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COMMERCIAL ARBITRATION

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ALBERT JAN VAN DEN BERG

with the assistance of the
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INTRODUCTION

Volume XXXIV 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 seventy 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 and of other developments relevant to the practice of arbitration. In this volume, information is provided on Algeria, the Cook Islands, the Dominican Republic, Ecuador, Haiti, Kosovo, Mauritius, the Nigerian State of Lagos, Rwanda and Ukraine.

Part II – A, Arbitral Awards, contains a selection of awards made under the auspices of the International Chamber of Commerce (ICC), the German Arbitration Institute (DIS) and the Netherlands Arbitration Institute (NAI), as well as an ad hoc partial award rendered under the UNCITRAL Arbitration Rules. Topics discussed in the awards include vitiated consent under French law (*dol* and *erreur*), pre-contractual liability, the existence of a duty to confidentiality in arbitration, force majeure, formation and interpretation of contract, specific performance, liquidated damages, assignment of contract and arbitration clause, correction and interpretation of the award and the issue of whether the reimbursement of advance payments made in the stead of the defendant is implied in the UNCITRAL Arbitration Rules. The competition law of the European Union 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 comprised publicly available final decisions and awards in investor-state

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arbitrations conducted pursuant to investment treaties and provided basic information on the decisions and awards, subject matters and the websites where they are posted. A biennial update of the Digest by the same authors was published in Yearbook XXXIII (2008). A second biennial update will appear in Yearbook XXXV (2010).

Part II – B, Court Decisions on Arbitration, contains a selection of decisions on different topics that are relevant to the practice of (international) arbitration. Two decisions of the Paris *Cour d'Appel* dealt respectively with investment arbitration and the responsibility of the ICC in the conduct of an arbitration. In a December 2008 decision, the Dutch Supreme Court annulled an arbitral award finding that the third arbitrator's refusal to sign should have been mentioned at the end of the award in a statement signed by the two remaining arbitrators in accordance with Dutch law, and that the third arbitrator's dissenting opinion was not part of the award and could not substitute for that signed statement. Three decisions reached opposite results in respect of the effect of bankruptcy proceedings on arbitration. Vivendi, a French company, sought to acquire an interest in a Polish mobile telephone company; when disputes arose, it commenced arbitration proceedings under separate contracts in Geneva under the ICC Rules and in London under the LCIA Rules. While these proceedings were pending, one of the Polish parties was declared bankrupt. In March 2009, the Swiss *Tribunal Fédéral* refused to annul a preliminary award on jurisdiction rendered in the ICC arbitration in Geneva by which the arbitrators ruled that they lacked jurisdiction because of the Polish bankruptcy proceedings. In July 2009, the English Court of Appeal affirmed the October 2008 High Court decision holding that the arbitrators in the LCIA arbitration did not lack jurisdiction because of the Polish party's bankruptcy.

Part II – B contains two US decisions dealing with the issue whether manifest disregard of the law survives as a non-statutory ground for vacating an award after the 2008 Supreme Court decision in *Hall Street*. In November 2008, the Second Circuit held that it does (*Stolt-Nielsen*), while the Fifth Circuit held in March 2009 that it does not (*Citigroup*) and expressly criticized the earlier decision of its sister circuit.

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

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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 PR China, Germany, Italy, Japan, Southern Africa, Spain, the United States and WIPO.

Part V – A, reporting on the 1958 New York Convention, traditionally constitutes the bulk of the Yearbook. This Volume contains 77 cases from 23 countries and one jurisdiction, including, for the first time, cases from Antigua and Barbuda and Kenya. The selection this year includes three Turkish decisions providing an update of jurisprudence on the application of the Convention in that country. Decisions from Austria, Canada, Germany, Greece, Hong Kong, India, Jordan, Kenya, the Russian Federation, Singapore, Turkey 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, the 1961 European Convention and the 1975 Panama Convention is mentioned. The reporting in Part V – A includes cases from Austria, Brazil, PR China, Germany, Greece, Israel, Italy, Jordan, Netherlands, Netherlands Antilles, Russian Federation, Switzerland, Turkey and Venezuela, all translated from their original language into English.

Recurring issues in the 1958 New York Convention decisions include anti-suit injunctions, the applicability of an arbitration clause to related contracts, whether tort claims fall within the scope of the arbitration clause in a contract, the waiver of the right to arbitration by various procedural acts or omissions, the incorporation of arbitration clause by general reference to standard conditions and the issue whether a non-signatory party is bound by an arbitration clause or may rely thereon. The enforcement of a partial award and the partial enforcement of an award were also discussed. Two Russian courts held that they could set aside an award rendered abroad under Russian substantive law. A Dutch court granted enforcement of an award that had been set aside in Russia, reasoning that the annulment decision did not meet the private international law requirements for being recognized in the Netherlands. In a US case, the Fifth Circuit discussed whether arbitration should be compelled in Venezuela in light of the political unrest in that country.

Part V – B (reporting on the 1961 European Convention) contains a decision of the Court of First Instance in Turin, Italy, holding that the procedural rules laid down in the Convention remedy the parties' failure to determine the rules applicable to the arbitration in their agreement.

Part V-D (reporting on the 1975 Inter-American (Panama) Convention) contains a decision of the United States District Court for the Southern District of New York, holding that the Peruvian drinking water and sanitation program

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Programa Agua Para Todos is an organ of the Peruvian State rather than a separate entity and that as a consequence the State was bound by the arbitration clause in the agreement entered into by the program with a Brazilian consulting firm.

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 XXXIV (2009) 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 China, England, France, Germany, Hong Kong, Japan and The Netherlands, as well as commentaries on the rules of the ICC, the LCIA, the NAI and the Vienna International Arbitral Centre. The ICC Guide on the procedure for the recognition and enforcement of awards under the 1958 New York Convention, a comparative report on the practice in sixty-six countries, is also announced, as is a book of recollections by Professor Piet Sanders, spanning the long and eventful life of this founding father of modern arbitration. Specific studies cover varied areas of interest such as arbitration in investment disputes, mediation and the independence and impartiality of mediators, arbitrability, the role of national courts in aid of foreign arbitration, resolution of cross-border disputes arising in connection with the Internet and the UNIDROIT principles of international commercial contracts.

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.

Very 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 (PCA) and its Secretary-General, Drs. Christiaan Kröner. For more than a

INTRODUCTION

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); Professor Jan Paulsson, General Editor, *International Handbook on Commercial Arbitration* (France); Professor Martin Hunter (United Kingdom) and the undersigned as General Editor of 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 2009

Albert Jan van den Berg
General Editor

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ONLINE RESOURCES

The ICCA website underwent 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 by ICCA members
- 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
- resources for young arbitration practitioners

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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