

Introduction

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This treatise aspires to provide a comprehensive description and analysis of the contemporary constitutional structure, law, practice and policy of international commercial arbitration. It also endeavors to identify prescriptive solutions for the conceptual and practical challenges that confront the international arbitral process. In so doing, the treatise focuses on the law and practice of international commercial arbitration in the world's leading arbitral centers and on the constitutional principles and legal frameworks established by the world's leading international arbitration conventions, legislation and institutional rules.

International arbitration warrants attention, if nothing else, because of its historic, contemporary and future practical importance, particularly in business affairs. For centuries, arbitration has been a preferred means for resolving transnational commercial disputes, as well as other important categories of international disputes.¹ The preference which businesses have demonstrated for arbitration, as a means for resolving their international disputes, has become even more pronounced in the past several decades, as international trade and investment have burgeoned. As international commerce has expanded and become more complex, so too has its primary dispute resolution mechanism - international arbitration.² The practical importance of international commercial arbitration is one reason that the subject warrants study by companies, lawyers, arbitrators, judges and legislators.

At a more fundamental level, international commercial arbitration merits study because it illustrates the complexities and uncertainties of contemporary international society - legal, commercial and cultural - while providing a highly sophisticated and effective means of dealing with those complexities. Beyond its immediate practical importance, international arbitration is worthy of attention because it operates within a framework of international legal rules and

¹ The history of international arbitration is summarized below. *See* §1.01.

² The popularity of international commercial arbitration as a means of dispute resolution is discussed below. *See* §1.03.

institutions which - with remarkable and enduring success - provide a fair, neutral, expert and efficient means of resolving difficult and contentious transnational problems. That framework enables private and public actors from diverse jurisdictions to cooperatively resolve deep-seated and complex international disputes in a neutral, durable and satisfactory manner. At their best, the analyses and mechanisms which have been developed in the context of international commercial arbitration offer models, insights and promise for other aspects of international affairs.

The legal rules and institutions relevant to international commercial arbitration have evolved over time, in multiple and diverse countries and settings. As a rule, where totalitarian regimes or tyrants have held sway, arbitration - like other expressions of private autonomy and association - has been repressed or prohibited; where societies are free, both politically and economically, arbitration has flourished.

Despite periodic episodes of political hostility, the past half-century has witnessed the progressive development and expansion of the legal framework for international commercial arbitration, almost always through the collaborative efforts of public and private actors. While the latter have supplied the driving and dominant force for the successful development and use of international commercial arbitration, governments and courts from leading trading nations have contributed materially, by ensuring the recognition and enforceability of private arbitration agreements and arbitral awards, and by affirming principles of party autonomy and judicial non-interference in the arbitral process.

In recent decades, the resulting legal framework for international commercial arbitration has achieved progressively greater practical success and acceptance in all regions of the world and most political quarters. The striking success of international arbitration is reflected in part in the increasing numbers of international (and domestic) arbitrations conducted each year, under both institutional auspices and otherwise,³ the growing use of arbitration clauses in

³ See §1.03.

almost all forms of international contracts,⁴ the preferences of business users for arbitration as a mode of dispute resolution,⁵ the widespread adoption of pro-arbitration international arbitration conventions and national arbitration statutes,⁶ the refinement of institutional arbitration rules to correct deficiencies in the arbitral process,⁷ and the use of arbitral procedures to resolve new categories of disputes which were not previously subject to arbitration (*e.g.*, investor-state, competition, securities, intellectual property, corruption, human rights and taxation disputes).⁸

The success of international arbitration is also reflected by a comparison between the treatment of complex commercial disputes in international arbitration and in national courts - where disputes over service of process, jurisdiction, forum selection and *lis pendens*, taking of evidence, choice of law, state or sovereign immunity, recognition of judgments and neutrality of litigation procedures and decision-makers are endemic, and result in significant uncertainty and inefficiency.⁹ Equally, the litigation procedures used in national courts are often ill-suited for both the resolution of international commercial disputes and the tailoring of procedures to particular parties and disputes, while decision-makers often lack the experience and expertise demanded by complex international business controversies. In all of these respects, international arbitration typically offers a simpler, more effective and more competent means of dispute resolution, tailored to the needs of business users and modern commercial communities.

Drawing on these advantages, this treatise aspires to describe the law, practice and policy of international commercial arbitration in a manner that enables it

⁴ See §1.03.

⁵ See §1.04.

⁶ See §1.04.

⁷ See §1.04.

⁸ See §1.05.

⁹ The persistence and complexity of such disputes are beyond the scope of this work. They are discussed in G. Born & P. Rutledge, *International Civil Litigation in United States Courts* (5th ed. 2010); L. Collins *et al.* (eds.), *Dicey Morris and Collins on The Conflict of Laws* (15th ed. 2011); R. Geimer, *Internationales Zivilprozessrecht* (5th ed. 2005).

to be of use, and guidance, in other areas of international affairs, including international litigation. The treatise begins with an Overview, in Chapter 1, which introduces the subject of international commercial arbitration. This introduction includes an historical summary, as well as an overview of the legal framework governing international arbitration agreements and the principal elements of such agreements. Chapter 1 also introduces the primary sources relevant to a study of international commercial arbitration. The remainder of the treatise is divided into three Parts.

Part I of the treatise deals with international commercial arbitration agreements. It describes the legal framework applicable to such agreements, the presumptive separability or autonomy of international arbitration agreements, the law governing international arbitration agreements, the substantive and formal rules of validity relating to such agreements, the nonarbitrability doctrine, the competence-competence doctrine, the legal effects of international arbitration agreements, the interpretation of international arbitration agreements and the legal rules for identifying the parties to international arbitration agreements.

Part II of the treatise deals with international arbitration proceedings and procedures. It addresses the legal framework applicable to such proceedings, the selection and challenge of international arbitrators, the rights and duties of arbitrators, the selection of the arbitral seat, the conduct of arbitral procedures, disclosure or discovery, provisional measures, consolidation and joinder, the selection of substantive law, confidentiality and legal representation.

Part III of the treatise deals with international arbitral awards. It addresses the legal framework for international arbitral awards, the form and contents of such awards, the correction and interpretation of arbitral awards, actions to annul or vacate awards, the recognition and enforcement of international arbitral awards and the application of principles of *res judicata*, preclusion and *stare decisis* in international arbitration.

The focus of the treatise, in all three Parts, is on international standards and practices, rather than a single national legal system. Particular attention is devoted to the leading international arbitration conventions - the United Nations

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),¹⁰ the European Convention on International Commercial Arbitration¹¹ and the Inter-American Convention on International Commercial Arbitration.¹²

This treatise rests on the premise that these instruments, and particularly the New York Convention, establish a constitutional framework for the conduct of international commercial arbitrations around the world. That framework is given effect through national arbitration legislation, with Contracting States enjoying substantial autonomy to give effect to the basic principles of the Convention. At the same time, the Convention also imposes important international limits on the ability of Contracting States to deny effect to international arbitration agreements and arbitral awards. These limitations have not always been appreciated by courts in Contracting States, and are not always fully addressed in commentary, but they form a critical constitutional foundation for the contemporary international arbitral process. Identifying and refining these limits is a central aspiration of this treatise.

The treatise also devotes substantial attention to leading national arbitration legislation - including the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration¹³ and the arbitration statutes in leading arbitral centers (including the United States, England, France, Switzerland, Germany, Austria, Sweden, Singapore, Hong Kong, Japan and elsewhere). The treatise’s focus is expressly international, focusing on how both developed and other jurisdictions around the world give effect to the New York Convention and to international arbitration agreements and arbitral awards. Every effort is made to avoid adopting purely national solutions, without consideration of international and comparative perspectives.

¹⁰ See §1.04[A][1].

¹¹ See §1.04[A][2].

¹² See §1.04[A][3].

¹³ See §1.04[B][1][a].

The treatise's international and comparative focus rests on the premise that the treatments of international commercial arbitration in different national legal systems are not diverse, unrelated phenomena, but rather form a common corpus of international arbitration law which has global application and importance. From this perspective, the analysis and conclusions of a court in one jurisdiction (*e.g.*, France, the United States, Switzerland, India, or Hong Kong) regarding international arbitration agreements, proceedings, or awards have direct and material relevance to similar issues in other jurisdictions.

That conclusion is true both descriptively and prescriptively. In practice, on issues ranging from the definition of arbitration, to the separability presumption, the competence-competence doctrine, the interpretation of arbitration agreements, choice-of-law analysis, nonarbitrability, the role of courts in supporting the arbitral process, the principle of judicial non-interference in the arbitral process, the immunities of arbitrators and the recognition and enforcement of arbitral awards, decisions in individual national courts have drawn upon and developed a common body of international arbitration law. Guided by the constitutional principles of the New York Convention, legislatures and courts in Contracting States around the world have in practice looked to and relied upon one another's decisions and have formulated and progressively refined legal frameworks of national law to ensure the effective enforcement of international arbitration agreements and awards.

More fundamentally, national courts not only have but should consider one another's decisions in resolving issues concerning international arbitration. By considering the treatment of international arbitration in other jurisdictions, and the policies which inspire that treatment, national legislatures and courts can draw inspiration for resolving comparable problems. Indeed, it is only by taking into account how the various aspects of the international arbitral process are analyzed and regulated in different jurisdictions that it is possible for courts in any particular state to play their optimal role in that process. This involves considerations of uniformity - where the harmonization of national laws in different jurisdictions can produce fairer and more efficient results - as well as the ongoing reform of the legal frameworks for international arbitration - where

national courts and legislatures progressively develop superior solutions to the problems that arise in the arbitral process.

The treatise also focuses on leading institutional arbitration rules, particularly those adopted by the International Chamber of Commerce, the London Court of International Arbitration and the American Arbitration Association's International Centre for Dispute Resolution, as well as the UNCITRAL Rules.¹⁴ Together with the contractual terms of parties' individual arbitration agreements, these rules reflect the efforts of private parties and states to devise the most efficient, neutral, objective and enforceable means for resolving international disputes. These various contractual mechanisms provide the essence of the international commercial arbitral process, which is then given effect by international arbitration conventions and national arbitration legislation.

Taken together, international arbitration conventions (particularly the New York Convention), national arbitration legislation and institutional rules provide a complex legal framework for the international arbitral process. That framework requires Contracting States to effectuate the broad constitutional mandate of the New York Convention - to recognize and enforce arbitration agreements and arbitral awards - while affording individual states considerable latitude in implementing these obligations. In turn, most Contracting States have used that latitude to adopt vigorously pro-arbitration legislative frameworks, which grant arbitral institutions, arbitrators and parties broad autonomy to devise mechanisms for the arbitral process and which give effect to international arbitration agreements and arbitral awards. The resulting legal framework provides a highly effective means for resolving difficult international commercial disputes in a fair, efficient and durable manner.

The treatise's analysis is intended to be clear, direct and accessible. International arbitration law is complex, sometimes unnecessarily so. That is unfortunate. Like most things, the arbitral process works better, and its problems are more readily confronted and overcome, when it is clearly described and when issues are transparently presented. Every effort has been

¹⁴ See §1.04[C].

made in the drafting of this treatise to avoid obscurity, and instead to address matters clearly and simply so they can be understood and debated.

Like international commercial arbitration itself, this treatise is a work in progress. The first edition of *International Commercial Arbitration*, published in 2009, was the successor to two earlier works by the same author; this second edition of the treatise builds upon and extensively revises these earlier works. In doing so, this edition of the treatise draws on the extensive body of judicial authority, legislative and institutional developments and commentary that have been become available since 2009.

This edition inevitably contains errors, omissions and confusions, which will require correction, clarification and further development in future editions, to keep pace with the ongoing developments in the field. Corrections, comments and questions are encouraged, by email to gary.born@kluwerlaw.com.