Review of Gary Born's International Commercial Arbitration

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Campbell Mclachlan (Victoria University of Wellington Faculty of Law)

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Gary Born's magisterial new work *International Commercial Arbitration*, published in two volumes this year by Kluwer, represents, in the range and depth of its coverage, and in the rigour and perception of its analysis, the most complete exposition of the law of international commercial arbitration ever available. Yet perhaps the most remarkable thing about this book is what it represents in terms of a coming of age of the field of international commercial arbitration, such that a book of this kind could be written at all.

Born states modestly in his Introduction, that his treatise 'is intended to be clear, direct and accessible', and so it is. Indeed, devotees of Gary Born's earlier works, starting with his ground-breaking, now classic case-book *International Civil Litigation in United States Courts* (1 ed, 1989; 4 ed, Kluwer, 2006), will already well-appreciate the ability of the author's probing mind to unpick and present in deceptively simple terms the contentious controversies of our age. But this book sustains that research and analysis to embrace jurisprudence and doctrine from every corner of the world. It 'rests on the premise that the treatments of international commercial arbitration in different national legal systems are not diverse, unrelated phenomena, *but rather form a common corpus of international arbitration law which has a global application*.' [emphasis added]

The notion of a common corpus of international arbitration law of global application is, in the present reviewer's estimation, something rather more than a vision of arbitration as merely an expression of the parties' will, delocalized from national legal systems. That conception of international arbitration has been with us for at least half a century, since the work of Berthold Goldman (Goldman (1963) III *Recueil des Cours* 347), and has recently received the distinguished blessing of the Supreme Court of Canada (*Dell Computer Corp v Union des Consommateurs* 2007 SCC 34, (2007) 284, DLR (4th) 577, [51]). But an undue emphasis on arbitration as flowing solely from the will of the parties can lead to a fragmented conception of the role of the international arbitral tribunal in which '[e]ach tribunal is sovereign, and may retain … a different solution for resolving the same problem (*AES Corp v Argentine Republic* (Jurisdiction) ICSID Case No ARB/02/17 (ICSID, 2005, Dupuy P, Böckstiegel & Janeiro), [30]). Such a conception threatens to reduce arbitration to what Tennyson described two centuries ago as '…the lawless science of our law, / [t]hat codeless myriad of precedent, / [t]hat wilderness of single instances (Alfred Lord Tennyson 'Aylmer's Field' (1793), *The Collected Poems of Alfred Lord Tennyson* (Wordsworth Ed, 1994) 581).

Nor is 'international arbitration law' simply a description of the emergence of a professional and academic community of international arbitration lawyers with common concerns about a transnational phenomenon, nurtured by their experiences in the international arbitral institutions, and by collegial

discussion (Dezalay, Garth & Bourdieu, *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order (language and discourse)* (1996)), a sort of international academy of comparative law for arbitrators.

Rather, Born's point of departure is a conception of a legal system for arbitration, which is separate and distinct from both international law and national legal systems. There are, to be sure, differences, often important differences, between the responses of national law to such a system. But these can be critically assessed by reference to an international norm. This seems much closer to a conception of an '*ordre juridique arbitral*' (Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (2008) [133]) in which the international arbitral award is seen, as the French *Cour de Cassation* has recently accepted, as an 'international judicial decision', which is not anchored to any national legal order (*PT Putrabili Adyamulia v Est Epices* (29 June 2007) (2008) 24 Arb Int 293, 295, note Pinsolle (2008) 24 Arb Int 277).

In starting from this premise, Born comprehensively proves his point in the way in which the greatest legal scholars have always done (and which the Academy neglects at its peril), by drawing together the apparently disparate responses of arbitrators and national courts on the central issues of arbitration into a sustained treatise, which expounds the *common* principles of the law. This achievement is all the more remarkable since it has been written by a lawyer and arbitrator with a distinguished and full-time practice.

The exposition of international arbitration law is pursued through 26 chapters, divided into three parts: international arbitration agreements; international arbitral procedures; and international arbitral awards. Born's approach throughout is *thematic* – dividing each section by topic, and then integrating the relevant practice (whether of national law or arbitral institutions) into the discussion of that topic or issue. The approach is also *methodological* – it approaches each issue as a problem to be solved, critically assessing the potential solutions and the legal authority for each. This permits sustained sub-division and analysis of problems in a way which is, to this reviewer's knowledge, not matched by any other existing arbitration text. For example, the choice of law rules applicable to an arbitration agreement, a question of great practical importance and doctrinal difficulty, is analysed over some 150 pages, and broken down into choice of law relating to formation and substantive validity; non-arbitrability; formal validity; capacity; authority; and interpretation.

The work's utility to practitioner, arbitrator and scholar alike is greatly enhanced by the agreement of Born's publishers on this occasion to include comprehensive tables of awards, cases, commentaries, conventions, rules and other materials, cross-referenced to the text, together with an index. This provides a means of accessing the wealth of material referred to throughout the work, and means that it can serve its primary function as a reference-work.

Born returns to consideration of the overall unity of international arbitration law at the very close of his work in a thought-provoking discussion of the doctrine of precedent in arbitration (Chapter 26). Arguing eloquently for an end to the myth that there is no room for a doctrine of precedent in Public International Law, he presents a nuanced case for reference to prior arbitral authority in international arbitration:

The historic aspirations, and contemporary development, of the international arbitral process reject any such notion of a closed elite, possessed of special knowledge of the law, and instead demand equality of access – both in presenting the parties' cases to the arbitrators and in researching the relevant authorities which are to be presented. (2969)

This requires, Born argues:

… no absolute rule of binding precedent, but instead a pragmatic analysis that gives effect to the underlying values served by the doctrine of precedent, while permitting change, evolution and correction in the law. That is consistent with, and mandated by, the basic objectives and aspirations of the international arbitral process. (2970)

In delivering to us this monumental work of legal scholarship, Gary Born has himself contributed in no small measure to such a process. He has equipped us with the fruits of his experience and research in a text which lays claim, like no other, to becoming the *terminus a quo* on the law of international commercial arbitration in the 21st Century.

Professor Campbell McLachlan QC, Wellington, New Zealand