BOOK REVIEWS

The French Law of Arbitration *by* JEAN ROBERT and THOMAS E. CARBONNEAU. *Published by Mathew Bender, New York, 1983 (Nine Chapters plus Preface, Table of Contents, Appendices, Selected Bibliography and Index). Price $75 US.*

A Swiss-American Perspective of a Franco-American Treatise

Gallic arbitration law holds a special fascination for the student of international commercial dispute resolution, whether scholar or practitioner, connoisseur or novice. France's popularity as an arbitration situs may explain some of this interest.[1] However, the deeper intellectual significance of the subject probably lies in the historical richness of the French judicial and legislative elaboration of a special status for international commercial arbitration. The development of French arbitration law represents a paradigm of the modern trend toward 'delocalised' procedure,[2] in which arbitral autonomy is restricted by only a bare minimum of local procedural imperatives.

The French Law of Arbitration is a first-rate adaptation of Jean Robert's classic treatise on French arbitration law, first published in 1937, and now in its fifth edition.[3] But it is much more. The authors' guide to the interaction of judge and arbitrator in France provides an interpretation of civil law concepts for the common law mind that constitutes valuable scholarship in its own right. The work is an intellectually rewarding, practically useful, and elegantly styled contribution to the growing literature in the field.[4] This effort illustrates the potential for fruitful co-operation among comparativists from divergent backgrounds, and should stimulate further inquiry into broader questions relating to the way curial norms of the place of arbitration apply to international arbitral proceedings.

The experience, talent and credentials of the authors, as well as the reputation of Columbia's Parker School, under whose auspices the book was published, would lead one to expect a quality book. This expectation is not disappointed. Jean Robert has been a distinguished member of the Paris bar for well over half a century. Thomas Carbonneau is a tenured member of the faculty of Tulane Law School and Assistant

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1 France has been selected as a place of arbitration in about a third of the recent arbitrations conducted under the rules of the International Chamber of Commerce. See W. Craig, W. Park and J. Paulsson, *International Chamber of Commerce Arbitration* (1984), Appendix I, Table 7 for the three years 1980, 1981 and 1982.

2 The apogee of this trend is Decree No. 81–500, of 12 May 1981, which followed by one year a revision of domestic arbitration law in Decree No. 80–354, of 14 May 1980. On the 1981 Decree, see generally Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981,* in *Resolving Transnational Disputes Through International Arbitration* (Sixth Sokol Colloquium) (T. Carbonneau, ed., 1984); and Goldman, 'La nouvelle réglementation francaise de l'arbitrage international', in *Essays on International Arbitration, Liber Amicorum for Pieter Sanders*, (J. C. Schultsz and A. J. van den Berg eds. 1982).

3 Robert, *L'Arbitrage: droit interne et droit international privé* (5th ed. 1983).

4 Other recent works include M. de Boisseson, *Le droit francaise de l'arbitrage* (1983) and Jean-Louis Delvolvé, *Arbitration in France* (1982).

Director of the Eason-Weisman Center for Comparative Law, with a long string of excellent articles on international arbitration.

The first part of the book is devoted to domestic arbitration. The second part deals with the peculiarities of international arbitration. Both have extensive notes of important cases, a feature which is particularly appealing to the Anglo-American jurist accustomed to judicial precedent.

The authors' academic approach emphasises the law's conceptual development. This does not mean, however, that the book will not be useful to practitioners. On the contrary, the historical analysis of the law contributes to an understanding of its function and application. It is easier to understand the 'how' of a rule if one understands its 'why', or at least its genesis.

At times, however, the authors pay too much attention to the historical background. For example, discussions of applicable law include numerous references to the troublesome conjunction in Article 2 of the 1923 Geneva Protocol: 'The arbitral proceeding . . . is governed by the will of the parties *and* the [local] law . . .' (See, eg, pages II: 1–7, II: 2–11 and II: 4–3).

The Nouveau Code de Procédure Civile (Articles 1494 and 1495) permits parties to international arbitration, by establishing their own procedure, to avoid many dispositions of French law. This freedom leads the authors to focus on the 1981 Decree (Nouveau Code de Procédure Civile, Articles 1492–1507), and the 'specificity' of international arbitration is a theme running through the entirety of the treatise's second part. Nevertheless, some elements of French procedure are inescapable, and the book admirably identifies these mandatory norms of the *lex loci arbitri*. The authors deal, *inter alia*, with provisions relating to the agreement to arbitrate, the composition of the arbitral tribunal, the applicable law, and all aspects of the award, including its recognition and enforcement and procedures for challenge.

The French procedure for challenge of international awards (Nouveau Code de Procédure Civile, Articles 1502 and 1504), covered in the chapter on 'Recourse', generally promotes the integrity and the rigor of the arbitral process, through respect for due process, party-set limits on arbitral authority, and those elements of French public policy applicable to international transactions (*ordre public international*). These grounds for challenge have analogues in the United States (9 USC § 10), England (Sections 22 and 23 of the Arbitration Act of 1950 and Section 1 of the Arbitration Act 1979), and Switzerland (Article 36, Swiss Intercantoral Arbitration Concordat). The next edition of the book might provide a more detailed comparison of these non-French counterparts of the French grounds for challenge, which could provide a springboard for a more general discussion of recent developments in the interaction of judge and arbitrator.

The authors face squarely the intellectual difficulty of distinguishing between error of law and excess of authority, and the necessity of dealing vigorously with the latter. The authors note that for an arbitrator to take 'egregious interpretive liberties with the parties' agreement . . . undermines the consensual nature of the arbitration process . . .' (Page II: 8–16). To protect the parties' rights in this area, a court may be required to run 'perilously close to a merits review'. (Page II: 8–16). Distinguishing between error of law and excess of authority does not lend itself to a facile formula – at least none that is entirely honest intellectually. Yet courts are in the business of drawing lines and making judgment calls. It would have been interesting to have authors' views of how French judges fare in this endeavour relative to their brethren in other popular arbitral locations.

Translation of French concepts into English (and *vice versa*, of course) is always problematic. However the authors may have complicated matters unduly. *Clause compromissoire* is sometimes rendered 'compromissory clause' (Page II: 1–3), when the customary English term 'arbitration agreement' would do quite well. Translation of Nouveau Code de Procédure Civile Article 1497 (App. B-17), renders *amiable compositeur* as '*ex aequo et bono*'. Yet the term is left *amiable compositeur* in the part of Article VII of the European Convention that inspired Article 1497. In many places the authors might have left the French original in parentheses next to the English translation. For example, in discussing actions to annul the award (Section 8.04 – Page II: 8–17) the authors might have given the French for 'annulment action' – *recours en annulation* in Article 1504 of the original – in the same manner that they left *tierce opposition* in their discussion of recourse under old Article 1028 (Section 8.01 – Page II: 8–2).

The authors' view of 'floating' or 'a-national' awards derives from their concept of party autonomy. They conclude, 'Once an international award cannot be localised objectively in a given country because of a lack of sufficient contact with any one country, there are no applicable rules of procedure relating to the form and content of the award – except for those established by the parties or the regulations of an arbitral institution.' (Page II: 6–8). Such a statement probably takes party autonomy beyond the frontiers of the law as it is today – from *lex lata* to proposal *de lege ferenda*. Some local procedural requirements – such as the requirement of a reasoned award (Article 1471) – clearly may be waived. (Waiver is permitted under Nouveau Code de Procédure Civile Article 1495). But what of other matters? May the award in a 'delocalised' arbitration include decisions on questions never submitted to the tribunal? Would not such an award, annulled by the Court of Appeal under Article 1504 on one of the five grounds set forth in Article 1502, (eg . . . absence of a valid arbitration agreement) be in some sense a 'French award' even though the parties and the subject of the dispute were non-French? Treatment of the *SPP v. Egypt* case[5] in the next edition should also provide a focus for a fuller treatment of the issue of a-national awards: whether an award annulled in its country of origin will be enforceable abroad. On the same day that the Cour d'Appel annulled the SPP award, a court in Amsterdam granted its *exequatur*. One can only speculate about what would have happened if annulment had come earlier.

The erudite chapter on choice of law covers both procedural and substantive law. The authors present several alternative approaches to the choice of law problem, and comment on the link between Article VII of the European Convention and Article 1496 of the Nouveau Code de Procedure Civile, and on the role of commercial custom and usage in the arbitral process. The role of *lex mercatoria* in the choice of law process is discussed with enlightening references to the work of such eminent scholars as Professors René David, Berthold Goldman, and Philippe Kahn.

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5 *SPP v. Egypt* (14 July 1984) dealt with an agreement to build two tourist complexes, one of which was near the pyramids. The court set aside an ICC award rendered against the Egyptian State, ruling that the Egyptian Ministry of Tourism did not agree to arbitration. The Ministry's ratification of the agreement containing the arbitration clause was construed merely as approval of the project in a supervisory capacity. An English translation of the case by Professor Emmanuel Gaillard may be found at 23 *ILM* 1048 (1984). A translation of the Dutch sequel by A. J. van den Berg appears at 24 ILM 1040 (1985).

One particularly interesting aspect of French procedure, which applies to international arbitrations only if subject to French procedural law, is the prohibition on dissenting opinions, imposed by the requirement of the secrecy of the proceedings.[6] Less than a page is devoted to dissenting opinions. (Section 6.07 on page II: 6–14). Dissents are not unfamiliar to America lawyers,[7] and are known in ICC[8] and ICSID[9] practice. The book would benefit from more exploration of the policy considerations that lead the French to their position. The following questions might provide avenues for discussion: (i) should a legal system impose a prohibition on dissents? (ii) should there be provision for dissents in a national arbitration statute? (iii) should dissents form part of the award? (iv) should dissents be favoured or disfavoured? (v) should answers to these questions vary according to whether the arbitration is domestic or international?

Dissents may further the rigour and integrity of the arbitral process by exposing the arbitrator's reasoning to the light of public scrutiny. Scrutiny may be particularly important to confidence in the arbitral process in developing countries whose lawyers are not part of the emerging caste of professional arbitrators. This stimulus to rigorous legal reasoning (one is more careful in a debate than a monologue) may also further the creation of *lex mercatoria* and a general system of international arbitral precedent.

On the other hand, dissents (and written opinions of any sort) may serve as dangerous invitations to judicial inquiry into the validity of the award, which may be abused by a losing party seeking to have the award set aside.[10] Moreover, dissenting opinions raise the risk of a breach of the privacy that may have impelled the parties to arbitrate rather than to litigate. Increased disclosure of potentially confidential facts is always a danger when another opinion is written, particularly if its author has an apologetic axe to grind.

The authors might also discuss the implications of alternative judicial sanctions that might be used to enforce secrecy (*secret du délibéré*) when it is imposed. Is the annulment of the award an effective deterrent? Or will annulment merely reward the minority dissenter, with delight in the result he seeks? A dissenting opinion may give the loser a 'back door' through which to have the award set aside if 'his' arbitrator will go along with the scheme.

Dissenting opinions raise policy considerations that are not unrelated to those raised by the requirement of reasoned awards (Nouveau Code de Procédure Civile, Article 1471), which parties to international arbitration may waive. In a recent article,

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6 On the *secret du délibéré*, see generally M. de Boisesson, *Le droit francais de l'arbitrage* (1983), Sections 342 and 343. It is worth noting that the French view of dissents is not necessarily shared by their Swiss neighbours. Article 24 of the Intercantonal Arbitral Concordat provides that gaps in the arbitral rules of procedure are to be filled by analogy to the Federal Act on Civil Procedure. In contrast to cantonal practice, federal judges express their views openly in public deliberations.

7 In *Mobil v. Asamera*, 391 N.Y.S. 2d. 614 (1977) at 615, a New York state court reviewing an interlocutory award referred to the dissenting arbitrator's views.

Howard Holtzman notes: 'It is not the usual practice for dissenting opinions to be written, although there is no provision in the statutes or AAA Rules which prevents a dissenting arbitrator from doing so.' Holtzmann, US National Report, II *Yearbook of Commercial Arbitration* 132 (1977).

8 See Chapter 19.06 of Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (1984).

9 See the dissenting opinion by Professor Schmidt in *Klockner v. Cameroon*, and comment thereon by Niggemann in 1 *J. of International Arbitration* 331 (1984).

10 Robert Coulson notes, 'Written opinions can be dangerous because they identify targets for the losing party to attack.' Coulson, *Business Arbitration – What You Need to Know*, at 25 (1982).

Professor Carbonneau has called into question the English practice (generally followed in the US) of rendering awards without reasons.[11] Professor Carbonneau argues that reasoned awards contribute to the development of a truly international legal order. In his vision of a transnational *stare decisis*, awards become part of an objective corpus of international arbitral law. Dissenting opinions might likewise contribute to the emerging body of transnational case law.

Of course, to state that the authors should have inflated the section on dissents and reasoned awards is partly to indulge in the classic temptation of inquiring why the authors wrote a different book from the one the reviewer might have written.

The treatise concludes with a superb chapter on public policy, with a section on the concept of international arbitration (Chapter 9.07), which in and of itself makes the book an essential part of any arbitration lawyer's library.

High praise is due for the completeness, clarity and erudition of this treatise. The second edition might include more emphasis of the differences between French, English and American law and greater evaluation of their policy underpinnings. But there can be no cavil as to the treatise's lucidity, comprehensiveness and eminent value to the community of comparativist legal scholars, as well as judges and legislators in other countries contemplating revision or re-interpretation of their own arbitration law.

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William W. Park**

Interim Protection – A Functional Approach *by* JEROME B. ELKIND.
Published by Martinus Nijhoff, Netherlands (1981, 261 pp.). Price $55 US.

The various bodies of rules that regulate international arbitration often empower arbitral tribunals to order provisional measures, yet typically offer few, if any, guidelines as to how this authority should be exercised. As a result, international arbitral tribunals may be compelled to seek out commonly accepted international principles to guide them in the granting of interim relief. The question then arises whether there are any general principles in the area of interim protection.

Dr Elkind's interesting and carefully reasoned book, while focused on the rather more limited question of the manner in which interim measures have been, and should be, ordered (or suggested) by the International Court of Justice, offers an affirmative answer to the question of whether general principles of interim relief may be identified, and then proceeds to an analysis of the circumstances in which interim relief may be ordered under international principles.

Article 41 of the Statute of the ICJ authorises the court to 'indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to

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11 Carbonneau, 'Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions', 23 *Col J. of Transnational L.* 579 (1985).