NOTES & INFORMATION

BOOK REVIEW:

COMPARATIVE LAW OF INTERNATIONAL ARBITRATION

Second Edition by Prof. Jean-François Poudret and Dr. Sebastien Besson

*Reviewed by Christopher R. Seppälä and Olga Mouraviova**

"*Comparative Law of International Arbitration*" by Prof. Jean-François Poudret and Dr. Sebastien Besson is a second edition in English of their highly- respected "*Droit compare de l'arbitrage international*" which was published in French in Switzerland in 2002. The new edition in English is described as a "second edition updated and reviewed" by Messrs. Poudret and Besson and translated by Prof. Stephen V. Berti and Ms. Anette Ponti. The authors have taken this opportunity to review and update the first edition, which quickly became very popular among scholars and practitioners in international arbitration who are able to read French.

The second edition in English is, equally, an indispensable tool for every practitioner in international arbitration as it offers an invaluable Swiss perspective on the comparative law of international arbitration.

The second edition (like the first edition) of Messrs. Poudret and Besson's book is organized in 11 chapters and in a manner that will be familiar to civil law lawyers. It begins with Chapter 1, the "Definition and Sources of International Arbitration", and proceeds to the subsequent chapters as follows:

Chapter 2 - The Law Governing the Arbitration ("*lex arbitrii*") and the Role of the Seat of the Arbitral Tribunal
Chapter 3 - The Arbitration Agreement
Chapter 4 - The Arbitral Tribunal
Chapter 5 - Control of the Arbitral Tribunal's Jurisdiction
Chapter 6 - The Arbitral Procedure
Chapter 7 - The Law Applicable to the Merits of the Dispute
Chapter 8 - The Award
Chapter 9 - The Judicial Control of the Award by the Court of the Seat of the Arbitration

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Stockholm International Arbitration Review 2008:2, 193-196,

Chapter 10 - Recognition and Enforcement of Arbitral Awards
Chapter 11 - General Conclusions

This structure is similar to that followed by this Swiss book's French counterpart, "*Fouchard, Gaillard, Goldman on International Commercial Arbitration*" edited by Emmanuel Gaillard and John Savage (1999), which is hardly surprising as they both reflect a civil law approach to international arbitration. However, it is interesting to compare this new English edition of "*Comparative Law of International Arbitration*" to what is perhaps the other leading recent text on the same subject: "*Comparative International Commercial Arbitration*" by Julian D.M. Lew, Loukas A. Mistelis, and Stefan M. Kröll, common law and/or civil law lawyers, published in 2003. Both books represent monumental works of research in the field of comparative law and have the same aim of comparing different legal systems and their arbitration rules in the field of international arbitration.

However, the approach to international arbitration of these two groups of authors is very different, not to say opposite. This can be seen most clearly from the preface or foreword to each book. The Preface to the work of Messrs. Poudret and Besson states that:

> The idea of an arbitration proceeding being detached from national jurisdictions and governed by a transnational arbitration order is certainly interesting from a theoretical standpoint, but it does not reflect the reality of arbitration law or practice today.

In their Foreword, Messrs. Lew, Mistelis and Kröll could hardly express a more different approach:

> International arbitration has become independent from national laws and courts in practice and legally. Parties and arbitrators do, in the main, conduct proceedings in a rarefied non-national or international legal environment. Whilst there may, in some cases, be influences from national law on the procedure, this can be controlled by the parties, the arbitrators and international practice. Experienced arbitration lawyers and the major international arbitration institutions have recognised national procedural laws are generally irrelevant and inapplicable. These international practices are acknowledged and upheld by arbitration awards being recognized and enforced under the New York Convention.

From these two quotations, one could well wonder whether these two groups of authors are writing about the same field of law.

Returning to the work of Messrs. Poudret and Besson, it provides a well informed analysis and comparison of the UNCITRAL model law and the arbitration laws of eight European countries, namely, Belgium, France,

Germany, Great Britain, Holland, Italy, Sweden and Switzerland, as well as an analysis and comparison of the main international treaties in the field of arbitration. There are also some references to other legal systems, such as to U.S. federal law, although the attention given to civil law legal systems in the analysis leaves relatively limited space to common law systems.

Chapter 11 containing "General Conclusions" is especially useful and stimulating. This chapter presents an assessment of the similarities and differences in the arbitration laws of the eight countries discussed, as well as the authors' views on improvements that could be made to such laws and of where harmonization is desirable. While the discussion is of a high standard, occasionally one may find the authors' comments on the practice of arbitration surprising. Thus, on page 879 (paragraph 965), the authors state:

> Despite the allure of the name, discovery is rarely practiced and the civil law method of producing documentary evidence is generally preferred. [Emphasis added.]

In our experience, discovery in the sense of the production of documents as provided for in the "*IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999)*" is quite widespread in international arbitration.

Producing a book that not only compares a variety of different legal systems but also in a language (English) other than the one (French) in which it was originally was written is a very challenging undertaking and, inevitably, some slips have occurred. Without wishing to suggest that this work is not generally of the very highest quality, one example of a confusion that seems more than merely linguistic is the authors' treatment of the notion of "expert determination".

On page 14 (paragraph 15) of their book, they define expert determination as a situation where an expert gives an "opinion" binding on the parties, whereas expert determination as it is commonly used in English refers to a situation where an expert does not merely give an opinion but makes a "decision" that is binding (at least, usually) on the parties. The most authoritative book in English on the subject defines expert determination as "a means by which the parties to a contract jointly instruct a third party to decide an issue between them."[1] Klaus Sachs explains in his article "*The Interaction between Expert Determination and Arbitration*", published in the ASA Special Series No. 24 of May 2005 on page 235, that in an

[1] John Kendall, Clive Freedman, James Farrell, *Expert Determination*, Fourth Edition, Sweet & Maxwell, London, 2008, 1.

expert determination, the expert is called on "to make binding decisions on specific matters" [emphasis added].[2]

In conclusion, in the view of the undersigned, this book is an outstanding study of the comparative law of international arbitration, primarily from a civil law viewpoint, as it is a work of scholarship of the highest caliber. If the authors should in the future produce a new edition in English, as we hope (for there continues to be a shortage of books in English providing a civil law perspective on international arbitration), their work would not suffer if they were to add a co-author from a common law country, as the book is likely then to provide an even broader perspective on the comparative law of international arbitration. This being said, the new edition of the "*Comparative Law of International Arbitration*" by Messrs. Poudret and Besson is undoubtedly one of the most impressive works on international arbitration available today and every serious practitioner needs to have a copy of it to hand.

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[2] From the point of view of editing, some comments must be made for which the publishers (not the authors) are to blame. Why cannot legal publishers – and they are practically all to blame, at least outside the U.S. – make it clear whether the references in the table of contents, in the table of cases and arbitral awards and in the indexes are to paragraph numbers or to pages? To this end, it would greatly facilitate the use of every law book if it were stated at the top of every page of the table of contents, the table of cases and arbitral awards and the index what method of referencing is being used (U.S. law books generally do this as a matter of routine: *e.g.*, compare pages 913 to 931 of the index of Thomson / West's *International Commercial Arbitration*, Third Edition (2006) by Tibor Varady, John J. Barcelo and Arthur T. von Mehren, published in the U.S., with pages 939 to 952 of the index of the present book published by Thomson / Sweet&Maxwell in England). In Europe, readers are forced to waste a lot of time turning back to the first page of the table of contents or the table of cases and arbitral awards or the index, as the case may be, to find out what method of referencing is being used (and even then, in the case of the book under review, the method of referencing is not always clearly indicated even on that page). This should be a simple matter for law book publishers to correct if they turned their mind to it and would save lawyers a lot of valuable time.

The book contains a general bibliography on international arbitration at the end and special bibliographies on the issues developed in each of the chapters, which is very helpful for the reader. However, the way the references within the chapter are organized do not allow an easy referral to sources, as the only information given in the footnotes is the author and the page number of its article or book. To find out exactly which article or book is referred to, one needs to go back to the first page of the chapter (not indicated in the reference), which is quite impractical and causes the reader to lose a considerable amount of time.

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