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Gary B. Born is the world's leading authority on international commercial arbitration and international litigation. He is the author of numerous works on these subjects, including *International Commercial Arbitration* (3d ed. 2021), *International Arbitration: Law and Practice* (3d ed. 2021), *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (6th ed. 2021), *International Civil Litigation in United States Courts* (6th ed. 2018) and *International Commercial Arbitration: Commentary and Materials* (2d ed. 2001). Mr. Born has been practicing for over thirty years in the fields of international arbitration and litigation in Europe, the United States, Asia, Latin America, Africa, and elsewhere.

Clyde Raymond and Eleanor Juan Born

In Memory

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PREFACE

This Third Edition 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 inter-state (or state-to-state) disputes.

The materials in the Third Edition of this 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 for nothing else, because of its historic, contemporary and future practical importance, particularly in business affairs. For centuries, businesses, states and individuals have used arbitration as a preferred mechanism for resolving their international disputes, a preference that has become even more pronounced in the past several decades as international trade and investment have burgeoned. As both international commerce and governmental activities have expanded and become more complex, 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

1. The popularity of international commercial arbitration as a means of dispute resolution is discussed below. *See infra* pp. 38-44, 51-78, 113-32.

is worthy of attention because it operates within a framework of international legal rules and institutions that—with remarkable and enduring success—provide a fair, neutral, expert and efficient means of resolving difficult and contentious transnational problems. This 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 mechanisms that 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 relevant to 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 have been 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 the latter have supplied the driving and dominant force for the successful development and use of international commercial arbitration, governments and courts from leading trading nations have contributed materially, by ensuring the recognition and enforceability of private arbitration agreements and arbitral awards, and affirming principles of party autonomy and 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).[2] In recent decades, the resulting 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 is reflected in part in the increasing number of international (and domestic) arbitrations conducted each year, under both institutional auspices and otherwise;[3] the growing use of arbitration clauses in almost all forms of international contracts;[4] the preferences of business users for arbitration as a mode of dispute resolution;[5] the widespread adoption of pro-arbitration international arbitration conventions and national arbitration statutes;[6] the refinement of institutional arbitration rules to correct deficiencies in the arbitral process[7] and the use of arbitral procedures to resolve new categories of disputes which were not previously subject to arbitration (*e.g.*, investor-state, competition, securities, intellectual property, corruption, human rights and taxation disputes).[8]

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2. *See* Born, *The Right to Arbitrate: Historical and Contemporary Perspectives*, 17 Asian Disp. Rev. 56 (2015).
3. *See infra* pp. 129-32.
4. *See infra* pp. 113-18, 121-23, 132.
5. *See infra* pp. 121-23.
6. *See infra* pp. 38-44, 51-78.
7. *See infra* pp. 87-98.
8. *See infra* pp. 543-91.

The success of international arbitration is also reflected in a comparison between the treatment of complex commercial disputes in international arbitration and in national courts, where 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.[9]

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 typically offers a simpler, more effective and more competent means of dispute resolution, tailored to the needs of business users and modern 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 the study of international commercial arbitration. The remainder of the casebook is divided into three general Parts.

Part I of the casebook deals with international arbitration agreements, which are addressed in Chapters 2 to 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).

Part II deals with international arbitration proceedings, which are addressed in Chapters 7 to 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).

Part III deals with international arbitral awards, which are addressed in Chapters 14 to 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).

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9. 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*(6th ed. 2018); L. Collins & J. Harris (ed.), *Dicey Morris & Collins on The Conflict of Laws*(15th ed. 2017); R. Geimer, *Internationales Zivilprozessrecht* (7th ed. 2014).

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, Hong Kong 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 UNCITRAL Rules and most commonly-used institutional arbitration rules, particularly those of the International Chamber of Commerce ("ICC"), the Singapore International Arbitration Centre ("SIAC") the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), the London Court of International Arbitration ("LCIA") and the International Centre for Settlement of Investment Disputes ("ICSID"). 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 the treatments of international commercial arbitration in different national legal systems are not diverse, unrelated phenomena, but rather form a common corpus of international arbitration law which has global application and importance. From this perspective, the analysis and conclusions of a court in one jurisdiction (*e.g.*, 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, 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, nonarbitrability, the role of courts in supporting the arbitral process the principles of judicial non-interference in the arbitral process, the immunities of arbitrators and the recognition and enforcement of arbitral awards, decisions in individual national courts 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 looked to and relied upon one another's decisions, and commentary on international arbitration, formulating and progressively

refining legal frameworks of national law with the objective of ensuring the effective enforcement of international arbitration agreements and awards.

More fundamentally, national courts not only have but should consider one another's decisions in resolving issues concerning international arbitration. By considering the treatment of international arbitration in other jurisdictions, and the policies that inspire that treatment, national legislatures and courts can draw 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.

The three editions of this book would not have been possible without able assistance and comments from colleagues, friends and competitors from around the world. In particular, Katrin Frach and Elke Jenner's exceptional secretarial and organizational talents, as well as the able assistance of Marta Valtulini and Barbara Bozward, were invaluable. Very helpful research and other assistance was provided by Suzanne Spears, Kenneth Beale and Dr. Maxi Scherer. Numerous invaluable contributions to the Third Edition were made by Youjin Jo, Marc Lee, Nadja Al Kanawati, Matteo Angelini, Margaret T. Artz, Matteo Baratta, Othmane Benlafkih, Sabine Berendse, Daniela Carvalho Meira, Sally Charin, Russell Childree, Ognjen Cipovic, Nick Cleary, Daniel Costelloe, Elliott Couper, Jack Davies, Mohamed Gamal, Maria Camila Hoyos, Nahi El Hachem, Michael Howe, Shanelle Irani, Shanu Jain, Attila Jakoi, Ole Jensen, Cem Kalelioglu, Leila Kazimi, Marleen Krueger, Seung-Woon Lee, Alfie Lewis, Justin Li, Jonathan Lim, Cyprien Mathié, Danielle Morris, Ibukunoluwa Owa, Apoorva Patel, Soledad Peña Plaza, Sneha Pradeep, Dharshini Prasad, Vamika Puri, Clara Reichenbach, Joe Rich, Ella Rutter, Farshad Rahimi Dizgovin, Iurii Rybak, Marija Šćekić, Rina See, Andy Sellitto Ferrari, Olivier Stéphan, Jared Tan, Leticia Tomkowski, Valeriya Tsekhanska and Muhamed Tulić. 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, addressing 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@wilmerhale.com.

Gary B. Born
London, England

December 2021

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INTERNATIONAL ARBITRATION

Chapter 1

Introduction to International Arbitration

International arbitrations take place within a complex and vitally-important international legal framework. As summarized in this introductory chapter, contemporary international conventions, national arbitration legislation and institutional arbitration rules provide a specialized and highly-supportive enforcement regime for most contemporary international commercial arbitrations and international investment arbitrations. A significantly less detailed legal framework exists for inter-state arbitrations, although international law instruments provide a workable enforcement regime even in this context.

The international legal regimes for international commercial and investment arbitrations have been established, and progressively refined, with the express goal of facilitating international trade and investment by providing a stable, predictable and effective legal framework in which these commercial activities may be conducted: "international arbitration is the oil which lubricates the machinery of world trade."[1] More specifically:

> Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.[2]

1. Veeder, *The Lawyer's Duty to Arbitrate in Good Faith*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 115, 118 (2004). *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 2 (2d ed. 2013) ("an effective system of international dispute resolution is indispensable to the growth of more complex transnational arrangements, and — for the foreseeable future — that system of resolution is primarily international arbitration"); Myburgh & Paniagua, *Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 J. L. & Econ. 597 (2016); Paulsson, *International Arbitration Is Not Arbitration*, 2008:2 Stockholm Int'l Arb. Rev. 1.

2. *David L. Threlkeld & Co. v. Metallgesellschaft Ltd*, 923 F.2d 245, 248 (2d Cir. 1991). *See also Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] F.C.A.F.C. 192, ¶¶192-93 (Australian Fed. Ct.) ("The New York Convention and the Model Law deal with one of the most important aspects of international commerce — the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration

This chapter summarizes the principal components of the contemporary international legal framework for international commercial, investment and state-to-state arbitrations. First, the chapter provides an overview of leading international arbitration conventions, including particularly the New York Convention (with regard to international commercial arbitration) and the ICSID (Convention on the Settlement of Investment Disputes between States and Nationals of Other States) Convention (with regard to international investment arbitration). Second, the chapter briefly describes leading national arbitration statutes (including particularly the UNCITRAL United Nations Commission on International Trade Law Model Law). Third, the chapter summarizes the differences between *ad hoc* arbitration and institutional arbitration, particularly in the context of international commercial arbitration, including a summary of leading international arbitral institutions. Fourth, the chapter describes the principal elements that are typically found in contemporary international arbitration agreements. Fifth, the chapter summarizes the principal choice-of-law issues that arise in the international arbitration process (including the law governing the parties' underlying agreement, whether a contract or treaty, the law governing the arbitration agreement and the procedural law governing the arbitral proceedings). Finally, the chapter summarizes leading research tools and sources for international arbitration.

A. *HISTORICAL OVERVIEW OF INTERNATIONAL ARBITRATION*

A brief review of the history of arbitration in international matters provides an important introduction to contemporary international commercial arbitration. In particular, this review identifies some of the principal themes and objectives of international commercial arbitration and places modern developments in context. An historical review also underscores the extent to which state-to-state and international commercial arbitration developed in parallel, with similar objectives, institutions and procedures.

1. Historical Development of Arbitration Between States

The origins of international arbitration are sometimes traced, if uncertainly, to ancient mythology. Early instances of dispute resolution among the Greek gods, in matters at least arguably international by then-prevailing standards, involved disputes between Poseidon and Helios over the ownership of Corinth (which

as their agreed method of dispute resolution. . . . An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. . . . The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the Model Law.").

was reportedly split between them after an arbitration before Briareus, a giant),[3] Athena and Poseidon over possession of Aegina (which was awarded to them in common by Zeus),[4] and Hera and Poseidon over ownership of Argolis (which was awarded entirely to Hera by Inachus, a mythical king of Argos).[5] Egyptian mythology offers similar accounts of divine arbitrations, including a dispute between Seth and Osiris, resolved by Thot ("he who decides without being partial").[6]

a. Inter-State Arbitration in Antiquity

Deities aside, international arbitration was a favored means for peacefully settling disputes between states and state-like entities in Antiquity: "arbitration is the oldest method for the peaceful settlement of international disputes."[7] Historical scholarship provides no clear conclusions regarding the first recorded instance of international arbitration between states (or state-like entities). In the state-to-state context, some cite what contemporary reporters would denominate as the case of *Lagash v. Umma*, apparently settled in 2550 B.C. by King Mesilim of Kish,[8] or the 2100 B.C. case of *Ur v. Lagash*, in which the King of Uruk ordered one city to return territory seized by force from another.[9] Others look to two disputes decided in the 8th century B.C. by Eriphyle, a noblewoman, over Argos's plans to wage war on Thebes,[10] a 650 B.C. dispute between Andros and Chalcis over possession of a deserted city,[11] a controversy between Athens and Megara in 600 B.C. over the island of Salamis[12] or a 480 B.C. disagreement between Corinth and Corcyra over control of Leucas.[13]

In one authority's words, "arbitration was used throughout the Hellenic world for five hundred years."[14] This was the result of frequent inclusion of arbitration clauses in state-to-state treaties, providing for specified forms of arbitration to

3. J. Ralston, *International Arbitration from Athens to Locarno* 153 (1929).

4. C. Phillipson, II *The International Law and Custom of Ancient Greece and Rome* 129 (1911).

5. J. Ralston, *International Arbitration from Athens to Locarno* 153 (1929).

6. Mantica, *Arbitration in Ancient Egypt*, 12 Arb. J. 155 (1957).

7. A. Stuyt, *Survey of International Arbitrations 1794-1989* vii (3d ed. 1990).

8. L. Edmonson (ed.), *Domke on Commercial Arbitration* §2.1 (3d ed. 2010 & Update December 2020).

9. Lafont, *L'Arbitrage en Mésopotamie*, 2000 Rev. Arb. 557, 568-69.

10. D. Roebuck, *Ancient Greek Arbitration* 71 (2001). Eriphyle, the sister of the King of Argos, also appears to have been one of the first recorded instances of a corrupt arbitrator, accepting bribes of a magic necklace and a magic robe to decide, *inter alia*, against her husband.

11. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179 (1925-1926) (citing A. Raeder, *L'Arbitrage International chez les Hellènes* 16-17 (1912)).

12. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 Tex. Int'l L.J. 197, 203 n.30 (2004-2005).

13. Plutarch, *Themistocles* 24.1, cited in G. de Sainte Croix, *The Origins of the Peloponnesian War, Classical Philology* 379 (1976).

14. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 188 (1925-1926).

resolve future disputes that might arise under the treaty,[15] as well as submission agreements with regard to existing "inter-state" disputes.[16]

The procedures used in arbitrations between Greek city-states would not be unfamiliar to contemporary litigants. The parties were represented by agents, who acted as counsel (in a dispute between Athens and Megara, Solon represented the former),[17] the parties presented documentary evidence and witness testimony (or sworn witness statements), oral argument was presented through counsel, with time limits imposed on counsel's arguments and the arbitrators rendered written, signed and reasoned awards.[18]

One aspect of ancient state-to-state arbitration that would strike contemporary observers as unusual was the number of arbitrators: although most tribunals were apparently comprised of three members, there were instances where tribunals consisted of large numbers (variously, 600 Milesians, 334 Larissaeans and 204 Cnidians), which arguably reflect a quasi-legislative, rather than adjudicatory, function.[19] Other "arbitrations" appear to have been more in the nature of non-binding mediation, or political consultation, than true arbitration.[20]

Arbitration was also used to settle disputes between state-like entities during the Roman age. Although commentators observe that the use of arbitration declined from Hellenic practice,[21] it was by no means abandoned. Territorial subdivisions of the Roman Empire, as well as vassal states and allies, appealed to the Roman Senate, to Roman proconsuls or to other Roman institutions for "arbitral" decisions or the appointment of arbitrators to resolve territorial and other disputes.[22] In general, however, the historical record indicates that Rome preferred political or military solutions, within the Empire, to inter-state arbitration or adjudication.[23]

15. J. Ralston, *International Arbitration from Athens to Locarno* 156-58 (1929); M. Tod, *International Arbitration Amongst the Greeks* 65-69 (1913).

16. S. Ager, *Interstate Arbitrations in the Greek World, 337-90 B.C.* 8-9 (1997); Westermann, *Interstate Arbitration in Antiquity*, II Classical J. 197, 199-200 (1906-1907).

17. M. Bohacek, *Arbitration and State-Organized Tribunals in the Ancient Procedure of the Greeks and Romans* 197-204 (1952); J. Ralston, *International Arbitration from Athens to Locarno* 161-62 (1929); D. Roebuck, *Ancient Greek Arbitration* 46-47 (2001).

18. S. Ager, *Interstate Arbitrations in the Greek World, 337-90 B.C.* 15 (1997); J. Ralston, *International Arbitration from Athens to Locarno* 162-64 (1929).

19. J. Ralston, *International Arbitration from Athens to Locarno* 159 (1929).

20. S. Ager, *Interstate Arbitrations in the Greek World, 337-90 B.C.* 264-66 (1997) (describing Rome's increasingly frequent role as "mediator and arbitrator" in disputes between Sparta and the Achaean League), 281 (describing "interven[tion]" and "mediation" by Megara in a dispute between Achaia and Boeotia).

21. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 190 (1925-1926) ("The republic lost what Greece had gained, and the empire lost the little the republic had won.").

22. J. Ralston, *International Arbitration from Athens to (1997) Locarno* 171-72 (1929).

23. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 190 (1925-1926).

b. Inter-State Arbitration in the European Middle Ages

After an apparent decline in usage under late Roman practice, international arbitration between state-like entities in Europe experienced a revival during the Middle Ages. Although historical records are sketchy, scholars conclude that international arbitration "existed on a widespread scale" during the Middle Ages, that "the constant disputes that arose in those warlike days were very frequently terminated by some kind of arbitration," and that "it is surprising to learn of the great number of arbitral decisions, of their importance and of the prevalence of the '*clause compromissoire.*' "[24] The states of the Swiss Confederation[25] and the Hanseatic League,[26] as well as Italian principalities,[27] turned with particular frequency to arbitration to settle their differences, often pursuant to agreements to resolve all future disputes by arbitration.[28]

Determining the precise scope and extent of international arbitration between states or state-like entities during the Medieval era is difficult, in part because a distinction was not always drawn between judges, arbitrators, mediators and *amiables compositeurs.*[29] Indeed, one of the most famous "arbitrations" of the age — Pope Alexander VI's division of the discoveries of the New World between Spain and Portugal — appears not to have been an arbitration at all, but rather a negotiation or mediation.[30] On the other hand, numerous treaties throughout this period drew quite clear distinctions between arbitration (in the sense of an adjudicative, binding process) and conciliation or mediation (in the sense of a non-binding procedure).[31]

As with arbitration in Antiquity, the procedures used during arbitral proceedings in Medieval times bore important resemblances to those used today. Both parties presented arguments through counsel, evidence and testimony were received

24. *Id.* at 190-91. *See* J. Ralston, *International Arbitration from Athens to Locarno* 177-78 (1929) (citing 1235 treaty of alliance between Genoa and Venice providing for arbitration of future disputes; 1343 "arbitral convention" between Denmark and Sweden promising to arbitrate any serious future disputes; and 1516 treaty of "perpetual peace" between France and England).

25. J. Verzijl, VIII *International Law in Historical Perspective* 189-90 (1974) (citing historical authorities).

26. J. Ralston, *International Arbitration from Athens to Locarno* 176-77 (1929).

27. J. Verzijl, VIII *International Law in Historical Perspective* 189-90 (1974).

28. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 192 (1925-1926); J. Ralston, *International Arbitration from Athens to Locarno* 176-77 (1929).

29. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 195 (1925-1926); J. Ralston, *International Arbitration from Athens to Locarno* 179 (1929) ("By a quite universal practice it would appear that before proceeding to adjudge, the arbitrator acted in the capacity of what subsequently became known as *amiable compositeur* — in other words he sought to find a basis for the composition of difficulties before considering them from the standpoint of law.").

30. E. Bourne, *The Demarcation Line of Pope Alexander VI*, in *Essays in Historical Criticism* Chap. VII (1901).

31. See examples cited in J. Ralston, *International Arbitration from Athens to Locarno* 180 (1929).

by the tribunal, the arbitrators deliberated and a written award was made.[32] There is also evidence that written briefs were a standard element of inter-state arbitral procedures.[33] Parties appear to have placed importance on the prompt resolution of their disputes, including by imposing time limits in their agreements on the arbitrators' mandates.[34] And, if a losing party flouted an arbitral tribunal's decision, the arbitrator or another authority was sometimes empowered to impose sanctions to enforce compliance.[35]

During the 16th, 17th and 18th centuries, the popularity of international arbitration as a means of resolving state-to-state disputes apparently declined significantly. Although by no means entirely abandoned, the rising tide of nationalism apparently chilled historic reliance on state-to-state arbitration: "nor is arbitration the immediate jewel of Tudor souls."[36] It was only at the end of the 18th century, with Jay's Treaty between the newly-founded United States and Great Britain (discussed below),[37] that international arbitration in the state-to-state context saw a new resurgence.

c. Inter-State Arbitration in the 18th and 19th Centuries

Great Britain's North American colonies appear to have embraced inter-state arbitration from at least the moment of their independence. The 1781 Articles of Confederation provided a mechanism for resolving inter-state disputes between different American states, through what can only be categorized as arbitral procedures.[38]

More significantly, "[t]he modern era of arbitral or judicial settlement of international disputes, by common accord among all writers upon the subject, dates from the signing on November 19, 1794 of the Jay's Treaty between Great Britain and the United States."[39] Among other things, in a determined effort to restore amicable relations between the United States and Great Britain, Jay's Treaty

32. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 196 (1925-1926); J. Ralston, *International Arbitration from Athens to Locarno* 185-86 (1929) (describing four-member legal teams of Kings of Castile and Navarre in 1176).

33. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 197-98 (1925-1926) (case study of arbitration by Henry II of England between Castile and Navarre); Roebuck, *L'Arbitrage en Droit Anglais Avant 1558*, 2002 Rev. Arb. 535, 538.

34. J. Ralston, *International Arbitration from Athens to Locarno* 186 (1929) (citing 1405 treaty requiring award to be rendered within six weeks and three days).

35. *Id.* at 187-88 (discussing penalty bonds, undertakings and possibility that violators of arbitral awards might be excommunicated by Pope).

36. Fraser, *A Sketch of the History of International Arbitration*, 11 Cornell L.Q. 179, 198 (1925-1926).

37. *See infra* pp. 6-7.

38. J. Ralston, *International Arbitration from Athens to Locarno* 190 (1929). The Articles of Confederation provided for states with inter-state disagreements to jointly appoint five "commissioners or judges" to resolve their disputes; failing agreement, a complex list system was prescribed, in which each party was entitled to strike names of unsuitable candidates. Articles of Confederation, Art. IX (1781).

39. J. Ralston, *International Arbitration from Athens to Locarno* 191 (1929).

provided for the establishment of three different arbitral mechanisms, dealing with boundary disputes, claims by British merchants against U.S. nationals and claims by U.S. citizens against Great Britain.[40] This was a remarkable step, between recent combatants, which ushered in a new age of inter-state arbitration.

The United States continued its tradition of arbitrating international disputes throughout the 19th century. It included an arbitration clause (albeit an optional one) in the 1848 Treaty of Guadalupe Hidalgo, which provided for resolution of future disputes between the United States and Mexico "by the arbitration of commissioners appointed on each side, or by that of a friendly nation."[41] The United States did the same in the 1871 Treaty of Washington with Great Britain, excerpted in the Documentary Supplement at pp. 69-76, providing the basis for resolving a series of disputes provoked by the Civil War; the Treaty provided for arbitration of the disputes before a five-person tribunal, with one arbitrator nominated by each of the United States and Great Britain, and three arbitrators nominated by neutral states.[42] One product of the Treaty of Washington was the so-called "Alabama Arbitration," in which Great Britain was ordered to pay $15.5 million in gold (equivalent to roughly Great Britain's annual government budget) for having permitted the outfitting of Confederate privateers that caused substantial damage to Union shipping.[43] The United States and Great Britain also repeatedly resorted to arbitration to settle various boundary and other disputes during the 19th and early 20th centuries.[44]

Agreements to arbitrate in the Americas were not confined to matters involving the United States. On the contrary, between 1800 and 1910, some 185 separate treaties among various Latin American states included arbitration clauses, dealing with everything from pecuniary claims, to boundaries, to general relations.[45] For example, an 1822 agreement between Colombia and Peru, which was intended to "draw more closely the bonds which should in future unite the two states," provides that "a general assembly of the American states shall be convened . . . as an umpire and conciliator in their disputes and differences."[46] Moreover, many Latin American states engaged in inter-state arbitrations arising from contentious boundary disputes inherited from colonial periods, which the disputing parties submitted to a foreign sovereign or commission for resolution.[47] Arbitration of such matters was not always successful, especially when the disputed territory was rich in natural

40. Jay's Treaty, Arts. V-VII (1794).

41. Treaty of Guadalupe Hidalgo, Art. XXI (1848). The United States and Mexico entered into a number of other treaty arrangements during the 19th century, to resolve various categories of disputes. J. Ralston, *International Arbitration from Athens to Locarno* 203-07 (1929).

42. Treaty of Washington, Art. 1 (1871).

43. *See infra* pp. 118-119; Bingham, *The* Alabama Claims *Arbitration*, 54 Int'l & Comp. L.Q. 1 (2005); F. Hackett, *Reminiscences of the Geneva Tribunal of Arbitration* (1911).

44. J. Ralston, *International Arbitration from Athens to Locarno* 194-95 (1929).

45. *See* W. Manning, *Arbitration Treaties Among the American Nations* (1978).

46. *Id.* at 1 n.1.

47. Woolsey, *Boundary Disputes in Latin-America*, 25 Am. J. Int'l L. 324, 325 nn.1, 2 (1931) (Argentine and Paraguayan territory dispute settled by 1878 arbitral award issued by U.S. President Hayes; Costa Rican and Nicaraguan territory dispute settled by 1888 arbitral award