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COMMERCIAL ARBITRATION

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VOLUME XXXVI – 2011

GENERAL EDITOR
ALBERT JAN VAN DEN BERG

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague



INTRODUCTION

Volume XXXVI (2011) of the Yearbook again presents readers with a selection of arbitral awards and court decisions made accessible by translations, indices and categorized lists. Since Volume XXXV (2010), the Yearbook's selection of arbitral awards and court decisions is available in a combination of print edition and online publishing. *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>. 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 XXXVI (2011) can therefore access materials from both this Volume and Volume XXXV (2010).

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>.

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 Australia, Denmark, Egypt, France, Germany, Italy, the Russian Federation, the United Kingdom and the International Chamber of Commerce (ICC).

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 Australia, Brazil, Cape Verde, PR China, Costa Rica, France, Ghana, Greece, Hong Kong, Liechtenstein, Mexico, Moldova, Pakistan, Qatar, Singapore, Spain, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United States.

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 the United Nations

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Convention on Contracts for the International Sale of Goods (CISG); the UNIDROIT Principles of International Commercial Contracts; the applicable law to the validity of an arbitration clause; competence-competence of the arbitrators; conflicting arbitration and forum selection clauses; the constitutional procedures required for the formation of a contract with a State; liquidated damages and rates of interest.

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. An update of the Digest by the same authors was published in Yearbook XXXIII (2008).

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 seventy-eight cases from twenty-six countries, including, for the first time, cases from Albania, Ecuador, Poland, Ukraine and the United Arab Emirates. The selection this year includes five decisions from the courts of the Russian Federation and four court decisions each from Germany and the Netherlands. Decisions from Australia, Austria, Germany, Greece, Hong Kong, India, Poland, the Russian Federation, Singapore, Spain, Ukraine and Venezuela reflect the parallel application of the UNCITRAL Model Law on International Commercial Arbitration 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 Albania, Austria, Brazil, Colombia, Ecuador, France, Germany, Greece, Italy, Netherlands, Poland, Portugal, the Russian Federation, Spain, Sweden, Switzerland, Ukraine, the United Arab Emirates and Venezuela, all translated from their original language into English.

Recurring issues in the 1958 New York Convention decisions include the availability of set-off in enforcement proceedings; the enforcement of awards that are not yet binding on the parties or have been set aside; the competence-competence of arbitrators regarding the existence and validity of an arbitration agreement; whether parties are estopped from raising a defense under the Convention that they did not raise in the arbitration; the alleged excess of

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authority of arbitrators and the posting of security as a condition for granting a stay of enforcement proceedings. Problems relating to the case in which the party seeking enforcement does not supply the necessary documents at the time of filing the application were also discussed, as was the issue of whether non-signatory parties may be deemed bound to an arbitration clause or may rely thereon. This issue was examined in particular by the UK Supreme Court in its 3 November 2010 decision in the *Dallah* case.

Decisions rendered by courts in the United States dealt, inter alia, with the question whether an arbitration agreement was null and void on public policy grounds and with the definition of non-domestic award. The incorporation of arbitration rules in an arbitration agreement as evidence that arbitrability is to be decided by the arbitrator rather than the court was also discussed.

Part V – B, reporting on the 1961 European Convention, contains a decision of the *Audencia Provincial* of Barcelona, holding that interim measures of protection can be sought from the Spanish courts when (foreign) arbitration proceedings are pending or are to be commenced.

No new decisions are reported this year in **Part V – C**, reporting on the 1965 Washington Convention. Two decisions from the United States are reported in **Part V – D** on the 1975 Panama Convention. The United States Court of Appeals for the Fourth Circuit refused in *RZS Holdings* to set aside an ICC award rendered in the United States because the party resisting enforcement failed to prove the alleged partiality, corruption or misconduct of one of the arbitrators. In *Empresa de Telecomunicaciones*, the United States District Court for the Southern District of Florida rejected an objection of violation of due process and granted enforcement of a Colombian award, finding that the defendant had been duly informed of the arbitration but chose not to participate.

Up-to-date lists of Contracting States and Signatories to the respective Conventions 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 topics that are relevant to the practice of (international) arbitration. This year, the reporting includes a decision of the Paris Court of Appeal denying an application to set aside the ICC awards rendered in the *Dallah* case, and the decision of the Hong Kong Court of Final Appeal in *FG Hemisphere* on the doctrine of sovereign immunity applicable in Hong Kong.

In *Granite Rock*, the Supreme Court of the United States clearly set out the framework for deciding whether parties agreed to arbitrate a specific dispute and the dispute is therefore arbitrable.

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The English Supreme Court held in *Jivraj* that arbitrators are not “employed” by the parties; as a consequence, the requirement in an arbitration clause that arbitrators be members of a religious community was not void under the UK Employment Equality (Religion or Belief) Regulations 2003. In the *Yukos* saga, the English High Court found that the decision of a Dutch court of appeal holding that the Russian court decisions annulling the awards rendered in favour of Yukos were the result of a partial and dependent judicial process estopped the defendant, Rosneft, from arguing the contrary in the English proceedings.

The selection in this Part also includes a decision of the Brazilian Supreme Court of Justice in *GE Medical Systems*, holding that an action in which the validity of an arbitration clause is challenged, pending in Brazil, does not per se prevent recognition of a foreign court decision holding that the clause is valid. Three decisions of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation are also reported. The Presidium found in *Al'yans* that arbitrators may rule on their own jurisdiction even where the existence of a valid arbitration agreement is disputed; in *Buryatenergo*, that an award based on a regulation that is later recognized to be unlawful may not be enforced; and in *Voskhod*, that the provisions of the Russian arbitration law allowing parties to agree on the arbitral procedure and the language(s) of the arbitration do not violate due process and are therefore not unconstitutional.

Finally, this Part reports on a decision of the Swiss Federal Supreme Court, rendered on 10 November 2010, concerning an application to set aside an award that was qualified as an interim or a partial award but in fact contained procedural orders, namely, a decision to stay arbitration until the parties paid the costs incurred by the arbitrators until that moment. The Court held that no recourse for setting aside is available against such procedural order; it further noted that arbitrators lack the power to issue a binding decision on their own costs.

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> under the Publications button.

The Yearbook concludes with the **Bibliography**, which this year includes works on

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.

Many 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

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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 almost fifteen years, the PCA 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 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 2011

Albert Jan van den Berg
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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 Congress and Young ICCA Event in Singapore on 10-13 June 2012
- 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
- video interviews with with Professor Pieter Sanders, one of ICCA’s founding members, and Professor Pierre Lalive, one of its first members, on the occasion of ICCA’s fiftieth anniversary

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

ONLINE INSTRUMENTS

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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NOTE TO THE READER

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