### ICCA CONGRESS SERIES NO. 7

## XIIth INTERNATIONAL ARBITRATION CONGRESS VIENNA, 3-6 November 1994

KLUWER LAW INTERNATIONAL The Hague/London/Boston

# INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

### PLANNING EFFICIENT ARBITRATION PROCEEDINGS

## THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION

GENERAL EDITOR: ALBERT JAN VAN DEN BERG

with the cooperation of the T.M.C. Asser Instituut Institute for Private and Public International Law, International Commercial Arbitration and European Law

#### Library of Congress Cataloguing-in-Publication Data

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Published by Kluwer Law International P.O. Box 85889 2508 CN The Hague, The Netherlands

Sold and distributed in the USA and Canada by Kluwer Law International 675 Massachusetts Avenue Cambridge, MA 02139, USA

Sold and distributed in all other countries by Kluwer Law International P.O. Box 85889 2508 CN The Hague, The Netherlands

Printed on acid- free paper

ISBN 9041102248

© 1996, Kluwer Law International Revised reprint 1999

Kluwer Law International incorporates the publishing programmes of Graham & Trotman Ltd, Kluwer Law and Taxation Publishers and Martinus Nijhoff Publishers.

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Printed and bound in Great Britain by CPI Antony Rowe, Eastbourne

### TABLE OF CONTENTS

PREFACE Prof. Albert Jan van den Berg, General Editor	v
WELCOMING ADDRESS  Dr. Nikolaus Michalek, Austrian Federal Minister of Justice	1
OPENING ADDRESSES Prof. Giorgio Bernini, President of ICCA DDr. Werner Melis, Chairman, International Arbitral Centre of the Austrian Federal Economic Chamber	4
WORKING GROUP I PLANNING EFFICIENT ARBITRATION PROCEEDINGS Judge Howard M. Holtzmann, Editor of the Proceedings of Working Group I	
FOREWORD Judge Howard M. Holtzmann and Prof. Iván Szász	12
SUMMARY Judge Howard M. Holtzmann	16
REPORTS	
Power of Arbitrators to Determine Procedures under Various Arbitration Laws and Rules	
Prof. Pierre Mayer  Comparative Analysis of Power of Arbitrators to Determine  Procedures in Civil and Common Law Systems	24
Dr. Gerold Herrmann Power of Arbitrators to Determine Procedures under the UNCITRAL Model Law	39
Mr. Antonio A. de Fina  Comparative Analysis of Power of Arbitrators to Determine  Procedures under Various Arbitration Rules	56

#### TABLE OF CONTENTS

Possible Methods of Increasing Efficiency

Mr. Arthur L. Marriott	
Pros and Cons of More Detailed Arbitration Laws and Rules	65
Dr. Pierre A. Karrer	
Pros and Cons of Terms of Reference and Specific Procedural	
Agreements in Arbitration Clauses: Storm in to Calm the Sea	73
Dr. J. Gillis Wetter	
Procedures for Avoiding Unexpected Legal Issues	87
Dr. Jernej Sekolec	
UNCITRAL Project for Improving Methods of Planning Arbitral	
Proceedings	100
Improving the Presentation of Evidence	
. ,	
Dr. Jan Paulsson	
Overview of Methods of Presenting Evidence in Different	
Legal Systems	112
Mr. Robert B. von Mehren	
Burden of Proof in International Arbitration	123
Prof. Andrew Rogers	
Improving Procedures for Discovery and Documentary Evidence	131
Dr. Gino Lörcher	
Improving Procedures for Oral and Written Witness Testimony	145
Mr. André J. Faurès	
Improving Procedures for Expert Testimony	154
Prof. Hans Smit	
Roles of the Arbitral Tribunal in Civil Law and Common Law	171
Systems with Respect to Presentation of Evidence	161
Discussion of the UNCITRAL Project for Improving Planning of	
Arbitral Proceedings	
Judge Howard M. Holtzmann	
Questions Concerning the Desirability and Text of the UNCITRAL	
Project to Improve Planning of Arbitral Proceedings	173
110,000 to amplote 1 mining of 1110tour 110000mings	2, 3
LIST OF ORAL INTERVENTIONS TO WORKING GROUP I	195

TABLE OF CONTENTS	ix
Panel Discussion: Practical Experience and Solutions in Planning Arbitral Proceedings	
Dr. Kurt Heller	
International Arbitral Centre of the Austrian Federal	
Economic Chamber	197
Mr. Eric A. Schwartz	
International Court of Arbitration of the International	201
Chamber of Commerce	206
The Rt. Hon. Sir Michael Kerr London Court of International Arbitration	213
Dr. Aron Broches	213
International Centre for Settlement of Investment Disputes	221
Mr. Robert Coulson	221
American Arbitration Association	223
Dr. Eva Horváth	
Various Central and Eastern European Centres	227
Prof. Nabil N. Antaki	
Other Arbitration Centres: Québec National and International	
Commercial Arbitration Centre	233
Judge Bjørn Haug	
Non-administered Arbitration	247
WORKING GROUP II	
THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION	
INTRODUCTION	
Prof. Dr. Karl-Heinz Böckstiegel, Chairman of Working	
Group II, Session I	251
REPORTS	
The Law Applicable in International Arbitration: Preliminary Issues	
Prof. Konstantin Razumov	
The Law Governing the Capacity to Arbitrate	260
· · · ·	

Mr. V.V. Veeder	
Towards a Possible Solution: Limitation, Interest and Assignment	
in London and Paris	268
Mr. Ibrahim F.I. Shihata and Mr. Antonio R. Parra	
Applicable Substantive Law in Disputes between States and	
Private Foreign Parties: The Case of Arbitration under	
the ICSID Convention	294
The Law Governing the Procedure	
Mr. Martin Hunter, Chairman of Working Group II,	
Session II	220
Introduction: the Law Governing the Procedure	320
Mr. Dominique T. Hascher	
The Law Governing the Procedure: Express or Implied Choice	200
by the Parties - Contractual Practice	322
Mr. Michael F. Hoellering	227
International Arbitration under U.S. Law and AAA Rules	337
DDr. Werner Melis	255
Mandatory National Procedural Law and Auxiliary Powers of Courts	355
Dr. Robert Briner	
Special Considerations Which May Affect the Procedure (Interim	
Measures, Amiable Composition, Adaptation of Contracts,	2/2
Agreed Settlements)	362
Dr. Allan Philip  Procedural Decisions by the Arbitral Tribunal	274
Procedural Decisions by the Arbitral Tribunal	374
Methods Used to Determine the Applicable Substantive Law in	
the Practice of Arbitration	
Dr. Wolfgang Kühn	
Express and Implied Choice of the Substantive Law in	
the Practice of International Arbitration	380
Dr. Marc Blessing	
Regulations in Arbitration Rules on Choice of Law	391
Dr. Julian D.M. Lew	
Relevance of Conflict of Law Rules in the Practice	
of Arbitration	447

TABLE OF CONTENTS	xi
Prof. Andrea Giardina	
International Conventions on Conflict of Laws and Substantive Law	459
Mr. Gerald Aksen The Law Applicable in International Arbitration – Relevance of Reference to Trade Usages	471
Special Features of the Application of Particular Laws Relevant for the Practice of Arbitration	
Mr. Fali S. Nariman	
Special Features of the Application of Particular Laws Relevant for the Practice of Arbitration - Common Law	480
Yves Derains Some Special Features of the Law of Civil Law	
States Relevant for the Practice of Arbitration	494
Prof. Ahmed El-Kosheri Islamic Law	506
Prof. Delia Revoredo de Mur	300
Law Applicable to International Contracts in Latin America	513
Prof. Stanisław J. Sołtysiński Arbitration Law in States after Fundamental Changes	530
Prof. Yasuhei Taniguchi	
Arbitration and Applicable Law in Japan	542
Dr. Serge Lazareff Mandatory Extraterritorial Application of National Law Rules	550
Application of Rules Beyond National Law	
Dr. Norbert Wühler	
Application of General Principles of Law H.E. Judge Stephen M. Schwebel	565
The Law Applicable in International Arbitration: Application of Public International Law Prof. Emmanuel Gaillard	574
Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules	582
LIST OF ORAL INTERVENTIONS TO WORKING GROUP II	603
LIST OF PARTICIPANTS	604
LIST OF ICCA OFFICERS AND MEMBERS	621