Procedure and Evidence in International Arbitration

BY JEFFREY WAINCYMER

Wolters Kluwer
Law & Business

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Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3168-3

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

About the Author

Jeff Waincymer is a Professor of Law at Monash University, Melbourne, Australia. He is also a legal practitioner specialising in international trade, investment and arbitration as counsel and arbitrator. He is a Fellow of ACICA and is on the panels of HKIAC, KLIAC, ICDR Asia and SIAC. He is a nominee on the WTO government panel list.

Foreword

It is a great pleasure to be asked to contribute a foreword to Professor Waincymer's new book. We were colleagues at Monash University in Melbourne some two and a half decades ago. I left the university to enter practice while Professor Waincymer moved to Deakin University, although he has since returned to Monash. At the university we both had an interest in International Trade Law and Conflict of Laws. The latter subject naturally led me to explore International Arbitration. When the opportunity came for me to lead an Australian team to the Vis Moot in Vienna, I passed it on to Professor Waincymer as I had, by that time, entered practice. Professor Waincymer took up the baton and has, over many years, coached a succession of successful teams participating in the Vis Moot. He is an excellent teacher and has acquired a deep understanding of international arbitration, having taught the subject for many years. In more recent years he has commenced practice, first as a tribunal secretary and then as counsel and arbitrator, and this has undoubtedly expanded his appreciation of arbitration.

Professor Waincymer's treatise, 'Procedure and Evidence in International Arbitration' suggests a book of limited compass. A scrutiny of its Table of Contents quickly reveals otherwise. It covers many topics pertinent to International Arbitration and in considerable depth. There are chapters, as one would expect, devoted to Evidence, Arbitrators, Hearings, the Award, Remedies and Costs, amongst others. But the work also deals with important theoretical underpinnings such as Policy Considerations and difficult subjects such as Complex Arbitrations. In short it is much more than a practical guide; it is a study in depth.

The work is firmly predicated on theory but is well supported by reference to other writers and judicial and arbitral decisions. The frequent reference to other writers does not mean that the book is a compendium of other people's views. Far from it. There is much Waincymer throughout the text and in the arrangement and treatment of subjects.

I read with interest the chapter on Choice of Law. It is still not fully recognized that choice of law in international arbitration is very different from choice of law in litigation. For a start there are many more choice of laws that can arise in arbitration. These include the laws applicable to the following matters: the arbitral regime, the arbitration agreement, the particular reference to arbitration and the substantive rights of the parties. Often counsel seem to simplify issues by classifying them as either 'procedural' or 'substantive', following court practice. In relation to the former I prefer to speak of the law applicable to the arbitral regime rather than the procedural law. How can matters relating to the constitution of the tribunal and its powers and responsibilities be regarded as merely 'procedural'?

Moreover in international arbitration there arises the question of whether the traditional choice of law methodology is applicable. Some would suggest that the traditional process of classification and selection of the applicable law is not appropriate.

It is through works like Professor Waincymer's treatise that the regime of international arbitration will be better understood and studied. After all international arbitration is no longer a form of alternative dispute resolution. It is the primary procedure for the resolution of international commercial and investment disputes. As such, national litigation has become a form of alternative dispute resolution for international disputes. Lawyers' familiarity with domestic litigation should not be allowed to unduly colour approaches to international arbitration.

I congratulate Professor Waincymer on the publication of his detailed treatise, which makes a valuable contribution to literature on international arbitration. It deserves to be consulted by practitioners and students alike.

Michael Pryles

Preface and Acknowledgements

The aim of this book has been to combine practical analysis of the procedural and evidentiary stages of international arbitration, with a theoretical and comparative perspective, in order to identify optimal solutions to promote fairness and efficiency. While there is a range of exceptionally fine treatises dealing with all aspects of international arbitration, they vary from those that provide an exemplary introduction and overview of key areas, to those that magisterially and at great length, outline the laws and rules in most key jurisdictions. By concentrating on procedure and evidence, this book aims to fill a gap between these two extremes, in particular by devoting more time to articulating the arguments for and against various practical responses to particular procedural and evidentiary issues. The aim was to be more exhaustive as to general issues and practical options, but not as to every relevant rule or case wherever they might be found.

The book aims to cover each and every procedural and evidentiary stage in rough chronological order and be informed by variations in approaches between legal families, different institutions and different *lex arbitri.* Essentially, the book seeks to articulate what parties can and should do at each stage of the arbitral process. It considers how tribunals should behave in order to promote the fairest and most efficient dispute resolution exercise and how and why trade-offs should best be made when fairness and efficiency inevitably conflict. It also seeks to show how important procedural and evidentiary discretions are to the outcome and quality of arbitral adjudication and how many supposedly distinct topics such as choice of law, remedies and costs, can be better understood only when sufficient attention is given to the implications in those fields of evidentiary and procedural choices.

A project of this magnitude by a sole author would not be possible without the encouragement and assistance of a range of people who have added immeasurably to the work but who of course are not responsible for remaining errors or

idiosyncratic views. I am particularly indebted to the following practitioners who commented on individual chapters, namely (in alphabetical order): Brooks Daly, Hew Dundas, Tony Canham, Justice Clyde Croft, Graham Easton, Martin Hunter, Mark Kantor, Neil Kaplan, Pierre Karrer, Julian Lew, Albert Monischino, Tim Nelson, Michael Pryles, Lucy Reed and Matthew Secomb.

In similar vein, the project would simply have been impossible without the support of a significant number of exceptionally fine research assistants, the bulk of whom are former student participants in Willem C Vis Arbitration Moot teams that I have coached over the last nineteen years. Again I wish to highlight the assistance of (in alphabetical order): Rosehanna Amin, David Barda, Michael Beaconsfield, Keren Benjamin, Thomas Dreyfus, Amy Greenberg, Jarred Hofman, Catherine Miller, James Patto and Nita Rao, with a special mention to those of my (sensibly non-lawyer) children who were in the country at key times, namely, Ben and Ilan, who stepped in at short notice to do footnotes extraordinaire when the regular pool of assistants dried up from time to time. I wish to pay particular tribute to three former students and research assistants who from time to time also coordinated with the research team at the same time as doing the lion's share of the work. Here I wish to thank in chronological order, Angus Dempster, Alex Fawke and Chris Collie.

Nothing I do or achieve is ever possible without the wholehearted support of all my family, Sara, Ben, Sophie and Ilan and the tireless and incomparable work of my friend and secretary Lorna Frick, ably supported by Jeanette Harlock. Eleanor Taylor at Kluwer was always a supportive and relaxed editor who was a pleasure to work with along with her broader team. Finally, the research aims to be current as at the end of 2011.

Jeff Waincymer
Melbourne

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