

INTERNATIONAL ARBITRATION

Expert Analysis

Important Books for the International Commercial Arbitration Practitioner

Having been in lockdown as a result of COVID-19 for the last 12 weeks, I've had a chance to spend more time than usual with my books. This led me to focus my latest column on what I believe are important books in the field of international commercial arbitration. Given the somewhat presumptuous nature of this task, I begin with some caveats and a word about methodology.

First the caveats. A list such as this is likely to suffer from limitations resulting from parochialism, subjectivity, and lack of linguistic competence: parochialism, because I'm sure that if I had pursued my legal career in, say, Hong Kong, rather than New York, I would have relied upon books different to those currently on my shelves; subjectivity, because my own personal interests will inevitably lead me to prefer some books over others; and lack of linguistic competence, because I'm sure that if I could read, for example, Portuguese or Mandarin, the list would

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be different. In order to take this latter point into account, I focus only on books published in English.

Let me make two points about methodology. First, this article discusses books with a general rather than a specific focus. Thus, many excellent books fall outside its scope because they concern particular industries or practice areas, particular arbitral rules, or a particular city, country or region. The result is to omit many books that provide insights that go beyond their official focus. Second, because I seek to cover a broad range of topics, many excellent books are omitted for reasons of space.

Books about international arbitration can be divided into three broad topics: law, practice and theory. While few books fit neatly into only one of those categories, many do have as their primary focus only one. Some, however, cut across

all three. Thus, I consider books in four sections: those primarily dealing with the law, those with practice, those with theory, and those that defy easy categorization—that I label books of special interest.

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The Law of International Commercial Arbitration

There is one book that would make any list of important books about international commercial arbitration, allowing for every possible caveat and applying any methodology: Gary B. Born, *International Commercial Arbitration* (2014 (2d ed.)). The first edition, which was published in 2009, comprised two volumes. Since then, *Born* has grown on us, both literally and metaphorically; its second edition is three volumes. A third edition is on the way.

Born is both comprehensive and authoritative: comprehensive because it discusses the law of the popular arbitral jurisdictions on

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just about every pertinent issue, however obscure, that may arise in the field and authoritative because it is routinely cited by advocates in arbitration proceedings, as well as by the courts. For example, it was just cited by the Supreme Court in its most recent decision in the field of international arbitration, issued just a few weeks ago. *GE Energy Power Conversion France SAS, Corp. v. Outokumpo*, 590 U.S. ___, 2020 WL 2814297, *6 (June 1, 2020) (holding that the New York Convention does not preclude a non-signatory from seeking to compel arbitration under domestic, state law principles).

Let me give an example of *Born's* comprehensiveness. Recently, my opponent in an arbitration seated in New York made an unsuccessful institutional challenge to one of the arbitrators on grounds of bias. I was curious to know whether, under the Federal Arbitration Act (FAA), which applied to the arbitration, a court would accord any deference to the institution's denial of that challenge in the event my opponent applied to vacate an award in my client's favor based on the "evident partiality" ground in the FAA. I had an intuition about the answer, which I wanted either confirmed or refuted. I remember thinking to myself that, even though this was a narrow and discrete issue, I bet *Born* addresses it. And it does. See §25.04(E)[5]—making it clear that, in the US, an institution's denial of a challenge to an arbitrator on grounds of bias does not preclude an application to vacate an award on grounds of "evident partiality," which is reviewed de novo.

Another excellent book about the law of international arbitration is Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (2015 (6th ed.)). While *Redfern and Hunter* is not as comprehensive as *Born*, it nonetheless contains an illuminating discussion of all major issues in the field, starting from the agreement to arbitrate through to the recognition and the enforcement of arbitral awards. Like *Born*, *Redfern and Hunter* is authoritative and often relied upon by advocates and courts.

While Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2017 (3d ed.)) is focused more on the law of the United States than the other two books, it does a superb job of combining an outline of the legal framework governing international arbitration with useful practical guidance.

The Practice of International Commercial Arbitration

When it comes to the practice of international arbitration, two important issues stand out: drafting arbitration clauses for international contracts and acting as an advocate in arbitration proceedings. Here I want to highlight four books, one about drafting arbitration clauses, three about advocacy.

Paul D Friedland, *Arbitration Clauses for International Contracts* (2007 (2d ed.)) covers just about every issue you could conceivably think of when drafting an arbitration clause, and many that you wouldn't, such as excluding the power of arbitrators to award punitive damages—an authority that, absent exclusion,

arbitrators would possess in a case seated in the US. The book also contains useful sample clauses covering each of the many issues it discusses. *Friedland* also has helpful sections on the factors to consider in choosing litigation or arbitration, in choosing between administered or non-administered arbitration, and in choosing an administering institution.

A book designed to teach you advocacy is akin to a book that aims to teach you how to ride a bicycle; ultimately, there is no substitute for experience, no alternative to failing dismally and getting back in the seat and trying again. But books can guide you through the basics and provide practical tips on how to navigate different terrains you may encounter along the way; advocating before arbitrators from different legal cultures; cross-examining financial experts; using technology effectively.

While there are many books about advocacy in international arbitration, unfortunately, some offer trite advice—like that old chestnut, "keep it simple," which provides no concrete guidance in the context of any particular case—or arbitrary prescriptions, such as "make no more than three points on cross-examination," which are as helpful as the proverbial broken clock that is correct twice a day.

However, there are some books that are very useful: R. Doak Bishop and Edward C. Kehoe (editors), *The Art of Advocacy in International Arbitration*, (2017 (2d ed.)); Stephen Jagusch and Philippe Pinsolle (editors), *The Guide to Advocacy*, (2019 (4th ed.)); and Lawrence W. Newman and Timothy G. Nelson (editors), *Take*

the Witness: Cross Examination in International Arbitration (2019 (2d ed.)). Each is an edited volume—with essays by leading practitioners in the field from a wide range of jurisdictions, legal cultures, and practice areas.

Bishop and Kehoe and *Jagusch and Pinsolle* address all aspects of advocacy, from the preparation of written submissions to all the different types of advocacy involved at hearings, including opening statements, direct, cross- and redirect examination, and closing arguments. And both books benefit from providing an arbitrator's perspective on effective advocacy; *Bishop and Kehoe* by having separate chapters written by prominent arbitrators, *Jagusch and Pinsolle* by having scattered throughout the work various practice pointers by leading arbitrators.

Because the practice in international arbitration is for the direct testimony of witnesses to be submitted in writing in advance, the vast bulk of arbitration hearings is taken up with cross-examination. It is no surprise, therefore, that all three books have extensive discussions of cross-examination, with *Newman and Nelson* making the topic its exclusive focus. One of the strengths of all three books is that a range of experienced practitioners offer insights into their own approaches to cross-examination, enabling readers to choose the elements of each that best suit them. *Newman and Nelson* also contains an excellent chapter on *Cross-Examination By Video Conference* by David Roney, which many might find helpful in current circumstances given the

shift to virtual hearings as a result of COVID-19.

International Arbitration Theory

There are few works of theory in the field of international arbitration in the English language. This is somewhat surprising given that international arbitration rests on concepts, like “party autonomy,” that have deep philosophical resonance (recall Immanuel Kant) and raises questions of legitimacy that parallel those that have long-puzzled political philosophers, such as the justifiable basis upon which a state can lend its coercive power to enforce the decision of a private arbitral tribunal.

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Two insightful theoretical works are Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010) and Jan Paulsson, *The Idea of Arbitration* (2013). *Gaillard* discusses three different models that explain the legal basis of arbitration: one that sees an arbitration rooted in a single national legal system (the seat of the arbitration); one that sees it as rooted in a plurality of legal systems (those countries that might recognize an arbitration award); and one that views arbitration as its own autonomous legal order, separate and distinct any particular national legal system. *Gaillard* discusses these theories by reference to their implications for

various different issues that arise in the field, such as whether a court in a one country should give effect to an award set aside by a court at the seat.

Paulsson offers a wide-ranging theoretical discussion of some of the most difficult conceptual issues in the field. For example, he offers a theory to address one of arbitration's perennial questions, who as between courts and arbitrators should address an objection at the outset that a dispute does not properly belong in arbitration and, relying on Italian legal philosopher Santi Romano's theory, he offers an account of arbitration that is, at its heart pluralistic, and that views arbitration as somewhat autonomous from the legal order of any particular jurisdiction.

Books of Special Interest

Finally, I highlight six other books that are not easy to place neatly into the category of law, practice or theory.

George Bermann, *International Arbitration and Private International Law* (2017) seeks to locate international arbitration in the field private international law and vice versa. In the course of doing so, Bermann addresses just about every important issue of theoretical interest in the field, and illuminates all of them. Just one of Bermann's many thought-provoking insights is to view arbitration law as seeking to reconcile the values of legitimacy and efficacy. To take an extreme example, if arbitration law required that courts undertake a full hearing on the merits (with appropriate appellate review) of even the barest of objections to an

arbitration agreement (e.g., the dispute falls outside the scope of that agreement), arbitration's legitimacy would be assured. However, its efficacy would be undermined; few would agree to arbitrate if full blown court proceedings were required for an arbitration proceeding even to get going.

The paradigm instance of an international arbitration proceeding is that which arises out of a bilateral contract. The complexity of international business, however, is that particular projects or ventures or dealings cannot easily be reduced to a single contract between two parties. A clear instance of this is a construction project, which has multiple participants and multiple contracts. International arbitrations involving multiple projects or parties thus raise distinct issues, absent from the paradigm case. Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (2006) explores these issues thoughtfully and thoroughly, examining such topics as the law and practice relating to non-signatories, the consolidation of arbitrations, and class arbitration.

While it is conventional wisdom that international arbitration must accommodate participants from different cultures, much writing in this area is about reconciling common and civil law approaches to legal process. Won L. Kindane, *The Culture of International Arbitration* (2017) takes us well beyond this familiar ground, discussing among other things, the African legal tradition. *Kindane* is animated by a desire to understand "the extraordinary lack of cultural diversity

among the decision-makers, and the cultural disconnect between the decision-makers and those who must suffer the consequences of the decisions." This book challenges much that leading participants in the field might take for granted and, at a minimum, forces us to ask whether what we view as a natural or obvious approach to an issue is simply the product of the culture from which we come.

William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2012 (2d ed.)) is a collection of erudite essays that Park composed over many years as a practitioner, scholar and arbitrator. Park writes with calm cadence as he addresses broad theoretical issues, the legal framework that governs arbitration and the many practical issues that may arise during an arbitration proceeding. The late Johnny Veeder QC's elegant foreword to the second edition is alone worth the price of admission.

One of the hallmarks of international arbitration is that the participants in any particular case may be subject to different ethical obligations, which sometimes conflict. Moreover, the failure to abide by some of these obligations can have serious implications; an arbitrator's failure to disclose a particular relationship might result in the setting aside of their award. Catherine Rogers, *Ethics in International Arbitration* (2014) is a highly sophisticated work, going well beyond the superficial discussions that often characterize this area, e.g., the merits of the IBA Guidelines on the Conflicts of Interest in International Arbitration. Rather, *Rogers* delves deep to

consider the theoretical underpinnings of the ethical rules that should govern the conduct of participants in the field, by, for example, considering the degree to which arbitrators are properly viewed as contractual services providers akin to, say, a hairdresser, or as performing a public adjudicatory role akin to a judge. Ultimately, *Rogers* proposes a robust system of self-regulation that she defends against the often-made charge that self-regulation stands in relation to regulation as self-righteousness does to righteousness or self-importance to importance.

Stacie I. Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (2009) is unique in the field. It is a helpful book for both newcomers, who might find that their typical research strategies of looking at the law reports aren't always effective in international arbitration, to seasoned practitioners, who may be less familiar with the diverse body of electronic sources of useful information.

As I noted at the outset, any list like the one offered here suffers from many limitations. I would be delighted to hear from readers about the many excellent books I have omitted that they would place on their list of important books about international commercial arbitration.