# THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

## SECOND EDITION

*The Principles and Practice of International Commercial Arbitration* provides the reader with immediate access to understanding the world of international arbitration. Arbitration has become the dispute resolution method of choice in international transactions. This book explains how and why arbitration works. It provides the legal and regulatory framework for international arbitration, as well as practical strategies to follow and pitfalls to avoid. It is short and readable, but comprehensive in its coverage of the basic requirements, including the most recent changes in arbitration laws, rules, and guidelines. The second edition includes updates on rules and guidelines, such as the arbitration rules of the ICC, the SCC, the ACICA, and UNCITRAL, as well as the 2010 IBA Rules on the Taking of Evidence in International Arbitration. In this book, the author includes insights from numerous international arbitrators and counsel, who tell firsthand about their own experiences with arbitration and their views of the best arbitration practices. Throughout the book, the principles of arbitration are supported and explained by the practice, providing a concrete approach to an important means of resolving disputes.

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# Contents

# Preface to the Second Edition

The purpose of this book is to provide an overview of the world of international commercial arbitration. It is a world that needs to be understood by both legal practitioners and their clients, as well as by students and others who may participate in resolving disputes privately, outside a national court system.

This book is designed to help the reader obtain an understanding of international commercial arbitration quickly but comprehensively. Although there are many fine treatises available on international commercial arbitration, there are few that are short. This book is compact and readable, but comprehensive in its coverage of the basic requirements, including the most recent changes in arbitration laws, rules, and guidelines. In writing the book, I have had input from many practitioners and arbitrators, who took time to meet with me to share their insights and experience. The resulting benefit is that the principles of arbitration are supported by the practice. Thus, the book provides not only the legal and regulatory framework, but also a practical sense of how international arbitration works, and how some of the better strategies and practices can lead to both procedurally efficient and substantively reasonable resolutions.

Topics range from drafting an arbitration agreement to enforcing an award. There is specific advice from arbitrators and practitioners relating to choosing arbitrators, selecting the chair of the tribunal, interviewing experts, managing hearings, cross-examining witnesses, and a host of other issues. In addition to dealing with pertinent laws and the interaction of arbitration and the courts, the book contains a final chapter on investment arbitration. Arbitrations growing out of foreign investments, whether based on a contract or on a treaty, have increased significantly in the past decade. Finally, there are Appendices containing important laws, rules, ethics codes, model clauses, and useful websites.

In talking with friends and colleagues, I have learned that this book has proved very useful to professors teaching arbitration, to students trying to

gain a grasp of arbitration, and to practitioners and arbitrators new to the field. As international commercial arbitration grows, so does the need to bring new people, both legal professionals and arbitrators, into the field. Clients also need to know the parameters of international commercial arbitration, which today is the dispute resolution method of choice in international transactions. This book provides a practitioner, student, professor, or businessperson with immediate access to understanding the world of international commercial arbitration. This second edition updates important sets of rules and guidelines, such as the arbitration rules of the ICC, the SCC, the ACICA, and UNCITRAL, as well as the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

I very much appreciate the helpful comments and insight of the following international practitioners, arbitrators, and professors: Louise Barrington, Guido Carducci, Jack Coe, Diana Droulers, Hew Dundas, Sarah François-Poncet, Claudia Kälin-Nauer, Pierre Karrer, Gillian Lemaire, Pierre Mayer, Sylwester Pieckowski, Ryan Reetz, Jose Rosell, Mauro Rubino-Sammartano, Claudia Salomon, Larry Schaner, Eric Schwartz, Ingeborg Schwenzer, Christopher Seppälä, Nicholas Simon, Jingzhou Tao, and David Wagoner. A special thank-you to Professor Michael Zimmer, whose encouragement and support were essential.

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# Foreword to the First Edition

Professor Moses' book is appearing at an auspicious time. The year 2008 marks the fiftieth anniversary of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the keystone on which the entire edifice of international commercial arbitration is built. The anniversary will be celebrated in arbitration circles by events around the world.

It is little remarked, but 2008 is also the eighty-fifth anniversary of the 1923 Protocol on Arbitration Clauses. Although the New York Convention is currently by far the more important, the 1923 Protocol was the more revolutionary. It marked the first occasion on which the international community through the League of Nations agreed upon a multilateral text in the field of arbitration. It was followed four years later by the 1927 Convention for the Execution of Foreign Arbitral Awards. The Protocol and the Convention were highly successful, but both were flawed. At the instance of the International Chamber of Commerce, the United Nations undertook the revision that resulted in the New York Convention.

For the modern student, scholar, and practitioner, this may all be ancient history. However, it is important to remember just how recent the development of international commercial arbitration is. Arbitration has, of course, a long history. Depending on how it is defined, one can find examples going back to Roman times and even before. However, once the modern nation-state asserted the monopoly of law creation in the late eighteenth and early nineteenth centuries, it was only natural that there would be a concomitant assertion of a monopoly (or something akin to it) of dispute settlement by the courts. The manifestation was a common rule that predispute arbitration agreements were not enforceable as such. The refusal by the respondent to enter into the arbitration might be treated as a breach of contract leading to a claim for damages. However, because it was normally impossible to show that any damages had arisen, a claim for damages was of no value.

The 1923 Protocol and the 1925 Federal Arbitration Act, both designed to allow for the enforcement of predispute arbitration agreements, date from the same period. During the inter-war years, there was a growth in the use of arbitration, but there was still little that could be considered to be international commercial arbitration as it is understood today. Any arbitration of an international commercial dispute was conducted under national rules that seldom took the international aspect of the dispute into consideration. That began to change with the adoption of the New York Convention in 1958. This change was quickly followed by the European Convention on International Commercial Arbitration of 1961, which was the first international text to use the words "international commercial arbitration." There was further progress in 1966 with the European Convention Providing a Uniform Law on Arbitration, unsuccessful though it was, and the Arbitration Rules of the United Nations Economic Commission for Europe, which have been widely used.

To this observer's eyes, the final breakthrough came with the adoption of the UNCITRAL Arbitration Rules in 1976 and the UNCITRAL Model Law on International Commercial Arbitration in 1985. The UNCITRAL Arbitration Rules were the first to reconcile some of the procedural differences between the civil law and the common law. The Model Law introduced the idea that it would be appropriate to have separate rules for domestic arbitrations and for international arbitrations, thereby liberating international arbitration from many of the policy constraints that continue to be thought appropriate for domestic arbitration in many countries. Those two related texts have provided the template for modern institutional arbitration rules and for national legislation on arbitration, both international and domestic.

The institutional changes brought about by the various texts had another important effect that was more in the nature of a change in attitude. Although "international commercial arbitration" as a distinct area of law was first announced in 1961 in the European Convention, the past thirty years has seen the development of a body of rules and procedures unique to it that are generally recognized in much of the world. There is by now general agreement on basic procedures to follow in international commercial arbitration.

It has become common to describe arbitration as the preferred method for resolving international commercial disputes. There are a number of ways in which it is preferable to litigation, of which only a few of the more salient need to be mentioned. Arbitration is certainly better than litigating a dispute in the other party's courts, which would otherwise be the usual result for one of the parties. Even if one could feel confident that those courts were unbiased, they might operate in a different language and with a civil procedure that was unfamiliar. Under modern arbitration laws, the

dispute can be arbitrated in a neutral third country to which neither party belongs. Because of the New York Convention, an arbitral award is more easily enforced throughout the world than are decisions of foreign courts.

The most significant of those advantages of arbitration over litigation of international commercial disputes relevant to this book is that it is easily possible to pick a seat for the arbitration that allows the parties to be represented by their regular counsel, which is not possible when litigating in a foreign court. Local counsel must be engaged to handle the dispute. Although local counsel may be expert in local procedure and may be highly competent, it may be estranged from the client and perhaps from regular counsel, with all the possibilities of misunderstanding the relevant business culture and legal dynamics that motivated the client. It is far preferable that counsel familiar with the client be able to handle the dispute to completion.

This recital of developments makes it seem all too easy. It appears as though international commercial arbitration was a single subject with a clearly defined body of law. As compared to a half century ago, it is. In absolute terms, it is not. Although there has been a large convergence of rules and procedures and the specialists in the field speak a common language, those rules and procedures remain specific to each arbitral organization and to the individual national laws governing arbitration. Even the New York Convention is subject to the varied interpretations given to it by the national courts.

Furthermore, the increased popularity of arbitrating international commercial disputes has brought many new players to the game. It is no longer just a field for the Grand Old Men as it was a half century ago. There are a large number of arbitrators, counsel, and parties who come to international arbitration knowing little about the subject. Those who are new to it undoubtedly expect that an international arbitration will be conducted the way that arbitration is conducted in their own country, and that probably means in a manner similar to litigation in the national courts. They are apt to have an unhappy experience as a result.

Traditionally, lawyers have entered the field by working with a senior lawyer who is already engaged in arbitration. The apprenticeship approach may still be the major mode of entry. Until the last few years, very few law schools in any country have offered courses that have gone into international arbitration in any depth, if they had courses that mentioned it at all. That is beginning to change, particularly at the graduate level. There are currently several excellent LL.M. programs specifically in international arbitration, particularly in Sweden, the United Kingdom, and the United States, and these have begun to feed a certain number of academically trained young lawyers into the field. The Chartered Institute of Arbitrators has long had courses for those new to the field. I would be remiss if I did not mention the Willem C. Vis International Commercial Arbitration Moot, which introduces more than a

thousand law students to the subject every year. However, an introduction is just that. They need more.

There are many books on arbitration and more arrive every year. Most of them are directed at the specialist, but are often limited to the law in a given country. There are several excellent books that treat the subject from an international perspective and in depth. They may, however, treat the subject in too much depth for the newcomer, whether a senior lawyer without experience in this field, the young lawyer newly entering the field, or the student. What they need is a short, concise discussion of the issues with enough detail to explain what is involved and with reference to sources that treat the individual issues in more depth.

Professor Moses has undertaken to fulfill this need. She has succeeded. If you are reading this Foreword, then you have probably already purchased the book, and I congratulate you on your choice. If you have not yet purchased it, I urge you to do so. Even a person knowledgeable in the field will find much in it of interest. I did.

Eric E. Bergsten