Book Review

Negotiating International Commercial Contracts

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Moser, G., and McIlwrath, M. *Negotiating International Commercial Contracts, Practical Exercises*. The Hague, Eleven International Publishing, 2020, 122 p., ISBN 9789490947095.

Negotiating International Commercial Contracts is a very practical and comprehensive toolkit to help practicing attorneys and in-house counsels to build proficiency in negotiating methods of dispute resolution as well as choice of law and forum clauses. These topics are equally important for mediators drafting international settlement agreements.

The authors, Gustavo Moser, legal counsel at the London Court of International Arbitration, and Michael McIlwrath, Vice President Litigation for the global energy technology company Baker Hughes, share their elaborate experience with the vast array of different options and procedures available to propose inclusion in cross-border contracts. It would be a mistake to underestimate the importance of an efficient and reliable method for resolving conflicts when doing business with a counterpart in another country than in one's own familiar jurisdiction. The same applies to reliability in enforcing contractual stipulations. In the reverse it is important to be able to assess the potential consequences of accepting a compromise solution in order to reach an agreement with another party.

Many pitfalls are encountered in enforcing stipulations without deliberate and considered arrangements on the basis of informed consent. It is important to avoid the pitfall of considering the dispute resolution clauses, often in the closing hours of the negotiation, as being of minor commercial interest. Even between trusted parties, a solid and reliable arrangement to avoid escalation and resolve disputes may be the foundation of a successful working- or trading relationship. There are, I believe, three important stages during which the true carat of the personality of one's contracting party will manifest itself. The first is while negotiating the contract. Much like personal relationships, if two people fight before they get married, they are quite likely to continue doing so after they have had their marriage bond formalised. When questions and challenges can be overcome in a constructive manner during the negotiations, it is quite likely that the same attitude will enable the parties to work well together in the second stage, which starts after the contract has been signed. In ideal circumstances, the contract ends up in the corporate file, not to be looked at again. A third stage that may be introduced when problems that inevitably occur in every cooperation cannot be directly resolved. These can absorb much energy, time and costs and destroy a once happy relationship. Mediation, which is not overlooked in the book, may then be a useful instrument, particularly to save relations and to discuss difficulties in a safe, confidential environment. Moser and McIlwrath explain the advantages of mediation in international contracts succinctly: it can mitigate a party's concerns over the risks posed by the contract's binding form of dispute resolution. In the best of cases the parties will eliminate the risk of imperfect dispute resolution by settling instead of initiating formal proceedings that may appear less than ideal. Even if they do not settle, they may obtain a better understanding of their dispute by having met and attempted to resolve their differences in mediation. Mediation, rather than initiation of formal proceedings, may help to preserve important relationships where they exist. The process of

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mediation is confidential, so the parties may openly address the causes of their dispute, without concern that their candour will be used against them in subsequent proceedings if a settlement is not reached. Finally, whereas litigation is about winning or losing – and judges and arbitrators are limited to the cause of action – mediation enables the parties to use the process to identify ways to alter their contractual relationship to provide for mutually satisfactory solutions (e.g. agreeing to sell or purchase additional products or services or adopt discounts or advance payments). As I like to remark in mediation, litigation is about the past, while mediation is about the future. Contracts can be torn up and rewritten in mediation to create a fresh start.

What I believe may be emphasised more elaborately in a future edition of the book is that a simple undertaking in a contract to try mediation before starting formal litigious proceedings will not be enforceable everywhere. This is particularly so if no institution with a set of rules is being referred to. Most institutions that administer mediation will, in their rules, deal with issues that would otherwise have to be detailed in a mediation clause in order to be enforceable: e.g. place and language, selection of the mediator, fees and costs, conduct of the mediation, confidentiality and termination of the proceedings.

The book offers many insights, ideas and examples spread across five chapters: Escaping the Trap of the Familiar in International Contract, Negotiating Choice of Law, Negotiating Methods of Dispute Resolution, Defective Choice of Law and Dispute Resolution Clauses – Prevention and Management of Potential Risks, and Putting It All Together. Each chapter features exercises that can be performed individually or collaboratively. There is an appendix that contains 'suggested answers', rather than solutions that are either right or wrong.

The book, which I expect to become evergreen with many successive editions, is a treasure trove for every lawyer who is or will become involved in international contracting. Anyone involved in international transactions, negotiation and enforcement or interpretation of international dispute resolution clauses may benefit from it, not only to self-educate but also to obtain an overview of all that is possible in the choice of law to govern a contract and the method and place of dispute resolution.

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