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Review Essay: The Uses of Comparative Arbitration Law

Comparative Law of International Arbitration *by JEAN-FRANÇOIS POUDRET AND SÉBASTIEN BESSON. Published by Sweet & Maxwell (2007).*

by WILLIAM W. PARK* and THOMAS W. WALSH**

The father of modern comparative law, Charles-Louis de Secondat (better known as Montesquieu, author of *De l'esprit des lois*) once suggested that true genius lies in knowing when uniformity is needed and when diversity will be appropriate.[1] The world of international arbitration provides a fertile testing ground for this thesis.

For the true scholar, the study of comparative law serves first and foremost as a source of knowledge to fuel mature reflection. An appreciation of how things are done in other cultures can counteract the silly smugness often engendered by excessive and self-regarding preoccupation with purely local doctrinal disputes.[2]

Moving to the practical world of cross-border dispute resolution, comparative law also provides a powerful tool for designing the legal framework regulating the interaction of judge and arbitrator. By making decision-makers more aware of the spectrum of solutions available to address problems common to several legal systems, comparative law study can suggest options better than the ones already tested in the observer's own space and time. Examining contrasts between national legal systems plays a role in the evolution of judge-made law as well as in drafting uniform statutes. In turn, such legal harmonisation can facilitate

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1 'La grandeur du génie ne consisterait-elle pas mieux à savoir dans quel cas il faut l'uniformité, et dans quel cas il faut des différences?' Charles-Louis de Secondat, Baron de la Brède and de Montesquieu, *De l'esprit des lois* (1747), Bk XXIX, ch. 18. In this context, Montesquieu likely contemplated religious and family law. His paragraph continues, 'A la Chine les Chinois sont gouvernés par le cérémonial chinois et les Tartares par le cérémonial tartare'.

2 Of course, not all comparative scholarship necessarily enlightens, particularly when focused on methodology to the detriment of substantive differences. Compare the approach and propositions suggested in Ugo Mattei and Anna di Robilant, 'The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe' in (2001) 75 *Tulane L Rev.* 1053.

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international economic cooperation by reducing the risks of cross-border economic ventures.[3]

Montesquieu's Helvetic successors (several generations removed) have provided a truly superb example of comparative analysis at its best. Several years ago, Prof. Poudret and Dr. Besson gave the francophone their joint treatise[4] containing an insightful and comprehensive examination of how national laws affect international arbitration. The updated second edition now brings their work to English-speaking lawyers.

What sets this treatise apart is its detailed evaluation of national statutes and case law, skilfully teasing out the nuances in both practice and theory. These two Swiss scholars compare the law in eight countries: Germany, England, Belgium, France, Italy, Holland, Sweden and Switzerland. Occasionally, references are made to the case law and legislation of other nations, including Austria, Spain and the United States. They address the principal treaties in the field, as well as the UNCITRAL Model Law and the more important arbitration rules.

The work is rooted in reality. While acknowledging the continued interest in 'delocalised' arbitration, the authors stress that in practice the arbitral process is usually grounded in the law at the seat of the arbitration.[5] Moreover, despite progress made in the harmonisation of arbitration statutes, the authors note that the differences among these national laws remain significant.[6]

The work does not shy away from controversial topics. For example, the authors deliver a keen critique of the 'group of companies' doctrine thought to have received its present notoriety from the well-known *Dow Chemical* arbitration, where the tribunal permitted a claimant company to join proceedings on the basis of an arbitration clause signed by one of its affiliates. As an initial matter, Prof. Poudret and Dr. Besson note that the decision seems more often cited than followed. They estimate that only one-quarter of the cases surveyed accepted extension of the arbitration clause to non-signatories.[7] The figures are noteworthy when one considers that most such cases implicate obvious grounds for joinder such as fraud, lack of corporate personality and confusion of entities, which would justify extension of the arbitration clause under normal national law doctrines for piercing the corporate veil.

The authors examine both geographical delocalisation (the practice of applying the arbitration law of a country other than the seat) and what might be called legal delocalisation (separation of the arbitration from national systems of procedural law). On each subject they review the limited case law, but without the type of excessive treatment that would throw the readers off the book's more central themes.[8]

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3 *See generally*, Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* [*An Introduction to Comparative Law*], translated from the German by Tony Weir (3rd edn, 1998).

4 Jean-François Poudret and Sébastian Besson, *Droit comparé de l'arbitrage international* (2002).

5 At paras. 120–132.

6 At paras. 972–991.

7 At para. 254.

8 At paras. 121–131.

The treatise addresses every major aspect of commercial arbitration. These include subject matter arbitrability; validity of the arbitration agreement; composition of the arbitral tribunal; jurisdiction; applicable law; and the role of national courts in providing assistance to the arbitral process and judicial scrutiny of the award. Readers will happily find that Messrs. Poudret and Besson organise the treatise by providing chapters addressing each step along the path of an arbitral proceeding. The work includes an introductory chapter on definitions and sources of law, and a concluding review of the differences in the national laws reviewed in earlier pages.

The authors do not hesitate to contend for their own doctrinal preferences, peppering the text with intellectual exclamation points where they feel most emphatic. The principle of *lis pendens*, for example, incites both attention and comment. Messrs. Poudret and Besson spill a decent amount of ink on the complexities arising when courts in one country are asked to recognise an agreement to arbitration in another. These include potential conflicts between courts in the two jurisdictions, and application of the law of a place other than the arbitral seat.[9] The authors propose a legal harmonisation that would tend to reduce the prospect of such clashes.[10]

The learned section on provisional measures is a particular highlight, reflecting much of Dr. Besson's own published doctoral thesis, which not surprisingly was supervised by Prof. Poudret.[11] This section concentrates on three primary issues: the jurisdiction of the arbitrators and of the courts to order provisional measures; measures available to the parties; and enforcement of such measures. In regard to the controversial matter of whether provisional measures ordered by an arbitral tribunal are enforceable under the New York Convention, the authors opine in the negative.[12] In their view, an arbitral order for provisional measures (even if labelled an 'award') cannot qualify as a binding decision under the Convention. For them, provisional measures by their very nature must be subject to judicial review in the national courts where enforcement is sought.

Rich in detail, the book's magisterial treatment of arbitration makes the subject both accessible to the novice and useful to experienced scholars and practitioners. An exemplary discussion of procedural distinctions contrasts the rules applicable to the arbitral tribunal's conduct of proceedings with those of the law governing matters such as judicial review and enforceability, subject matter arbitrability and societal notions of fundamental procedural fairness.[13] The authors address the

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9 At para. 520.

10 The authors note that this solution would be most effective if adopted by convention rather than through the piecemeal amendment of national laws. They consider a revision of the New York Convention as the ideal occasion for unifying the treatment of *lis pendens* in the national laws. *See* para. 998.

11 Sébastian Besson, *Arbitrage international et measures provisoires: Etude de droit comparé* (1998).

12 At paras. 639–640. As the authors note, their position contrasts with the way much legal thinking has evolved in the United States, including the decisions in *Publicis Communication* v. *True North Communications, Inc.*, 206 F.3d 725 (7th Cir. 2005), and *Sperry International Trade* v. *Government of Israel*, 532 F. Supp. 901 (S.D.N.Y. 1982).

13 *See, e.g.*, distinctions between rules governing the conduct of the arbitration and those applied by the national law of the arbitral seat: paras. 523–524.

interaction of the law of the seat and the principle of party autonomy, distinguishing mandatory and non-mandatory legal provisions.

The authors submit that any arbitrator is bound by the mandatory provisions of the arbitral seat, particularly by those the violation of which can result in the setting aside of the award. This approach, they argue, is required in order to respect the implications of the parties' choice of seat and to avoid the setting aside of the award at the place of arbitration, which might reduce enforceability of the award in foreign jurisdictions.[14]

These mandatory procedural rights are expressed in national laws using varied terminology. In France, for example, procedural guarantees are rooted in the 'principle of adversarial proceedings', while Germany draws such rights from the 'principle of equality and the right to be heard'.[15] At a higher level, however, the rights derived from these national formulations remain largely the same. Litigants are generally entitled to submit factual and legal arguments to the arbitrators before the award is rendered. This broad guarantee necessitates subsidiary rights, including access to the opposing party's submissions to the tribunal and the opportunity to express a position on all the factual elements on which the award is based.

The laws part ways over whether the right to be heard provides for both written and oral submissions. For example, Belgium seems to permit waiver of oral hearings, while in the Netherlands a prior waiver would not be effective if one side requests oral hearings.[16] The French seem to take yet another path, allowing arbitrators to content themselves with written submissions in certain circumstances.

The full weight of the authors' enviable experience displays itself in the treatise's final chapter, which assesses the similarities and differences of national law, identifying the more significant conflicts that arise between national courts. The distillation of these differences into a single chapter provides a checklist of issues that law-makers and practitioners may consult easily, and which serious students should be delighted to discover.

In the book's preface, Messrs. Poudret and Besson assert with customary humility their hope that the work has 'contributed' to the understanding of arbitration law. Their magnificent treatise achieves that goal and much more.

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[14] At para. 146.
[15] At para. 547.
[16] At para. 548.