

Jarrold Hepburn, Jarrold. Domestic Law in International Investment Arbitration. Oxford: University Press, 2017, 234 p.

The book at hand examines domestic law, an area of international investment law, which has so far not received substantial attention in the academic research. Domestic law is important for the international investment arbitration. Every foreign investor and her investment operate in specific host state according to its domestic legal order. As such international investment tribunals may come across a point in the dispute where question of domestic law will certainly arise. This situation raises many questions for arbitral tribunals as to when and how to apply domestic law or even if to apply domestic law. Thus, the book by Jarrold Hepburn directly aims at the specifics and status of domestic law and when and how it ought to be applied in international investment arbitration.

Target audience of the book includes practitioners, academics and students with specialisation in international investment law.

The book's overall perspective, in a nutshell, emphasizes the significance of the domestic law as one of factors affecting legitimacy of investment arbitration system. Hepburn presumes a potential connection between appreciation of domestic law by investment arbitral tribunals and the perception of legitimacy of the system by public stakeholders such as population of the sued state.

According to Hepburn, not so much attention in the academia was dedicated to the area of domestic law. This is also due to the fact that each state has its own domestic laws. In case of at least one hundred states being in the role of defendant in investment arbitration, the role of domestic law may be seen as case-specific.

Hepburn, therefore, does not look to the specifics of domestic law of the states. He rather investigates in which situations domestic law is applied in investment arbitration and assesses the quality of application by arbitral tribunals.

Based on the aforementioned perspective of domestic law, author structures the main argument of the book around the thesis that, firstly, role the domestic law plays a significant role in international investment arbitration and secondly, domestic law has not yet been fully appreciated by the arbitral tribunals.

The first part of the main argument is discussed in the first part of the book in chapters one to four, while the second part of the main argument is discussed in the second part of the book in chapters five to seven.

First part of the book deals with the current practice of arbitral tribunals and critical analysis of case law related to domestic law. It offers an answer to the question do arbitral tribunals take into account domestic law of the host state based on the current case law. As for second part of the book, the author devises recommendations on *how* arbitral tribunals should take upon domestic law related questions in investment disputes and then tests these recommendations on available case law.

In first chapter of the book, Hepburn builds his argument on the research by previous authors and applicable law theories. He argues that domestic law does play a part in additional situations related to substantive liability and damages in investment disputes apart from situations which were identified by previous authors.

Chapter two examines the commitment of a state to fair and equitable treatment, an investment standard typical for international investment regime.

Chapter three relates to the due process requirement in case of lawful expropriation.

Chapter four dwells on question of remedies for breach of international investment agreement. In this chapter author concludes that there is, more room for application for remedies. The questions of domestic law provide use in cases of full reparations, determinations of interest and non-monetary remedies.

While first part of the book addressed the question of *when* domestic law is applicable, second part of the book addresses question of *how* arbitral tribunals have and they should endorse the relevance of domestic law by proper application.

Chapter five of the second part of the book discusses how arbitral tribunals should respond to

the practical problem of applying domestic law with which arbitral tribunal is not familiar. This chapter concludes, that although it may be burdensome to oblige arbitral tribunals to act in some way or another, this does not constrain introduction of guidelines for application of domestic law, which would respect the decision-making discretion of the arbitral tribunal.

Chapter six examined arguments limiting the relevance of domestic law in arbitral tribunal practice in case of preliminary questions such as compliance of investor according to the national law or estoppel. Hepburn finds that although arbitral tribunals have established a specific position to the domestic law, it does not limit its the relevance substantially.

Chapter seven goes on in testing the proposed guidelines in chapter five on the existing case law of arbitral tribunals on various issues of domestic law mentioned in previous part of the book.

In conclusion of the book Hepburn confirms his argument that arbitral tribunals are indeed equipped with necessary tools for proper application of domestic law which could enhance the perceived legitimacy of the investment arbitration. Author, however, does not forget to clarify that domestic law is a “*one small corner*” of the overall investment arbitration regime. Thus, domestic law can contribute to the improved legitimacy of the system. On the other hand, this means that other criticized issues of investment regime than domestic law will need to be also addressed.

As for chapters of the book which offer substantial contribution, chapters five and seven deserve more attention in this book review.

Chapter five gives an account of how arbitral tribunals ought to approach domestic law. Therefore, framework for assessing domestic law is proposed. This framework, according to the author, should include: treating domestic law as a law, not law as a fact, applying domestic law as it would be applied in the state of origin and using domestic legal sources, academic literature, expert evidence in assessing the contents and meaning of domestic law. Important is also applying *iura novit curia* as arbitral tribunal and rather play an active role in resolving domestic law questions. To sum up, this chapter summarises available tools at hand for arbitral tribunals to use and offers views from literature for methods in how to perform sometime complex task of extracting the true nature of domestic law from available mediums, such as duelling legal expert reports or lack of domestic law secondary sources.

If chapter five proposed a toolbox of available methods for assessment of domestic law then chapter seven tests these methods on available case law. Accordingly, this case law is categorised in two predefined categories based on errors or positive models of application of domestic law. The taxonomy of cases is based on the extent of application of domestic law, in other words, if arbitral tribunals assessed domestic law inappropriately or if they acted positively and applied methods which resemble methodological framework presented in chapter five.

As for types of legal situations, the chapter assesses case law on domestic law which relates to compliance of foreign investor with domestic law, nature of investment as a bundle of rights and the trio fair and equitable treatment, expropriation and remedies.

The first half of the chapter introduces a taxonomy of tribunal errors in subcategories such as: failure to appreciate the role of domestic law, failure to investigate sources of this law, failure to engage with available law sources or lack of reasoning for stating legality of conduct. Last but not least one of these errors include situations when arbitral tribunals relied on improper sources of domestic law.

Hepburn assesses that the case law presented in this chapter confirms that arbitral tribunals do indeed engage to varying degree with domestic law on the scale of no appreciation to erroneous or deficient application.

As for the second part of this chapter which presents the positive practice of arbitral tribunals, this chapter is divided in to the following subcategories: emulating domestic judges, use of domestic legal materials, reliance on expert witnesses. The last subcategory is indeed interesting since it brings attention to not ideal situations such as when expert reports collide, or if an expert report is adverse to the claim of disputing party.

Based on this chapter, Hepburn concludes that arbitral tribunals are indeed equipped for assessing domestic law questions. This can be seen from the positive practice of arbitral tribunals in second

part of this chapter. Therefore, Hepburn sees a room in the current arbitral framework for reducing non-appreciation of domestic law by following the methodological framework presented in chapter five. Chapter seven on its own is of great value with classification of case law it presents based on the degree and quality of use of domestic law. This chapter provides case-studies for each situation where domestic law was present and how did arbitral tribunal approach this issue (either in positive or negative way)

Moving to the overall style of the book the gradual development main argument in the book is clear and concise. Author examines each phase of arbitration proceedings for arbitral tribunal's reference to the domestic law. Claims of the author are not only based on the case law but they envision also what may be in the missing puzzle pieces of potential situations. In a nutshell, the arguments are carefully structured and fit precisely in to the main thesis of the book.

Although, in some instances the book may give an impression of higher inclination for the use of domestic law, this is not without substantiated reasons while acknowledging upfront discretionary powers of arbitral tribunal by the author.

From the viewpoint of members of the audience this book strikes the thin line separating the academia over the legitimacy of the investment arbitration system. Thus, author ventures in an area which is subject of value-oriented debate between proponents and critics of the current investment arbitration system. As such, the main of the book may give an impression of being provocative, for example, in proposing a guide investment arbitral tribunals or for criticising the limited appreciation of domestic law by arbitral tribunals which results in perceived deficiency of legitimacy.

Nevertheless, the book creates a room for a greater debate on the relevance and the role of domestic law in investment arbitration. It also provides for a normative methodology as for what the practice of applying domestic law ought to be, which can be tested in the academic community.

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