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COMMERCIAL ARBITRATION

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GENERAL EDITOR  
ALBERT JAN VAN DEN BERG

with the assistance of the  
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## INTRODUCTION

Volume XXXV (2010) of the Yearbook marks a profound change in the way materials are presented to the reader. As of this Volume, the Yearbook's selection of arbitral awards and court decisions – made accessible by translations, indices and categorized lists – is available to the reader in a combination of print edition and online publishing which takes into account the needs of an increasingly mobile work environment.

The Yearbook's contents have been streamlined and Parts have been re-numbered. *Arbitral awards* continue to be published in print in their entirety, as are Parts of the Yearbook providing various information. *Court decisions* are presented at two levels of consultation: a *Summary* of each decision, prefaced by a short recap, is published in print; a detailed *Excerpt* of the decision is available online at <[www.kluwerarbitration.com](http://www.kluwerarbitration.com)>. A code provided with the Yearbook allows readers to access the relevant Volume online, as well as the preceding Volume. Readers who have purchased Volume XXXV (2010) can therefore access materials from both this Volume and Volume XXXIV (2009).

Information on how to access the online materials is provided in a **Note to the Reader** at the beginning of this Volume (p. xv).

All volumes of the Yearbook, along with ICCA's *International Handbook on Commercial Arbitration* and selected volumes of ICCA's *Congress Series*, are also made available by general 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 seventy countries. The Handbook contains National Reports together with the relevant legal texts. Its Table of Contents is reproduced in **Part I** of the Yearbook.

In **Part II** of the Yearbook, new or amended rules of arbitral institutions are announced, with a reference to the websites where the rules can be obtained. This year, information is provided on Bahrain, PR China, Estonia, India, the International Chamber of Commerce, Italy, Japan, Malaysia, Singapore, Sweden, UNCITRAL and the United Kingdom.

**Part III** announces newly enacted arbitration legislation and informs readers of other developments relevant to the practice of arbitration. In this volume, information is provided on Argentina, Australia, Bahama, Belize, Brunei, PR China, Fiji, Ireland, Kenya, Mexico, Qatar, the Russian Federation, Scotland, Singapore, Spain and Vietnam.

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**Part IV**, Arbitral Awards, contains a selection of awards made under the auspices of the International Chamber of Commerce (ICC) and the Arbitration Chamber of Paris. Topics discussed in the awards include European Union legislation on competition law and food safety; the United Nations Convention on Contracts for the International Sale of Goods (CISG); post-termination contractual obligations; the *res judicata* effect of a withdrawal of claim; the reasonableness of substitute purchases; the applicable law to the capacity of corporations; the validity of arbitration clauses and the scope of trade usages.

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 bilateral investment treaties (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 arbitrations conducted pursuant to investment treaties and provided basic information on the decisions and awards, and the websites where they are posted, as well as subject matters. A biennial update of the Digest by the same authors was published in Yearbook XXXIII (2008). A future update is envisaged.

Part V of the Yearbook reports on court decisions on arbitration. **Part V – A**, reporting on the 1958 New York Convention, traditionally constitutes the bulk of the Yearbook. This Volume contains 86 cases from 25 countries, including, for the first time, cases from Gibraltar and Uganda. The selection this year includes eleven court decisions from Germany and two from Austria, two Israeli Supreme Court decisions, five decisions rendered by courts of the Russian Federation, five Spanish decisions and the decision of the Dutch Supreme Court in the *Yukos* case. Decisions from Australia, Austria, Canada, Germany, Hong Kong, India, Ireland, the Russian Federation, Singapore, Spain and Uganda 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 Argentina, Austria, Brazil, PR China, France, Germany, Israel, Italy, Netherlands, the Russian Federation, Spain and Sweden, all translated from their original language into English.

Recurring issues in the 1958 New York Convention decisions include the status of a country as party to the Convention; anti-suit injunctions enjoining a foreign lawsuit; the court’s discretion to stay enforcement proceedings pending annulment proceedings; the period of limitation to request enforcement of a

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foreign award; the separability of the arbitration clause and sovereign immunity from jurisdiction and execution. The nullity of arbitration agreements for, inter alia, violation of mandatory European Union law provisions and on public policy grounds was discussed, as was the meaning of “non-domestic award”. Two decisions dealt with awards that had not been signed by one of the arbitrators or had been rendered by a truncated tribunal. Several US decisions examined choice-of-law and arbitration clauses in seafarers’ agreements that allegedly deprived the seafarers of their rights under US statutes.

**Part V – B**, reporting on the 1961 European Convention, contains a decision of the Court of Appeal in Dresden, Germany, granting enforcement of a Czech award because the defendant, who argued that the award came as a surprise, failed to show that the outcome of the arbitration would have been different had he been given the opportunity to state his position in respect of the arbitral tribunal’s opinion during the arbitral proceedings.

No new decisions are reported this year in **Part V – C**, reporting on the 1965 Washington Convention, and **Part V – D** on the 1975 Panama Convention.

Up-to-date lists of Contracting States and Signatories to the respective Convention are also provided. In addition, Part V – A also contains an Index of Cases reported in this Volume.

**Part V – E**, Other Court Decisions on Arbitration, contains a selection of decisions on different topics that are relevant to the practice of (international) arbitration. This year, two decisions of the European Court of Human Rights are reported. In *Kin-Stib v. Congo*, an individual who had not been a party to the arbitration but had later bought a stake in the original creditor under the ensuing award could file a claim for violation of the European Convention on Human Rights based on the partial enforcement only of the award. In *Regent Engineering v. Ukraine*, the Court held that the right to demand payment of a debt under an award is a “civil” right within the meaning of the same Convention.

In *Asturcom Telecomunicaciones*, the European Court of Justice held that a court hearing a request for enforcement of a final award rendered in a dispute between a seller or supplier and a consumer who did not participate in the arbitration must assess of its own motion whether the arbitration clause in the contract between the parties is unfair, insofar as national rules of procedure require the court to assess at the enforcement stage whether the arbitration clause violates public policy.

Part V – E also contains two decisions from, respectively, Switzerland and the United States. In *Club Atlético de Madrid v. Sport Lisboa e Benfica*, the Swiss Federal Supreme Court set aside an award of the Court of Arbitration for Sport (CAS), because the CAS failed to take into account the res judicata effect of a prior

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decision by a Swiss court finding that the 1997 FIFA Transfer Regulation, under which compensation was sought, was null and void for violation of European and Swiss competition law. In another case, the Federal Supreme Court annulled an ICC award because a criminal investigation in another country had determined that false witness statements had been made to the arbitrators, misleading them into upholding an agreement that was in fact null and void because it was part of an influence peddling scheme.

The Supreme Court of the United States decided in *Rent-a-Center* that a provision within an agreement to arbitrate delegating to the arbitrator authority to decide on all disputes relating to the validity of the agreement to arbitrate is separable from the agreement to arbitrate itself and, unless challenged specifically, must be enforced. In *Stolt-Nielsen*, the Supreme Court vacated for excess of authority an award allowing class arbitration in a dispute concerning a charterparty, finding that the arbitrators failed to identify a rule of law, basing their decision instead on a perceived arbitral consensus that arbitration is beneficial “in a wide variety of settings”.

A complete list of all court decisions and awards published in the Yearbook since 1976 and a Consolidated Index of Cases are available online on the ICCA website <[www.arbitration-icca.org](http://www.arbitration-icca.org)> under the Publications button.

The Yearbook concludes with the **Bibliography**, which this year includes works on mediation and investment arbitration, commentaries of the arbitration legislation and practice in India, Scotland, Singapore, Switzerland, the United Kingdom and New York City, as well as collections of awards of the Permanent Court of Arbitration (PCA) and the Belgian Arbitration and Mediation Centre (CEPANI/CEPINA). Specific studies cover varied areas of interest such as bias challenges, the enforcement of arbitration agreements, evidence and institutional 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.

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. Helen Pin, and Ms. Lise Bosman, executive editor, who assisted in preparing this year’s Bibliography.

On behalf of ICCA, I also wish to thank the Permanent Court of Arbitration and its Secretary-General, Drs. Christiaan Kröner. For more than a decade, the PCA has hosted the ICCA Editorial Staff at the headquarters of its International

## INTRODUCTION

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 Professor Jan Paulsson, President of ICCA and General Editor, *International Handbook on Commercial Arbitration*; Mr. Kap-You (Kevin) Kim, Secretary-General of ICCA; Professor Martin Hunter 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 the New York Convention, the European Convention, the Washington Convention and the Panama Convention.

Brussels  
November 2010

Albert Jan van den Berg  
General Editor

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## ONLINE RESOURCES

The **ICCA website** 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 50th Anniversary Conference and Young ICCA Event in Geneva in May 2011
- 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 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 and a link to Young ICCA
- full film footage of the presentations given at the XX ICCA Congress in Rio de Janeiro in May 2010

The ICCA website can be found at <[www.arbitration-icca.org](http://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

#### ONLINE INSTRUMENTS

Series are also available by subscription in the KluwerArbitration database at <[www.kluwerarbitration.com](http://www.kluwerarbitration.com)>. All materials in this database are fully searchable through a variety of search tools.

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# NOTE TO THE READER

This Yearbook Commercial Arbitration Volume XXXV (2010) includes online access to the complete contents of the 2009 and 2010 Yearbooks at <[www.kluwerarbitration.com](http://www.kluwerarbitration.com)>.

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