INTERNATIONAL COUNCIL
FOR COMMERCIAL ARBITRATION

YEARBOOK

COMMERCIAL ARBITRATION

VOLUME XXXI – 2006

GENERAL EDITOR
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with the assistance of
International Bureau of the
Permanent Court of Arbitration
The Hague

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

ISBN 90 411 2437 3

Published by Kluwer Law International,
P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and distributed in North, Central and South America
by Aspen Publishers, Inc.
7201 McKinney Circle, Frederick, MD 21704, USA

Sold and distributed in all other countries by
Turpin Distribution Services Ltd.,
Stratton Business Park, Pegasus Drive, Biggleswade,
Bedfordshire SG18 8TQ, United Kingdom

Printed on acid-free paper

Printed in The Netherlands

INTRODUCTION

Volume XXXI of the Yearbook retains it traditional format, but this year its contents demonstrate in some respects the impact of the World Wide Web and the Internet on the documentation of international commercial arbitration. The policy of the Yearbook is to go beyond the Internet to collect and organize a broad selection of arbitral awards, arbitration rules and court decisions, and to present them to the reader in an accessible format, including translations, indices and categorized lists. However, where such material is now readily available in a reliable and easily accessible form on the Internet, only selected texts are reproduced in the Yearbook.

In addition to its printed format, the Yearbook, along with ICCA's *International Handbook on Commercial Arbitration* and selected volumes of ICCA's *Congress Series*, is made available by subscription in two electronic formats. They are published by Kluwer Law International as part of the materials on the *Arbitration CD-Rom: Resources on International Commercial Arbitration* and 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 sixty countries. National Reports together with the relevant legal texts are published in the Handbook. The Table of Contents of the Handbook is reproduced in Part I of the Yearbook where, until the introduction of the Handbook, National Reports were published. In Part IV of the Yearbook, readers of the Yearbook are informed of newly enacted arbitration legislation through summaries of the salient features of the legislation. In this volume, information is provided on Austria, Cambodia, Italy and Malaysia.

Part II – A, Arbitral Awards, contains a selection of ad hoc awards and awards made under the auspices of the German Maritime Arbitration Association (GMAA), the International Chamber of Commerce (ICC) and the Netherlands Arbitration Institute (NAI). The ad hoc arbitral award (*Altmann, et al. v. Austria*) returning five Klimt paintings held in Austria to the heirs of the original owners illustrates the acceptance of the use of arbitration in the settlement of cultural property disputes. The selection of awards also includes three awards where the arbitral tribunal found that it lacked jurisdiction: GMAA award of 8 November 2005, ICC award no. 10904 and the ad hoc UNCITRAL award of 2 June 2005. Other recurring topics are the applicable law and, in particular, the application or exclusion of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG); limitation periods and time limits, particularly with respect to the notification of defects; and the calculation of the arbitration and legal costs.

For several years the Yearbook has not included excerpts of awards made under the auspices of ICSID and its Additional Facility, as well as other "investment awards" made under BITs and NAFTA, because the full texts of such awards are posted, within a short time after being issued, on various well-known websites. A new feature in Part II – A, however, is a "Digest of Investment Treaty Decisions and Awards", compiled by Devashish Krishan and Ania Farren. The Digest comprises publicly available final decisions and awards in investor-state arbitrations conducted pursuant to investment treaties and provides basic information on the decisions and awards, subject matters and the places on the Internet where they are posted.

Part II – B contains the US Supreme Court decision of 26 February 2006 in *Buckeye v. Cardegna* where it was held that it is for the arbitrator, not the court to decide the question if a contract containing an arbitration agreement is void for illegality. This very recent decision has already been extensively referred to in subsequent US District and Circuit Court decisions applying the 1958 New York Convention. This Part also contains the decision of the US District Court, District of Columbia of 31 October 2005 in *Loewen v. USA* where the court found that the claim to set aside a NAFTA award was time-barred.

As of this volume, the decision was taken no longer to reproduce in Part II – C the reporting in UNCITRAL's CLOUT on the Model Law on International Commercial Arbitration, as CLOUT can be consulted on UNCITRAL's own website (<www.uncitral.org>) together with a variety of indices to facilitate research.

In a further step, only a limited selection of new arbitration rules are reproduced in this volume, as arbitral institutions now make their rules available on their websites, often in several languages, shortly after they are adopted. Part III – A includes the text of the newly amended Rules of the International Arbitration Centre of the Austrian Federal Economic Chamber, with an Introduction by DDr. Werner Melis; ICSID and its Additional Facility; and the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, with an Introduction by Prof. Alexander Komarov. Information is also provided on newly amended rules of a number of other arbitral institutions, with reference to where they may be found on their websites.

Part V – A, reporting on the 1958 New York Convention, constitutes the bulk of the Yearbook. Ninety-five cases from fifteen countries are included this year, including for the first time, cases from Israel. Decisions from Australia, Canada, Germany, Hong Kong and India reflect the parallel application of the UNCITRAL Model Law as adopted in these jurisdictions together with the

Convention. The 1961 European Convention and the 1975 Panama Convention are also applied in conjunction with the 1958 New York Convention. The reporting includes cases from Austria, Belgium, China, France, Germany, Israel, Italy, The Netherlands and Spain, all translated from their original language into English.

Recurring issues in the 1958 New York Convention decisions include waiver and estoppel, arbitrability of issues arising under a particular law, set-off, non-signatories to the arbitration agreement, sovereign immunity, Bilateral Enforcement Treaties and Bilateral Investment Treaties. Among the selection of US decisions, eight decisions relate to a tax strategy marketed to clients of an accounting firm which would entail a series of foreign investments and re-investments. When the US Internal Revenue Service determined that the "losses" generated by this strategy could not be used to reduce income tax liability, numerous clients sued in state courts. In the reported cases, the various defendants, relying on the 1958 New York Convention, removed the suit to federal court and sought to have the case referred to arbitration. In five of the cases, the district courts held that the action was properly removed to federal court under the Convention:

United States District Court, Central District of California, Southern Division, 14 December 2004 (US no. 529) *Reddam*;
United States District Court, Southern District of Mississippi, Jackson Division, 6 January 2005 and 9 January 2006 (US no. 530) *Chew*;
United States District Court, Central District of California, Southern Division, 29 March 2005 (US no. 535) *Hansen*;
United States District Court, Southern District of Texas, Houston Division, 19 May 2005 (US no. 541) *Galtney*;
United States District Court, Northern District of Illinois, Eastern Division, 30 November 2005 (US no. 559) *Wilson*.

In the three remaining decisions, the district courts held that on the facts, the action could not be removed from state court as it neither involved property located abroad, envisaged performance abroad nor had some other reasonable relationship with a foreign state:

United States District Court, District of Oregon, 13 September 2005 (US no. 552) *Maletis;*
United States District Court, Eastern District of Texas, Sherman Division, 28 November 2005 and 30 December 2005 (US no. 558) *Ling*;

United States District Court, Eastern District of Texas, Sherman Division, 5 December 2005 (US no. 560) *RA*.

Part V – C contains the decision of the UK High Court of 20 October 2005 concerning the ICSID award in *AIG v. Kazakhstan* and immunity from execution of assets held on behalf of the National Bank of Kazakhstan.

Each component of Part V (Part V – A on the 1958 New York Convention, Part V – B on the 1961 European Convention, Part V – C on the 1965 Washington Convention, and Part V – D on the 1975 Panama Convention) contains an up-to-date list of Contracting States and Signatories to the respective Convention. In addition, Part V – A contains an Index of Cases Reported in Volume XXXI (2006) which links the cases to the Commentaries on the New York Convention prepared by the General Editor (see Volume XXVIII (2003) for the most recent Commentary).

The Yearbook concludes with the Bibliography which this year includes several works on dispute settlement in the WTO, sports arbitration, European community law and detailed commentaries on the ICC Arbitration Rules and the new Swiss Rules.

Each year, as General Editor, I express my gratitude to the network of correspondents whose interest and generosity make it possible for the Yearbook to effectively portray the broad spectrum of international commercial arbitration as it evolves. That this expression is repeated year after year serves to emphasize the dedication and loyalty of the many contributors who make the Yearbook possible. The correspondents are too numerous to thank individually in this Introduction. They are mentioned and acknowledged in the Introductions to the various Parts and in footnotes where appropriate.

Another annual feature of this Introduction is an expression of appreciation to the ICCA Editorial Staff. I wish to express again my deep appreciation to the ICCA Editorial Staff for all the work done in compiling and editing the volume of the Yearbook. Throughout the year, Ms. Alice Siegel, sub-editor; D.ssa Silvia Borelli, assistant managing editor; and Ms. Judy Freedberg, managing editor, request and gather material, make selections, provide translations, prepare excerpts and transform all this into a meticulously edited volume.

A very special word of thanks goes to Judy Freedberg who will go on retirement on 1 July 2007. For more than twenty-five years she has been the linchpin of the ICCA publications. She came on board in 1979. Her involvement in the ICCA publications has been extra-ordinary. It is no exaggeration that without her, the ICCA publications would not have achieved the size and status

they have today. ICCA in particular and the world of international arbitration in general owe Judy a formidable debt of gratitude.

On behalf of ICCA, thanks go to the Permanent Court of Arbitration and its Secretary-General, Tjaco T. van den Hout, who, for nearly a decade, have hosted the 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 Dr. Gerold Herrmann, President of ICCA (Austria); Mr. Antonio Parra, Secretary-General of ICCA (United States); Mr. Jan Paulsson, General Editor, *International Handbook on Commercial Arbitration* (France); Mr. Martin Hunter (United Kingdom) and the undersigned as General Editor of the 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 UNCITRAL Model Law or the New York, European, Washington or Panama Convention.

Brussels
November 2006

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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