

RESEARCH AND PRACTICE IN
INTERNATIONAL COMMERCIAL ARBITRATION

Sources and Strategies

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SI STRONG

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DEDICATION

Dedicated to my sister, Maria Strong, a fantastic attorney and a wonderful person, without whom I would not have gone into law in the first place.

—SI Strong

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ACKNOWLEDGEMENTS

Every book has a beginning, and this one began with Richard M Franklin and Michael L Morkin, both brilliant international practitioners and two of the kindest lawyers I have ever met. Back in 2004, the three of us were asked to develop a regional training program in international dispute resolution for the associates in Baker & McKenzie's North American practice group. One of the first topics in the series involved research sources and strategies for international commercial arbitration, something we considered a necessary predicate to the rest of the training program and a subject of particular interest to me, given my longstanding interest in the interplay between practice and scholarship in this area of law. As I started to prepare for the training session, I discovered that there were no published materials on research methodology in international commercial arbitration, even though it is a subject that is both unique and uniquely difficult. I also realized that much of what I took for granted regarding my own research methods was actually the result of the formal and informal mentoring I received during years spent as a lawyer and solicitor in London, New York, and Chicago. The more I thought about it, the more I understood that there was more to this topic than I could share in the ninety minutes allotted to me. More needed to be said to cover the subject adequately. As it turned out, the notes I made for that training session formed the rough outline for the book that you see before you today. Therefore, I owe a great debt of gratitude to Rich, Mike, and the Baker & McKenzie North American International Dispute Resolution Training Program, for without them I never would have been inspired to write this book.

Although my name appears on the front cover, no book is ever written by one person alone, particularly when it attempts—as this one does—to draw together the diverse strands of a complex and uncodified area of legal practice. The ideas in this book are derived from the knowledge and advice that my mentors and colleagues have shared with me over the years, and I am grateful to them for their generosity in passing on their expertise. I have been incredibly fortunate in having had the chance to work with some of the best lawyers in the world and would therefore like to thank my former colleagues in the international dispute practice of Weil, Gotshal & Manges LLP, particularly Peter Gruenberger, Katherine M Oberlies, Eric Ordway, James W Quinn, Richard A Rothman, Mindy J Spector, and Kenneth L Steinthal in the New York office, as well as Michael Jones in the

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They say that the best way to learn a subject is to teach it, and after my experience at the University of Missouri, I could not agree more. It is a joy to teach a subject that excites you, but it is also incredibly enlightening to view the material through the eyes of a newcomer to the field. I therefore want to thank all the students who have studied International Commercial Arbitration with me at Mizzou, as well as my independent study students, since their questions and observations have done much to strengthen this book.

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The law is stated as it is believed to be on 1 September 2008.

Dr SI Strong

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RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction	1.01	Necessary in International Commercial Arbitration	1.07
B. Unique Concerns Related to Research and Practice in International Commercial Arbitration	1.03	D. Benefits Associated with Learning Special Research and Practice Methodologies for International Commercial Arbitration	1.09
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A. Introduction

Many lawyers believe that their practice area is the most intellectually rigorous, unique, and interesting specialty possible. From tax to real estate to commercial law to probate—it would admittedly be difficult to do well in any of these or other areas of specialization without some training. Nevertheless, those who practise in these areas of law benefit from the roots that each of these specialties has in a domestic legal system—the same legal system that the lawyers have known and prepared for since their first days of law school. However, those who venture into international commercial arbitration find themselves in deep water, indeed. Not only is it a private form of dispute resolution (which means that there are few precedents to control either outcome or procedure),¹ it requires the use of unique legal resources **1.01**

¹ Some opponents to arbitration claim that the informality of the procedure and the lack of adherence to substantive legal principles results in a ‘lawless’ decision-making process. See Christopher R Drahozal, ‘Is Arbitration Lawless?’, 40 *Loyola Law Review* 187 (2006). While there may be valid concerns about certain types of domestic arbitration, many of the criticisms are not applicable to international arbitration and are, in any event, likely outweighed by the fact that arbitral awards are much easier to enforce internationally than judgments. See Philip J McConaughay, ‘The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration’,

and practice methodologies. Furthermore, it is not just international—it is in ways both anational (in that it does not follow the dispute resolution procedures existing in any particular national legal system) and multinational (in that it can require the application of the laws of several different states).²

- 1.02** Although continuing legal education providers have begun to address the need for instruction in many matters regarding international commercial arbitration,³ there is one area that is not typically discussed in those courses and seminars—research and practice methodologies.⁴ While the omission is in some ways understandable—there is only so much that can be covered in a half-day or weekend seminar, particularly when attendees have mixed levels of seniority and experience in the field—it can leave newcomers to international commercial arbitration without a proper understanding of what is required when handling these types of disputes. This is particularly dangerous when the newcomer to arbitration is very experienced in other areas of law, since the seminars do not emphasize to senior practitioners how radically research and practice in international commercial

93 Northwestern University Law Review 453 (1999); Linda Silberman, 'International Arbitration: Comments from a Critic', 13 American Review of International Arbitration 9 (2002).

² At one point there was a movement to make international arbitration completely delocalized in the sense that it would operate outside any domestic legal system. See Julian DM Lew et al, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) para 4-49. While proponents of delocalization failed to create a process that is completely unaffected by any domestic legal system, the actual procedures used today typically do not track the rules of national civil litigation. At the same time, the transnational nature of the dispute means that there will be conflicts of legal rules and, more importantly, legal cultures. As a result, procedure in international arbitration typically represents a compromise between different national approaches.

³ For example, many of the major international arbitral institutions, including the International Chamber of Commerce ('ICC'), the London Court of International Arbitration ('LCIA'), and the International Centre for Dispute Resolution ('ICDR') of the American Arbitration Association ('AAA'), host continuing education courses for practitioners. Furthermore, several universities offer special certificates and/or intensive summer courses in international commercial arbitration, including: American University Washington College of Law in the United States; the School of International Arbitration at Queen Mary, University of London in the United Kingdom; the International Centre for Arbitration, Mediation and Negotiation of the Institute for European Studies of the CEU San Pablo University in Spain; and the University of Hong Kong in Hong Kong, just to name a few. Law students from around the globe can also participate in an international commercial arbitration mooting competition. See eg, Janet Walker (ed), *The Vis Book—A Participant's Guide to the Willem C Vis International Commercial Arbitration Moot* (Juris Publishing, 2008); Eric E Bergsten, 'The William C Vis International Commercial Arbitration Moot and the Teaching of International Commercial Arbitration', 22 Arbitration International 309 (2006).

⁴ There are, of course, numerous books and articles that discuss arbitral procedure at a very practical level. For example, volumes 21:4 and 23:2 of Arbitration International are devoted to advocacy and the art of arbitrating in international commercial arbitration. See also R Doak Bishop (ed), *The Art of Advocacy in International Arbitration* (Juris Publishing, 2004); United Nations Commission on International Trade Law ('UNCITRAL') Notes on Organizing Arbitral Proceedings, UN GAOR, 29th Sess, Supp No 17, UN Doc A/51/17 (1996), available at: <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>>. However, these resources do not focus on how one goes about preparing a case to be heard in front of an international commercial arbitrator.

arbitration differ from research and practice in other areas of law. Therefore, this text focuses on research and practice strategies unique to international commercial arbitration, a topic which appears not to have been discussed in any of the literature in the field.

B. Unique Concerns Related to Research and Practice in International Commercial Arbitration

Like most legal specialties, international commercial arbitration is very much a product of its history. For many years, practice in this area was reserved to an elite group of lawyers and law firms. Centralization made sense: international commercial arbitration required access to specialized (and expensive) resource material; utilized unique and sometimes complex procedures; involved a very small client base consisting of large international private actors; and tended to seat itself in cities that were also home to the few existing international arbitral institutions, thus limiting practitioners to those who were in geographic proximity to those institutions. **1.03**

In the last ten to twenty years, however, both the economic and legal environments have changed. The easy availability of electronic databases means that non-specialists now have access to some (though not all) of the expensive specialist legal material that was once beyond their purview. Electronic mail and overnight courier systems allow lawyers to communicate quickly and efficiently with adversaries, clients, arbitrators, and arbitral institutions, regardless of location. Finally, the rapid increase in the number of private actors in the realm of international investment and commerce (due to economic globalization) has greatly expanded the international client base as well as the number of international commercial arbitrations that are filed each year. **1.04**

As a result of these shifts, international commercial arbitration has become a booming business, with increasing numbers of first-time or part-time practitioners and arbitrators. Many of these people have years of experience in litigation and/or domestic arbitration, so they are not new to the practice of law. However, international commercial arbitration is inherently different than either litigation or domestic arbitration, both in terms of the resources used in legal research, and in terms of the practices and procedures. These differences exist for three basic reasons. First, international commercial arbitration reflects a unique blend of civil and common law traditions. Experienced practitioners take this blended approach into account and do not try to mimic procedures used in domestic courts or arbitrations, lest they lose valuable opportunities to benefit their clients or, worse still, damage their credibility with the arbitrator. Second, international commercial arbitration is a private dispute resolution mechanism with few **1.05**

'official' precedents or bright line rules. However, there is a wealth of persuasive authority that can help advocates make their case. Those who are new to the field may not know about these materials or how to use them, thus losing a chance to persuade the arbitrator and/or rebut (or even anticipate) an opponent's argument. Third, international commercial arbitration involves parties from different legal systems, which means that lawyers must navigate through a complex maze of jurisdictional options and potentially applicable provisions of law, all the while contending with the issues that can arise when advocates and arbitrators come from different legal cultures. Knowing the laws of one's home jurisdiction is simply not enough, even if the arbitration is seated in one's own backyard and bolstered by a choice of law provision that guarantees procedural and substantive matters will be governed by one's own national law. By its very nature, international commercial arbitration raises issues from more than one state, and lawyers must be prepared to handle those issues as they arise.

- 1.06** This is not to say that international commercial arbitration must remain in the hands of the same specialists who have handled such matters for decades. It does mean, however, that those who have not trained at specialist firms must be prepared for a sharp learning curve should they find themselves involved in an international commercial arbitration, no matter its size and no matter how 'domestic' it may feel at the outset.

C. Why Special Research and Practice Methodologies are Necessary in International Commercial Arbitration

- 1.07** Lawyers are a clever bunch. Dispute resolution specialists, in particular, are very good at picking up new information quickly and presenting a sophisticated analysis to a trier of fact and/or law. What's all the fuss about research and practice in international commercial arbitration?
- 1.08** The problem is when 'you don't know what you don't know'. International commercial arbitration can be misleading. At times, it can very easily look like other dispute resolution processes, particularly since there is no single, standard procedure that must be followed in all cases. This can perpetuate the notion that 'anything goes' once the process is begun. In fact, international commercial arbitration involves certain conventions that should be respected as a matter of good practice.⁵ Failure to do so might not result in an unenforceable award, but could

⁵ For example, an American lawyer who objects, courtroom style, in an arbitration will not be ejected from the hearing, but will look like a novice. Conversely, a civil law lawyer who fails to cross-examine a witness (because that procedure is foreign to civil law trials) has lost an opportunity to advance his or her case. See eg, Carmen Casado, '10 Tips for Beginning Practitioners from an

prejudice the arbitrator against one's case and/or create unnecessary conflicts with one's adversaries. Furthermore, international commercial arbitration involves certain resources and types of legal argument that might not be apparent to those who do not practise regularly in the field.

D. Benefits Associated with Learning Special Research and Practice Methodologies for International Commercial Arbitration

Legal research is typically considered the domain of junior lawyers. However, understanding not only how to conduct legal research but how to use it is critically important in international commercial arbitration, since it is a dispute resolution process that relies heavily on written submissions. Even if more senior lawyers are not doing the hands-on tasks, they need to understand how the materials can be used if they are to present the client's case in its best light. It's particularly important for senior advocates to know how arbitrators might consider the relative weight of the different materials so that the supervising attorney can ensure that arguments are properly made, either in writing or in a hearing. **1.09**

Although newcomers to the field will reap the most benefit from the principles discussed herein, this text contains information that will be useful even to those who have acted as advocates or arbitrators in this field for many years. For example, those who have typically used traditional methods of research may be surprised at the diversity of resources available now, particularly in electronic forms. Furthermore, experienced lawyers may learn new approaches to the materials as well as new strategies regarding the presentation of one's case. **1.10**

When considering the recommendations contained in the following chapters, the reader should bear in mind that there are many ways to approach legal research and advocacy. The suggestions contained herein are but one method of proceeding. Nevertheless, the principles outlined in these pages should be useful both to those who have never considered these issues before and to those who have some practical experience in the field. **1.11**

There is no need here to rehearse either the substantive or procedural principles involved in international commercial arbitration, and indeed those subjects are far beyond the scope of this text. For those who are interested, there are several **1.12**

ICDR Case Manager', 62 *Dispute Resolution Journal* 67 (Feb–Apr 2007); Alexandre de Gramont, 'In Focus: Americans find their place in the world', *The National Law Journal* (US) (Nov 26, 2007); Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure', 36 *Vanderbilt Journal of Transnational Law* 1313 (2003).

excellent treatises available that discuss international arbitration from both a practical and theoretical standpoint.⁶ Those who either need an overview of the field or need to research the specifics of a particular issue can look to those sources for guidance. This book is for lawyers who are ready to go beyond general treatises and general principles and conduct their own independent research.

E. How to Use This Book

- 1.13** This book is broken into two parts: (1) substantive chapters containing practical recommendations on research and practice in international commercial arbitration (Chapters 2–4) and (2) a bibliography of both electronic and print resources commonly used in the field (Chapter 5). Using both sections together will give readers a deep appreciation of how best to research and present a case to an international arbitrator.
- 1.14** The substantive chapters address three major areas of concern. Chapter 2 describes the sources available in international commercial arbitration and how they are used. International commercial arbitration is a private dispute resolution process that blends civil and common law traditions while simultaneously utilizing elements of both an anational and a multinational approach. As a result, the resources in this field are fundamentally different than the legal resources used in domestic dispute resolution. Those who wish to be an effective advocate or arbitrator in this area of law must therefore learn: (1) what legal authorities exist in international arbitration; (2) how experienced advocates use those authorities; and (3) what weight experienced arbitrators give those authorities. These three topics form the basis of Chapter 2.
- 1.15** It is not just that the materials in international commercial arbitration are different than those used in other forms of dispute resolution; the materials are also difficult to find.⁷ Chapter 3 discusses: (1) where to locate the materials unique to international commercial arbitration as well as (2) how those materials are typically used in researching common areas of dispute, including: arbitration agreements; arbitral procedure; challenges to an arbitrator; and recognition, enforcement,

⁶ Four of the best are Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2008); Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999); Julian DM Lew et al, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003); and Alan Redfern and Martin Hunter et al, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004). For specialized commentary regarding arbitration at the International Chamber of Commerce, see Yves Derains and Eric A Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2005).

⁷ See eg, Dr Emmanuel Jolivet, 'Access to Information and Awards', 22 *Arbitration International* 265 (2006).

and challenge of an award. However, one does not necessarily use the same research materials to address each of these subjects. For example, research on enforcement of an award will focus on conventions, treaties, domestic legislation, and case law, since enforcement issues fall naturally within the exclusive province of the courts (though the researcher will have to deal with the question of which court). Using the same research techniques to investigate arbitral procedure would lead to disaster, since procedural issues are very much committed to the arbitrator's discretion. Thus, lawyers investigating procedural concerns would focus much more heavily on reported arbitral awards, arbitral rules, treatises, and other learned works. However, since procedural errors can result in enforcement problems,⁸ one would be well advised to consult—but not rely entirely upon—domestic law as well.

The issue of how to apply one's research continues in Chapter 4, which discusses the practical aspects of legal research. For example, an American advocate might be inclined to string together several citations to American cases in support of a particular legal proposition. Although this technique would be well received in a domestic litigation or arbitration, it would not be looked upon as favourably in an international arbitration. Similarly, an advocate trained in the civil law tradition might rely heavily on treatises and/or statutes to support his or her argument, even when a common law lawyer is acting adversely or as the arbitrator. Failing to give due weight to judicial decisions in those circumstances could lead to disaster. This chapter thus helps advocates and arbitrators realize how different legal materials can and should be used in an international arbitral proceeding. The chapter also covers issues such as how to adapt pleadings to take into account the legal traditions of one's arbitrators or adversaries; how to present one's research formally (including citation forms) and procedurally; and how to submit written testimony from expert witnesses. **1.16**

Chapter 5 consists of a bibliography supplemented by additional instruction on how to find and use each of the materials. The bibliography also recognizes the realities of the electronic age and includes references not only to possible print locations but also to electronic locations. **1.17**

With these guidelines in place, it is time to discuss the many possible sources of law in the field of international commercial arbitration. **1.18**

⁸ See eg, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art V, June 10, 1958, 330 UNTS 3 ('New York Convention').

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