

FOREWORD

As the Secretary of the United Nations Commission on International Trade Law (UNCITRAL), I would like to express my appreciation to Tom Webster for this new Edition of the *Handbook of UNCITRAL Arbitration*.

UNCITRAL is well known for its work in the field of international commercial arbitration, including the promotion of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006), the UNCITRAL Arbitration Rules, which have been adopted in 1976 by UNCITRAL and revised for the first time in 2010, and the United Nations standards on transparency in treaty-based investor State arbitration (the Mauritius Convention on Transparency and the UNCITRAL Rules on Transparency). However, the role of UNCITRAL is far from being limited to the sphere of international arbitration. UNCITRAL is the core legislative body of the United Nations in the field of international trade law. Its work aims at facilitating international trade by establishing a modern and harmonized legislative framework, thereby contributing to the 2030 Agenda for Sustainable Development. UNCITRAL also provides technical assistance to law reform activities, including by assisting States in the review and assessment of their need for law reform, and in the drafting of domestic legislation required to implement UNCITRAL texts.

By its references to the United Nations process by which UNCITRAL instruments are prepared and adopted, the *Handbook* provides a precious insight into this process. Like all the legislative and non-legislative instruments prepared or promoted by UNCITRAL, the UNCITRAL Arbitration Rules and related instruments presented in this new edition of the *Handbook* were negotiated through an inter-governmental process involving a broad range of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organizations; and practitioners represented by non-governmental organizations. As a member of an observer delegation, Mr. Webster gathered first-hand information on this process as he attended sessions of the UNCITRAL Working Group on Dispute Resolution, which prepared these instruments and contributed to its deliberations.

The UNCITRAL Arbitration Rules are often cited as one of the most successful instruments of contractual nature in the field of international trade law. In 2010, the General Assembly of the United Nations, by its resolution 65/22, recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations. This recommendation was based on the conviction that “the revision of the Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations and to the continuous strengthening of the rule of law”. The resolution also noted that “the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes”. Nowadays, the UNCITRAL Arbitration Rules are used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. They have been used as a

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model by arbitral institutions for drafting their own rules, as emphasized in the UNCITRAL Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, adopted in 2012. The *Handbook* also introduces the reader to the UNCITRAL Notes on Organizing Arbitral Proceedings, initially adopted in 1996, and revised in 2016. The purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings. The Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution. The Notes, while not exhaustive, cover a broad range of situations that may arise in arbitral proceedings, and they are of a very practical nature. Dealing also with investment arbitration, a field of growing interest, this new Edition provides relevant information on the United Nations instruments on transparency in treaty-based investor-State Arbitration which are paving the way for reform of the field of investment arbitration.

The *Handbook* covers the key instruments of UNCITRAL in the field of international arbitration through various angles, making the *Handbook* a precious companion and a valuable reference for those involved in international arbitration.

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PREFACE

The adoption of the revised UNCITRAL Rules in 2010 (Rules) was a major event not only with respect to UNCITRAL Arbitration, but with respect to arbitration in general. The revision to the Rules was successful. This is reflected in the Queen Mary Survey of 2018,¹ which indicates that the UNCITRAL Rules were chosen as the preferred option for ad hoc arbitration by 85% of those responding.

Since the first edition of this *Handbook* was published in 2010, there have been a number of major developments that led to a second edition in 2014 and to this third edition. As regards the UNCITRAL Rules themselves, they were amended in 2013 with the addition of art.1(4) in 2013 to provide for the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration that were introduced effective 1 April 2014. Therefore, the general rules for investor state arbitration are changing and it is important to discuss the Rules on Transparency. As discussed in Part II of the *Handbook*, the Rules on Transparency deal with third party submissions, non-disputing party submissions and access to hearings as well as access to documents. However, just as important is the increased transparency of arbitration institutions themselves and art.12 of the *Handbook* contains summaries of over 40 published decisions of arbitral institutions on challenges to arbitrators and a table of related decisions by state courts.

As regards procedures adopted in international arbitration, in 2016 UNCITRAL issued—for the first time in 20 years—new Notes on Organizing Arbitral Proceedings (the 2016 UNCITRAL Notes). The 2016 UNCITRAL Notes are intended to be used in both ad hoc and institutional arbitrations. However, they are particularly suited to arbitration under the Rules as they were drafted “after consultations with governments, interested intergovernmental and international non-governmental organizations active in the field of arbitration, including arbitral institutions, as well as individual experts.”² The 2016 UNCITRAL Notes are non-prescriptive and do not seek to establish best practices but they are illustrative and discuss in detail issues relating to international arbitration proceedings. Therefore, the *Handbook* refers to the 2016 UNCITRAL Notes as a key point of reference for arbitration procedure.

In addition to UNCITRAL’s 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 and that are intended to reflect best practices. According to the IBA Report on Soft Law,³ 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. The IBA Guidelines on Conflicts of Interest as revised in 2014 and the IBA Guidelines on Party Representation in International Arbitration of 2013 are also important reference points in international arbitration. Therefore, as in prior editions, this *Handbook* relies on this “soft” law to interpret the Rules.

¹ <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration> [Accessed February 12, 2019], p. 2.

² 2016 UNCITRAL Notes, p.vii.

³ The IBA Arbitration Guidelines and Rules Subcommittee, “Report on the reception of the IBA Arbitration soft law products”, September 2016.

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As discussed in this *Handbook*, the Rules are incorporated in the parties' agreement to arbitrate and should be interpreted as such. That overall arbitration agreement will be subject to a specific national law generally. Nevertheless, there is a strong argument that the Rules should be interpreted in a consistent. However, as was highlighted in the prior editions, UNCITRAL arbitration rules are generally subject to the arbitration law of the place of arbitration. UNCITRAL has also played a very active role in this respect with the development of the UNCITRAL Model Law on International Arbitration as amended in 2006 (the Model Law). The commentary reflects the principles in the Model Law, as well as the principles in the arbitration laws applicable in a number of major places of arbitration (France, Switzerland, England, the United States and Singapore for example). 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. The *Handbook* discusses issues including how the state courts view Appointing Authority decisions on challenges and on the obligations not dealt with in the Rules, such as the collegiality amongst arbitrators. The *Handbook* also examines issues such as non-signatories and the differing treatment of the same Award in *Dallah Real Estate* in the UK Supreme Court⁴ and the Paris Court of Appeal.⁵ The issue of enforcement of annulled awards has proceeded beyond the *Hilmarton* cases and is now the subject of cases such as *Termorio*⁶ and *COMMISA*⁷ in the United States and *Yukos Capital* in the UK.⁸ In what may be a significant change of direction, the French Supreme Court has limited the scope of waivers of sovereign immunity in *NML v Argentina*⁹ and annulled an award based on its determination that it involved money laundering.¹⁰ In addition, access to court cases continues to improve. UNCITRAL now has a functioning website (<http://www.newyorkconvention1958.org>) that provides updates on cases from a number of countries regarding the New York Convention in those jurisdictions and UNCITRAL has published in 2016 a detailed guide to the New York Convention.

The reception of the prior editions of this *Handbook* was very gratifying. Without limiting my responsibility for any shortcomings in this second edition, it is appropriate to thank various persons. This edition, like the prior editions, reflects the value of discussion of the various legal issues by UNCITRAL and its Secretariat and Working Group II. In addition, Andreas Webster assisted in preparing the manuscript, carried out research for the book in an effort to reflect the latest developments and prepared the tables relating to the challenges to arbitrators discussed in art.14.

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⁴ *Dallah Real Estate* [2010] UKSC 46.

⁵ *Dallah Real Estate*, Paris Court of Appeal, 7 February 2011.

⁶ See (2007) ASA Bull Vol.25, No.3, p.643.

⁷ *COMMISA* 2013 WL 4517225 (SDNY 27 August 2013).

⁸ *Yukos Capital* [2012] EWCA Civ 855.

⁹ *NML v Argentina* Cass 1iere 28 March 2013 (No.395); see also the other two decisions of that date Nos 394 and 396.

¹⁰ Paris Court of Appeal, 21 February 2017.