ARBITRATION LAW HANDBOOK

EDITED BY
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Faegre & Benson LLP, International Arbitration Group

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To

Jamie, Alex, Charlotte and Christina
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Zoe, Kate, Christopher, Henry and Charlie

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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 that 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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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

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CHAPTER I GENERAL PROVISIONS

Article 1 Scope of application[1]

(1) This Law applies to international commercial[2] 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.