Book review

THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE

by J. Gillis Wetter, Oceana Publications Inc., New York, 1979, 5 vols. (xxxviii & 617 pp., xv & 622 pp., x & 470 pp., ix & 550; xi & 593 pp. (including Index)). Reviewed by K. J. Keith.*

Dr. Wetter has produced a fascinating book, one that is unique in its coverage and in its approach, and that is provocative in consequence. He is concerned to bring together massive ranges of material relating both to public international arbitration (as evidenced most recently by the troubled *Beagle Channel* case between Argentina and Chile) and to international private (especially commercial) arbitration (as evidenced at the treaty and legislative level by the World Bank Convention setting up the Centre for the Settlement of Investment Disputes and the Arbitration (International Investment Disputes) Act 1979 to give effect, for New Zealand, to the Convention). He is concerned as well to produce much valuable historical material and not to concentrate just on current disputes. The past (for instance a careful, detailed account of the dispute concerning the United States claim to indirect damages in the *Alabama Claims* case and of the Venezuela-Guyana case) can, he believes, directly illuminate the problems of the present.

Dr. Watter's emphasis is very much on the arbitral process. We have been taught, he says,[1] by Karl Llewellyn that

> law is a constantly moving, dynamic process and that all those who perform functions in this vast arena had better understand that they are doing a job . . . . Those who are engaged in this great endeavour of creating and administering law . . . [should] go about their daily tasks on the assumption that there is worthwhileness in doing as such, and doing it well.

Dr. Wetter is very well qualified by his own experience to tell of the process — he has been counsel or secretary to arbitral tribunals in a major inter-state arbitration[2] and arbitrations between states and aliens.[3] He has also published extensively on international and domestic arbitration.[4] This experience and study

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1 Vol. IV, 283.

2 The Rann of Kutch dispute between India and Pakistan. Cp. Vol. I, 17-18, 250-275.

3 The dispute between Saudi Arabia and the Arabian American Oil Company (cp. Vol. I, 409-431), the dispute between Libya and B.P. (cp. Vol. I, 432-440), and the dispute before the International Centre for the Settlement of Investment Disputes between Holiday Inns/Occidental Petroleum and Morocco.

4 E.g. Wetter and Schwebel, "Some Little-known Cases on Concessions" (1964) 40 B.Y.I.L. 183, and see Vol. IV, 9-82.

leads him to the conclusion that "public and private [international arbitration] form a unity, just as the past and present are inextricably linked with one another".[5]

What are some of the principal characteristics of the process — public and private, past and present? Dr. Wetter attempts to indicate them in an interesting *Epilogue*[6] and the five volumes are all, of course, full of relevant material. A principal characteristic is consent. The parties must agree. They must agree to jurisdiction and to the statement of the matter in dispute. They must agree to the tribunal. They may also regulate the detail of the procedure by agreement and they can, of course, always agree to settle the dispute rather than have the tribunal proceed to a decision. This requirement of consent can obviously prevent the use of the best designed arbitral systems and may indeed even prevent the continuation of an arbitral process which has been properly begun.[7] Those possibilities obviously point to a major defect in arbitration. But they point as well to one of its strengths and a second principal characteristic — its flexibility. The parties are able to shape the dispute, to constitute the tribunal and to design the procedure in such a way as best to resolve the matter at large between them. They may also, if it is appropriate, take account of other procedures relevant to the settlement of the dispute and of other aspects of their bilateral relationship; the arbitral process must not after all be seen as something complete and entire of itself. Indeed the tribunal might itself be sensitive, within the proper limits, to some of those broader features and developments. That points to a third characteristic which is much evidenced in the volumes — the great significance of the professional and related skills of the arbitrators and counsel. A major example is provided by the *Alabama Claims* case. Dr. Wetter says of one of its statements on indirect damages:[8]

> [It] was a masterpiece of flexibility and draftsmanship: at once an award and no award, at once a negotiated settlement with the claimant and a face-saving adjudicatory act, at once an avoidance of decision making authority and a head-on exercise of authority.

Some might see some parallel in the fascinating judgments of 20 December 1974 given by the International Court of Justice in the *Nuclear Testing* cases: the Court avoided a ruling on its jurisdiction to deal with the matter and thereby did not have later to face the enormous complexity of the general law relating to atmospheric nuclear testing by holding that the development of relations between the parties showed that there were no longer real disputes (at least as the Court saw the disputes); in coming to that conclusion it actually held that France was bound not to test, a holding which in the normal course could not have been expected until after a further round of proceedings which would take at least another year. The second and third characteristics also emphasise the great importance, for a proper understanding of major international litigation, of the pleadings. One of the values of these volumes is that they produce not just the awards (which in most cases are already widely available) but also large extracts from the pleadings (which in most cases are not widely available).

5 Vol. I, xxiv.
6 Vol. IV, 283-300.
7 See e.g. Vol. III, 357-387.
8 Vol. I, xxix.

But arbitration is not completely flexible and completely up to the whim of the parties and the tribunal. The volumes themselves point to underlying principles of procedure and professionalism. That is indeed one of their major purposes. They provide potential litigants and their advisers, arbitrators and those who set up and administer arbitral systems with a mass of suggestive material. So, to give the volumes a local context, and to take a few examples, the International Centre for the Settlement of Investment Disputes (of which New Zealand is now a member) receives extensive treatment,[9] the English law of arbitration, much of which is relevant in New Zealand, is one of the major domestic systems discussed,[10] the texts of the major treaties regulating public and private international arbitration to which New Zealand is a party are included,[11] and those involved in drafting arbitration clauses in agreements with foreign investors are provided with much illustrative material.[12]

The documentation has an abiding theoretical value as well. So, what are the underlying principles relating to the nullity of awards? What is the system of law underlying arbitration proceedings other than those which are truly interstate? What is the relevant substantive law? To what extent is the arbitration autonomous?[13]

These practical and theoretical questions can be related to the broader context of dispute settlement, for instance, to the mounting material relating to the International Court and to the wider jurisprudential discussions (for instance of Lon Fuller) concerning the various methods — both national and international — of dispute settlement. Much of that discussion is carried on by general assertion and counter assertion such as "compulsory third party settlement will produce world peace through law", and "compulsory third party settlement is a violation of the sovereign rights of independent States". The volumes provide a corrective to that level of generality. They provide a basis for practical judgments about the contribution that arbitration and adjudication can make — and the limits. They show that the doctrinaire sovereignty view is often qualified in practice by those who most vigorously press it at the theoretical level. They show that a great range of procedures and institutions are available if governments wish to make use of them.

Finally a word about the excellence of the presentation of the volumes. They are produced by a photo-offset process which means that the readers are in almost the same position as if they had the original document.[14] They are handsomely bound. And they have been produced very quickly. They include material dated as late as April 1979 and all the volumes were available in Wellington within two months of that date.

9 Vol. II, 139-144; Vol. IV, 432-550.
10 E.g. Vol. I, 560-589; Vol. IV, 83-219, 337-362.
11 Vol. V, 187-227, 301-307.
12 E.g. Vol. V, 443-529.
13 These questions can also, of course, be severely practical. So far as the first is concerned consider the Argentinian claim in respect of the Beagle Channel award Vol. I, 380-390, and the B.P./Libya case, Vol. II, 559-622.
14 E.g. of the *Palmas* award, Vol. I, 189-249.

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