STUDIES IN COMPARATIVE CORPORATE AND FINANCIAL LAW

Conflicting Legal Cultures in Commercial Arbitration

Old Issues and New Trends

Editors
Stefan N. Frommel
and Barry A.K. Rider

INSTITUTE OF ADVANCED LEGAL STUDIES
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KLUWER LAW INTERNATIONAL

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KLUWER LAW INTERNATIONAL
THE HAGUE - LONDON - BOSTON

Published by
Kluwer Law International Ltd
Sterling House
66 Wilton Road
London SW1V 1DE
United Kingdom

Sold and distributed
in the USA and Canada by
Kluwer Law International
675 Massachusetts Avenue
Cambridge MA 02139
USA

Kluwer Law International incorporates
the publishing programmes of
Graham & Trotman Ltd,
Kluwer Law & Taxation Publishers
and Martinus Nijhoff Publishers

In all other countries, sold and distributed by
Kluwer Law International
P.O. Box 322
3300 AH Dordrecht
The Netherlands

ISBN 90–411–1227–8
Series ISBN 90–411–9670–6

British Library Cataloguing in Publication Data
A catalogue record for this is available from the British Library

Library of Congress Cataloging-in-Publication Data
Conflicting legal cultures in commercial arbitration : old issues
and new trends / Stefan N. Frommel and Barry A.K. Rider (eds.).
p. cm. – – (Studies in comparative corporate and financial law:
v. 4)
ISBN 9041112278. – – ISBN 9041196706 (series)
1. Conflict of laws– –Arbitration and award. 2. Arbitration and
award, International. I. Frommel, Stefan N. II. Rider, Barry
Alexander K. III. Series.
K7690.C66 1999
341.5'22– –dc21

99-35739
CIP

Typeset in 11/13 pt Times by Midland Book Typesetting, Loughborough
Printed and bound in Great Britain by Antony Rowe Limited, Reading, Berkshire

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Volume 4

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London WC1 5DR

The titles published in this series are listed at the end of this volume

Preface

The Institute of Advanced Legal Studies has long had more than a passing interest in the resolution of disputes other than through the traditional judicial system. In part this stems from the position of the Institute as *de facto* the law library of the Commonwealth and hence its exposure to and interest in a variety of mechanisms and systems for the resolution or mediation of disputes beyond those contemplated by the English common law. In recent years the Institute's role as the national law library for Britain has necessitated a much greater degree of involvement in legal systems outside the Commonwealth and the traditions of the common law. Consequently, successive Directors of the Institute have encouraged interest in the law and practice relating to alternative dispute resolution procedures. It is in this context that this volume of essays has been assembled and published.

The Institute held a series of public lectures during its jubilee year, on the law of arbitration under the chairmanship and inspiration of Professor Stefan Frommel. The lectures were generously supported by Simmons & Simmons and Kirkland & Ellis and attracted considerable interest. The calibre of speakers and the quality of their papers was such that there was widespread support for the proposal that the Institute should produce a collection of the essays, supplemented by one or two additional contributions. Professor Frommel and I undertook to do this and this volume is the result of, I must say, largely Professor Frommel's powers of persuasion and persistence. The collection is not as disparate as it may at first seem. The theme is the development of arbitration as a device, and the law and practice that has grown up around it, in the context of commercial disputes. Of particular interest, is the essentially cross-cultural perspective of this discussion reflecting, of course, one of the primary strengths of the very process of arbitration. The Institute is in the process of establishing other initiatives and programmes on the basis of this highly

successful project and contemplates the drawing together of its work in the area of alternative dispute resolution under a research centre.

The editors wish to acknowledge the considerable support that they have received from the contributors to this book. All are busy scholars and practitioners and all have undertaken revision and up-dating of their papers to render them relevant and accurate at the date of publication. The editors must also acknowledge the assistance of Mr Richard Alexander, The Rowe and Maw Research Officer in European Law, at the Institute for assisting in the co-ordination of the project, as well as, of course, our publishers, Kluwer Law International.

Professor Barry A.K. Rider
Jesus College, Cambridge
1 July 1999

Biographies of Authors

Dr. Christian Borris

Dr. Christian Borris is a specialist in corporate and commercial law and arbitration, educated at the Universities of Giessen and Cologne and the University of Miami School of Law. A Partner in the Cologne office of Deringer Tessin Herrmann & Sedemund, Dr. Borris was admitted as a Rechtsanwalt in 1989 and was further admitted to the Oberlandesgericht of Cologne in 1994. He previously served as Legal Assistant to the President of the Iran–United States Claims Tribunal in the Hague from 1987 to 1989. Dr. Borris is a member of the German Bar Association, the German–American Lawyers' Association and the German Institution of Arbitration.

Bernardo M. Cremades

Dr. Bernardo Cremades holds doctorates in Spanish law, from the University of Seville, and German law, from the University of Cologne. He is a highly distinguished arbitrator, among his many present posts being President of the Spanish Court of Arbitration and of the Arbitration Commission of the High Council of the Spanish Chambers of Commerce, Industry and Navigation, Member of the Chartered Institute of Arbitrators in London, the Panel of Foreign Arbitrators of the London Court of Arbitration, the Court of Maritime Arbitration in Monaco and the International Council for Commercial Arbitration. He has previously held such posts as Associate President of the Arbitration Committee of the United Nations for Perishable Products in Geneva, Chairman of the Arbitration Commission of the World Peace Through Law Center and Member of the Panel on Arbitration of the ICSID. He is also a practising advocate, member of the Bars of Madrid, Paris and Brussels.

Professor Cremades has enjoyed a no less distinguished academic career: *Catedrático* Professor at the University of Madrid and Member of the Academic Council of the International Institute for Business Law.

He has published numerous articles and books, both in Spanish and English, on the subjects of international commercial law and arbitration, among them *Panorámica española del arbitraje comercial internacional*, Madrid 1975; *Arbitraje comercial internacional* (2nd edn.), Madrid 1984, *Litigating in Spain*, Kluwer 1989, *Arbitration in Spain*, Butterworths 1991 and *Business Law in Spain*, Butterworths 1992.

Jonathon Crook

Jonathon Crook is a partner in the Hong Kong office of Simmons & Simmons. He was educated at the University of Cambridge, where he graduated with First Class Honours in Law, and at Yale Law School. He was admitted as a solicitor in England and Wales in 1991 and in Hong Kong in 1995. Prior to joining Simmons & Simmons, Jonathon worked for Standard Chartered Bank in Bombay where he represented the bank in relation to various proceedings, including actions in the Bombay High Court and arbitrations arising out of the Bombay securities scandal of 1991–1992.

Jonathon specialises in commercial litigation and arbitration, contentious insolvency matters and regulatory disputes. He has written a number of articles on arbitration in Hong Kong and the Asia Pacific region.

Horacio A. Grigera Naón

Dr. Horacio A. Grigera Naón is Secretary General of the International Court of Arbitration of the International Chamber of Commerce. He was educated at the University of Buenos Aires and Harvard Law School and holds doctorates from both. Dr. Grigera Naón, a member of the Bars of Buenos Aires, New York and the US Supreme Court, has practised in the field of international business law and international commercial arbitration for some 25 years and has published widely on both of these topics.

Serge Lazareff

Dr. Serge Lazareff, an avocat with Lazareff & Associés in Paris, is a specialist in corporate law and international arbitration. He was educated at the University of Paris and Harvard Law School, where he was a John Harvey Gregory Fellow. Dr. Lazareff has advised the French Government on a number of major projects, in particular during the negotiations surrounding Eurodisney, in which he advised both the French Republic and the Département of Seine-et-Marne. He previously served

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Serge Lazareff was General Counsel for International Operations and Vice President of Asia Pasific of Pechiney, a major French Co-operation.

Dr. Lazareff has enjoyed a prestigious career in arbitration, having appeared either as Chairman, arbitrator or counsel in 70 cases before such tribunals as the International Chamber of Commerce, the London Court of International Arbitration and UNCITRAL. These cases have involved the application of the laws of a wide variety of jurisdictions including France, England & Wales, Greece, Brazil, Korea and several US states. He is Chairman of the International Arbitration Commission (the French National Committee of the ICC), the ICC Working Group on Terms of Reference. He is the chairman of the ICC Institute of World Business Law and of the PIDA programme which is the ICC International Training Programme.

He is also Director of the Mediation and Arbitration Center of the Paris Chamber of Commerce and Member of the ICC International Arbitration Commission.

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Andreas F. Lowenfeld is Herbert and Rose Rubin Professor of International Law at New York University School of Law, where he specialises in both public and private international law, international economic transactions, litigation and arbitration. He was educated at Harvard University and Harvard Law School. Before joining New York University, he served as Special Assistant, Assistant Legal Adviser and Deputy Legal Adviser to the US Department of State. He is also a member of the Institut de Droit International, has twice been a Lecturer at the Hague Academy of International Law and has served as Associate Reporter for the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States*. Professor Lowenfeld has published widely on various aspects of international trade, investment, finance and dispute settlement, including *International Litigation and Arbitration*, *International Economic Law*, a 6 volume series, and, most recently, *International Litigation and the Quest for Reasonableness*.

Ambassador Malcolm Wilkey

Ambassador Malcolm R. Wilkey, a specialist in the areas of international, commercial and administrative law, has been an arbitrator at the highest level since 1991. He served on the United States–Chile Arbitration (Bryan–Suarez) Commission and in arbitration under the US–Canada Free Trade Agreement. Earlier in his career, Ambassador Wilkey held three Presidential appointments in the US Government, rising to Assistant Attorney General of the United States. Following 9 years in private practice, he returned to public service in 1970 as United States Circuit Judge of the US Court of Appeals for the District of Columbia Circuit and finally US Ambassador to Uruguay from 1985 to 1990. He was Chairman of President's Committee on Revision of Federal Ethics Laws in 1989 and Special Counsel to the US Attorney General for the Inquiry into the House Banking Facility in 1992.

Ambassador Wilkey's academic career has been no less notable, including Visiting Chairs at Brigham Young Law School, San Diego Law Summer School in Oxford and Tulane University Law Summer School in Grenoble and membership of the Law Faculty of Wolfson College, Cambridge. He has published widely, including *Is It Time For A Second Constitutional Convention?* An attorney admitted to the Bars of Texas, New York, the District of Columbia, the US Supreme Court and the Second, Fifth and Ninth US Circuit Courts of the District of Columbia, Ambassador Wilkey was also Adviser on the Restatement of the Foreign Relations Law of the US for the American Law Institute and is a Fellow of the American Bar Foundation.

Sigvard Jarvin

Sigvard Jarvin is a member of the Paris and the Swedish bars. He was general counsel to the ICC International Court of Arbitration, Paris (1982–1987) and member of the Court (1988–1995). He is in charge of Lagerlöf & Leman's Paris office, is engaged in international business practice with an emphasis on international arbitration and head of Linklaters & Alliance International Arbitration Group in Paris. Mr. Jarvin is the author of *Guide to Arbitration and Related Services offered by the ICC* and co-author of *Commercial Arbitration Law in Asia and the Pacific* and of *Collection of ICC Arbitral Awards.* He is general editor of the *Stockholm Arbitration Report* and responsible for the arbitration chronicle in *Lamy Contrats Internationaux.*

Jean Reed Haynes

Jean Reed Haynes is a partner in the New York office of Kirkland & Ellis. She practises in the areas of international and domestic arbitration and as a commercial trial lawyer. She was assisted in preparation of this paper by Leigh Hyer, an associate in the Washington, DC office of Kirkland & Ellis, and Sara Mogulescu, an associate in the New York office of Kirkland & Ellis.

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Dr. Christian Borris

I. THE ISSUE

1. Introduction

On being asked to contribute to this work, I was informed that its overall theme was: 'How arbitration can, in a civilised manner, resolve the differences that arise between parties coming from different legal cultures.' Such a title clearly assumes that there is a universal understanding of 'civilised manners'. Although I do not seek to question this assumption *per se*, arbitration, as a procedural concept, is in itself an expression of manners, namely, the manner of settling legal disputes. Consequently, dealing with differences in procedural rules means dealing with differences in 'manners'. Further, an absolute standard of civilised manners simply does not exist and the mere fact that a given set of manners is different from one's own should not automatically (dis)qualify them as 'uncivilised'. A better overall theme might therefore perhaps have been, 'How arbitration can manage the different civilised manners of parties coming from different legal cultures'.

At least as far as the settlement of commercial disputes is concerned, the differences in legal culture between the common law and civil law appear to relate to the procedure by which results are arrived at rather than to the results themselves. In probably the majority of all cases, the outcome of the proceedings would be the same whether conducted in a civil law or common law court. This does not mean, however, that in an

Conflicting Legal Cultures in Commercial Arbitration, S. Frommel and B. Rider (eds), Kluwer Law International, London, 1999; ISBN 90-411-1227-8

international dispute the choice of forum is irrelevant. The procedural rules applicable in national courts are (normally) designed primarily to settle domestic disputes, i.e. disputes between nationals of a particular country. The proceedings are conducted in the official language of the court; the judges are nationals of the country in question and have been educated in its legal tradition. For these reasons, a party is almost always at a natural disadvantage in proceedings before a national court of another jurisdiction. Such disadvantages can, however, be avoided in arbitration.

It is often the experience of the legal adviser in contractual matters that the parties have different philosophies with respect to clauses regulating the settlement of disputes. Some are simply not prepared to consider arbitration as a means of settling disputes because they feel uncomfortable with the fact that the arbitral tribunal's decision cannot be appealed or because the duration and cost of arbitration proceedings are seen as disadvantages. Such parties believe that litigation in a national court is in any event preferable to arbitration and are prepared to accept the jurisdiction of a foreign court. They know, of course, that they will have to live with the peculiarities of the foreign court's rules, that they will have no choice but to retain the services of legal counsel admitted to such court and that the proceedings will be conducted in the official language of the country where the court is situated.

Others accept arbitration, not only as the lesser evil but as a distinct preference. There are a number of reasons for this. Firstly, because they feel that to submit to the jurisdiction of a national court in the country where the other party is located would give that other party an advantage. Submission to the jurisdiction of the national courts of a third country is hardly ever appropriate, quite apart from the risk that the courts of that third country may not accept jurisdiction over the case. Arbitration is the only alternative. Secondly, arbitration is often preferred because it allows the parties to select arbitrators with specific expertise required for a particular dispute. Confidentiality is another appreciated feature of arbitration. Finally, arbitration is often faster and less costly than proceedings before the national courts, particularly where those proceedings go to several levels of appeal.

Parties who opt for arbitration as the means of settling their legal disputes expect the arbitration proceedings to be conducted in a manner which is fair to both parties, without strict adherence to the procedural

rules applicable in the national courts of the country in which they take place, or indeed any particular set rules other than those expressly agreed to.

2. The Principle of Party Autonomy

Most modern arbitration laws enacted in the last one or two decades recognise the contracting parties' desire for procedural flexibility and generally leave vast room for party autonomy in this respect. Mandatory provisions and interference with the arbitral proceedings by state courts are reduced to a minimum. This is true, for example, of the UNCITRAL Model Law on International Commercial Arbitration which has been adopted by a large number of countries.[1] It is also true of the new English Arbitration Act 1996, which incorporates most of the provisions of the UNCITRAL Model Law. The Report of the Departmental Advisory Committee on Arbitration Law expressly states that '... one of the main purposes of the [Act] ... is to encourage arbitral tribunals not slavishly to follow court or other set procedures'.

3. Procedural Discretion of the Arbitral Tribunal

Whilst modern arbitration legislation is almost unanimous in its attempt to reduce mandatory provisions to a minimum (usually to provisions guaranteeing equal treatment of the parties and the right to be heard), there is a growing tendency to offer the parties a more comprehensive set of procedural rules rather than leaving the conduct of the proceedings completely to the discretion of the arbitral tribunal.[2] Predictability of the conduct of the proceedings is, of course, an important element in the strengthening of the parties' confidence in this means of dispute settlement and we know that for this reason parties often prefer to agree upon the rules of an arbitration institution such as the ICC Rules, LCIA Rules,

[1] Germany has adopted the UNCITRAL Model Law with effect as of 1 January 1998.

[2] This is, for example, the approach of the UNCITRAL Model Law. Under the new Swiss Arbitration Act 1989, on the other hand, the procedure, in the absence of any agreement between the parties, is largely left to the discretion of the arbitral tribunal.