

**The Baker & McKenzie
International
Arbitration Yearbook
2010-2011**

JURIS

Questions About This Publication

For assistance with shipments, billing or other customer service matters,
please call our Customer Services Department at:
1-631-350-2100.

To obtain a copy of this book, call our Sales Department at: 1-631-351-5430
Fax: 1-631-351-5712 or 1-631-351-5430

Toll Free Order Line: 1-800-887-4064 (United States and Canada)

See our web page about this book:
www.arbitrationlaw.com

COPYRIGHT © 2011 by JurisNet, LLC

All rights reserved. No part of this publication may be reproduced in any form or by
any electronic or mechanical means including information storage and retrieval
systems without permission in writing from the publisher.

Printed in the United States of America
ISBN 978-1-933833-78-1

This is the fourth edition of the *Baker & McKenzie International Arbitration Yearbook*, an annual series established by the Firm in 2007. This collection of articles is comprised of reports in key jurisdictions around the globe on arbitration. Leading lawyers of the Firm's International Arbitration Practice Group, a division of the Firm's Global Dispute Resolution Practice Group, report on recent developments in national laws relating to arbitration and address current arbitral trends and tendencies in the jurisdictions in which they practice.

For this 2010-2011 edition, the topic of Section C of each chapter describes the results, both in practice and according to national legislation, when arbitration meets with the insolvency or bankruptcy proceedings of one of the parties to the arbitration.

The aim of this *Yearbook* is to highlight the more important recent developments in international arbitration, without aspiring to be an exhaustive case reporter or a text-book to arbitration in the broad sense. It is hoped that this volume will prove a useful tool for those contemplating and using arbitration to resolve international business disputes.

JurisNet, LLC
71 New Street
Huntington, New York 11743 USA
www.arbitrationlaw.com

TABLE OF CONTENTS

Foreword	xxxvii
About the 2010-2011 B&M Yearbook Editors	xli
Glossary	xlix
ASIA-PACIFIC	1
AUSTRALIA	
Leigh Duthie, Melbourne; and	
Sarah Lancaster, Sydney	3
A. Legislation, Trends and Tendencies	3
A.1 Legislative Framework	3
A.2 Amendments to Australia’s Legislative Framework	4
A.3 Amendments to the International Arbitration Act.....	6
A.4 Introduction of the Australian International Disputes Centre	8
B. Cases	9
B.1 Restricting Court Interference with Arbitral Awards.....	9
B.2 Proportionate Liability.....	13
B.3 Opting out of the Model Law under the Amended IAA	15
C. Insolvency Issues in Arbitration.....	18
C.1 Introduction.....	18
C.2 The Australian Insolvency Legal Framework.....	18

Table of Contents

C.3 The Lesser Stay—Voluntary Administration and Winding Up in Insolvency or by the Court 19

C.4 The Greater Stay—Voluntary Winding Up 22

C.5 Enforcing a Foreign Award against Assets in Australia 22

C.6 Enforcing a Foreign Award against Assets of an Australian Insolvent Debtor outside of Australia—Cross Border Insolvency Rules 23

CHINA

Catherine Mun, Hong Kong; and Shen Peng, Beijing 25

A. Legislation, Trends and Tendencies 25

B. Cases 28

C. Insolvency Issues in Arbitration 35

HONG KONG

Gary Seib and Catherine Mun, Hong Kong 37

A. Legislation, Trends and Tendencies 37

A.1 Recent Developments 37

A.2 Reform of Hong Kong Arbitration Regime 38

A.3 Trends 40

B. Cases 42

B.1 Sovereign Immunity 42

B.2 Enforcement 44

B.3 Abuse of Process 46

Table of Contents

C. Insolvency Issues in Arbitration.....	48
C.1 Court Interference in Arbitration Proceedings.....	48
C.2 Effect of Winding Up and Appointment of the Provisional Liquidator.....	49
INDONESIA	
Timur Sukirno and Reno Hirdarisvita, Jakarta	53
A. Legislation, Trends and Tendencies.....	53
B. Cases	55
C. Insolvency Issues in Arbitration.....	57
C.1 Bankruptcy in Indonesia	57
C.2 The Interaction between Bankruptcy and Arbitration.....	59
JAPAN	
Haig Oghigian, Mami Ohara and Junya Suzuki, Tokyo	63
A. Legislation, Trends and Tendencies.....	63
A.1 Historical Background.....	64
A.2 Main Features of the Arbitration Law	65
B. Cases	70
B.1 Court Assistance in Taking Evidence	70
B.2 Separability of Arbitration Agreement	71
B.3 Public Policy	74
B.4 Enforcement Order.....	75

Table of Contents

C. Insolvency Issues in Arbitration.....	77
C.1 Arbitration Proceedings and Bankruptcy Proceedings under Japanese Law.....	77
C.2 Arbitration Agreements Executed after the Commencement of Bankruptcy Proceedings.....	78
C.3. Commencement of Arbitral Proceedings by Bankrupt Debtors	79
C.4 Impact of Bankruptcy Proceedings on Pre-existing Arbitration Agreements	80
C.5 Effect of Bankruptcy Proceedings on Pre-existing Arbitral Awards	80
C.6 Commencement of Arbitral Proceedings against Bankruptcy Trustees.....	80
C.7 Effect of Bankruptcy on Pending Arbitration Proceedings	81
C.8 Conclusion	82

PHILIPPINES

Emmanuel S. Buenaventura, Marvin V. Masangkay, Jay Patrick R. Santiago and Camille I. Aromas, Manila.....	83
A. Legislation, Trends and Tendencies.....	83
B. Cases	87
B.1 Arbitration in the Philippine Construction Industry	87
C. Insolvency Issues in Arbitration.....	89

Table of Contents

SINGAPORE

Timothy Cooke and Shuan Lee, Singapore.....93

A. Legislation, Trends and Tendencies.....93

B. Cases94

 B.1 Conflict of Dispute Resolution Clauses in
 Related Contracts94

 B.2 Arbitral Award Will Not Be Set Aside on Grounds
 Other Than Those in the IAA96

 B.3 Arbitral Award Set Aside on Public Policy Grounds—
 Illegality.....98

 B.4 Court’s Exercise of Its Discretion to Refer an
 Interpleader Issue to Arbitration under the IAA101

C. Insolvency Issues in Arbitration.....103

 C.1 Mandatory Stay Provisions and Arbitration—
 Distinction between Foreign and Local Arbitrations?103

 C.2 Non-Arbitrability of Insolvency and Insolvency-
 Related Claims.....106

 C.3 Requirement of Consent by Companies in Schemes of
 Arrangement to Accept Commencement of Arbitration110

 C.4 Third Party Proprietary Interest May Defeat
 Arbitration Agreement and Stay of Proceedings.....111

TAIWAN

Tiffany Huang and Amber Hsu, Taipei.....113

A. Legislation, Trends and Tendencies.....113

 A.1 Overview.....113

 A.2 Arbitration Associations114

Table of Contents

A.3	Recent Developments across the Taiwan Strait	115
B.	Cases	117
B.1	Definition of a Valid and Effective Arbitration Agreement.....	117
B.2	<i>Ad hoc</i> Arbitration.....	119
B.3	Appointment of Arbitrators by the Court or Arbitration Association.....	120
B.4	Notification of and Intervention in the Arbitration.....	121
B.5	Time Limit for Rendering Arbitral Awards.....	122
B.6	Enforceability of Arbitral Awards.....	123
B.7	Revocation of Arbitral Awards.....	124
B.8	Enforcement of Foreign Arbitral Awards.....	126
C.	Insolvency Issues in Arbitration.....	129

THAILAND

Chirachai Okanurak and Timothy Breier, Bangkok.....131

A.	Legislation, Trends and Tendencies	131
A.1	Legislative Framework.....	131
A.1.1	Arbitrability	132
A.1.2	Formalities of the arbitration agreement	132
A.1.3	Validity of an agreement between a governmental agency and a private party	132
A.1.4	Stay of legal proceedings	133
A.1.5	Appointment of arbitrators	133
A.1.6	Duties and qualifications of arbitrators	134

Table of Contents

A.1.7	Liability of arbitrators	134
A.1.8	The power of the arbitration tribunal to rule on its own jurisdiction and the separability of the arbitration agreement	135
A.1.9	Interim relief	135
A.1.10	The arbitral proceedings	135
A.1.11	The award	136
A.1.12	Setting aside the award	136
A.1.13	Recognition and enforcement of the award	137
A.1.14	Grounds for refusal of enforcement	137
A.1.15	Appeal against the order or judgment of the court	138
A.2	Arbitral Institutions	138
A.2.1	TAI	139
B.	Cases	140
B.1	Arbitration Award under Investment Treaty	140
B.2	Validity of an Arbitration Agreement between a Governmental Agency and a Private Party	142
B.2.1	Expressway case	142
B.2.2	ITV case	144
B.3	Arbitral Proceedings and Appointment of Arbitrators	145
B.4	Arbitrability of Employment Contracts	146
B.4.1	Statutory entitlements not subject to arbitration clause	146
B.4.2	Unfair contracts subject to arbitration	147
B.5	Stay of Proceedings	148

Table of Contents

C. Insolvency Issues in Arbitration.....	149
C.1 Framework for Claiming against Debtor in Bankruptcy	149
C.2 Treatment of Arbitration Proceedings after Issuance of Absolute Receivership Order.....	149
C.3 Treatment of Arbitration Award Ratified by Thai Court Judgment	151
C.4 Treatment of Foreign Arbitration Aimed at Assets Located outside Thailand.....	151
C.5 Treatment of Domestic Arbitration Aimed at Assets Located outside Thailand.....	152
C.5.1 TAI declines to proceed with arbitration claim	152
C.5.2 TAI proceeds with arbitration claim	152
EUROPE, MIDDLE EAST, CENTRAL ASIA	155
AUSTRIA	
Stefan Riegler, Vienna	157
A. Legislation, Trends and Tendencies	157
B. Cases	157
C. Insolvency Issues in Arbitration.....	159
C.1 Introduction	159
C.2 Impact on the Arbitration Agreement	159
C.3 Arbitrability of Bankruptcy Matters and Claims.....	161
C.4 Effect of Bankruptcy on Pending Arbitral Proceedings	162
C.5 Practical Consequence of Insolvency on Costs.....	163

Table of Contents

BELARUS

Alexander Korobeinikov, Almaty 165

A. Legislation, Trends and Tendencies 165

 A.1 Legislation 165

 A.1.1 International treaties 165

 A.1.2 Domestic legislation 166

 A.2 Trends and Tendencies 166

 A.2.1 Growth of arbitration in Belarus 166

 A.2.2 Development of court-appointed mediation 167

B. Cases 168

 B.1 Refusal to Enforce an Arbitral Award against a
 Belarusian Company under Bankruptcy Proceedings 168

 B.2 The Claim of a Bankrupt Company May
 Not Be Transferred to Arbitration 169

C. Insolvency Issues in Arbitration 170

BELGIUM

**Arne Gutermann and Joeri Vananroye, Brussels;
and Koen De Winter, Antwerp** 173

A. Legislation, Trends and Tendencies 173

B. Cases 173

 B.1 Court Review of International Awards on
 Competition Law Issues at the Enforcement Stage 173

 B.2 Arbitrability of Distribution Agreements 177

 B.3 Membership by One Party in the Arbitral Institution
 Does Not Provide Automatic Grounds for Nullity 179

Table of Contents

B.4 The Unilateral Procedure for Designation of an Arbitrator by a State Court: At Odds with the Rights of Defense?	180
C. Insolvency Issues in Arbitration.....	182

CZECH REPUBLIC

Martin Hrodek and Michaela Koblasová, Prague	187
---	------------

A. Legislation, Trends and Tendencies	187
A.1 Recent Developments in Legislation	187
B. Cases	188
B.1 Setting Aside of an Award Ordering a Party to an Unpermitted Performance.....	188
B.2 The Arbitrator's Resolution of Lack of Jurisdiction Binds the Court	190
B.3 Delivery of Arbitration Awards	191
C. Insolvency Issues in Arbitration.....	192
C.1 Incidental Disputes Relating to Insolvency Proceedings Are Not Arbitrable.....	192
C.2 Czech Arbitration and Foreign Bankruptcy.....	193
C.3 Foreign Arbitration and Czech Bankruptcy.....	196
C.3.1 Czech bankrupt debtor as claimant.....	196
C.3.2 Czech bankrupt debtor as respondent	197
C.4. Conclusion	198

Table of Contents

EGYPT

Hazim Rizkana and Hatem Darweesh, Cairo199

A. Legislation, Trends and Tendencies199

 A.1 Legislative Framework199

 A.2 Recent Amendments201

B. Cases203

 B.1 Annulment of Arbitral Award for Violation
 of Public Policy.....203

 B.2 Rejection of Annulment Petition on the Basis of
 Lapse of Date to Issue the Award205

C. Insolvency Issues in Arbitration.....206

FRANCE

**Eric Boryzewicz, Jean-Pierre Harb and
Christophe Lobier, Paris**209

A. French Legislation.....209

B. French Case Law214

 B.1 Mandatory Public Policy Issues Do Not Affect the
 Jurisdiction of Arbitral Tribunals.....214

 B.2 Conditions for the Renouncement of the Arbitration
 Agreement and the Impact of Confidentiality
 on the Arbitrability of the Dispute.....215

 B.3 State Courts May Set Aside an Award in Case of
 Fraud during the Arbitral Proceedings.....218

 B.4 Basing an Award on Legal Concepts Not Raised by
 the Parties Amounts to Breach of Due Process219

Table of Contents

B.5	A Party That Refused to Take Part in Arbitration Proceedings May Still Seek to Set Aside the Resulting Award	220
B.6	French Courts May Not Order a Stay in Ongoing Arbitral Proceedings	223
B.7	The ICC’s Refusal to Administer a Case Is Insufficient to Render the Arbitration Clause Void	224
B.8	The French Supreme Court Defines the Concept of Estoppel	225
B.9	French Administrative and Civil Courts Share Jurisdiction over Set Aside Proceedings	227
B.10	Violation of the European Convention on Human Rights Becomes Ground for Annulment under French Law	228
B.11	<i>Res Judicata</i> Is a Question of Admissibility, Not a Ground for Setting Aside an Award	230
C.	Insolvency Issues in Arbitration	231
C.1	“Non-Arbitrable Disputes”	232
C.2	Arbitrable Disputes	236

GERMANY

Ragnar Harbst, Heiko Plassmeier and Jürgen Mark, Frankfurt and Düsseldorf	239
--	------------

A.	Legislation, Trends and Tendencies	239
A.1	New Adjudication Rules by the German Institution of Arbitration	239
A.1.1	DAB as a standing board during the project	240
A.1.2	Basic elements of the DAB dispute procedure under the DIS Rules	240

Table of Contents

A.1.3	Effect of the DAB decision.....	241
A.1.4	Notice of dissatisfaction.....	242
A.1.5	Enforcement of DAB decision?	242
A.1.6	Interim measures	243
A.1.7	Remuneration of adjudicators	244
A.1.8	Outlook	244
B.	Cases	244
B.1	Challenge of an Arbitrator.....	244
B.2	Most-favored Treatment and Recognition and Enforcement of Foreign Arbitral Awards.....	247
B.3	Admissibility of Set-off Defenses in Proceedings for the Declaration on Enforcement of an Arbitral Award	248
B.3.1	Confirmation of the established case law that substantive law defense can be raised in enforcement proceedings.....	249
B.3.2	Clarification on the court of appeal’s jurisdiction for set-off defenses.....	250
B.4	Preliminary Enforcement of Foreign Arbitral Awards in Germany.....	252
B.5	Natural Justice—No Obligation for Tribunal to Hear Witnesses on Unsubstantiated Allegations—No Obligations for the Tribunal to Give Hints as to Its Legal Opinion	254
B.5.1	No obligation to hear witnesses on unsubstantiated allegations	255
B.5.2	No need for arbitral tribunals to inform parties on their preliminary legal evaluation	256
C.	Insolvency Issues in Arbitration.....	257

Table of Contents

C.1 Effect of Insolvency on the Validity of Arbitration Agreements	258
C.1.1 Impecuniosity	258
C.1.2 Choice of non-performance	259
C.2 Insolvency before Commencement of Arbitration Proceedings	259
C.3. Insolvency pending Arbitration Proceedings	260
C.4. Insolvency after the Award	263
C.5. Arbitrability of Disputes Following Rescission of a Transaction	265

HUNGARY

József Antal and Anna Ménes, Budapest	267
--	------------

A. Legislation, Trends and Tendencies	267
A.1 Legislation	267
A.1.1 Arbitrability of disputes	267
A.1.2 Arbitration rules	268
A.1.3 Arbitrators, independence and impartiality of arbitrators	268
A.1.4 Remedies against arbitral awards	269
A.1.5 Enforcement	270
A.1.6 Costs	270
A.1.7 Confidentiality	271
A.1.8 Relationship of arbitration courts and ordinary courts	271

Table of Contents

A.1.9. The five main permanent arbitration courts operating in Hungary	271
A.2 Trends and Tendencies	274
B. Cases	275
B.1 <i>Res Judicata</i> Effect of Arbitral Awards—Issue Clarified by the Supreme Court	275
B.2 Independence and Impartiality of Arbitrators— Working Relationship as a Reason for Exclusion	276
B.3 Arbitration Clause Contained in General Terms and Conditions—Explicit Acceptance Is Needed	277
C. Insolvency Issues in Arbitration.....	278
C.1 Hungarian Insolvency Law	278
C.2 Impact on the Arbitration Agreement.....	278
C.2.1 Claims raised by the debtor	279
C.2.2 Claims against the debtor	279

ITALY

Claudio Camilli and Gaetano Iorio Fiorelli, Milan	281
A. Legislation, Trends and Tendencies.....	281
B. Cases	282
B.1 Interpretation of Contract Provisions by the Arbitrators and Limitation in the Appeal Procedure.....	282
B.2 Effects of One Party’s Bankruptcy on the Arbitration Clause	283
C. Insolvency Issues in Arbitration.....	283
C.1 The Recent Reform of the Insolvency Act	283

Table of Contents

C.2	The Effects of Bankruptcy on Arbitral Proceedings	284
C.3	Effect of an Award Issued before the Declaration of Bankruptcy	285
C.4	Stipulation to an Arbitration Agreement after Declaration of Bankruptcy	286

KAZAKHSTAN

Azamat Kuatbekov and Alexander Korobeinikov, Almaty

A.	Legislation, Trends and Tendencies	287
A.1	Domestic Legislation	287
A.2	International Treaties	289
A.3	Recent Amendments concerning Parallel Proceedings, Interim Measures and Issues of Sovereign Immunity	289
A.4	New Mediation Law	290
A.5	Trends	291
B.	Cases	292
B.1	Investment Disputes	292
B.2	Commercial Arbitration Disputes	293
C.	Insolvency Issues in Arbitration	294

THE NETHERLANDS

Frank Kroes and Marjon Lok, Amsterdam

A.	Legislation, Trends and Tendencies	295
A.1	Legislation	295
A.2	Proposed Changes to the Dutch Arbitration Act	297
A.3	Trends and Tendencies	298

Table of Contents

B. Cases	299
B.1 Arbitration Proceedings: Intervention Denied Due to Unreasonable Delay	299
B.2 Arbitration Proceedings: Tribunal Denies Request for Security	301
B.3 Arbitration Proceedings: Arbitration Agreement in GTC Not Unreasonably Onerous for Consumers	302
B.4 Court Proceedings: Valid Arbitration Agreement	304
B.5 Court Proceedings: Right to Full Disclosure versus the Nature of Arbitration	305
B.6 Court Proceedings: Boundaries of Arbitration versus Court Proceedings; Legal Consequences of Which Parties Cannot Freely Dispose	308
B.7 Court Proceedings: Summary Court Proceedings versus Summary Arbitration Proceedings	310
B.8 Court Proceedings: Appeal of Decision to Enforce Foreign Arbitral Awards	311
B.9 Court Proceedings: Exequatur Is Compulsory for Enforcement of Penalty	313
B.10 Court Proceedings: Enforcement of Foreign Arbitral Award	314
C. Insolvency Issues in Arbitration	317
C.1 Relationship between Bankruptcy and Arbitration	317
C.2 Rights and Obligations Comprised in the Estate	318
C.3 Procurement of Performance from the Bankrupt Estate	319
C.4 Circumventing Arbitration by the Distressed Entity	322
C.5 Cross Border Insolvency	323

Table of Contents

POLAND

Marcin Aslanowicz and Joanna Jasiewicz, Warsaw325

A. Legislation, Trends and Tendencies.....325

 A.1 Sources of Arbitration Law in Poland325

 A.2 Arbitrability.....325

 A.3 Arbitration Agreement.....326

 A.4 Arbitrators327

 A.5 Jurisdiction of an Arbitral Tribunal328

 A.6 Proceedings before an Arbitral Tribunal328

 A.7 Conclusion of Arbitral Proceedings329

 A.8 Appeals against Arbitration Awards.....330

 A.9 Recognition and Enforcement of an Arbitration Award.....331

B. Cases332

C. Insolvency Issues in Arbitration.....333

RUSSIAN FEDERATION

Vladimir Khvalei and Ekaterina Solomatina, Moscow335

A. Legislation, Trends and Tendencies.....335

B. Cases336

 B.1 *Lugana Handelsgesellschaft mbH v. Ryazansky Zavod Metalloceramicheskikh Priborov*336

 B.2 *Ansell S.A. v. MedbusinessService-2000 LLC*.....337

 B.3 *UralEnergogas CJSC (Russia) v. ABB Electroengineering LLC (The Netherlands)*338

 B.4 *Yukos Capital s.a.r.l v. Tomskneft VNK OJSC*.....340

Table of Contents

B.5	<i>AIG Europe S.A. and ACE Insurance Company CJSC v. Voskhod LLC</i>	341
B.6	<i>Sokos Hotels St. Petersburg v. AB Living Design</i>	344
B.7	<i>Lugana Handelsgesellschaft mbH (Germany) v. Ryazansky Zavod Metalloceramicheskikh Priborov (Russia)</i>	347
B.8	<i>Venture Global Engineering LLC (USA) v. Avtotor Holding Group OJSC (Russia)</i>	348
B.9	Enforcement of an Award on Debt Recovery under a Loan Agreement	349
C.	Insolvency Issues in Arbitration	351
C.1	Bankruptcy under Russian Law	351
C.2	Initiating a Bankruptcy Proceeding	351
C.3	International Arbitration and Bankruptcy	352
C.4	Arbitrability of Bankruptcy Disputes	352
C.5	Influence of Respondent's Bankruptcy on Arbitration	353
C.6	Arbitration Proceeding regarding Claims in which the Bankrupt Party Acts as the Claimant	357

SPAIN

**Victor Mercedes, Barcelona; and José Ramon Casado,
Madrid**

359

A.	Legislation, Trends and Tendencies	359
A.1	Setting the Reform Agenda of Spanish Arbitration Law	359
A.2	Procedural Aspects of the Reform	360
A.3	“ <i>Ex Aequo et Bono</i> ” Arbitration	361

Table of Contents

A.4	Suitability of Arbitrators	362
A.5	Challenging of Corporate Resolutions	363
A.6	Insolvency Aspects in the Reform.....	364
B.	Cases	364
B.1	Relevance of the Unequivocal Will of the Parties to Submit Their Disputes to Arbitration over the Terms Inserted in the Agreement	364
B.2	Judicial <i>Prima Facie</i> Review.....	366
B.3	Arbitration Clauses and Arbimanou Clauses and Adhesion Contract (“ <i>Contratos de Adhesion</i> ”).....	366
B.3.1	The arbitration clause incorporated into an adhesion contract is null and void when one of the parties is a consumer	366
B.3.2	The arbitration clause incorporated into an adhesion agreement is not null and void if the parties are not consumers	368
B.4	Interim Relief	368
B.5	Public Policy	369
B.6	Domain Names, Bills of Exchange, Debt-Enforcement Actions and Matters Involving Leases.....	370
B.7	Arbitration and Consumer-Protection Legislation.....	372
B.8	Service of Notice and Refusal to Accept Service.....	374
B.9	Flexibility and Oral Nature of Arbitral and Special Proceedings with Reference to “ <i>Ex Aequo et Bono</i> ” Arbitration.....	375
B.10	“ <i>Ex Aequo et Bono</i> ” Arbitration: Impartiality of the Arbitrators, the Demarcation of the Subject of the Proceedings, and the Scope of the Award.....	376

Table of Contents

B.11 Relevance of the Time Limit for Making the Award	376
B.12 Violation of Public Policy Where an Award Is Rendered by Default.....	377
B.13 Liability of the Arbitrators, in Particular in “ <i>Ex Aequo et Bono</i> ” Arbitration.....	378
C. Insolvency Issues in Arbitration.....	379

SWEDEN

Anders Isgren, Jonas Benedictsson, Stefan Bessman, Magnus Stålmärker and Robert Tischner, Stockholm	381
A. Legislation, Trends and Tendencies.....	381
B. Cases	382
B.1 Arbitrator’s Impartiality.....	382
B.2 Jurisdiction of Swedish Courts Where Arbitration Takes Place in Sweden	384
B.3 Jurisdiction of State Courts to Decide the Validity of the Arbitration Clause.....	387
B.4 Arbitrability of Issues Arising out of Corporate Decisions and Exclusion of Brussels I Regulation	389
C. Insolvency Issues in Arbitration.....	391
C.1 Introduction.....	391
C.2 Bankruptcy	391
C.3 Case Law on Arbitration and Bankruptcy	392
C.4 Conclusions.....	394

Table of Contents

SWITZERLAND

Urs Zenhäusern, Joachim Frick and Anne-Catherine Hahn,

Zurich; Luca Beffa, Geneva397

A. Legislation, Trends and Tendencies	397
B. Cases	400
B.1 No Challenge for Interim Measures	400
B.2 Jurisdiction to Award Damages for Breach of an Arbitration Clause	402
B.3 Lack of Jurisdiction for Lack of Arbitration Agreement	404
B.4 Challenge of Arbitrators for Wrong Behavior and Violation of the Right to Be Heard.....	405
B.5 Challenge of “In-House” Arbitrators	407
B.6 Challenge of Arbitrators for Previous Involvement in the Case.....	410
B.7 Inconsistent Awards and Public Policy.....	414
B.8 <i>Res judicata</i> and Public Policy	415
B.9 Minimal Duty to Examine Relevant Issues and Right to Be Heard	417
B.10 The “Pechstein” Saga	420
B.11 The <i>Valverde</i> Case	423
C. Arbitration and Insolvency: Switzerland.....	426
C.1 The Challenge: The <i>Vivendi/Elektrim</i> Case.....	426
C.2 The Distinction: Foreign Arbitration and Bankruptcy Debtor in Switzerland or Swiss Arbitration and Foreign Bankruptcy Proceedings	428

Table of Contents

C.3 Foreign Arbitration Proceedings and Swiss Bankruptcy Law.....	428
C.3.1 Impact on the Arbitration Agreement.....	428
C.3.2 Claims raised by the bankrupt debtor.....	429
C.3.3 Claims against the bankrupt debtor	430
C.3.4 No consideration of pending arbitral proceedings.....	432
C.4 Swiss Arbitration Proceedings and Foreign Bankruptcy Laws	433
C.4.1 Commencement of fresh proceedings by a foreign trustee in bankruptcy	434
C.4.2 Suspension or termination of pending proceedings.....	435
C.4.3 No mandatory suspension based on Swiss law	436
C.4.4 Effect of foreign bankruptcy law rules.....	436
C.5 Cost Issues in Relation to Bankrupt or Insolvent Parties	438

UKRAINE

Svitlana Romanova, Nataliya Demir and Taras Aleshko, Kyiv.....	441
A. Legislation, Trends and Tendencies.....	441
A. 1 Introduction.....	441
A.2 Short Overview of Ukrainian Legislation regarding Arbitration.....	442

Table of Contents

A.2.1	Arbitrability	442
A.2.2	Interim measures	444
A.2.3	Court assistance in taking evidence	446
A.2.4	Setting aside arbitral awards	446
A.2.5	Recognition and enforcement	446
A.2.6	Public policy	447
A.3	Recently Adopted Ukrainian Legislation regarding Arbitration	448
A.4	International Commercial Arbitration Court of Ukrainian Chamber of Commerce (“ICAC”)	449
B.	Cases	450
B.1	Investment Disputes	450
B.2	Arbitration Disputes against Ukraine	451
B.3	Shares Sale and Purchase Agreement Is Not a “Corporate Relationship” under Ukrainian Law	454
B.4	Refusal to Recognize and Enforce an Arbitral Award against a Ukrainian Debtor for Failure of Notice	455
B.5	Ukrainian State Enforcement Service Refused to Enforce Arbitral Award against a Ukrainian Debtor on a Technicality	456
C.	Insolvency Issues in Arbitration	456
C.1	Bankruptcy of a Ukrainian Debtor	456
C.2	Initiation of Bankruptcy of Ukrainian Debtor on Basis of Arbitral Award	459

Table of Contents

UNITED KINGDOM

Edward Poulton, Richard Davies and Katherine Lim,

London461

A. Legislation, Trends and Tendencies461

B. Cases462

B.1 Enforcement of Awards462

B.1.1 *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46462

B.2 Inoperative Arbitration Agreements: Beware of Local Law463

B.2.1 *Jivraj v. Haswani* [2010] EWCA Civ 712463

B.2.2 *Accentuate Ltd. v. Asigra Inc.* [2009] EWHC 2655 (QB)465

B.3 Cases Relating to Sections 67 and 68 Arbitration Act 1996.....466

B.3.1 *B v. A* [2010] EWHC 1626 (Comm)466

B.3.2 *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29 (Comm)468

B.3.3 *Stellar Shipping Co LLC v. Hudson Shipping Lines* [2010] EWHC 2985 (Comm)470

B.4 Pre-Action Disclosure in Arbitration471

B.4.1 *Travelers Insurance Company Ltd. v. Countrywide Surveyors Ltd.* [2010] EWHC 2455 (TCC)471

C. Insolvency Issues in Arbitration.....472

C.1 When English Law Is Relevant.....473

Table of Contents

C.2	An Insolvent Debtor Subject to English Law	473
C.2.1	Impact on the arbitration agreement	473
C.2.2	Claims by the insolvent debtor.....	474
C.2.3	Claims against the insolvent debtor	475
C.3	English Arbitration Proceedings and Foreign Insolvency Laws	477
C.3.1	<i>Vivendi/Elektrim</i>	480
C.4	Costs Issues in Relation to Insolvent Companies.....	483
 LATIN AMERICA		485
 ARGENTINA Gonzalo E. Cáceres and Santiago L. Capparelli, Buenos Aires		487
A.	Legislation, Trends and Tendencies.....	487
A.1	Legislation.....	487
A.1.1	National Code of Civil and Commercial Procedure	488
A.1.2	International Commercial Arbitration Act of Mercosur	490
A.1.3	Panama Convention	491
A.1.4	The New York Convention.....	491
B.	Cases	491
B.1	Enforcement and Scope of an Arbitration Agreement.....	491

Table of Contents

B.2 Judicial Assistance in Aid of Arbitration493

C. Insolvency Issues in Arbitration.....495

C.1 Article 134 of Law 24.522—Liquidation Proceedings495

C.2 Arbitration Agreements and Debtor Reorganization
(U.S. Chapter 11)496

BRAZIL

**Joaquim de Paiva Muniz, Katherine S. Spyrides,
Rio de Janeiro; and Maria da Graça Prado, São Paulo497**

A. Legislation, Trends and Tendencies497

A.1 New Draft Code of Civil Procedure497

A.1.1 Articles 69, 164, 206, IV and 236—The
Arbitral Letter (*Carta Arbitral*).....498

A.1.2 Article 969, III—Interlocutory Appeals499

A.1.3 Article 913 et seq.—Recognition and
Enforcement of Foreign Awards500

A.2 Arbitration in the Agreements regarding Exploration
and Production of Oil and Gas in the Pre-Salt
Reserves500

B. Cases505

B.1 Arbitration and Writ of Mandamus505

B.2 Conflicts concerning Arbitration Clauses508

B.2.1 Conflict arising from the coexistence of an
arbitration clause and a venue clause in the
same contract: The arbitration clause prevails508

B.2.2 Conflict between arbitration clauses provided
in related contracts.....511

Table of Contents

B.3 Arbitrability of Disputes Arising out of Medical Services.....	512
B.4 The Issue of Lack of Motivation in Arbitral Awards.....	515
C. Insolvency Issues in Arbitration.....	516
C.1 Enforceability of Arbitral Clauses upon Insolvency.....	517
C.2 The Effects of Bankruptcy and Judicial Recuperation on Pending Arbitrations	519
C.3 Participation in the Bankruptcy as a Waiver for Arbitration.....	520

CHILE

Antonio Ortúzar, Sr., Rodrigo Díaz de Valdés and Francisco Grob, Santiago	521
A. Legislation, Trends and Tendencies.....	521
A.1 Legislative Framework	521
A.2 Arbitration in Chile	521
A.3 Main Features of the Chilean Domestic Arbitration Regulations.....	522
A.4 Main Features of the ICA Law	523
A.5 Enforcement of Foreign Arbitral Awards.....	525
A.6 Trends.....	525
B. Cases	525
B.1 Application of the ICA Law	526
B.2 Enforceability of the Arbitration Clause	526
B.3 Application to Set Aside an Arbitral Award Rendered under the ICA Law	527

Table of Contents

B.4 Application of the Complaint Appeal in International Arbitration	528
B.5 Enforcement of Foreign Arbitral Awards.....	528
C. Insolvency Issues in Arbitration.....	533
C.1 Bankruptcy Declaration and Its Impact on the Arbitration Agreement.....	533
C.2 Foreign Bankruptcy Declaration	534
C.3 Arbitration and Workout Agreements	534
C.3.1 Preventive compromise.....	534
C.3.2 Preventive compromise of corporations subject to the security and insurance agency's supervision	535

COLOMBIA

Claudia Benavides, Bogotá	537
A Legislation, Trends and Tendencies.....	537
A.1 Overview of the Arbitral Legal Framework	537
A.2 Specifics of International Arbitration	540
A.3 Trends and Tendencies	543
B. Cases	544
B.1 Waiver of the Right to File an Action to Set Aside an Award by Reference to Arbitration Rules.....	544
B.2 Constitutional Actions for the Protection of Fundamental Rights and Arbitral Awards.....	548
C. Insolvency Issues in Arbitration.....	552

Table of Contents

C.1 Overview of the Legal Framework for Insolvency
Procedures552

C.2 Arbitration and Insolvency Proceedings in Colombia552

MEXICO

**Javier L. Navarro Velasco and Jessika Rocha Diaz,
Monterrey; and Juan Ygnacio Reyes Retana, Tijuana.....555**

A. Legislation Trends and Tendencies.....555

A.1 Obligation of Mexican Courts to Refer the Parties
to Arbitration556

A.2 Voluntary Non-contentious Jurisdiction556

A.3 Court Intervention557

A.4 Interim Relief558

B. Cases559

C. Insolvency Issues in Arbitration.....560

VENEZUELA

**Henry Torrealba, Edmundo Martínez, and
Gabriel De Jesus, Caracas565**

A. Legislation, Trends and Tendencies565

B. Cases566

B.1 Granting Preliminary Injunctions in Arbitration566

B.2 Recognizing the Importance of Arbitration.....567

C. Insolvency Issues in Arbitration.....571

Table of Contents

NORTH AMERICA573

CANADA

J. Brian Casey and Rebecca Murtha, Toronto575

A. Legislation, Trends and Tendencies575

A.1 Legislation575

A.2 Trends and Tendencies575

B. Cases576

B.1 *Yugraneft Corp. v. Rexx Management Corp.*576

B.2 *Znamensky Selektionno-Gibridny Center v. Donaldson International Livestock Ltd.*578

B.3 *Wires Jolley LLP v. Wong*580

B.4 *Accentuate Ltd. v. Asigra Inc.*581

C. Insolvency Issues in Arbitration583

C.1 Effect of Agreement to Arbitrate583

C.2 Effect on Recognition and Enforcement584

UNITED STATES

**Ethan Berghoff and Kate Ó Súilleabháin, Chicago;
James Bailey, New York; and Donald J. Hayden and
Heather Ann Frazier, Miami585**

A. Legislation, Trends and Tendencies585

A.1 Arbitration Fairness Act of 2009585

A.2 Dodd Frank Act587

A.3 Defense Appropriations Act588

Table of Contents

B. Cases	589
B.1 Class Action Arbitration	589
B.1.1 <i>Stolt-Nielsen S.A. v. AnimalFeeds International Corp.</i>	589
B.1.2 <i>Fensterstock v. Education Finance Partners</i>	591
B.1.3 <i>Omstead v. Dell, Inc.</i>	593
B.1.4 <i>Brewer v. Missouri Title Loans, Inc.</i>	593
B.2 “Manifest Disregard” Doctrine as a Viable Ground for Challenging Arbitral Awards.....	594
B.2.1 <i>Frazier v. CitiFinancial Corporation, LLC</i>	595
B.2.2 <i>T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.</i>	596
B.2.3 <i>Lagstein v. Certain Underwriters at Lloyd’s</i>	597
B.3 Other Grounds for Vacating Arbitral Awards: Error of State Law	598
B.3.1 <i>Broom v. Morgan Stanley DW Inc.</i>	598
B.3.2 <i>Pearson Dental Supplies Inc. v. Superior Court</i>	599
B.3.3 <i>Amerisure Mutual Ins. Co. v. Global Reinsurance Corp. of America</i>	600
B.4 Opting Out of the Federal Arbitration Act’s Grounds for Vacatur	601
B.4.1 <i>Ario v. Underwriting Members of Syndicate 53 at Lloyds</i>	601
B.5 Enforcing Foreign Arbitral Awards under the New York Convention.....	602
B.5.1 <i>Republic of Argentina v. BG Group PLC</i>	602

Table of Contents

B.5.2	<i>Polimaster Ltd. v. RAE Systems, Inc.</i>	604
B.6	Enforcing Agreements to Arbitrate	605
B.6.1	<i>Rent-a-Center, West, Inc. v. Jackson</i>	605
B.6.2	<i>Citibank, N.A. v. Stok & Assocs., P.A.</i>	606
B.6.3	<i>In the Matter of: Mirant Corporation, MC Asset Recovery LLC v. Castex Energy, Inc.</i>	607
B.7	Using Section 1782 Discovery in Aid of International Arbitration	609
C.	Insolvency Issues in Arbitration.....	610
C.1	A U.S. Bankruptcy Court’s Discretion to Deny Enforcement of an Arbitration Agreement.....	612
C.2	Foreign Arbitration and U.S. Bankruptcy Proceedings	617

