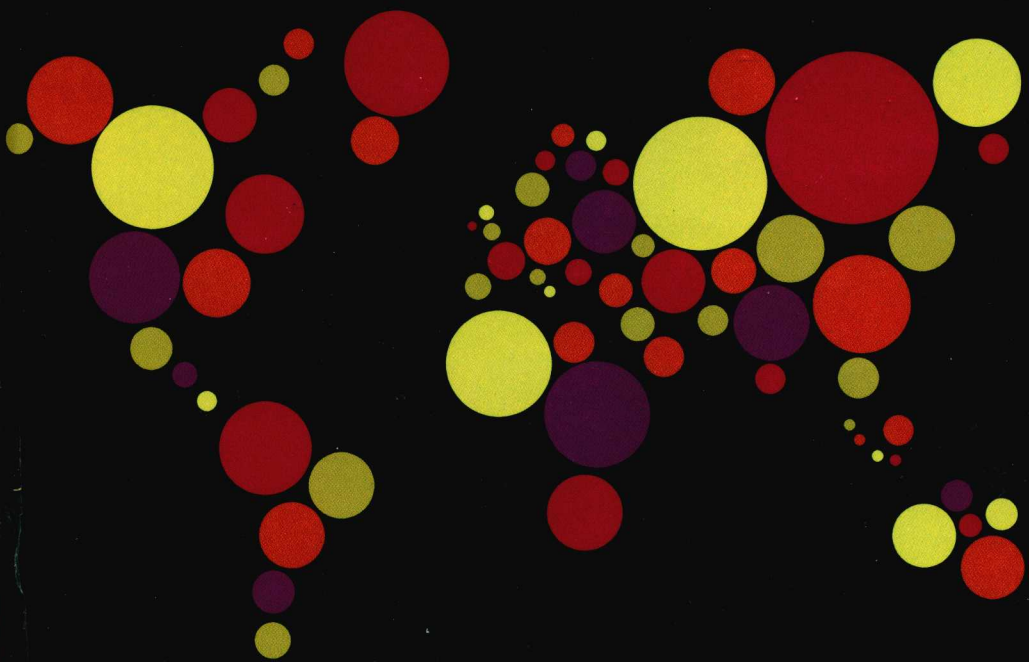
INTERNATIONAL COMMERCIAL ARBITRATION

Different Forms and their Features



EDITED BY
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CAMBRIDGE

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CAMBRIDGE
UNIVERSITY PRESS

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University Printing House, Cambridge CB2 8BS, United Kingdom

Published in the United States of America by Cambridge University Press, New York

Cambridge University Press is part of the University of Cambridge.
It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107033481

First published 2013
3rd printing 2013

Printed in the United Kingdom by the CPI Group Ltd, Croydon CR0 4YY

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
International commercial arbitration : different forms and their features / Edited by Giuditta Cordero-Moss.
p. cm.
Includes index.
ISBN 978-1-107-03348-1
1. International commercial arbitration. I. Cordero-Moss, Giuditta.
K2400.I5926 2013
346.07–dc23
2012032733

ISBN 978-1-107-03348-1 Hardback

INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration clauses in international commercial contracts are often reused from existing contracts. By so doing, the parties choose to apply, for example, either ad hoc or institutional arbitration and the UNCITRAL, ICC, LCIA, SCC, Swiss or other arbitration rules without necessarily being aware of the consequences. Moreover, parties often assume that an arbitration clause has the effect of excluding any kind of interference from a court of law and of rendering any but the chosen law redundant.

This book highlights the specific features of various forms of arbitration and enables lawyers to make informed choices when drafting arbitration clauses. Chapters explain the framework for arbitration, its relationship with national law, and the features of the main arbitration institutions in Europe. Attention is also paid to new trends in other parts of the world that may have repercussions on the theory of international arbitration.

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Introduction

GIUDITTA CORDERO-MOSS

Arbitration is very common for disputes arising out of international commercial contracts. With an arbitration clause in the contract, disputes between the parties are solved by an arbitral tribunal chosen by the parties and outside of the ordinary courts.

Despite their obvious importance, arbitration clauses are not always given their deserved attention in international contract practice. Most commercial parties know that it is advisable to choose arbitration, but often they have little specific knowledge regarding the choice of arbitration type that an arbitration clause entails. The drafting of a dispute resolution clause may be reduced to a 'copy and paste' exercise using contracts that were used in the past; by so doing, the parties choose *ad hoc* arbitration or institutional arbitration, the UNCITRAL, ICC, LCIA, SCC, Swiss or other Arbitration Rules, without actually being aware of the differences between them.

In addition, parties do not always have a precise understanding of what consequences an arbitration clause has. Often parties assume that an arbitration clause choosing a foreign venue, coupled with the choice of a foreign law to govern the contract, has the effect of excluding any kind of interference from any court of law, and of rendering any other law but the chosen law fully redundant. Parties may feel that by choosing international arbitration, they enter an autonomous dimension completely detached from the systems of law to which their legal relationship is connected. The parties may even assume that the arbitration law of the place of arbitration is irrelevant.

In reality, arbitration is a complex system that deserves more thorough evaluation than an automatic reproduction of an arbitration clause found in an old contract.

Arbitration depends on international conventions as well as on the national law of the place where the arbitral tribunal has its seat.

Moreover, the enforceability of an arbitral award depends on international conventions as well as on the national law of the place of enforcement. The interaction between the national law and international arbitration may lead to results that come as a surprise to those parties who relied on the fully autonomous nature of arbitration.

In addition to the local arbitration law, other factors may influence an arbitral proceeding: the proceeding will be subject to the arbitration rules of the chosen institution, to harmonised arbitration rules referred to by the parties such as those issued by the UNCITRAL or to the discretion of the tribunal, depending on whether the arbitration clause provides for institutional or *ad hoc* arbitration. National arbitration laws may differ quite considerably from each other, and there is a variety of arbitration institutions to choose from.

This renders it highly advisable to make an informed decision when writing the arbitration clause in a contract. In turn, this assumes an understanding of the specific features that characterise the various arbitration forms, both in respect of the applicable arbitration rules and in respect of the applicable arbitration law.

This book highlights the specific features of various forms of arbitration, thus enabling an informed choice. The focus of the book is on the features of the main arbitration institutions in Europe as well as on *ad hoc* arbitration.

In addition, the book also presents new trends in other parts of the world that cannot be ignored when dealing with international arbitration because of the repercussions that they may have on the theory of international arbitration.

Part I gives an overview of the role played by national arbitration law in international arbitration. This part is intended to give an understanding of the extent to which national law is relevant in the context of international arbitration.

Part II discusses the main differences between *ad hoc* and institutional arbitration, and will analyse the UNCITRAL Arbitration Rules, often used in *ad hoc* arbitration. This part is intended to give an understanding of the legal sources regulating *ad hoc* arbitration, thus enabling to make an informed choice between *ad hoc* and institutional arbitration.

Part III examines the arbitration institutions in Europe that are more commonly used for international commercial disputes: the ICC, LCIA, Swiss Rules, Arbitration Institutes in the Chambers of Commerce in Austria, Denmark, France, Germany, Italy, Norway, Russia and Sweden.

The authors present their respective topic by highlighting the specific features in respect of the following (having regard both to the applicable arbitration rules and to the applicable arbitration law):

1. Time frame for the proceeding
2. Cost determination (including security)
3. Procedure for the appointment of the tribunal
4. Identity and role of the appointing authority
5. Form of the arbitration agreement
6. Interference/support by the courts (including the tribunal's powers to involve them)
7. Tribunal's powers *ex officio*
8. Possibility of interim measures and their enforceability
9. Multiparty arbitration (including joinder and consolidation)
10. Conduct of arbitration (terms of reference, number of briefs, disclosure, written or oral evidence, modality of hearings, applicable law)
11. Confidentiality
12. Institution's role
13. Possibility of excluding the courts' review of the award's validity
14. Grounds for invalidity of the award
15. Other specific features in the arbitration rules or the arbitration law.

Part IV examines trends in other parts of the world that should not be ignored when dealing with international arbitration irrespective of the geographical area. The American Law Institute's first Restatement of international commercial arbitration law is presented, an unprecedented work that is in the course of being issued and will certainly receive attention even in Europe. Moreover, trends in Latin America are presented. Latin America has often been considered as an arbitration-unfriendly environment and its doctrines are sometimes referred to in support of a restrictive understanding of party autonomy in arbitration. An overview of the trends will be relevant to the general discussion on arbitration.

There are numerous publications on international arbitration. Many of these are a presentation of, or guidelines for the procedure at a specific arbitration institution. There are also numerous detailed analyses of various legal aspects of arbitration. It is entirely possible, on the basis of the existing literature, to obtain the information necessary in order to make an informed choice of arbitration form.

However, it may be quite demanding under the time pressure of contract negotiations to identify from the wealth of information the specific features that under the given circumstances may justify preferring one form of arbitration to another.

The aim of this book is to present a reasoned comparison of various arbitration forms, so that it becomes apparent what distinguishes one from the other.

PART I

Arbitration law's significance for international disputes

1

International arbitration is not only international

GIUDITTA CORDERO-MOSS

Parties to international arbitration are sometimes under the impression that they may draft arbitration agreements and prepare arbitration proceedings without taking national laws into consideration. National laws may seem to be irrelevant if international arbitration is considered to be an autonomous system that depends on the will of the parties and on some international instruments that are uniformly applied all over the world. This, however, is an oversimplification.

To a large extent, arbitration's autonomy is confirmed by international instruments – primarily, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If parties decide to submit a dispute to arbitration, according to article II of the Convention, the courts of the nearly 150 states which have ratified the Convention[1] must decline jurisdiction on that dispute. If the arbitral tribunal chosen by the parties renders an award based on the instructions given by the parties and applies the law chosen by the parties, according to article V of the Convention, the courts of all those states have to enforce that award, subject to a few exceptions. This is certainly enhancing the impression that arbitration is an autonomous system, where national laws are allowed to have an impact only to the extent that they have been chosen by the parties.

In addition, the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration has been adopted in more than sixty countries[2] and is widely used as a reference elsewhere. The Model Law was intended as a source of

[1] For an updated overview of the status of ratifications see the Convention's official site at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

[2] Of the countries analysed in Part III of this book, the following have adopted the Model Law: Austria, Denmark, Germany, Norway and Russia. For an updated overview of the countries that have adopted the Model Law see www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html