高等院校**法律专业双语课程**规划教材

International Commercial Arbitration

国际商事仲裁

（英文版）

王秉乾 李纪恩 /编著

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前　言

国际商事仲裁是国际商事争议解决中的重要制度之一，以其具有的最终约束力、便利性、保密性、专业性等特点而受到国际商业界人士的青睐与支持，一直以来就是解决国际商事争议的重要方式。在经济全球化的今天，国际商事仲裁的作用和地位都在加强，了解和掌握相关的法律知识对于我国企业界和法律界来说变得必不可少。这不仅要求知识上的掌握，还要求在语言上能够通过原文来了解和操作国际商事仲裁，这就要求尽可能地以英文来进行。因此，国际商事仲裁的学习有必要以英文作为学习的主要工具，惟此才能使学习者在将来的工作中尽快熟悉和掌握国际商事仲裁的相关实务和理论问题，尽早地跨越语言障碍和知识障碍。

《国际商事仲裁》（英文版）是为培养复合型涉外法律专门人才而编写的法学双语教材。在广泛收集资料、重视国外学者相关论述的基础上，本教材采用了英文为主、中文为辅相结合的方式，对国际商事仲裁中的重要问题进行了叙述。本教材共分为十章，内容包括国际商事仲裁简介、国际商事仲裁机构、仲裁协议、仲裁准据法、仲裁机构、仲裁程序、仲裁临时措施、仲裁裁决对仲裁裁决的异议，国际仲裁裁决的承认与执行等，涉及到了国际商事仲裁的主要理论与实践问题，做到了语言地道、论述清晰、重点突出、难度适当，全面、深入、系统地阐述了国际商事仲裁法律制度的主要内容。本教材注重理论与实践的相结合，不仅做到知识上的覆盖，更强调若干实务问题，做到了背景、知识、理论与案例的有机统一。为此，本教材内容皆精选自相关国外权威著作对国际商事仲裁的论述，又根据我国读者的需要做了适当编著，做到了内容新颖、语言地道、表达简练，学术性与实务性结合紧密，适合中国学生学习之用。为了方便学习，本书特意对一些重点内容以汉语做了相关注释，并提供了一些基本的背景性知识介绍，以帮助理解。从实用性角度来看，本书既可以作为高等学校法学、国际贸易、国际企业管理等专业学生的教材，也可以为国家机关、企（事）业单位中从事法律、经济和贸易的相关人员提供有意义参考。

本书第 1～5 章由李纪恩负责编写，第 6～10 章由王秉乾负责编写，全书由王秉乾最后统稿并定稿。本书是对外经济贸易大学 211 工程第三期（国际建设工程争端解决机制研究，项目号 73400036）的子成果之一。编著者特此向对外经济贸易大学出版社提供的帮助与支持表示衷心感谢。

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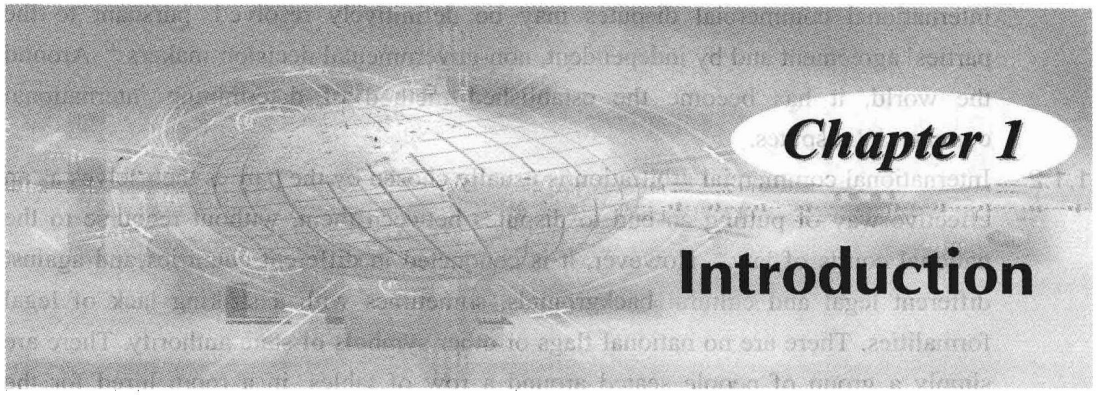

Chapter 1 Introduction

【Chapter Summary】

International commercial arbitration has become an important means of international dispute resolution. This chapter offers an outline of international commercial arbitration. After offering the definition, this chapter discusses the characteristics and historical backgrounds for international commercial arbitration. Then the merits and demerits of international commercial arbitration are contrasted, to be followed by discussion of foundations and the kinds of arbitration. Lastly, sources of international commercial arbitration are discussed.

【Objectives】

Through this chapter, students are required to understand the framework of international commercial arbitration and major issues involved, including the merits and demerits of international commercial arbitration and the sources of international commercial arbitration. This chapter is designed to lay a solid foundation for further studies.

【Key Words】

International commercial arbitration, the agreement to arbitrate, arbitration award, arbitration tribunal, institutional arbitration, ad hoc arbitration, international treaties and conventions

1 International commercial arbitration in brief

1.1 The definition of international commercial arbitration

1.1.1 By legal definition, international commercial arbitration is a means by which

international commercial disputes may be definitively resolved, pursuant to the parties' agreement and by independent, non-governmental decision-makers.[①] Around the world, it has become the established method of determining international commercial disputes.

1.1.2 International commercial arbitration is usually chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the national courts of law.[②] However, it is conducted in different countries and against different legal and cultural backgrounds, sometimes with a striking lack of legal formalities. There are no national flags or other symbols of state authority. There are simply a group of people seated around a row of tables, in a room hired for the occasion. To an outsider, it would look as if a conference or business meeting was under way rather than a formal and strict legal proceeding was going on.

1.2 The characteristics of international commercial arbitration

1.2.1 Generally speaking, international commercial arbitration bears several defining characteristics distinguishable from other means of dispute resolution.

1.2.2 First, in most cases, the parties to the dispute must agree to refer their differences to arbitration, that is to say, arbitration is based upon agreement. Second, arbitrations are resolved by arbitrators. They do not serve as state judges, but are private persons ordinarily selected by the parties. Third, arbitration produces a binding award, which is capable of enforcement through national courts. Finally, arbitration is comparatively flexible, as contrasted to most court procedures.

1.2.3 In addition, it must also be mentioned of the international nature of arbitration. The practice of resolving disputes by international commercial arbitration only works because it is provided in place by a complex system of national laws and international treaties. Even a comparatively simple international commercial arbitration may require reference to as many as four different national systems or rules of law.

1.2.4 First of all, there is the law that governs recognition and enforcement of the agreement to arbitrate. Then, there is the law that governs, or regulates, the actual

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① Gary B Born. International Commercial Arbitration: Commentary and Materials. 2nd edn.. Kluwer Law International, 2001: 6.

② Julian D.M. Lew, Loukas A. Mistelis, Stefan Kroll. Comparative International Commercial Arbitration. Kluwer Law International, 2003: 8.

arbitration proceedings themselves. Next, in most cases, there is the law or the set of rules that the arbitral tribunal has to apply to the substantive matters in dispute before it. Finally, there is the law that governs recognition and enforcement of the award of the arbitral tribunal.①

1.2.5 These laws may well be the same. The law that governs the arbitral proceedings (which will usually be the national law of the place of arbitration) may also govern the substantive matters in issue. But it does not mean that this is not necessarily so. The substantive law may be an entirely different system of law. It may be international law, or a blend of national laws and international law, or other laws. In addition, the system of law which governs recognition and enforcement of the award of the arbitral tribunal will usually be different from that which governs the arbitral proceedings themselves. Therefore, the existence of a conflict of laws also naturally arises in the context of international commercial arbitration.

1.3 A historical review of international commercial arbitration

1.3.1 The practice of arbitration has been in existence for a long time because the parties to a dispute want to settle it with less formality and expenses than is involved in recourse to the courts.

1.3.2 It may be found out the "primitive" nature of the arbitral process in its early history. Two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted for his decision. They would do so not because of any legal sanctions or procedures, but because this was expected of them within the community in which they carried on business.②

1.3.3 Looking first at its history, the origins of contemporary private arbitration lie in mediaeval Western Europe. It can be said with some confidence that the dispute resolution mechanisms of the post-classical mercantile world were conducted within, and drew their strengths from, communities consisting either of participants in an individual trade or of persons enrolled in bodies established under the auspices and control of geographical trading centers. Such communities gave birth to the implicit

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① Alan Redfern, M. Hunter, Nigel Blackaby, Constantine Partasides. Law and Practice of International Commercial Arbitration, 4th edn.. Sweet & Maxwell, 2004: 5.

② Emmanual Gaillard, John Savage. Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International, 1999: 6.

expectations and peer-group pressures which both shaped and enforced the resolution of disputes by impartial and often prestigious third persons. Within such communities, external sanctions would have been largely redundant, even if a legal framework had been available to bring them into play, which in the main it was not.

1.3.4 In the past, arbitration was mainly conceived of as an institution of peace, the purpose of which was not primarily to ensure the rule of law but rather to create harmony between persons who were destined to live together. People thought the rules and procedures provided by the law were too rigid and costly and troublesome. Thus, arbitration came in to offer an alternative. Parties were authorized to submit a dispute to an arbitrator, and expected that he would be able to devise a satisfactory solution.

1.3.5 Anyway, no modern state could stand back and allow a system of private justice, which depends on the goodwill of the participants, to regulate commercial activities which are of increasing importance; and so it was to be expected that at some stage, the national state would step in and regulate matters.

1.3.6 But international commercial arbitration does not stay within national boundaries. For example, a corporation based in China might contract with another corporation based in Germany, with any disputes being resolved by arbitration in Stockholm. How is the arbitration agreement to be enforced, if a dispute arises and one of the parties refuses to arbitrate? And how is an award of damages to be enforced, if the losing party refuses to carry out the award voluntarily? The national law of one state alone could not deal with problems of this kind. Plainly what is needed calls for an international treaty or convention which would link together national laws and provide a uniform solution.

1.3.7 In time, such treaties came into being. There was, notably, the Geneva Protocol of 1923, which went some way to provide for the international enforcement of arbitration agreements and arbitral awards. This was followed by the Geneva Convention of 1927, which widened the scope of the Geneva Protocol; and then by the New York Convention of 1958, which further strengthened the process of the international enforcement of arbitration agreements and arbitral awards. These instruments offer a solid foundation for international commercial arbitration.

1.3.8 On the other hand, the influence of arbitral institutions in the establishment of these international treaties has been always considerable. For instance, the London Court of International Arbitration (LCIA) is one of the oldest of these institutions, having been

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