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FOR COMMERCIAL ARBITRATION

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INTRODUCTION

With this Volume XXX, the Yearbook completes its third decade of reporting on international commercial arbitration law and practice. As Jean Robert, President of ICCA, wrote in 1976 in his Preface to Volume I of the Yearbook, “at the New Delhi Congress in 1975, ICCA decided to publish a Yearbook that would serve as a source of information of what is going on in the field of commercial arbitration throughout the world”. Pieter Sanders, the Yearbook’s first General Editor, opened his Introduction to the first Yearbook stating “This Yearbook is the first of a series of at least five”. Thirty volumes later, the Yearbook still reports on “what is going on” in a greatly expanded field of commercial arbitration.

The XXXth volume of the Yearbook retains its traditional printed format. In addition, in collaboration with its publisher, Kluwer Law International, the Yearbook, along with ICCA’s *International Handbook on Commercial Arbitration* and selected volumes of ICCA’s *Congress Series*, are made available by subscription in two electronic formats 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. Thus, the reader will find arbitral awards, rules and leading court decisions from a broad range of countries and institutions in the Yearbook, and National Reports and legislation on arbitration in the Yearbook’s companion publication, the Handbook. In addition, Part IV of the Yearbook, entitled *Recent Developments on Arbitration Law and Practice*, provides a summary of the salient features of newly enacted arbitration legislation, this year reporting on Chile, Denmark, Norway, Philippines and Poland.

The contents of Part II – A of this Yearbook reflect the evolving policy of arbitral institutions increasingly to make awards and decisions issued under their auspices available online on their websites or in their printed publications. In response to this increased availability, the Yearbook has become more selective, publishing relevant awards from sources which otherwise are not readily available. This year’s selection includes awards from the German Maritime Arbitration Association, Hamburg Friendly Arbitration and the International

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Chamber of Commerce. The awards deal with issues such as a holding of lack of jurisdiction, consolidation, applicable law to the validity of the arbitration agreement and the applicable substantive law, applicability of the 1980 UN Sales Convention, employment disputes, interim relief and the various forms in which it may be ordered, and the recurring question of calculation of damages.

Part II – B reports on leading court decisions falling outside the scope of Part V’s reporting on the major arbitration conventions. It includes a Canadian decision upholding a NAFTA award, stating that the “applicable standard of review ... is at the high end of the spectrum of judicial deference”; two French decisions, one holding that WIPO internet domain name decisions are not awards and that applications for setting aside are not admissible in the French courts and the other granting a request to assist in the appointment of a party arbitrator in an arbitration where the only connection with France was that the president of the ICC Chamber of Commerce would appoint the third arbitrator if the parties failed to do so, on the basis that to not do so would be a denial of justice. The 1923 Geneva Protocol is found not to be applicable in a Pakistani court decision, and finally, in a Swedish court decision, the court held that it did not have jurisdiction over an application to set aside an award where the award stated that the place of arbitration was Stockholm, but in the view of the court, there was no connection with Sweden and it did not foresee a denial of justice as the award could be subject to setting aside elsewhere.

Part II – C reproduces court decisions applying the UNCITRAL Model Law as reported in UNCITRAL’s periodical *Case Law on UNCITRAL Texts (CLOUT)*.

Recently introduced or amended rules are reproduced in Part III – A. They include the China International Economic and Trade Arbitration Commission (CIETAC) amended Arbitration Rules and their new Financial Disputes Arbitration Rules, the China Maritime Arbitration Commission (CMAC) amended Arbitration Rules and the newly issued International Chamber of Commerce (ICC) Dispute Board Rules.

The reporting this year on the Iran-US Claims Tribunal in Part III – B contains a Decision relating to the Security Account and an Interlocutory Award on jurisdiction over counterclaims issued by the Full Tribunal in disputes between the United States and Iran.

A major part of the Yearbook reporting consists in the documentation of court decisions applying the 1958 New York Convention. This year, Part V – A reports the decisions in seventy-nine cases from twelve countries, including two newcomers, Brazil and Ireland. While, as usual, the majority of cases comes from courts in the United States, the reporting this year includes twelve German cases and five decisions each from Canada, Spain and the United Kingdom.

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Recurring issues in the decisions are stay of enforcement proceedings pending annulment proceedings; waiver of rights and estoppel; sovereign immunity; the Brussels/Lugano Conventions and the former's successor, the EU Council Regulation no. 44 of 2001; and, particularly in the German decisions, the more-favourable-right provision. Injunctions enjoining a foreign lawsuit are a frequent issue in the UK decisions.

Issues relating in particular to US decisions include removal to federal court and remand to state court and the relationship among Chapters 1 (domestic arbitration), 2 (New York Convention 1958) and 3 (Panama Convention 1975) of the Federal Arbitration Act (FAA). A significant number of US cases deal with the question of whether the FAA allows disputes relating to contracts of employment of seamen which provide for foreign arbitration, to be referred to arbitration under Art. II of the Convention. In most cases the courts have held that the exemption in Chapter 1 FAA, which excludes employment contracts from the scope of the Act, does not apply to arbitrations falling under Chapter 2 of the Act, which implements the New York Convention. See:

United States District Court, Southern District of Florida, 15 June 2004 (US no. 493), *Holmes*;

United States Court of Appeals, Fifth Circuit, 9 August 2004 (US no. 498), *Freudensprung*;

United States District Court, Eastern District of Louisiana, 19 October 2004 (US no. 503), *Amizola*;

United States District Court, Eastern District of Louisiana, 10 November 2004 (US no. 506), *Umali*; and

United States Court of Appeals, Eleventh Circuit, 18 January 2005 (US no. 513), *Bautista*.

Amizola, *Umali* and other decisions deal with the sometimes interrelated question of whether the Convention preempts mandatory provision of state laws prohibiting forum selection clauses. See also:

United States Court of Appeals, Fifth Circuit (US no. 490), *Dahiya*;

United States District Court, Eastern District of Louisiana, 27 May 2004 (US no. 492), *Lejano*; and

United States Court of Appeals, Fifth Circuit, 24 March 2005 (US no. 518), *Lim*.

Part V – B reports two decisions applying the 1961 European Convention, including for the first time a decision from the Russian Federation. Part V – D

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reports two US decisions applying the 1975 Panama Convention, in line with the continuing trend of an increasing number of courts applying this Convention.

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 also contains an Index of Cases Reported in Volume XXX (2005) 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 Volume concludes with a list of journals on arbitration and a bibliography announcing recently published books relating to general topics in arbitration and individual countries and regions. This year's selection includes several new or updated handbooks and textbooks on international commercial arbitration, as well as a number of publications on settling foreign investment disputes.

The worldwide network of correspondents who generously provide assistance and material for the Yearbook is an essential element in the compilation and editing of the Yearbook. 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.

The ICCA Editorial Staff works in close cooperation as a team throughout the year to collect and process the contents of the Yearbook. I would like, however, to express my thanks and appreciation to each of them individually for their essential contribution:

- Ms. Alice Siegel, who as sub-editor continues to assure that the Yearbook is presented in a literate, consistent and attractive format;
- D.ssa Silvia Borelli, who has assumed the responsibility for the New York Convention reporting, including translations into English from French, German, Italian and Spanish;
- Ms. Judy Freedberg, who with great skill and dedication puts together and manages the entire Yearbook.

On behalf of ICCA, continuing thanks go to the Permanent Court of Arbitration and its Secretary-General, Tjaco T. van den Hout, for hosting 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

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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.

The names of the readers who have provided materials for this volume are gratefully acknowledged in the appropriate Parts.

Brussels
October 2005

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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