The International Arbitral Process: Public and Private, by J. Gillis Wetter, New York, Oceania Publications Inc., 1979, 5 volumes, 2852 pp. (including index) $US250.00 (volumes not sold separately).

Over the years this reviewer has come to treat with a measure of wariness the multivolume offerings of Oceana Publications Inc. Happily, this is not the case with *The International Arbitral Process: Public and Private.* Here is a first rate achievement in legal scholarship and publishing; one which is marred only by the price which will put it out of reach of all but institutions. Thus, any person seriously interested in arbitration must either beg his library to acquire a copy or borrow elsewhere or — one hesitates in a legal journal to add the third injunction. The reader will find five volumes that need to be dipped into and savoured for the wealth of comment, observation, analysis and original material that they offer on the arbitral process. As a working tool these volumes provide practical information in a number of areas where it is otherwise sadly deficient or difficult to obtain.

Aspects of the arbitral process considered can be seen from an examination of the chapter headings:

Volume I

Chapter I — War or Peace: Public International Law Arbitration.
Chapter II — Arbitration between States and Aliens.
Chapter III — Arbitrators, Umpires, Experts, Valuers and Conciliators: What is Arbitration and What is Not.

Volume II

Chapter IV — U.S. Arbitration Law in a Nutshell.
Chapter V — The Great International Commercial Arbitration Institutions: Organization, Practices and Policies.
Chapter VI — The Laws and the Rules and the Missing Link: A Uniform International Arbitration Procedure.
Chapter VII — Revision and Reopening.

Volume III

Chapter VIII — The Venezuela-Guyana Boundary Dispute: An In-Depth Documentary Case Study of Nullity of an Arbitral Award.
Chapter IX — Standards of Independence and Impartiality of International Arbitral Tribunals.
Chapter X — East Meets West in Sweden: The US/USSR Optional Clause Agreement.

Volume IV

Chapter XI — Autonomy or Subordination of Arbitral Tribunals: Sweden and England Illustrating a World Dichotomy.
Chapter XII — Arbitration Tribunals and Courts: An Analysis of Cases Decided During a Decade in the Federal Court of Switzerland and in Zurich.

Chapter XIII — National Arbitration Laws.
Chapter XIV — Transnational Arbitration Rules.
Volume V
Chapter XIV — continued.
Chapter XV — Public International Law Arbitration Rules.
Chapter XVI — Multilateral Conventions.
Chapter XVII — Arbitration Clauses.

There are a number of books available on the arbitral process. They deal with it almost exclusively in one of three contexts: interstate relations; international commercial relations, including disputes between States and aliens; municipal relations. The second is in a sense midway between the other two in the milieu in which it operates; the issues it raises. The authors here are more likely to be aware of the differences and similarities in using arbitration in each of the other contexts. Yet none have attempted to do what Dr. J. Gillis Wetter has done, and prepare a work covering all contexts. The word "prepare" is used as this is not a treatise on the subject of arbitration. It is an attempt to show the common essence of arbitration as a process in whatever set of relationships it appears. The author does this by a mixture of commentary and analysis together with a selection of extracts from arbitral awards, court cases, books, articles, official and private correspondence, even tourist guides. Many of these extracts would otherwise be difficult to obtain and some have never before been published. Of particular importance and interest is the "Epilogue" (vol. IV, pp. 283-299) where the author expresses his views on the "quintessence" of the extracts he uses, on what are "the really important principles and issues in the field of arbitration".

That is what these volumes are all about. They are of great value in the advancement of knowledge. Yet, having said that, do they fully achieve what the author set out to do? Ultimately, it is only by this standard that they can be judged.

In a sense the chapters are disjointed and selective, their treatment being only of particular aspects and selected municipal situations. The author argues that this is not a proper appreciation of his approach; that what he has attempted to do is illuminate various facets of arbitration as a total process, whether it is used in the international or municipal sphere. This is central to his whole thesis:

"The international arbitral process is a process that I have seen before my own eyes and with which I work every day . . . in my conception, public and private form a unity, just as the past and the present are inextricably linked with one another" (vol. I, p. xxiv).
and further—
". . . the concept [viz. the 'international arbitral process'], used in its widest sense, clearly is valid and useful. It is one of the few which may bridge East and West — indeed the world at large — in a mean-

ingful interchange of views, and it creates the basis of a fruitful comparative legal analysis" (vol. I, p. xxiii).

The views of the author on this point command great respect. He has had extensive practical experience in the conduct of arbitration — both public and private. He assisted H. E. Gunnar Lagergren, the Marshal of the Realm of Sweden, in a number of arbitration proceedings, e.g., the *Rann of Kutch,* the *BP* v. *Libya* and the *Holiday Inns/Occidental Petroleum* v. *Morocco* arbitrations. These were of a public or quasi-public nature. He, himself, has presided in many arbitrations of private commercial disputes. His is one of 18 names on the list of arbitrators established by the American Arbitration Association and the U.S.S.R. Chamber of Commerce and Industry in connection with the "Optional Arbitration Clause for Use in Contracts in U.S.A.-U.S.S.R. Trade — 1977". In addition he is the Solicitor Royal of Sweden and Partner of Wetter & Wetter, Stockholm.

The author states as his chief aim: "to seek to identify the great issues and problems in a vast field which is not yet ripe for Linnean scholarship and indeed so dynamic and diverse that it inevitably eludes the firm grasp of dogmatic systematization" (vol. I, p. 485). Considering this statement in light of the thesis expressed above one would expect that each "great issue and problem" would be analysed as far as possible in relation to each of the various contexts in which arbitration may be used. Yet this is not always the case. In some chapters it is done and yet in others where one would expect it to occur it is not done.

Let us take, for example, chapter VIII which deals with the great issue of the validity or nullity of the award. This is a matter of central importance to any arbitration — whether public or private. The issue is illustrated by the *Venezuela-Guyana Boundary Dispute.* The award in that arbitration contained no reasons. Later evidence — some of it made public for the first time in this book — indicates that the award resulted from a compromise made, under pressure from the President of the Tribunal, in order to achieve unanimity. Thus, although this was an interstate or public arbitration, the issue it raises is common to any arbitration. Must the arbitrators decide on the basis of strict legal rights or can they strive for the decision that they think will gain acceptance — a compromise, one which both gives and takes from each party? If there are no reasons given, how can the parties establish the basis used by the arbitrators in reaching the decision? What effect does the giving of reasons have on other aspects of the procedure? The author produces the thesis that the arbitration in the *Venezuela-Guayana Boundary Dispute* was responsible for poisoning the atmosphere in South America against all arbitration — a state of affairs which has held good to this day. Thus, chapter VIII identifies a major issue for arbitration, illustrates it by reference to an appropriate decision and draws conclusions of moment both for public

and private international arbitration. This is an excellent example of the author's aim to analyse a problem in all the relevant contexts of the arbitral process.

"*Buraimi Oasis Case* 1955", involving the United Kingdom and Saudi

The same can be said of chapter IX dealing with the independence and impartiality of international arbitral tribunals. It discusses the standard of personal conduct that arbitrators should exhibit while the arbitration is in process. The first question raised is that of the arbitrator acting as advocate. The issues here are illustrated by the Arabia. The dispute arose over the frontier between Saudi Arabia and Abu Dhabi and sovereignty over the Buraimi zone. The two States agreed that the matter should be arbitrated — each appointing one arbitrator to a five-man tribunal. The arbitration failed following the resignation of the British member over the conduct of the Saudi Arabian member. It was alleged that the latter could not give an impartial decision owing to his official position in the Saudi Arabian Government and that this had been exemplified by his conduct during the proceedings. The Government of Saudi Arabia argued that their appointee's position was well known at all times to all persons involved. An article discussing the issues at stake is reproduced in the chapter following on material from the arbitration itself. The author also refers to various examples of law controlling the arbitrator's conduct in the national law of England, Sweden and the United States. The American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes is reproduced. Reference is made to two English cases dealing with the implications of a party to the dispute entertaining an arbitrator.

On the other hand, two chapters — XI and XII — confront the issue of autonomy of the arbitral tribunal before national courts. This is certainly one of the great issues and problems of international private and semi-private arbitration. The laws of Sweden and England are taken as examples; following on an extract from an article discussing the problem. Then, in chapter XII, the author takes issue with the current assessment of Zurich as an undesirable choice for the place or arbitration. That assessment was recently expressed in Sydney in these terms:

"The Court of Arbitration never chooses London, Zurich or Rome as a place of arbitration because of the various restrictions on arbitrations and the experience of interference with arbitrations in the past, particularly in Zurich" ("Presentation of the Court of Arbitration of the International Chamber of Commerce" Address by M. Michel Gaudet, Sydney, March 19, 1979).

By reference to decided cases in the Swiss courts the author concludes:

"Thus, on balance, the critical thesis initially stated in this Chapter which has lately become fashionable in many quarters, viz. that Zurich is an unsuitable *locale* for international arbitral proceedings, must be considered to have been exposed for what it is: an essentially unfounded opinion disproved by the actual facts available to a dispassionate observer" (vol. IV, p. 278).

These matters, while highly relevant to international private arbitration and international arbitration between States and aliens are of no moment to arbitration between States. The chapters are of interest then in the private and semi-private fields. The situation is similar with chapters IV — "U.S. Arbitration Law in a Nutshell" — and X — "East Meets West in Sweden: the U.S./U.S.S.R. Optional Clause Agreement".

Yet, the issues raised in chapters I, II and V could perhaps have been taken further in pursuit of the principle that arbitration, in all these contexts, is still the same process. This reviewer agrees with and supports the contention that all arbitrations represent one process; that much can be learnt from studying it in different contexts and that it should not be classified as public or private in the sense that "never the twain shall meet". However, it does seem that the material used and the commentary thereon, while throwing up major issues and problems of arbitration, sometimes does not relate it sufficiently to both the public and private aspects. For example, chapter I deals with the impact of arbitration on the issues of war and peace — a public matter. Chapter II analyses arbitration as used for resolving disputes between aliens and States — in terms of arbitral competence to hear the dispute, the law governing proceedings and that governing substance. It would seem appropriate to have added a chapter dealing with the same central issue — the benefit of arbitration — in purely private international commercial disputes. Furthermore, in chapter V, after analysing the major private and semi-public (ICSID) arbitral institutions, it should have been possible to translate the lessons taught by these bodies to the public field of interstate disputes. While some mention is made of the Permanent Court of Arbitration (vol. I, p. 524) and *ad hoc* arbitration (vol. II, p. 244) this does not relate to the major section where the issue is dealt with.

The argument then is that in light of the author's expressed thesis the aim of the book has not been achieved in all respects. The major issues of arbitration have been exemplified but not in all contexts in such a way as fully to establish the author's thesis.

Be that as it may, the book as a whole is a magnificent achievement. It can of course be read from cover to cover but, more likely, this will be a book that will be dipped into and savoured little by little. It is full of material casting light not only on the arbitration procedure itself but also on the surrounding aspects. For example, there is a

description of the Alabama Hall in the City Hall of Geneva (vol. I, p. 13). This gives a flavour to any reading of the extracts from arbitrations that have been held there — *Alabama, Rann of Kutch, Beagle Channel.* By way of further example, how many people realize that arbitration is a British invisible export in the sum of £500 million per annum (vol. II, p. 250, fn. 12)? These illustrations add spice to a work of scholarship.

PATRICK J. O'KEEFE*

Constructive Trusts, by A. J. Oakley, London, Sweet & Maxwell's Modern Legal Studies, 1978, xiv + 142 pp. (including index) $5.90 (paperback only).

Ten years ago Sydney legal practitioners would have been unlikely to hear the words "constructive trusts" outside the lecture room. Now they are part of the suburban solicitor's verbal artillery, and have been accepted into the vocabulary of our accounting and commercial colleagues. One suspects, however, that the words are more often used than understood. Even within the legal profession, there seems occasionally to be an assumption that the law of constructive trusts is a unified doctrine, triggered by a single set of circumstances. It would be astounding, however, if the property transactions of fiduciaries, bankers, purchasers, and criminals could be governed by the same rule. In fact, though these situations have family resemblances, all that can be said about them in general is that the trust which is found to exist in each case is imposed by operation of law, independently of any expressed or presumed intention to create a trust. But the *rules* which give rise to a constructive trust in each situation are far from identical.

Mr. Oakley's book gives a sound account of the modern law, and the major controversies which surround it. He begins with trusts imposed as a result of fraudulent, unconscionable or inequitable conduct.[1] There are three fairly clear cases: where a person other than a *bona fide* purchaser acquires property as a result of undue influence; where a murderer acquires property in consequence of the death of his victim; and where a transferee seeks to set up the absolute character of a transfer in his favour in order to defeat a trust declared orally. More sweepingly, Lord Denning, M.R. has recently held that a "constructive trust of a new model" may be imposed whenever the result would

* B.A., LL.B. (Qld), M.A. (Business Law) (City of London Polytechnic), LL.M. (A.N.U.), Senior Lecturer in Law, University of Sydney.