procedure, brought about by the increasing influence of Anglo-American law firms. This has led to increasing costs and duration as well as to a "glocalised localism" or "localised globalism" in international arbitration. Despite recent efforts to revive informality and to adopt a more global approach, Prof. NOTTAGE remains somewhat sceptical that they ultimately will bear fruit.

In part I, Prof. NOTTAGE traces the history of ICA (chapters 2–3) and its development in Japan and Australia (chapters 4–5). In the first third of part I, comprising some 50 pages, Prof. NOTTAGE describes the emergence of ICA and of supranational legal norms as a means of neutral dispute resolution during the Cold War and amid North–South tensions. He goes on to explain how this globalisation soon led to increasing localisation and formalisation, particularly in emerging markets, eventually causing a persisting "crisis of arbitration". Prof. NOTTAGE presents various efforts to innovate in ICA, including through the promotion of "Arb-Med", "expedited procedures", "e-arbitration", and other special procedures or areas including expert determination, sports arbitration, and domain name and mass claim disputes. He highlights different inter- and supra-state regimes concerning the resolution of trade and investment disputes. Turning to Japan, Prof. NOTTAGE outlines (over the next 50+ pages) the country's ongoing efforts to promote dispute resolution, starting with its adoption of the 2003 Arbitration Act and leading up to the liberalisation of the market for foreign lawyers. Overall, Prof. NOTTAGE views Japan as an example of "localised globalism" or "glocalisation" and expects that its focus will remain on early dispute settlement as well as on time and cost efficiency. In the final third of part I, Prof. NOTTAGE reflects on Australia's bid to become a competitive arbitral venue. He considers Australia's 2010 amendment of its Arbitration Act, originally based on English arbitration law by adopting the UNCITRAL Model Law as well as recent pro-arbitration decisions by Australian courts. As in the case of Japan, Prof. NOTTAGE sees a need for further changes in Australia in order for it to establish itself in the arbitration market, and he makes salient proposals for how it may do so.

In part II, comprising another 100+ pages, Professor NOTTAGE assesses the polarisation between ICA and ISA, often juxtaposing the two regimes and drawing direct comparisons. He observes a prevailing "power law" dynamic which has resulted in a dominant class of actors in the field, and notes the continuous challenges of costs and delays, which are particularly

noticeable in ICA due to strict confidentiality and an absence of dispute resolution alternatives. On the other hand, Prof. NOTTAGE observes a growing trend towards transparency and other kinds of reforms – especially in ISA. His overall prognosis, presented in the form of a weather forecast, remains positive: "mostly sunny" with "some cloudy weather" and possible "thunderstorms" (particularly in ISA), which Prof. NOTTAGE expects to eventually "pass over".

The last 100+ pages, comprising part III, deal with Asian ISA and investment treaty practices. In Prof. NOTTAGE's view, this field's future remains uncertain. Some countries such as Australia remain highly ambivalent to ISA while others, for instance Japan, have shown a general openness to it. With regard to investment treaties, Prof. NOTTAGE notes Japan's increasing flexibility in adopting treaties both with (e.g., CPTPP) and without (e.g., Japan–Australia EPA, RCEP) ISA while rejecting what he considers to be too far-reaching reforms such as an EU-style investment court. He views Australia similarly to Japan, observing that ISA has gained recognition but proposing a more structured and careful approach to treaty drafting to restore consensus on the use of ISA. He then provides a detailed account of efforts as early as 2014 (including through a recommendation paper he prepared) to encourage the Australian government to develop a model investment treaty. Among other things, Prof. NOTTAGE sees the EU's investment court as a possible model for compromise. At the same time, he argues – convincingly – that rather than throwing out the baby with the bathwater, a better approach would be to incrementally reform the existing ISA system through careful drafting of treaties and model bilateral investment treaties (BITs). The closing chapter looks at the impact of COVID-19 on international arbitration. Despite the recent rise of virtual hearings and the diversification of arbitral seats, Prof. NOTTAGE does not expect this 'new normal' to persist long-term. His recommendation, particularly to Japan and Australia, is for jurisdictions to use this experience to increase visibility as attractive emerging venues and continue governmental cooperation.

Professor NOTTAGE's book offers a genuine *tour d'horizon*, with insights going far beyond the two jurisdictions of Australia and Japan. It provides a fascinating analysis of the development of commercial and investment arbitration over the last two decades. While it does consist of previously published articles, this book is much more than a mere collection of past publications. Many chapters have been considerably updated, and introductory footnotes as well as an overview chapter mould the patchwork of contributions into a single coherent treatise. For some readers of this new book, certain passages may of course read as somewhat dated and, despite the added updates, could probably have been condensed. As a whole, however, Prof. NOTTAGE's book squarely delivers what the preface promises: "com-

parative, historical, interdisciplinary and doctrinal perspectives" on ICA and ISA in Australia and in Japan.

******

The second book, entitled "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution", is edited by Professor NOTTAGE together with Professor Dr Shahla ALI from the University of Hong Kong, and associate professors Dr Bruno JETIN and Dr Nobumichi TERAMURA from the University of Brunei Darussalam. It compiles fifteen self-contained chapters written by expert practitioners and scholars from the region. About half of the chapters are authored or co-authored by the editors, showing their deep involvement not only in conceptualising but also in authoring the book. While there seems to be a slight bent toward Australia and Japan, this publication focuses on hot topics and initiatives in the wider Asia-Pacific region, including recent investment treaties (chapters 5, 11, 12) and the Belt and Road Initiative (chapters 6–7) as well as other international instruments such as the Singapore Convention on Mediation (chapter 14). As a helpful overarching theme, the book contains observations on potential or needed reforms as well as on the attractiveness of various jurisdictions as settings for dispute resolution. The concluding observations (chapter 15) string the various contributions together by examining whether Asian states will pave the way for modernisation and innovation in the context of global dispute resolution.

Chapter 1 describes the rise of trade and foreign investment in the Asia-Pacific region, which led to the somewhat belated proliferation of international investment agreements and the increase of investment arbitration disputes, as well as an emergence of regional arbitration centres and ADR services. Chapter 1 also contains helpful summaries of the following chapters, placing them in the relevant context of the overall analysis.

The next four chapters focus on Australia. The authors of chapter 2 make the case for the establishment of an Australian international commercial court ("AICC") as an alternative to ICA. The proposal for an AICC follows similar trends in the region, including in Singapore, Dubai, and Abu Dhabi, and such a commercial court has been seen as a potential tool for resolving commercial disputes swiftly, among other things via online litigation. Nonetheless, as the authors themselves recognise, the future and success of such an AICC will much depend on further government support and judicial cooperation in the area. Chapter 3 considers ways to enhance Australia's position as a regional ICA hub. In the authors' view, Australia will have to overcome the key challenges of geographical remoteness and fragmentation of its legal systems, which it can achieve through reforms entailing the legalisation of indemnity costs for failed challenges to awards, empowerment of Australian courts to issue subpoenas to support foreign arbi-

tration, limitation or exclusion of the application of consumer protections to cross-border business-to-business disputes, and centralisation of judicial power for ICA appeals.

Chapter 4 addresses the topics of confidentiality and transparency in international arbitration, particularly in Japan and Australia. Despite substantial differences in scope and procedure, Prof. NOTTAGE notes a general strengthening of confidentiality in ICA, as opposed to in ISA. However, in his view, confidentiality remains a "double-edged sword" and greater arbitrator (and counsel) transparency would be required to enhance predictability and legitimacy. Chapter 5 updates readers on Australia's latest investment treaty practices and ISA policy. Australia's treaties generally follow contemporary US-style drafting (exemplified in the TPP/CPTPP) aimed at enhancing host state rights. Notable innovations include provisions for investor-state mediation in Australia's treaty with Indonesia and extensive transparency obligations following its ratification of the 2017 Mauritius Convention.

The next three chapters introduce Hong Kong's and China's international arbitration practices, in particular the Belt and Road Initiative ('BRI'). Chapter 6 considers Hong Kong's future as an ICA and ISA hub. Emphasising its unique relationship with and position as a gateway to Mainland China, the author sees the potential for Hong Kong to become an attractive location for BRI-related disputes. Chapter 7 makes the case for harmonisation and clarification of the public policy exception, particularly for BRI-related ICA. Contrasting the status quo with the EU's and OHADA's approaches to public policy, the author suggests introducing a negative list to reduce uncertainty. Chapter 8 continues with a critical analysis of China's recent efforts to promote its courts and its laws – particularly with the advent of the BRI. Its initiatives include online and integrated dispute resolution services as well as the brand-new China International Commercial Court specialising in commercial litigation and appeal and enforcement proceedings for arbitral awards. China is also hoping to attract ISA disputes. The author does not pass up the opportunity to emphasise the need, however, for more judicial expertise and less political conformity.

Chapter 9 describes Malaysia's latest efforts, albeit still in their early stages, to participate in ISA and to align its legal framework to the international standard. The next two chapters deal with Japan. Revisiting Japan's historical aversion to confrontation and preference for harmony and amicable settlement, Chapter 10 assesses its recent move to establish itself as a regional hub for international dispute resolution. The authors conclude that Japan will require targeted marketing and a continuous, coordinated effort to enhance specialisation before it will be able to compete with established hubs such as Hong Kong and Singapore. Chapter 11 contains an overview of Japan and Korea's long-standing WTO-related and other tensions as well as potential

dispute settlement alternatives. In light of the complexity and delicacy of the situation, the authors suggest the parties seek to resolve their disputes through mediation. Chapter 12 focuses on India's stance toward ISA since its denunciation of investment treaties and institution of reforms towards greater reliance on domestic and trade-based remedies. The author questions whether such reforms will provide the level of protection required by individual investors or complement India's overall growth and development.

Chapter 13 concerns the very timely yet still somewhat exotic topic of the (lack of) enforcement of public health and environmental protection measures. In the authors' view, regional free trade agreements (FTAs) could address this problem through incorporation of soft law and a strong dispute resolution mechanism. Chapter 14 then looks at ways to enhance the promotion of mediation following the implementation of the Singapore Convention on Mediation.

The final chapter, Chapter 15, concludes that the Asia-Pacific region is in the process of transforming itself from a rule-taker to a rule-marker, albeit at varying speeds across the examined six jurisdictions. It posits that in the age of COVID-19, Asian jurisdictions should make active use of the associated opportunities and new forms of dispute resolution (including online hearings and mediation) to resolve technological, economic, and socio-political challenges. At the same time, issues unrelated to the pandemic (concerning arbitrator diversity, transparency, environmental protection, and cost/time inefficiencies) remain and will also have to be dealt with to expand Asian-Pacific international dispute resolution frontiers.

The editors, professors NOTTAGE, ALI, JETIN, and TERAMURA, have put forward a treatise which, befitting its title, pushes new frontiers. The reviewers are not aware of any other book which provides such current and comprehensive insights into recent dispute resolution developments in Australia, China, Hong Kong, Japan, India, and Malaysia, arguably some of the key jurisdictions in the Asia-Pacific region, even if some might argue that the book could have been even broader in its jurisdictional scope. Be that as it may, particularly practitioners from outside the Asia-Pacific region will benefit from the analyses when deciding on the best possible venue and dispute resolution method. While international arbitration features prominently in the publication's title, readers are treated to a comprehensive assessment of dispute resolution methods spanning commercial courts, BRI dispute settlement, and mediation as well as commercial and investment dispute resolution options. Considering its expert observations and analytical depth, the book can be highly recommended to newcomers and experts on Asia-Pacific dispute resolution alike.

******

This leaves the difficult final question of whether the libraries of those interested in Asian-Pacific dispute resolution should contain both books, or whether one should be recommended over the other. As so often, the answer is: it depends. Readers with a focus on Australia may want to only pick one, as some contents overlap (e.g., chapter 8 of the first book and chapter 4 of the second book). For a highly topical and practical overview of challenges and developments in international arbitration in the Asia-Pacific region, "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution" would appear to be an indispensable choice. However, for the usually Japan-focused readership of Journal of Japanese Law, the treatise "International Commercial and Investor-State Arbitration – Australia and Japan in Regional and Global Contexts", in spite of (or maybe precisely because of) some of its empirical and historical detours, might offer deeper and more principled academic insights. For anyone still undecided, the reviewers suggest that both books offer uniquely valuable content and approaches and therefore provide indispensable guidance on commercial and investment arbitration – as well as on other dispute resolution methods – in the Asia-Pacific region, and particularly Australia and Japan.

Lars MARKERT / Anne-Marie DOERNENBURG*

* Dr. Lars MARKERT, Rechtsanwalt und Partner, Nishimura & Asahi, Tōkyō; Anne-Marie DOERNENBURG, Rechtsanwalt und Associate, Nishimura & Asahi, Tōkyō.