INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

YEARBOOK
COMMERCIAL ARBITRATION
VOLUME XXXVII – 2012

GENERAL EDITOR
ALBERT JAN VAN DEN BERG

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague
Prof. Dr. Pieter Sanders

1912 – 2012

On 27 September 2012, days after his 100th birthday, Prof. Dr. Pieter Sanders, Honorary President of ICCA, passed away. His contribution to the development of international commercial arbitration, and to ICCA in particular, can only be called unique.

Professor Sanders played a key role as a principal drafter of the 1958 New York Convention, and contributed greatly to the development of other harmonizing instruments. He was a special consultant to the United Nations Commission on International Trade Law for the preparation of the UNCITRAL Arbitration Rules 1976, and participated in the drafting of the 1961 European Convention on International Commercial Arbitration.

The negotiations for the Convention inspired him and a few others to establish a forum where arbitration practitioners from all over the world could meet and exchange ideas, unfettered by the bureaucracy of States and their tense relations in the midst of the Cold War: the International Council for Commercial Arbitration, ICCA, thus emerged.

In 1976, feeling the need to monitor the application of the New York Convention in the Contracting States, he led ICCA to publishing the Yearbook Commercial Arbitration. The ICCA Congress Series followed in 1982 and the International Handbook of Commercial Arbitration in 1984. Of all these publications he was the first General Editor.

Professor Sanders was also an active member of the ICCA Council (the new Governing Board), including serving two terms as President between 1978 and 1986. Through his 100th year, he continued to advise ICCA Council members on ICCA policy and to provide inspiration for ICCA’s young practitioners’ group, Young ICCA, founded in 2010.

Pieter Sanders also played an essential role in Dutch arbitration. He wrote an outstanding doctoral thesis on the setting aside of arbitral awards; co-founded the Netherlands Arbitration Institute (NAI) in 1949 and chaired it for many years; was a member of the ICC Arbitration Commission since 1949; drafted the 1986 Dutch Arbitration Act; edited the Tijdschrift voor...
Arbitrage (TvA – Journal for Arbitration) and, before it, Arbitrale Rechtspraak (Arbitration Case Reports); authored the treatise *Het nieuwe arbitragerecht* (The New Arbitration Law) and many other publications in the field of arbitration. In 1959, he became a professor at the Dutch Economic Polytechnic School, the predecessor of the Erasmus University Rotterdam, and in 1962 he was the motor behind the creation of the Erasmus School of Law.

Pieter Sanders’ impact on the legal world was not limited to arbitration. Among other things, he developed the concept of the European Company for the European Commission in Brussels and the Code of Conduct for Transnational Corporations for the United Nations.

The life of this prominent lawyer was no less impressive outside the world of arbitration. As a young lawyer with a degree from Leiden University he was interned in a hostage camp in the Netherlands during the war. When the war ended, he was called to serve the first free Dutch Government as Secretary-General of War. In that capacity he assisted the Dutch government in its negotiations with Mr. Sukarno over the independence of Indonesia, then a Dutch colony. He resigned when it became clear that a peaceful solution was impossible, and went back to his hometown Schiedam, near Rotterdam, to resume his arbitration practice.

The son of a famed architect, Pieter Sanders was an art lover and collector. The house he shared for over fifty years with his wife Ida, who died in 2010, was filled with exceptional modern, contemporary and ethnic art. His enormous gift for recognizing talent helped him discover artists, such as Henry Moore and Karel Appel, early in their career. Appel was a close friend. Their friendship dated back to the time (around 1950) that the artist, then still unknown, stole some paint. Pieter Sanders stepped in as his lawyer and advised him never to do that again, then paid for his paint. Karel Appel was grateful for this for the rest of his life, as evidenced by his many paintings in Pieter Sanders’ collection.

Professor Sanders was very generous with the materials that he had collected, both books and art. In 1978, he donated his extensive arbitration library to the T.M.C. Asser Institute in The Hague, and again in 2011 to the Peace Palace library. He and Ida donated almost their entire art collection to several Dutch museums.

Professor Pieter Sanders will be greatly missed, as a giant of arbitration, as a model of elegance, manners and good humor, and as a mentor and friend to those who had the fortune of working with him.
Pieter Sanders 1912-2012

Founder and editor of the Yearbook Commercial Arbitration, the ICCA Congress Series and the International Handbook on Commercial Arbitration

As the founder and inaugural editor of the ICCA Publications, Pieter Sanders was crucial for Kluwer Law International’s arbitration content. We remember him as an inspiring person with many passions in life.

Wolters Kluwer
Law & Business
INTRODUCTION

Volume XXXVII (2012) of the Yearbook again presents readers with a selection of arbitral awards and court decisions made accessible by translations, indices and categorized lists. Since Volume XXXV (2010), the Yearbook's selection of arbitral awards and court decisions is available in a combination of print edition and online publishing. Arbitral awards continue to be published in print in their entirety, as are Parts of the Yearbook providing various information. Court decisions are presented at two levels of consultation: a Summary of each decision, prefaced by a short recap, is published in print; a detailed Excerpt of the decision is available online at <www.kluwerarbitration.com>. A code provided with the Yearbook allows readers to access the relevant Volume online, as well as the preceding Volume. Readers who have purchased Volume XXXVII (2012) can therefore access materials from both this Volume and Volume XXXVI (2011).

Information on how to access the online materials is provided in a Note to the Reader at the beginning of this Volume (p. xv).

All volumes of the Yearbook, along with ICCA's International Handbook on Commercial Arbitration and selected volumes of ICCA's Congress Series, are also made available by general subscription on the online service <www.kluwerarbitration.com>.

The International Handbook on Commercial Arbitration functions alongside the Yearbook in providing up-to-date information on arbitration law and practice in more than seventy countries. The Handbook contains National Reports together with the relevant legal texts. Its Table of Contents is reproduced in Part I of the Yearbook.

In Part II of the Yearbook, new or amended rules of arbitral institutions are announced, with a reference to the websites where the rules can be obtained. This year, information is provided on Brazil, PR China, Cyprus, Germany, Korea, Malaysia, the Netherlands, Rwanda, Switzerland, the United Kingdom and the International Centre for Settlement of Investment Disputes (ICSID).

Part III announces newly enacted arbitration legislation and informs readers of other developments relevant to the practice of arbitration. In this volume, information is provided on Colombia, Finland, Hungary, India, Lithuania, Montenegro, Portugal, Singapore, South Sudan, Tajikistan, Turkey and Venezuela.

Part IV, Arbitral Awards, contains a selection of awards made under the auspices of the International Chamber of Commerce (ICC). Topics discussed in the awards include the interpretation of ambiguous arbitration clauses, the requirement that an arbitration clause be "in writing", the applicable law to the
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Substantive validity of the arbitration clause, rate of interest and compound interest, the costs of arbitration and legal costs, and the standing of a liquidator to commence arbitration.

Part V of the Yearbook reports on court decisions on arbitration. Part V – A, reporting on the 1958 New York Convention, traditionally constitutes the bulk of the Yearbook. This Volume contains 82 cases from 22 countries, including, for the first time, cases from Bosnia and Herzegovina, Guatemala and Uruguay. The selection this year includes an update on Brazilian jurisprudence on the New York Convention, with twelve reported cases, six decisions from the courts of Germany and five from the Netherlands. Decisions from Australia, Germany, Greece, Guatemala, India, the Russian Federation, and Spain reflect the parallel application of the UNCITRAL Model Law as adopted in these jurisdictions together with the Convention. In some decisions, the relationship between the 1958 New York Convention, the 1965 Washington (ICSID) Convention and the 1975 Panama Convention is mentioned. The reporting in Part V – A includes cases from Bosnia and Herzegovina, Brazil, Colombia, France, Germany, Greece, Guatemala, Israel, Italy, Korea, Netherlands, the Russian Federation, Spain, Switzerland, the United Arab Emirates and Uruguay, all translated from their original language into English.

The selection this year includes the decision of the Supreme Court of India in Bharte, in which the Court effectively set aside earlier holdings and held that Indian courts may annul only awards rendered in arbitrations taking place in India and may not annul awards rendered in international commercial arbitrations held outside India under Indian substantive law. Recurring issues in the 1958 New York Convention decisions further include the applicable law to the existence and validity of the arbitration agreement; the enforcement of an award set aside in the country of rendition; alleged violations of due process, in particular the lack of a proper notice; the requirement that the arbitration agreement and the award be translated; and whether the failure to supply the necessary documents for requesting enforcement of an award may be cured at the later stage in the enforcement proceedings.

Decisions rendered by courts in the United States dealt in several cases, inter alia, with the issue whether the public policy defense under the New York Convention can be raised at the stage in which enforcement of the arbitration agreement is sought. The Eleventh Circuit in Lindo answered this question in the negative.

No new decisions are reported this year in Part V – B, reporting on the 1961 European Convention.
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Part V – C, reporting on the 1965 Washington (ICSID) Convention, contains a United States decision discussing subject-matter and personal jurisdiction and proper venue in respect of the enforcement of an ICSID award. One decision from the United States is also reported in Part V – D on the 1975 Panama Convention.

Up-to-date lists of Contracting States and Signatories to the respective Convention are also provided. In addition, Part V – A also contains an Index of Cases reported in this Volume.

Part V – E, Other Court Decisions on Arbitration, contains a selection of decisions on topics that are relevant to the practice of (international) arbitration. This year, the reporting includes a decision of the Swiss Federal Supreme Court annulling an award of the Court of Arbitration for Sport on public policy grounds, and two decisions from the United Kingdom: the Privy Council in La Générale des Carrières et des Mines (Gécamines) gave an overview of the doctrine of sovereign immunity and the position of state-owned corporations and concluded that Gécamines, an entity owned by the Democratic Republic of the Congo, could not be equated with the State and was not liable for the State’s debts consisting of two ICC awards. The Court of Appeal in Sulamerica dealt in detail with the issue of the law applicable to arbitration agreements and concluded that in the case at issue, failing either an express or implied choice, the law of the seat – English law – applied as having the closest and most real connection with the arbitration agreement.

A complete list of all court decisions and awards published in the Yearbook since 1976 and a Consolidated Index of Cases are available online on the ICCA website <www.arbitration-icca.org> under the Publications button.

The Yearbook concludes with the Bibliography, which this year includes works on investment arbitration, arbitration under the Energy Charter Treaty, detailed examinations of the rules of several arbitral institutions, overviews of the arbitration law and practice in Asia, PR China and Korea, and a discussion of recent developments in the case law of the United States Supreme Court on arbitration.

The Yearbook’s effort to reflect as many aspects as possible of the evolving world of arbitration was supported as always by its numerous correspondents, whose assistance is gratefully acknowledged. They are individually thanked in the Introductions to the various Parts and in footnotes where appropriate.

Many thanks go to the ICCA Editorial Staff, D.ssa Silvia Borelli, managing editor, and Ms. Alice Siegel, assistant managing editor, who collected, selected, translated, excerpted and edited the materials for this volume with the able assistance of Ms. Helen Pin, and Ms. Lise Bosman, executive director of ICCA.
INTRODUCTION

and Ms. Yanying Li, assistant legal counsel of the Permanent Court of Arbitration, who both assisted in preparing this year’s Bibliography.

On behalf of ICCA, I also wish to thank the Permanent Court of Arbitration and its current Secretary-General, Hugo Hans Siblesz, as well as its former Secretary-General, Mr. Christa de Roovere who was replaced in June 2012. For fifteen years, the PCA has hosted the ICCA Editorial Staff at the headquarters of its International Bureau at the Peace Palace. The administrative and technical support of the entire PCA staff is greatly appreciated.

In all of its publications, ICCA is advised by ICCA’s Editorial Board. The Editorial Board is presently composed of Professor Jan Paulsson, President of ICCA and General Editor, International Handbook on Commercial Arbitration; Mr. Kap-You (Kevin) Kim, Secretary-General of ICCA; Professor Martin Hunter and the undersigned as General Editor of ICCA publications.

Since the inception of the Yearbook, readers throughout the world have been a major source of material. Therefore, may I continue to call on you, as reader and Yearbook user, to submit texts concerning:

- recent changes in arbitration legislation;
- newly enacted arbitration rules;
- arbitral awards (the confidentiality of which is ensured);
- court decisions of general interest and, in particular, court decisions applying the New York Convention, the European Convention, the Washington Convention and the Panama Convention.

Brussels
November 2012

Albert Jan van den Berg
General Editor

Materials for the Yearbook are to be addressed to the General Editor or to the ICCA Editorial Staff at their respective addresses as indicated below.

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ONLINE RESOURCES

The ICCA website contains constantly updated information and useful tools to make consultation of ICCA publications easier and more user-friendly.

The ICCA website contains:
- a presentation on ICCA and the current list of its officers and members
- information on general membership of ICCA
- the announcement of upcoming events, such as the forthcoming ICCA Congresses in Miami in 2014 and Mauritius in 2016
- a selection of recent articles by ICCA members
- a "latest news" section
- information and reports on ICCA’s training workshops for national court judges, known as the New York Convention Roadshow

Under the “Publications” button, the reader will find:
- the tables of contents of all volumes of the Yearbook and of the ICCA Congress Series, as well as the current table of contents of the International Handbook on Commercial Arbitration
- a list of all court decisions and awards published in the Yearbook since 1976
- a Consolidated Index of Cases, which facilitates research of decisions applying the 1958 New York Convention by subject matter and Article of the Convention

Also included on the website are:
- historic materials from the archives of ICCA and its members
- resources for young arbitration practitioners and a link to Young ICCA
- full film footage of the presentations given at the XXI ICCA Congress in Singapore in June 2012

The ICCA website can be found at <www.arbitration-icca.org>.

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KluwerArbitration database

Materials published in the Yearbook Commercial Arbitration, the International Handbook on Commercial Arbitration and selected volumes of ICCA’s Congress Series are also available by subscription in the KluwerArbitration database at <www.kluwerarbitration.com>. All materials in this database are fully searchable through a variety of search tools.
NOTE
TO THE READER

This Yearbook Commercial Arbitration Volume XXXVII (2012) includes online access to the complete contents of the 2011 and 2012 Yearbooks at <www.kluwer arbitration.com>.

To activate your access, visit:

<www.kluwerlaw.com/forms/online+access+books>

Fill in your contact details and use the unique access code provided on the cover of this Yearbook.

Online subscriptions last one year and need to be activated by 31 December 2013; your activation date is the start date.

This is a single-user subscription for personal use only.

Customer support can be contacted at <sales@kluwer law.com> should there be any difficulty in activating the access.
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