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Book Review

Arbitraje, by FRANCISCO GONZÁLEZ DE COSSÍO. *Published by Editorial Porrúa, Mexico (2004, xxiii + 596 pp.).*

After a number of years abroad (in New York and Paris) working in the field of international arbitration, the author of this impressive volume returned home to Mexico where he has quickly established himself as a practitioner and scholar. There might have been a temptation for him to write a book on international arbitration, with the goal of making available an up-to-date monograph in Spanish on the concepts and craft of a discipline in which much of Latin America had for generations been, to be blunt, something of a laggard. But González de Cossío had a more encompassing ambition, and so his title is the single word *Arbitraje*.

In other words, his purpose was to exploit international resources and experience to revitalise the understanding of arbitration in *national* law, and thus speak to a far wider audience than those who routinely deal with international transactions. After all, he reasons in his concluding chapter, Mexico has a tradition of finding 'direct source or inspiration' in other legal systems, beginning with the Constitution and continuing with various civil and commercial legislation, such as the laws on commercial companies, securities and competition (the latter being the subject of another monograph authored by González de Cossío, *Competencia económica: aspectos jurídicos y económicos* (Editorial Porrúa, Mexico, 2005, with forewords by Judge Richard Posner and Prof. Dennis Carlton)). Thus we benefit from others' experience, he writes, and are in a position to emulate their successes.

Since its publication, the book has already been noted in a number of Latin American countries, and is used as a teaching tool in law faculties. It has been cited by trial and appellate courts in Mexico, and commented upon by Supreme Court justices (whose opportunity to refer to it in the context of their decisions, one surmises, is a matter of time).

The very appearance of books like this should be of interest even to those who do not read Spanish, because it is evidence of what may be (and should be) a new stage of international arbitration. The process now commends itself to practitioners in Latin America, or Asia or the Middle East, not as a foreign technique to be used by sophisticates in foreign operations, but as a vehicle for improving the implementation of the rule of law generally, to be assimilated, mastered, incorporated – and finally *appropriated* in such a way as to enable and

entitle lawyers from a widening range of regions to influence its development. They feed back their experiences and evaluation both inward, into their national systems, and outward, back into the international system of which they thus become a part.

Thus, in this instance, we find a Mexican scholar investigating the concept of the agreement to arbitrate (Chapter III) as it is understood in countries where international arbitration has historically been particularly well developed, and then developing a sustained juxtaposition with its theoretical cognates in Mexican jurisprudence. Are the intellectual foundations reconcilable, the author seems to ask, and if that is in doubt, what are the accommodations that would make it so? And of course, expressions which might be mysterious and therefore mischievous within a national system may be elucidated by the rich variety of experience elsewhere. So, when article 1416 of the Mexican Commercial Code defines 'arbitration' as 'any *arbitral* procedure of a commercial character', González de Cossío is quick to suggest that this should not be interpreted as a hapless circularity destined to engender confusion and arbitrariness, but the conscious opting for an open texture susceptible of encompassing a number of mechanisms which have proved interesting elsewhere, and would have been excluded by a narrow definition: *arbitrato irrituale* in Italy, *Binden Advies* in the Netherlands, *Schiedsgutachten* in Germany and 'valuation' in some common law countries. Thus, the very notion of arbitration is supple, and theoretical boundaries may evolve. The author, at p. 57, proposes his own articulation of the elements that (for now?) constitute arbitration.

The comparative references presented here are impressive indeed. For example, to give content to the somewhat nebulous notion that arbitration must concern a 'defined legal relationship' (an expression used in the New York Convention, the UNCITRAL Model Law, and indeed article 1416.I of the Mexican Commercial Code), he refers not only to what may be a unique case in point, *The Damianos* [1971] 2 QB 588, [1971] All ER 1301, but goes beyond Lord Denning's somewhat rambling speech in the Court of Appeal to isolate the ultimately operative notion ('sufficiently close connection'), which was in fact that of the High Court judgment he upheld.

Similarly, the author carefully contrasts the fundamental conceptions of consent as developed by Mexican jurisprudence under the Civil Code with international experience under treaties, and the familiar problems of incorporation by reference and the 'in writing' requirement.

The general structure of the book is not innovative. It proceeds from an overview of types of non-judicial methods of dispute resolution, and the requirements and nature of the agreements to arbitrate, to awards and their enforcement, the centrepiece being the inevitable lengthy section on the arbitral proceedings themselves. What is unique is the constant perspective and the depth of its description and analysis. A typical example: the discussion of provisional measures in arbitration comprises three substantial sections: international precedents, comparative law and Mexican law. International practitioners are likely to be fully familiar with the first, to have a spotty acquaintance with the

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second (and the author himself must accept a similar comment about this section of his book, given the inexhaustible richness of comparative law), and to find the Mexican section, informed as it is by insightful comparisons, to be of great interest. The Mexican non-internationalist practitioner, one surmises, would recompose the last sentence in reverse order. (One can only applaud, by the way, the economy and insight with which the author informs someone whose practice is based wholly in a national court system of all he or she needs to know about the theory and practice of the *cautio judicatum solvi* (security for costs) in international arbitration – and that includes the House of Lords' decision in *Ken-Ren* and its subsequent correction by Arbitration Act 1996, s. 38(3).)

In the end, the reader recognises that this book could be compared to the experience of two alien beings who give themselves time to look at each other, inch by inch from top to toe, and gradually see their countenance and movement and purpose reflected in the other, and realise that they are not strangers at all.

As in his other writings, González de Cossío addresses the reader in a lively and direct style which contrasts with the baroque formulations and passive voice with which Latin American authors too often drive some foreign readers (at least this reviewer) to distraction. Complex syntax is, of course, no evidence of insightfulness. The clarity of this author's exposition is at once evidence of careful thought, a sign of respect for his readership, and evidence of a desire to connect rather than to dazzle.

Jan Paulsson

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