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PREFACE

This casebook aspires to provide an introduction to the contemporary constitutional structure, law, practice, and policy of international arbitration. It aims to do so from an international perspective, focusing on international instruments, authorities, and solutions, rather than on materials drawn from any single jurisdiction. The casebook also endeavors to examine all forms of international arbitration — including the arbitration of international commercial disputes, on which it focuses, as well as investor-state and interstate (or state-to-state) disputes.

The materials in the casebook are drawn principally from the legal framework established for international commercial arbitration by contemporary international arbitration conventions, legislation, and institutional rules. The book focuses in particular on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Law"), and leading institutional arbitration rules (including the UNCITRAL Arbitration Rules). The book also examines the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), the 1907 Hague Convention for the Pacific Settlement of International Disputes (the "1907 Hague Convention"), and other materials addressing the use of international arbitration to resolve investment and inter-state disputes.

Why does international arbitration merit study? International arbitration warrants attention, if nothing else, because of its practical importance (both past and present), particularly in business affairs. For centuries, businesses, states, and individuals have used arbitration as a preferred mechanism for resolving their international disputes, a preference which has become even more pronounced in the past several decades as economic activity and transactions have become increasingly more global. As both international commerce and governmental activities have expanded and become more complex over the past century, so too has their primary dispute resolution mechanism — international arbitration.[1] The practical importance of international arbitration is one reason that the subject warrants study by companies, lawyers, arbitrators, judges, legislators, and law students.

At a more fundamental level, international 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 in a predictable and uniform manner. Beyond its immediate practical importance, international arbitration is worthy of attention because it involves a framework of international legal rules and institutions which — with remarkable and enduring success — establish a fair, expert, and efficient mechanism for 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

1. The popularity of international commercial arbitration as a means of dispute resolution is discussed below. *See infra* pp. 31-36, 42-61, 87-102.

mechanisms which have been developed in the context of international arbitration offer models, insights, and promise for other aspects of international affairs.

As the materials excerpted in this casebook illustrate, the legal rules and institutions applied in international commercial arbitration have evolved over time, in multiple and diverse countries, legal systems, 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 private actors have been the driving and dominant force for the successful development and use of international commercial arbitration, governments and courts from leading trading nations have also contributed materially to international arbitration's efficacy by ensuring the recognition and enforceability of private arbitration agreements and arbitral awards. State actors have also contributed to international arbitration's development by affirming principles of party autonomy, judicial non-interference in the arbitral process, and limited judicial support for the arbitral process (i.e., in granting provisional measures and taking evidence in aid of arbitration).

As a consequence, in recent decades the legal framework for international 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 as a method for the final resolution of transnational disputes is reflected in part in the increasing numbers of international (and domestic) arbitrations conducted each year, under both institutional auspices and otherwise,[2] the growing use of arbitration clauses in almost all forms of international contracts,[3] the preferences of business users for arbitration as a mode of dispute resolution,[4] the widespread adoption of pro-arbitration international arbitration conventions and national arbitration statutes,[5] and the use of arbitral procedures to resolve new categories of disputes which were not previously subject to arbitration (e.g., investor-state disputes, competition, securities, intellectual property, corruption claims, and human rights disputes).[6]

The success of international arbitration can be seen through a comparison between the treatment of complex commercial disputes in international arbitration with their treatment in national courts. In the latter, disputes over service of process, jurisdiction, forum selection and *lis pendens*, taking of evidence, choice of law, state or sovereign immunity, neutrality of litigation procedures and decision-makers, and recognition of judgments are endemic and result in significant uncertainty and inefficiency.[7] 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. In all of these respects, international arbitration offers a simpler, more effective, and more competent means of dispute resolution, tailored to the needs of business users and modern

2. *See infra* p. 102.
3. *See infra* pp. 88-92, 94-96, 102.
4. *See infra* pp. 94-96.
5. *See infra* pp. 31-36, 42-61.
6. *See infra* pp. 421-56.
7. 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* (4th ed. 2007); L. Collins (ed.), *Dicey Morris & Collins on the Conflict of Laws* (14th ed. 2006); R. Geimer, *Internationales Zivilprozessrecht* (5th ed. 2005).

commercial communities — and thus, again, warrants careful study by students of international affairs.

This casebook begins with an Introduction, in Chapter 1, of 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 casebook is divided into three general parts.

The first part of the casebook deals with international arbitration agreements, which are addressed in Chapters 2, 3, 4, 5, and 6. These chapters describe the legal framework applicable to such agreements (Chapter 2), the presumptive separability or autonomy of international arbitration agreements (Chapter 3), the law governing international arbitration agreements (Chapter 3), the competence-competence doctrine (Chapter 3), the substantive and formal rules of validity relating to such agreements (Chapter 4), the interpretation of arbitration agreements (Chapter 5), and the issues related to identifying the parties to international arbitration agreements (Chapter 6).

The second part of the casebook deals with international arbitration proceedings, which are addressed in Chapters 7, 8, 9, 10, 11, 12, and 13. These chapters consider the legal framework applicable to such proceedings (Chapter 7), the selection of the arbitral seat (Chapter 7), the selection and challenge of arbitrators (Chapter 8), the conduct of the arbitration and arbitral procedures (Chapter 9), disclosure or discovery (Chapter 9), confidentiality (Chapter 9), provisional measures (Chapter 10), consolidation and joinder (Chapter 11), the selection of substantive law (Chapter 12), and legal representation and ethics (Chapter 13).

The third and final part of the casebook deals with international arbitral awards, which are addressed in Chapters 14, 15, and 16. These chapters examine the legal framework for international arbitral awards (Chapter 14), the form and contents of such awards (Chapter 14), the correction and interpretation of arbitral awards (Chapter 14), actions to annul or vacate arbitral awards (Chapter 15), and the recognition and enforcement of international arbitral awards (Chapter 16).

The focus of this casebook, in all three parts, is on international standards and practices, rather than on a single national legal system. Particular attention is devoted to the leading international arbitration conventions and the foundation they establish for the contemporary international arbitral process. These conventions include the New York Convention, the ICSID Convention and, although of more limited contemporary relevance, the 1907 Hague Convention for the Pacific Settlement of International Disputes. Identifying and refining the limits imposed by the foundational framework they establish is a central aspiration of this casebook.

This casebook also devotes substantial attention to contemporary national arbitration legislation — including the UNCITRAL Model Law and the arbitration statutes enacted in leading arbitral centers (including the United States, France, Switzerland, England, Singapore, and elsewhere). Here again, the book's focus is expressly international, concentrating 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.

This casebook also focuses on the most commonly used institutional arbitration rules, including particularly those adopted by the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), the International Centre for the Settlement of Investment Disputes ("ICSID"), as well as the UNCITRAL Rules. 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, and objective means for resolving international disputes in a final and binding manner. These various contractual mechanisms constitute the essence of the international arbitral process, which is then given effect by international arbitration conventions and national arbitration legislation.

This casebook's international and comparative focus rests on the premise that different national legal systems' treatment of international commercial arbitration are not diverse, unrelated phenomena, but rather form a common corpus of international arbitration law which has global application. From this perspective, the analysis and conclusions of a court in one jurisdiction (i.e., France, the United States, Switzerland, India, Singapore, England, 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, decisions by individual national courts 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, issues of non-arbitrability, the role of courts in supporting the arbitral process, and the recognition and enforcement of arbitral awards, 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 formulated and progressively refined legal frameworks of national law to ensure the effective enforcement of international arbitration agreements and awards.

More fundamentally, national courts in various jurisdictions not only have but should continue to 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 and guidance for resolving comparable problems. Indeed, only by taking into account how the various aspects of the international arbitral process are analyzed and regulated in different jurisdictions is it 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. Equally, this involves the ongoing reform of the legal frameworks for international arbitration, where national courts and legislatures progressively and cooperatively develop superior solutions to the problems that arise in the arbitral process.

This casebook explores the resulting legal framework for international arbitration — in the context of commercial, as well as investment and inter-state, disputes. It endeavors to do so in the same manner that this legal framework has been developed — by examining both international instruments and legislation, rules, authorities, and critiques from all leading jurisdictions, without preference for any particular jurisdiction, and by considering how these different sources have contributed towards the development of the contemporary law and practice of international arbitration. At the same time, the book suggests prescriptive solutions to the challenges of international dispute resolution, again, without preference for the approach of any particular jurisdiction.

This book would not have been possible without able assistance and comments from colleagues, friends, and competitors from around the world. In particular, Elke Jenner's exceptional secretarial and organizational talents, as well as the able assistance of Barbara Bozward and Jennifer Hill, were invaluable. Very helpful research and other assistance was provided by Suzanne Spears, Kenneth Beale, and Dr. Maxi Scherer, as well as by Sarah Ganslein and Nausheen Rahman. All mistakes are of course mine alone.

Like international arbitration itself, this casebook is a work in progress. It is the successor to two earlier editions of a work in a complex field that is continuously evolving in response to changing conditions and needs. The casebook inevitably contains errors, omissions, and confusions, which will require correction, clarification, and further development in future editions, to keep pace with the field. Corrections, comments, and questions are encouraged, by email to Gary.Born@kluwerlaw.com.

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London, England

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