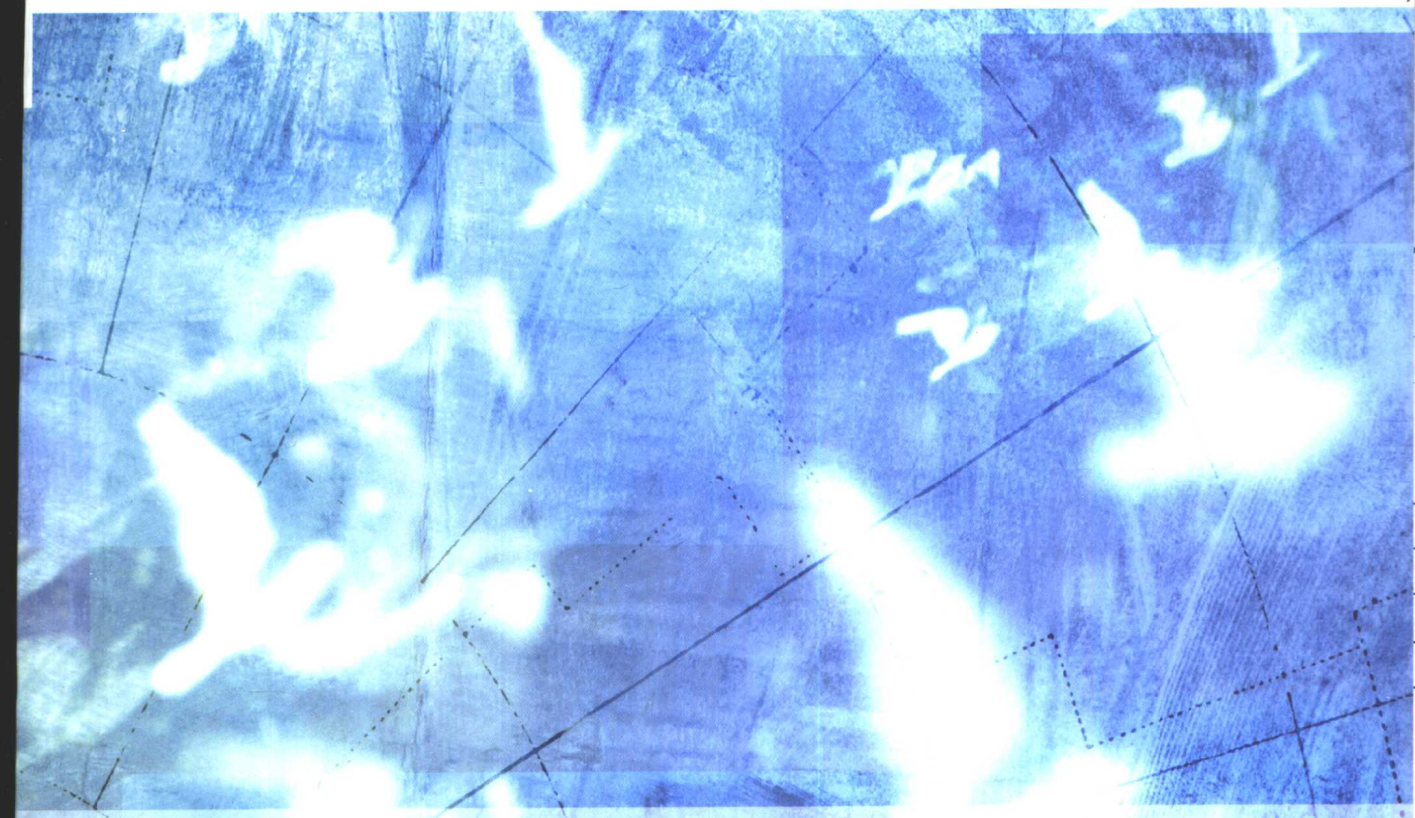

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第二版

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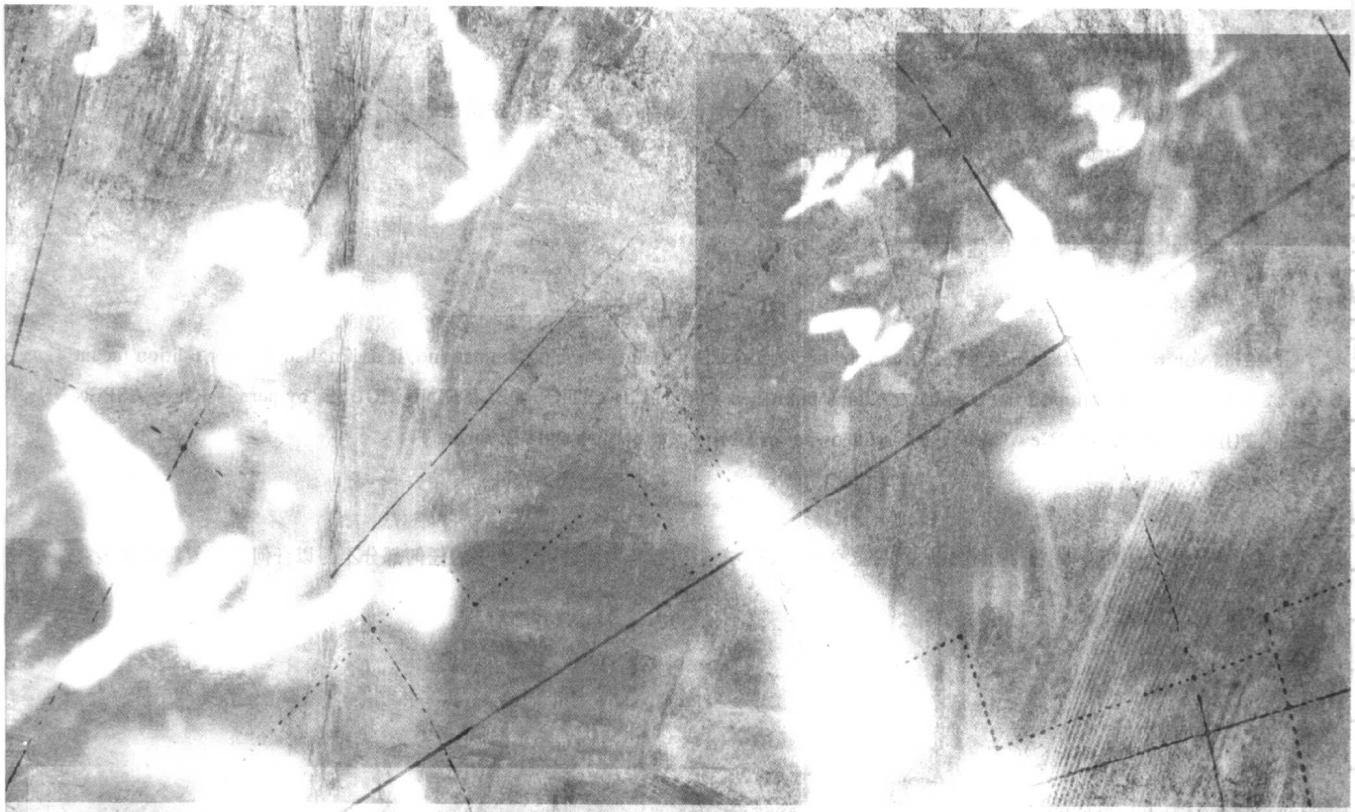

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**国际仲裁法律与实践**

GUOJI ZHONGCAI FALÜ YU SHIJIAN

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# 总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要**（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析**（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者

读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列**（Casebook Series）覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要**（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

# International Arbitration Law and Practice

# FOREWORD

*by*

*The Right Hon. The Lord Mustill*

The past two decades have witnessed a remarkable flowering in the study of arbitration. It has always been a subtle and elusive subject, but until quite recently the intellectual problems have been masked by the relatively small scale of the disputes, by the fact of their conduct within the confines of individual national systems of law and practice, and by their strictly limited exposure to scrutiny. With the exception of a few notable international scholars few were interested in the articulation of a process which was considered to be of only local and workaday concern.

This landscape is now dramatically transformed. Disputes are now often of a quite different order of magnitude. The availability of primary sources, and particularly of international sources, has been greatly enhanced, so that workers in the field can look beyond their own parochial and personal experience to see how others with equal experience but different cultural and legal backgrounds have conducted the arbitral process. An intensified conflictual element has made all concerned in that process more ready to dissect and criticise what is going on. The growth of large-scale institutional arbitration has brought together, head to head, numbers of skilled arbitrators with differing legal and forensic backgrounds, whose preconceptions and methods may differ widely. The large amounts at stake have attracted the attention of law firms, packed with able lawyers, who would previously have seen arbitration as no more than a minor adjunct of their major concerns. Equally, there has been the exposure of major cleavages – between the supposedly antithetical procedural disciplines of the civil and the common law; between private choices in dispute resolution and public policy; between party autonomy and due process; between speed and economy on the one hand and accuracy of decision on the other; and of course between various conceptions of what a fair process really involves – an exposure which has made all those who think about arbitration realise how confused and difficult its principles really are. This realisation has led academic law departments which might previously have regarded arbitration as a minor dependency of commerce and hence unworthy of serious study to come to recognise that this is an area in which the best minds can fruitfully be engaged.

All these factors have combined to create a pressing need for published studies which combine two virtues, not always found together. First, they must be scholarly, which means they must be both intellectually rigorous and well founded on the primary materials. Second, they must show an awareness of, and a response to, the needs of the community (and particularly the international trading community) whose function it is for commercial arbitration to serve. The outcome

of this need has been a surge of publication. Any further contribution to it must justify its existence by freshness of approach, clarity of structure, cogency of reasoning, or breadth and depth of learning.

Happily, the present volume amply satisfies these demands, as the call for a new edition plainly shows. Even a glance through the chapter headings is enough to show the welcome breadth of the author's approach. Certainly, some of them occasion no surprise. Nowadays no work on arbitration with any international pretensions could omit a full treatment of, for example, the role of the state court, or the enforcement of foreign awards. But many of them are not routine. We find distinct and full treatment of the Iran/US Claims Tribunal; ICSID arbitration; speed in arbitration; documents-only arbitration; disputes between states; disputes between states and private parties; the UNCITRAL Rules; venue. These and others are not the common coin of texts aimed at those who want to learn no more than will help them to join the top players in the narrow and exclusive world of eurocentric commercial dispute-resolution. The perspective is wider, and the aims more grounded in practice, than that. And of course the reader will not simply glance at the chapter headings, but will look within, at the notable collection of materials and ideas; notable for the manner of organisation and the profusion of sources, drawn from round the world. There will be found an interesting discussion of, amongst others, the participation of connected parties, not a novelty in itself, but a conceptually difficult topic which one can look for in vain in works aimed at the practitioner; administered arbitration; internal appeals from one arbitral body to another, long a feature of common law commercial arbitration but scarcely noticed in the doctrinal works; the kindred topic, now achieving prominence, of a standing external body able to receive challenges and appeals otherwise than by recourse to the courts; *tronc commun*, already well known as one of the author's special fields. There is no need to multiply examples. These will serve to show the distinctive character of the work.

The last chapter is entitled: "The continual search for improvements". One need look no further for the philosophy of the author or for the service which this work will perform for the arbitrating community.

*Mustill*

# PREFACE

If I am right, the best role each of us can play is that of bearer of our beliefs and ideals. If this is so, what matters is that these beliefs and ideals continue to be carried on, irrespective of who the individual bearers are. However, nobody can carry them on unless others have carried them on before and passed them on further.

I therefore hope that the opinions expressed in this book will be kept alive by other bearers, along with continuing development and improvement in the ideas. I gratefully acknowledge the existing contributions on arbitration, in particular those by van den Berg, Fouchard, David, Lew, Wetter, Gaja, Craig et al, Saleh, Simmonds et al., Schizzerotto, Vecchione and Bernardini, as well as publications such as *Clunet,* the *Yearbook Commercial Arbitration* and the *Revue de l'arbitrage.* Without them this study (which is based on my lectures to law students at the University of Padua during the academic years 1987–1988 and 1988–1989) could not have been made.

I have been asked to say in what way this study is different from others. The author is generally the least suitable person to express such a view but, if I have to give an opinion, I would say that the main characteristic of this study is that it focuses on a different criterion for identifying international arbitration.

A distinction must certainly be made between international arbitration and domestic and foreign arbitration. I believe that a further distinction must be made between international arbitration and arbitration which is international only because of the different nationality (or residence) of the parties, or because it concerns relationships connected with various jurisdictions.

An 'internationality' based on procedure seems to me to be the key element of international arbitration. Once this is acknowledged, international arbitration acquires a unity. I have tried to reflect the effects of this unity on the different aspects of international arbitration.

The references I have made to various legal systems have been taken from specialised publications. Because of the scope and diversity of the subject matter and of the continual revision of statutory provisions and changes in precedents, the information given here is simply preliminary. It cannot be used to settle specific cases without being checked and studied in detail with the advice of expert local counsel.

*Milan, June 1, 1989*

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The eleven years which have elapsed since the first edition have been rich in changes in national legislations. The Uncitral Model Law has been adopted by many countries.

The number of arbitral proceedings has increased. ADR has registered more interest in the U.S. than in other parts of the world. Several law schools are now teaching arbitration. I myself have taught arbitration once again at the University of Milan during the academic year 1996 – 1997 and at a 22-hour course organised by the European Court of Arbitration and the Council of the Bar of Milan. The procedural aspects of it have attracted more attention from scholars of procedural law.

The new millennium offers much room for improvement, for instance in the field of an International Arbitration Court of Appeal. Open minds have the opportunity to help arbitration progress in many ways.

*Milan, April 2000* *Mauro Rubino-Sammartano*

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I am grateful to my colleague in my London Chambers, Mrs. Claire Vines for having done her best to improve my English; and my son Ruggero, who has joined my Milan Chambers, for having helped me substantially, putting together my illegible notes, footnotes and a myriad of reviews and corrections.

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