

KLUWER LAW INTERNATIONAL

Private Dispute Resolution in International Business

Negotiation, Mediation, Arbitration

Second Edition

Volume II:

Handbook

by
Klaus Peter Berger



Wolters Kluwer
Law & Business

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in International Business**

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Private Dispute Resolution in International Business

Preface to the Second Edition

The underlying idea of this Project is to allow the reader to experience an international business dispute through three different dispute resolution scenarios: negotiation, mediation and arbitration. Through this project, the reader will develop a better and deeper understanding of the similarities and differences of these three mechanisms.

This Project has been very well received both in international practice and in academic circles all over the world. The Project has been used in both post graduate university courses and in-house training courses of law firms and corporate legal departments. Many students who attended the Willem C. Vis International Commercial Arbitration Moot in Vienna used the two books and DVD-ROM (containing more than four hours of highly practical training videos) to prepare for that competition.

The Second Edition takes account of new developments in the law of international ADR, including the ICC Arbitration Commission's Report on "Techniques for Controlling Time and Costs in Arbitration", new soft law instruments that have been issued in the area of international arbitration, and important court decisions such as the *West Tankers* judgement of the EU Court of Justice and the *Hall Street Associates* decision of the US Supreme Court. The basic thrust of the Project, which combines the hard law with the soft skills that are required for a successful practice in the area of international ADR, has remained untouched. For a more detailed explanation of the underlying ideas please refer to the Preface to the First Edition, reprinted immediately after this Preface.

I am particularly indebted to my senior research fellows Bernd Scholl and Matthias Schalljo for their excellent editorial work and to my student research assistants Melanie Kaspers, Miriam Miltenberger, Bettina Richter, Nimalka Rohns, Julia Strerath, Erika Theisen, Juliane Thon, Thomas Claeßens, Andreas Hesse, Kai Mathar, and Tobias Prang for their involvement with the Project.

I am also indebted to Professor Charles Craver and Dr René A. Pfromm, LL.M. who made me aware of new literature in international business negotiation and mediation. Katherine Simpson did a wonderful job in improving the English text of the Handbook.

I would also like to thank all of the students who have attended the Summer Academies on International Business Negotiation and Mediation and International Commercial Arbitration which CENTRAL organizes every year in cooperation with the German Institution of Arbitration (DIS) at Cologne University. Last but not least, I would like to thank the students in my post graduate courses on international arbitration at the Centre for Energy, Petroleum and Mineral Law & Policy (CEPMLP) at the University of Dundee in Scotland. Many of the ideas and inspirations which I received from these students over the past years have found their way into this Second Edition.

It is strongly recommended that those users who have not worked with this Project before consult the “User’s Guide” immediately following the Acknowledgements before using the books and the DVD-ROM.

Regular updates and further information about the project can be found at www.private-dispute-resolution.com. Any comments, critiques or suggestions are very welcome and should be sent to casebook@transnational-law.de.

Klaus Peter Berger
Cologne, July 2009

Preface to the First Edition

International business has always favored Private Dispute Resolution outside domestic courts. This practice has increased dramatically over the past decades. Almost every dispute resolution process is preceded by more or less intense negotiations between the respective managers who are in charge of the project. Almost 90 per cent of major international commercial contracts contain an arbitration clause and international contract practice is making increasing use of mediation. Some commercial contracts contain highly sophisticated 'multi-tier' dispute resolution clauses which require the parties to reach a settlement of their disputes by going through consecutive steps of different Private Dispute Resolution processes. As a consequence of these developments, every major international law firm has a dispute resolution group. Legal departments of major companies are likewise discovering the benefits and cost-saving effects of pro-active dispute management, especially in light of the high potential for Private Dispute Resolution to preserve valuable business relationships.

Working successfully in this field of international business and discovering these potentials requires the ability to make an informed choice between the various options available in the ever growing arsenal of Private Dispute Resolution. However, although the privacy and confidentiality of these processes count among the major reasons why businessmen resort to them, it is precisely these reasons which make it hard for students and young practitioners to get a profound understanding of both the law and the practice of Private Dispute Resolution. This project provides the missing link, an insight into the law and the practice of the three archetypes of Private Dispute Resolution: Business Negotiation, Business Mediation and International Commercial Arbitration.

The project is designed for in-house training and university courses, summer academies, or as a tool for practitioners, wishing to prepare themselves (or representatives of their clients who have to appear as witnesses before international mediators or arbitrators) for their appearance in a Private Dispute Resolution process.

The project is unique in many ways. It is based on an interactive learning concept which combines a Case Study and a Handbook with an interactive DVD-ROM and a homepage on the internet. This innovative approach provides the user with a comprehensive, realistic and highly practical portrayal of the art of Private Dispute Resolution.

The project is based on a comprehensive Case Study that is contained in Volume I. The Case Study was originally developed for a seminar that the Center for Transnational Law (CENTRAL), together with the German Institution of Arbitration ('Deutsche Institution für Schiedsgerichtsbarkeit e.V.', DIS) and arbitration practitioners, organized in the summer of 1999 at Schloss Gracht near Cologne, Germany. The Case Study has been used in annual seminars on international arbitration at the T.M.C. Asser Institute in The Hague. The course was founded by Professor Martin Hunter who has become a major source of inspiration also for this project. The Case Study and a previous project, 'Arbitration Interactive', were also used in numerous teaching and training courses around the world and in the annual Cologne CENTRAL/DIS Summer Academy on International Commercial Arbitration at the University of Cologne, Germany (see www.private-dispute-resolution.net).

The Case Study demonstrates in 29 Scenarios how a promising business relationship between a Swiss exporting company ('ALT') and a Dutch importer ('NedTrans') turns into a hard-fought legal battle before an international arbitral tribunal after negotiations between the managers of the two companies responsible for the conclusion of the contract and a business mediation between the companies' two CEOs fail. This concept of a single case being run through three different Private Dispute Resolution processes allows the user to draw parallels and make comparisons which are otherwise not available.

There are two other unique features of this project which serve as catalysts for the user's learning process.

The Handbook which constitutes Volume II of the project provides detailed Answers to the Questions posed at the end of each Scenario of the Case Study. The Questions and Answers cover almost every aspect of the three Private Dispute Resolution processes dealt with in the project.

The DVD-ROM, which is enclosed in the back cover of Volume I provides an animated graphical Case Development, a Chronological Order of Events, including pdf-files of all contract and other written documentation, the text of relevant legal materials, a List of Parties and Persons and further learning and teaching aids. The DVD-ROM also contains videos of the negotiation, mediation and arbitration sessions. They provide realistic and highly practical visual instructions of the practice of Private Dispute Resolution. The subtitles in the video refer back to the Answers in the Handbook and provide the user with a

unique opportunity for an integrative learning approach, which includes not only the legal side but also the soft skills and advocacy skills required in the practice of Private Dispute Resolution. The 'Summary Guide to Effective Legal Negotiation' by Professor Charles B. Craver from George Washington University, Washington D.C., USA, which is also on the DVD-ROM, opens the whole kaleidoscope of negotiation tactics, tricks and theories to the user of this project. The Tree Age decision tree program allows the user to make his own calculations of the settlement value of the dispute between NedTrans and ALT.

It is strongly recommended that users consult the 'User's Guide' immediately following the Acknowledgements before using the books and the DVD-ROM.

Any comments, critique, suggestions or information from readers are very welcome. They should be sent to casebook@transnational-law.de.

Klaus Peter Berger
January 2006

Acknowledgements

A project of this size and complexity would not have been possible without the assistance, constant support and enduring commitment and enthusiasm of a large number of people.

First and foremost, the CENTRAL Team at the University of Cologne deserves a very special thank you. Under the supervision of Philipp Stürmer, they have done a marvellous job in assisting the author in finalizing the two books, the videos and the DVD-ROM. Jan Paszek prepared numerous graphics for the Handbook. Tobias Hahne did an amazing job in editing the footnotes. Stefan Ueding, head of CENTRAL's Transnational Law Database Team (www.tldb.de), and Sven Tönnemann prepared the DVD-ROM label. The members of the DVD-ROM Team were Bilal Abedin (DVD programming), Oliver Froitzheim (pdfs) and Philip Lüghausen (icons). Their limitless creativity, enthusiasm and extremely positive spirit have always amazed me. My assistants, Lucas Kleine, Marthe Stemper, Björn Waterkotte, Verena Kamphausen, my secretary Heidi Potschka and the Managing Director of CENTRAL, Ellen Allerödter, were of invaluable assistance in the final phase of the editing process.

The author is also very grateful to Stephanie Wolfrum, former Managing Director of CENTRAL and a trained mediator, for her extremely valuable comments on earlier drafts of the mediation section of the project and for the numerous discussions on the law and practice of mediation.

I am likewise deeply indebted to Dr Jörg Risse, LL.M., attorney at law in Frankfurt a.M. and author of a leading German handbook on business mediation, who plays the mediator, Dr Raiser, in the mediation videos and has read previous drafts of the mediation section. His comments, ideas and his constant encouragement have been invaluable.

The author is extremely grateful to those practitioners who have acted as counsel, arbitrators and mediator in the videos which appear on the

DVD-ROM. They all accepted the author's invitation to participate in the video sessions without hesitation and with great enthusiasm. With their extremely professional approach during the video sessions, they have made an essential contribution to the implementation of the interactive learning concept of this project. In the negotiation videos, Dr Friedrich Blase and Stefan Hoffmann, who was also the editorial assistant for the previous project *Arbitration Interactive*, have played the two managers Mr Stutz and Mr Bakker. Friedrich Blase and Stefan Hoffmann have also acted as witnesses in the arbitration videos which were shot in 2001 at the video department of Münster University. Bas Knipphorst, who is also the publisher responsible for this project at Kluwer Law International in The Hague, played the CFO of ALT, Al Hopmans, in the mediation videos. Dr Wolfgang Peter and Dr Cornelis Canenbley have played the two CEOs, Mr Jaeggi and Mr Martens. Dr Jörg Risse, LL.M. played the mediator Dr Raiser while Dr Peter Niggemann, LL.M. and Dr Christoph Witte acted as counsel Mr Kurz and Dr Stam. In the arbitration videos, Professor Martin Hunter, Dr Pierre Karrer, LL.M. and Hilmar Raeschke-Kessler, LL.M. appear as members of the arbitral tribunal. Constantine Partasides and Claudia Kälin-Nauer played the parties' counsel while Dagmar Winkelsträter acted as secretary to the tribunal. Without the commitment and professionalism of all these practitioners, this project would not have been possible.

A very special thank you goes to Peter Butterly and Daniel J. Behrends, heads of the video team of the University of Cologne (AVMZ) and to all members of that team who shot the videos for the negotiation and mediation videos. Everybody at CENTRAL very much enjoyed working together with this highly professional and very friendly and cooperative team.

The author is also deeply indebted to Professor Charles B. Craver from George Washington University, Washington D.C., USA. His excellent negotiation workshops at the University of Cologne will be remembered for a long time. Professor Craver kindly allowed us to include his 'Summary Guide to Effective Legal Negotiation' which he prepared for the Minnesota Continuing Legal Education program, on the DVD-ROM. He also prepared brief video statements for the negotiation part of the project which are also on the DVD-ROM. Both the Guide and his video statements have greatly enhanced the potential of the DVD-ROM as a comprehensive and interactive learning and teaching device.

Professor Eric Bergsten, the director of the Annual Willem C. Vis International Commercial Arbitration Moot in Vienna, has always been a great source of motivation and inspiration. The fact that he has recommended the previous project, *Arbitration Interactive*, to the participants of the Moot as 'the best set of teaching materials for students and young practitioners on the conduct of an international commercial arbitration that exists' has been a constant source of encouragement for the author and the whole CENTRAL-Team.

The author is particularly grateful to Jens Bredow, Secretary General of the German Institution of Arbitration (DIS), for his extremely helpful comments on earlier drafts of the arbitration section and to Isabel Mulder, Deputy Secretary General of DIS, for providing the author with the authentic administrative documentation for this case from the DIS Secretariat. Their remarkable support has greatly helped making the Case Study and the materials on the DVD-ROM even more realistic. The DIS has also allowed us to shoot the mediation videos in the DIS library in its head office in Cologne.

Jeff Stripp from Tree Age Software Inc., Massachusetts, USA, was extremely helpful and allowed us to install a trial version of his company's decision tree software, TreeAge Pro, on the DVD-ROM.

Mariel Dimsey has, once again, done a great job in improving the readability of the English text of both the Case Study and the Handbook and of materials on the DVD-ROM.

Finally, a very special thank you goes to all reviewers of the previous project and all participants in the many workshops, seminars and summer academies which were conducted with Arbitration Interactive over the past three years. Space limitations do not permit mentioning them all here. The post-graduate students who have attended my annual courses at the Asser College Europe in The Hague, a post-graduate program for East-European students, and at the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) at Dundee University, Scotland where the author teaches a post-graduate course on international commercial arbitration every year as visiting professor, have provided me with new insight, ideas and considerable inspiration over the past years. Alexander von Saucken made me aware of some deficits in the previous project. Timothy J. Tyler, attorney at law from Houston, Texas very kindly provided me with the outline of his course on international commercial arbitration that he teaches at Texas University and which is based in part on Arbitration Interactive.

The experiences gained in all these courses and workshops and the favorable and highly constructive feedback received from many participants and users and from the reviewers of Arbitration Interactive have had a substantial and extremely beneficial impact on this project.

Klaus Peter Berger

User's Guide

The package which you hold in your hands consists of three items: the Case Study (Volume I), the Handbook (Volume II) and the DVD-ROM which you will find in the back cover of Volume I. In addition, there is a homepage on the internet at www.private-dispute-resolution.com. Due to its interactive nature, working with this package requires a special approach to achieve maximum learning efficiency. This approach is based on the fact that the books, DVD-ROM and homepage can and should be used simultaneously. Please check the instructions on the DVD-ROM and the homepage for the software and hardware requirements.

Case Study

The Case Study is divided into three Parts with twenty-nine Scenarios. Part One (Scenarios 1–5) deals with business negotiations, Part Two (Scenarios 6–15) with international business mediation and Part Three (Scenarios 16–29) with international commercial arbitration. The structure of each Scenario follows the same three-tier pattern:

- Facts (Volume I),
- Questions (Volume I),
- Answers (Volume II).

The Questions asked after the exposition of the factual background of each Scenario in Volume I are intended to prepare you for the discussion of the legal issues in the Answers to each of these Questions which you find in Volume II. The list of keywords which you find at the outset of each Scenario in the Case Study allows you to focus your thinking towards the respective problems while going through the facts of that Scenario.

Handbook

The Handbook (Volume II) can be used in various ways.

It is strongly suggested that you first familiarize yourself with the factual background of the Case Study in Volume I and try to find your own Answers to the Questions for each Scenario before proceeding to the Answers given in the Handbook. This will ensure a deeper understanding of the dispute resolution process and of the many legal issues related thereto. It is not necessary to read the Answers to all Questions in order to understand the case. For the quick reader, a summary of the Answer is given in a box at the end of each Answer. However, it is strongly recommended that you work through all Questions and Answers of the First and Second Scenario, where the groundwork is laid for the understanding of the dispute between the parties.

The Handbook can also be used as a general reference manual for the law of international commercial arbitration. The Handbook has three key features which allow you to use it in this way. First, the table of contents contains summaries of the problems to be discussed in the Answers of each Scenario. Secondly, you will find comprehensive lists of 'Issues Covered' in the Answers at the outset of each Scenario which provide a more detailed overview of the issues which are dealt with in the Answers of that Scenario. Thirdly, the comprehensive keyword index in the back of Volume II assists you in finding answers to specific legal problems covered in the Handbook.

DVD-ROM

The DVD-ROM which you will find in a plastic pocket in the back cover of Volume I, has a large number of interactive teaching and learning features which you can use simultaneously with the books or separately.

The main menu of the DVD contains seven buttons: 'Parties and Persons', 'Case Development', 'Documents and Events', 'Materials', 'Videos', 'Soft Skills' and 'Links'.

The button 'Parties and Persons' provides an overview of the 'actors' who appear in the video section of the DVD-ROM.

Under the button 'Case Development' you will find an animated graphical Case Development which enables you to better understand the sequence of events in the first two Scenarios of the Case Study. This tool should therefore be used simultaneously with the Case Study.

Under the button 'Documents and Events' you will find a chronological list of events for each Scenario, together with the relevant documents produced by the

parties during the contract negotiations, the negotiations in the Hague, the mediation (fax messages, general contract conditions, etc.) and the arbitration (legal briefs, communications from the DIS Secretariat, orders of the Tribunal, awards, etc.) as pdf files. You should refer to these documents whenever the symbol '(Ⓢ)' indicates that the document is reproduced on the DVD. You can also click from the Chronological Order of Events directly to the relevant document. Finally, you can print out all the documents (except for the letters from the DIS Secretariat) and create your own file of the case.

Under the button 'Materials', you will find the laws, mediation and arbitration rules etc. which are referred to in the book. Again, the symbol '(Ⓢ)', which you find both in the Case Study and the Handbook, indicates that the material can be found on the DVD-ROM. You will also find further important materials which are not directly relevant for the case but are highly important for a deeper understanding of international mediation and arbitration practice. For further materials, you may refer to the 'Links' section of the DVD-ROM. The Links section also provides access to CENTRAL's Translex Online Database ('Tldb') and to some other internet sites. Under the 'materials' button, you also find a trial version of the decision tree/decision analysis software 'TreeAge Pro' which allows you to do your own calculations of settlement values in the dispute between NedTrans and ALT.

The Case Study contains various personal meetings and hearings which are very hard to describe in written form. This applies to the negotiations between Mr Bakker and Mr Stutz in The Hague (Scenarios 4 and 5), the mediation between Mr Jaeggi and Mr Martens in Hamburg (Scenarios 7–14) and the hearing on the arbitral tribunal's jurisdiction in Scenario 20 as well as the two-day hearing on the merits as the core part of the arbitration between the parties in Scenarios 24–26. For each of these Scenarios, you will find a sequence of videos for the relevant meeting or hearing under the button 'Videos'. For each negotiation video, you will find a video comment by Professor Charles B. Craver from George Washington University, Washington D.C., USA, which you should watch only after you have seen the relevant negotiation video. Furthermore, it is recommended that, before watching the videos, you first read the Facts, Questions and Answers of these Scenarios. The video sequences contain subtitles which refer you to the paragraph numbers of the relevant parts of the Handbook.

Under the 'Soft Skills' button you will find a variety of learning and teaching aids for negotiation, mediation and arbitration. The 'Summary Guide to Effective Legal Negotiation', which was prepared by Professor Charles B. Craver and is reproduced on the DVD-ROM with his kind permission, deserves special mention. It provides you with a comprehensive and in-depth learning and teaching device for almost every aspect of negotiation theory and practice.

Internet Homepage

Finally, the internet homepage at www.private-dispute-resolution.com provides regular updates for the problems covered in the Handbook, reports about the ‘Making Of’ of the videos and about workshops and seminars conducted with this project worldwide. It also contains information about the CENTRAL/DIS Summer Academy, which takes place every year at the University of Cologne and which is also based on this project.

List of Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
A.C.	Appeal Cases
ACC	Association of Corporate Counsel
AcP	Archiv für die civilistische Praxis (German journal)
ADR	Alternative Dispute Resolution
Alb. L. Rev.	Albany Law Review
ALI	American Law Institute
All E. R.	All England Reports
ALTHCL	Alternatives to High Cost Litigation
AMINOIL	The American Independent Oil Company
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l L.	American Journal of International Law
Am. Rev. Int'l Arb.	The American Review of International Arbitration