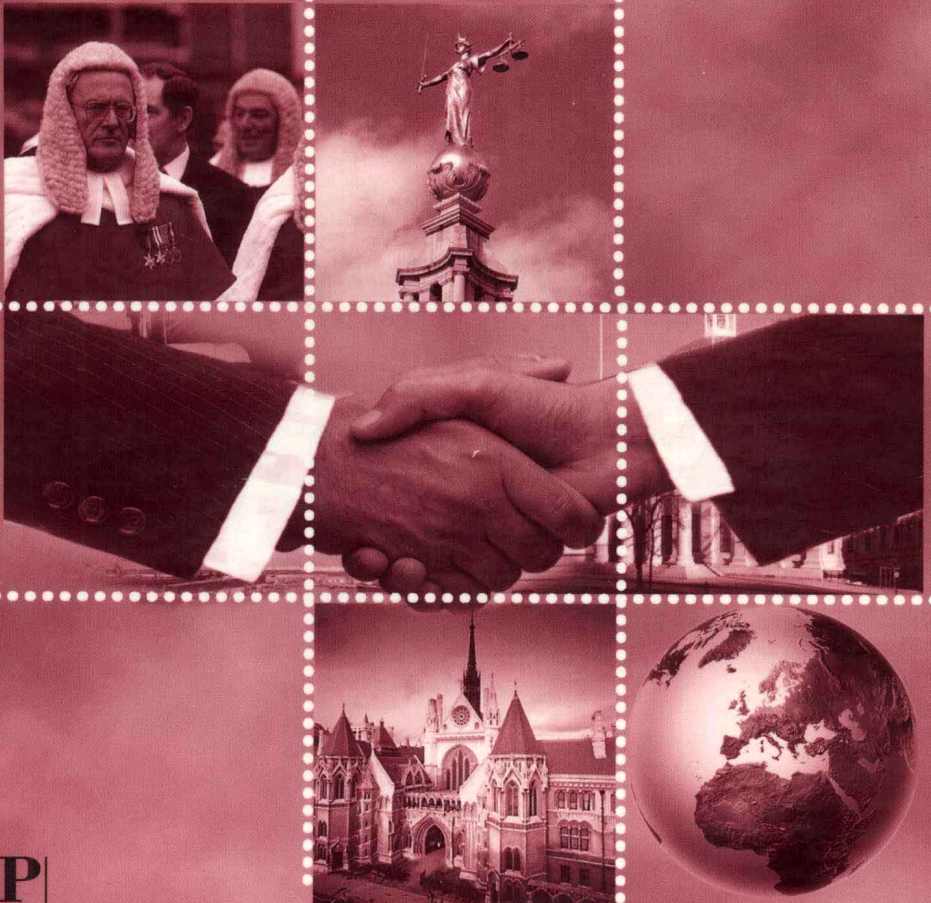


DISPUTE RESOLUTION GUIDES

# INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK

SECOND EDITION

By Mark Huleatt-James and Nicholas Gould



LLP

INTERNATIONAL  
COMMERCIAL  
ARBITRATION

A HANDBOOK

*by*

MARK HULEATT-JAMES

*and*

NICHOLAS GOULD

SECOND EDITION

LOVELL WHITE DURRANT

**|LLP|**

LONDON HONG KONG

1999

LLP Reference Publishing  
69-77 Paul Street  
London EC2A 4LQ  
Great Britain

EAST ASIA  
LLP Asia  
Sixth Floor, Hollywood Centre  
233 Hollywood Road  
Hong Kong

First edition 1996  
Second edition 1999

© Mark Huleatt-James and Nicholas Gould, 1996, 1999

*British Library Cataloguing in Publication Data*

A catalogue record for this book  
is available from the  
British Library

ISBN 1-85978-882-3

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of LLP Limited.

Whilst every effort has been made to ensure that the information contained in this book is correct neither the editors and contributors nor LLP Limited can accept any responsibility for any errors or omissions or for any consequences resulting therefrom.

**Are you satisfied with our customer service?**

These telephone numbers are your service hot lines for questions and queries:

Delivery: +44 (0) 1206 772866  
Payment/invoices/renewals: +44 (0) 1206 772114  
LLP Products & Services: +44 (0) 1206 772113  
e-mail: Publications@LLPLimited.com or fax us on +44 (0) 1206 772771

*We welcome your views and comments in order to ease any problems and answer any queries you may have.*

**LLP Limited, Colchester CO3 3LP, U.K.**

Typeset in 10/12pt Plantin by  
Selwood Systems, Midsomer Norton  
Printed in Great Britain by  
WBC Limited,  
Bridgend, Mid-Glamorgan

## PREFACE TO THE SECOND EDITION

The principal changes which have been made to this edition are to take account of the revisions to the arbitration rules of leading international arbitration institutions such as the American Arbitration Association, the China International Economic and Trade Arbitration Commission, the International Court of Arbitration of the International Chamber of Commerce and the London Court of International Arbitration. In addition, where appropriate, small changes have been made to take account of recent cases and statutes, and to enhance the clarity of the text. Alluring as it was, we have resisted the temptation to make significant additions to the detail contained in the book, so as to preserve its role as an introductory text providing an overview of international commercial arbitration.

*30 September 1998*

MARK HULEATT-JAMES  
NICHOLAS GOULD

## PREFACE TO THE FIRST EDITION

There are few books dealing with international commercial arbitration generally. Of those that do, none can be described as a slim volume providing an overview of the subject. This presents a problem to those whose objective is to obtain an idea of the most significant aspects of international commercial arbitration, but without being able to devote a considerable amount of time to the task. These people include in-house lawyers with broad responsibilities who have to consider arbitration either as a possible dispute resolution mechanism to be included in an international contract, or as a means of settling an existing or contemplated dispute arising out of an international contract. They need to be primed on the issues which are likely to be important without having to read an excessive amount of detail. Equally, busy lawyers in law firms may need to gain a quick overview of the subject, especially if they have previously had little contact with it. Finally, students of the subject may find it helpful to start with an overview of international commercial arbitration which indicates what its principal elements are, and how they relate to each other, before embarking upon a more in-depth study of the subject as a whole.

It is for people such as these that this handbook is intended, and their perceived needs have shaped its scope and content. For that reason, this book cannot be a detailed treatise on the law and practice of international commercial arbitration. If more detail is required, specialist lawyers or text books should be consulted.

There are many women active in arbitration, either as advocates or as arbitrators. It is only for reasons of economy that the masculine form is used throughout this book to include the feminine.

*29 September 1995*

MARK HULEATT-JAMES  
NICHOLAS GOULD

## TABLE OF CASES

|   |                    |
|---|--------------------|
| Ali Shipping Corp v. Shipyard Trogir [1998] 2 All E.R. 136 .....  | 37                 |
| Esso/BHP v. Plowman (1995) Arb. Int'l Vol. 11, No. 3, p. 235 .....  | 37                 |
| Halki Shipping Corp v. Sopex Oils Ltd [1997] 3 All E.R. 833 .....   | 48                 |
| Hiscox v. Outhwaite [1991] 2 W.L.R. 1321, [1991] 3 All E.R. 124; [1991] 2 Lloyd's Rep.<br>1, C.A., [1991] 3 W.L.R. 297, [1991] 3 All E.R. 641, [1992] 1 A.C. 562; [1991] 2<br>Lloyd's Rep. 435, H.L. .... | 106                |
| Kuwait Foreign Trading Contracting and Investment Company v. Icori Estero SpA (1996)<br>C.A. Paris, 1ère ch., 13 juin 1996, Rev. arb. 1997. 251, note E. Gaillard .....                                   | 16                 |
| Mastrobuono v. Shearson Lehman Hutton Inc. 514 U.S. 52 (Supreme Court, 1995) .....  | 99                 |
| National Thermal Power Corporation v. The Singer Corporation, (1992) 3 Supreme Court<br>Cases 551 (Indian Supreme Court) .....  | 36                 |
| Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha (The <i>Eastern Saga</i> ) [1984] 2 Lloyd's<br>Rep. 373, [1984] 3 All E.R. 835 .....  | 40                 |
| Siemens AG v. Dutco Construction Co., Cass. (Fr.) 7 janvier 1992, [1994] ADRLJ 36 .....   | 42                 |
| Société Hilmarton v. Société Omnium de traitement et de valorisation, Cass. civ. 1ère, 10<br>juin 1997, Rev. arb. 1997. 376, note Ph. Fouchard .....  | 101, 106, 107, 114 |

# TABLE OF LEGISLATION

## ENGLAND

### Arbitration Act 1996

|                     |          |
|---------------------|----------|
| s. 16(6) .....      | 51       |
| 24(1) and (4) ..... | 73       |
| 34(2) .....         | 85       |
| 41 .....            | 70, 93   |
| 48(5) .....         | 99       |
| 66 .....            | 107, 114 |
| 67 .....            | 113      |
| 68 .....            | 113      |

## FRANCE

### Code of Civil Procedure

|                 |     |
|-----------------|-----|
| Art. 1460 ..... | 85  |
| 1466 .....      | 64  |
| 1498 .....      | 107 |

## INDIA

### Arbitration and Conciliation (Second)

|                      |    |
|----------------------|----|
| Ordinance 1996 ..... | 36 |
|----------------------|----|

## NETHERLANDS

### Arbitration Act 1986

|                    |    |
|--------------------|----|
| Art. 1039(5) ..... | 85 |
| 1052 .....         | 64 |

## SWITZERLAND

### Private International Law Act 1987

|                |     |
|----------------|-----|
| Art. 190 ..... | 113 |
| 192 .....      | 113 |

# TABLE OF CONVENTIONS, ARBITRATION RULES AND MODEL CLAUSES

|   |   |
|---|---|
| <p>AAA International Arbitration Rules . . . 49, 51,<br/>100, 103, App. 3</p> <p style="padding-left: 20px;">Art. 1(1) . . . . . 76</p> <p style="padding-left: 40px;">2 . . . . . 49</p> <p style="padding-left: 40px;">11(1) . . . . . 60</p> <p style="padding-left: 40px;">15(1) . . . . . 67</p> <p style="padding-left: 40px;">16(1) . . . . . 76</p> <p style="padding-left: 40px;">19(1) . . . . . 85</p> <p style="padding-left: 40px;">20(6) . . . . . 85</p> <p style="padding-left: 40px;">22 . . . . . 89</p> <p style="padding-left: 40px;">23 . . . . . 93</p> <p style="padding-left: 40px;">27(3) . . . . . 106</p> <p style="padding-left: 40px;">28(5) . . . . . 37</p> <p style="padding-left: 40px;">30 . . . . . 99</p> <p>AAA Model Clause . . . . . 32, App. 4</p> <p>Brussels Convention on Jurisdiction and<br/>the Enforcement of Judgments in<br/>Civil and Commercial Matters<br/>1968 . . . . . 4</p> <p>Center for Public Resources Rules for<br/>Non-administered Arbitration of<br/>International Disputes 1992 . . . . . 30</p> <p>CIETAC (China International Econ-<br/>omic and Trade Arbitration<br/>Commission) Arbitration Rules. 48, 49</p> <p style="padding-left: 20px;">Art. 7 . . . . . 76</p> <p style="padding-left: 40px;">13 . . . . . 49</p> <p style="padding-left: 40px;">35 . . . . . 29, 33</p> <p>European Convention on International<br/>Commercial Arbitration 1961 . . . 21-22</p> <p>Geneva Convention 1927 . . . . . 21</p> <p style="padding-left: 20px;">Art. 1(2)(d) . . . . . 96</p> <p>Geneva Protocol 1923 . . . . . 21</p> <p>ICC Arbitration Rules . . . . 15, 32, 37, 49, 50,<br/>51, 54, 78, 79, 84, 96,<br/>100, 102, 103, App. 3</p> <p style="padding-left: 20px;">Art. 4(2) . . . . . 49</p> <p style="padding-left: 40px;">6(2) . . . . . 67</p> <p style="padding-left: 40px;">(4) . . . . . 68</p> <p style="padding-left: 40px;">15(1) . . . . . 85</p> <p style="padding-left: 40px;">17(1) . . . . . 18</p> <p style="padding-left: 40px;">(2) . . . . . 19</p> <p style="padding-left: 40px;">18(1) . . . . . 82</p> <p style="padding-left: 40px;">(3) . . . . . 83</p> <p style="padding-left: 40px;">(4) . . . . . 82</p> | <p>ICC Arbitration Rules—<i>cont.</i></p> <p style="padding-left: 20px;">Art. 19 . . . . . 63</p> <p style="padding-left: 40px;">20(4) . . . . . 90</p> <p style="padding-left: 40px;">21(2) . . . . . 93</p> <p style="padding-left: 40px;">25(3) . . . . . 106</p> <p>ICC Model Clause . . . . . 32, App. 4</p> <p>ICSID Rules . . . . . 84, 111, 112</p> <p style="padding-left: 20px;">Rule 13(3) . . . . . 33</p> <p>LCIA Arbitration Rules . . . . 37, 49, 54, 84,<br/>96, 100, 103, 104,<br/>App. 3</p> <p style="padding-left: 20px;">Art. 1 . . . . . 49</p> <p style="padding-left: 40px;">13(2) . . . . . 29</p> <p style="padding-left: 40px;">14(1) . . . . . 76</p> <p style="padding-left: 40px;">15(8) . . . . . 93</p> <p style="padding-left: 40px;">21 . . . . . 89</p> <p style="padding-left: 40px;">23 . . . . . 64</p> <p style="padding-left: 60px;">(1) . . . . . 67</p> <p style="padding-left: 40px;">25(2) . . . . . 37</p> <p style="padding-left: 40px;">26(2) . . . . . 72</p> <p style="padding-left: 40px;">30 . . . . . 37</p> <p>LCIA Model Clause . . . . . 32, App. 4</p> <p>Moscow Convention 1972 . . . . . 22</p> <p>New York Convention on the Recog-<br/>nition and Enforcement of<br/>Foreign Arbitral Awards 1958 . . . 4, 9,<br/>20, 21, 22, 23, 32, 35,<br/>48, 73, 107, 108,<br/>112, 114, 115,<br/>App. 1</p> <p style="padding-left: 20px;">Art. I . . . . . App. 1</p> <p style="padding-left: 40px;">II . . . . . 2, 31, 33</p> <p style="padding-left: 40px;">III . . . . . 108</p> <p style="padding-left: 40px;">IV(1) . . . . . 108</p> <p style="padding-left: 40px;">V . . . . . 113, 115</p> <p style="padding-left: 60px;">(1) . . . . . 20</p> <p style="padding-left: 80px;">(a) . . . . . 16, 64, 68, 115</p> <p style="padding-left: 80px;">(b) . . . . . 73, 115</p> <p style="padding-left: 80px;">(c) . . . . . 63, 64, 66, 68, 99,<br/>116</p> <p style="padding-left: 80px;">(d) . . . . . 73, 76, 86, 116</p> <p style="padding-left: 80px;">(e) . . . . . 96, 116</p> <p style="padding-left: 40px;">V(2) . . . . . 116, 117</p> <p style="padding-left: 60px;">(a) . . . . . 16</p> <p style="padding-left: 60px;">(b) . . . . . 73, 100</p> |
|---|---|



**xx Table of Conventions, Arbitration Rules and Model Clauses**

|  |   |
|--|---|
| New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958— <i>cont.</i> |   |
| Art. VII   | 108   |
| Panama Convention 1975   | 22-23   |
| Rome Convention on the Law Applicable to Contractual Obligations 1980                                | 16, 18, 23  |
| UNCITRAL Arbitration Rules 1976  | 23, 24, 28, 30, 32, 38, 47, 49, 51, 53, 54, 59, 61, 64, 69, 79, 96, 98, 100, 101, 104, App. 3 |
| Art. 3   | 49  |
| Art. 5   | 51  |
| 6(2)   | 24  |
| 12(1)  | 24  |
| 18   | 80  |
| 19   | 80  |
| 21   | 64  |
| (2)  | 67  |
| 24(1)  | 86  |
| 25(1)  | 70  |
| (6)  | 86  |
| 27   | 89  |
| 28   | 70, 93  |
| (1)  | 93  |
| 30   | 86  |
| UNCITRAL Arbitration Rules 1976— <i>cont.</i>  |   |
| 31(1)  | 24  |
| 33(1)  | 18  |
| (3)  | 19  |
| UNCITRAL Model Clause  | 38, App. 5  |
| UNCITRAL Model Law on International Commercial Arbitration 1985                                      | 8, 23, 24, 25, 47, 49, 51, 70, 104, 113, App. 2   |
| Art. 1(1)  | 9   |
| 14(1)  | 71  |
| 16   | 64  |
| (1)  | 67  |
| (2)  | 64  |
| (3)  | 65  |
| 18   | 71  |
| 19(2)  | 85  |
| 21   | 49  |
| 25   | 70, 93, 97  |
| 26   | 89  |
| 28(4)  | 71  |
| 31(1)  | 71, 72  |
| 34   | 113   |
| Vienna Convention on Contracts for the International Sale of Goods 1980                              | 23  |
| Washington Convention 1965   | 22, 29  |

# CONTENTS

|   |           |
|---|-----------|
| <i>Preface to the Second Edition</i>                                    | v         |
| <i>Preface to the First Edition</i>                                     | vii       |
| <i>Table of Cases</i>   | xv        |
| <i>Table of Legislation</i>   | xvii      |
| <i>Table of Conventions, Arbitration Rules and Model Clauses</i>        | xix       |
| <br>  |           |
| CHAPTER 1—SOME PRELIMINARY CONSIDERATIONS                               |           |
| Historical overview   | 1         |
| Arbitration and other means of dispute resolution                       | 2         |
| Choosing between arbitration and court proceedings                      | 2         |
| Alternative Dispute Resolution  | 5         |
| The significance of the labels “international” and “commercial”         | 8         |
| Legal significance – “international” character                          | 8         |
| “Commercial” nature   | 9         |
| Practical significance  | 9         |
| Important questions and issues  | 10        |
| Essentials of arbitration   | 12        |
| <br>  |           |
| CHAPTER 2—APPLICABLE LAWS AND RULES                                     |           |
| Introduction  | 15        |
| Capacity  | 15        |
| The arbitration agreement   | 16        |
| The arbitration proceedings   | 17        |
| The dispute   | 18        |
| Recognition or enforcement of awards                                    | 20        |
| International conventions   | 20        |
| The Geneva Protocol of 1923   | 21        |
| The Geneva Convention of 1927   | 21        |
| The New York Convention of 1958   | 21        |
| The European Convention on International Commercial Arbitration of 1961 | 21        |
| The Washington Convention of 1965                                       | 22        |
| The Moscow Convention of 1972   | 22        |
| The Panama Convention of 1975   | 22        |
| Bilateral treaties  | 23        |
| The UNCITRAL Arbitration Rules and Model Law                            | 23        |
| The Arbitration Rules   | 23        |
| The Model Law   | 24        |
|   | <b>ix</b> |

## x Contents

### CHAPTER 3—THE ARBITRATION AGREEMENT

|   |    |
|---|----|
| Prelude   | 27 |
| Preliminary matters                                 | 27 |
| Institutional arbitration                           | 28 |
| <i>Ad hoc</i> arbitration                           | 30 |
| Creating an enforceable arbitration agreement       | 30 |
| Enforcing the arbitration agreement                 | 31 |
| Agreement for institutional arbitration             | 32 |
| The number of arbitrators                           | 33 |
| The place (or “seat”) of the arbitration            | 33 |
| The law applicable to the substance of the disputes | 36 |
| The language of the arbitration                     | 36 |
| Miscellaneous matters                               | 36 |
| Agreement for <i>ad hoc</i> arbitration             | 38 |
| Relevant matters                                    | 38 |
| Caveats   | 39 |
| Multi-party arbitration                             | 39 |
| Introduction  | 39 |
| Chain contracts                                     | 40 |
| The Arbitration Agreement                           | 41 |
| Consortium or partnership contracts                 | 44 |
| Privacy   | 45 |
| Conclusion  | 46 |
| Tailpiece   | 46 |

### CHAPTER 4—THE COMMENCEMENT OF THE ARBITRATION AND THE APPOINTMENT OF THE ARBITRAL TRIBUNAL

|  |    |
|--|----|
| Introduction   | 47 |
| Applicable rules and law                                       | 47 |
| A dispute  | 48 |
| The commencement of the arbitration                            | 48 |
| Time limits  | 49 |
| The appointment of the tribunal                                | 51 |
| The number of arbitrators                                      | 51 |
| The manner in which the appointment of arbitrators may be made | 51 |
| Selecting the arbitrator to be appointed                       | 54 |
| The role of a party-nominated arbitrator                       | 55 |
| The tribunal’s fees and expenses                               | 56 |
| Establishing the entitlement to fees and expenses              | 56 |
| Securing payment of the tribunal’s fees and expenses           | 57 |
| Removal of arbitrators   | 58 |
| The circumstances in which removal may be appropriate          | 58 |
| How an application for removal is to be dealt with             | 59 |
| The consequences of removal                                    | 59 |

CHAPTER 5—THE JURISDICTION, POWERS AND OBLIGATIONS OF THE TRIBUNAL

|  |    |
|--|----|
| Sources  | 61 |
| Jurisdiction   | 62 |
| Introduction   | 62 |
| The consequences of absence of jurisdiction                                | 63 |
| What is a party to do if it believes that the tribunal lacks jurisdiction? | 63 |
| Partial challenge  | 64 |
| Challenge to the entire jurisdiction                                       | 66 |
| The powers of the tribunal   | 68 |
| Source and purpose   | 68 |
| Compliance with the tribunal's directions                                  | 69 |
| The tribunal's obligations   | 70 |
| Source and nature  | 70 |
| The consequences of, and remedies for, breach of obligation                | 72 |

CHAPTER 6—THE PROCEEDINGS

|   |    |
|---|----|
| Introduction                                      | 75 |
| The preliminary meeting                           | 77 |
| Form  | 77 |
| Timing  | 78 |
| Preparation                                       | 78 |
| Items for the agenda                              | 78 |
| After the preliminary meeting                     | 81 |
| Terms of reference                                | 81 |
| Role  | 81 |
| Contents  | 82 |
| Drafting  | 82 |
| The party which refuses to co-operate             | 83 |
| The written submissions                           | 83 |
| Differences in approach                           | 83 |
| Institutional requirements                        | 84 |
| Time limits                                       | 84 |
| Evidence  | 85 |
| Technical rules of evidence                       | 85 |
| Burden of proof                                   | 86 |
| Documents   | 86 |
| Witnesses   | 88 |
| Expert witnesses                                  | 89 |
| The hearing                                       | 90 |
| Representation at hearings                        | 91 |
| Arrangements for hearings                         | 91 |
| The order of proceedings at the hearing           | 92 |
| Transcripts                                       | 92 |
| Failure by one party to participate               | 92 |
| The arbitration agreement                         | 93 |
| The law applicable to the arbitration proceedings | 93 |

## **xii Contents**

|  |     |
|--|-----|
| <i>Ex parte</i> hearings   | 93  |
| <br>   |     |
| <b>CHAPTER 7—AWARDS</b>  |     |
| Introduction   | 95  |
| Types of award   | 95  |
| Interim/interlocutory awards                                       | 96  |
| Partial awards   | 96  |
| Final awards   | 96  |
| Consent awards   | 96  |
| Default awards   | 97  |
| Remedies which may be included in an award                         | 97  |
| Order for the payment of money                                     | 97  |
| Declaration  | 98  |
| Specific performance   | 98  |
| Injunction   | 98  |
| Rectification  | 98  |
| Punitive damages   | 99  |
| Interest   | 99  |
| Costs  | 100 |
| Validity of the award  | 101 |
| Other requirements for enforcement                                 | 103 |
| Approval   | 103 |
| Communication  | 103 |
| Registration or deposit  | 103 |
| Consequences of invalidity   | 103 |
| <br>   |     |
| <b>CHAPTER 8—RECOGNITION OR ENFORCEMENT OF AWARDS</b>              |     |
| After the award  | 105 |
| Recognition or enforcement   | 105 |
| Domestic and foreign awards  | 106 |
| Where to apply for recognition or enforcement                      | 106 |
| Procedure for recognition or enforcement                           | 108 |
| Time limits  | 109 |
| <br>   |     |
| <b>CHAPTER 9—RESISTING AWARDS</b>                                  |     |
| The options  | 111 |
| Appeal pursuant to the rules of the arbitration                    | 111 |
| Challenge in the courts of the country in which the award was made | 112 |
| Relevant matters   | 112 |
| Nature of relief   | 112 |
| Timing   | 112 |
| Form   | 113 |
| Grounds  | 113 |
| Security pending the outcome of a challenge                        | 113 |

|   |     |
|---|-----|
| Resisting recognition or enforcement of a foreign award   | 114 |
| Introduction  | 114 |
| Defences under the New York Convention  | 114 |
| The consequences of successfully resisting an application for the recognition or enforcement of a foreign award | 116 |
| State immunity  | 117 |
| <br>  |     |
| APPENDIX 1—States which have ratified, or acceded to, the New York Convention of 1958 (as at 30 September 1998) | 119 |
| <br>  |     |
| APPENDIX 2—States which have based their arbitration laws on the UNCITRAL Model Law                             | 123 |
| <br>  |     |
| APPENDIX 3—Comparative table of international arbitration rules   | 124 |
| <br>  |     |
| APPENDIX 4—Model arbitration clauses recommended by the AAA, the ICC and the LCIA                               | 131 |
| <br>  |     |
| APPENDIX 5—UNCITRAL Model Arbitration Clause  | 133 |
| <br>  |     |
| APPENDIX 6—Draft <i>ad hoc</i> arbitration clause   | 135 |
| <br>  |     |
| <i>Index</i>  | 139 |

## CHAPTER 1

# SOME PRELIMINARY CONSIDERATIONS

### HISTORICAL OVERVIEW

Even if theirs is not the world's oldest profession, merchants have been involved in international trade from the dawn of civilisation. The Assyrians traded with the ancient Egyptians; the Chinese with the peoples of India, the Greeks and the Romans. And, needless to say, merchants were throughout that time often involved in disputes.

Since international trade inevitably involved at least one foreigner, and xenophobia is not just a modern phenomenon, one party frequently distrusted the courts of the other. Furthermore, the judges of those courts were often overloaded with domestic disputes (in the sense that such disputes were between nationals of the same state). This led to the practice of the appointment by the parties of a respected private individual to act as arbitrator of the dispute between them. Regrettably, that person did not always behave as he should; Greek mythology gives us the example of Paris, the Trojan prince who, when asked to determine which of the goddesses Hera, Athene and Aphrodite was the most beautiful, failed to weigh the evidence and, instead, accepted a bribe from Aphrodite in the form of the promise of her help in the abduction of the beautiful princess Helen—thus setting in train the events leading to the Trojan war. There may also have been difficulties in enforcing awards. (But arbitration clearly worked well enough over the centuries to retain its popularity and to develop into what is now one of the most widely accepted and effective means of settling international commercial disputes.)

So what is "arbitration" today? Arbitration may be described broadly as a private process which commences with the agreement of parties to an existing, or potential, dispute to submit that dispute for decision by a tribunal of one or more arbitrators. (The tribunal is chosen by, or on behalf of, the parties who may also establish the procedures to be adopted by the tribunal.) The decision (award) of the tribunal is final and legally binding on the parties, but is to be made in the light of the evidence and arguments submitted to the tribunal by the parties. A valid award may be recognised and enforced by the courts.

Whilst these elements are to be found in practically every arbitration, arbitration is not a homogeneous product. The nature of each arbitration will be influenced by matters such as the size and character of the dispute and the

## **2 Some Preliminary Considerations**

location and identity of the parties to the dispute. Some utilities companies and travel associations have introduced simple arbitration procedures for the speedy resolution of customer complaints. Commodity traders generally resolve their disputes in accordance with the particular arbitration rules and practices of the relevant trade association (and which may include the rather quaintly named “look-sniff” procedures to determine quality). Construction arbitrations are notorious for their length and complexity.

### **ARBITRATION AND OTHER MEANS OF DISPUTE RESOLUTION**

The parties to a dispute which they are unable to settle between themselves have three principal means available to them by which they may resolve that dispute. These include, as we have just seen, court proceedings and arbitration. They also include some form of alternative dispute resolution, usually known by its acronym “ADR”.

It is as well to give some thought to these not only when considering whether or not to enter into an arbitration agreement, but also at the stage when court proceedings or an arbitration are about to be commenced.

The importance of thinking about the options prior to entering into an arbitration agreement is obvious. What is not so obvious is the value of giving some further thought to the options once a dispute has arisen. Even if an arbitration agreement was not included in the main commercial contract entered into between the parties, they may, nevertheless, both come to the conclusion that the dispute is of such a kind (e.g. its existence causes embarrassment to both of them) that it would best be resolved by arbitration. If that is the case, the parties still have the opportunity to enter into an agreement to arbitrate the dispute, and thereafter have the dispute resolved in arbitration proceedings.

#### **Choosing between arbitration and court proceedings**

A seemingly obvious point, but one which must nevertheless be made, is that the jurisdiction of a judge or an arbitrator to settle a particular dispute is an *exclusive* one. Either a judge of a national court will decide a dispute, or the parties to that dispute may agree, whether before or after it arises, that it should be submitted to an arbitrator for decision. Where the parties have a valid agreement for arbitration, the courts of most countries will enforce the arbitration agreement and will stay (i.e. prevent from going forward) any court proceedings brought in contravention of the agreement (see page 32 below). This should always be the case where the state in which the court in question is situated adheres to the New York Convention of 1958 (see Article II of that Convention). This important point is subject to the following qualifications:



- (a) National courts are frequently called upon to act in support of arbitrations. That is, they may be asked to:
- (i) assist in the appointment or removal of an arbitrator;
  - (ii) issue an injunction protecting property in dispute;
  - (iii) compel production of documents by a third party, or attendance of a witness at a hearing;
  - (iv) assist in the enforcement of an arbitrator's award.

None of these acts however involves a court in making a final decision on the merits of the dispute.

- (b) An unsuccessful party in an arbitration may seek to challenge an award (i.e. attack its validity or effect) in the courts of the country in which it has been made or, where it wishes to resist enforcement of the award, in the courts of the country in which enforcement is sought. Such a party may ask the courts to:
- (i) declare that the award is not valid because it fails to comply with the applicable rules relating to its form (such as naming the arbitrator, being signed by the arbitrator, dated, and so on).
  - (ii) correct the award on the basis that it contains a serious mistake of fact or law. Depending on local law and, in particular, the extent to which it permits a review of an award at all, the court may remit the award (i.e. send it back) to the arbitrator with a direction that the offending part of the award be corrected, annul the award or, in some cases, actually correct the award itself.
  - (iii) refuse enforcement of the award on the basis that the arbitrator lacked jurisdiction to make it, the unsuccessful party was not given a proper opportunity to present its case or that it would be contrary to public policy to enforce the award.

The correction of an award by a court is the only instance of a court imposing on the parties its own decision as to the merits. It may only do so (if at all) once the award has been made by the arbitrator.

- (c) It is possible for parties to a contract to agree that certain disputes arising under the contract are to be submitted to arbitration, whilst others are to be settled in the courts. In such a case, the jurisdictions of the courts and the arbitrator remain exclusive for those particular disputes which have been referred to them. Such agreements are not as a rule recommended because, unless carefully drafted, they can give rise to disputes as to the extent of the jurisdiction of the arbitrator or the courts.

The choice between the courts of a particular state, or arbitration, is not a choice that can be made in a complete vacuum. The nature of the dispute (actual, or potential), the identity of the parties, the courts which might otherwise have jurisdiction, and the location of assets are only some of the