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VOLUME XXXII – 2007

GENERAL EDITOR  
ALBERT JAN VAN DEN BERG

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# INTRODUCTION

Volume XXXII of the Yearbook again presents the reader with a selection of arbitral awards and court decisions made accessible by translations, indices and categorized lists. Reflecting the developments in the dissemination of information, when materials are 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 on the online service <[www.kluwerarbitration.com](http://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 are informed of newly enacted arbitration legislation through summaries of the salient features of the legislation, and of other developments relevant to the practice of arbitration. In this volume, information is provided on Bolivia, China, Mongolia, New Zealand and Switzerland.

Part II – A, Arbitral Awards, contains a selection of awards made under the auspices of the International Chamber of Commerce (ICC) and the Netherlands Arbitration Institute (NAI). Topics discussed in the awards include the applicable law to both arbitration and the merits, the binding as opposed to the preliminary nature of a contract, the incorporation of standard conditions, the duty to negotiate in good faith, the duty to inform the contractual partner of deviations from usual business practice and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).

The Yearbook no longer includes excerpts of awards made under the auspices of ICSID and its Additional Facility, as well as other “investment awards” made under BITs and NAFTA, as the full texts of such awards are promptly posted on various websites. In 2006 an extensive “Digest of Investment Treaty Decisions and Awards” by Devashish Krishan and Ania Farren was published. The Digest comprised publicly available final decisions and awards in investor-state arbitrations conducted pursuant to investment treaties and provided basic information on the decisions and awards, subject matters and the websites where they are posted.

Part II – B, Court Decisions on Arbitration, this year contains the European

## INTRODUCTION

Court of Justice decision of 26 October 2006 in *Mostaza v. Centro Movil Milenium*, where the ECJ held that under EC Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts a national court seized of an action for annulment of an award must determine whether the arbitration agreement is void because it contains an unfair term within the meaning of the Directive, even though the consumer first raised that objection in the course of the annulment action. This Part also contains the decision of the UK Court of Appeal of 16 October 2006 in *CGU v. AstraZeneca*. The Court of Appeal held that it has residual jurisdiction to permit an appeal where the lower court has denied that permission – despite the explicit prohibition in the English Arbitration Act 1996 – if the lower court's refusal is challenged on the grounds of unfairness under the European Human Rights Convention.

Since 2006, Part II - C of the Yearbook no longer reproduces the reporting on the UNCITRAL Model Law on International Commercial Arbitration in UNCITRAL's Case Law on UNCITRAL texts (CLOUT), as CLOUT can be consulted on UNCITRAL's own website (<[www.uncitral.org](http://www.uncitral.org)>) together with a variety of indices to facilitate research.

Also as a consequence of the widespread practice of making materials directly available on the Internet, as of this Volume XXXII new or amended arbitration rules are announced rather than reproduced in the Yearbook, with a reference to the websites of the arbitral institutions where the rules can be obtained. This year, Part III – A provides information on the amended Rules of the Dubai International Arbitration Centre (DIAC), the Singapore International Arbitration Centre (SIAC), the Arbitration Institute of the Stockholm Chamber of Commerce and the International Arbitration Court at the Ukrainian Chamber of Commerce and Industry, as well as the rules of the Mongolian National Arbitration Center.

Part V – A, reporting on the 1958 New York Convention, traditionally constitutes the bulk of the Yearbook. This Volume contains 89 cases from 18 countries, including, for the first time, cases from Pakistan, Portugal and Venezuela. The selection includes 16 Spanish court decisions providing an update of Spanish jurisprudence on the application of the 1958 New York Convention. Decisions from Australia, Germany and Mexico 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 and the 1961 European Convention is also mentioned. The reporting in Part V – A includes cases from Austria, Brazil, France, Germany, Italy, Mexico, Portugal, the Russian Federation, Spain, Switzerland and Venezuela, all translated from their original language into English.

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Recurring issues in the 1958 New York Convention decisions include arbitrability of disputes arising under certain national statutes, non-signatories to the arbitration agreement, public policy, incorporation of the arbitration agreement by reference to standard contracts, applicable law to arbitration agreements, separability of the arbitration clause from the main contract in which it is contained and written form of the arbitration agreement. Several decisions deal with the scope of the arbitration clause. The decision rendered in October 2007 by the House of Lords in *Premium Nafta*, on appeal in the *Fiona Trust* case, is particularly relevant in this respect (UK no. 77). By that decision, the House of Lords obliterated the distinction between clauses providing for arbitration of disputes “arising out of” and “arising under” a contract. Although clauses using the latter wording were sometimes given a narrower meaning by the English courts, the House of Lords held that there is no such difference as arbitration clauses in international contracts must be liberally construed.

Part V – B contains the decision of the Commercial Court of the City of Kiev of 30 January 2003 in *Closed Joint Stock Company v. Czech Company*, holding that under Art. VI of the 1961 European Convention, an objection to court jurisdiction based on an arbitration clause must be raised before or at the same time as the filing of a defense on the merits of the dispute.

Part V – D contains the decision of the United States District Court for the Southern District of New York of 2 August 2007 in *Sanluis Developments, LLC et al. v. CCP Sanluis, LLC et al.*, where the court held that the defense of manifest disregard of the law applies to the annulment of an arbitral award under the 1975 Panama 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 XXXII (2007) 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 works providing a review of arbitration in Latin America and Asia as well as studies of mediation and other means of alternative dispute resolution.

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.

## INTRODUCTION

I also wish to express my deep appreciation 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 this volume. They were joined in August 2007 by Ms. Tamela Smith, senior editor, following the retirement of Judy Freedberg, for many years the heart and motor of ICCA publications.

On behalf of ICCA, thanks go to the Permanent Court of Arbitration and its Secretary-General, Tjaco T. van den Hout. For more than a decade, the Permanent Court of Arbitration 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 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 2007

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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