

# TABLE OF CONTENTS

*Preface*

## CHAPTER I CHANGES IN ARBITRATION PRACTICE AND CLIMATE

A. CHANGES IN ARBITRATION PRACTICE	1
Introduction	1
1. Advantages and Disadvantages of Arbitration	2
(a) <i>Advantages of Arbitration</i>	2
(b) <i>Disadvantages</i>	6
(c) <i>Special Advantages in International Arbitration</i>	7
2. Increasing Use of Arbitration	9
3. Cooperation between Arbitration Institutes	12
4. Harmonisation of Arbitration Rules	13
5. Publication of Awards	14
6. Publication of Court Decisions	15
B. CHANGES IN THE ARBITRATION CLIMATE	17
1. Attitude of the Courts towards Arbitration	17
2. Truncated Arbitral Proceedings	19
3. Juridization of the Arbitral Process	22
4. Overcoming Cultural Differences	24

## CHAPTER II DIFFERENT CONCEPTS OF ARBITRATION

INTRODUCTION	27
A. THE COMMON LAW CONCEPT OF ARBITRATION	28
Introduction	28
1. English Arbitration Act 1950	28
2. English Arbitration Act 1979	29



## Table of Contents

3. English Arbitration Act 1996	31
<b>B. THE CIVIL LAW CONCEPT OF ARBITRATION</b>	<b>33</b>
1. No court control on the merits	33
2. Arbitration ex aequo et bono	35
3. Reasons for the Award	36
<b>C. HARMONISATION</b>	<b>37</b>
 <b>CHAPTER III</b>	
<b>REGIONAL ASPECTS</b>	
 <b>INTRODUCTION</b>	<b>39</b>
 <b>A. LATIN AMERICAN COUNTRIES</b>	<b>40</b>
Domestic Arbitration	40
1. Compromiso to be drawn up	40
2. Domain of arbitration and Calvo-doctrine	41
3. Arbitrato de derecho and amiable composition	43
4. Different grounds for setting aside	43
International Arbitration	44
5. The Panama Convention 1975	44
6. The IACAC Rules	46
7. Summary and Perspectives	48
 <b>B. ARAB COUNTRIES</b>	<b>50</b>
Introduction	50
1. The Shari'a	51
2. Influence of the Shari'a on the merits	52
3. Arbitration laws of Arab Countries	54
4. Conventions	55
5. The Euro-Arab Arbitration Practice	58
6. Summary and Perspectives	59



Table of Contents

C. THE FORMER SOCIALIST COUNTRIES	59
1. The Old Situation	60
2. The Present Situation and Perspectives	63
D. COUNTRIES OF THE FAR EAST	64
1. Preference for Conciliation	64
2. The Present Situation and Perspectives	65
SUMMARY CHAPTER III	66
CHAPTER IV	
IMPACT OF INTERNATIONAL INSTRUMENTS	
INTRODUCTION TO THIS CHAPTER	67
A. THE NEW YORK CONVENTION 1958	68
1. Short History of the Convention	68
2. The Convention	69
3. Harmonising effect of published Court Decisions on the NYC	70
4. Harmonising Effect of the NYC	71
5. The European Convention 1961	72
6. Enforcement of an Annulled Award?	74
<i>Commentary</i>	76
Summary	78
B. THE MODEL LAW OF UNCITRAL (1985)	79
1. Short History of the Model Law	80
2. List of Countries which adopted the Model Law	81
<i>In USA</i>	82
3. Harmonising Effect of the Model Law	83
4. Scope of Application (Article 1 of the M.L.)	84
<i>Introduction</i>	84
<i>a. 'International'</i>	85
<i>b. 'Commercial' (footnote)</i>	88



## Table of Contents

5. Extension of Scope by Agreement (para. 3(c))	89
6. Extension of the Scope by Law	91
<i>a. One Regime for Domestic and International Arbitration</i>	91
<i>List of one regime countries</i>	93
<i>b. Opting-into the M.L. regime for international arbitration</i>	96
7. Legislative Techniques when Adopting the Model Law	98
 C. ARTICLES OF THE MODEL LAW MODIFIED ON ADOPTION	 99
Introduction	99
Article 7 (Definition and Form of Arbitration Agreement)	100
Article 10 (Number of Arbitrators)	104
Article 13 (Challenge)	105
Article 16 (Jurisdiction)	108
Article 17 (Interim Measures of Protection)	110
Article 28	112
Article 31(2) (Reasons for the Award)	115
Article 34 (Setting Aside)	116
Articles 35 and 36 (Recognition and Enforcement)	121
 D. PROVISIONS ADDED WHEN ADOPTING THE MODEL LAW	 123
(a) Conciliation	124
(b) Confidentiality	124
(c) Consolidation	125
(d) Fees and Costs in Arbitration	126
(e) Filling of Gaps	141
(f) Interest	145
(g) Interpretation of the Model Law	147
(h) Liability of Arbitrators	149
Survey of C and D and Perspectives	151



**CHAPTER V**  
**SPECIFIC TOPICS**

INTRODUCTION	153
1. THE ARBITRATION AGREEMENT	154
(a) One form for present and future disputes	154
(b) ‘In writing’	155
2. DOMAIN OF ARBITRATION	158
Introduction	158
(a) Antitrust and Competition Law	161
(b) Securities Regulations	164
(c) Patents and Trademarks	165
(d) Filling of Gaps	166
3. PROCEDURES AKIN TO ARBITRATION	170
4. SEPARABILITY OF THE ARBITRAL CLAUSE	171
5. THE PLEA OF LACK OF JURISDICTION	176
Introduction	176
Model Law	178
(a) <i>Court Control under the Model Law</i>	178
Other Arbitration Laws	180
(b) <i>Court Control on a Negative Ruling</i>	180
(c) <i>The Affirmative Ruling</i>	181
Summary and Perspective	185
6. STATE OR STATE-CONTROLLED ENTERPRISE AS PARTY	186
A Capacity to Enter into an Arbitration Agreement	187
B. State Immunity	189
(a) <i>Two Draft Conventions on State Immunity</i>	190
(b) <i>The New York Convention 1958</i>	192
(c) <i>Washington Convention 1965</i>	196



## Table of Contents

(d) <i>State Immunity under National Laws</i>	199
1. USA and England	199
2. Canada, Hong Kong, Australia	200
3. Western Europe	201
4. Eastern Europe	203
5. Latin America	204
6. Arab Countries	205
7. Far East	206
<i>Summary and Perspective</i>	207
 7. MULTI-PARTY ARBITRATIONS	209
Introduction	209
A. Issues which may be privately regulated	211
B. Consolidation	213
Summary and Perspectives	222
 8. THE ARBITRATORS	224
Introduction	224
(a) <i>Impartial and Independent</i>	225
(b) <i>Challenge Procedures</i>	227
(c) <i>Persons Eligible As Arbitrator</i>	229
(d) <i>Composition of the Arbitral Tribunal</i>	230
(e) <i>Number of Arbitrators</i>	232
(f) <i>Liability of Arbitrators</i>	234
(g) <i>Code of Ethics</i>	236
 9. THE ARBITRAL PROCEDURE	238
Introduction	239
A. Organisation of Arbitral Proceedings	241
<i>Preparatory Meetings</i>	241
<i>Terms of Reference</i>	242
B. The Place of Arbitration	244
<i>Determination of the Place of Arbitration</i>	244
<i>Freedom left to Arbitrators</i>	245
<i>Singing of the award</i>	246
<i>Freedom of the Parties</i>	247



## Table of Contents

<i>Denationalisation of Arbitral Proceedings</i>	248
C. Selection of Further Procedural Topics	250
D. Some General Issues	251
<i>1. Hearings</i>	251
<i>2. Production of Documents</i>	253
<i>3. Language</i>	255
E. Evidence by Witnesses	256
<i>1. Unwilling Witnesses</i>	256
<i>2. Oath and Affirmation</i>	258
<i>3. Written Statements and Affidavits</i>	258
<i>4. Hearing of a Party</i>	259
<i>5. The Manner of Hearing Witnesses</i>	260
F. Evidence by Experts	263
10. INTERIM MEASURES OF PROTECTION	268
Introduction	269
1. Interim Measures under the Model Law	271
2. Interim Measures under Other Laws	272
3. Arbitration Rules on Interim Measures	273
4. Pre-award Attachments	274
In Conclusion	275
11. THE AWARD	276
Introduction	276
(A) Form and Contents of the Award	278
<i>1. In Writing and Signing</i>	278
<i>2. Reasons</i>	279
<i>3. Place of Arbitration</i>	280
(B) Making of the Award	281
<i>1. Majority Rule</i>	281
<i>2. Dissenting Opinions</i>	283
<i>3. Costs of the Arbitration</i>	285
(C) Post-award Awards	289
<i>Introduction</i>	289
<i>1. Correction of the Award</i>	289
<i>2. Interpretation</i>	292



## Table of Contents

3. <i>Additional Award</i>	295
Summary	298
12. RULES APPLICABLE TO THE MERITS	299
A. Arbitration According to the Rules of Law	299
1. <i>Under the M.L.</i>	299
2. <i>Other Arbitration Laws</i>	301
3. <i>Arbitration Rules</i>	302
4. <i>Impact of 'Rules of Law'</i>	302
B. Arbitration Ex Aequo et Bono	304
1. <i>Arbitration Laws</i>	305
2. <i>Emphasis on Equity</i>	307
3. <i>Possible Impact on Application of Lex Mercatoria</i>	308
4. <i>Possible Impact on Filling of Gaps</i>	309
C. Contract and Usages	310
13. ENFORCEMENT	311
Introduction	311
A. Enforcement in Common Law Countries	313
B. Enforcement in Civil Law Countries	314
Summary and Perspective	317
14. MEANS OF RECOURSE OTHER THAN SETTING ASIDE	318
A. Second Arbitral Instance	318
B. Full Appeal to the Court	320
C. Appeal on a Question of Law	322
D. Remission	324
15. SETTING ASIDE	327
Introduction	327
A. Grounds for Setting Aside	329
1. <i>Validity of the Arbitration Agreement</i>	329
2. <i>Due Process</i>	331
3. <i>The Arbitrator's Mandate</i>	331
4. <i>Composition of the Arbitral Tribunal</i>	334



## Table of Contents

5. <i>Public Policy</i>	335
6. <i>The Merits of the Award</i>	338
7. <i>Reasons</i>	339
8. <i>Awards Made after the Time-Limit</i>	339
9. <i>Awards with Contradictory Decisions</i>	340
10. <i>Signature and Place of the Award</i>	341
11. <i>Misconduct by Arbitrators</i>	342
<i>Summary and Perspectives</i>	343
B. <i>Procedural Aspects</i>	343
1. <i>Introduction of the Action</i>	343
2. <i>Suspension of Enforcement</i>	345
3. <i>Exclusion of the Action</i>	346
4. <i>Waiver</i>	348
C. <i>The Post-Setting Aside Situation</i>	350

## CHAPTER VI CONCILIATION

INTRODUCTION	353
(a) The Trend towards Conciliation	353
(b) Distinction between Arbitration and Conciliation	355
A. STATUTORY PROVISIONS IN MODEL LAW COUNTRIES	358
1. Complete Regulation Compared with UNCITRAL Conciliation Rules	359
(a) <i>The Laws Involved</i>	359
(b) <i>Comparison with Issues Contained in UNCITRAL's Conciliation Rules</i>	360
(c) <i>Issues Dealt with in These Laws but Not in UNCITRAL's Rules</i>	366
2. Succinct Regulations	368
(a) <i>Policy Statement</i>	368
(b) <i>More than only a Policy Statement</i>	369



## Table of Contents

3. Summary	371
<b>B. THE AWARD ON AGREED TERMS</b>	<b>372</b>
Introduction	372
1. The Award on Agreed Terms in Arbitration Laws	374
2. The Award on Agreed Terms in Arbitration Rules	376
3. Award on Agreed Terms in the Absence of a Statutory Regulation	377
<b>C. CONCILIATION RULES</b>	<b>378</b>
Introduction	379
1. The Conciliation Agreement	380
2. Appointment of the Conciliator	381
3. The Conciliator and the Conciliation Proceedings	382
(a) <i>May the Conciliator Have Separate Meetings with Each of the Parties?</i>	383
(b) <i>Confidentiality of the Information Received</i>	383
(c) <i>May the Conciliator Obtain Assistance or Advice from an Independent Expert?</i>	384
(d) <i>Withdrawal of the Conciliator</i>	384
4. The Parties and the Conciliation Proceedings	385
(a) <i>No Initiation or Pursuance of Arbitral or Judicial Proceedings</i>	385
(b) <i>Representation of the Parties</i>	385
(c) <i>Withdrawal of a Party</i>	386
5. Settlement Negotiations	386
(a) <i>UNCITRAL and ICA</i>	387
(b) <i>CPR and WIPO</i>	387
6. Confidentiality	389
(a) <i>Confidentiality of Information</i>	390
(b) <i>Confidentiality of Records</i>	390
(c) <i>Confidentiality of Evidence in Subsequent Proceedings</i>	390
7. Conciliator shall not act as Arbitrator	392
8. Exclusion of Liability	392



D. CONCILIATION IN THE FAR EAST	393
Introduction	393
1. Conciliation in the P.R. of China	394
(a) <i>Conciliation Rules</i>	395
(b) <i>Ethical Rules for Conciliation</i>	397
(c) <i>Arbitration Rules of CIETAC</i>	399
(d) <i>The Law on Arbitration</i>	400
2. Conciliation in Other Countries	401
(a) <i>JAPAN</i>	401
(b) <i>SINGAPORE</i>	401
(c) <i>HONG KONG</i>	402
3. One Concept of Conciliation	403
CHAPTER VII	
A LOOK INTO THE FUTURE	
1. TOWARDS A MODEL LAW ON CONCILIATION?	406
(a) Introduction	406
(b) Contents of a Model Law on Conciliation	407
(c) Summary and Perspective	412
2. THE NEW YORK CONVENTION 1958	413
3. THE MODEL LAW OF UNCITRAL	415
(a) Changes in the Text	416
(b) Additions to the Text	419
(c) In Conclusion	421
Selected Bibliography	423
Subject Index	437