Book Review

Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Kluwer Law International, The Hague, 2006, 2 Volumes, xi + 174 + DVD, xi + 637, EUR 75, ISBN 9041124993)

REVIEWED BY LUKE NOTTAGE*

This is a wonderful work, commended unreservedly to all interested in 'private dispute resolution' (international commercial arbitration, mediation, negotiation) and, indeed, contract law and practice. It is particularly useful for teachers and law students, especially those developing new courses at an undergraduate or postgraduate level and those involved in student moot competitions. But the two-volume set is also very valuable for lawyers (in small or large practices), in-house counsel, and specialists from other disciplines likely to encounter challenges in planning cross-border deals and resolving some inevitable disputes. For a work of such richness in this area, it is very attractively priced.

The author is University of Cologne Professor Klaus Peter Berger. He is a leader in the 'next generation' of arbitration specialists who continue the rich European (and American) tradition of engaging academics in defining and developing the field, as multi-talented teachers, commentators and arbitrators. Professor Berger also generously acknowledges the synergistic contributions of many others in this book project. As well as his team at the Centre for Transnational Law (CENTRAL) and up-and-coming arbitration experts like Constantine Partasides, Professor Berger also acknowledges contributions from several senior practitioners. Collaborators include Professor Martin Hunter, Dr Pierre Karrer and Dr Hilmar Raeschke-Kessler (on the arbitration side), Dr Joerg Risse (mediation), and George Washington University Professor Charles Craver (negotiation).

The project is innovative in two main respects: the use of a sustained case study and extremely well-integrated DVD resources that come with the book. The case study 'demonstrates in 29 "Scenarios" how a promising business relationship between a Swiss exporting company ('ALT') and a Dutch importer ('Nedtrans') turns into a hard-fought legal battle before an international arbitral tribunal after negotiations between the managers of the two companies responsible for the conclusion of the contract and a business mediation between the companies' two CEOs fail'.[1]

---

* Associate Professor, University of Sydney Law School; Co-director of Japanese Law Links Pty Ltd.

1 Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (2006) at vi.

This allows readers to appreciate some distinctions between negotiation (bilateral) and mediation (adding a neutral third-party) and between both these processes (purely consensual and hence potentially open to more flexible solutions) and arbitration (initiated by agreement but usually ending in the arbitrator's binding decision based on application of the law). On the other hand, by juxtaposing these different processes in a specific cross-border setting, readers also begin to appreciate the considerable flexibility left to the parties in tailoring the arbitration procedure even once commenced. There is also a significant margin for discretion left to the arbitrator in the choice and application of the substantive law. This allows some arbitrators to take an active — even sometimes interventionist — role in proceedings, like some mediators do. In practice, both aspects can blur the conceptual distinction between purely consensual mediation and partly consensual arbitration — such conceptualism being one reason why some purists now assert that the latter is not true 'Alternative Dispute Resolution'. This book largely sidesteps that debate by neatly encompassing all these processes within the new broad church of 'Private Dispute Resolution'.

Further, as readers work through these various processes in the Case Study, they encounter contract law and practice at each turn, to initiate the process. In the arbitration phase, readers also learn especially about some key aspects of the *United Nations Convention on Contracts for the International Sale of Goods* ('CISG'). CISG is now the default regime for international sales between almost all the world's major economies. It also provides the core of 'opt-in' rules for international dealings such as the UNIDROIT Principles of International Commercial Contracts ('UPICC'), an important part of the substantive *lex mercatoria* used in negotiating, drafting and arbitrating contracts.[2] Thus, Berger's present book manages to integrate quite seamlessly various areas of law and practice, which is always a challenge when adopting a case study approach. From personal experience in the University of Sydney's LLB course in International Commercial Transactions ('ICT'), using a carefully devised case study can prove very valuable for students in need of grounding in several fields while not 'losing the plot'.

The DVD resources, especially the videos, are also successfully integrated into the design and layout of the book set. Professor Berger bases the videos on those developed in an earlier book of his.[3] That book had already been convincingly described by Professor Eric Bergsten, organiser of the immensely popular Vis Arbitration Moot in Vienna (and now Hong Kong),[4] as 'the best set of teaching materials for students and young practitioners on the conduct of an international commercial arbitration that exists.'[5] Both the ICT course and an LLM course in International Commercial Arbitration at the University of Sydney have long used one of the original video hearings to highlight basic principles and dramatically reinforce key distinctions from many court proceedings, especially in the English common law tradition. In 'International Dispute

2 Klaus Peter Berger (ed), *The Practice of Transnational Law* (2001).

3 Klaus Peter Berger, *Arbitration Interactive: A Case Study for Students and Practitioners* (2002).

4 The Annual Willem C. Vis (East) International Commercial Arbitration Moot: <www.cisgmoot.org/> accessed 14 April 2008.

5 Berger, above n1 at x.

Resolution — Practice and Procedure', another LLM course at the University of Sydney initiated this year that compares arbitration with inter-state processes (like those before the World Trade Organisation and the International Court of Justice), this book's DVD promises further rich video resources and associated resources.

Specifically, videos are available now not only for the arbitration phase (Scenarios 16–29, raising the most legal issues), namely the hearing in which a challenge to jurisdiction is heard by the arbitrators (Scenario 20) and hearings on the merits (arguing CISG: Scenarios 24–26). There are also videos for key parts (Scenarios 4–5) of the negotiation phase (Scenarios 1–5) and for almost all the mediation phase (Scenarios 7–14, not Scenario 15 where ALT's Board rejects the settlement that seemed to have been reached).

The DVD, found at the back of Volume I, also incorporates six other sets of useful resources:

(1) Parties and Persons;
(2) Case Development (an animated depiction of the events in Scenario 1 in which the contract is concluded, and Scenario 2 in which the dispute arises due to problems afflicting ALT's South Korean supplier);
(3) Documents and Events (linked by a chronology for each Scenario, and containing valuable examples of contract terms and submissions);
(4) Materials (key legislation, arbitration or mediation rules, and a trial version some decision tree software);
(5) 'Soft Skills' (such as Craver's 'Summary Guide to Effective Legal Negotiation'); and
(6) 'Links' (including to CENTRAL's online Transnational Law database, www.tldb.net and a website for updates to this book, www.private-dispute-resolution.net).

Volume I (sub-titled 'Case Study and Interactive DVD-ROM') succinctly outlines the facts and key each issues for each Scenario, even for those where there are some videos, beginning with keywords and ending with some questions for study and discussion. It also appends a concise 'Glossary of Terms' (pp158–174). The much lengthier Volume II ('Handbook') provides detailed Answers and discussion materials, concluding with a selective bibliography and handy index. An identical 'User's Guide' at the start of each volume clearly explains how to use all the resources and the layout and style of writing are very appealing. There appear to be very few grammatical or typographical errors, especially for a work of this length by a non-native English speaker, and the errors which are found do not detract from the flow (for example, paragraph 24–15 in Volume I repeats paragraph 24–14).

In the end, like Oliver Twist in Charles Dickens' second novel, all this reviewer can add is: 'Please, sir, I want some more'. Although this work is a superlative elaboration of *Arbitration Interactive* and will give us all much to digest over the next few years, the brilliant basic features could be developed even further. For example, a 'prequel' (or 'Scenario 0') might provide background and role-play material on how the original (or some different) contract was concluded. The same basics for effective negotiations

introduced in this work could be extended beyond the context of resolving a breakdown in a pre-existing contractual relationship (given in Scenario 1). This would be particularly useful for those involved in the large Japan Intercollegiate Negotiation and Arbitration Competition now held in Tokyo every December. The first day of this competition involves the two parties reaching a contractual arrangement; the second day involves arbitrating a dispute arising under that contract applying UPICC.[6]

Secondly, Scenario 22 might be elaborated to go beyond its 'intermezzo' or pause in the arbitral proceedings allowing parties 'time out' to renew bilateral settlement negotiations. In addition, there might be a further video and more discussion about the pros and cons of various forms of mediation attempted by the arbitrators themselves. Such hybrid and potentially very cost-effective 'arb-med' processes are attracting renewed attention, as companies and dispute resolution professionals become more familiar with mediation and arbitration individually. (It has emerged, for example, as a recurrent theme in the Clayton Utz/University of Sydney International Arbitration Lecture series).[7]

Thirdly, there could be a video about 'beauty parades'. This is the increasingly common practice whereby each side interviews potential arbitrators, especially if a party-appointed arbitrator is allowed by the arbitration agreement or rules. There could be detailed consideration of the 2004 International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, adding to Scenario 19 on arbitrator selection.

Fourthly, in future it might be worth developing Scenario 21, to include a video of a hearing on interim measures. This is another very important area in arbitration practice, with UNCITRAL approving in 2006 amendments to the 1985 Model Law on International Commercial Arbitration.[8] In particular, unlike Scenario 21 and subject to specified safeguards, the revisions provide for the contentious possibility of ex parte applications (without notice or submissions by the other party).

Fifthly, prior to the video of the evidence presented by key witnesses in Scenario 26, there could be another video and more detailed written material about lawyers interviewing their own witnesses. This is another important skill, which has spawned its own student competitions.[9]

Finally, it may be worth adding another two videos to go with the concluding two Scenarios (28–29) on, respectively, setting aside the arbitral award at the seat (Germany) and contesting enforcement in a state where the losing party has assets. This would add an opportunity to reinforce just how different and inflexible court procedures are. If the video associated with the enforcement proceedings was based on a common law country, like Australia, readers could also get a sense of how its courts differ from those of civil law countries like Germany.

6 See <www.law.usyd.edu.au/anjel/content/anjel_teaching_comp.html> accessed 14 April 2008.

7 See <www.ialecture.com> accessed 14 April 2008.

8 United Nations Commission on International Trade Law <www.uncitral.org> accessed 14 April 2008.

9 See for example Sydney University Law Society <www.suls.org.au> accessed 14 April 2008.

On the other hand, adding those two videos might send the wrong impression. After all, although there do seem to be more judgments recently in countries like Australia involving international commercial arbitration, that is probably linked to more active use of arbitration in cross-border dealings involving Australian companies. It must still be true, in Australia as elsewhere, that only a tiny proportion of disputes leading to or in the shadow of arbitration get anywhere near a courtroom. Long may it remain so. This latest book by Berger offers a rich resource for keeping arbitration and other private dispute resolution predominantly just that — private — and hence more capable of adapting to the evolving needs of commercial parties.