

**HANDBOOK
OF UNCITRAL
ARBITRATION**

THOMAS H. WEBSTER

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Second Edition

Commentary, Precedents and Materials

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DEDICATION

To Birgit and our sons
Kevin, Andreas and Anthony

PREFACE

The adoption of the revised UNCITRAL Rules in 2010 (Rules) was a major event not only with respect to UNCITRAL Arbitration, but with respect to arbitration in general. Since the first edition of this Handbook was published in 2010, there have been a number of major developments that led to this second edition. As regards the UNCITRAL Rules themselves, they were amended in 2013 with the addition of Article 1(4) in 2013 to provide for the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration that were introduced effective April 1, 2014. Therefore, the general rules for investor state arbitration are changing and it is important to discuss the Rules on Transparency. As discussed in Part II of the Handbook, the Rules on Transparency deal with third party submissions, non-disputing party submissions and access to hearings as well as access to documents. The probable effect of the Rules on Transparency is reflected in the prior practice under NAFTA in particular which is discussed in Part II.

In addition, as was highlighted in the first edition, UNCITRAL arbitration rules are generally subject to the arbitration law of the place of arbitration. UNCITRAL has also played a very active role in this respect with the development of the UNCITRAL Model Law on International Arbitration as amended in 2006 (the Model Law). The commentary reflects the principles in the Model Law, as well as the principles in the arbitration laws applicable in a number of major places of arbitration (France, Switzerland, England and the United States). A key element of this Handbook is analysing how Tribunals seek to meet these requirements and how the state courts interpret legal requirements at the place of arbitration or the place of enforcement with respect to arbitration in general. As with the prior edition, this second edition focuses on the law applicable in the places where most international arbitrations take place: France, Switzerland, England, the United States and the UNCITRAL Model law countries. The latter category is expanding and becoming more important. The Handbook reflects and provides an English translation of the new French arbitration law. It discusses issues including how the state courts view Appointing Authority decisions on challenges and on the obligations not dealt with in the Rules, such as the collegiality amongst arbitrators. The Handbook also examines issues such as non-signatories and the differing treatment of the same Award in *Dallah Real Estate* in the UK Supreme Court¹ and the Paris Court of Appeal.² Another issue is whether it is for the Tribunal or the state court to interpret the scope of the arbitration clause and the US Supreme Court case of *Oxford Health Plans v Sutter*, and the more recent *BG Group v Argentina* case³ and, for England, once again *Dallah Real Estate*. The issue of enforcement of annulled awards has proceeded beyond the *Hilmarton* cases and is now the

¹ *Dallah Real Estate* [2010] UKSC 46.

² *Dallah Real Estate*, Paris Court of Appeal, February 7, 2011.

³ *BG Group PLC v Republic of Argentina* 572 U.S. ____ (2014).

subject of cases such as *Termorio*⁴ and *COMMISA*⁵ in the United States and *Yukos Capital* in the UK.⁶ In what may be a significant change of direction, the French Supreme Court has limited the scope of waivers of sovereign immunity in *NML v Argentina*.⁷ In addition, the French Supreme Court has referred the *Tecnimont* case to the Court of Appeal to examine the issue of waiver.⁸ The Swiss court also annulled an Award as being rendered after the parties' agreed deadline.⁹ In addition, access to court cases continues to improve. UNCITRAL now has a functioning website (<http://www.newyorkconvention1958.org/>) that provides updates on cases from a number of countries regarding the New York convention in those jurisdictions.

In addition to UNCITRAL's material relating to arbitration, various other entities, such as the International Bar Association (IBA) and the International Law Association (ILA) have produced guidelines or recommendations that continue to be discussed and used in international arbitration. The IBA Rules on the Taking of Evidence in International Arbitration as revised in 2010 have become a standard point of reference for arbitration procedure. The IBA Guidelines on Conflicts of Interest continue to provide a point of reference and have been recently amended. The new IBA Guidelines on Party Representation in International Arbitration will also be used as a point of reference. The ILA recommendations seek to grapple with issues of parallel proceedings, *res judicata* and the ascertaining of applicable law and also provide a point of reference in those areas. The trend—despite the hesitation of some practitioners—is to seek to ensure that there are objective points of reference to decide issues in international arbitration rather than leaving matters to the discretion of the Tribunals.

The reception of the first edition of this Handbook was very gratifying. Without limiting my responsibility for any shortcomings in this second edition, it is appropriate to thank various persons. This edition, like the prior editions, reflects the value of discussion of the various legal issues by UNCITRAL and its Secretariat and Working Group II. In particular, I would like to thank Corinne Montineri for her insights on the issue of Transparency in Part II. I would also like to thank Jennifer Sharman-Koh, for her assistance with respect to this edition and to Andreas Webster who carried out research for the book in an effort to reflect the latest developments, particularly with respect to US law.

London, November 17, 2014

⁴ See (2007) ASA Bull Vol.25 No.3, p.643.

⁵ *COMMISA* 2013 WL 4517225 (SDNY August 27, 2013).

⁶ *Yukos Capital* [2012] EWCA 855.

⁷ *NML v Argentina* Cass 1iere March 28, 2013 (No.395); see also the other two decisions of that date Nos 394 and 396.

⁸ Cass 1^{re} June 25, 2014 (11–26.529).

⁹ 4A_490/2013, January 28, 2014.

ABBREVIATIONS

AAA-ICDR	The American Arbitration Association International Centre for Dispute Resolution
ABA	American Bar Association
Am Rev Int'l Arb	The American Review of International Arbitration
Arb Int	Arbitration International
ASA Bull	Swiss Arbitration Association Bulletin
Bus L Int'l	Business Law International
Ch.	Chapter
CA	Cour d'appel (French Court of Appeal)
Cass Civ 1re	Cour de cassation 1ère Chambre Civile (French Supreme Court)
Cass Civ 2eme	Cour de cassation 2ème Chambre Civile (French Supreme Court)
Code of Ethics for Arbitrators	Code of Ethics for Arbitrators in Commercial Disputes (2004) (adopted by the AAA and ABA in 2004)
Colum J Transnat'l L	Columbia Journal of Transnational Law
CPC	French Code of Civil Procedure
CRCICA	The Cairo Regional Centre for International Commercial Arbitration
D.	Dalloz
Disp Res J	Dispute Resolution Journal
England	England and Wales
JDI	Journal de droit international (Clunet)
EU	European Union
IntlALR	International Arbitration Law Review
Int'l Am L R	International American Law Review
Int'l Comp Law Quart	International and Comparative Law Quarterly
IBA	International Bar Association
IBA Guidelines on Conflicts of Interest	IBA Guidelines on Conflicts of Interest in International Arbitration (2014)
IBA Guidelines on Party Representation	IBA Guidelines on Party Representation in International Arbitration (2013)
IBA Rules of Evidence	IBA Rules on Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICC Court	ICC International Court of Arbitration
ICC IC Arb Bull	ICC International Court of Arbitration Bulletin
ICC Rules	ICC Rules of Arbitration (2012)
ILA	International Law Association
ILM	International Legal Materials

J Chart Inst Arb	Journal of the Chartered Institute of Arbitrators
J Int'l Arb	Journal of International Arbitration
Mealey's IAR	Mealey's International Arbitration Report
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OLG	Oberlandesgericht (German Higher Regional Court)
PILA	Swiss Private International Law Act
PLI	Practicing Law Institute
Rev Arb	Revue de l'arbitrage
RDAI/IBLJ	Revue de droit des affaires internationales International Business Law Journal
Rev Crit DIP	Revue critique de Droit International Privé
Rules on Transparency s.	UNCITRAL Rules on Transparency Section
SIAC	Singapore International Arbitration Centre
TDM	Transnational Dispute Management
TGI	Tribunal de Grande Instance (French Court of First Instance)
Tribunal	Arbitral Tribunal
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006
UNCITRAL Notes	UNCITRAL Notes on Organising Arbitral Proceedings (1996)
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010, with new article 1, para.4, as adopted in 2013)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2004)
USC	United States Code
YBCA	Yearbook of Commercial Arbitration
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

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