REVIEW OF GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS (WOLTERS KLUWER, 2011)

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Arbitration is a preferred mode of settlement of international disputes, be it between states or business undertakings, particularly as it provides an 'expeditious, efficient and expert' mechanism for resolving disputes. As the author of the book under review points out, the 'striking success' of arbitration as a means for resolution of disputes is evidenced by the growing numbers of arbitrations, use of arbitration clauses, preference for arbitration by businesses, adoption of international conventions and national legislations and the application of arbitration to newer categories of disputes.[1] The casebook under review entitled *International Arbitration: Cases and Materials* seeks to provide an introduction to the 'contemporary constitutional structure', law, practice and policy of international arbitration. The book focuses on international commercial arbitration but also covers inter-state and investor-state arbitrations.

The author, Gary Born, is 'the world's pre-eminent authority on international commercial arbitration', has participated in over 550 international arbitrations including ICC and ad hoc arbitrations[2]. He has served as an arbitrator in over 150 institutional and ad hoc arbitrations and has vast teaching experience.[3]

A significant feature of the book is that it does not focus on any particular jurisdiction; rather it deals with the subject from an international perspective, covering international standards and practices, including cases, rules and legislative provisions from various jurisdictions, highlighting their contributions to international law and practice. The author is of the opinion that national legal systems' treatment of international commercial arbitration "forms a common corpus of arbitration law", and emphasises the need for national courts to continue to consider each other's decisions in this regard.[4]

The book comprises of an introduction and 15 chapters classified into three parts, dealing respectively, with arbitration agreements (chapters 2-6), arbitration proceedings (chapters 7-13) and arbitral awards (chapters 14-16). In addition, a

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[1] GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 36 (Wolters Kluwer, 2011) [hereinafter BORN].

[2] Gary Born-Biography, WILMER HALE, http://www.wilmerhale.com/gary_born/ (last visited Mar. 12, 2012).

[3] BORN, s*upra*note 1.

[4] *Id.*

documentary supplement is provided which contains the texts of various international conventions and national arbitration statutes as well as texts and extracts from institutional arbitration rules and other rules, guidelines and notes of the UNCITRAL, IBA, etc., referred to in the main volume.

The introductory chapter sets out the historical development of arbitration as well as provides an overview of the major international conventions and instruments forming the 'constitutional framework of international arbitration', domestic legislation (both 'supportive' and 'less supportive' of international arbitration), basic provisions of arbitration agreements, and choice of law issues, highlighting basic provisions, distinctive features and their contributions to the development of the international arbitration framework. The chapter commences with an interesting account of the historical usage of arbitration which has been utilised in the resolution of international disputes, both commercial and inter-state, since antiquity[5] and many features and reasons behind the use of which share similarities with the current system. The author also points out that in certain periods in the 19th century, there was hostility towards arbitration in many jurisdictions including England and the US, resulting in limitations, both judicial and legislative, being imposed. The chapter provides an overview of the features, pros and cons, of institutional and ad hoc arbitration. Another helpful tool for both students and researchers is the overview of sources of information on international commercial arbitration.

The first section, which addresses 'international arbitration agreements' looks into a range of issues relating to the legal framework, fundamental principles such as separability and competence-competence, the role of reciprocity; formation and validity of agreements, their interpretation, non-signatory issues and the allocation of competence in dealing with non-signatory issues. Arbitration proceedings are the focus of the second section which covers various aspects regarding the arbitral seat (such as meaning, importance, and selection), the selection, qualifications and removal of arbitrators; procedural issues (including exercise of procedural authority, evidence, discovery, confidentiality and judicial review); choice of substantive law on the merits of the dispute; representation, and standards and supervision of professional conduct. The final section of the book covers arbitral awards: their framework, amendment and revision, recognition and enforcement. This section discusses presumptive finality, grounds for annulment, grounds for refusal of recognition and the issue of reciprocity.

Each chapter discusses several issues through relevant extracts from international conventions, domestic legislations, treatises, case law and arbitral

[5] In fact, the author also cites instances in Greek mythology where arbitration was used for settlement of disputes.

awards from different jurisdictions. Each section is followed by detailed notes by the author highlighting issues and questions and posing hypotheticals arising from the legislative provisions and case law enabling the reader to critically evaluate the principles of international arbitration, legislative provisions and interpretation and approach adopted by the judiciary and arbitrators in that regard. These notes reflect the author's impressive practical experience and scholarly analysis of arbitration law.

The author identifies deficiencies in the current framework and areas where the position of law is not clear, such as the lack of guidance under international conventions and national legislation on what constitutes arbitration agreements[6];non-specification in the New York Convention as to what nation's law or international standards would apply in determining Article (V)(1)(b)'s exception for procedural unfairness;[7] absence of provisions on the preclusive effects which are mandated by Article III or cognitive provisions of the New York Convention with fewer authorities, addressing the preclusive effects of the New York Convention or other international conventions;[8] confidentiality of international arbitration proceedings (which is controversial, unclear, and on which there are no specific provisions in international conventions and also leading arbitration statutes);[9] uncertainty as to the meaning of Article XIV of the New York Convention;[10] absence of provisions in most arbitration statutes, UNCITRAL rules and institutional rules on issues of joinder, consolidation and intervention;[11] lack of express definitions of 'arbitral awards' in international conventions and arbitration legislations;[12] absence of specific provisions in international conventions and national legislations on lack of independence or impartiality or misconduct of the arbitrator as a ground for non-recognition of awards[13] etc.

He also points out areas where although the principle in question has been recognised and accepted in most jurisdictions, the specific implications remain unsettled, for instance, while the positive effects of arbitration agreements, i.e., good faith and cooperation in participating in the arbitration proceedings is recognised, the precise duties implied by it, such as participating in selection of the tribunal, payment of fees, no obstructions or delays in proceedings,

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[6] BORN, *supra* note 1, at 104.
[7] *Id.*at 1169.
[8] *Id.*at 1048.
[9] *Id.*at 971.
[10] *Id.*at 1030.
[11] *Id.*at 893.
[12] *Id.*at 1003.
[13] *Id.*at 1179.

cooperation on disclosure requests, etc is unsettled.[14] Again, though the principle of competence-competence has been accepted in many jurisdictions, there are divergent approaches to allocation of competence to decide jurisdictional issues between arbitrators and courts; although it is agreed widely that awards have binding *res judicata* effects, the precise nature of the effects and the legal sources are debated,[15] while requirements on independence and impartiality of arbitrators are found in most statutes, there is significant variation in the content of these requirements[16] etc.

The importance of various principles and issues in international arbitration law and rationales behind different approaches and principles is also discussed. For instance, the 'profound legal and practical consequences' of location of the arbitral seat on internal matters (party autonomy on substantive and procedural issues, pleadings and evidentiary issues, etc.) and external matters such as setting aside the award[17], rationale for reciprocity reservations under Article I(3) of the New York Convention with regard to enforcement of awards,[18] importance of selection of counsels as there may be restrictions in some laws[19] etc.

The book highlights different approaches taken in various jurisdictions to particular issues, such as divergent approaches to allocation of competence[20], application by some authorities of general choice of law clauses to 'separable' arbitration provisions and refusal by other authorities to do so, particularly, when the choice would invalidate the action; laws applicable to the agreement in the absence of choice of law clauses (most significant relationship and closest connection standards, substantive law of the arbitral seat, cumulative application of all potentially applicable laws, validation principle and international principles)[21]; authorities holding that the arbitral clause may be valid though the underlying contract is not and those taking the opposite view;[22] approaches in different national laws as to consequences of failure to nominate arbitrators[23] etc.

While pointing out the different approaches or principles applied by courts in different jurisdictions, the author does not express specific opinions on their correctness or otherwise but raises issues as to their pros, cons and effects so that the readers may be able to examine the same.

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[14] *Id.*at 265.
[15] *Id.*at 1048.
[16] *Id.*at 653.
[17] *Id.*at 535-36.
[18] *Id.*at 1029.
[19] *Id.*at 965.
[20] *Id.*at 252-55.
[21] *Id.*
[22] *Id.*at 388-89.
[23] *Id.*at632.

Issues that arise in practice, such as differences in terminology used in framing arbitration clauses; 'standard formulae' used in arbitration clauses to describe their scope, such as 'relating to', 'arising under' and their interpretation;[24] practical functioning of leading arbitration institutions including fee structures, appointment of arbitrators, degree of interference on proceedings,[25] etc. are discussed.

In dealing with most issues, as mentioned above, the author views the subject from an international perspective and refers to materials from various jurisdictions. As such, the book may not be relevant for readers seeking to study the subject as treated by a specific jurisdiction. However, it may be mentioned here that the position of law in the US courts is discussed with regard to most issues.

As the book provides an exhaustive analysis of most issues (for instance, in dealing with the issue of choice of a 'foreign' procedural law by parties, the author discusses issues of validity raised by such choice, potential consequences of the parties' choice, meaning of the parties choice of procedural law governing arbitration, potential conflicts from selection of foreign procedural law, etc.[26]), it is not recommended for beginners or those seeking to get a quick overview of arbitration. However, it is of great relevance and forms a 'must read' for researchers and practitioners who need an in depth understanding of the subject and the difficulties and issues arising in practice.

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[24] *Id.*at 475.
[25] *Id.*at 25.
[26] *Id.*at 562-77.