

Comparative International Commercial Arbitration

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FOREWORD

This book has been long in gestation. Originally conceived as a textbook for students on the London University and other postgraduate international commercial arbitration programmes it has developed to a significantly deeper study. It is now a work that it is hoped will be a guide and assistance to lawyers practising in the area of international arbitration. We hope that it will be useful also to the student and lawyer involved occasionally with international dispute settlement.

International arbitration is essentially a private, comparative and international mechanism. No two arbitrations are the same. There are few absolutes. There are no fixed rules or procedures. Any factual variation will invariably result in a significant change in the context and structure of the arbitration. The matrix which affects every arbitration varies depending upon the arbitration agreement, the procedure agreed by the parties, the nationality of the parties, the make-up of the tribunal, the applicable arbitration rules, the substantive applicable law or rules, the subject-matter of the dispute, the mandatory law of the place of arbitration and the permissive law where everything else is silent.

All of these factors are directly controlled by party autonomy. The choice of arbitration by the parties and their decision as to how, where and what the procedure should be is the decisive factor in every case. The simple agreement of the parties to refer disputes to arbitration is a positive rejection of the national courts and in many cases strict national law procedure. The right of parties to determine all aspects of the arbitration is unquestioned. Accordingly, party autonomy has the greatest control on international commercial arbitration.

The effect of party autonomy is a major reason why arbitration has achieved world-wide acceptance as the favoured and principal mechanism for resolving disputes arising out of international commercial transactions. Party autonomy also has been the main influence on the development of truly transnational rules and practices for international arbitration. These rules and practices have crossed the barriers of legal systems and national laws. There are accordingly few determinative answers in arbitration.

The principal factor outside party autonomy that has directly influenced international arbitration practice and law has been the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This Convention is the backbone to the acceptance of international arbitration by the business world. It sets down simply the obligation of states to recognise and give

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effect to the agreement of parties to refer their disputes to arbitration in preference to a national court jurisdiction. If one party commences court proceedings in defiance of a valid arbitration agreement the national court should stay its proceedings and send the parties to arbitration.

The New York Convention also established the system to ensure the maximum possibility for the simple enforceability of arbitration awards. Over 130 countries are presently party to the New York Convention. The most significant effect of the New York Convention has been the harmonisation of the approach to enforcement of awards through the application of the New York Convention principles in national laws and courts. Whilst there remain countries whose courts do not always follow the spirit and letter of the New York Convention, they are rare exceptions. In the main arbitration awards made in one country will be recognised and enforced in any other state party to the New York Convention.

International arbitration has become independent from national laws and courts in practice and legally. Parties and arbitrators do, in the main, conduct proceedings in a rarefied non-national or international legal environment. Whilst there may, in some cases, be influences from national law on the procedure, this can be controlled by the parties, the arbitrators and international practice. Experienced arbitration lawyers and the major international arbitration institutions have recognised national procedural laws are generally irrelevant and inapplicable. These international practices are acknowledged and upheld by arbitration awards being recognised and enforced under the New York Convention.

The plethora of other international instruments, such as the Algiers Accords, bilateral investment treaties, North American Free Trade Association and the Energy Charter Treaty, further evidence the recognition of arbitration as an autonomous process. The *lex mercatoria*, as evidenced in part in the UNIDROIT Principles of International Commercial Contracts and the Vienna Convention on International Sale of Goods, is naturally applicable by international arbitration tribunals. This again is testament to the autonomous character of the international arbitration process.

The UNCITRAL Model Law on International Commercial Arbitration has reduced to legal formality much that transpires in practice. It reflects a common denominator of laws applicable to international arbitration. It is a compromise which has stripped out national characteristics and contains provisions acceptable to most systems. Many of its provisions are general and it is left to arbitration tribunals and national courts to interpret them. The Model Law has been adopted

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in over 30 jurisdictions. Decisions of an international tribunal or national court concerning the terms of the Model Law will influence how other tribunals or courts will interpret and apply the same provisions.

This book addresses all these issues and seeks to reflect international arbitration practice, *i.e.* what parties and arbitrators do, how arbitration is conducted, and the principles pertaining to the arbitration agreement, the formation, role and functions of arbitration tribunal, and the importance and effect of the arbitration award. These practices are illustrated by published international awards, the international instruments and arbitration rules, and some national court decisions. At every stage of the arbitration process there remains a conceptual legal conflict between the inherent international and autonomous character of arbitration and the national laws of the parties and the place of arbitration. These issues are reviewed with particular reference to national constitutional and regulatory systems, the effect of mandatory laws of connected states, European and international law including international human rights instruments.

As with any project of this kind there are many individuals who have supported, cajoled, encouraged and assisted in its completion. In particular, my secretary at Herbert Smith, Martina Gamberoni, has typed and retyped many drafts and revisions of the text, and prepared the camera ready script. My assistant at Herbert Smith, Norah Gallagher, has co-ordinated the editorial of the project, with additions and footnotes added by each of the authors, and has taken the editorial role to help with consistency and objective clarity. Gui Conde e Silva, a research student at the School of International Arbitration, Centre for Commercial law Studies, Queen Mary, has assisted with editing the book and the footnotes, and prepared the lists of abbreviations, laws, conventions, cases and awards and the general index. Our publisher, Gwen de Vries, has shown patience as deadlines have passed. Her encouragement and support are much appreciated.

Responsibility for the content and views in this book are those of its three authors. Its merits will be judged by those who use this book.

Julian D M Lew
March 2003

TABLE OF ABBREVIATIONS

INSTITUTIONS, ORGANISATIONS AND RULES

The Institution may import the Rules

AAA	American Arbitration Association
AIA	Italian Arbitration Association
ASA	Swiss Arbitration Association
CAMCA	Commercial Arbitration and Mediation Centre for the Americas
CCPIT	China Council for the Promotion of International Trade
CEPANI	Belgian Centre for Arbitration and Mediation
CIETAC	China International Economic and Trade Arbitration Commission
CMEA	Council for Mutual Economic Assistance (Eastern Europe) (COMECON)
CMI	Comité Maritime International
CPR Institute for Dispute Resolution	Center for Public Resources Institute for Dispute Resolution
CRCICA	Cairo Regional Centre For International Commercial Arbitration
CRT	Claims Resolution Tribunal for Dormant Accounts in Switzerland
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
EC	European Community
ECAFE	United Nations Economic Commission for Asia and the Far East
ECOSOC	United Nations Economic and Social Council
EDF	European Development Fund
EEC	European Economic Community
EU	European Union
FALCA	Fast and Low Cost Arbitration (LMAA)
FIDIC	Fédération Internationale des Ingénieurs-Conseils
GAFTA	Grain and Feed Trade Association

Abbreviations

Geneva	Chamber of Commerce and Industry of Geneva Arbitration Centre
HKIAC	Hong Kong International Arbitration Centre
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
ICA	Indian Council of Arbitration
ICAC	Moscow International Commercial Arbitration Court
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	American Arbitration Association International Center for Dispute Resolution
ICHEIC	International Commission on Holocaust Era Insurance Claims
ICSID	International Centre for the Settlement of Investment Disputes
IFCAI	International Federation of Commercial Arbitration Institutions
JCAA	Japan Commercial Arbitration Association
Korea	Korean Commercial Arbitration Association
Kuala Lumpur	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
LME	London Metal Exchange
MERCOSUR	Common Market of the Southern Cone pursuant to the Treaty of Asunción of 26 March 1991
MIGA	Multilateral Investment Guarantee Agency
NAI	Netherlands Arbitration Institute
NOFOTA	Netherlands Oil, Fats and Oilseeds Trade Association

Abbreviations

OECD	Organisation for Economic Co-operation and Development
OHADA	Organization for the Harmonization of Business Law in Africa
PCA	Permanent Court of Arbitration (The Hague)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SIAC	Singapore International Arbitration Centre
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission for International Trade Law
UNECE	United Nations Economic Commission for Europe
UNIDROIT	International Institute for the Unification of Private Law
Venice	Venice Arbitration Court Rules 1998
Vienna	Austrian Federal Economic Chamber in Vienna
WIPO	World Intellectual Property Organisation
Zurich	Zurich Chamber of Commerce

GENERAL ABBREVIATIONS

AC	Law Reports, House of Lords (Appeal Cases)
ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALR	Australian Law Reports
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Am U Int'l L Rev	American University International Law Review
Ann IDI	Annuaire de l'Institut de droit international

Abbreviations

Arb Int	Arbitration International
Arbitration	Arbitration, Journal of the Chartered Institute of Arbitrators
ASA Bulletin	Swiss Arbitration Association Bulletin
Asian DR	Asian Dispute Review
ATF	Arrêts du Tribunal Fédéral Suisse
Betriebs-Berater	Der Betriebs-Berater (German journal)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des schweizerischen Bundesgerichts
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen
Boston U Int'l L J	Boston University International Law Journal
BT-Drs	Bundestags-Drucksache
BverfGE	Entscheidungen des Bundesverfassungsgerichts
BYBIL	British Yearbook of International Law
CA	Court of Appeal of England and Wales
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CC	Code civil, codice civile, civil code
CCI	Chamber of Commerce and Industry of the Russian Federation
CCP	Code of Civil Procedure
ChD	Chancery Division
CIF	Cost, insurance, freight
CISG	United Nations Convention on the International Sale Goods
CLR	Commonwealth Law Reports
Clunet	Journal de droit international
Columbia J Transnat'l L	Columbia Journal of Transnational Law
Con LR	Construction Law Reports
CPR	Civil Procedure Rules (England)
Croat Arbit Yearb	Croatian Arbitration Yearbook

Abbreviations

DAC	Departmental Advisory Committee
Décisions et rapports	Décisions et rapports of the European Court of Human Right
DIS-Materialien	DIS collection of materials on arbitration
Disp Res J	Dispute Resolution Journal
DLR	Dominion Law Reports
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
EDNY	Eastern District of New York
EHRR	European Human Rights Reports
EJCL	Electronic Journal of Comparative Law
ER	English Reports
European Convention	European Convention on International Commercial Arbitration 1961(Geneva).
European Comm HR	European Commission of Human Rights
European Ct HR	European Court of Human Rights
EWCA Civ	Neutral citation for England and Wales Court of Appeal civil division decisions
EWiR	Entscheidungen zum Wirtschaftsrecht
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
FAA	United States Federal Arbitration Act
Fair Empl Prac Cas	Fair Employment Practice Cases
FOB	Free on board
FS	Festschrift
F Supp	Federal Supplement
GDR	German Democratic Republic
Geo Wash J Int'l L & Eco	George Washington University Journal of International Law and Economics
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
HKHC	Hong Kong High Court

Abbreviations

HKLJ	Hong Kong Law Journal
HL	House of Lords
IBA Rules	IBA Rules on the taking of Evidence in International Commercial Arbitration, 1999
ICC Bulletin	International Chamber of Commerce International Court of Arbitration Bulletin
ICLQ	International and Comparative Law Quarterly.
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
IECL	International Encyclopedia of Comparative Law
INCOTERMS	ICC International Commercial Terms
Int ALR	International Arbitration Law Review
Int'l Bus Law	International Business Lawyer
Int'l Fin L Rev	International Financial Law Review
Int'l Law	International Lawyer
ILM	International Legal Materials
ILR	International Law Reports
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
IPRspr	Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre ...
Iran-US CTR	Iran-US Claims Tribunal Reports
JBL	Journal of Business Law
J Int'l Arb	Journal of International Arbitration.
Journal des Tribunaux	(Belgian) Journal des Tribunaux
Juris-Classeur Proc Civ	Juris-Classeur (procedure civile)
KTS	Konkurs-Treuhand und Schiedsgerichtswesen
Law & Policy in Int'l Bus	Law & Policy in International Business
Lloyd's Rep	Lloyd's Law Reports
Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Louisiana L Rev	Louisiana Law Review

Abbreviations

Mealey's IAR	Mealey's International Arbitration Reports
Minn L Rev	Minnesota Law Review
Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted 21 June 1985
MR	Master of the Rolls
NCPC	French Code of Civil Procedure (Nouveau Code de Procedure Civile)
NE	North East Reporter
Ned Jur	Nederlands Jurisprudentie
New L J	New Law Journal
New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NJW	Neue Juristische Wochenschrift.
NSWLR	New South Wales Law Reports
NW J Int'l L & Bus	Northwestern Journal of International Law and Business
NYAD	New York Appellate Division
NYLJ	New York Law Journal
NY L Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law
OJ	Official Journal of the European Communities
PC	Privy Council
PIL	(Swiss) Private International Law
QBD	Queen's Bench Division
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RCADI	Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law
RDAl/IBLJ	Revue de droit des affaires internationales / International Business Law Journal
Rev Arb	Revue de l'arbitrage
Rev crit dip	Revue critique de droit international privé

Abbreviations

RHDI	Revue hellénique de droit international
Riv Arb	Rivista dell' Arbitrato
RIW	Recht der Internationalen Wirtschaft
Rome Convention	EC (Rome) Convention on the Law Applicable to Contractual Obligations 1980
RPS	Recht und Praxis der Schiedsgerichtsbarkeit
Rutgers L Rev	Rutgers Law Review
SchiedsVZ	Zeitschrift für Schiedsverfahren
SchwZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
S Ct	Supreme Court of the United States
SDNY	Southern District of New York
SLT	Scots Law Times Reports
Texas Int'l LJ	Texas International Law Journal
Tulane L Rev	Tulane Law Review
UCC	Uniform Commercial Code
U Cin L Rev	University of Cincinnati Law Review
UCP 500	Uniform Customs and Practices relating to Documentary Credits – ICC publication no 500
U Ill L Rev	University of Illinois Law Review
UKPC	Neutral citation for decisions of the Privy Council
U Miami Inter-Am L Rev	University of Miami Inter-American Law Review
UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics
Vanderbilt L Rev	Vanderbilt Law Review
WAMR	World Arbitration and Mediation Report
Washington Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965

Abbreviations

WIPO Expedited Rules

WL

WLR

WM

WTAM

WuB

Yale LJ

YBCA

ZBB

ZfRV

ZIP

ZPO

ZVglRwiss

WIPO Expedited Rules

Westlaw

The Weekly Law Reports

Wertpapier-Mitteilungen

World Trade and Arbitration Materials

Entscheidungssammlung zum Wirtschafts-
und Bankrecht

Yale Law Journal

Yearbook of Commercial Arbitration

Zeitschrift für Bankrecht und Bankwirtschaft

Zeitschrift für Rechtsvergleichung

Zeitschrift für Wirtschaftsrecht und
Insolvenzpraxis

German Code of Civil Procedure (ZPO)

Zeitschrift für vergleichende
Rechtswissenschaften

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