Book Reviews – Top Three for Winter

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Winter holidays invite fun reading, including good professional reading, that most of the rest of the year forbids. Not exactly beach reads, but the same idea. And, this year, readers from the United States with interests in international arbitration, had their choice among a host of new offerings. Three warrant special mention.

First, Professor Bo Rutledge's "Arbitration and the Constitution" offers a thoughtful and provocative study of what, in the United States, are surprising companions. As Rutledge comments at the outset of his work, "Arbitration and the Constitution? At first glance, these two bodies of law appear to be strange bedfellows." On the one hand, arbitration is quintessentially "private" – resulting from private (usually commercial) agreements between private (usually business) parties to resolve private (again, usually commercial) disputes in private (non-public, and generally confidential) proceedings before private parties (called arbitrators). On the other hand, constitutional law is quintessentially "public" – resulting from public (super-majoritarian) legislative acts for the purpose of regulating public (governmental) institutions in their conduct of the public's affairs. One might naturally conclude that the one field offers little, if anything, of importance for the other.

Rutledge's thesis, however, is that the 20th century witnessed a gradual cross-fertilization between the two fields. He correctly notes the demise of the non-arbitrability doctrine, resulting in the increasing use of arbitration to resolve "public law" disputes (such as antitrust or securities law claims), the expansion of international arbitration into the fields of trade and investment (NAFTA and ICSID arbitration being salient examples), and the growth of arbitrations involving consumers and employees. Not surprisingly, as a consequence, constitutional principles and values have been imported, often on an ad hoc and sporadic basis, into different aspects of arbitration.

Rutledge's book explores these various developments, and their theoretical underpinnings, beginning with an examination of legislative and judicial authority to require recognition and judicial enforcement of arbitral awards. His analysis, which is both concise and insightful, concludes with the, quite correct, observation that U.S. courts have virtually always rejected arguments urging constitutional requirements for heightened judicial review (under Article III of the U.S. Constitution) of arbitral awards or limits on executive authority to conclude and implement international agreements including arbitral mechanisms (such as NAFTA). Rutledge then turns to the relationship between arbitration and federalism in the United States, describing the complex, and often confusing, relationship between federal and state law in the U.S. Supreme Court's decisions under the Federal Arbitration Act. Finally, Rutledge turns to the relationship between arbitration and constitutionally protected individual rights, devoting particular attention to the role of due process analysis in judicial review of arbitral awards (and arbitration agreements). In each area of his analysis, Rutledge weaves together a sophisticated mix of doctrinal authority and observations about "system design" (including the AAA's due process protocols and the U.S. approach towards NAFTA and BIT arbitrations).

Rutledge concludes with a call for further study, including comparative study of the relationship between arbitration and constitutional law. He also correctly notes the curious fact that many aspects of procedural "due process" protections in arbitration have resulted from private initiatives (such as due process protocols and, he might note, institutional requirements for procedural fairness and impartiality and independence of arbitrators).

Rutledge's work is sure to be of particular interest in the United States, where his observations about U.S. constitutional principles are of special value. But his observations are no less relevant or insightful outside the United States: Rutledge combines a rich historical and doctrinal study with incisive observations and provocative prescriptions, all informed by practical experience in both domestic and international arbitrations. In particular, Rutledge's suggestion for comparative research is well-timed and will hopefully excite interest in European, Asian and other academies. One subject where further exploration may also be warranted is the role of the New York Convention as a "constitutional" instrument (see, for example, *Yugraneft Corp. v. Rexx Mgt Corp.,* 2010 SCC 19 (Canadian S. Ct.) (characterizing "the Convention as a 'constitutional instrument' that leaves a substantial role for national law and national courts to play in the arbitral process," citing G. Born, *International Commercial Arbitration* 101 (2009)). In particular, the influence of different forms of constitutional analysis, both with regard to procedural protections and limitations on legislative interference with individual rights (of contract and association), offer promising fields for further research – building on Rutledge's ambitious platform.

Second, of a very different but also rewarding genre, the U.S. Federal Judicial Center announced the publication of Professor Stacie Strong's guide to international commercial arbitration – titled "International Commercial Arbitration – A Guide for U.S. Judges." The work is part of a broader series, produced by the Federal Judicial Center, aimed at assisting U.S. federal judges in the field of international litigation. The work is aimed not at theory, but practicality, and provides a concise (100 pages or so) overview of international commercial arbitration in U.S. courts.

The guide is comprehensive and painstakingly executed. Professor Strong begins with a definitional chapter, distinguishing international arbitration from other forms of arbitration (and dispute resolution), including both domestic arbitration and international litigation. She then provides a concise, but very helpful, overview of the arbitral process, including introductions to sources of legal authority (for U.S. courts) and of the procedural conduct of an international arbitration. Strong's book then addresses the enforcement of arbitration agreements, including (the uniquely American) motions to compel arbitration, as well as other means of enforcing international arbitration agreements. The book moves on to the (very limited) role of U.S. courts during the arbitral process, including challenges to arbitrators (unusually, not generally available under the Federal Arbitration Act) and preliminary relief in aid of arbitration. Finally, Professor Strong concludes with a treatment of the recognition and enforcement of foreign arbitral awards, as well as actions to vacate (or annul) awards made in the United States.

Throughout the guide, Professor Strong aims, with singular success, at clear, direct and concise descriptions of the U.S. law of international commercial arbitration. In so doing, she makes a major contribution to the international arbitral process. U.S. courts, like those in a number of jurisdictions, have sometimes encountered difficulties in dealing with the complexities and unfamiliarities of international commercial arbitration. Ironically, those difficulties seem most pronounced in the District of Columbia – where the U.S. Court of Appeals for the District of Columbia has begun to earn a reputation for badly misunderstanding both the international arbitral process and U.S. commitments under the New York Convention and other U.S. treaties (first, in *Termorio v. Electranta* and more recently in *BG Group v. Argentina*). The offer of greater guidance in the field for judicial decision-makers is both very welcome and timely. Both Professor Strong and the Federal Judicial Center deserve particular appreciation for addressing a significant and growing issue of concern for U.S.

treaty partners and international businesses.

Finally, taking to heart the adage, in some countries, that one cannot have two without three, one cannot omit mention of the American Law Institute's (ALI's) Restatement (Third) of the U.S. Law of International Commercial Arbitration. Unlike Professors Strong and Rutledge, who provide single instalment works, the "Restaters" – Reporters George Bermann, Jack Coe, Chris Drahozal and Catherine Rogers – provide readers with a steady series of instalments – a la "24" or "Game of Thrones" – that provide a highly detailed study of the U.S. law of international commercial arbitration. The Restatement is a highly ambitious undertaking, aiming at completion within the next several years, and drawing on both the Reporters' collective expertise and the advice of an extensive body of expertise represented in their Advisory Committee and the ALI Members' Consultative Group.

The most recent work released by the Reporters included a Tentative Draft of the (important) definitional sections and (equally important) sections on recognition and enforcement of foreign awards and annulment of awards made in the United States. As with all ALI Restatements, the Reporters' work takes the form of "black letter" rules (analogous to those in Collins, Dicey & Morris on the Conflict of Laws), comments (that explain the rules) and the all-important "Reporters Notes" (that provide detailed expositions of existing U.S. authority and reasons for preferring particular approaches in cases where authorities are divided). The current drafts, which have been approved by the ALI membership, are available to the public, and for citation in U.S. litigation and courts, are comprehensive and thoughtful.

Among other things, the Restatement's definitions are carefully-constructed and not only provide clarity with respect to a number of technical terms, but also provide a clear and precise framework for analysis. Additionally, the Restatement's treatment of the limited grounds for judicial review of "non-domestic" awards made in the United States (which the Restatement defines as "Convention Awards Made in the United States" or "U.S. Convention Awards) is innovative and noteworthy. In particular, the Restatement provides that the bases for vacatur available under Chapter 1 of the FAA (including the manifest disregard doctrine) does not apply to the annulment of Convention awards made in the United States. If this position were adopted by U.S. courts, it would effectively subject annulment of awards made in the United States to the same grounds as those applicable in UNCITRAL Model Law jurisdictions. Similarly, the Restatement's treatment of the preclusive effects of arbitral awards makes a substantial contribution to the field, including by underscoring the central importance of the New York Convention in the field.

In any work of this magnitude, readers will have criticisms. Particularly given the recent decisions of the District of Columbia Circuit (noted above), one would hope for a stronger affirmation of the limited role of the non-arbitrability doctrine and public policy under Article V(2) of the Convention. The current drafts of the Restatement dealing with Article V(2)(a) and (b) will probably leave many readers wishing for a bit more emphasis on the limitations on these doctrines (which are already reflected in most U.S. and foreign judicial decisions in the field). The good news is that a Tentative Draft leaves room for just those sorts of changes – so, taking an optimistic view, readers are encouraged to watch this space this time next year.