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PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION EDITED BY LOUKAS A. MISTELIS AND JULIAN D.M. LEW



PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION

Edited by Loukas A. Mistelis and Julian D.M. Lew, QC





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FOREWORD

The School of International Arbitration, at the Centre for Commercial Law Studies (CCLS), Queen Mary University of London celebrated its twentieth anniversary in 2005. On this occasion we decided to look into the future and identify issues which are pervasive and topical in international arbitration.

This volume is a distillation of ideas discussed in a three day symposium held in London from 10 to 12 April 2005. This was attended by many of the leading academic and practising arbitration specialists from around the world. There were over 320 participants from 71 countries at the conference.

A wide area of specialist contributors undertook the task of taking a fresh look at some of the legal and practice issues which frequently occur in international arbitration. These discussions demonstrated over the three days not only the increasing breadth and scope of the subject, but also the way in which many of its themes and issues cross legal and disciplinary boundaries and pose questions for the future of the law and arbitration practice in an internationalised world.

International arbitration is at the junction of national, international and conflicts laws, public and private law and substantive and procedural law. The conference and this book illustrate the combination of the scholarly and the highly practical approach which characterises the mission of the School of International Arbitration and CCLS since their inception.

We owe a number of debts. The conference could not have taken place and this book published without the generosity of the contributors who enthusiastically gave their time to prepare their contributions, participate in the conference and finalise their chapters. This alone stands as testimony to the high regard in which the School is held nationally and internationally.

Particular thanks are due to the Rt Hon Lord Justice Bernard Rix, Chairman of the CCLS Advisory Council who chaired the conference, Professor Sir Roy Goode, the founding Director of CCLS and a constant inspiration for our activities, Professor Marise Cremona, the head of the CCLS Unit which includes the School; Sandra Baird and Sarah Batty for their administration and organisation of the Conference. Stavros Brekoulakis, a research fellow at the School of International Arbitration, has assisted with editing the book and prepared the subject index.

As always, it has been a pleasure to work with Kluwer on the project. Our publisher, Bas Kniphorst, has shown patience as deadlines have passed. His encouragement and support are much appreciated.

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Julian D M Lew QC Visiting Professor

Head, School of International Arbitration

3 February 2006

TABLE OF ABBREVIATIONS

INSTITUTIONS, ORGANIZATIONS AND RULES

The Institution may import the Rules

AAA American Arbitration Association

ABA American Bar Association
ASA Swiss Arbitration Association

CIETAC China International Economic and Trade

Arbitration Commission

CRCICA Cairo Regional Centre For International

Commercial Arbitration

DIS Deutsche Institution für Schiedsgerichtsbarkeit

EC European Community

EEC European Economic Community

EU European Union

HKIAC Hong Kong International Arbitration Centre

IBA International Bar Association

ICC International Chamber of Commerce ICCA International Council for Commercial

Arbitration

ICDR American Arbitration Association

International Center for Dispute Resolution

ICSID International Centre for the Settlement of

Investment Disputes

IFCAI International Federation of Commercial

Arbitration Institutions

JCAA Japan Commercial Arbitration Association
LCIA London Court of International Arbitration
OECD Organisation for Economic Co-operation and

Development

PCA Permanent Court of Arbitration (The Hague)
SCC Stockholm Chamber of Commerce Arbitration

Institute

SIAC Singapore International Arbitration Centre
UNCITRAL United Nations Commission for International

Trade Law

UNIDROIT International Institute for the Unification of

Private Law

Vienna Austrian Federal Economic Chamber in

Vienna

WIPO World Intellectual Property Organisation

GENERAL ABBREVIATIONS

AC Law Reports, House of Lords (Appeal Cases)

ADRLJ Arbitration and Dispute Resolution Law

Journal

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

Arb Int Arbitration International

Arbitration, Journal of the Chartered Institute

of Arbitrators

ASA Bulletin Swiss Arbitration Association Bulletin

Asian DR Asian Dispute Review

ATF Arrêts du Tribunal Fédéral Suisse

BGB Bürgerliches Gesetzbuch (German Civil Code)

BGE Entscheidungen des schweizerischen

Bundesgerichts

BGHZ Sammlung der Entscheidungen des

Bundesgerichtshofs in Zivilsachen

BIT Bilateral Investment Treaty

Boston U Int'l L J Boston University International Law Journal

Brooklyn J Int'l L

Brooklyn Journal of International Law
BYBIL

CA

Court of Appeal of England and Wales
CC

Code civil, codice civile, civil code
CCLS

Centre for Commercial Law Studies

CCP Code of Civil Procedure

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

CPR Civil Procedure Rules (England)
Disp Res J Dispute Resolution Journal

Duke L J Duke Law Journal

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

EHRR European Human Rights Reports

EJCL Electronic Journal of Comparative Law

ER English Reports

EWCA Civ Neutral citation for England and Wales Court

of Appeal civil division decisions

F 2d The Federal Reporter Second Series
F 3d The Federal Reporter Third Series

FAA United States Federal Arbitration Act

FS Festschrift

F Supp Federal Supplement

Geo Wash J Int'l L & Eco George Washington University Journal of

International Law and Economics

Hastings Int'l & Comp L Rev Hastings International and Comparative Law

Review

HKHC Hong Kong High Court

HL House of Lords

IBA Rules on the taking of Evidence in

International Commercial Arbitration, 1999

ICC Bulletin International Chamber of Commerce

International Court of Arbitration Bulletin

ICLQ International and Comparative Law Quarterly.

ICSID Rev-FILJ ICSID Review – Foreign Investment Law

Journal

IECL International Encyclopaedia of Comparative

Law

InsO Insolvenz Ordnung

Int ALR International Arbitration Law Review

Int'l Bus Law International Business Lawyer

Int'l Law International Lawyer

ILAInternational Law AssociationILMInternational Legal MaterialsILRInternational Law Reports

IPRax Praxis des internationalen Privat- und

Verfahrensrechts

Iran-US CTR Iran-US Claims Tribunal Reports

JBL Journal of Business Law

J Int'l Arb Journal of International Arbitration.

Law & Policy in Int'l Bus Law & Policy in International Business

Lloyd's Rep Lloyd's Law Reports

LNTS League of Nations Treaty Series

Louisiana L Rev Louisiana Law Review

Loy LA Int'l & Comp LJ Loyola Los Angeles International and

Comparative Law Journal

Mealey's IAR Mealey's International Arbitration Reports
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

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

NY New York

NYAD New York Appellate Division

NYLJ New York Law Journal

NY L Sch J Int'l & Comp L New York Law School Journal of

International and Comparative Law

OJ Official Journal of the European Communities

OLG Oberlandesgericht
PC Privy Council

PECL Principles of European Contract Law
PIL (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

RDAI/IBLJ Revue de droit des affaires internationales /

International Business Law Journal

Rep Report

Rev Arb Revue de l'arbitrage

Rev crit dip Revue critique de droit international privé

Rome Convention EC (Rome) Convention on the Law

Applicable to Contractual Obligations 1980

SchiedsVZ Zeitschrift für Schiedsverfahren

S Ct Supreme Court of the United States
SDNY Southern District of New York

SIA School of International Arbitration, Queen

Mary University of London

Stanford J Int'l L Stanford Journal of International Law Texas Int'l LJ Texas International Law Journal

Tulane L Rev Tulane Law Review

U Cin L Rev University of Cincinnati Law Review
U Ill L Rev University of Illinois Law Review

UKPC Neutral citation for decisions of the Privy

Council

UNCITRAL Notes UNCITRAL Notes on Organizing Arbitral

Proceedings

Unif L Rev Uniform Law Review

UNTS United Nations Treaty Series
Vanderbilt L Rev Vanderbilt Law Review

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 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
ZPO German Code of Civil Procedure (ZPO)

European Human Rights Reports

xxii

TABLE OF CONTENTS

Table of Abbreviations		
Intr	roduction	
	idamental Problems in International Arbitration an D.M. Lew QC	1
Par	t I: Arbitration and Policy Issues	9
<i>Mit</i> s Cou	subishi After Twenty Years: Mandatory Rules Before arts and International Arbitrators	11
	nald Francis Donovan & Alexander K.A. Greenawalt	
I.	Introduction	11
II.	The Mitsubishi Doctrine	16
	1. Background	16
	2. The Mitsubishi Decision	19
TTT	3. Understanding Mitsubishi The Courte's Parametrica	24
III.	The Courts' Perspective	30
	1. Improper Delegation	30
	The Waiver Argument Arbitration of Mandatory Rules After <i>Mitsubishi</i>	33
IV.		38
IV.	.	42 46
	 Mandatory Rules and Arbitral Authority Application of Mandatory Rules Which Exceed the 	46
	Parties' Agreement	53
	ratics Agreement	23

Chapter 2 Effect of International Public Policy in International Arbitration Pierre Mayer		
I.	Introduction	61
II.	Notion of Transnational Public Policy	62
III.	Nature of Transnational Public Policy	63
	1. Proposed Analysis	63
	2. Consequences of Proposed Analysis	66
IV.	Choice between Reliance on Transnational Public Policy and	
	Application of Mandatory State Rules	67
Dete Law	oter 3 rmination and Application of Relevant National and International and Rules erine Kessedjian	71
I.	Introduction	71
II.	Etat des lieux (Inventory)	72
III.	Hierarchy?	74
IV.	Role of Conflict of Laws	81
V.	A Special Note on the Interpretation of Contract	83
VI.	How to Ascertain the Content of the Applicable Law?	83
VII.	Evolution of Applicable Law Over Time	85
VIII.	Extent to Which a Judge May Control the Application of the	
	Law or Rules by the Arbitral Tribunal	85
The '	oter 4 Transparency of International Arbitration: Process and Substance Veeder QC	89
I.	Introduction: Arbitral Confidentiality in Related Court	
	Proceedings	89
II.	Established Confidentiality	91
III.	Confidentiality and English Law	93
IV.	Conclusion	101

Tim	npter 5 ne and Money: Cost Control and Effective Case Management sus Sachs	103
		100
I. II.	Introduction Costs of Arbitration	103
11.		104
		104
	2. The Various Methods of Calculating Arbitrator's Fees(a) Institutional Arbitration	104
	(a) Institutional Arbitration (b) UNCITRAL Arbitration Rules 1976 and Ad Hoc	105
	Arbitration	108
	(c) The Administrative Fees	108
	(d) The Comparison between the Different Calculation	109
	Methods	109
	(e) The Cost of Legal Representation	110
III.	The Reasons for the Increasing Costs of Arbitration	112
IV.	How to Control and Reduce the Cost of Arbitration	113
V.	Conclusion	115
Inte	t II: National and International Regulation of crnational Arbitration	117
Aut	onomy of International Arbitration Process ri Alvarez	119
Ī.	Introduction	119
II.	International Arbitration Procedure	120
III.	Nomination and Appointment of Arbitrators	127
IV.	Separability and Kompetenz-Kompetenz - Different Approaches	
	to These Questions and Limits	131
V.	Standards in Respect of Expert Evidence	138
VI.	Conclusions	139
The Non	pter 7 Procedural Soft Law of International Arbitration: -Governmental Instruments iam W. Park	141
[.	The Challenge of Soft Law	1 / 1
ι. [Ι .	The Challenge of Soft Law Soft Law and the Arbitral Process	141
11.	Soft Law and the Arbitral Process	143

	1.	What Consumers Want: Balancing Fairness and Efficiency	143
	2.	"Judicialisation"	146
	3.	Institutional Rules	147
	4.	Divergent Cultural Baselines	150
	5.		
		Soft Law	152
		(a) Who Gets the Last Word?	153
		(b) Ex Parte Measures	153
III.	So	ft Law and the Imperial Arbitrator	153
Cha	pter 8		
		of National Courts and Lex Fori in International	4
		ial Arbitration	155
War	ig Shen	gchang and Cao Lijun	
I.	Lex .	Fori and Laws to be Applied to an Arbitration	156
	1.	Three Laws Distinguished	156
	2.	The Applicable Laws Referred to in the New York Convention	157
	3.	Arbitration Agreement v. Lex Arbitri	158
II.	The	Judicial Role with Regard to Arbitration Agreement	159
	1.	The New York Convention and National Legislations	159
	2.	Stay of the Court Action and Anti-Suit Injunctions in England	
		and the United States	160
	3.	Upon the Request of a Party?	162
	4.	Null and Void, Inoperative or Incapable of Being Performed	163
		(a) Meaning of the Terms	163
		(b) Which Law to Decide "Null and Void, Inoperative or	
		Incapable of Being Performed"?	163
		(c) The Judicial Review of the Existence, Validity, and Scope	
		of the Arbitration Agreement	164
III.		Judicial Role in the Composition of the Tribunal	165
	Ι.	Equal Treatment Concern	166
	2.	Arbitration Agreement and Lex Fori Regarding the	
	_	Composition of the Tribunal	166
	3.	The Court's Role in the Constitution and Reconstitution	
** 7	701	of the Tribunal	167
IV.		Judicial Role with Regard to Interim Measures of Protection	168
	1.	Which Organ to Order Interim Measures, the Court	
		or the Tribunal?	169
		(a) Necessity of Court-Ordered Measures	169

			Three Approaches	170
	2.	3		
	_	_	eement to Arbitrate?	173
	3.		cial Enforcement of Interim Measures in Support of	
			rnational Commercial Arbitration	174
			Enforcement of Tribunal-Ordered Measures	174
		(b)	Enforcement of Court-Ordered Measures by the Court	1.75
T 7	~		of Another Jurisdiction	177
V.			view of Arbitral Awards	177
	1.		Types of Review and Applicable Laws	177
	2.		unds for Refusing Recognition and Enforcement	150
	2		Grounds for Setting Aside	178
	3.		ocalized Awards	179
	4.		orcement Despite the Existence of a Ground for Refusal	180
			Enforcement of an Award In Spite of its Being Set Aside	181
VI.	C	(b) clusio	Enforcement Despite Procedural Irregularities	181
V 1.	Con	ciusio	11	183
	pter 9			
			asures	185
Ali 1	'esilirn	nak		
I.	Intro	ductio	on	185
II.	Arbi	tral Pi	rovisional Measures	187
	1.	Juris	sdiction of Arbitrators	188
	2.	Stan	dards, Principles and Procedures	188
III.	Com	pleme	entary Mechanisms	192
	1.	Eme	ergency Measures from a Head or Organ of an	
			itral Institution	194
	2.	Eme	ergency Arbitral Provisional Measures Procedures	194
IV.	Enfo	rceme	ent of Arbitral Provisional Measures	196
V.	Cond	clusio	n	200
Cha	pter 10	0		
			he Use of Anti-Suit Injunctions in	
			rbitration	201
	ianuel			
I.	Intro	ductio	on	201
II.	The	Varie	d Use of Anti-Suit Injunctions in International Arbitration	202
III.			quacy of Anti-Suit Injunctions in International Arbitration	208

Part III: International Arbitration and State Parties			
Inve	pter 11 stment Arbitration and Commercial Arbitration he Tale of the Delphin and the Shorts	217	
	(or the Tale of the Dolphin and the Shark) Nigel Blackaby		
I.	Introduction		
II.	The Differences	218	
	1. Source of the Consent to Arbitrate	218	
	2. The Amicable Negotiation Period	220	
	3. Nature of Issues	222	
	4. Applicable Law	222	
	5. State Participation	225	
	6. Transparency	226	
	7. Publicity of Decisions	227	
	8. Importance of Lex Arbitri	229	
	9. International Legal Effect	230	
III.	Similarities	232	
IV.	Conclusion	233	
by R	sdiction Challenges in BIT Arbitrations – Do You Read a BIT leading a BIT or by Reading into a BIT? The way we will be a bit of the way of the	235	
I.	Overview	235	
II.	Substance v. Appearance in ICSID Arbitrations	233	
III.	CMS v. Argentina	240	
IV.	SGS v. Pakistan	244	
V.	SGS v. Philippines	247	
VI.	Tokios Tokelés v. Ukraine	250	
VII.	Conclusion	254	
	pter 13	254	
-	pretation of Treaties: How Do Arbitral Tribunals Interpret		
Disp	ute Settlement Provisions Embodied in Investment Treaties? rielle Kaufmann-Kohler	257	
I.	The Question: How to Approach It and Why It Is Relevant	257	
II.	A Reminder: Basics of Treaty Interpretation	258	
	1. The Vienna Convention	258 258	
	1. The vicinia Convention	238	

xii