

FOREWORD

The Rules of Arbitration of the International Chamber of Commerce were first published in 1922/1923. Since then, the ICC Rules have been revised on a number of occasions, and most recently in 2012 and 2017. In modernizing the ICC Rules the Court provided in 2012 for emergency arbitration and in 2017 for expedited rules for arbitrations of a limited value, which apply on an opt-out basis.

The Court has also adopted and revised a Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration (the “ICC Note”). The ICC Note renders ICC arbitration more transparent and includes guidance to ensure that the highest standards of ethics are maintained at all times in ICC arbitrations, in particular as far as conflict disclosures are concerned. The ICC Note also seeks to promote efficiency by setting out a procedure for dealing with manifestly unmeritorious claims and defences and providing incentives for arbitrators to render awards promptly.

The recent Queen Mary and White & Case arbitration survey shows that 77% of interviewees identified ICC as their most preferred arbitral institution. The ICC leads all other institutions on all continents, including Asia. This is a testament to our commitment to quality and efficiency, and an encouragement to continue innovating and improving our services. It is also an incentive to disseminate knowledge of ICC arbitration.

This fourth edition of the Handbook of ICC Arbitration provides a commentary on ICC arbitration as it is now practiced around the world. Both of the authors are very experienced arbitrators and counsel. In addition, both authors participated in the ICC Court for over six years. In the Handbook of ICC Arbitration, the authors carefully analyse the ICC Rules and their amendments in 2012 and 2017. The Handbook discusses in detail the practices of the ICC Court based on the authors’ own experience and as reflected in the ICC Note. The Handbook deals with issues ranging from the scope of the arbitration agreement, to arbitration procedure, disclosure obligations and challenges of arbitrators and enforceability of awards. It also discusses the various changes to the ICC Rules and ICC practices intended to promote efficiency in ICC arbitration. The authors discuss these issues by reference to a wide range of material, including ICC Awards and publications and the various IBA arbitration publications, as well as to the national court decisions relating to arbitrations in jurisdictions such as France, Germany, Switzerland, England, the US, and Singapore. The Handbook is a comprehensive and in-depth analysis of ICC arbitration.

As with the prior editions, I am sure that this fourth edition of the Handbook of ICC Arbitration will provide a valuable contribution to ICC arbitration.

Alexis Mourre
President
ICC International Court of Arbitration

PREFACE

The main focuses of this fourth edition include, in particular, the application of Article 29 of the ICC Rules with respect to emergency arbitrators introduced in 2014 as well as the introduction in 2017 of Article 30 of the ICC Rules dealing with expedited procedure. As discussed in the introduction, the emergency arbitrator provisions have already been accepted by parties and that is bound to increase. With respect to expedited procedure there is already an indication that these provisions will be widely used. Therefore, both provisions are rapidly becoming frequent features in ICC arbitration.

In addition, the ICC has published a detailed “Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration” which deals with a number of issues. First, the Note seeks to encourage Tribunals to deal rapidly with claims or defences that are manifestly without merit. Second, the Note sets out various incentives for Tribunals to render Awards more rapidly. Third, the Note sets out in much more detail than previously was the case the ICC Court’s practices with respect to administration of arbitrations. Therefore, the Commentary includes references where appropriate throughout the Commentary.

However, approaching ICC arbitration is much more complex, whether as counsel or arbitrator. The complexity is reflected in procedural orders and Awards issued by Tribunals. It is also reflected in the case law of the courts, whether the courts of the place of arbitration or the courts of the place of enforcement. In scrutinising awards, the ICC Court “considers to the extent practicable, the requirements of the mandatory law at the place of arbitration” (art.6, App.II to the Rules) and the ICC Court and the Tribunal shall “make every effort to make sure that the award is enforceable at law” (art.41).

A key element of this Handbook is analysing how Tribunals seek to meet these requirements and how the state courts interpret legal requirements at the place of arbitration or the place of enforcement with respect to arbitration in general. As with the prior editions, this fourth edition focuses on the law applicable in the places where most ICC arbitrations take place: France, Switzerland, England, the US, and the UNCITRAL Model law countries including, in particular, Singapore. The latter category is expanding and becoming more important.

The Handbook also deals with various specific issues that frequently arise in ICC arbitration such as the issue of challenges to arbitrators, jurisdiction with respect to non-signatories of the arbitration agreement, capacity of parties and enforcement of awards that have been annulled at the place of arbitration. As regards challenges to arbitrators, in addition to setting out the standards applied by the ICC Court and state courts regarding conflicts of arbitrators, this fourth edition sets out a summary table in particular of ICC Court decisions regarding challenges as well as summary tables with respect to various state courts. These tables are intended to provide an overview of how the general principles are applied in practice. In a series of English cases, the English courts have declined to annul awards or remove an arbitrator where there has been a failure to disclose relevant information regarding conflicts but this failure has been viewed as an error by the arbitrator.¹ A similar approach has been adopted in the US² (although the Brazilian

¹ See in particular *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) and *Haliburton Company v Chubb Bermuda Insurance Ltd.* [2018] EWCA Civ 81 referred to at para.14-98.

PREFACE

courts refused to enforce the award).³ As regards annulment of Awards, the trend of state courts to refrain from re-examining the merits has been maintained but it is particularly noteworthy that the French courts have had a more critical approach where they view that there is an underlying issue of corruption.

In addition to the ICC's internal material relating to arbitration, various other entities, such as the International Bar Association (IBA) and the International Law Association (ILA) have produced guidelines or recommendations that continue to be discussed and used in international arbitration. The IBA Rules on the Taking of Evidence in International Arbitration as revised in 2010 have become a standard point of reference for arbitration procedure as is reflected in the IBA Arbitration Guidelines and Rules Subcommittee, "*Report on the reception of the IBA Arbitration soft law products*, September 2016". The IBA Guidelines on Conflict of Interest continue to provide a point of reference in international arbitration as is reflected in the 2016 Report. However, as discussed in the commentary, the ICC has adopted a broader standard for disclosure than that in those Guidelines. This is an issue addressed under art.11.

As with the prior editions, this Handbook is based, in particular, on the arbitrations in which the authors have been, and are currently, involved as arbitrators and counsel. The various procedural issues dealt with in procedural orders, hearings and awards are an essential part of this Handbook and reflect the valuable contributions, in particular, of fellow arbitration practitioners and members of the Secretariat. Particularly when dealing with issues such as applications for admissions of evidence, bifurcation, and the conduct of hearings this day-to-day practice is a continual reminder of the requirements to deal with issues relating to cost, effectiveness, and due process.

The reception of the previous editions of this Handbook have been very gratifying. Without limiting any responsibility for any shortcomings in this fourth edition, it is appropriate to thank various persons. This edition, like the prior editions reflects the value of discussion of the various legal issues under both the 1998 Rules and the current rules with the ICC Court members and the members of the Secretariat. In addition, the Handbook refers to, and relies on, the considerable work that has been carried out by the ICC ADR Commission with respect not only to the Rules themselves but also with respect to issues such as controlling time and costs. We would like to thank Andreas Webster who carried out research for the book in an effort to reflect the latest developments, particularly with respect to US law and who was instrumental in preparing the tables of challenge decisions. We would also like to express our appreciation to Ileana Smeureanu of Jones Day Paris, as well as to Anzhela Torosyan, formerly an intern with Jones Day Paris, for their research assistance. We also very much appreciate the enthusiastic and effective assistance from the entire team at Thomson Reuters.

Paris and London, September 2018

Tom Webster
Michael Bühler

² 549 Fed Appx. 41 (2014) affirming the decision of the decision of the Southern District of New York of 7 January 2013, but see *Noel Madamba Contracting LLC v Romero* 364 P. 3d 518 to the contrary.

³ *Brazil/19 April 2017/Brazil, Superior Tribunal de Justiça (Superior Court of Justice)/ASA Bioenergy Holding A.G. v Adriano Giannetti Dedin Ometto/Challenged Foreign Award 9.412.*