BOOK REVIEW

PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION

Jeffrey Waincymer (Kluwer 2012)

*Reviewed by Timothy G. Nelson**

Jeffrey Waincymer's *Procedure and Evidence in International Arbitration* is a work of remarkable breadth and comprehension, spanning a vast array of topics facing the modern arbitration practitioner.

Professor Waincymer, a noted arbitration academic and expert in international trade law and international arbitration at Monash University, Melbourne, begins his analysis with a thoughtful discussion of the nature of "procedure," and the theoretical consideration that distinguishes it from substance. In this regard, he quotes the observations of his (and my) compatriot, George Panagopoulos, who wrote that "procedure 'is concerned with manner, whereas . . . substance is concerned with matter.'"[1] Maybe so, but the world of international arbitration sometimes seems to defy the ordinary laws of physics. A few months ago, this reviewer was confronted with a new multi-jurisdictional case involving an investment in the Middle East involving two agreements with quite different arbitration clauses. My co-counsel—a U.S. litigator of great experience and distinction—was eager to jump straight into the contractual liability and damages issue, viewing the "procedural" issues (choice of law, credentials of arbitrator and selection of the arbitral institution) as merely "arguing over the shape of the table." As our analysis unfolded, however, it turned out that these "shape of the table" issues could well have a profound impact on the case, and might even be issue-determinative. Professor Waincymer's text explains why.

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[1] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 10 (Kluwer 2012) (quoting George Panagopoulos, "Substance and Procedure in Private International Law," Journal of Private International Law (2005)).

Professor Waincymer's stated approach is to "cover each and every procedural and evidentiary stage in rough chronological order . . . informed by variation in approaches between legal families, different institutions and *lex arbitri*.[2] This, if anything, understates the author's determination to cover all bases and all angles, and on occasion, play "provocateur" on contentious issues. The first topic—"Power, Rights and Duties of Arbitrators," exemplifies this approach: Waincymer addresses in depth the doctrinal debate over the "source" of an arbitrator's power and duties (e.g., whether a commercial arbitrator's capabilities derive from contract, the *lex arbitri*, or some other source), and whether arbitrator can be said to possess "inherent" power. He then examines the debate over arbitral "duties," including familiar question such as the duties of impartiality, the duty to ensure each party has an opportunity to present its case (a "widely accepted mandatory norm"[3]), and some less familiar, and potentially more controversial, territory, such as what a tribunal should do when it "form[s] the view that counsel is performing sub-optionally and is not taking points that might well be put or has a severe lack of understanding of international arbitration." (Waincymer considers that there is no duty to "ensure that each party presents its case in an optimal fashion," but admits "there is a debate over the educative role of an arbitrator".[4]) He also addresses other potentially contentious issues, such as whether arbitrators have a "duty of commerciality" (a view urged by commentators such as Julian Lew),[5] the (potentially contentious) issue of whether an arbitrator has a duty to propose settlement[6] as well as the impact of ethical guidance such as the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration.[7]

There are some recurrent themes throughout Waincymer's text, perhaps some more so than his interest in choice of law—and the latent power and discretion that choice of law places in arbitrators' hands. In Chapter 2, we learn that arbitrators are "generally given a broad discretion as to choice of law,"[8] in Chapter 3 we are reminded of the significance of "applicable substantive law" in the drafting of

[2] *Id.* at xli.

[3] *Id.* at 83.

[4] *Id.* at 85.

[5] *Id.* at 87.

[6] *Id.* at 93.

[7] *Id.* at 89.

[8] *Id.* at 116.

the arbitrator agreement,[9] and then in Chapter 13, Waincymer addresses at length the issue of *lex mercatoria* (i.e., the notion of a transnational body of commercial law), as well as "mandatory substantive law" (or *lois de police*), i.e., the possibility that the chosen substantive law may be trumped by the mandatory laws of another jurisdiction.[10] Given that, for U.S. practitioners, this debate is only understood (or misunderstood) through the laws of a footnote—one Supreme Court case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985),[11] the detailed treatment of this topic is highly beneficial to U.S. practitioners. Indeed, one of the most pleasing features of Waincymer's writing is that he is able to navigate between legal, cultural and systems—civil versus common law; Anglo-Australian versus American—relatively seamlessly, thus bringing to life any number of "continental" issues in a manner accessible to English-speaking practitioners.

Another theme (and, one suspects, a subject of fascination for the author) is the potentially significant role of the arbitral seat—and the lurking significance of the *lex arbitri*. The *lex arbitri*, Waincymer warns, may not only dictate a host of critical procedural and evidentiary issues, it may also intrude on substantive questions (such as the availability of punitive damages).[12] And, just as there can be mandatory substantive laws, Waincymer warns there also can be "mandatory procedural laws"—not just the relatively basic and familiar features of the Swiss or English arbitration statutes (mandating an opportunity for parties presenting their cases),[13] but relatively arcane laws—Waincymer cites the arbitral laws of Spain and China in this regard—which may pose a trap for the unwary. Waincymer also notes a possible role for transnational law, either through a "transnational public policy" (a concept that has gained currency among some civil lawyers), or through a broadly-accepted "procedural *lex mercatoria*."[14]

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[9] *Id.* at 156-57.

[10] *Id.* at 1013-39.

[11] *See generally* Donald F. Donovan & Alexander K.A. Greenawalt, *Mitsubishi after Twenty Years: Mandatory Rules before Courts and International Arbitrators*, in *Pervasive Problems in International Arbitration* 11 (Loukas Mistelis & Julian Lew eds., 2006).

[12] Waincymer at 1167.

[13] *Id.* at 184.

[14] *Id.* at 201-03.

As the title suggests, the "guts" of the book deal with the evidentiary and procedural issues facing arbitration: the "procedural framework" for arbitration, e.g., terms of reference, time limits and the like (Chapter 6), "preliminary" issues such as the handling of jurisdictional challenges (Chapter 8), the conduct of the hearing (Chapter 9), the handling of evidence (Chapters 10 through 12), remedies (Chapter 14), costs (Chapter 15) and, finally, the award (Chapter 16). Chapter 7 is devoted to so-called "complex" arbitration, a term coined by Bernard Hanotiau to cover "multi-party, multi-claim and multiple proceeding disputes."[15] Whether this description is in all senses a convenient or correct way of classifying supposedly "complex" arbitration is open to doubt—a few minutes with Waincymer's text will convince even the casual reader that almost any international arbitration is potentially "complex" in the right hands—but the chapter nevertheless provides a convenient receptacle for some of international arbitration's more "awkward" issues, e.g., the treatment of amicus submissions, third-party funding, the treatment of state respondents, so-called "class arbitration," and the possibility for related arbitrators to be consolidated. The author also addresses a relatively overlooked issue, namely, how to deal with insolvency issues and insolvent parties in arbitration.[16]

Throughout, there is a rare "layering" quality to the writing; serious doctrinal discussions, or advanced comparison between different institutional arbitral rules, are interspersed with very practical (and sometimes very amusing) observations. It is hard, for example, not to admire (and harder still to disagree) with Waincymer's views on Microsoft PowerPoint:

> There are differences in view as to the use of PowerPoint and other visual and technological aids. Most people do not use such tools effectively. They are particularly inappropriate when they force the listener to divide their attention between the slide and the speaker, without any clear indication of how this should occur. Other problems with technology such as PowerPoint is that there may often be problems in setting it up, getting the technology to work on cue and having different tribunal members able to read it with ease. Their main value is when the speaker wishes to talk to

[15] *Id.* at 496.

[16] *Id.* at 589-600.

> something while it is visualised by the tribunal. They are often valuable when diagrams, pictures or graphs are involved. Visual aids can also be particularly effective where counsel must address the interpretation of documents, statutes or treaties. If instead, the PowerPoint is merely summarising the points being made orally, it must have been a poorly presented case from the outset if the key issues cannot be understood by listening alone. This is particularly so if the advocate concentrates attention on the matters that are likely to be still troubling the tribunal. An additional problem with PowerPoint is that advocacy is the art of persuasion and counsel may only be aware of the key matters on which the tribunal still needs to be convinced when seeing the body language of the arbitrators and hearing their observations during the hearing. In many cases, it is impossible to optimally identify those matters in advance when trying to generate PowerPoint slides. However, the more complex the matter and the greater the number of claims and cross-claims, the more justification there may be for hard copy or technological outlines of arguments.[17]

Sadly, one suspects this cry for sanity will go unheeded.

This book aims to give a comprehensive in-depth treatment to the modern process of international arbitration, and, as a result covers most of the issues *du jour*—sometimes to a fault. There is extensive discussion of hot topics like "mediators," "witness conferencing," the role of the tribunal "secretary" and third-party funding. While all of these are topical, they also are in constant flux and they may well be overtaken by market developments or changing professional practices.

The text also recognizes the potentially different issues that can arise in investor-state arbitration. While the treatment of investor-state arbitration and public international law issues is extremely thoughtful—the author's familiarity with ICJ and Iran-US Claim Tribunal jurisprudence, for example is rare and refreshing—practitioners will still need to rely on Schreur or related texts for a "grander" treatment of ICSID procedure or specific matters (e.g., bifurcation). At the same time, the fused discussion of inter-state and commercial arbitration has some highly valuable aspects—perhaps

[17] *Id.* at 735 (footnote omitted).

nowhere more so that the 23-page Appendix to Chapter 5, "Decision on Challenges to Arbitrators," which surveys decisions on arbitrator challenges from a broad spectrum of national and international institutions (including the ICC, ICSID, the Iran-US Claims Tribunal, the PCA and the SCC), providing succinct, user-friendly summaries of these numerous decisions, complete with citations.

Finally, Waincymer's text is notable for it breadth of citation—not only to numerous national and international cases,[18] but also to literally hundreds of books and articles in the professional and academic literature. The sheer diversity of cited articles—often written by practitioners or prominent arbitrators—is eloquent testimony to the role practitioners have played in shaping modern arbitration; a role that arguably eclipses that of national legislation or case law. Moreover, the copious anecdotal detail, as evidenced by the names of practitioners who commented on individual draft chapters (full disclosure: this reviewer is one of them) demonstrates the commitment on Waincymer's part to engage not just on a doctrinal level, but a practical one too. This text should prove an invaluable source for practitioners, academics and students alike.

[18] Small point: the publishers may contemplate a Table of Authorities in later editions.