

APPLICABLE
LAW IN
INTERNATIONAL
COMMERCIAL
ARBITRATION



Lew

Applicable Law in International Commercial Arbitration

A Study in Commercial Arbitration Awards

By

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PREFACE

In a recent article dedicated to Vladimir Horowitz, Hubert Saal wrote that the famous pianist "has always been willing to take risks to achieve greatness. At the age of three, imitating his mother's keyboard technique, he strummed on the window panes so hard that he smashed them and covered himself with blood"⁽¹⁾ If he accepts to be compared with the most romantic of today's virtuosos, Julian Lew might acknowledge that he, too, took great risks in selecting the subject of his doctoral thesis.

"The Choice of the Applicable Law in International Commercial Arbitration" (as the original thesis was entitled) is a subject beset by two major difficulties. One is the scarcity of primary documentation; the other concerns the hybrid character of international commercial arbitration.

As to the first difficulty, Julian Lew sagaciously calculated the risks and has admirably surmounted them. Moreover, in assembling a great number of extracts of unpublished arbitration awards, this work offers both the practitioner and the researcher an original source of solutions relating to the determination of the applicable law by private arbitrators. The first merit of the author — and it is considerable — is that he managed to obtain the documentation which, at the outset, had appeared to be so poor. This was not achieved without much effort and perseverance. Mr. Lew consulted the archives of several arbitration centres in both the East and the West, and travelled extensively in Europe for the purposes of his research. He has made use of material which one hitherto regretted not to know of but the contents of which, after this first exploration, appear to be somewhat disappointing.

This is at the least the feeling of the Continental lawyer whom the author has asked to write this preface. And on this point perhaps our opinions diverge somewhat, for Mr. Lew does not seem quite as concerned by the weakness of the arbitral motivation, as long as it supports the solution the arbitrator considers to be best, even at the cost of being a bit artificial at times.

This reflection leads to the second difficulty the author had to surmount: where to situate international commercial arbitration? It is clear that whilst international commercial arbitration must be distinguished from

1. "Lord of the Piano", Newsweek, January 23, 1978.

truly inter-State arbitration, which falls under public international law, its practitioners, of which Mr. Lew is a brilliant representative, are unwilling to submit to all forms of State control. One is immediately tempted by the “*tertium genus*”, the idea of a transnational arbitration. Though rarely using the expression, this appears to be the kind of arbitration Mr. Lew prefers: international commercial arbitration is a privileged forum for the elaboration of the lex mercatoria, a creation of the international business community.

However, Mr. Lew remains aware of the hybrid character of such arbitration. Although the arbitration procedure may wish to avoid recourse to national courts, it risks being affected at both ends, by actions before national courts. Firstly, the contracting party who refuses to execute the arbitration agreement may summon the other party before a national court. The arbitration procedure can only begin if the national court seized has declared itself not to have jurisdiction. Then, after the arbitrator has made his award and if the losing party refuses to execute the award, yet another action may be brought, bringing the contracting parties before a national court for forced execution of the award. To the extent that businessmen constitute a purely homogeneous milieu, strong enough to have “their” law respected, such incidents are rare; this illustrates however that the effectiveness of arbitration is linked to the independence of its structures from national law.

Faced with the particular problem dealt with in the present work — that of the determination of the applicable law — the arbitrator can be compared to the albatros in Baudelaire’s poem: since he cannot walk i.e. refer to a system of private international law, it only remains for him to spread his wings and to exclude all conflicting methods. Similarly, if the arbitrator must evaluate the respective claims of the contracting parties in the light of the general interest, he is in an uncomfortable position. Public policy, in any liberal system is associated with the autonomy of the parties. He thus finds himself between the duty, advocated by some to abstain from considering a dispute concerning the public policy of any State, and the exciting responsibility to set aside the provisions in a contract or in the applicable national law only by virtue of truly international public policy.

Such a dilemma expresses quite well the contradictory responsibilities of international commercial arbitration. On the one hand, international arbitrators must cooperate with the development of a new private international law, free from the trifles of the conflictual, independent and often contradictory methods of protecting the various national interests so as to satisfy a milieu of business and commercial men ready to respect the new

law without being obliged to do so by the territorial organs of the State powers. On the other hand, international arbitrators must avoid all open confrontation with the national authorities and with the rules they enact and, in the motivation of their awards, respect the formalism of the conflictual method without encroaching upon the essential prerogatives of the States concerned which, in the final analysis, are necessary to obtain the forced execution of the arbitration award.

* * *

All these difficulties have been well perceived and analysed by Julian Lew. He not only gathered excellent material for our reflection, but throughout the work offers a coherent application of the doctrine he defends. For the rest, the work will be appreciated for its particular qualities which the reader will discover without having his attention drawn to them.

I must add that the direction of this study in its original form gave a great deal of intellectual pleasure to this writer. Julian Lew spent several years at the "Centre Charles de Visscher pour le Droit International" and has lasting friends there. During that time he made available to the Centre his experience and knowledge. With the publication of this book a long common enterprise reaches its conclusion. The members of the "Centre Charles de Visscher pour le Droit International" have been the privileged witnesses of Julian Lew's qualities as a lawyer. The publication of his work will enable many others to obtain the same conviction.

François Rigaux

AUTHOR'S FOREWORD

When I embarked on this study, the most glaring problem was the non-availability of primary source material, that is, actual decided international commercial arbitration awards. Despite the many studies preaching the merits or describing the working of international commercial arbitration, few were based on or supported by actual case studies. The reader, lawyer and businessman, without experience with arbitration, is expected to accept the merits of arbitration without real life examples of how arbitration is actually organised in practice.

The merits and demerits of the national court systems are evident for those without personal experience of these institutions; there are both public news reports and the law reports. Thus possible litigants are able to estimate, in the light of past experience, how the courts may react in given circumstances.

Should there not be similar publications of arbitration awards?

Two major objections have been voiced against the publication of international commercial arbitration awards. Firstly, it is suggested that the very secrecy of arbitration encourages businessmen to submit disputes to arbitration even when this may involve their admitting to certain commercial practices which, if made public, could cause substantial embarrassment and perhaps political and commercial reverberation in the country in which they act. This is well illustrated by the award discussed at number 423 below. However, such cases are the exception and not the rule; in the main, disputes submitted to arbitration arise out of genuine commercial disagreements. Furthermore, should arbitration be organised in such a way as to serve as a screen for questionable, even immoral, commercial practices?

Secondly, it is argued, if awards were published an arbitral case law would evolve, resulting in arbitrators being bound to the emerging arbitral precedent. This is thought by some to be undesirable. However, need the emergence of an arbitral case law necessarily restrict the freedom of arbitrators when reaching their award? Quite the opposite: it would give an added dimension to international commercial arbitration, enabling arbitrants and their advisers to identify how particular type disputes may be resolved; hence encouraging in some cases settlement between the parties. Furthermore, an arbitral case law would be a valuable source of support and inspiration to arbitrators faced with a difficult decision.

It is my belief, on the basis of an extensive study of commercial arbitration awards, that these fears are not only unfounded but deny to the international business community proof of the real merits of arbitration: the freedom of arbitrators from the strictures of any system of procedure or any national legal provisions relating to the substantive question in issue. The further and increased confidence in arbitration will be enhanced by the publication of commercial arbitration awards. Furthermore, the developments and application of the law of international commerce, the lex mercatoria, which is a major function and characteristic of arbitration, should be traced and studied for future reference.

This book deals with the law and non-legal standards applied by arbitrators to resolve disputes arising out of international commerce. However, throughout my discussions are based and conclusions influenced by decided arbitration awards, and each question is analysed with the support of the cases; it is a case by case study. Whilst not identifying the parties involved, I have stated the facts and legal questions at issue, as well as the arbitrator's reasoning behind their decisions. I have also in numerous cases identified the arbitrators by name; these persons are the judges of international commerce and owe a responsibility to both the arbitrants in the particular dispute and the participants of international commerce in general. As with national court judges, one is entitled to know how they react in given situations.

The merits of this book will be judged by its utility to those scholars and lawyers involved with arbitration. Apart from its purely legal content, it is my ardent hope that the use made of decided arbitration awards concerned with all kinds of international commercial transactions, will bring closer the day when international arbitration tribunals publish their awards for the benefit of those for whom arbitration as an institution exists.

* * *

In this study we have relied on books, articles, national court decisions and awards originally published or written in several languages; however, in the text all quotations have been translated from the original, where necessary, into English. On the other hand, references in the footnotes to national case law have been kept in the form which is normal in the system with which the reference is concerned; references to the writings of authors have been made, as near as possible, in accordance with the system of citation contained in the Uniform System of Citation published by the Harvard Law Review Association, Cambridge, Massachusetts, USA.

* * *

This book is based on the thesis submitted to the Catholic University of Louvain for the degree of "Doctorat special en droit". The present text has been updated and revised. I wish to acknowledge the support, assistance and advice which I received from many quarters in preparing both the original work and this book.

Particular mention must be made of the financial assistance provided in the form of scholarships by the Belgian, Danish, French, Italian and Yugoslav governments, the Max-Planck-Institut für Ausländisches und Internationales Privatrecht and the Fondation Paul-Henri Spaak. These grants financed the journeys undertaken to collect materials and to consult arbitral archives, and enabled me to concentrate my efforts on this book.

The most important and original part of this study is the discussion of previously unpublished arbitration awards. That this was possible is due to the Court of Arbitration of the International Chamber of Commerce having allowed me access to their archives. The Court of Arbitration attached to the Czechoslovak Chamber of Commerce and the Arbitration Tribunal at the Yugoslav Federal Economic Chamber also provided me with previously unpublished awards.

From the outset I had the benefit of the support and wisdom of Professor François Rigaux. He was closely associated with my original plans and followed the development of this work; he carefully read and constructively criticised the various drafts which I submitted to him. It is consequently appropriate, and I am indeed grateful, that he has accepted to write the preface to this book.

The bulk of the work was done whilst associated with the Department of Law of the City of London Polytechnic and the Centre Charles De Visscher pour le Droit International. I wish to acknowledge the encouragement received from both those institutions.

I was greatly assisted in the translations for this work of numerous French texts into English by Marie-Rose Vermeir. However, I alone am ultimately responsible for any inaccuracies which may exist in these translations.

Elizabeth Ellis was responsible for transcribing my illegible and constantly changing manuscript into a workable document. She and Chantal Callahan prepared the camera-ready manuscript for this work.

Professor Kenneth Simmonds as General Editor of this book has been a constant support, advising generally and with respect to the technical

preparation of this book.

Finally, my mother and father provided all the encouragement and support necessary to revive and inspire an often sagging morale. Their interest remained constant until the end and, despite their own busy schedules, they undertook to read the proofs of the camera-ready manuscript. As a small token of my appreciation I dedicate this work to them.

Julian D.M. Lew
Brussels,
June 1978

ABBREVIATIONS

<u>A.C.</u>	Appeal Cases, English Law Reports
<u>Acta Juridica</u>	Acta Juridica Academiae Scientiarum Hungariae
<u>Am. J. Comp. L.</u>	American Journal of Comparative Law
<u>Am. J. Int'l L.</u>	American Journal of International Law
<u>Ann. d'études int'l</u>	Annales d'études internationales
<u>Ann. Fac. Dr. Liège</u>	Annales de la Faculté de Droit de Liège
<u>Ann. prop. ind.</u>	Annales de la propriété industrielle, artistique et littéraire
<u>Ann. fr. dr. int'l</u>	Annuaire français de droit inter- national
<u>Ann. inst. dr. int'l</u>	Annuaire de l'Institut de Droit International
<u>Ann. suisse dr. int'l</u>	Annuaire suisse de droit inter- national
<u>Arb. J.</u>	Arbitration Journal
<u>ATF</u>	Recueil des Arrêts du Tribunal fédéral suisse
<u>AWD</u>	Aussenwirtschaftsdienst des Betriebs- Beraters: Recht der Inter- nationalen Wirtschaft
<u>BGHZ</u>	Entscheidungen des Bundesgerichtshof in Zivilsachen
<u>Boston U.L. Rev.</u>	Boston University Law Review
<u>Br. Y'book Int'l L.</u>	British Yearbook of International Law
<u>Cahiers Dr. Eur.</u>	Cahiers de droit européen
<u>Calif. L. Rev.</u>	California Law Review
<u>Can. Bar. Rev.</u>	Canadian Bar Review
<u>Can. Y'book Int'l L.</u>	Canadian Yearbook of International Law
<u>Ch.</u>	Chancery Division, English Law Reports
<u>CILSA</u>	Comparative and International Law Journal of South Africa
<u>Clunet</u>	Journal de Droit International
<u>C.M.L. Rev.</u>	Common Market Law Review
<u>Cmd.</u>	Command Paper, presented by the Crown to the United Kingdom Parliament; after 1956
<u>Colum. J. Transnat'l L.</u>	Columbia Journal of Transnational Law

<u>Colum. L. Rev.</u>	Columbia Law Review
<u>Com. Cas.</u>	Commercial Cases, England
<u>Cornell Int'l L.J.</u>	Cornell International Law Journal
<u>Corn. L.Q.</u>	Cornell Law Quarterly
<u>D.</u>	Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine
<u>Dir. sc. int'li</u>	Il Diritto negli Scambi Internazionali
<u>Dr. Bulg.</u>	Droit bulgare
<u>D.P.C.I.</u>	Droit et pratique du commerce international
<u>F.2d.</u>	Federal Reporter, Second Series
<u>F. Supp.</u>	Federal Reporter, Supplement
<u>Ga. J. Int'l & Comp. L.</u>	Georgia Journal of International and Comparative Law
<u>Geo. Wash. L. Rev.</u>	George Washington Law Review
<u>Harv. Int'l L.J.</u>	Harvard International Law Journal
<u>Harv. L. Rev.</u>	Harvard Law Review
<u>ICJ Reports</u>	Reports of the International Court of Justice
<u>I.C.L.Q.</u>	International and Comparative Law Quarterly
<u>Int'l Law.</u>	The International Lawyer
<u>Int'l Lgl. Mats.</u>	International Legal Materials
<u>IPR spr.</u>	Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts
<u>Japan Ann. Int'l L.</u>	The Japanese Annual of International Law
<u>J. Bus. L.</u>	Journal of Business Law
<u>J.C.P.</u>	Juris-Classeur périodique: semaine juridique
<u>J.T.</u>	Journal des Tribunaux
<u>J.W.Tr.L.</u>	Journal of World Trade Law
<u>Jurispr. port d'Anvers</u>	Jurisprudence du Port d'Anvers
<u>Jur. W.</u>	Juristische Wochenschrift
<u>K.B.</u>	King's Bench, English Law Reports
<u>L. & Contemp. Prob.</u>	Law and Contemporary Problems
<u>L. & Pol. Int'l Bus.</u>	Law and Policy in International Business
<u>L. of the Am.</u>	Law of the Americas
<u>L.Q.R.</u>	Law Quarterly Review
<u>Law & Legis. in GDR</u>	Law and Legislation in the German Democratic Republic
<u>Lloyd's Rep.</u>	Lloyd's Law Reports

<u>L.R.Q.B.</u>	English Law Reports, Queens Bench
<u>Melb. U.L. Rev.</u>	Melbourne University Law Review
<u>Mod. L. Rev.</u>	Modern Law Review
<u>Moo. P.C.</u>	Moore, English Privy Council Reports
<u>Ned. Tijds. Int'l Recht</u>	Nederlands Tijdschrift voor Inter- nationaal Recht
	Netherlands Yearbook of Inter- national Law
<u>N.J.</u>	Nederlandsche Jurisprudentie
<u>NJW</u>	Neue Juristische Wochenschrift
<u>NYS 2d</u>	New York Supplement Reports, Second
<u>NYU J. Int'l L. & Pol.</u>	New York University Journal of International Law and Politics
<u>NYU L. Rev.</u>	New York University Law Review
<u>Ohio St. L.J.</u>	Ohio State Law Journal
<u>P.</u>	Probate Division, English Law Reports
<u>Pas.</u>	Pasicrisie
<u>Peters</u>	Peter's United States Supreme Court Reports
<u>Proc. Is. Acad. Sc. & Hum.</u>	Proceedings of the Israeli Academy of Science and Humanity
<u>Rec. des Cours</u>	Recueil des cours de l'Académie de droit international
<u>Rec. gén. des lois</u>	Recueil général des lois et de la jurisprudence de répertoire commercial
<u>Rec. Jurisp. Cour</u>	Recueil de la jurisprudence de la Cour de Justice des Communautés Européennes
<u>Rev. Arb.</u>	Revue de l'arbitrage
<u>Rev. belge dr. int'l</u>	Revue belge de droit international
<u>Rev. Crit.</u>	Revue critique de droit inter- national privé
<u>Rev. dr. int'l & dr. comp.</u>	Revue de droit international et de droit comparé
<u>Rev. hellénique dr. int'l</u>	Revue hellénique de droit inter- national
<u>Rev. int'l dr. comp.</u>	Revue internationale de droit comparé
<u>Rev. Roum. Sc. Soc.</u>	Revue roumaine des Sciences Sociales
<u>Rev. tr. dr. comm.</u>	Revue trimestrielle de droit commercial
<u>Rutgers L. Rev.</u>	Rutgers Law Review
<u>S.</u>	Sirey, Recueil général des lois et des arrêts

<u>St. Louis Univ. L.J.</u>	Saint Louis University Law Journal
<u>Soviet Y'book of Int'l L.</u>	Soviet Yearbook of International Law
<u>Tex. L. Rev.</u>	Texas Law Review
<u>Transactions Grotius Soc.</u>	Transactions of the Grotius Society
<u>Travaux du Comité français de d.i.p.</u>	Travaux du Comité français de droit international privé
<u>U.B.C.L. Rev.</u>	University of British Columbia Law Review
<u>Unidroit Yearbook</u>	Yearbook of the International Institute for the Unification of Law
<u>U.S.</u>	United States Reports
<u>Vand. L. Rev.</u>	Vanderbilt Law Review
<u>Va. J. Int'l L.</u>	Virginia Journal of International Law
<u>W.</u>	Weekblad van het Recht
<u>Wash. U.L.Q.</u>	Washington University Law Quarterly
<u>W. Bl.</u>	William Blackstone' English King's Bench Reports
<u>WM</u>	Wertpapier - Mitteilungen
<u>Yale L.J.</u>	Yale Law Journal
<u>Yugo. Rev. Int'l L.</u>	Yugoslav Review of International Law
<u>Zambia L.J.</u>	Zambia Law Journal

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