

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

YEARBOOK
COMMERCIAL ARBITRATION

VOLUME IV - 1979

GENERAL EDITOR PIETER SANDERS

KLUWER

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with the cooperation of
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**YEARBOOK
COMMERCIAL ARBITRATION**

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INTRODUCTION

1. The International Council for Commercial Arbitration (ICCA) held its Sixth International Arbitration Congress in Mexico City in March 1978. The Congress was attended by many lawyers, businessmen and, especially, judges, from all parts of the world. The Resolutions of this successful Congress, as well as those of the three working groups, are reproduced on the next pages. The list of papers submitted to the Congress can be found in Part VII (Bibliography).

At the ICCA Council meeting in Mexico, Me Jean Robert, who for so many years served as the stimulating and inspiring President of ICCA, was succeeded by the undersigned. As a token of appreciation for Me Robert's dedication to ICCA, the Council has nominated him as its honorary President.

It was also decided that an Interim Meeting of ICCA on the theme 'International Arbitration in Multi-Party Business Disputes' will be held in Warsaw from June 30 until July 2, 1980. The provisional program is reproduced on pages XXV-XXVI.

2. *Part I* of this volume of the Yearbook devotes special attention to the law and practice of arbitration in oil-producing countries (Algeria, Iran, Iraq, Kuwait, Libya and Saudi Arabia). It includes, further, national reports on arbitration law and practice in Egypt, Austria, F. R. Germany, and Japan.

Part II contains, as usual, extracts of arbitral awards. Of particular interest is the award made in the dispute between Libya and foreign oil companies, which is given extensive coverage. Due to lack of space, we can only publish a limited number of extracts of awards. In the forthcoming Volume we hope to be able to publish more extracts of arbitral awards. We therefore invite our readers to continue to send us awards of general interest for publication.

Lack of space also makes it necessary to leave out of this Volume *Part III* (Arbitration Rules) and *Part IV* (Recent Amendments on Arbitration Statutes). In Volume V (1980) we intend to reproduce the new Arbitration Rules of the London Court of Arbitration (in force as of September 1, 1978), which integrate to a large extent the UNCITRAL Arbitration Rules,

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reproduced with an extensive commentary in Volume II. Our next Volume may also contain an amendment to the English Arbitration Act of 1950 which is currently under consideration.

The lack of space is mainly caused by the considerable number (40) of court decisions on the New York Convention 1958, reported in *Part V*. The reported cases are preceded by a consolidated commentary on the decisions reported in Volumes III and IV, along the same lines as the commentary in Volumes I (1976) and II (1977). In addition, *Part VI* contains two articles on the application by national courts of the New York Convention, one concerning Italy (written by Prof. Giuseppe Mirabelli), the other dealing with the United States (written by Mr. Gerald Aksén). The total number of court decisions reported in the four Volumes of the Yearbook now amounts to 112, representing 16 countries.

Part VI contains, in addition to the two articles on the application of the New York Convention, also two other articles. Mr. Aron Broches, Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID), gives a brief description of the recently established 'Additional Facility' for arbitration under the auspices of the Centre. The other article is the first in a series we intend to publish on the training of arbitrators and lawyers. It was written by Mr. Berti Vigrass, Secretary of the Institute of Arbitrators (U.K.).

3. ICCA has again – see Introduction to Volume II (1977) – been approached by the United Nations Commission on International Trade Law (UNCITRAL) to set up a special Advisory Committee in order to advise UNCITRAL on a new project, this time concerning Conciliation. This subject will be discussed at UNCITRAL's forthcoming meeting in Vienna, June 1979.

Beginning with this Volume, ICCA enters into cooperation with the T.M.C. Asser Institute for International Law, The Hague. This inter-university institute has enlarged its activities to include the collection and classification (in anonymous form) of arbitral awards resulting from international trade, as well as all other material (laws, publications etc.) on international commercial arbitration. Members of the Department for Private International Law and Commercial Arbitration of the Institute lent most valuable assistance in the preparation of this Volume. My warmest thanks are again due to Dr. Albert Jan van den Berg, my collaborator for Volumes II and III, who, since joining the Institute, has continued his assistance.

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4. Finally, I again express my sincere thanks to all those who were so kind as to contribute to the Yearbook. Without their help the Yearbook would not be the source of world-wide information it is today.

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General Editor

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RESOLUTIONS OF THE SIXTH INTERNATIONAL CONGRESS ON ARBITRATION MEXICO CITY, MARCH 16, 1978

GENERAL RESOLUTIONS

I

Resolved that the Congress,

Aware that its work could not have been accomplished without the many types of assistance provided to it through the efforts of the Mexican Organizing and Host Committees;

Recognizing the fraternal reception that its delegates have received in so many ways from the Presidents and all members of the Mexican Organizing and Host Committees;

Honoured by the hospitality that the delegates and accompanying persons have received from government officials, from the Mexico City Chamber of Commerce, from the National Confederation of Chambers of Commerce of Mexico and from distinguished personages;

Expresses its appreciation to the Mexican Organizing and Host Committees and requests that they be the bearers of the gratitude of the Congress to government authorities, to the commercial organizations and to eminent Mexicans.

The Congress sends its greetings to the Mexican nation, together with its best wishes for the prosperity of the country and the well-being of its people.

II

Resolved that the Congress,

Notes with satisfaction that during the period since the Fifth International Arbitration Congress, many important developments have occurred in the field of international arbitration. Among these developments have been the modernization of arbitration rules and the establishment of new rules by various bodies and institutions throughout the world, notably including the UNCITRAL Arbitration Rules which were developed by the United Nations Commission on International Trade Law;

Notes also that the General Assembly of the United Nations by resolution adopted 15 December 1976 has recommended 'the use of the arbitration rules of the United Nations Commission on International Trade

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Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference in commercial contracts';

Bearing in mind that, as stated in the resolution of the General Assembly, the UNCITRAL Arbitration Rules were prepared after extensive consultations with arbitration institutions and centers of international commercial arbitration, which consultations were carried out in large measure through the activities of the International Council for Commercial Arbitration;

The Congress recommends that arbitration institutions throughout the world should be encouraged to consent to act as appointing authorities pursuant to the UNCITRAL Arbitration Rules when they are so designated by the parties or by the Secretary-General of the Permanent Court of Arbitration at The Hague, and also to consent to perform administrative services in connection with cases under the Rules when so requested.

III

Resolved that the Congress,

Believing in the extremely important role which the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, is able to play in ensuring the effectiveness of international commercial arbitration;

Wholeheartedly welcoming the appeal of the General Assembly of the United Nations that those countries which have not yet ratified or acceded to that Convention should 'consider the possibilities of adhering thereto';

Being convinced that it would be in accord with the action of the United Nations and with the objective needs of eliminating obstacles which hinder normal development of world trade;

Calls on arbitration institutions and other organizations active in this field to work to the fullest extent of their powers for the widespread adoption of the 1958 Convention, as well as for all conceivable perfecting of the manner in which it is applied in the member countries.

IV

Resolved that the Congress,

Noting with great satisfaction that three issues of the 'Yearbook on Commercial Arbitration' have been successfully published under the sponsorship of the International Council for Commercial Arbitration;

Believing that the 'Yearbook on Commercial Arbitration' provides an important source of information concerning international arbitration, including reports on arbitration law and practice in various nations through-

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out the world, texts of new arbitration legislation and rules, a comprehensive collection of digests of cases concerning the application of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, analytical articles on subjects of great interest and a complete world bibliography on arbitration;

Urges that arbitration institutions throughout the world exercise their best efforts to give the widest possible circulation to the 'Yearbook on Commercial Arbitration'.

V

Resolved that the Congress,

Takes note of the resolutions adopted by its three Working Groups which considered the subjects 'Arbitration and Business', 'Arbitration and the Courts' and 'Arbitration and Technology'.

VI

Resolved that the Congress,

Determines that the next Interim Meeting of the International Council for Commercial Arbitration shall be held at Warsaw, Poland, in June 1980 on a date and with a theme to be determined by the Council.

VII

Resolved that the Congress,

Determines that the Seventh International Congress on Arbitration shall be held at Hamburg, Federal Republic of Germany in June 1982, on a date and with a theme to be determined by the International Council for Commercial Arbitration.

RESOLUTIONS OF WORKING GROUP I ARBITRATION AND BUSINESS

The working group, assigned to the study of 'Arbitration and Business', adopted the following resolutions:

1. It is possible for arbitration to become an efficient instrument for the resolution of disputes which may arise from international commerce, and this is the case if the arbitrators and institutions administering arbitrations carry out their functions in accordance with accepted standards.
2. The VIth International Arbitration Congress calls the attention of all States to the advisability of ratifying the multilateral conventions on international commercial arbitration.

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3. The VIth International Arbitration Congress recommends to all States the advisability of passing modern legislation on arbitration adapted to the present time, in which the following criteria, at least, should be included: the necessity of confirmation of the courts or Public Notary of the arbitration agreements should be removed; by means of arbitration it should not only be possible to settle disputes already existing, but also those which may arise in the future; in the solution of disputes, arbitrators should be empowered to fill gaps in the contract if empowered by the parties; the participation in arbitration of States and agencies should be encouraged; their administered arbitration should be encouraged to the utmost; the arbitral award should be final and binding as a judgment of the court; it would be advisable to limit the possibility of appeals in arbitration awards to extreme cases.
4. The existence of permanent arbitration institutions operating at an international level should be supported as a guarantee of the neutrality and stability of arbitration. Special attention should be given to those which are specially concerned with particular aspects of commerce in their region.
5. The Congress stresses the vital importance of the training of arbitrators and emphasizes the need for the dissemination of information on arbitration.

RESOLUTIONS OF WORKING GROUP II ARBITRATION AND THE COURTS

RESOLVED that the Working Group on Arbitration and the Courts,

Expresses deep appreciation to the distinguished judges from many nations, including judges of the highest courts, who have participated in the Working Group on arbitration and the courts, being the first broadly international meeting of specialists in law and arbitration from all regions and social and economic systems which has ever convened to analyse systematically the relationship of arbitration and the courts and to develop ways to encourage common efforts by arbitrators and judges to facilitate world trade and economic cooperation.

The Working Group reaches the following conclusions:

1. There is clear evidence that commercial arbitration is strongly desired throughout the world by businessmen, by governments, by intergovernmental bodies, and by arbitration organizations. While in most cases parties voluntarily comply with agreements to arbitrate and respect arbitration awards, when they fail to do so effective international commercial arbitration cannot exist alone, but requires the support of national legal systems. Therefore, the relationship of the courts to arbitration is highly important.
2. Arbitration and the courts are complementary legal processes; they are not antagonistic or competitive, but, rather are partners in a system of international commercial justice.
3. While arbitration is a process created by and responsive to the will of the parties, it is nevertheless governed by national laws and international treaties and cannot function effectively without the support of national courts which interpret and enforce those laws and treaties. The understanding and cooperation of judges of national courts is, therefore, a vital and indispensable element in establishing and maintaining international commercial arbitration.
4. The cooperation and support of national courts may be needed at all stages of the arbitration process – in recognizing agreements to arbitrate, in assisting during arbitration proceedings and in enforcing arbitral awards.
5. In deciding legal issues relating to international commercial arbitration, judges have a great responsibility because their decisions affect not only the business interests of the parties but also often establish conditions for trade which have a lasting influence upon the economic development of their countries. Court decisions which support effective arbitration facilitate international trade and thereby promote

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stability and world peace. Likewise, arbitrators have a great responsibility to act in a manner which reflects fundamental principles of justice and accords fairness and equality to the parties.

The Working Group recommends that cooperation of the courts be encouraged in recognizing and enforcing agreements to arbitrate. Courts can assist effective arbitration by refusing to decide the merits of a case when the contract provides for arbitration. When seized of such cases, it is suggested that courts limit their inquiries to the fewest possible questions, most particularly to, whether an agreement to arbitrate exists, and that they apply the widely-accepted 'separability' doctrine which permits the arbitral tribunal to determine (subject to judicial review) the existence and validity of the contract of which the arbitration clause forms a part.

The Working Group recommends that the cooperation of courts be encouraged in facilitating the conduct of arbitration cases. Such cooperation may occur, inter alia, in the following ways:

1. When seized of matters involving international arbitration, courts can cooperate by recognizing that trade is facilitated by prompt disposition of such cases.
2. When called upon to appoint arbitrators in cases in which the parties have failed to do so or where the contract does not specify a method for appointment, judges can cooperate by recognizing the growing practice in international cases of taking into account the advisability of appointing arbitrators of a nationality other than the nationality of the parties. In this connection, judges are invited to consult arbitration institutions concerning the names of qualified arbitrators of other countries, and arbitration institutions are urged to cooperate with the judiciary when so requested. ICCA is urged to initiate programs to encourage such cooperation.
3. When the contract of the parties provides that the arbitration shall be conducted in accordance with the rules of intergovernmental bodies or established institutions, judges can cooperate by permitting the arbitration to be conducted in accordance with such rules, it being recognized that such established rules reflect broadly accepted international practice and rarely, if ever, violate fundamental principles of justice.
4. When interim measures of protection are needed to safeguard property which is the subject matter of an arbitration, or when witnesses fail to appear voluntarily or to present necessary evidence, effective arbitration often depends on prompt assistance by courts. Judges can cooperate by giving such assistance to the fullest extent permitted by governing law.

The Working Group recommends that cooperation of the courts be encouraged in enforcing international commercial arbitration awards on the basis of international conventions and in carrying out the will of the parties as expressed in their contract. In this connection, the Congress notes with satisfaction judicial decisions in many countries which demonstrate a growing tendency of courts to make a distinction between national public policy which is applicable in domestic cases and an international public policy which is to be applied in international cases. This useful distinction provides judges with a basis for supporting international commercial arbitration while at the same time preserving national public policy for use in domestic cases.

The Working Group recommends that courts be encouraged to interpret national legislation as liberally as their powers permit in order that the subject matters which are capable of being submitted to international arbitration include the entire range of modern business transactions. While transactions consisting primarily of sales of goods continue to be of great significance in world trade, long-term transactions involving investments, use of natural resources, transfers of technology, construction of industrial facilities, and other forms of economic development are of growing importance. Arbitration facilitates such transactions. Courts may also assist economic development by permitting arbitrators to fill 'gaps' which may arise in long-term transactions, a function whose value was recognized in the resolutions of the Fifth International Arbitration Congress in New Delhi in 1975. Where national legislation narrowly limits the scope of arbitration or restricts the possibility of arbitrators to fill 'gaps', it is

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suggested that all concerned cooperate in an effort to bring about modern reforms of such legislation.

The Working Group wholeheartedly urges ICCA to take the lead in sponsoring programs and projects to encourage greater collaboration and cooperation between judges and arbitration practitioners, including inviting judges to participate in the activities of ICCA and exploring the possibilities for further cooperation with the International Union of Judges and other national and international organizations.

RESOLUTIONS OF WORKING GROUP III ARBITRATION AND TECHNOLOGY

1. Whereas arbitration has a great contribution to make in settling disputes in connection with agreements for the transfer of technology, as pointed out inter alia in the resolutions of the IVth International Arbitration Congress in Moscow;
2. Whereas close cooperation is an essential feature of these agreements and is a means whereby international development can be promoted and improved;
3. Whereas it is fully recognized that disputes arising out of construction and engineering contracts should also be included within the scope of the proposed arbitration, as well as any other disputes arising out of agreements providing for performance which is highly technical in nature;
4. Whereas it is in the interest of all parties concerned that agreements be fully performed and completed in all their parts;
5. Whereas in certain cases damages may provide inadequate compensation for non-performance, an award directing specific performance should be given by arbitrators;
6. Whereas enforcement of such an award may encounter difficulties, thus emphasizing the need for voluntary compliance;
7. Whereas voluntary compliance is commonly accepted in the socialist countries and is often encountered in the practice of arbitration under the aegis of qualified administering bodies at international level;
8. Whereas the scope of international arbitration goes beyond the settlement of disputes and includes the promotion of international cooperation at large;
9. Whereas legal regulation of transfers of technology is a relatively novel phenomenon and represents a challenge in future perspectives which arbitral organizations are best suited to meet, inter alia by spreading all pertinent information and model contract forms;
10. Whereas, having regard to past experience, there still exist divergencies of views in different countries and business circles as to how transfer of technology should be regulated;
11. Whereas the problem of technology transfer presents socio-political aspects of great importance which should not be ignored by all parties concerned;
12. Whereas in the negotiations at present in progress in UNCTAD for a code of conduct for transactions involving the transfer of technology, it was noted that arbitration was contemplated as the most suitable means for the settlement of disputes arising out of the code;
13. Whereas it was further considered that rules might be introduced making it possible for arbitration to be dealt with at an international level;
14. Whereas by the combined efforts of all parties differences can be reduced so as to lead to overall fairness and an equilibrium with the aim of fostering international cooperation and development;
15. Whereas in dealing with transfers of technology, the legal and technical aspects of the problems cannot be severed, thus calling for the harmonious contribution and collaboration both of lawyers and technicians/technologists;

It is accordingly resolved that:

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- 1) Professional societies, technical institutions and centers of higher education should be utilized and encouraged to actively teach and promote the due process of international arbitration into engineering, construction, and procurement contracts, to assist the establishment of special arbitration conventions, and to facilitate adherence to existing ones, as may be to the best interest of all parties concerned.
- 2) Parties should relinquish parochialism and overprotection of interests. Solutions should be sought at the international level through the aid of competent organizations, and voluntary performance should be encouraged.
- 3) Attention should be drawn to the highly technical aspects of disputes that may arise out of contracts pertaining to transfer of technology, this involving a large amount of technical, as well as commercial and legal, expertise.
- 4) Efforts should be made to bring into the same arbitral proceedings all differences which may arise out of agreements ancillary to the main agreement whereby technology is transferred, it being recognized that not all construction contracts involve the transfer of technology, but may be intimately related to that transfer.
- 5) Attention should be given to special situations where arbitration can be an effective instrument, such as nuclear supply and development and other highly technical agreements.
- 6) The international financial institutions and development agencies should further support and implement the use of arbitration on the part of their borrowers by recommending the inclusion of arbitration clauses into engineering, construction and procurement contracts, and by assisting in the establishment of special arbitration conventions or facilitating adherence to existing ones, as may be to the best interest of all parties concerned.
- 7) All agreements involving the transfer of technology to the recipient should be based on fair communication and collaboration giving access to the widest experience; consideration should be given to equitable remuneration for the transferor's efforts.
- 8) Agreements transferring technology should carefully define the rights of the parties to technological developments and special attention should be given to the training of personnel, thus avoiding undue dependence upon the transferor.
- 9) Both the technical and legal aspects of the transaction should be exhaustively defined and the eventual evolution of the technology should be provided by giving to the arbitrators sufficient powers to fill all possible gaps.
- 10) As little restriction as possible should be placed upon the right of the parties to have recourse to arbitration, and to choose the law applicable to both the substance and the procedure.
- 11) Efforts should be made by all interested organisations towards publication of awards, subject to adequate protection of confidentiality.

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