

THIRD EDITION



Drafting and Negotiating International Commercial Contracts

A practical guide, with ICC model contracts

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FOREWORD

It was already my privilege to write the foreword of the second edition of Fabio Bortolotti's now traditional book on Drafting and Negotiating International Contracts. Doing it, I understand why Heraclites was pointing out that "*There is nothing permanent except change.*" This book remains the same as the one published in 2013 and, paradoxically, any owner of the later needs it. Indeed, although the fundamentals of drafting and negotiating of international contracts are permanent, their legal environment has evolved since the second edition. This is the case of the ICC Model Forms of contracts which, as in the previous editions, are presented in the longer chapter of the book. In this regard, the author's comments on the 2017 ICC Model Commercial Agency Contract (short form) and on the 2016 ICC Model Distributorship Contract (long form) are, among many others, of particular interest. The brand new model Consortium Agreement, of 2016, draws as well the attention. With his huge experience of advising clients and teaching students, Fabio Bortolotti walks the readers through the various ICC Model Forms of contract, in a way that helps businessmen and lawyers with little experience of international legal problems to draft safe contracts.

However, if this book would just do that, it would be like teaching sailing without providing information as to the currents of the sea and the strengths of the wind. As in the previous editions of his book, the author explains the framework within which the contracts are concluded, performed and eventually come to an end. This framework is not static which makes the acquisition of this new edition indispensable.

A well-deserved importance is given to the problems relating to the law applicable to the contract and to the resolution of conflicts. The author rightly stresses the danger of not indicating in the contract which law applies to it and recalls that according to the statistics of the years 2011-2015 published by ICC, a choice of law clause had been agreed by the parties in the great majority of cases. Yet, he explains that the choice of a national law is not necessarily the better choice and that a reference to a-national rules may be more appropriate in a significant number of situations. The UNIDROIT Principles have an increasing role in this respect and are giving a new youth to the recourse to the *lex mercatoria*. The publication by UNIDROIT in 2013 of model clauses for the use of the Principles in international commercial contracts will contribute to it.

New developments on the limits of the parties' autonomy when choosing the applicable are very welcomed. I am not thinking so much of the issue of the intervention of overarching mandatory provisions of laws different from the law applicable to the contract as such, which is a classical one, although not sufficiently addressed by the parties when drafting and performing their contracts. The information provided in this book on the determination of the rules which may be considered as international mandatory rules, in the light of the assessment of the European Court of Justice are particularly valuable.

Concerning the resolutions of conflict, the reader will find indications on the new arbitration institutions which have appeared recently and on their model clauses, as well as a precise analysis of the innovations introduced in the 2017 version of the ICC Rules of Arbitration. The expedited procedure now applicable where the amount in dispute does not exceed US\$ 2 million may change the face of international arbitration in a near future as it is an excellent answer to the criticisms to the length of arbitration proceedings. I would not be surprised if the limit of US\$ 2 million would be increased soon and, why not, if after some years the expedited procedure would become the rule and the present procedure the exception.

The examples of the precious information provided to businessmen and practising lawyers by this 3rd edition could cover pages and pages: the main feature of the ICC

Mediation Rules, new case law on the written requirement of the arbitration clause, the effectiveness of choice of forum clauses, Internet operations such as Internet Sales, etc... I must stop the enumeration and let the reader discover all the benefits you will draw from this book in a day to day practise.

None of those who know Fabio Bortolotti will be surprised by the qualities of this book. For years, businessmen and lawyers have been guided by his deep knowledge of the practice of international contracts. As Chair of the ICC Commission on Commercial Law and Practice and an active member of the Council of the ICC Institute of World Business Law, his talent benefits the worldwide business community. This book is a further expression of such talent.

Yves Derains
Chair, ICC Institute of World Business Law