

ARBITRATION LAW HANDBOOK

EDITED BY
BEN HORN AND
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BEN HORN & ROGER HOPKINS

Faegre & Benson LLP, International Arbitration Group

informa

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Preface

The practice of international commercial arbitration is unique in the sense that lawyers in one jurisdiction may often conduct arbitrations where the seat of the arbitration is somewhere other than the country in which they are qualified. The substantive law may be the law of their own jurisdiction but the procedural law will be governed by the law of the seat. Arbitrators, schooled in the substantive and procedural law of one jurisdiction, may accept appointments in connection with references to be held abroad.

In compiling the material for this book, the editors have focussed upon not only the established centres of arbitration, such as London, Stockholm, Geneva, Paris, Hong Kong and New York, but also those centres which, for a myriad of reasons, are becoming more popular. These include Singapore and Shanghai, as well as other regionally important centres, in Europe, Asia and South America, with developing reputations as centres for international commercial arbitration.

The leading maritime centres of the world have also developed institutions and separate rules of arbitration for the determination of maritime disputes. Maritime arbitrations are routinely conducted in London under the rules of the LMAA; in Germany under the rules of the GMAA; in Singapore under SMAC rules; in China under CMAC rules; in France under CAMP rules; as well as in other jurisdictions.

The importance of international conventions and agreements relating to international arbitration cannot be overstated. The foremost convention relating to arbitration is the New York Convention which deals with recognition and enforcement of awards. This convention is set out in the international section in its original form and a table showing the 142 signatories has also been included. WIPO, of which there are more than 180 members, provides rules of arbitration for the resolution of disputes concerning intellectual property.

The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which came into force on 14 October 1966, has been signed by 156 states, of which 144 have deposited instruments of ratification. ICSID arbitration awards are required by the Convention to be enforced in all ICSID contracting states whether or not they are a party to the dispute.

The UNCITRAL Model Law is also set out in its entirety; such has been its influence in shaping the international arbitration laws of many countries. More than 50 countries have introduced legislation based on the provisions of the Model Law, which has contributed greatly to the harmonisation of the laws of international commercial arbitration. This process is continuing. In the section dealing with the UAE it is noted that the existing law of international arbitration is in the course of revision in line with the UNCITRAL Model law.

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PREFACE

Daniel (based in Frankfurt), Peter Neumann and Dawn Zhang (Shanghai), and Walt Duffy (Minneapolis).

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Contents

<i>Acknowledgements</i>	vii
<i>Preface</i>	ix

A. AGREEMENTS RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION

Overview	1
A.1 UNCITRAL Model Law on International Commercial Arbitration 1994	3
A.2 UNCITRAL Arbitration Rules (General Assembly Resolution 31/98)	20
A.3 WIPO Arbitration and Expedited Arbitration Rules	31
A.4 ICSID Arbitration Rules	69
A.5 ICSID List of Contracting States and other Signatories of the Convention	84
A.6 United Nations Conference on International Commercial Arbitration —Convention on the Recognition and Enforcement of Foreign Arbitral Awards—“New York Convention”	89
A.7 Parties to the “New York Convention”	92
A.8 Arab Convention on Commercial Arbitration	97
A.9 Inter-American Convention on International Commercial Arbitration (Panama Convention, 30 January 1975)	104
A.10 Geneva Convention on the Execution of Foreign Arbitral Awards	106
A.11 European Convention on International Commercial Arbitration	108

B. AUSTRALIA

Overview	115
B.1 International Arbitration Act 1974	116
B.2 ACICA Arbitration Rules 2005	154
B.3 IAMA Arbitration Rules	166

C. AUSTRIA

Overview	175
C.1 Code of Civil Procedure—Fourth Chapter	176
C.2 International Arbitral Centre of the Austrian Federal Economic Chamber Vienna—Rules of Arbitration and Conciliation (Vienna Rules)	180

CONTENTS

D. BELGIUM

Overview	194
D.1 CEPANI Rules	195

E. BRAZIL

Overview	232
E.1 Law No. 9.307 of 23 September 1996	233
E.2 São Paulo Arbitration Chamber Rules	241

F. CANADA

Overview	246
F.1 Commercial Arbitration Act R.S., 1985, C. 17 (2nd Supp.)	247
F.2 CCAC International Arbitration Rules, 2003	257
F.3 ADR Chambers International Arbitration Rules	267

G. CHINA

Overview	271
G.1 Arbitration Law of the People's Republic of China, 1994	272
G.2 CIETAC Arbitration Rules	284
G.3 China Maritime Arbitration Commission Arbitration Rules	298

H. FRANCE

Overview	301
H.1 Code of Civil Procedure	302
H.2 Chambre Arbitrale Maritime de Paris Arbitration Rules and Annex I	305
H.3 ICC Rules of Arbitration	315

I. GERMANY

Overview	333
I.1 German Arbitration Act	334
I.2 Deutsche Institution für Schiedsgerichtsbarkeit E.V. (DIS) (German Institution of Arbitration) Arbitration Rules 1998	344
I.3 Arbitration Rules of the German Maritime Arbitration Association	356

J. HONG KONG

Overview	362
J.1 Arbitration Ordinance 1997—Chapter 341	363
J.2 Hong Kong International Arbitration Centre (HKIAC) Procedures for the Administration of International Arbitration	399
J.3 HKIAC Securities Arbitration Rules	404
J.4 HKIAC Electronic Transaction Arbitration Rules	413

CONTENTS

K. INDIA

Overview	431
----------	-----

L. IRELAND

Overview	432
L.1 Arbitration (International Commercial) Act 1998	433
L.2 Arbitration Rules of the Chartered Institute of Arbitrators—Irish Branch	447

M. JAPAN

Overview	455
M.1 Arbitration Law	456
M.2 The Japan Commercial Arbitration Association Commercial Arbitration Rules	472
M.3 Amendment of JCAA Commercial Arbitration Rules 2006	486
M.4 Administration and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules	486

N. KOREA

Overview	490
N.1 Arbitration Act of Korea	491
N.2 The Rules of International Arbitration for the Korean Commercial Arbitration Board 2007	499

O. MEXICO

Overview	514
O.1 Book Five, Title Four, Commercial Arbitration	515
O.2 Mexico City National Chamber of Commerce Arbitration Rules	524
O.3 Rules of Arbitration of the Arbitration Center of Mexico (CAM)	536

P. NETHERLANDS

Overview	549
P.1 Arbitration Act 1986—Dutch Code of Civil Procedures	550
P.2 Netherlands Arbitration Institute (NAI)—Arbitration Rules	553
P.3 TAMARA Arbitration Rules	581

Q. NORWAY

Overview	586
Q.1 Norwegian Arbitration Act 2004	587
Q.2 Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce	597

CONTENTS

R. RUSSIAN FEDERATION

Overview	612
R.1 Law of the Russian Federation on International Commercial Arbitration	613
R.2 Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation	624

S. SINGAPORE

Overview	642
S.1 Singapore Arbitration Act 2001 (Chapter 10)	643
S.2 International Arbitration Act 2005 (Chapter 143A)	661
S.3 Arbitration Rules of the Singapore International Arbitration Centre (SIAC)	684
S.4 Arbitration Rules of the Singapore Chamber of Maritime Arbitration	694
S.5 Arbitration (International Investment Disputes) Act (Chapter 11)	705

T. SWEDEN

Overview	707
T.1 Swedish Arbitration Act 1999	708
T.2 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce	719
T.3 Rules for Expedited Arbitrations	731
T.4 Insurance Arbitration Rules	743

U. SWITZERLAND

Overview	745
U.1 Federal Statute on Private International Law—Twelfth Chapter: International Arbitration	746
U.2 Swiss Rules of International Arbitration (Swiss Rules) January 2006	749

V. UKRAINE

Overview	767
V.1 The Law of Ukraine on International Commercial Arbitration 1994	768
V.2 Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry	776
V.3 Rules of the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry	791

W. UNITED ARAB EMIRATES

Overview	807
W.1 The UAE Civil Procedure Code	808
W.2 Dubai International Financial Centre Arbitration Law	811
W.3 DIAC Arbitration Rules of Commercial Conciliation and Arbitration, 2007	824

CONTENTS

X. UNITED KINGDOM

Overview	840
X.1 Arbitration Act 1996	842
X.2 The LCIA Rules	888
X.3 Chartered Institute of Arbitrators Arbitration Rules (2000 Edition)	900
X.4 The LMAA Terms (2006)	907
X.5 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Section 66 (C.40)	923
X.6 The Scottish Arbitration Code 1999	932

Y. UNITED STATES OF AMERICA

Overview	942
Y.1 The Federal Arbitration Act	943
Y.2 American Arbitration Association International Dispute Resolution Procedures	948
Y.3 Maritime Arbitration Rules	963
<i>Index</i>	973

Agreements Relating to International Commercial Arbitration

OVERVIEW

The 1985 UNCITRAL Model Law was adopted on 21 June 1985. It was drafted in order to assist states in reforming and modernizing their laws of international arbitration. Concern existed as to the need to improve and harmonize these laws because then existing national laws had often been drawn up with domestic arbitration in mind. The Model Law has been accepted by states of all regions with different legal or economic systems. Currently, legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in around 50 states, including Australia, Azerbaijan, Bulgaria, Greece, the Islamic Republic of Iran, Japan, Jordan, Mexico, Paraguay, Poland, Tunisia and Turkey. A full list of countries whose laws of international commercial arbitration are based on the Model Law is available at the UNCITRAL web site.

The 1976 UNCITRAL Arbitration Rules provide a set of procedural rules upon which the parties may agree for the conduct of all procedural aspects of the reference. They are often used in ad hoc references, as well as in administered arbitrations and are set out in Section A.2. below.

The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States which came into force on 14 October 1966 provided for the creation of the International Centre for Settlement of Investment Disputes (ICSID). ICSID is an autonomous international organization with close links to the World Bank. Pursuant to the convention, ICSID provides a system of arbitration and conciliation of disputes between member states and investors who are nationals of other member countries. The recourse to international arbitration is an important safeguard for the investor. All ICSID contracting states, of which there are 157 as of 9 May 2007, are required by the Convention to recognize and enforce ICSID arbitration awards. The ICSID rules of arbitration are set out in Section A.4.

The World Intellectual Property Organization (WIPO), based in Geneva, was set up pursuant to the Convention Establishing the World Intellectual Property Organization in 1967. It provides arbitration and other forms of alternative dispute resolution procedures in relation to disputes concerning intellectual property. WIPO dispute resolution clauses are common in a variety of contracts involving intellectual property, such as patent, know how and software licences, franchises, trademark co-existence agreements, distribution contracts, joint ventures, research and development contracts, technology-sensitive employment contracts, mergers and acquisitions with important intellectual property aspects, sports marketing agreements and publishing, music and film contracts. There were, as of July 2007, 184 member countries, all of whom under WIPO Rules agree to carry out decisions of the arbitral tribunals without delay.

Arbitration awards are enforceable pursuant to the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention does not apply to all awards and limited grounds for non-recognition are provided for in the Convention, the full text of which is set out in Section A.9. Currently the Convention has been signed by 142 states.

A.1 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1994

CONTENTS

UNCITRAL Model Law on International Commercial Arbitration

Chapter I General provisions

- Article 1 Scope of application
- Article 2 Definitions and rules of interpretation
- Article 3 Receipt of written communications
- Article 4 Waiver of right to object
- Article 5 Extent of court intervention
- Article 6 Court or other authority for certain functions of arbitration assistance and supervision

Chapter II Arbitration agreement

- Article 7 Definition and form of arbitration agreement
- Article 8 Arbitration and substantive claim before court
- Article 9 Arbitration agreement and interim measures by court

Chapter III Composition of arbitral tribunal

- Article 10 Number of arbitrators
- Article 11 Appointment of arbitrators
- Article 12 Grounds for challenge
- Article 13 Challenge procedure
- Article 14 Failure or impossibility to act
- Article 15 Appointment of substitute arbitrator

Chapter IV Jurisdiction of arbitral tribunal

- Article 16 Competence of arbitral tribunal to rule on its jurisdiction
- Article 17 Power of arbitral tribunal to order interim measures

Chapter V Conduct of arbitral proceedings

- Article 18 Equal treatment of parties
- Article 19 Determination of rules of procedure
- Article 20 Place of arbitration
- Article 21 Commencement of arbitral proceedings
- Article 22 Language
- Article 23 Statements of claim and defence
- Article 24 Hearings and written proceedings
- Article 25 Default of a party
- Article 26 Expert appointed by arbitral tribunal
- Article 27 Court assistance in taking evidence

Chapter VI Making of award and termination of proceedings

- Article 28 Rules applicable to substance of dispute
- Article 29 Decision making by panel of arbitrators
- Article 30 Settlement
- Article 31 Form and contents of award
- Article 32 Termination of proceedings
- Article 33 Correction and interpretation of award; additional award

Chapter VII Recourse against award

- Article 34 Application for setting aside as exclusive recourse against arbitral award

Chapter VIII Recognition and enforcement of awards

- Article 35 Recognition and enforcement
- Article 36 Grounds for refusing recognition or enforcement

A.1 AGREEMENTS RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION

Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration

- A. Background to the Model Law
 - 1. Inadequacy of domestic laws
 - 2. Disparity between national laws
- B. Salient features of the Model Law
 - 1. Special procedural regime for international commercial arbitration
 - 2. Arbitration agreement
 - 3. Composition of arbitral tribunal
 - 4. Jurisdiction of arbitral tribunal
 - 5. Conduct of arbitral proceedings
 - 6. Making of award and termination of proceedings
 - 7. Recourse against award
 - 8. Recognition and enforcement of awards

CHAPTER I GENERAL PROVISIONS

Article 1 Scope of application¹

(1) This Law applies to international commercial² arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
 - (b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2 Definitions and rules of interpretation

For the purposes of this Law:

- (a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

1. Article headings are for reference purposes only and are not to be used for purposes of interpretation.

2. The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

- (b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
- (c) “court” means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3 Receipt of written communications

- (1) Unless otherwise agreed by the parties:
 - (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
 - (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.

Article 4 Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5 Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6 Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by . . . [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II ARBITRATION AGREEMENT

Article 7 Definition and form of arbitration agreement

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.