March 2, 2009


Paul G Rozelle
Book Review


Paul G. Rozelle*

While the growth of arbitration as a mechanism for resolving international commercial disputes has been rapid,¹ a diverse literature in the field has developed more slowly. There are many excellent treatises on international commercial arbitration, but they are long, directed at specialists, or focused on the law of one country.² Professor Margaret Moses offers a thorough, updated, and practical analysis of the subject in The Principles and Practice of International Commercial Arbitration.

The growth of international commerce has led to a recent and dramatic expansion in the use of arbitration to address the disputes that inevitably arise. Parties to international commercial transactions may be wary of subjecting themselves to the jurisdiction or vagaries of foreign courts and to legal environments and procedures they find hostile and expensive. For example, attorneys and their clients in the United States take liberal discovery and trial by jury for granted, but neither is the norm elsewhere. These concepts may be intimidating and unwelcome to even the most sophisticated non-U.S. lawyers and businesspeople. Arbitration is seen as neutral and, therefore, credible and effective, ensuring that no party gains a procedural or cultural “home court” advantage and that whatever award results is more likely to be enforceable. Arbitration is also private and confidential, important considerations for businesses

¹ The caseload of major arbitral organizations nearly doubled between 1993 and 2003. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005). Asia has seen especially strong growth. For example, the caseload of the Hong Kong International Arbitration Centre grew from 23 commercial cases in 1993 to 103 cases in 2007. Hong Kong International Arbitration Centre, International Arbitration Cases Received, http://hkiac.org/HKIAC/HKIAC_English/main.html (last visited Feb. 3, 2009).

² There are several excellent, thorough, and specialized treatises on the subject, including GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (3d ed. 2009); W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 2001); JULIAN D. M. Llew, LOUKAS A. MISTELIS, & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003), and ALAN REDFERN, ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th ed. 2004).
involved in disputes over trade secrets or intellectual property. Because an effective dispute resolution system reduces the risks involved in commercial transactions, it is no surprise that arbitration is the preferred method for resolving international commercial disputes.

On the Fiftieth Anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), Professor Moses aims to explain how and why international commercial arbitration works and to provide practical strategies and warnings about traps for the unwary. Although the book is in English by an American law professor, it is not centered on any one legal system. Professor Moses’s explanations and analyses are thoughtfully informed and supplemented by insights from numerous international arbitrators and counsel who give firsthand accounts of their own experiences and their views on best practices.

The author covers the topic thematically from the drafting of the arbitration agreement through enforcement of the award. Also included is a chapter on investment treaty arbitration, a subject de rigueur for inclusion in any current work on international commercial arbitration.

Following an introduction discussing international arbitration generally, Professor Moses moves into the arbitration agreement, an area she rightly notes suffers from “sad neglect.”

---


4 See, e.g., Gerald Paul McAlinn, Facilitating Arbitration in Japan: Making the JCAA a Regional Center for ADR, 20 JCAA NEWSLETTER 7, 8 (July 2008) (“A well-used dispute resolution forum that is capable of delivering prompt, just and commercially reasonable decisions can . . . be viewed as a proxy for an internationally sophisticated business environment.”).


6 In addition to the sources cited in note 2, supra, see, e.g., HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 279-340 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006).

Typically, the draftspersons are transactional lawyers whose knowledge of arbitration, especially transnational arbitration, is limited. They are primarily concerned with the substance of the deal, which may have been difficult to negotiate. Having finally reached an agreement, lawyers and businesspeople are understandably reluctant to jeopardize it by haggling over those boilerplate paragraphs typically found toward the end of the contract: severability, choice of law, counterparts, and of course, the arbitration clause. Why invest time and money to discuss the details of what happens if the deal everyone worked hard to close falls apart? However, such inattention might result in an unenforceable arbitration clause or one that is well-meaning but has unintended consequences. Involving a dispute resolution attorney in drafting the arbitration clause reduces the potential for future problems. At a minimum, Professor Moses advises parties to use the model language suggested by the institution that will administer the arbitration. Also, do not “hold an arbitration in a place where you would not go on vacation.”

Among the most useful aspects of the book is the author’s treatment of the arbitral proceedings, especially the selection and function of the arbitrator. It is here that the experienced counsel and arbitrators she interviewed for this project make the strongest contribution.

---

8 For example, consider the following “home and home” provision:

Any and all disputes between the parties arising out of the Agreement shall be settled by arbitration to be held in [the home city of Party B], if [Party A] demands arbitration, or in [the home city of Party A], if [Party B] demands arbitration . . . .

The intention is to encourage the parties to resolve their dispute short of arbitration: who wants to arbitrate on the other party’s home turf? However, too much disincentive to arbitration can have the unintended consequence of emboldening both sides, each of which thinks that the other side will never demand arbitration in a hostile forum and therefore calculates that it can take a more aggressive position in the dispute or even continue or escalate the offending conduct. What may have started as a small dispute can turn into a bet-the-company problem in such an environment.

9 Professor Moses includes model arbitration clauses from several different governing bodies at Appendix I.

10 MOSES, supra note 7, at 43. Lawyers and clients should carefully weigh the risks of logistical difficulties, language barriers, or unstable political or economic climates in deciding where to arbitrate. These factors can drive the outcome of a dispute more than any finely crafted contract provision or legal argument.
Selecting the arbitrator(s) is “perhaps the most important thing a lawyer does with respect to resolving the client’s dispute.” It is also probably the biggest counseling job a lawyer performs. The client will look to the lawyer to select the “best” arbitrator and will hold the lawyer accountable if the arbitrator ends up being unsophisticated, dilatory or, worse, ruling against the client. Assigning Chapters 6 and 7 as homework to clients will help inform them and manage their expectations about the process.

Conducting due diligence on potential arbitrators is the foundation of selecting an arbitrator who is best suited for the case. Not only is international commercial arbitration a field that is rapidly expanding beyond a few well-known specialists, but modern technology makes much more information available for analysis than in years past. Gone are the days when obtaining a curriculum vitae, asking colleagues their opinion of the arbitrator candidate, and reading everything that person published is sufficient background research. Google, Youtube, and social and professional networking internet sites contain a wealth of information about the character, intelligence, expertise, and physical and mental health of the arbitrator candidate(s), along with clues about their familiarity with the social and business culture in which the dispute arose and will be adjudicated. The author gives practical examples and advice from counsel and arbitrators on whether and how to interview prospective arbitrators. Sound judgment is key. For

1 When drafting the agreement, one does not know the scope, complexity, or financial risk of a potential dispute. Among the author’s practical suggestions is that the arbitration agreement provide for one arbitrator if the dispute is under a certain dollar amount and for three arbitrators if it is over that limit. \textit{Id.} at 117.

12 \textit{Id.} at 116.

13 As for the oft-debated question of whether to have a lawyer or a nonlawyer as sole arbitrator or chair of the tribunal, consider a hybrid approach: In cases with specialized or technical facts in issue, select a lawyer but have the arbitrator retain his or her own independent expert. Many arbitration rules permit the tribunal, with the permission of the parties, to appoint a neutral expert. See, e.g., International Chamber of Commerce Arbitration Rules, art. 20; AAA Rules, art. 21; LCIA Rules, art. 22. The Japan Commercial Arbitration Association does not even require consent of the parties: “The arbitral tribunal may appoint one or more experts to advise with respect to any necessary issues and report the findings in writing or orally.” Japan Commercial Arbitration Ass’n, R. 38, ¶ 1.
example, asking a candidate to identify her top ten clients in terms of billings would not be advised.  

As Professor Moses notes, it is presumed that a sole arbitrator or chairperson will be of a different nationality than either of the parties. However, this can create problems. Where the applicable law is the law of the home country of one of the parties, a prohibition on a same-nationality sole arbitrator or chairperson might eliminate those most experienced with the law. Furthermore, how should one evaluate a candidate who is a national of the same country as one of the parties, but who has lived, practiced law, and raised a family in a “neutral” country for twenty-five years and who is fluent in the neutral country’s language? Hopefully, the increased globalization of business and law practice will achieve the spirit of the Model Law: “No person shall be precluded by reason of his nationality from acting as an arbitrator . . . .”

In keeping with the book’s focus on the practical and useful, the sample agenda letter for the first pre-hearing conference serves as an excellent checklist to focus the parties and the arbitrator on conducting an efficient proceeding. The pre-hearing conference is best attended in person. The opportunity to build rapport with the arbitrators and gain insights into how to present the case most persuasively is well-worth the time and travel invested.

The section on presenting evidence is especially useful to experienced practitioners who are new to international commercial arbitration. For example, the tone and pace of a cross-examination is quite different than in a U.S. court or arbitration, and there is an art to presenting

---

14 Opposing counsel asked this question of a candidate during a joint interview for the position of sole arbitrator. Of course, the prospective arbitrator did not answer the question.

15 For a fascinating discussion of this issue, including empirical data on the subject, see Ilhyung Lee, Practice and Predicament: The Nationality of the International Arbitrator, 31 FORDHAM INT’L L.J. 603 (2008).


17 MOSES, supra note 7, at 154-57. The sample agenda is generously volunteered by David Wagoner.
evidence through witness statements (as is the norm) rather than by direct, live testimony. Even seasoned lawyers may be unfamiliar with the “conferencing” technique, where party-retained experts discuss the case or confront each other without counsel posing questions. These procedures should be considered when choosing and preparing experts, an issue that Professor Moses stresses is of secondary importance only to the selection of the tribunal itself.

Other topics, such as judicial assistance for the arbitration or proceedings for enforcing an award or setting an award aside are handled in the same thorough, pragmatic manner, with the reader directed to key cases, articles, and other treatises for further guidance. To guide one’s reading, or to retrace one’s steps, there is a detailed table of contents and index. Also handy are appendices that include useful arbitration websites, the International Bar Association Rules on Taking Evidence in International Commercial Arbitration, the New York Convention, and the Model Law. The footnotes demonstrate comprehensive research, but a bibliography of secondary sources would be helpful to the reader in need of further information. The insights from experts in the field are useful, though more perspectives from those outside the United States or Europe would add to the diversity of the viewpoints presented.

Professor Moses successfully provides the reader with a comprehensive understanding of the field, including trends and the business context in which those developments are occurring. Her prose is clear and concise and is readily accessible to those who need practical information. The book is not an exhaustive treatment of the subjects covered, but the reader will find careful thought and an interesting, efficient presentation of the material. Specialists and scholars, in

---

18 See, e.g., International Bar Ass’n Rules on the Taking of Evid. in Int’l Commercial Arbitration, art. 5(3) (1999) (“The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports . . . .”).

19 MOSES, supra note 7, at 176.
particular, will find The Principles and Practice of International Commercial Arbitration a welcome addition to their libraries and will benefit from the insights and approaches that Professor Moses shares.