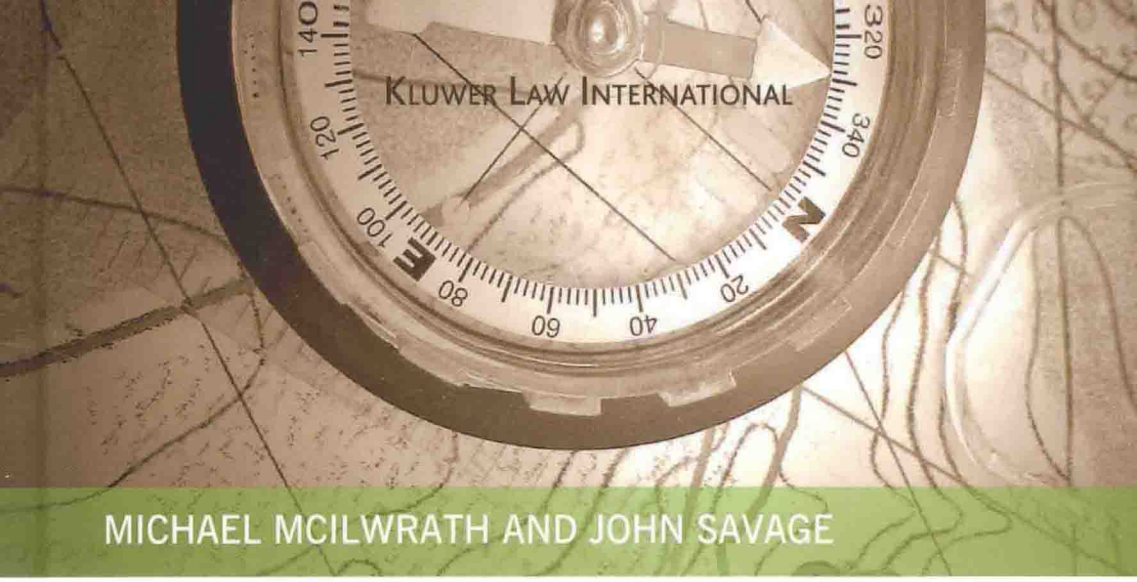


MICHAEL MCILWRATH AND JOHN SAVAGE

# International Arbitration and Mediation

## A Practical Guide

Wolters Kluwer
Law & Business

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**Michael McIlwrath**

**John Savage**

常州大学山书馆
藏书章

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# Introduction

Today's business world is about risk. Those who can accept risk – and manage the downside – will be rewarded. In international contracts, dispute resolution often is or should be the single most important consideration in deciding whether a particular risk is one to accept. The value of the contract may ultimately reside in how any disputes arising out of it will be resolved. Indeed, a contract may contain a whole package of risk mitigation devices, such as limitations of liability, warranties, and rights of termination for non-performance or recovery in the event of wrongful termination, but if there is no certainty that these provisions will be enforced, it can effectively be the same as having no contract at all. **I-001**

This book is chiefly intended as a resource for those indispensable advisers – in-house lawyers and their counterparts in private practice – who counsel businesses on questions of dispute resolution when planning and documenting international deals, and who work with the same clients to achieve a successful resolution when disputes emerge. We attempt to provide concrete answers to practical business questions, explain how to accept risks rather than avoid them, predict the likely consequences (and costs) of decisions, and suggest legal strategies that do more than pursue litigation victories at any cost. The underlying assumption is that a 'successful' result of a dispute will always be defined by how close it comes to achieving a party's commercial goals. **I-002**

Another of our aims is to assist parties in the imperfect world in which business is done, rather than provide an objective, abstract discussion of the theory of dispute resolution in its different forms. For example, we do not assume that dispute resolution clauses are 'drafted' in a vacuum in which the proposing party always has its clause accepted by the other contracting party, and we acknowledge that there are dangers in stressing one form of dispute resolution at the expense **I-003**

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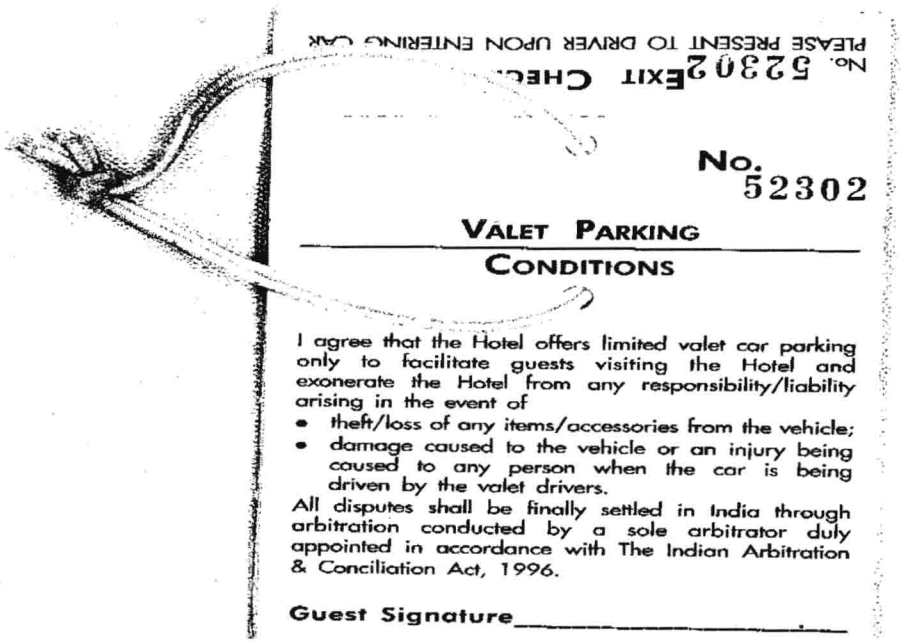
of real-world commercial needs. Take, for example, the dispute resolution clause in this valet parking ticket from a hotel in New Delhi:

*Example Ia – Dispute Resolution Clause*


PLEASE PRESENT TO DRIVER UPON ENTERING CAR

No. 52302 EXIT CHEC...

No. 52302

VALET PARKING

CONDITIONS

I agree that the Hotel offers limited valet car parking only to facilitate guests visiting the Hotel and exonerate the Hotel from any responsibility/liability arising in the event of

- theft/loss of any items/accessories from the vehicle;
- damage caused to the vehicle or an injury being caused to any person when the car is being driven by the valet drivers.

All disputes shall be finally settled in India through arbitration conducted by a sole arbitrator duly appointed in accordance with The Indian Arbitration & Conciliation Act, 1996.

Guest Signature_____

Presumably, the hotel inserted the arbitration clause in its valet parking tickets to avoid being subjected to inefficient local courts when disputes arise with customers who complain of damage or losses. Perhaps the hotel believes this clause will discourage small or frivolous claims by imposing the additional cost of an arbitrator. That may be, but the cost will also be imposed on the hotel, possibly in addition to having to litigate the matter before the courts. In fact, the courts may be called to decide in the first instance the enforceability of a dispute resolution clause contained in a stub given to customers as they walk to the hotel registration desk.

**I-004** The real question, however, is whether the hotel wishes to manage its valet parking claims through an artful legal practice or by accepting the risk of inefficient courts and relying on good customer management to avoid ending up there. It is unlikely the hotel will ever be in the position of asserting claims against its valet parking customers, so the inefficiencies of the courts may even be to the hotel's advantage. At the same time, an arbitration clause in this context can create an impression that

the hotel wishes to create an obstacle for customers who may have meritorious claims. Assuming this clause is enforceable (already a large assumption), is there really any commercial advantage to including it in the valet parking stub? As we discuss throughout this book, there are many instances in which arbitration will represent the better approach to resolving disputes. However, it would be wrong to assume it will be optimal for every intersection of commercial interests.

**I-005** Rather, we recognise that the most important contracts for a business will almost always be negotiated texts that require substantial compromise. Likewise, we recognise that most parties exist in a resource-constrained environment in which their willingness to subject themselves to different forms of dispute resolution will depend not only on concerns over fairness but on the costs they will incur along the way, and whether those costs are justified. Not all businesses will have the luxury (or leverage) to insist on dispute resolution in their backyard under their home country's laws, and there may be financial rewards for those who can get comfortable with and accept, the other side's preferences. Recognising this, we present international arbitration as an established means of mitigating the risk of dispute resolution away from home, as an area of legal practice that is accessible rather than esoteric. We believe arbitration can be astutely supplemented through a considered and strategic use of mediation, which, while less established than arbitration in international practice today, appears to be spreading at an even faster rate.

**I-006** Our focus is on international rather than domestic disputes. Access to effective dispute resolution is a cornerstone of a business' ability to grow outside of its home market, and the resolution of international disputes – disputes between parties from different nations – often presents a series of challenges not encountered in the domestic context. In particular, many parties in an international business relationship will desire a neutral dispute resolution forum, such as international arbitration, rather than the other party's courts. This concern should be irrelevant to two parties from the same country, as they share the same national courts and should be equally comfortable (or uncomfortable) bringing their disputes before them, with a possible exception where one party is a local subsidiary of a foreign parent. Also, enforcement of decisions across national borders can be tricky, although international arbitration often makes it easier.

**I-007** We examine the whole of the international dispute resolution process, from the outset – when parties agree in their contracts how to resolve disputes – through any disputes that emerge, and concluding with the endgame of enforcement. We emphasise the range of methods of dispute resolution and, notably, the settlement of international business disputes through negotiation that can be facilitated by mediation.

**I-008** We do not advocate any particular form of dispute resolution as the preferred option for every case, and we believe that even when one form of dispute resolution is the best option, a party would be wise to challenge the received wisdom (if it can identify one) as to how it should be conducted. A party's business objectives should set the direction, not someone else's perceptions of how to proceed. The

considerations that go into the decision of whether to include arbitration in a valet parking ticket are not so different from those behind a complex international contract. Legal concepts must be connected with realistic commercial objectives, or they may do more harm than good. No sensible lawyer would recommend the same terms and conditions for all contracts. Given the range of available dispute resolution systems, and the diversity of contracts in international business, it would be similarly unwise to adopt a 'one-size-fits-all' approach to disputes clauses.

## I. ORGANISATION OF THIS BOOK

**I-009** We have tried to make the book user friendly. This means using straightforward language, with a presentation style that includes checklists and panels to highlight important issues. We also share anecdotes that generally consist of our own, sometimes unhappy experiences over the years. We have assumed that a party involved in an international dispute will have practical questions such as 'how long will it take, how much will it cost, and will we be able to enforce it?' We have tried to provide practical, direct answers. We also include forms and other resources in the appendices, including sample arbitration clauses and submissions.

**I-010** The book is divided into chapters that follow the life cycle of an international commercial dispute, as seen through the eyes of the parties. Chapter 1, *The Elements of an International Dispute Resolution Agreement*, does what it says by explaining the various components of a dispute resolution clause. We also try to provide some guidance to parties by evaluating which elements would work best for their different contracts, such as which institutions may be 'better' at administering an international arbitration or organising an international mediation, and the countries where the environment is most favourable to the conduct of international dispute resolution. In Chapter 2, *Negotiating an International Dispute Resolution Agreement*, we acknowledge that the dispute resolution clause of most international contracts will present an opportunity for parties to negotiate, and we suggest different risk assessment and negotiation strategies to help the parties optimise the agreed method of resolution.

**I-011** With Chapters 3 and 4, we shift gears and focus on the dispute that is now underway or about to be. In Chapter 3, *When the Dispute Arises*, we discuss how parties can improve their positions before proceedings are commenced, from taking threshold preliminary steps to preserve their rights to deciding whether and how to appoint counsel, performing an early case assessment (ECA), and calculating the likely costs of the dispute. Having estimated outcomes and costs of resorting to proceedings in Chapter 3, we suggest ways of improving on the potential results in Chapter 4, *International Settlement Negotiation and Mediation*. The premise of this chapter is that once armed with a reasonable estimate of the likely outcome and costs of achieving it, a party is well-positioned to seek a superior result through settlement.

Chapters 5 to 7, by contrast, assume that settlement efforts have failed, and we return to the topic of international arbitration as the contractually selected means of achieving a final disposition of the parties' dispute. Chapter 5, *The Conduct of the Arbitration*, provides a step-by-step guide to the unfolding proceedings, paying special attention to the opportunities presented for parties to influence the course of the arbitration. At the end of Chapter 5, we assume that the parties will have an arbitration award in hand. Chapter 6, *After the Arbitration: Challenge, Recognition, and Enforcement of the Award*, addresses the many difficult issues related to the challenge and enforcement of that award. Chapter 7, *ICSID and Investment Treaty Arbitration*, is designed to provide guidance about the special protections that investment treaties offer parties doing business in foreign countries. We discuss how parties can enhance their access to those protections through their contracting practices and how disputes are likely to be resolved when these protections are available. **I-012**

## II. INTERNATIONAL ARBITRATION

At this stage, we should specify what we mean by 'international' dispute resolution and how it differs from domestic forms of litigation, mediation, and arbitration in the country of one of the parties. **I-013**

While international arbitration may be seen as the natural alternative to litigation in domestic courts, it also stands in contrast to 'domestic arbitration'. Domestic arbitration is in many cases just a slightly modified form of litigation as conducted before the courts of the place of arbitration, only before arbitrators and not judges. Unfortunately for many parties, the advantages of an international arbitration are easy to lose if a party does not defend its expectation of a truly international proceeding. **I-014**

*International arbitration defined.* Arbitration is a process by which parties agree to the binding resolution of their disputes by adjudicators, known as arbitrators, who are selected by the parties, either directly or indirectly via a mechanism chosen by the parties. The three key criteria are thus that arbitration is always a product of agreement between the disputing parties (which distinguishes it from court litigation, which need not be chosen by the parties together), the dispute is resolved by people selected by the parties (which also distinguishes arbitration from court litigation, where parties do not select their judge), and the resolution is binding (which distinguishes arbitration from non-binding processes such as mediation). **I-015**

There is much discussion in the literature, as well as provisions in arbitration laws and rules, about what an 'international' arbitration is. Strictly speaking, an international arbitration is likely to be defined as an arbitration between parties of different nationalities, or an arbitration between parties of the same nationality where there are one or more other factors that connect the arbitration to a second country. These could be the place of arbitration or perhaps the subject matter of the dispute being in that second country, or even the applicability of a foreign law. **I-016**

**I-017** As a practical matter, however, an arbitration meeting the above criteria can too easily lose its 'international' character in matters of procedure when it is conducted by arbitrators and counsel who come from the same country. Parties may unintentionally make counsel and arbitrator appointments that lead to such an outcome. This risk – and how to avoid it – is discussed in more detail in Chapter 3, *When the Dispute Arises*, and Chapter 5, *The Conduct of the Arbitration*.

**I-018** *Increased harmonisation of international practice.* As international arbitration grows as the standard method of resolving disputes arising out of international business transactions, an increasingly harmonised practice has begun to emerge around the world. This can be seen in the convergence of modern municipal arbitration statutes, the rules of the leading arbitral institutions, the promulgation of international standards for use in arbitration, such as the International Bar Association (IBA) Rules of Evidence and the IBA Guidelines on Conflicts, and procedural practices commonly adopted in proceedings. The resulting law and practice of this form of truly transnational arbitration is a hybrid between civil-law and common-law procedures, which is considered to be suitable for the resolution of disputes between parties of different nationalities, often represented by counsel from different parts of the world, who are usually appearing before a multinational tribunal.

| **Not that this ever really happens** | The claimant was from an eastern European country, and the respondent from southern Europe. Their dispute arose under a contract that required the claimant to build a substantial portion of the respondent's infrastructure, which the respondent refused to honour. Although the contract provided for any disputes to be decided in London, under English law, the claimant appointed an eminent Belgian lawyer as arbitrator. The respondent appointed a well-known English barrister as arbitrator. The party-appointed arbitrators selected as chair an English lawyer practicing in Paris, with considerable experience of international arbitration. The respondent appointed English counsel known for his capabilities in English domestic litigation. Despite the connections with England (place of arbitration, governing law, the nationality of two arbitrators, and one side's law firm), the respondent found itself at a net disadvantage when the arbitrators opted for an international approach to the proceedings, and the respondent's insistence on English procedural points fell on deaf ears. |
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**I-019** *The international arbitration 'bar'.* Further evidence of harmonisation includes the emergence of an international arbitration bar, comprised of lawyers from different countries and backgrounds who are truly specialised in the area. Likewise, there is

now a large community of international arbitrators, which overlaps to a certain extent with the international arbitration bar. These lawyers and arbitrators serve in arbitrations around the world, not merely in arbitrations in their home country. Their practices increasingly focus exclusively or predominantly on international arbitration, which is not conducted as an offshoot of their main domestic litigation or transactional practice. The proceedings in which these lawyers and arbitrators are involved may bear little resemblance to the procedures of the courts of the place of the arbitration, or indeed of any other courts, but will often closely resemble dozens of other arbitrations being heard at the same time in different locations around the globe.

*'Local' international arbitration.* Not all international arbitration meets this har- **I-020**
monised, globalised, and specialised description. There is another group of international arbitrations that are perhaps more reminiscent of the local court system of the place where the arbitration is held. These 'local' international arbitrations are frequently manned by non-specialist lawyers and arbitrators, who are naturally more likely to fall back upon local court procedures with which they are familiar than to follow specialised, internationally accepted practices. For example, both authors have witnessed English barristers representing parties in international arbitrations in London arguing that obscure rules of the English courts should apply because the proceedings in question were 'London arbitrations'. In each case the arbitrators gave our learned friends' submissions short shrift, rightly observing that there is no such thing as a 'London arbitration' in an international context, and that international rules and practices applied.

Sometimes, both disputing parties will be represented by law firms from the place **I-021**
of arbitration that have little experience in international arbitration. Both will treat the arbitration in the same way as a local court litigation, and their clients may not know any better. The arbitrators may know better, but faced with counsel on both sides who conduct the arbitration like local court litigation, there is a limit to how much the arbitrators can do about it. In some cases, the arbitrators will also be more familiar with the local courts than with international arbitration, and in some countries are almost invariably retired judges.

| | |
|---|---|
| **Not that this ever really happens** | The claimant and the respondent (neither of whom were English) appointed well-known English barristers as co-arbitrators. Perhaps unsurprisingly, the party-appointed arbitrators selected a prominent English barrister as chair. On advice of their external law firms, both parties supplemented their representation by appointing, in addition to external counsel, prominent English barristers to help present their cases before the arbitral tribunal. Both parties found themselves quickly immersed in the idiosyncrasies of English pleading practices rather than procedures more commonly followed in international arbitration. |

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