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ARBITRABILITY
INTERNATIONAL
& COMPARATIVE PERSPECTIVES

EDITED BY LOUKAS A. MISTELIS
& STAVROS L. BREKOULAKIS



Wolters Kluwer
Law & Business

KLUWER LAW INTERNATIONAL

Arbitrability

International & Comparative Perspectives

Edited by

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Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspennpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2730-3

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Printed in Great Britain.

Arbitrability

International Arbitration Law Library

Series Editor Dr. Julian D.M. Lew QC

In the series *International Arbitration Law Library* this book,
Arbitrability: International & Comparative Perspectives
is the Nineteenth title

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

FOREWORD

Since the introduction of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958, a great deal has been achieved towards the creation of uniform rules and practices relating to international arbitration. There were some areas, however, where uniformity was impossible or, indeed undesired, to achieve, and were reserved for the domain of national laws: most prominently, public policy, mandatory rules and arbitrability. All three topics have received significant attention by scholarly writing, arbitral and judicial practice. One can nowadays safely argue that as far as public policy and mandatory rules of law are concerned, certain international and even transnational standards have been developed and are in the meantime widely accepted.

This is not the case with arbitrability where, despite significant debate, the focus is on national laws and national practices. Arbitrability is a multi-faceted and multi-purpose concept which despite national origins has an international dynamic. It defines the classes of disputes that *may* be removed from the scope of arbitral reference and be placed at the exclusive jurisdiction of given national courts. This does not automatically imply that an arbitration tribunal will be barred from determining whether a particular issue can be adjudicated in arbitration. In other words, national laws typically retain for national courts the determination of limited legal rights; such a jurisdictional retention, however, would not cover all disputes arising out of these rights. It is unclear to what extent one could argue that even in the context of arbitrability there are certain international and even transnational standards.

Several questions relating to arbitrability are pertinent and are explored in this book. More specifically, the book discusses first the notions and rationale of arbitrability in international arbitration, as well as the laws applicable to the issue of arbitrability (Part I), and second, specific national and international substantive rules on arbitrability (Part II).

This volume originates from a conference organised by the Hellenic Arbitration Initiative, the Greek chapter of the alumni of the School of International Arbitration, in September 2005. Seven of the sixteen chapters in this volume were originally presented at the 2005 conference. As these papers were finalised, we thought we had to expand the collection of contributions by inviting leading academics and practitioners from Europe and the United States to write on the arbitrability and addressing aspects of the topic not encompassed by the Athens conference.

We owe a number of debts. First, to our authors: this book could not have been published without the generosity of the contributors who enthusiastically gave their time to prepare their contributions. Second, to the Hellenic Arbitration Initiative: for organising the arbitrability conference and for inviting us and the other speakers to contribute. Third, to John Ribeiro who has assisted with the technical and linguistic editing of this volume.

As always, it has been a pleasure to work with Kluwer Law International. Our publishers, Eleanor Taylor and Vincent Verschoor, have shown patience as deadlines have passed. Their encouragement and support are much appreciated.

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20 DECEMBER 2008

TABLE OF ABBREVIATIONS

INSTITUTIONS, ORGANIZATIONS, RULES AND JOURNALS

AAA	American Arbitration Association
ABA	American Bar Association
AC	Law Reports, House of Lords (Appeal Cases)
ADRLJ	Arbitration and Dispute Resolution Law Journal
Akron L. Rev.	Akron Law Review
Alb. L. Rev	Albany Law Review
ALI	American Law Institute
All ER	All England 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
Ann IDI	Annuaire de l'Institut de droit international
Ann. Rev. Banking L.	Annual Review of Banking Law
Arab L. Q.	Arab Law Quarterly
Arb. Int'l	Arbitration International
Arbitration (Arb.)	Arbitration, Journal of the Chartered Institute of Arbitrators
ASA	Swiss Arbitration Association
ASA Bulletin	Swiss Arbitration Association Bulletin
Asian DR	Asian Dispute Review

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Asian Pac. L. Rev.	Asian Pacific Law Review
ATF	Arrêts du Tribunal Fédéral Suisse
BC L. Rev.	Boston College Law Review
Berkeley J. Emp. & Lab. L.	Berkeley Journal of Employment and Labor Law
Berkeley J. Int'l L.	Berkeley Journal of International Law
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des schweizerischen Bundesgerichts
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen
BIT	Bilateral Investment Treaty
Brook. J. Int'l L.	Brooklyn Journal of International Law
BU Int'l L. J.	Boston University International Law Journal
BULR	Boston University Law Review
BYIL	British Yearbook of International Law
BYU L. Rev.	Brigham Young University Law Review
CA	Court of Appeal
Cardozo L. Rev.	Cardozo Law Review
Cass. Civ.	Cour de cassation (civil chamber)
Cass. Com.	Cour de cassation (Chambre commerciale et financière)
CC	Code civil, codice civile, civil code
CCLS	Centre for Commercial Law Studies
CCP	Code of Civil Procedure
CIETAC	China International Economic and Trade Arbitration Commission
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

Cornell Int'l L.J.	Cornell International Law Journal
CPR	Civil Procedure Rules (England)
CRCICA	Cairo Regional Centre For International Commercial Arbitration
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
Disp. Res. J.	Dispute Resolution Journal
Duke L. J.	Duke Law Journal
EAA	English Arbitration Act
EC	European Community
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
EEC	European Economic Community
EHRR	European Human Rights Reports
EHR	European Human Rights Reports
Electronic J. Comp. L.	Electronic Journal of Comparative Law
ER	English Reports
EU	European Union
EWCA Civ	Neutral citation for England and Wales Court of Appeal civil division decisions
EWHC	High Court of England and Wales
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
F Supp	Federal Supplement
FAA	United States Federal Arbitration Act
FS	Festschrift
FSR	Fleet Street Reports
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Gaz. Pal.	Gazette du Palais

Geo. Wash. J Int'l L. & Eco.	George Washington University Journal of International Law and Economics
Hague Yearbook of Int'l L.	Hague Yearbook of International Law
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
HKHC	Hong Kong High Court
HKIAC	Hong Kong International Arbitration Centre
HL	House of Lords
IBA	International Bar Association
IBA Rules	IBA Rules on the taking of Evidence in International Commercial Arbitration, 1999
ICC	International Chamber of Commerce
ICC Bulletin	International Chamber of Commerce International Court of Arbitration Bulletin
ICCA	International Council for Commercial Arbitration
ICDR	American Arbitration Association International Center for Dispute Resolution
ICL Rev.	International Construction Law Review
ICLQ	International and Comparative Law Quarterly.
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
IECL	International Encyclopaedia of Comparative Law
IFCAI	International Federation of Commercial Arbitration Institutions
ILA	International Law Association
ILM	International Legal Materials
ILR	International Law Reports
InsO	Insolvenzordnung
Int'l ALR	International Arbitration Law Review
Int'l Bus. Law.	International Business Lawyer

Int'l Law	International Lawyer
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
Iran-US CTR	Iran-US Claims Tribunal Reports
IStr	Internationales Steuerrecht – Zeitschrift für europäische und internationale Steuer- und Wirtschaftsberatung
J. Am. Arb.	Journal of American Arbitration
J. Disp. Res.	Journal on Dispute Resolution
J. Int'l Arb.	Journal of International Arbitration.
J. Pat. Off. Soc'y	Journal of the Patent and Trademark Office Society
J. Trans'l. Law & Policy	Journal of Transnational Law & Policy
JBL	Journal of Business Law
JCAA	Japan Commercial Arbitration Association
Law & Policy in Int'l Bus.	Law & Policy in International Business
LCIA	London Court of International Arbitration
Lewis & Clark L. Rev.	Lewis & Clark Law Review
LGDJ	Librairie Générale de Droit et de Jurisprudence
Lloyd's Rep.	Lloyd's Law Reports
LNTS	League of Nations Treaty Series
Louisiana L. Rev	Louisiana Law Review
Loy. LA Int'l. & Comp. L.J.	Loyola Los Angeles International and Comparative Law Journal
Managing IP	Managing Intellectual Property
Mealey's IAR	Mealey's International Arbitration Reports
Miami L. Rev.	Miami Law Review
Michigan J. Int'l L.	Michigan Journal of International Law
Minn. L. Rev.	Minnesota Law Review
Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted 21 June 1985
MR	Master of the Rolls

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NC J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
NCPC	French Code of Civil Procedure (Nouveau Code de Procedure Civile)
New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NILR	Netherlands International Law Review
NW. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
NY	New York
NY. L. Sch. J. Int'l & Comp. L.	New York Law School Journal of International and Comparative Law
NYAD	New York Appellate Division
NYLJ	New York Law Journal
NZLR	New Zealand Law Review
OECD	Organisation for Economic Co-operation and Development
Ohio St. J. Disp. Res.	Ohio State Journal on Dispute Resolution
OJ	Official Journal of the European Communities
OLG	Oberlandesgericht
PC	Privy Council
PCA	Permanent Court of Arbitration (The Hague)
PECL	Principles of European Contract Law
Pepperdine Disp. Res. L.J.	Pepperdine Dispute Resolution Law Journal
PILA	(Swiss) Private International Law
QBD	Queen's Bench Division
RCADI	Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law
RCJB	Revue Critique de Jurisprudence Belge
RDAI/IBLJ	Revue de droit des affaires internationales / International Business Law Journal
Rep	Report

Rev. Arb.	Revue de l'arbitrage
Rev. Brasileira Arb.	Revista Brasileira de Arbitragem
Rev. Crit. Dip.	Revue critique de droit international privé
Rome Convention	EC (Rome) Convention on the Law Applicable to Contractual Obligations 1980
S Ct	Supreme Court
S. Tex. L. Rev.	South Texas Law Review
SCC	Stockholm Chamber of Commerce Arbitration Institute
SchiedsVZ	Zeitschrift für Schiedsverfahren – German Arbitration Law Journal
SDNY	Southern District of New York
SIA	School of International Arbitration, Queen Mary University of London
SIAC	Singapore International Arbitration Centre
Stanford J. Int'l L.	Stanford Journal of International Law
Stockholm Int'l Arb. Rev.	Stockholm International Arbitration Review
Suffolk U. L. Rev.	Suffolk University Law Review
Syracuse L. Rev.	Syracuse Law Review
Tex. L. Rev.	Texas Law Review
Texas Int'l L.J.	Texas International Law Journal
Tul. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
Tul. Mar. L.J.	Tulane Maritime Law Journal
Tulsa J. Comp. & Int'l L.	Tulsa Journal of Comparative and International Law
U. Cin. L. Rev.	University of Cincinnati Law Review
U. Ill. L. Rev.	University of Illinois Law Review
UKHL	United Kingdom House of Lords Decisions
UKPC	Neutral citation for decisions of the Privy Council
UNCITRAL	United Nations Commission for International Trade Law

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UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings
UNIDROIT	International Institute for the Unification of Private Law
Unif L. Rev.	Uniform Law Review
UNTS	United Nations Treaty Series
Va. J. Int'l L.	Virginia Journal of International Law
Va. L. Rev	Virginia Law Review
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vanderbilt L. Rev.	Vanderbilt Law Review
Vienna	Austrian Federal Economic Chamber in Vienna
WAMR	World Arbitration and Mediation Report
Washington Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965
WIPO	World Intellectual Property Organisation
WIPO Expedited Rules	WIPO Expedited Rules
WL	Westlaw
WLR	The Weekly Law Reports
WTAM	World Trade and Arbitration Materials
Yale LJ	Yale Law Journal
YBCA	Yearbook of Commercial Arbitration
YJIL	Yale Journal of International Law
ZPO	German Code of Civil Procedure (ZPO)

PART I
FUNDAMENTAL OBSERVATIONS
AND APPLICABLE LAW

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