



E-LETTER

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WELCOME

Welcome to the first edition of the YIAG E-Letter. As this is the first issue, a short introduction is in order.

With 1,300 members from 80 different jurisdictions, we felt it was necessary to create a means of communication (although not exclusive of others!) between the YIAG co-chairs and YIAG members and amongst YIAG members. The primary purpose of the bi-annual E-Letter is therefore to keep YIAG members informed of YIAG's recent and future activities, as well as share news about YIAG members.

We would like to take this opportunity to provide some background to YIAG's current *modus operandi*. As most of you know, YIAG is an association sponsored by the LCIA, but actually "administered" by four co-chairs, young practitioners themselves, from different jurisdictions. YIAG was founded nine years ago in order to allow younger practitioners to exchange views on international arbitration law and practice and also "network", in the same way as more senior practitioners are able to do through the LCIA symposia, which are held several times a year around the world. The main objective of YIAG has not changed. Membership remains free and YIAG endeavours to hold an average of two symposia each year, usually immediately before an LCIA symposium, and following the same format. Hence, the symposia consist of lively debates on specific questions raised in advance by YIAG members and moderated by two or more of the co-chairs. In addition, YIAG co-sponsors, from time to time, events organised in association with other young practitioners' organisations, (e.g., the YAP (Young Arbitration Practitioners) symposium that took place on 3 June 2006, the ITA's (Institute for Transnational Arbitration) Dallas Roundtable for Young International Arbitrators on 14 June 2006 - see the section on recent YIAG events in this E-Letter).

As of this year, YIAG will organise one or two arbitration training seminars (focused on arbitration practice) in emerging countries. Since YIAG's main purpose is to promote the understanding and use of international arbitration law and practice among young lawyers, it seems that it would be most useful to share the knowledge and experience within YIAG with young practising lawyers and in-house counsel in emerging countries. Our aim would be to provide young practitioners with a better understanding of international arbitration law and arbitration practice through one-day seminars led by two of the YIAG co-chairs and/or regional representatives together with two experienced YIAG members. The seminar would cover the basic legal framework of international arbitration (in all its facets) with a strong emphasis on the practical aspects of arbitration procedure. As we are keen to provide our colleagues in emerging countries with the opportunity to learn (more) about international arbitration, we strive to offer these training seminars free of charge. Therefore, the YIAG members, regional representatives and co-chairs involved, take on this task on a voluntary basis. Volunteers are welcome! Details on forthcoming events are set out below.

Other ideas are being investigated, taking into account not only the plethora of arbitration events already taking place each year but also YIAG's administration and prime objectives. Very much worth considering in our view are the various IT options which may be available (and practicable) in order to assist YIAG members from different firms and/or jurisdiction in forging and maintaining friendly contact. On this issue, we have received interesting suggestions from the recently-appointed YIAG regional representatives, which will be investigated in the coming months in consultation with the LCIA. We should be able to inform YIAG members of the outcome in our next E-Letter (currently due in November 2006), if not before.

While the purpose of the E-Letter is not to be another arbitration journal or newsletter *per se*, we suggest that it also be used as a platform for YIAG members to pass on information about key developments in their jurisdiction from time to time. For this first E-Letter, we have asked those regional representatives who were able to do so, to introduce their jurisdiction and/or neighbouring jurisdictions. We are pleased to include regional reports on Central and Latin America from Sofia and Luis, on Austria and Eastern Europe from Barbara, on the Middle East from Laila, on North America from Martin and Rachel and from the Philippines from Enrique. We have also included a short piece from our Indian YIAG member, Dinesh. A warm thank you to you all.

Last but not least, if you have any suggestion of items for the next E-Letter, please write us at yiagEletter@lcia.org

With kind regards

Domitille



Lalive
Geneva

Matt



Allen & Overy
London

Melanie



Loyens & Loeff
Paris

Shai



Kilpatrick Stockton
London

YIAG REGIONAL REPRESENTATIVES

In February 2006, YIAG appointed new regional representatives for a three-year term, to represent the various jurisdictions of YIAG membership.

The principal roles of the regional representatives are to encourage membership of YIAG in the region, report to YIAG members on significant developments in arbitration in the region, assist to further the aim of YIAG to hold symposia in diverse locations worldwide, assist to arrange venues for symposia to be held in their region and encourage a good attendance by YIAG members within that region.

YIAG members are encouraged to contact the regional representatives with news and views of developments in arbitration and ADR.

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RECENT YIAG EVENTS

Singapore Symposium

The first symposium of the year was held in Singapore on 16 February. It was attended by over 40 delegates from 15 countries, extending west to east from the USA in the west through to Georgia (CIS not US), Singapore, South Korea, to Australia and the PRC in the south-east and east. There was a lively debate on a range of topics including the status of arbitrations conducted by foreign arbitration institutions in the PRC; the Tribunal's power to determine the applicable law without consulting the parties, interim measures and many others.

The symposium was followed by a reception at the Singapore China Club, kindly hosted by Shearman & Sterling. The China Club boasts fantastic views over both city and harbour, the appreciation of which was greatly assisted by the flow and variety of alcohol-proofed beverages. After the reception YIAG members adjourned to a dining room for a post-symposium traditional Chinese dinner, kindly and superbly organised by our local regional representative in Singapore, Yu Jin Tay – to whom we offer special thanks. We lost count after the eighth course, but suffice to say that the exquisite quality of the food only exceeded the amazing quantity and variety that was consumed by a little.

Many thanks to all who were able to attend and for helping to make the symposium interesting and enjoyable.



Shai and Melanie



Shai, Melanie, Domitille and Matt



Domitille and Matt



The Working Sessions



The Lunch

YAP conference – ICCA Montreal

One of the events that YIAG supported this year was the young practitioners' conference held under the auspices of YAP in Montreal on 3 June, immediately after the 2006 ICCA Congress on the theme of "New Expectations, New Challenges". Despite taking place after three and a half days of (LCIA and ICCA) conferencing, the YAP Conference was well-attended by over one hundred delegates and was a real success. The first session was moderated by Professor William Park (Boston University School of Law) and three young practitioners made short presentations on class actions, anti-trust matters, consumer disputes and confidentiality in arbitration. During the second session, moderated by Professor Emmanuel Gaillard (Shearman & Sterling and University Paris XII), three young practitioners introduced the topics of ethics, disclosure and regulatory control in arbitration, as well as issue-conflicts in investor-State arbitration. YIAG was well-represented as Matt Gearing delivered a lively speech on issue-conflicts in arbitration. This was a particularly delicate task as one of the main cases he was commenting on was the Ghana vs Telekom Malaysia case, starring the same Professor Gaillard. Obviously, Matt managed his task superbly. Both sessions were followed by a lively debate between the participants, the presenters and the moderators.

The conference was followed by drinks and dinner in a good Italian restaurant in downtown Montreal. Earlier that week YIAG's regional representative, Martin Valasek and his colleagues

Stephen Drymer and Richard Desgagnés organised a superb informal evening for young practitioners, kindly hosted by Ogilvy Renault in a trendy Montreal restaurant. A huge thank you to Stephen, Richard, Martin and to Ogilvy Renault for their authentic Canadian hospitality, which the young practitioners who had been able to make it to Montreal enjoyed throughout the week.

Dallas Roundtable – Institute for Transnational Arbitration

This year YIAG also co-presented the ITA “Dallas Roundtable: A Meeting for Young International Arbitrators” – together with the ITA, ICDR Young & International, and the USCIB Young Arbitrators Forum. The Roundtable, which took place before the main ITA Annual Workshop, was attended by over 140 young and aspiring international arbitrators, including many YIAG members (including regional representatives, Sofia Gomez Ruano, Rachael Kent and Martin Valasek) and was judged to be a great success. The Roundtable discussion consisted of two panel sessions, each followed by questions and comments from the floor. The first panel was comprised of representatives of the young arbitrators groups, Martin Gusy, Nancy Thevenin, and our very own Shai Wade, and was moderated by Dietmar Prager. The discussion centred on the important topic of the rise of international arbitration in developing countries and the role of international arbitration institutions in further developing this trend. The discussion inspired interesting comments from the floor, particularly from YIAG members Kevin O’Gorman and Professor Susan Frank. The second panel included Cecilia Flores Rueda, Daniel Magraw Jr, and Mark Baker, and was moderated by Anibal Sabater. The panellists discussed the somewhat controversial issue of non-signatory party involvement in international arbitration, with particular reference to the acceptance of amicus submissions in investment treaty arbitration proceedings.

As could be expected, the lively discussion inspired by the panel presentations continued well into the drinks and buffet reception that followed. The reception combined good food, drink and conversation in equal measures and followed the age-old Texan dictate: “If it’s worth doing - it’s worth overdoing!” Closing submissions and comments were presented late into the night at the conference hotel bar. Special thanks go to law firms Debevoise & Plimpton LLP, Fulbright & Jaworski LLP, Kilpatrick Stockton LLP and Proskauer Rose LLP, who co-sponsored the Dallas Roundtable.

MAIN FORTHCOMING EVENTS

You may wish to note the following (already planned) events in your diary. A more complete calendar of arbitration events, organised by other institutions and associations, including those for the not so young practitioners, can be found at the end of the E-Letter:

2006

8 September: YIAG Symposium, Tylney Hall near London.

9 October: YIAG Training Seminar, Bucharest.

2007

March: YIAG Symposium, Madrid

Spring: YIAG Training Seminar, Tallinn, Estonia

May/June: YAP Conference, Brussels

September: YIAG Symposium, The Grove near London (Tylney relocated)

October: YIAG Training Seminar (location to be determined)

2008

June: co-sponsored event: YAP Conference, immediately preceding or following the 2008 ICCA Conference in Dublin.

September: YIAG Symposium, The Grove near London

REPORTS FROM YIAG REGIONAL REPRESENTATIVES

Please note that the reports in this section are not intended to be comprehensive and should not be used as a primary source of legal research. The views expressed in the articles published in YIAG e-letter are those of the individual authors and are not expressed on behalf of the LCIA.

Central and Latin America



Sofia Gómez Ruano,
González Calvillo SC, Mexico City (FD), and

Luiz Claudio Aboim,
Freshfields Bruckhaus Deringer, Paris

Over the past 30 years Latin American countries have been modifying their political, cultural, economic and legal frameworks to attract foreign investment. Among those changes there featured a new found openness to international arbitration and other alternative dispute mechanisms for both private commercial and investor-State disputes.

Multilateral conventions on commercial arbitration

In 1975 thirteen Latin American states and the United States signed the Inter-American Convention on Commercial Arbitration ([Panama Convention](#)), which reflected within the regional context, the rules of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 ([New York Convention](#)). Nowadays, all Spanish and Portuguese-speaking Latin American states have adhered to the New York Convention, Mexico being the first to ratify (1971), and Brazil (2002), Dominican Republic (2002) and Nicaragua (2003) the most recent.

The adoption of the New York Convention by Latin American states gave a certain degree of comfort to foreign investors that arbitral awards made elsewhere would be recognized and enforced in accordance with international standards. But this was not enough incentive to make investors trust submitting their disputes to arbitration with seats in Latin America. The adoption of modern arbitration laws and the reform of the existing statutes were long needed.

National laws on commercial arbitration

Most Latin American countries have therefore been making efforts to modernize their arbitration laws and regulations. The publication of the UNCITRAL Model Law on International Commercial Arbitration ([Model Law](#)) in 1985 served as a catalyst. [Mexico](#) was the first country to adopt the Model Law, in 1993, followed by [Bolivia](#), [Guatemala](#), [Paraguay](#), [Peru](#), [Venezuela](#) and recently [Chile](#) (2004). In [Argentina](#) and [Colombia](#), attempts to introduce the Model Law have not progressed for political reasons, and the old civil laws still apply. Dominican Republic is also discussing a new arbitration act, reportedly based on the Model Law.

Some countries such as [Brazil](#) and [Costa Rica](#) adopted a hybrid system following the Model Law, while adding a “local touch” to their legislation. This is often the subject of criticism, but resulted from necessary compromises to accommodate different historical legal and political views. For example, the Brazilian Arbitration Act, Articles 6 and 7, retained the 1916’s former Brazilian Civil Code requirement for a post-dispute *compromisso* to be sought before Brazilian courts, albeit only in the case that a responding party refuses to submit to arbitration and the

arbitration clause does not refer to the rules of an arbitral institution or is silent on how to start the arbitration (the so-called “blank clause”).

In 1998, the Mercosur member-states, namely Brazil, Argentina, Uruguay and Paraguay signed the Mercosur Agreement on International Commercial Arbitration (*MAICA*), which has been recently ratified by, and is in force in Argentina, Brazil and Uruguay. The MAICA, which was later extended to Chile and Bolivia through a separate agreement, was in great part inspired by the Model Law and was designed to serve as a regional law on international commercial arbitration, for disputes arising out of international commercial contracts.

If on the one hand the MAICA provides the Mercosur member-states with a good quality regional law on arbitration, on the other hand it creates a parallel arbitration system since it supersedes member-states’ national laws in cases falling within its scope. This new system is expected to cause uncertainty as a result of MAICA’s unclear scope of applicability. An example, which may be a trap for the unwary, is that MAICA will apply, unless expressly excluded by the parties, in cases where the arbitral tribunal has its seat in a member-state and the contract has a legal or economic objective contact with one of the member-states (Art. 3, c).

Investment arbitration

In parallel with improving their national arbitration laws, many Latin American states have also ratified treaties for the promotion and protection of investments, often providing for resolution of disputes through arbitration under the [UNCITRAL Arbitration Rules](#), the [Rules of Arbitration of the International Centre for the Settlement of Investment Disputes \(ICSID\)](#) or the [ICSID Additional Facility Rules](#). As a result investors in Latin American states are now able to seek redress against such states in an international forum, without recourse to diplomatic protection. This development led to the ICSID Argentinean cases and is likely to be again evident after the recent nationalization measures adopted by the Bolivian government.

It is expected that multilateral investment treaties in the context of Mercosur, NAFTA and CAFTA will further change the profile of investment disputes in Latin America, specially because some of these states are becoming capital exporters and may soon realise that bilateral investment treaties can also protect investments of their own nationals abroad. Nevertheless, institutional commercial arbitration will still play an important role in the protection of foreign investments in certain states, which have not yet ratified any bilateral investment treaty, or the Washington Convention (e.g. Brazil).

Arbitral and court decisions

The boom in cases involving a high degree of political interests in some jurisdictions, or the inexperience of local courts or practitioners in others, have recently led to an increase in undue court intervention in international arbitration in the region. Eventually, Latin American courts have granted injunctions impeding arbitral proceedings against States or have reviewed issues of substance in arbitral awards. Nevertheless, it can be argued that Latin American courts in general are steadily increasing their favourable attitude to international arbitration, including where a state-party is involved (for an updated overview see *World Arbitration & Mediation Report*, v. 17, no. 3, March 2006, Jurisnet LLC, Huntington, NY, USA).

Eastern Europe

Austria



Barbara Steindl, Schönherr Rechtsanwälte, Vienna

A new arbitration act the UNCITRAL Model law into Austrian law comes into force in July (published in the Federal Gazette no. 7/2006, for German text see http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXII/BNR/BNR_00521/fname_053729.pdf; to receive an English working translation, please contact <mailto:b.steindl@schoenherr.at>).

As in most countries, the new Austrian law does not mirror each and every single aspect of the UNCITRAL Model Law, but the main features of that Law have been introduced. In line with Austrian legal tradition, the new law will not be codified in a separate Act but will form part of the Austrian Code on Civil Procedure (ss.577 *et seq*).

The new law will enter into force on 1 July 2006 and will apply to arbitration proceedings that are initiated on or after 1 July 2006. As far as the validity of the arbitration agreements is concerned, the new law will apply to arbitration agreements entered on or after that date. Unlike the Model Law, the new Austrian law does not distinguish between domestic and international arbitrations or between commercial and non-commercial arbitration proceedings. Thus, the same standards will apply to all types of arbitration.

Seat theory

Most provisions apply only if the legal seat of the arbitral tribunal (not actual venue) is in Austria (s.577(1)). The Austrian courts may also intervene before the tribunal is constituted or where arbitrators are challenged, if the seat has not yet been established, provided that one of the parties is domiciled or ordinarily resident in Austria (ss. 586-591). A limited number of provisions apply regardless of the location of the arbitral tribunal's seat (e.g. s. 583 on Formal Requirements of the Arbitration Agreements, s.584 on Arbitration Agreement and Legal Action before Court, s.585 on Arbitration Agreement and Interim Measures by Court, s.602 on Court Assistance and s.614 on Recognition and Declaration of Enforcement of Foreign Arbitral Awards).

Court intervention

Court intervention in arbitration proceedings is very restricted. Except where specifically provided by the new law, courts must refrain from intervening in arbitration matters (s.578). Consequentially, anti-suit injunctions against arbitrators or parties will not be admissible under the Austrian legal regime.

The principle of Kompetenz Kompetenz of the arbitral tribunal applies. In addition, once arbitration proceedings have been initiated, an action relating to the matter in dispute brought before a court shall be dismissed (but for cases in which a party to the pending arbitration has challenged the jurisdiction of the arbitral tribunal and the tribunal cannot be expected to decide within reasonable time). Contrariwise, arbitration proceedings may nevertheless be commenced or continued if an action is pending before court. Although the principle of separability is not explicitly promulgated by the new Austrian law, according to Austrian case law, there seems to be no substantial difference to the concept of separability under the Model Law.

Validity of the arbitration agreement

The definition of the arbitration agreement has been drafted along the lines of Art.7(1) Model Law, being an agreement by the parties to submit to arbitration all or certain disputes (contractual or not) which have arisen or which may arise between them in respect of a defined legal relationship (s.581(1)). In principle, any proprietary claim is arbitrable. Non-proprietary claims are arbitrable, if the parties are entitled to settle such disputes (s.582(1)). Exceptions to this rule concern e.g. the lease of property.

Interim measures

The arbitral tribunal, after having heard the other party, is empowered to order necessary preliminary or protective measures against the other party (s.593(1)). However, unlike Art.17 of the Model Law, s.593(1) creates a precondition for any such measure: the measure should only be issued in the event the enforcement of a claim would be frustrated or materially hampered, or if irrecoverable damage could be incurred without it. Appropriate security may be required. S.585 reflects the general principle that Austrian courts may also issue interim measures despite the parties' submission to arbitration.

For more detailed information on the new law, see

<http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=12225&i=1066620>.

Bulgaria promotes mediation

From 27 March to 14 April 2006, Mediation Days have been conducted in Sofia. The program included a series of lectures and seminars involving business people, lawyers and the government. The objective of the initiative was to raise the awareness of the public to the advantages of mediation as a fast and effective method for dispute resolution and to provide current information on the opportunities for dispute resolution through mediation in Bulgaria. Although Bulgaria adopted a Law on Mediation in 2004, the concept has not yet been completely accepted in practice. Procedural and ethical rules for the conduct of mediation were adopted in 2005 and, a unified register of Mediators has been created.

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Serbia and Montenegro ratify ICSID Convention and discusses new Arbitration Law

The Parliament of the State Union of Serbia and Montenegro is about to ratify the ICSID Convention (for information about the status see http://www.skupstina.gov.yu/active/sr-latin/home/aktivnosti_skupstine/zakoni_u_proceduri/ratifikacije.html).

The Socialist Federal Republic of Yugoslavia ("SFRY") has been a party to the ICSID Convention since 1967. The 1967 Decree of the Federal Executive Council of SFRY on the ratification of the ICSID Convention is still in force in Serbia and Montenegro. However, following the breakup of SFRY, the international legal status of the newly formed states and their succession to international treaties that have been entered into by SFRY remained unclear. To resolve any doubts Serbia and Montenegro decided to ratify the Convention.

Further, a new draft Law on Arbitration has been proposed by the Government (officially classified as a government bill since 21 October 2005, for Serbian text see http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=327&t=P-). According to the working group, the draft is influenced by the Model Law and the arbitration acts of France, Switzerland and the US. It remains to be seen whether Serbia can shortly be labelled a Model Law country.

Slovenia rethinks arbitration law and takes action to further arbitration

Arbitration seems to be on its way in Slovenia: Since 2004, a working group based at the Institute for Comparative Law at the University of Ljubljana's Law Faculty is carrying out a study and prepares a reform of the Slovenian legal provisions on Arbitration of 1999 (for the

Laws of 1999, see <http://www.sloarbitration.org/english/slo-arb-law/intro-sal.html>. The aim of the study is to set out a theoretical basis and define legal solutions for adopting a new law on arbitration based on the Model Law.

Additionally, the District Court of Ljubljana and the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia are cooperating in an effort to shift a part of the court's caseload to arbitral tribunals. Within the framework of this project judges from the Corporate Department of the District Court of Ljubljana advise legal entities, in particular those involved in high value and complex business disputes, about the possibility and advantages of resolving their disputes through arbitration.

India



Dinesh Mathur, J B Dadachanji & Co, New Delhi
New trends in arbitration law

The arbitral process in India has an unenviable history of long delays. Three recent judgments of the Supreme Court of India, and the Arbitration and Conciliation Bill 2003, suggest that both the Legislature and Judiciary are taking serious note of these delays and taking steps to turn India into an arbitration-friendly jurisdiction.

Readers are referred to a review of the Supreme Court judgements in *Shim-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd* (2005) 7 SCC 234, *SBP & CO v. Patel Engineering Ltd* 2005 8 SCC 618 and *Rite Approach Group Ltd v. Rosoboronexport* (arbitration petition No.3 of 2005, decided (6 November 2005) and of the proposals in the Indian Arbitration and Conciliation Bill 2003, by YIAG Member Dinesh Mathur, in the Arbitration Committee Newsletter of the International Bar Association (Vol 11, No 1, p.22).

Middle East



Laila El Shentenawi, DLA Matouk Bassiouny, Cairo

The final decade of the twentieth century witnessed huge developments in the field of arbitration in the Middle East. The Region realized that one of the essential incentives for investment is an effective arbitration system. Accordingly, most of the national laws regulating arbitration were subject to drastic reform in order to establish a healthy environment for foreign investment. This trend was accompanied by the establishment of several arbitral institutions.

Arbitration laws

Arbitration was generally regulated by the Civil and Commercial Procedural laws. However, following the period of legislative reform, most of the Middle Eastern countries introduced new arbitration laws. Some states adopted the UNCITRAL Model Law (e.g.: Egypt, Oman, Jordan, Tunisia and Bahrain), some preferred the trends in the New French Law (e.g.: Lebanon and Algeria) and some adopted Islamic Law (e.g.: Saudi Arabia and Yemen). An example of a country in the region that did not enact new arbitration legislation is the United Arab of Emirates ("UAE") although it is now considering doing so.

Enforcement

Most of the Middle East countries acceded to the New York Convention *inter alia* Egypt, Algeria, Lebanon, Kuwait, Morocco, Oman, Bahrain, Qatar, Syria, Jordan, Tunisia and Saudi Arabia. It is worth mentioning that although the UAE is expanding rapidly in the field of international trade, commerce and industry and attracting many foreign investors, the UAE is not a party to the NY convention and accordingly the enforcement of foreign arbitral awards may encounter difficulties in the absence of said international treaty. A number of regional conventions have been entered concerning amongst other matters the enforcement of foreign arbitration awards, including the 1952 Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards and the 1987 [Arab Convention on Commercial Arbitration \(Amman\)](#).

Arbitral institutions

Several arbitral institutions were established in the Middle East in recent years the Bahrain Arbitration Centre, The Abu Dhabi Commercial Conciliation and Arbitration Centre, the Lebanese Arbitration Centre, the Tunis Centre for Conciliation and Arbitration, the Dubai International Arbitration Centre and the Arab Centre for Commercial Arbitration in Rabat. Most of these institutions adopted the 1976 UNCITRAL Rules. The Cairo Regional Centre for International Commercial Arbitration (“CRCICA”) which adopted the UNCITRAL Rules is a notable example of a popular progressive arbitration centre in the Region. The CRCICA promoted arbitration as well as other ADR techniques in the Region and has gained international recognition and trust. The annual average number of arbitration cases filed before the CRCICA every year significantly rose from approximately ten cases in the eighties to more than seventy cases per year since the beginning of the 21st Century, and is expected to reach more than a hundred cases in the current year.

North America

Canada



Martin J. Valasek, Ogilvy Renault LLP, Montreal

The validity of arbitration clauses in consumer contracts remains uncertain. Earlier this year, the Supreme Court of Canada granted leave to appeal from the decision of the Quebec Court of Appeal in the case *Dell Computer Corp. v. Union des consommateurs* ([\[2005\] R.J.Q. 1448](#)). Leave to appeal to the Supreme Court of Canada granted on 19 January 2006, [\[2005\] S.C.C.A. 370](#)). The case highlights the uncertain place of arbitration in the consumer-contract context, and the related but broader question of whether and when an arbitration agreement is a valid defence to a proposed class action.

Dell concerned a consumer contract that was formed when an individual, Olivier Dumoulin, placed an order for certain products on Dell Computer Corporation’s website. By “clicking” through the on-line ordering form, Dumoulin agreed that the contract was subject to Dell’s standard terms of sale, although these were merely incorporated by reference (the terms were accessible on the website, but not required to be read as a condition of placing an order). Dumoulin in fact did not read the standard terms. Among the standard terms was an arbitration clause, which stipulated that any dispute was to be settled by arbitration pursuant to the Code of Procedure of the National Arbitration Forum based in the United States (see <http://www.arb-forum.com/>). Dell later informed Dumoulin that the website had posted incorrect prices, and that it would therefore not process the order.

Dumoulin applied to the Superior Court of Quebec for authorization to institute a class action on behalf of all consumers that were in a similar situation. Dell filed a motion asking the Court to stay the case for lack of subject-matter jurisdiction, based on the arbitration clause contained in the standard terms.

The Superior Court dismissed Dell's motion and authorized the class action. It held that the arbitration clause was unenforceable pursuant to article 3149 of the *Civil Code of Quebec* (C.C.Q.), which reads as follows:

A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

The Quebec Court of Appeal disagreed on this point. It held that article 3149 did not apply because, under NAF's Code of Procedure, the arbitration could and would take place in Quebec. Moreover, the arbitrators would be required to apply Quebec law, the Court noted. In the Court's view, therefore, there was no waiver of Quebec jurisdiction. The Court nevertheless upheld the result in the lower court. It found that the arbitration clause, which was incorporated by virtue of the reference to the standard terms (making it an "external clause" for purposes of the C.C.Q.), could not be enforced against Dumoulin because it had not been brought to his attention (a requirement established by article 1435 of the C.C.Q.).

Arguably the most interesting aspects of the Dell decision are the obiter dicta of the Court of Appeal. In particular, the Court opined that consumer contracts are arbitrable, drawing inspiration from the seminal 2003 Supreme Court decision *Desputeaux v. Les Éditions Chouette* ([\[2003\] 1 S.C.R. 178](#)). The Court also suggested, without entering into a long discussion on the subject, that the effect of an arbitration clause on a proposed class action would have to be assessed on a case-by-case basis, since the legislature has recognized the legitimacy of both arbitration and class actions and has given no indication that one procedure should have precedence over the other (earlier this year, the Quebec Court of Appeal confirmed that the effect of an arbitration clause on a proposed class action should be determined, at the authorization stage, by the judge seized of the motion to authorize the class action. (*Muroff v. Rogers Wireless Inc.* (31 January 2006), [Montreal 500-09-015854-052](#)).

On the class-action issue, the brief comments from the Quebec Court of Appeal in Dell are consistent with recent decisions from several common-law provinces of Canada. In *Smith v. National Money Mart Co.*, ([2005] O.J. No. 4269. Leave to appeal refused, [\[2005\] S.C.C.A. No. 528](#)) the Ontario Court of Appeal held that the tension between consensual arbitration and class proceedings is to be resolved on a case-by-case basis by the trial judge. The Court specified that while an arbitration clause does not deprive the Superior Court of its jurisdiction over class proceedings under the Class Proceedings Act, (*Class Proceedings Act, 1992*, [S.O. 1992, c. 6](#)) the judge must determine, during the certification stage of the action, whether arbitration would not be a preferable procedure for resolving the dispute. The same conclusion was reached by the British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co* ([\[2004\] B.C.J. No. 1961](#)).

In Ontario, however, the legislature has recently amended the Consumer Protection Act to include a provision that expressly invalidates arbitration agreements in a consumer contract, unless the consumer agrees to arbitration after the dispute arises (See Consumer Protection Act, 2002, [S.O. 2002, c. 30, Sch. A, s. 7](#).) This legislation effectively overturns the Ontario Court's decision in *Kanitz v. Rogers Cable Inc.*, ([\(2002\), 58 O.R. \(3d\) 299](#)) in which a proposed class action in the consumer context was stayed on the basis of an arbitration clause.

USA



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U.S. Supreme Court Holds that Illegality of Underlying Contract Should Be Decided by the Arbitrators

In February 2006, the United States Supreme Court held in [*Buckeye Check Cashing, Inc. v. Cardegna*](#), 546 U.S. ____ (2006) that the question of whether the underlying contract containing an arbitration clause is illegal and void *ab initio* should be resolved by the arbitrators, and not by the courts. The Court relied on its prior decisions in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), where it had recognized that an arbitration agreement is separable from the underlying contract and held that while a challenge to the arbitration agreement itself is generally to be resolved by the courts, a challenge to the underlying contract as a whole is reserved for the arbitrators. The Court also confirmed that this rule applies equally in U.S. federal and state courts.

Eleventh Circuit Holds that Incorporation of AAA Commercial Arbitration Rules Is Clear and Convincing Evidence that the Parties Intended the Arbitrators to Decide Arbitrability

In December 2005, in *Terminix International Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, the Eleventh Circuit held that the parties' incorporation of the AAA Commercial Arbitration Rules into their contract was clear and unmistakable evidence of the parties' intention that the arbitrators, and not the courts, should decide issues related to the validity of the arbitration agreement. The court held that this evidence was sufficient to reverse the presumption that questions related to an arbitrator's jurisdiction are normally for the courts (see *First Options v. Kaplan*, 514 U.S. 938 (1995)) and the court therefore reversed the lower court's decision denying the defendant's motion to compel arbitration.

Fifth Circuit Adopts Strict Arbitrator Disclosure Requirements

In January 2006, in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, the U.S. Court of Appeals for the Fifth Circuit vacated an arbitration award on the basis that the arbitrator had displayed "evident partiality" by neglecting to disclose that he had briefly served as co-counsel with the counsel for one of the parties in a litigation proceeding seven years prior to the arbitration. (The evidence showed that the prior litigation proceedings involved numerous law firms and lawyers on each side and that the arbitrator and the party's counsel had never actually met prior to the arbitration.) Although there was no suggestion of actual bias, the court held that the arbitrator displayed "evident partiality" by failing to disclose the prior professional relationship, which the court held would create a reasonable impression of partiality.

Tenth Circuit Allows Parties to Restrict Appellate Review of Arbitral Awards

In October 2005, the U.S. Court of Appeals for the Tenth Circuit held in *MACTEC, Inc. v. Steven Gorelick*, 427 F.3d 821, that parties may contractually limit appellate review of arbitral awards. The court held that although parties cannot contractually limit the power of the first instance district courts to vacate an arbitral award (reasoning that so long as the courts have the power to enforce an award, they must also retain the ability to vacate the award), parties can limit subsequent appellate review of that decision.

Eleventh Circuit Threatens Sanctions for Frivolous Challenges to Arbitral Awards

In February 2006, the United States Court of Appeals for the Eleventh Circuit issued an opinion in *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, No. 05-11153, warning parties and their attorneys that they may face sanctions if they bring baseless challenges to arbitration awards. The court stated that it was "exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law," noting the very limited grounds for moving to vacate under the Federal Arbitration Act. The court held that "[a] realistic threat of sanctions may discourage baseless litigation over arbitration awards and help fulfil the purposes of the federal policy contained in the FAA."

South East Asia

Philippines



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New Philippine law on international arbitration based on the UNCITRAL Model Law

[Republic Act No. 9285 is known as the "Alternative Dispute Resolution Act of 2004" \(ADR Act\)](#). This new law on arbitration was approved on 02 April 2004. It does not repeal but rather improves the old "Arbitration Law of 1953" (Republic Act No. 876) by providing a whole new chapter on international commercial arbitration. Section 19 of the ADR Act specifically provides that international commercial arbitration in the Philippines shall be governed by the UNCITRAL Model Law.

Non-lawyers and foreign nationals (lawyers) may represent parties in international arbitration conducted in the Philippines

Section 22 of the ADR Act provides that in international arbitration conducted in the Philippines, a party may be represented by any person of his choice. There is no prohibition against foreign nationals or lawyers from representing a party. However, if such representative is not admitted to the practice of law in the Philippines, he cannot appear as counsel in any Philippine court or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears.

Court intervention and interim relief

There are many instances when the courts may intervene before, during and after the arbitration. Section 24 of the ADR Act provides that the courts may restrain referral to arbitration if it determines that the *arbitration agreement is null and void, inoperative or incapable of being performed*.

Section 28 of the ADR Act also allows recourse to the courts before constitution of the arbitral tribunal for the issuance of an interim measure of protection, to wit: *(i) to prevent irreparable loss or injury; (ii) to provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission*.

Under Section 29 of the ADR Act, after the arbitral tribunal has been constituted, a party may seek interim relief from the tribunal, which includes: *(i) preliminary injunction directed against a party; (ii) appointment of receivers or detention; (iii) preservation, inspection of the property that is the subject of the dispute in arbitration. Either party may apply with the Court for*

assistance in the implementation or enforcement of an interim measure ordered by the arbitral tribunal.

Enforcement

Under Section 40 of the ADR Act, the recognition and enforcement of an award in an international arbitration shall be governed by Article 35 of the UNCITRAL Model Law. Thus, a party must apply in writing to a competent court for the recognition and enforcement of the award.

Applying Article 34 of the model law, an arbitral award may in certain circumstances be set aside by a competent court, upon the application of a party to the dispute (where there is, for example, incapacity, invalidity of the agreement, lack of notice of the proceedings, conflict with Philippine public policy).

Finally, Section 42 of the ADR Act provides that the New York convention shall govern the recognition and enforcement of arbitral awards.

OTHER ARBITRATION EVENTS

Further information about forthcoming international arbitration conferences, symposia and seminars may be found in the International Arbitration Planner at <http://www.arbitrationevents.com/> or http://www.iaiparis.com/agenda_v2.asp?Id=upevents

Date	Details	Venue
6-7 July 2006	<i>New Trends and Perspectives in Arbitration</i> Camera Arbitrale (Italy) http://www.camera-arbitrale.com/	Milan
3 – 4 July 2006	<i>ICC Seminar on International Construction Contracts and the Resolution of Disputes</i> http://www.iccwbo.org/events/id198.index.html	Hong Kong
8 September 2006	<i>LCIA Young International Arbitration Group Symposium</i> A half-day symposium immediately preceding the LCIA European Users' Council Symposium at Tylney Hall http://www.lcia.org/	Tylney Hall
8-10 September 2006	<i>LCIA European Users' Council Symposium</i> The second Tylney Hall symposium for 2006 www.lcia.org	Tylney Hall
9-17 September 2006	<i>Diploma in International Arbitration</i> Chartered Institute of Arbitrators http://www.arbitrators.org/	Oxford
15-16 September 2006	<i>Practical Arbitration</i> Chartered Institute of Arbitrators http://www.arbitrators.org/	London

Date	Details	Venue
16 September 2006	LCIA North American Users' Council Symposium A one-day symposium immediately preceding the IBA Conference http://www.lcia.org/	Chicago
17-22 September 2006	IBA Conference The IBA annual conference for 2006, featuring meetings of committees, including the arbitration committee http://www.ibanet.org/chicago06/index.cfm	Chicago
26 – 27 September 2006	Seminar on Tools and Tactics in International Commercial Arbitration Cornerstone Seminars If a dispute arises do you have a good enough understanding of the arbitration process to achieve a successful result? A practical two-day course providing an A-Z guide of how the arbitration process works in practice and tactics you can employ to ensure the strongest position for your organisation throughout this stage of the dispute. http://www.cornerstone-seminars.com/	Paris
26 – 27 September 2006	ICC Seminar on International Construction Contracts and the Resolution of Disputes www.iccwbo.org/events/id198.index.html	Hong Kong
4 October 2006	An Introduction to Arbitration Chartered Institute of Arbitrators www.arbitrators.org	London
8-10 October 2006	ICC International Commercial Dispute Resolution http://www.iccwbo.org/events/id198.index.html	Santa Fe, New Mexico
9-12 October 2006	International Commercial Arbitration Study of a Mock Case under the ICC Rules of Arbitration http://www.iccwbo.org/events/id198.index.html	Paris
17-18 October 2006	DIS Autumn Event German Arbitration Association (DIS) www.dis-arbitration.de	Hamburg
28 October 2006	LCIA Latin American Users' Council Symposium A one-day symposium in co-operation with CANOCO http://www.lcia.org/	Mexico
5-7 November 2006	International Commercial Arbitration in Latin America The ICC Perspective http://www.iccwbo.org/events/id198.index.html	Miami
13-14 November 2006	International Advanced Arbitration Practice Workshop (IAAP) http://www.iccwbo.org/events/id198.index.html	Paris

Date	Details	Venue
18 November 2006	LCIA Symposium in co-operation with ICSID This symposium immediately follows the AAA/ICC/ICSID 23 rd Joint Colloquium on International Arbitration http://www.lcia.org/	Washington DC
22 – 23 November 2006	Asian Conference on the 30th Anniversary of the UNCITRAL Rules of Arbitration Kuala Lumpur Regional Centre for Arbitration www.rcakl.org.my	Kuala Lumpur
3-5 December 2006	APRAG Conference 2006 Asia Pacific Regional Arbitration Group www.aprag.org	Hong Kong
6 December 2006	An Introduction for Arbitration Chartered Institute of Arbitrators www.arbitrators.org	London
1 December 2006	International Arbitration - Has London met the challenge? A one-day conference, preceded by a welcome reception and dinner, to mark the 10th anniversary of the 1996 Arbitration Act www.lcia.org	London
6-7 December 2006	The 12th Geneva Global Arbitration Forum Geneva Post Company S.A.	Geneva

NEW YIAG MEMBERS

We are delighted to announce the latest arrivals for Bronwyn Lincoln and for Jackie van Haersolte-van Hof



Charlotte Grace Lincoln



Louise van Haersolte-van Hof