INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

YEARBOOK

COMMERCIAL ARBITRATION

VOLUME II - 1977

GENERAL EDITOR PIETER SANDERS

KLUWER

INTERNATIONAL COUNCIL
FOR COMMERCIAL ARBITRATION

YEARBOOK

COMMERCIAL ARBITRATION

VOLUME II - 1977

GENERAL EDITOR: PIETER SANDERS

KLUWER

ISBN 90 268 0923 9

Printed in Great Britain

YEARBOOK
COMMERCIAL ARBITRATION

INTRODUCTION

This *second Volume* of the Yearbook, published under the auspices of the International Council for Commercial Arbitration (ICCA), concentrates, as far as national reports are concerned, on those countries where the Anglo-Saxon system of arbitration prevails. The next Volume (Volume III of 1978) will contain in Part I *inter alia* national reports on arbitration law and practice in Latin America; this is because of the ICCA Congress on arbitration, which will take place in Mexico during the last week of March 1978.

Part III, 'New Arbitration Rules', contains the UNCITRAL Arbitration Rules, unanimously approved by the U.N. Commission on International Trade Law on April 28, 1976 and adopted, without further debate, during the 31st Session of the General Assembly on December 15, 1976 with the following resolution:

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Being convinced that the establishment of rules for *ad hoc* arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Bearing in mind that the Arbitration Rules of the United Nations Commission on International Trade Law have been prepared after extensive consultation with arbitral institutions and centres of international commercial arbitration,

Noting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session after due deliberation,

1. *Recommends* the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the UNCITRAL Arbitration Rules in commercial contracts;

2. *Requests* the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules.

In the preparation of this new set of Arbitration Rules ICCA took an active part. I may refer here to the history of the UNCITRAL Rules as described in my Commentary on the Rules in Part III.

The other parts of the Yearbook contain the usual items: Arbitral Awards (Part II), Recent Amendments on Arbitration Statutes (Part IV), Court Decisions on the New York Convention (Part V) and Bibliography (Part VII), all of them brought fully up to date. Part VI (Articles) contains an Article on the successful interim meeting of the ICCA held in Vienna September 29 – October 1, 1976. For the material sent to us with regard to Parts II, IV, V and VII, the general editor is extremely grateful.

I would like to take this opportunity to call again upon the cooperation of all our readers in requesting them to send relevant material to the address of the general editor, mentioned below.

In conclusion, may I express my warm thanks to Dr. Albert Jan van den Berg for his very useful cooperation in composing this Volume of the Yearbook.

Pieter Sanders

Address of the general editor:

Prof. Pieter Sanders
134 Burg. Knappertlaan,
3117 BD Schiedam
Netherlands

TABLE OF CONTENTS

PART V

COURT DECISIONS ON THE NEW YORK CONVENTION 1958

PART VI

ARTICLES

PART VII

BIBLIOGRAPHY OF RECENT PUBLICATIONS ON ARBITRATION

(with the assistance of Albert Jan van den Berg)

Part I
National Reports

AUSTRALIA

*Dr. John Goldring**

Chapter I. Introduction

1. THE LAW OF ARBITRATION

Australia is a federal state. Under the Constitution of the Commonwealth of Australia, powers are divided between the central (Commonwealth) government and the States. Arbitration is a matter which, traditionally, has been covered by State and Territory, rather than Commonwealth, legislation. The Commonwealth Parliament, under its power to legislate with respect to external affairs, and to trade and commerce with other countries, has power to legislate in respect of international commercial arbitration, and has done so in the *Arbitration (Foreign Awards and Agreements) Act* 1974, which gives effect to the 1958 New York Convention.

All other law affecting commercial arbitration is to be found in the statutes and the common law of the States and Territories. The relevant statutes are: New South Wales, *Arbitration Act* 1902 (this Act also applies in the Australian Capital Territory); Victoria, *Arbitration Act* 1958; South Australia, *Arbitration Act* 1891–1974 (the 1891 Act, as in force in 1910, also applies in the Northern Territory); Western Australia, *Arbitration Act* 1895; Tasmania, *Arbitration Act* 1891–1934. These statutes are based on English legislation prior to the 1950 Arbitration Act. The *Arbitration Act* 1973 of Queensland is based on the English Act of 1950, and incorporates the 1958 New York Convention. The Acts are virtually identical. They are applied in the light of the common law, which, for this purpose, includes the common law of England. Decisions of the English Courts, though not strictly binding in Australia, are of high persuasive authority, and, as a general rule, are applied by the Australian courts. The law and practice of commercial arbitration in Australia closely resembles that in England.

In this report, reference will not be made to specific provisions of the State Acts, or to specific reported cases. Any person wishing to conduct arbitration in Australia is strongly advised to consult an Australian lawyer.

2. THE PRACTICE OF ARBITRATION

Except in a limited area, arbitration is favoured neither by the legal profession nor by commercial interests in Australia. It is regarded as cumbersome, ex-

* Senior Lecturer in Law, The Australian National University, Canberra.

pensive, and less efficient, in most cases, than litigation. However, arbitration is commonly used to settle building disputes and disputes arising out of insurance policies.

In agreements between Australian and other parties, which contain an international element, arbitration is increasingly accepted, as it may lead to the avoidance of problems arising from the conflict of laws, especially since the adoption of the 1958 New York Convention, the recognition and enforcement of foreign arbitral awards.

At the date of writing there is no formal body concerned primarily with arbitration. Assistance may be obtained through the various Chambers of Commerce, which are affiliated with the ICC. ICC rules may be used in arbitration.

3. OTHER FORMS OF ARBITRATION

Quality arbitration as such does not exist in Australia. Arbitration is of vital importance in industrial relations in Australia at both State and Federal level, but industrial arbitration is highly specialized, and is conducted exclusively through judicial or quasi-judicial institutions established under State or Federal law. It has no relevance to the law or practice of commercial arbitration.

4. BIBLIOGRAPHY (ALL IN ENGLISH)

P. S. Atiyah, '*International Commercial Arbitration*' in N.S.W. Bar Association, *Lectures on Commercial Arbitration* (1972).

J. L. Goldring, *Commercial Arbitration in Australia-Japan Trade Disputes* (1973) (Sydney, Commercial Law Association).

J. L. Goldring, '*The Supervisory Jurisdiction of the Courts over Decisions of Law by Law Tribunals*' (1974) 9 Melbourne University Law Review 669.

J. L. Goldring, '*Australian Law Affecting International Commercial Arbitration*' (1976) Col. J. Transnat. Law. Vol. 15.

H. K. Lücke, '*Arbitration Clauses in South Australia*' (1975) 5 Adel. L. Rev. 244–259.

N.S.W. Bar Association, *Lectures on Arbitration* (1972, Sydney).

P. E. Nygh, *Conflict of Laws in Australia* (3rd ed., 1976) (Sydney, Butterworths).

P. J. O'Keefe, *Arbitration in International Trade* (1975, Sydney, Prosper Law Publications) (contains a select bibliography).

Russell on Arbitration (18th ed., by Walton 1970) (London, Stevens) (This English text is the basic reference on arbitration in Australia).

Chapter II. Arbitration agreement

1. FORM

Although the courts may stay an action brought in a court where the parties have agreed to refer differences to arbitration, the legislation does not apply until there is a 'submission' to arbitration which is defined to include a reference of existing or future disputes to arbitration. Thus most standard arbitration clauses fall within this definition. There must always be a written agreement, and the agreement will not come into effect until there is a dispute.

An arbitration agreement may be an agreement to submit future disputes to arbitration, or it may be an *ad hoc* submission of an existing difference. There is no need to name an arbitrator, or to state the method of choosing an arbitrator, though it is common to do so.

No particular form of words is required provided there is a clear intention to submit disputes to arbitration. It is advisable to name a place. A general form might be: 'All differences and disputes arising from or under this agreement shall be referred to arbitration in [place] in accordance with the [name of statute of the particular State].' Further words, which are not essential, may provide for the appointment of an arbitrator, and that no action may be brought in any court in respect of a difference arising from or under the agreement, of which the clause forms part, until an award has first been given (*Scott* v. *Avery* clause).

Parties may wish to include the arbitration clause suggested by some institution.

Once an arbitration agreement is concluded, it will be enforced by the courts, subject to public policy, and it may not be revoked by the parties without the leave of the court.

2. GOVERNING LAW

The law of all Australian jurisdictions, like the law of England, on which it is based, regards arbitration as a matter of contract: it is the agreement of the parties to settle their differences in a specific way. However, they must act according to law, and, though they may settle disputes privately, outside the judicial system, the courts maintain a supervisory role to ensure fairness, and especially, that disputes are decided in accordance with law. Only the courts have the power to determine questions of law. Subject to this, the courts will respect and enforce agreements to arbitrate.

Whether or not an agreement to arbitrate exists may depend on construction of the contract, and this will depend upon the law governing the contract. In Australia, as in England, that is the 'proper law' of the contract, i.e. that system of law expressly or impliedly chosen by the parties, or that with which the transaction has 'the closest and most real connection'. Questions of capacity,