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with the assistance of the
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INTRODUCTION

Volume XXXIII of the Yearbook again presents the reader with a selection of arbitral awards and court decisions made accessible by translations, indices and categorized lists. When materials are readily available in a reliable and 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>.

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 the Dubai International Financial Centre, Rwanda, Slovenia, Syria and Ukraine, as well as on the Opinion of Advocate General Kokott on the question submitted to the European Court of Justice by the House of Lords in the *West Tankers* case (availability of anti-suit injunctions in aid of arbitration).

Part II – A, Arbitral Awards, contains a selection of awards made under the auspices of the International Chamber of Commerce (ICC), the Arbitration Chamber of Paris and the Netherlands Arbitration Institute (NAI). Topics discussed in the awards include the restitution of sums paid under a contract tainted by bribery, the capacity of a claimant having defective corporate status to sue in international arbitration, the effect of Italian winding-up proceedings, damages for wrongful termination of contract and the Spanish concept of *dolo*, good faith in the performance of a contract and the competence of arbitrators to order interim measures under Dutch law. The 1958 New York Convention and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) are also discussed.

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, a “Digest of Investment Treaty Decisions and Awards” by Devashish Krishan and Ania Farren was included in the Yearbook. It

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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. This Volume contains a biennial update of the Digest, by the same authors.

Part II – B, Court Decisions on Arbitration, contains a selection of three decisions on different topics that are relevant to the practice of (international) arbitration. On 1 March 2007, the German *Bundesgerichtshof* reversed its earlier jurisprudence that arbitration agreements must exclude the jurisdiction of state courts completely and upheld the validity of an arbitration clause providing that a party dissatisfied with the outcome of the arbitration could commence a court action in respect of the same dispute within one month of the award and that the award only became final and binding if no claim was filed within that time limit. On 10 January 2008, the Indian Supreme Court concluded in *Venture Global Engineering* that Indian courts may set aside an award rendered abroad on grounds of public policy. On 25 March 2008, the Supreme Court of the United States held in *Hall Street Associates v. Mattel* that the parties may not by their contract supplement the grounds on which an award may be vacated or modified that are listed in the Federal Arbitration Act.

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>) 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, since 2007 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 Dubai International Financial Centre, Mexico, Switzerland, the United Kingdom and the United States.

Part V – A, reporting on the 1958 New York Convention, traditionally constitutes the bulk of the Yearbook. This Volume contains 109 cases from 23 countries, including, for the first time, cases from Argentina, Belize, Chile and Peru. A decision from the British Virgin Islands is also included, where the court of appeal applied the New York Convention although the United Kingdom has not extended the application of the Convention to this Territory. The selection this year includes nine Russian and six Greek court decisions providing an update of jurisprudence on the application of the Convention in those countries. Decisions from Australia, Austria, Chile, Germany, Greece, Hong Kong, India,

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Ireland, the Philippines, the Russian Federation, Spain and Venezuela 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, or the 1975 Panama Convention, is mentioned. The reporting in Part V – A includes cases from Argentina, Austria, Brazil, Chile, France, Germany, Greece, Italy, Netherlands, Peru, Russian Federation, Spain and Venezuela, all translated from their original language into English.

Recurring issues in the 1958 New York Convention decisions include the existence of a valid arbitration agreement in writing (in particular in respect of charterparties), non-signatories to the arbitration agreement, the scope of the arbitration agreement, primary v. secondary jurisdiction of courts under the Convention, waiver of the right to seek arbitration by taking steps in court proceedings, pre-award attachment orders and the reviewability of a decision taken by the ICC in respect of the prima facie applicability of an arbitration clause. The need for a separate submission agreement (*compromisso arbitral*) in addition to the arbitration clause in the contract was discussed and rejected in three Brazilian decisions, but confirmed in one. In four of the nine reported Russian decisions, the court denied enforcement because of the lack of a proper notice of the arbitration proceedings; in only one case did the court conclude that the defendant had been duly informed of the arbitration. Several decisions dealt with anti-suit injunctions in aid of arbitration. The *West Tankers* case is particularly relevant in this respect (UK no. 78): on 21 February 2007, the House of Lords asked the European Court of Justice to decide whether a court of a European Union Member State may grant an injunction to restrain a person bound by an arbitration agreement from commencing or prosecuting proceedings in breach of that agreement in a court of another Member State which has jurisdiction to entertain the proceedings under EU Council Regulation (EC) no. 44/2001. On 4 September 2008, Advocate General Dr. Juliane Kokott issued an Opinion answering this question in the negative.

Part V – C (reporting on the 1965 Washington Convention) contains the decisions of the English High Court and Court of Appeal in *E.T.I. Euro Telecom v. Bolivia* on the availability of court-ordered interim relief in ICSID arbitration.

Part V – D (reporting on the 1975 Panama Convention) contains the decision of the United States District Court for the Southern District of Texas, Houston Division, in *Terminales Portuarios Termiport*, holding that a nonsignatory defendant was not bound to the arbitration clause, and the decision of the United States District Court for the Southern District of Florida, Miami Division (*Americatel El Salvador*), where the court exercised its discretion not to stay enforcement

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proceedings pending proceedings to set aside the award in the country of rendition.

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 XXXIII (2008) 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).

A complete list of all court decisions and awards published in the Yearbook since 1976 and a Consolidated Index of Commentary 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 general works on the theory and practice of arbitration in several Latin American and European countries as well as specific studies of, inter alia, investment arbitration, the arbitration clause and the obligation of confidentiality in 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.

Special 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. Mary Kendrick.

On behalf of ICCA, I also wish to thank the Permanent Court of Arbitration and its current Secretary-General, Mr. Christiaan Kröner, as well as its former Secretary-General Mr. Tjaco T. van den Hout who was replaced in September 2008. 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), Mr. Iván Szász (Hungary), Mr.

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Donald Donovan (United States), Mr. Michael Hwang (Singapore) 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 (a) the UNCITRAL Model Law, (b) the New York Convention, (c) the European Convention, (d) the Washington Convention and (e) the Panama Convention.

Brussels
November 2008

Albert Jan van den Berg
General Editor

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ONLINE RESOURCES

The ICCA website has undergone a thorough revision in 2008. It now 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
- the announcement of upcoming events, such as the next ICCA Congress in Rio de Janeiro in May 2010
- a selection of recent articles
- a “latest news” section

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
- the Digest of Investment Treaty Decisions and Awards, by Devashish Krishan and Ania Farren, providing information on final decisions and awards in investor-state arbitrations conducted pursuant to investment treaties, updated through 30 July 2008.
- a list of all court decisions and awards published in the Yearbook since 1976
- a Consolidated Index of Commentary 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

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

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.

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