



# **E-LETTER**

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## **WELCOME**

We hope you will enjoy this third YIAG E-Letter in which, as previously, we are pleased to report on past YIAG events and inform you about forthcoming events. A special welcome to the 209 new members who joined YIAG since January 2007.

In March, YIAG held one of its standard symposia (in Madrid). YIAG also co-sponsored and was represented at the annual YAP conference, which took place in Brussels in May, hosted by CEPANI 40, and at the Second Dallas Roundtable, the Institute of Transnational Arbitration's Meeting for Young International Arbitrators which was held in Dallas in June. We will also be busy in the next six months

with two symposia - in Dubai and The Grove - as well as a training seminar in Vilnius – more on this below.

## YIAG Symposium in Madrid – March 2007

We were very pleased to have the opportunity to visit Madrid in March. The YIAG symposium was organised with the assistance of **CEA-40** (Club Español del Arbitraje) and was a real success, with more than 60 participants. After an excellent presentation from **Alejandro Lopez** on Spanish arbitration legislation, the symposium followed the normal format, with topics and questions being presented by delegates followed by an open floor discussion. Topics included issues relating to the proper parties to the arbitration agreement and piercing the corporate veil, parallel arbitral and judicial proceedings, interviewing of arbitrators, dealing with dilatory tactics, the need (or not) for an active role of the arbitral tribunal in unravelling arguments and evidence, the role of the official (or non-official) secretary to the Tribunal, and various issues arising out of the recognition and enforcement of awards. We rounded the day off with drinks at the offices of **Pérez Llorca**, jointly organised by YIAG and CEA-40, followed by a fantastic dinner in downtown Madrid.





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## Co-sponsored Events: YAP conference in Brussels & ITA Dallas Roundtable

As in the past, YIAG supported the young practitioners' conference held under the auspices of **YAP**. This year the conference was held in **Brussels** in May and hosted by CEPANI 40. The theme was "Arbitration in a changing setting". The first session focused on "Changes within the arbitral proceedings", affecting either the parties to the dispute or the object of the dispute, and was moderated by Bernard Hanotiau. In the second session, which was moderated by Eric Schwartz, the discussion turned on "Changes outside the arbitral proceedings", in particular parallel court proceedings and parallel arbitral proceedings. YIAG was represented by Domitille who delivered a speech on "Changes which may affect the parties to the dispute: Insolvency". The conference was very well attended (with about 140 participants) and was followed by a superb cocktail reception organised by CEPANI 40, overlooking downtown Brussels from the roof bar of the Brussels Museum for Musical Instruments.

YIAG also co-sponsored the **ITA's "2<sup>nd</sup> Annual Dallas Roundtable**, a Meeting for Young International Arbitrators", together with the ICDR Young & International and the USCIB Young Arbitrators Forum. As usual, the Roundtable, which took place before the main ITA Annual Workshop, was very well attended with over 100 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 centred on the important topic of selecting arbitrators. The second panel discussed the relationship between arbitral proceedings and the courts. Shai represented YIAG by chairing the second session. As could be expected, the lively discussion inspired by the panel presentations continued well into the drinks and buffet reception that followed.

## **Next YIAG Training Seminar: Vilnius, 3 October 2007**

As you will recall, the goal of YIAG in holding Training Seminars is to provide, free of charge, a full day introduction to international arbitration (including investment treaty arbitration) to young practitioners from emerging regions where there are fewer opportunities to attend conferences on international arbitration.

We had hoped to organise two Training Seminars per year but our initial programme proved slightly over ambitious given our day time jobs. We have therefore reduced the programme to the more sensible number of one annual Training Seminar, in addition to the three annual YIAG symposia.

After a successful launch of the programme in Bucharest in October 2006 by Domitille and Matt (with the help of several YIAG members), Melanie and Shai will take the lead and organise the second YIAG Training Seminar in Vilnius, Lithuania, on 3 October 2007 with the help of YIAG Members **Marc Veit**, **Gisela Knuts** and **Petra Kiurunen**. We hope to attract many participants not only from the Baltic States but also from the wider region. An announcement and further details regarding the venue will soon be circulated to all YIAG Members and advertised through various channels. We are grateful if you can pass on the programme to young practitioners or in-house counsel from the region whom you believe might be interested. As always such an event will also be a great opportunity for more socialising and a bit of sightseeing in (for some of us) a new region.

We have not yet decided where the 2008 Training Seminar shall be held. If you have ideas, wish to help and are able to devote the necessary time (and finance your travel and accommodation expenses) please send a message to the E-letter email ([yiaGEletter@Icia.org](mailto:yiaGEletter@Icia.org)) quoting "2008 Training Seminar" in the subject field.

In the meantime, happy reading!

**Domitille, Matt, Melanie and Shai**

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## **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 for both young and not so young practitioners can be found at the end of the E-Letter:

### **2007**

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

October: YIAG Training Seminar, Vilnius

November: YIAG Symposium, Dubai

### **2008**

February: YIAG Symposium, New York

June: co-sponsored YAP Conference, Dublin, immediately preceding the 2008 ICCA Conference

June: co-sponsored ITA-Dallas Roundtable, Dallas, immediately preceding the 2008 ITA Symposium

Spring or autumn: YIAG Training Seminar, *location to be determined*

September: YIAG Symposium, The Grove near London

## **REPORTS FROM YIAG MEMBERS**

As in the past, we have received numerous excellent contributions from YIAG members. We will continue to do our best to include as many as we can in each E-Letter, taking into account the geographical balance and required mix between recent case law and new or amended arbitration legislation. Please send your contributions - consisting of notes of between 4 and 6 paragraphs relating to recent interesting developments in the field of international arbitration in your jurisdiction - to [yiaGEletter@lcia.org](mailto:yiaGEletter@lcia.org).

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 notes published in the YIAG E-letter are those of the individual authors and are not expressed on behalf of YIAG or the LCIA.

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## Argentina



Jean-Paul Dechamps, Freshfields Bruckhaus Deringer, Paris

**The past few years have seen a huge increase in investment treaty claims against Argentina. In the past 18 months, awards have been issued in the first five of these cases, all of which resulted from measures taken by the government in the context of Argentina's financial crisis of 2000-2002.**

In [Azurix Corp. v. Argentina](#) and [Siemens v. Argentina](#), \$165m and \$ 217m were respectively awarded to claimants objecting to measures taken by the respondent that disrupted the normal course of their respective contracts with the government. In *Azurix*, the Tribunal decided that Azurix had been illegally deprived of its water and sewage concession in the Province of Buenos Aires, in breach of the guarantees contained in the Argentina-US BIT. In *Siemens*, the tribunal found that Argentina had breached several guarantees contained in the Argentina-Germany BIT, in unlawfully interfering with the investor's right under a contract with the government, to develop a national identification and immigration control system.

[CMS v. Argentina](#), [LG&E v. Argentina](#) and [Enron v. Argentina](#) were all decisions based on breaches of the Argentina-US BIT. The *CMS* and *Enron* tribunals awarded \$130m and \$106m respectively to the claimants, whilst the *LG&E* tribunal still has to quantify the amount of damages. The cases were based on similar facts, all relating to the financial emergency measures taken by Argentina at the peak of the crisis, in 2001-2002.

Argentina has argued that it was entitled to rely on the defence of necessity in relation to the alleged breach of its treaty obligations, given that the emergency measures were necessary in order to maintain social harmony and economic continuity. In *CMS* (May 2005) and *Enron* (May 2007), the tribunals rejected Argentina's defence. On the other hand, in *LG&E* (October 2006) the tribunal accepted the plea of necessity in relation to actions taken during a period of 17 months in which, it said, the Argentine financial crisis, was at its peak. The surprising fact was that one of the arbitrators in the *LG&E* was also part of the *Enron* tribunal, but no attempt to explain the different interpretations of similar facts and law was made in the latter award.

ICSID awards can only be challenged through an application for annulment based on a limited number of grounds. In *CMS*, *Azurix* and *Siemens*, Argentina has filed applications for annulment of the awards. In *LG&E*, the decision on damages is still pending, whilst the application for annulment of the recently issued award in *Enron*, may still be filed by Argentina. Under the [ICSID Convention](#), investors are able to take final ICSID awards to Argentine domestic courts to seek payment; the courts are obliged to accord these awards the same finality as would be shown to decisions of Argentina's highest court. On the other hand, over the past two years, several Argentine officials have repeatedly threatened to have the Argentine courts review ICSID awards. This has raised some doubts as to whether ICSID awards against Argentina would be as effective as they were traditionally thought to be. However, the aggressive trend seems to be reverting in the form of certain filings recently made by Argentina in the annulment proceedings of the *CMS* award: in support to its request to stay enforcement of the award pending resolution of the annulment request, Argentina's Attorney General submitted a statement in which, in consideration to the particulars of the case, he agreed to recognize the *CMS* award - if it were to survive the annulment stage - as a proper international award under the ICSID Convention. In its [decision](#) the annulment committee accepted Argentina's assurance and granted the stay.

The statement made by Argentina to the *CMS* annulment committee appears to indicate a new stance by the Argentine government. It will be interesting to follow the pending annulment procedures to assess Argentina's attitude should it be required to provide similar undertakings. Over 20 investment treaty

arbitrations originating from the post-2002 emergency measures are still pending before international tribunals, and many of them should result in final awards in the upcoming months.

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## Austria



**Alfred Siwy**, Schönherr Rechtsanwälte, Vienna

**In its decision of 20 March 2007 (court file no. 10 Ob 20/07z), the Austrian Supreme Court (OGH) had to decide on the conformity of an arbitration clause contained in a contract for the carriage of goods with Art. 33 of the Convention on the Contract for the International Carriage of Goods by Road (the “CMR”).**

A Spanish carrier had undertaken to transport machine parts from Spain to Austria for repair. These parts never arrived at their destination and their whereabouts remain unknown. Subsequently, the Spanish carrier was sued before the Austrian courts by a German insurer who had indemnified the carrier's contracting partner. Three contract documents, (i) the framework contract between the carrier and its contractor, as well as (ii) their contract of carriage, and (iii) the general terms on the back side of the bill of lading, contained arbitration clauses which established the jurisdiction of the Spanish “*Junta Arbitral de Transporte*” (“Arbitration Court for Transportation”). Neither the framework contract nor the contract of carriage contained a choice of law clause. Art.1 of the general terms printed on the bill of lading however stated that “*land transport would be governed by CMR*”, whereas Art. 18, to some extent, provided for the application of the substantive law of the country of origin of the load, which was Spanish law.

Since the parties had concluded a valid arbitration agreement, in accordance with Spanish law (the contracts including the arbitration clauses had been entered into in Spain), the Vienna Commercial Court, in the first instance, found that it did not have jurisdiction to decide the dispute. However, concluding that the arbitration clause was invalid, the Vienna Higher Regional Court overruled the decision of the Commercial Court.

According to the Vienna Higher Regional Court, in contradiction with the requirement of Art. 33 CMR, the parties had not expressly agreed on the application of the CMR as the underlying rules on which the dispute was to be decided. This contractual defect invalidated the arbitration agreement under Art. 41 CMR, pursuant to which any stipulation shall be null and void which derogates from the provisions of the CMR (except as provided in Art. 40 CMR). The reference to CMR contained in Art. 1 of the general terms printed on the bill of lading was held to be insufficient to mandate the application of the CMR, given that it was understood as a mere general statement to the effect that international carriage of goods by road was governed by the CMR. This was especially so in light of Art. 18 of the general terms which provided for the application of Spanish substantive law.

On appeal, the Supreme Court upheld the decision of the Vienna Higher Regional Court. It reasoned that according to Art. 33 CMR, the arbitration agreement itself must include an express provision ordering the application of the CMR to the parties' contractual relationship. The Supreme Court held that a mere reference to a national law of which the CMR may be considered to form part (the perception of CMR member-states differs in this respect), such as Art. 18 of the general terms, was insufficient to fulfil the requirements of Art. 33 CMR. An explicit stipulation as to the application of the CMR would have been required in order to save the present arbitration clause.

Such a strict interpretation of Art. 33, in line with the opinions of international scholars, was believed to be necessary in order to guarantee a widespread application of the CMR to contracts of carriage in all contracting states (also by Arbitral Tribunals). As indicated above, a sole reference to the applicability of

a national law of a CMR member-state will not ensure the application of the CMR in all member-states. Taking into account the CMR member-states' intention to preserve the international consensus and the importance of CMR in its function as a uniform legal framework which effectively limits trade rivalry between carriers, the risk of a non-application of the CMR by Arbitral Tribunals was considered to constitute a valid ground for the invalidation of the arbitration agreement in the present case.

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## Belgium



**Dirk de Meulemeester & Maud Piers,**  
De Meulemeester & Partners-Lexlitis, Ghent &  
Brussels

The Brussels Court of First Instance recently (March 2007) rendered a remarkable decision granting a request to set aside an arbitral award on the basis of a violation of European anti-trust law (Articles 81 and 82 EC). The case is particularly interesting for the debate on the courts' authority to review the arbitrator's decision process and the overall reluctance against a *revision au fond*. A full case note will be published in the next ASA Bulletin.

It is largely accepted that the effectiveness of arbitration would be at stake if a national court engaged in a *revision au fond* substantively reviewing the merits of the case. National courts do acknowledge that they are not judge of the *case* but rather of the *award* ("*la cour n'est juge du procès, mais de la sentence*"). The European Court of Justice has indeed held that it is in the interest of an efficient arbitration procedure that the courts' review should be limited in scope and take place only in exceptional circumstances (*Eco Swiss*, 1999). The *Cour d'Appel* of Paris in the *Thalès* decision of 2004, when deciding whether an award was contrary to public policy, held that an award could only be set aside when a breach is blatant, effective and concrete ("*flagrantes, effectives et concrètes*").

In the case at hand, two parties were involved in a contractual relationship starting in 1991. SNF (a French limited liability company) and CYTEC (a Dutch limited liability company) concluded a first supply agreement for a chemical called AMD in 1991. In 1993 the parties concluded a second agreement for eight years starting from October 1, 1993. SNF committed to place all of its AMD-orders for the plant in the region of St-Étienne in France with CYTEC whenever its needs would surpass a certain amount. CYTEC was under the obligation to deliver the ordered quantities of AMD up to a certain annual maximum. A price evolution calculation was provided for in the agreement.

On January 10, 2000 SNF sent a letter by certified mail to CYTEC in order to terminate the second contract on the basis of a violation of the antitrust provisions in articles 81 and 82 of the EC Treaty. CYTEC thereupon filed for arbitration under the ICC Arbitration Rules in May 2000. Two arbitral awards were rendered by an ICC arbitral tribunal.

SNF filed an action to set aside both arbitral awards with the Belgian Court of First Instance of Brussels. The action was based on several grounds. The Brussels Court granted the request to set aside both arbitral awards for violation of public policy pursuant to Article 1704.2.a of the Belgian Judicial Code (BJC). Prior to its ruling on the merits, the Brussels Court affirmed that it had jurisdiction to hear the case and hence denied CYTEC's admissibility challenge pursuant to Article 1717.4 BJC.

The Brussels Court of First Instance set out the standard for review by referring to the judgment of the European Court of Justice in the *Eco Swiss* case and the *Thalès* decision of the Paris Court of Appeal.

According to the Brussels Court, it is uncontested that Articles 81 and 82 EC Treaty are public policy provisions. The *Eco Swiss* Court held that Article 85 EC Treaty “constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.” Therefore, where national rules of procedure allow the courts to set aside an arbitral award for failure to observe national rules of public policy, it must equally do so where the arbitral tribunal fails to comply with the prohibition laid down in Article 85.1 of the EC Treaty.

The Brussels Court further emphasised that it would not engage in a “*revision au fond*”. It also explicitly rejected the holding of the *Thalès* court. In order to ensure the effectiveness of the public policy rules the court verified the way in which the arbitrators had assessed the facts and evaluated their application of the law to these facts. The Belgian court held that the arbitrators in the case at hand had rightfully declared the second contract null and void pursuant to Article 81 EC. The Court then turned to the damages awarded. It concluded that the way in which the arbitrators had decided on the damages went against the “anti-trust nature” of the contract (“*revient à nier le caractère anti-concurrentiel de ce contrat*”). The Belgian Court thus held that the award violated Article 81 EC because the outcome of the arbitration (“*la solution qu’elles donnent au litige*”) in practice carried out a contractual relationship that was contrary to anti-trust law.

By rendering this judgment, the Brussels Court seems to have substituted or at least compared the arbitrators’ opinion with its own. The question arises whether this equals a “*revision au fond*”.

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## Canada

**Martin J. Valasek**, Ogilvy Renault LLP



**Ensuring the Efficacy of Interim Relief in Quebec \***

Canada is a Model Law jurisdiction. It is also a federal state, with legislative jurisdiction split between the federal Parliament and provincial assemblies. In Quebec (the only province with a civil-law tradition), most of the provisions of the Model Law were adopted through amendments to the *Civil Code of Quebec* and the *Code of Civil Procedure*. Each of Canada’s other provinces and territories (which have a common-law tradition) adopted the Model Law with minor modifications in their respective statutes on international arbitration.

In the common law provinces (such as Ontario and British Columbia), Articles 9 and 17 of the Model Law, which address the jurisdiction of courts and the arbitral tribunal, respectively, to grant interim measures, apply without reservation in the context of an international arbitration. In Quebec, the situation is less clear. First, Article 17 of the Model Law (empowering arbitrators to order interim relief) was never incorporated into Quebec law. The legislative debates show that Article 17 was left out because the interim relief that it contemplated, namely relief from the arbitral tribunal, was “unenforceable.” The legislators also reasoned that parties could always provide for the possibility of such relief in their contract. Second, although Article 9 of the Model Law (empowering courts to order interim relief) was

incorporated into Quebec law, through Article 940.4 of the *Code of Civil Procedure*, a recent lower-court decision injects some doubt over its interpretation and application in the province, as explained below.

Article 940.4 of the *Code of Civil Procedure* provides that “a judge or the Court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties.” Moreover, Article 3138 of the *Civil Code of Quebec* provides that, in international cases, a Quebec court “may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.” (Article 3148, paragraph 2, of the *Civil Code of Quebec* confirms that a Quebec court does not have jurisdiction over a dispute “where the parties, by agreement, have chosen to submit all existing or future disputes ... to an arbitrator ...”)

Notwithstanding the clear language of Article 940.4 of the *Code of Civil Procedure* and Article 3138 of the *Civil Code of Quebec*, in a recent judgment of the Superior Court of Quebec, in the case *Ekinciler Demir Ve Celik San, a.s. v. Bank of New York*, 2007 Q.C.C.S. 1615, the judge interpreted the arbitration clause in the parties’ contract as excluding recourse to the Quebec courts, even for provisional or conservatory measures. The judge held that, in the circumstances, Article 3148, paragraph 2 took priority over Article 3138 of the *Civil Code of Quebec*. (There is no mention in the judgment of Article 940.4 of the *Code of Civil Procedure*.)

The arbitration clause that was at issue in the case reads, in relevant part, as follows: “All disputes arising in connection with this contract shall exclusively be settled by arbitration in Zurich in accordance with the arbitration rules applicable.” There is no additional or specific language in the clause that expressly excludes the possibility of seeking interim relief from state courts (although the judge gave some weight to the use of the term “exclusively”). Nor is such relief expressly excluded by Chapter 12 of Switzerland’s Private International Law Act, which contains the default rules that would be applicable to the Zurich arbitration. As such, the reasoning of the judge in *Bank of New York*, in principle, could apply to most standard arbitration clauses.

Although there is authority in Quebec that goes the other way, including an earlier decision of the Quebec Court of Appeal, *Bennett Fleet (Quebec) Inc. v. Acolam Inc.*, 4 December 2006, denying leave to appeal from a lower-court decision that gave effect to Article 940.4, the issue seems somewhat unsettled, in light of the *Bank of New York* decision.

Until this issue is unequivocally resolved, parties contemplating the need to turn to the Quebec Courts for provisional measures, in the context of arbitration, would be well advised to include express language in their arbitration clauses empowering courts to grant interim relief. Furthermore, given that Article 17 of the Model Law was not adopted into Quebec law, parties contemplating arbitration in Quebec should, in addition, include express language in their arbitration clauses granting the arbitral tribunal the power to order interim relief. Of course, an arbitration clause selecting the application of the *LCIA Arbitration Rules* cures both problems, via the provisions on interim and conservatory measures included in Article 25 of the Rules.

\* The electronic versions of the judgments cited in this article are found on the website “Consensual Arbitration in Quebec” (<http://www.mcgill.ca/arbitration/>) of Professor Frédéric Bachand of the Faculty of Law of McGill University, to whom I am most grateful both for the website and for his comments on this short article. The views herein, and any errors, are mine alone.

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## Croatia



**Barbara Steindl**, Schönherr Rechtsanwälte, Vienna

### Legal Framework for Arbitration under Croatian Law

Until 2001, arbitration in Croatia was regulated by the Croatian Civil Procedure Act and by the Act on Conflict of Laws, which were mere adaptations of the former Yugoslavian legislation. The [Croatian Arbitration Act 2001](#) (ie *Zakon o arbitraži*, Official Gazette no. 88/01; “the CAA”) came into force on 19 October 2001, compiling all arbitration regulations into a single act and adopting (in part) the UNCITRAL Model Law.

The CAA governs (i) “domestic arbitration”, (ii) recognition and enforcement of domestic/foreign arbitral awards, as well as (iii) state court intervention in arbitration proceedings (Art. 1 CAA). Disputes “without an international element” (*i.e.* all parties being Croatian) shall have their place of arbitration in Croatia. Legal scholars argue that this provision is incompatible with the European principle of freedom of trade in services. Hence, in preparation for the accession to the EU, Croatia may soon abolish this restriction.

“*Domestic arbitration*”, most interestingly, is likewise defined in relation to the venue of the proceedings: an arbitration is *domestic* if it *takes place within* Croatia. In turn, the CAA only considers arbitration proceedings as truly “international” in the event that they take place *outside the territory* of Croatia. However, disputes which only bear an “international element” (*i.e.* at least one party is foreign), may also validly take place outside Croatia (Art. 2 CAA).

**Arbitrability:** The parties may agree on arbitration for the settlement of disputes involving rights of which they may freely dispose.

**Arbitration agreement:** Art. 6 para 1 CAA sets forth the essential components of an arbitration agreement: (i) The parties shall *submit* to arbitration (ii) *all or certain disputes* which have arisen/may arise between the parties in respect of a *defined legal relationship* (iii) of a *contractual or non-contractual* nature. An arbitration agreement may be concluded in the form of an arbitration clause or a separate arbitration agreement.

The arbitration agreement must be agreed in writing (Art. 6 para 2 CAA). This form requirement is fulfilled if the agreement (i) is contained in a document signed by the parties or (ii) has been agreed upon by an exchange of letters, telexes, faxes, telegrams or other means of telecommunications which provide a record of the agreement, irrespective of whether the latter have been signed by the parties. Reference to a document containing an arbitration clause also suffices. Finally, the CAA acknowledges arbitration agreements which have been tacitly accepted (*cf* Art. 6 para 3 CAA), a threshold below that of the UNCITRAL Model Law.

**Appointment of Arbitrators:** In the event the parties have not determined otherwise, the number of arbitrators shall be three (Art 9 CAA). Detailed rules specify the procedure for the arbitrator(s)’ substitute appointment by an appointing authority or the state courts in case of the parties’/arbitrators’ default (Art. 10 CAA). The challenge of an arbitrator will be successful on the standard grounds, *i.e.* to the extent circumstances exist that give rise to justifiable doubts about the arbitrator’s independence or impartiality, or if the arbitrator does not possess the qualifications agreed upon by the parties or fails to fulfil his or her duties as to the swift conduct of the arbitration (Art. 12 CAA). It is the arbitral tribunal itself that decides on the challenge.

*Proceedings:* The CAA embodies the widely accepted principles of the arbitral tribunal's *Kompetenz-Kompetenz*; the separability of the arbitration clause (Art. 15 CAA); equal treatment of the parties to the arbitration and due process (Art. 17 CAA); the parties' freedom, to agree directly or by reference to a set of arbitration rules, on the procedural conduct of the arbitration (Art. 18 CAA); and, failing the parties' agreement, the arbitral tribunal's power to decide on the place of arbitration and the language of the proceedings. Note that in case neither the parties nor the arbitrators reach agreement on the language of the arbitration, the Croatian language shall be chosen as such. More arbitration friendly perhaps, the CAA helps preventing delayed proceedings by determining (i) expeditious conduct, (ii) timely action and (iii) forethought with regard to potential delays as the arbitrators' primary duties. Finally the arbitral tribunal may issue interim measures and impose securities upon the parties in relation to such measures (Art. 16 CAA).

*Applicable law:* The arbitral tribunal shall decide the dispute in accordance with such rules of law as were *chosen by the parties* as applicable to the substance of the dispute. Failing any designation by the parties, the arbitral tribunal shall apply the law which it considers *most closely connected* to the dispute.

*Award:* An award may be rendered by majority vote. Repeated deliberations shall take place in the event no majority can be found. If such is not achieved, the chairman of the tribunal is empowered to finally deliver an award on his or her own (Art. 28 CAA). The award can be set aside by the competent Croatian state court only on the limited grounds listed in Art. 36 CAA.

*Croatian Arbitration Institutions:* The Permanent Arbitration Court attached to the Croatian Chamber of Commerce is the most important arbitration institution in Croatia. Although the institution's focus rather lies in the settlement of disputes between Croatian parties, the institution has, since 1853, dealt with arbitration proceedings to which foreign and domestic entrepreneurs were parties. For further details on the institution and its arbitration rules, the [website of the Croatian Chamber of Commerce](#) may be consulted.

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## England



**Andrew Pullen, Allen & Overy LLP**

**Arbitration agreements must be liberally construed: the *Fiona Trust* decision**

In [Fiona Trust & Holding Corporation & ors v Yuri Privalov & ors](#) [2007] EWHC 1217 (Comm) the English Court of Appeal has finally abandoned semantics in favour of a commercially sensible presumption that parties to international transactions intend all their disputes to be resolved in "one-stop" (although contracting parties should continue to include expansive wording in case courts in other jurisdictions take a more restrictive view). The Court of Appeal has also reinforced the essential doctrine of separability of the arbitration clause by confirming that the arbitration clause will only be disregarded where it is directly impeached by a relevant allegation (such as of fraud).

The claimants claimed to have rescinded eight charterparties with the defendants on the basis that they had been procured by bribery. The defendants claimed to have validly referred to arbitration the question of whether the purported rescission was effective. The charterparties were governed by English law.

The first issue before the Court of Appeal was the construction of the dispute resolution clauses, which permitted a party to refer “any dispute arising under this charter” to arbitration. There was also a reference to “a dispute [that] has arisen out of this charter”. Morison J, at first instance, had accepted the claimants’ argument that the bribery allegations fell outside the scope of the clause.

The Court of Appeal disagreed. It observed that the authorities on the construction of jurisdiction and arbitration clauses were not all readily reconcilable and called for a “*line to be drawn*” under previous authorities and for a “*fresh start*”. Businessmen would be surprised at the time taken up debating whether a particular case falls within one set of words or another very similar set of words. Any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. “Arising out of” should cover “*every dispute except a dispute as to whether there was ever a contract at all*”. “Arising under the contract” should no longer be given any narrower meaning. The clause is wide enough to cover a dispute as to whether the contract can be rescinded for alleged bribery.

The claimants’ second argument was that, when they rescinded the charterparties, they also rescinded the arbitration clauses. Under s7 [Arbitration Act 1996](#), an arbitration clause is treated as a separate agreement from the contract in which it is contained (the principle of separability). The Court of Appeal confirmed that, as a consequence, a matter affecting the validity of the contract has no effect on the arbitration clause unless the arbitration clause is itself directly impeached. The arbitration clause might be impeached where there is a plea of *non est factum* or of a mistake (such as to the identity of the counterparty), going to the question of whether any agreement was ever reached, but not by the allegation of bribery here. Accordingly, the arbitrators had jurisdiction to decide whether the claimants had had the right to rescind the charterparties and, since there was no issue affecting the validity of the arbitration clause, the court had no discretion but to stay its proceedings in favour of arbitration.

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## Germany



Jan Kraayvanger, Mayer Brown Rowe & Maw LLP, Frankfurt

### **Obstacles to the Enforcement of Arbitral Awards in Germany – the issue of arbitration costs.**

Germany is a Member of the New York Convention 1958. Moreover, since 1999 the rules of the New York Convention are directly applicable to the recognition and enforcement of foreign arbitral awards regardless of whether or not the place of arbitration was located in another member state. Although this approach is very receptive to the recognition and enforcement of foreign arbitral awards, there is one specific obstacle which frequently renders foreign arbitral awards unenforceable in Germany.

As early as 1976, the German Federal Supreme Court ruled that the arbitral tribunal must not fix the costs of arbitration. In other words, the arbitrators must not decide on their fees in the arbitral award. The Court argued that otherwise the arbitrators would act as judges in their own matter and by doing so would infringe German public policy. As a result, such arbitral awards have since then been unenforceable in Germany with regard to the costs of arbitration. Moreover, the arbitrators are even prohibited from determining the value in dispute if the arbitrators’ fees depend on such value. According to the Federal Supreme Court, the arbitrators may only fix the costs of arbitration if the parties have mutually agreed and paid them prior to the rendering of the arbitral award. The Court argued that (only) in such a case the arbitrators could divide the costs of arbitration between the parties rather than rule on their fees.

The approach of the German Federal Supreme Court does not conform to practice in international arbitration. Art. 38 of the [UNCITRAL Arbitration Rules](#) even explicitly requires the arbitral tribunal to fix the costs of arbitration in the arbitral award, including the arbitrators' fees. It is therefore not surprising that still today, more than 30 years after the Federal Supreme Court rendered its judgment, even arbitral awards rendered under the auspices of renown international arbitration organizations like the ICC contain cost decisions which are not enforceable in Germany.

In order to meet the requirements of the German Federal Supreme Court, it is of the essence that the parties agree on the value in dispute and pay the costs of arbitration in full prior to the arbitral tribunal having fixed them in the award. If the parties cannot reach an agreement, the arbitral tribunal cannot fix the arbitration costs but may only divide such costs between the parties in the abstract (e.g. party A shall bear 70% of the costs, party B 30%). In order to determine the actual costs, the arbitrators are then forced to claim their fees from the parties in separate court proceeding based on the arbitration contract between the parties and the arbitrators. Once the costs of arbitration have been fixed in the separate court proceeding, the arbitrators may supplement the arbitral award by fixing the costs in accordance with the court decision that they have obtained.

The German Federal Court has been heavily criticized for the consequences of its decision on the issue of costs. However, the Court has refrained from overruling its judgment and has even confirmed its ruling in several subsequent decisions. It is therefore essential for both arbitrators and counsel to be aware of this German legal practice.

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## Kazakhstan



**Dmitriy Vetlugin**, Director of Legal Department, Resmi Group Ltd, Almaty

### **Legislation on Arbitration of the Republic of Kazakhstan**

The legislative acts of the Republic of Kazakhstan regulating domestic and international commercial arbitration were adopted on 28 December 2004. There are two laws: Law "On Arbitral Tribunals" and Law "On International Commercial Arbitration". The difference between the two laws is that the first regulates the local (domestic) arbitration, and the second deals with arbitration with foreign parties (non-residents of the Kazakhstan).

### **Competence of Arbitral Tribunals**

Unfortunately, the adopted legislative acts significantly limit the competence of arbitral tribunals, both local and international. According to Article 1 of the Law On Arbitral Tribunals and Article 1 of the Law On International Commercial Arbitration, arbitral tribunals have the authority to settle disputes arising only from civil-law contracts, unless provided otherwise by the legislation of the Republic of Kazakhstan. It means that other types of disputes (e.g., disputes regarding property title, not related with the contract) cannot be settled by arbitration.

There is also a limitation on competence for domestic arbitration that is provided in para. 7 of Article 7 of the Law On Arbitral Tribunals stipulating that "arbitral tribunals do not have jurisdiction over the disputes under which the interests of the state, state enterprises, minors, persons recognized incapable by the court, not being party to the arbitration agreement are affected; disputes arising out of the contracts on

provisions of services, realization of works, production of goods by the subjects of natural monopolies, dominants, as well over the cases on bankruptcy, except for the cases provided by the laws of the Republic of Kazakhstan”.

However, the disputes under which the interests of the state are affected should not be interpreted too broadly. By analogy with other legislative acts (e.g., Law On Investments), the interests of the state can be deemed to be affected in the case of necessity of provision of defensive potential, national and ecological security.

### **Challenging the Arbitral Award**

Article 31 of the Law On International Commercial Arbitration quotes the corresponding provisions of the 1985 [UNICTRAL Model Law On International Commercial Arbitration](#) and provides for the two options for the setting aside of the award: upon the petition for setting aside by one of the parties, and upon the decision of a competent court (which can be adopted without any petition by the party).

The grounds for the petition are limited to procedural violations (one of the parties was not duly notified of the appointment of the arbitrator or of the arbitral proceedings, or was recognized incapable, the arbitral award was rendered on a dispute not provided by the arbitration agreement, etc.).

In addition, the competent court may under its own initiative reverse an arbitral award on two grounds: 1) the arbitral award contradicts to the public policy of the Republic of Kazakhstan; 2) the dispute cannot be the subject of arbitral proceedings under the legislation of the Republic of Kazakhstan.

However, it should be noted that the limitations for arbitral tribunals under para. 5 of Article 7 of the Law On Arbitral Tribunals do not extend to international commercial arbitration.

### **Enforcement of Arbitral Awards**

Both laws deal with the enforcement of arbitral awards. Article 33 of the Law On International Commercial Arbitration sets out the grounds for refusal of recognition and enforcement of arbitral awards and generally corresponds to the provisions established by the UNICTRAL Model Law and the 1958 New York Convention On Recognition and Enforcement of Foreign Arbitral Awards.

Article 48 of the Law On Arbitral Tribunals (Art. 48) provides for similar provisions. However, there is one unclear provision for the refusal of enforcement of domestic arbitral awards: if the rendering of the award became possible as a result of committing a criminal offence established by verdict of the court.

The order of enforcement is established by the Code of Civil Procedure separately for domestic awards (Chapter 18-1 “Enforcement of Domestic Arbitral Awards”) and international arbitral awards (Articles 425-1, 425-2, 425-3). Articles 425-1 to 425-3 deal with international commercial arbitration awards rendered in the Republic of Kazakhstan. Enforcement of foreign arbitral awards is regulated by the provisions of the 1958 New York Convention.

Article 3 of the New York Convention provides: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”. Hence, national procedural legislation of Kazakhstan, i.e. Article 425 of the Code of Civil Procedure, applies to the enforcement of foreign arbitral awards in the Republic of Kazakhstan.

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## Poland



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### **Project of amendments to Polish law on arbitration**

It can be safely said that Poland is fast becoming one of the leading arbitration centres in Eastern Europe. The number of proceedings is rising and arbitration institutions have thrived in response to a significant interest in private methods of resolving disputes. Academic interest has also grown, and there are now frequent international conferences attracting prominent speakers.

With some variations, the Polish law on arbitration primarily reflects the UNCITRAL Model Law on International Commercial Arbitration. This relatively new legislation, which came into force on 17 October 2005, creates a unified regime for both domestic and international proceedings that accords with international standards. The provisions remain in the [Polish Code of Civil Procedure](#), emphasising their procedural nature and character. However, after almost 20 months in force, certain aspects of the new law have become controversial and, as a result, some revisions to the law are desirable and inevitable. Recently, proposals for certain amendments have been put forward by leading Polish arbitration specialists.

The first proposed revision relates to the procedure for challenging and removing an arbitrator. Concern has arisen following a noticeable growth in the number of challenges to arbitrators on the grounds of conflict of interest. Unsurprisingly perhaps, it appears that many such challenges are not genuinely motivated, but used as a tactic to delay and divert the course of arbitral proceedings. While the grounds for the removal of an arbitrator under Polish law follow internationally accepted principles (Article 1174 § 2, lack of independence and/or impartiality as well as qualifications agreed to by the parties), the procedure itself, set-forth in Article 1176, does not clearly establish how the right of the parties to agree a procedure for challenging arbitrators should interact with the jurisdiction of the national courts.

Under the provisions of Article 1176 § 2, parallel challenges can be made, both within the arbitration and before national courts when, for instance, an arbitration institution delays resolving a challenge. After one month from the date of submitting the challenge application to the arbitration institution, the challenging party acquires the right to apply for the removal of an arbitrator before the national courts. Under the proposed amendments, the national court would be required to render its decision immediately, or at least no later than two weeks from the date of the application. Such temporal restrictions would definitely increase the pace of challenge proceedings. Nevertheless, the main problem with the current law is that courts will still hear unjustified applications, and this problem will remain. Further, under Article 1176 as it currently stands, parties are entitled to and often do exercise their right to challenge an arbitrator on the same grounds repeatedly in the same proceedings.

The second disputed point under the current legislation concerns the procedure for setting aside an award under Article 1207 of the Polish arbitration law. The simplification, as well as the reduction in the multiplicity of instances in post-arbitral proceedings, have been among the priorities of those advocating change. The finality of the national courts' decisions on the setting aside of awards is the most important aspect of the proposed amendments.

First, the jurisdiction over applications for setting aside awards should exclusively lie within the competence of the Court of Appeal in Warsaw (*S d Apelacyjny w Warszawie*). The reasons are

straightforward; to provide, create and build-up uniformity in case law and to narrow the current three-instance system of national courts' supervision over arbitral awards.

The second proposal is to introduce a time limitation of three months for the court to hand down its decisions. Third, a restriction of the right to intervene in setting aside proceedings is proposed. Currently, anyone who has a legal interest in the outcome of the arbitral proceedings is entitled to join the setting aside proceedings as an intervener. For instance, in a recent case, the ex-wife of a member of the Board of Directors of a company intervened in proceedings brought to set aside an arbitral award relating to the company.

Finally, shorter time limitations under Article 1208 have been suggested, for example, two months instead of three (from the date of delivery of the award) for the filing of a party's application to set aside the award. In the case of an application under points 5 or 6 of Article 1206 § 1 (grounds of fraud or *res judicata*), the time limit to submit the application should start on the day on which the party discovers such ground, provided that it is discovered within one year from the date of the delivery of the award (there is a five-year period under the current legislation).

International experience clearly shows that countries which have enacted similar provisions have become very attractive places for cross-border arbitrations and have earned the status of "arbitration-friendly" states. The above proposals will certainly increase foreign investors' confidence in Poland and in Polish arbitration law.

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## Singapore



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### **Singapore International Arbitration Centre (SIAC) Issues New Arbitration Rules and Fee Arrangements**

The SIAC has recently published a new set of [Arbitration Rules](#) ("New Rules") which came into effect on 1 July 2007, replacing the current 2<sup>nd</sup> edition of the SIAC Rules issued ten years ago. The New Rules introduce significant changes to the SIAC's arbitration procedures, its role in administering arbitrations, as well as its fee structures. While some of these changes appear inspired by the popular ICC arbitration rules, the New Rules also incorporate certain innovative features.

### **Appointment and Number of Arbitrators**

The SIAC clarifies its role as an appointing authority. In future arbitrations subject to the New Rules, even if the arbitration agreement provides that one arbitrator is to be "appointed" by each of the parties (or any third persons such as co-arbitrators), that agreement shall only be treated as an agreement for each party to "nominate" an arbitrator (New Rule 5.2). A nominated arbitrator will only be deemed "appointed" when confirmed by the SIAC Chairman (New Rule 5.5). This New Rule usefully clarifies and formalises what was in fact the SIAC's practice before the New Rules came into force of confirming the parties' selections of their respective arbitrators after agreement of the arbitrators' terms of appointment (SIAC Practice Note 01/07, para. 12).

Importantly, if the parties have not agreed on the number of arbitrators, the Registrar will have the power to decide that a dispute warrants the appointment of three arbitrators, taking into account the dispute's

complexity, sums involved or other relevant circumstances (New Rule 5.1). This contrasts with the old rules where, failing agreement of the parties, a sole arbitrator will be appointed (2<sup>nd</sup> Edition Rule 6). This change brings the New Rules in line on this point with the ICC Rules.

### **No Automatic Suspension Upon Challenge of Arbitrators**

Under the current SIAC Rules, when a party's challenge of an arbitrator is notified to the SIAC Registrar, the arbitration is automatically suspended until the challenge is resolved or decided upon (2<sup>nd</sup> Edition Rule 13.2). Under the New Rules, there is no longer any automatic suspension of proceedings. Instead, the SIAC Registrar now has discretion whether to order the suspension of the arbitration until the challenge is resolved (New Rule 11.2). This is a welcome change as the automatic suspension encouraged dilatory parties to challenge arbitrators at critical stages of the arbitration, notably on the eve of or during hearings.

### **Memorandum of Issues**

A significant amendment is the introduction in the New Rules of a requirement that the tribunal and the parties prepare a Memorandum of Issues within 45 days following completion of the parties' submission of written statements (New Rule 17). Written statements here refer to Statements of Case, Defence, Counterclaims and further written statements including witness statements (New Rule 16). The Memorandum of Issues will define the matters that the tribunal is to decide in its award. It must be signed by the parties and the tribunal. If a party refuses to participate in this process, the tribunal may submit its Memorandum of Issues to the SIAC Registrar for approval. At first sight, the SIAC's Memorandum of Issues appears similar to the drawing up of Terms of Reference in ICC arbitration. In practice, however, it is likely to be of greater importance in the dispute because it is to be drawn up only after the parties have fully argued their respective cases in writing. This innovation by the SIAC requires the parties and the tribunal to focus and agree on the dispositive issues in the dispute shortly before the hearings, which should help streamline the latter part of the arbitration.

### **Scrutiny of Draft Awards by SIAC**

Another new requirement is for a tribunal to submit its draft award to the SIAC Registrar for scrutiny and approval on matters of form, before the award may be issued (New Rule 27.1). The Registrar may suggest modifications as to form and may also draw the tribunal's attention to points of substance. With this new feature, SIAC now exercises control over the quality of the award without affecting the arbitrators' liberty of decision.

### **New *Ad Valorem* Fee Structure**

The New Rules are accompanied by a new Schedule of Fees used to determine both the arbitrators' remuneration and the SIAC's administrative fees. In the same way as the ICC's fee system, the SIAC's Schedule of Fees uses a sliding scale, with fees charged in proportion to the sums in dispute. However, the SIAC's administrative fees are significantly lower than the fees charged by the ICC for a dispute of equivalent size. And while, unlike the ICC, the SIAC does not offer a minimum-maximum range of arbitrators' fees, the SIAC's new fees for arbitrators are comparable to the median rates fixed by the ICC for similarly sized disputes. Parties are likely to welcome the SIAC's introduction of a more objective and transparent system for determining arbitrators' fees, while keeping the SIAC's administrative fees highly competitive. Also, the level of the SIAC's arbitrators' fees should now allow parties choosing SIAC arbitration to select without difficulty the world's leading – and most expensive – arbitrators.

### **Conclusion**

With its New Rules, which are the fruit of broad consultation within the international arbitration community, the SIAC has enhanced the certainty and transparency of its procedures. Its new fee arrangements are, in our view, a distinct improvement. These developments reflect the SIAC's rising stature as a leading global

arbitral institution, which is particularly suited for the expeditious resolution of cross-border disputes relating to Asia.

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## Spain



**Alberto Fortún Abogado**, Cuatrecasas, & **Elena Gutiérrez**, Uría & Menéndez, Madrid

**Celebrating the third anniversary of the Spanish Arbitration Act: on March 26, 2004, a modern Arbitration Act entered into force in Spain. Inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration, but improved with the experience of few decades of arbitration, the Spanish Arbitration Act has proved to be an outstanding legal tool to attract arbitration into Spain with the required guarantees and legal certainty.**

The collateral effects of the new Spanish Arbitration Act range from the increasing interest and knowledge of the judiciary to the creation of groups of practice like the *Club Español de Arbitraje*, (CEA) which are committed to put Spanish arbitration in line with international current trends and practices. The young practitioners' group of the CEA, CEA-40, has enrolled in this challenging task of conveying to entrepreneurs and colleagues the benefits that the Spanish Arbitration Act may bring to them. The CEA is also revising any legal aspect or practice that could jeopardize Spain as an arbitration venue.

Set out below is a short depiction of some of the relevant features of the Spanish Arbitration Act for the international community of young practitioners.

The 2003 Arbitration Act covers both domestic and international arbitration taking place in the Spanish territory although it also provides for some rules which are applicable even if the arbitration has taken place somewhere else. Among others, the provisions regarding (i) form and content of the arbitration agreement (Article 9, except for section 2); (ii) effects of the arbitration agreement (Article 11); (iii) arbitrator's power to grant interim measures (Article 23); and (iv) enforcement proceedings of international awards (Chapters VIII and Chapter IX) are applicable whether or not the arbitration has its seat in Spain.

Notably, where the arbitration is international, an arbitration agreement will be valid and the dispute will be arbitrable provided that the requirements for validity and arbitrability of either (i) the law chosen by the parties to govern the arbitration agreement, (ii) the law applicable to the merits of the dispute or (iii) Spanish law are met (Article 9.6). Therefore, arbitrability is no longer a domestic issue in Spain but a question controlled by the law applicable to the arbitration agreement.

An arbitration shall qualify as international not only if the dispute subject to arbitration or the parties meet any of the [UNCITRAL Model Law](#) criteria of internationality (*i.e.* the parties' places of business are in different States, or the place of arbitration, the place where a substantial part of the obligations of the legal relationship from which the dispute arises, or the place most closely related to the disputed issues are located outside the State of the parties' places of business) but also if "*the legal relationship from which the dispute arises affects the interest of international commerce*" (Article 3.1c) of the 2003 Arbitration Act). Therefore, Articles 9 and 3.1.c) expand the concept of internationality into areas which certainly favour arbitration agreements.

Following international standards, the Spanish Arbitration Act provides for the assistance to the parties and to the arbitrators of the Courts of First Instance (*Juzgados de Primera Instancia*), which are

empowered to appoint arbitrators, take evidence or grant interim measures. Also, the Courts of First Instance are obliged to compel the parties to arbitration provided that one party so requests it. In case of arbitration and court procedures running in parallel, Article 11.2 provides that arbitration prevails over court proceedings and prevents judges from staying arbitration while the party enforcing the arbitration agreement is defending its motion to compel to arbitration. It is expressly established that arbitration shall be confidential.

Finally, regarding enforcement, it should be noted that the award is enforceable even if the defeated party has filed a motion to set aside or vacate the award. Before 2003, the Supreme Court had jurisdiction regarding recognition and enforcement of foreign awards, deferring the enforcement measures to the Courts of First Instance. Currently, the Courts of First Instance and the Commercial Courts have jurisdiction to decide on both the exequatur of the award and the enforcement measures thereby speeding up the enforcement process. However, since the Courts of First Instance have not yet acquired the experience of the Spanish Supreme Court in enforcing foreign awards, it is important that the party seeking to enforce an award in Spain prepares its request carefully.

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## Switzerland



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### **Parallel proceedings and *lis pendens*: new Article 186 (1bis) of the Swiss Private International Law Act**

A recent amendment to the Swiss law on international arbitration has clarified that arbitrators sitting in Switzerland are not required to stay their proceedings if the same dispute between the same parties is already pending before foreign courts or before another arbitral tribunal. The newly introduced [paragraph 1<sup>bis</sup> of Article 186 of the Swiss Private International Law Act \(PIL Act\)](#), which took effect on 1 March 2007, confirms the arbitral tribunal's *competence-competence* in these circumstances by providing that the arbitral tribunal “[...] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.”

The change in legislation was triggered by the 2001 [Fomento decision](#) of the Swiss Federal Supreme Court (ATF 127 III 279). In *Fomento*, the Court found that arbitrators sitting in Switzerland had to stay their proceedings pending foreign court proceedings regarding the same dispute and between the same parties, unless they found that it was not to be expected that the foreign court would, within a reasonable time, render a decision capable of being recognized in Switzerland. The Court reached this finding by applying to arbitral tribunals the same rules regarding *lis pendens* that apply to Swiss courts, pursuant to Article 9 of the PIL Act, which grants priority to foreign court proceedings that are filed prior to the introduction of the same dispute before Swiss courts. The arbitral tribunal in the *Fomento* case had not stayed its proceedings, despite the already pending proceedings concerning the same dispute before Panamanian courts and the Swiss Federal Supreme Court set aside the resulting arbitral award.

The *Fomento* decision was criticized, particularly because it was feared that the application of the principle of *lis pendens* to arbitration proceedings could open the door to dilatory tactics that could significantly disrupt the process in arbitrations with their seat in Switzerland. Other authors found such fears exaggerated, arguing that *Fomento* turned on its own facts, and that it did leave discretion to arbitral tribunals to disregard pending foreign court proceedings which had been introduced in clear violation of a valid arbitration agreement.

Regardless of which interpretation of the *Fomento* decision one adopts, the introduction of Article 186 (1bis) is welcome in that it unambiguously confirms the arbitrator's *competence-competence* and the autonomy of the arbitral process in Switzerland. It thus reduces the risk of the arbitrators' jurisdiction being impaired by the abusive commencement of foreign court proceedings and provides for legal certainty, which will further contribute to maintaining the attractiveness of Switzerland as a place for arbitration.

### **Revision of international arbitral awards rendered in Switzerland**

In 1992, with a landmark decision, the Swiss Federal Supreme Court had filled a gap in the Swiss PIL Act by affording parties to an arbitration the option to request the Supreme Court to *revise* the award rendered in the proceedings that opposed them ([ATF 118 II 199](#) of 11 March 1992, published in ASA Bull. 1992, pp. 356-364). Unlike a challenge which aims at the annulment of an award, the revision of an arbitral award is a remedy whereby the arbitral proceedings can be reopened to correct an award that has already become *res judicata*.

Since the 1992 decision, the revision of arbitral awards had remained a rather theoretical remedy as no successful case was reported. This changed in August 2006 when the Supreme Court for the first time granted a request for revision, on the basis of newly discovered evidence which could, in the Court's eyes, hypothetically alter the outcome of the award, rendered by an ICC Tribunal in Geneva some two years earlier (Decision [4P.102/2006](#) of 29 August 2006). The dispute leading to the award had arisen out of a call-option agreement in respect of 25.1% of the shares in a major Russian mobile telephone operator, and concerned, *inter alia*, money laundering allegations. The Supreme Court found that the new affidavit, on which the applicant relied for its request for revision, and documents mentioned therein, could establish facts that the applicant had purported in the arbitration but was unable to prove. As a result, the award was remanded to the arbitral tribunal for reconsideration in view of this new evidence.

The grounds upon which a request for revision may be based are well defined by the Supreme Court, by analogy to provisions relating to the federal judiciary (Articles 137 and 140-143 of the Judicial Organization Act, on 1 January 2007 replaced by [Art. 123 et seq. of the new Supreme Court Act](#)). They are twofold: for an action to revise an arbitral award to be successful, the applicant must show that either (a) it is established in criminal proceedings that the award was influenced, to the detriment of the applicant, by a crime or misdemeanour, even if no conviction resulted, or (b) the applicant acquired subsequent knowledge of new relevant facts or found convincing evidence that existed at the time the award was rendered but that it had not been able to plead or adduce in the initial proceedings, despite its reasonable diligence.

Contrary to the solution adopted in France, where requests for revision of arbitral awards are to be made directly to the arbitral tribunal that has rendered the award in question, Swiss law provides that the Federal Supreme Court has exclusive jurisdiction to hear requests for revision. Applications must be made within 90 days from discovery of the ground for revision and no later than 10 years from notification of the award, but in the case of a criminal influence on the rendering of the award, even beyond. Where the application for revision is successful, the Supreme Court will then, if possible, remand the case to the original arbitral tribunal. Hence, as a practical matter, it might be in the arbitrators' interest to archive, rather than destroy, their files in case they are called upon to re-sit in the same case years after having rendered the award.

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## The Netherlands



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**A hole in the dyke? In its decision of 22 December 2006 (*Kers/Rijpma*), the *Hoge Raad der Nederlanden* (the Netherlands Supreme Court) has put into perspective its decision in a landmark case of 2004, which, in practice, was considered to have opened the door to a substantive review of the reasoning of arbitral awards.**

Under Dutch law, the setting aside of arbitral awards is only possible on limited grounds, including the absence of reasoning, and has a statutory basis in article 1065 of the Netherlands Arbitration Act. The law is now quite settled again thanks to the recent clarification by the *Hoge Raad* in the *Kers/Rijpma* decision. In this context, it is to be noted that the most recent proposals for the amendment of the Dutch Arbitration Act are dated 20 December 2006, and were issued before the publication of the *Kers/Rijpma* judgment. These proposals do not provide further guidance.

In 2000, a lingering academic debate between leading scholars, including the *eminence grise* Prof. Sanders, about the requirement to provide a reasoning for arbitral awards was given new impetus by a decision of the *Hoge Raad* in the *Benetton* case. Although this award appeared, at first review, to keep the floodgates firmly closed by only allowing a setting aside in case the grounds of the arbitral award were completely absent, a closer review revealed the underlying scope for a more substantive review. The *Benetton* judgment, arguably, left room for a setting aside not only where the reasoning was completely absent from the award, but also in cases of manifestly defective (*apert ondeugdelijke*) reasoning. The latter could be considered equal to a complete lack of reasoning. However, erroneous reasoning as such was ruled out as a basis for setting aside, as well as a substantive review of the arbitral award required to establish such error. The reason for such restraint was the guidance contained in the Parliamentary History of the Dutch Arbitration Act and a desire to discourage *de facto* appeals of arbitral awards under the guise of setting aside actions.

Four years after the *Benetton* judgment, the *Hoge Raad* had, and took, the opportunity to further clarify its position in the landmark case, generally referred to as "*Nannini*" judgment. In the formal sense, this is a Netherlands Antilles case decided upon final appeal to the *Hoge Raad* in The Hague. In this judgment, the *Hoge Raad* held that a reasoning, which lacks any coherent (the, rather vague, term used is "*steekhoudende*") explanation for the decision given in the award, can equate to a complete absence of reasoning. Quite logically, this judgment had the effect of not only selling prints of legal journals containing various commentaries, but also of increasing the incidence of setting aside actions. The *Nannini* judgment was received as, at least, a limited opening of floodgates and also, due to its wording, as rather cryptic. Hence arguments for a further clarification by the *Hoge Raad* were frequently advanced.

The 2006 *Kers/Rijpma* case is the third act of this play and, going by annotations that have recently appeared, will no doubt not be the final one. Counsel to *Kers* argued for a reversal of the *Nannini* judgment, primarily on the basis that the criterion set out therein and outlined above was unworkable, *inter alia*, given (i) the unclear meaning of the word "*steekhoudend*" and (ii) that actions on such basis amount to appeals on the merits.

Although the *Hoge Raad*, on this occasion, did not abolish the *Nannini* criterion, it elected to further define and refine it. In doing so, the *Hoge Raad* followed the opinion of its Advocate-General and emphasised both the need for restraint ("*terughoudendheid*") in the review of arbitral awards and that an award may only be set aside if it can be considered as amounting to a completely unreasoned award. The objective of the *Hoge Raad* was to strengthen the construction of the floodgates that the *Nannini* decision was considered to have slightly opened.

Hence, in the *Kers/Rijpma* judgment, the *Hoge Raad* began with establishing that arbitral awards can only be set aside in cases where the reasoning is completely absent and that setting aside proceedings cannot be used to complain about defective reasoning as such (by reference to its *Benetton* judgment). The *Hoge Raad* then confirmed its *Nannini*-decision, *ie* that if an arbitral award contains some reasoning, but no conclusive explanation whatsoever for the decision can be found in the contents of the award, this can be put on par with an arbitral award that does not contain any reasoning at all. In the case at hand, the *Hoge Raad* hence reversed the Court of Appeal's decision.

Given these developments, it is safe to conclude that the substantive review of arbitral awards has been discouraged by the *Hoge Raad* and that the scope for review has been limited. However, a review of the reasoning in an award is conceivable and – quite clearly – also required to determine whether or not such reasoning is *steekhoudend i.e.* conclusive. The extent to which such review is permitted will be the subject of further debate by scholars and judges alike. The *Kers/Rijpma* judgment will serve to control the limited water flow through the floodgates, by removing doubts cast by the *Nannini* judgement and thereby putting the Netherlands back on the internationally accepted track. As things now stand, there is no reason to panic behind the Dutch dykes.

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## United States



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***Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd***, 432 F. Supp. 2d 1305 (S.D. Fla. 2006) centred around the defendants' alleged failure to construct properly a luxury yacht. Plaintiff Sea Bowld sued numerous defendants alleging causes of action sounding in tort and contract. The underlying contract called for arbitration in Western Australia according to the laws of Western Australia. One defendant moved to compel arbitration on the basis of the parties' Shipbuilding Agreement. That Agreement contained a clause requiring disputes to be "referred to arbitration in Western Australia in accordance with the laws relating to arbitration in force in Western Australia." A second clause in the Agreement stated it would "be governed by and construed in accordance with the applicable laws of the State of Western Australia and the Commonwealth of Australia and all the parties hereto agree to submit to the courts of Western Australia and the Commonwealth of Australia having jurisdiction".

Sea Bowld asserted the arbitration clause was unenforceable because three of the named defendants had not signed the Shipbuilding Agreement, and argued that the Court was required to apply Australian law to determine both the enforceability and scope of the arbitration clause because the choice-of-law clause selected Australian law. The defendants argued that the clauses dictated the substantive law an arbitrator would apply to the dispute, but that the arbitrability analysis itself must proceed under U.S. federal law. The Court agreed with the defendants.

The Court held:

"Indeed, each of Sea Bowld's claims against them "presumes the existence of" the Agreement, and therefore the non-signatory Defendants may insist upon arbitration of the claims to the same extent as Oceanfast. Finally, Sea Bowld's allegations in the Amended Complaint blend wrongdoing by Oceanfast, the signatory, with misconduct by the three non-signatory Defendants, establishing the other ground for equitable estoppel identified in *MS Dealer Service*. This is a classic case of a

signatory to an agreement resisting arbitration on technical grounds. Under such circumstances, the Eleventh Circuit allows for extension of the Arbitration Clause to the non-signatory Defendants.” (At 1314-15.)

The Court concluded that parties are able to specify the substantive law that will govern the issue of arbitrability. Where they do not, their silence requires the application of federal law, regardless of a choice of law or arbitration clause referencing foreign law. The Court proceeded to apply federal law to determine whether the case was subject to arbitration in Australia. It found that under U.S. federal law, non-signatories are permitted to participate in the arbitration under circumstances where the parties and claims were interrelated, and similarly, that the claims under Australia’s Trade Practices Act were so interrelated and intertwined with the breach of contract claims, that it was proper to arbitrate them (at 1317). Finally, the Court concluded the arbitration clause was enforceable under the New York Convention, as the Convention permits courts to compel arbitration when: (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a signatory to the Convention; (3) the agreement to arbitrate arises out of a commercial legal relationship; and (4) there is a party to the agreement who is not an American citizen (at 1317).

Interestingly, in reaching its opinion that the it would apply federal common law, the Court makes no reference to the rapidly developing body of case law in the Second Circuit, but instead cites to *Becker Autoradio U.S.A. v. Becker Autoradiowerk, et al.*, 585 F.2d 39, 43-44 (3d Cir. 1978), (“questions of interpretation and construction of such arbitration agreements are similarly to be determined by reference to federal law”) and *Westbrook Int’l v. Westbrook Techs.*, 17 F. Supp. 2d 681 (E.D. Mich. 1998), (“the Court will not infer that International intended to have Ontario law govern the arbitrability of its claims simply because the agreement contained a choice of law provision.”). See Bowld’s reliance upon these cases is interesting given the fact the Second Circuit and the Southern District of New York have recently dealt extensively with this precise issue. See *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2<sup>nd</sup> Cir. 2004), *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2<sup>nd</sup> Cir. 2005), and *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 355-356 (S.D.N.Y. 2005).

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**Rebecca G. Deutsch**, Wilmer Hale, Washington, D.C.

A recent ruling of the U.S. Court of Appeals for the District of Columbia Circuit held that, absent “extraordinary circumstances,” the courts should deny enforcement of an arbitral award that has been set aside by a competent authority of the country in which the award was made.

The case, *TermoRio S.A. E.S.P. v. Electranta S.P.*, No. 06-7058, \_\_\_ F.3d \_\_\_ (D.C. Cir. May 25, 2007), arose out of a dispute concerning Electranta’s alleged breach of a power purchase agreement. An arbitration tribunal in Colombia entered an award in TermoRio’s favour, but the Consejo de Estado - Colombia’s highest administrative court - nullified the award on the ground that the arbitration agreement violated Colombian law. TermoRio subsequently sought enforcement of the arbitration award before a U.S. district court. The district court denied TermoRio’s request, and the court of appeals affirmed.

The court of appeals held that under Article V(1)(e) of the New York Convention, a secondary contracting state normally may not enforce an arbitral award that has been lawfully set aside by a competent authority in the primary contracting state, absent “extraordinary circumstances.” The court found that the Consejo de Estado was indisputably a “competent authority” and that there was nothing in the record

indicating that the proceedings before the Consejo de Estado were “tainted” or suggesting that the judgment was “not authentic.” It therefore concluded that the district court had properly denied TermoRio’s enforcement petition.

The court distinguished *In re Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996), in which the federal district court for the District of Columbia had granted a petition to enforce a foreign arbitral award that had been nullified by a court in the situs state. The court of appeals explained that, in contrast to the case *sub judice*, the contract at issue in *Chromalloy* had expressly provided that the losing party could not seek review of any arbitration award.

Also of interest, **two recent decisions of U.S. federal district courts** — *In re Oxus Gold PLC*, No. 06-82, 2007 WL 1037387 (D.N.J. April 2, 2007) and *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006)—have held that U.S. courts have the power to order discovery in aid of international arbitrations sited outside of the United States. Both cases address the reach of 28 U.S.C. § 1782, which provides that a federal district court “may order” a person “resid[ing] or . . . found” in the district to give testimony or produce documents “for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person.”

Although prior lower court authority had widely concluded that Section 1782 did not extend to arbitration tribunals, the federal district courts are now re-examining Section 1782 in light of a 2004 decision of the U.S. Supreme Court, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), in which the Court quoted with approval an academic commentary on Section 1782 that maintained that “arbitral tribunals” are included within the intended scope of the provision.

In April of this year, in *In re Oxus Gold*, the District Court for the District of New Jersey held that a tribunal sitting in an arbitration convened pursuant to a United Kingdom – Kyrgyz bilateral investment treaty qualified as a “foreign or international tribunal” for purposes of Section 1782. The court reasoned that the arbitration was not “private” because it was filed pursuant to the BIT and was governed by the Rules of UNCITRAL, a UN body established by its member states. Accordingly, the court granted the Section 1782 discovery application.

Late last year, the District Court for the Northern District of Georgia adopted an even more expansive interpretation of Section 1782 in *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N. D. Ga. 2006). In that case, Roz Trading, a Cayman Islands company, urged the court to compel the Coca-Cola Company to produce documents for use in an arbitration proceeding before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the “Centre”). Relying on *Intel*, the district court rejected Coca Cola’s argument that, as a private arbitral institution whose proceedings are voluntary, the Centre was not a “tribunal” within the meaning of the statute. Notably, the district court exercised its discretion under Section 1782 to grant Roz Trading’s discovery request even though the company had not first sought discovery from the arbitral tribunal, and the tribunal had not applied to the court for any assistance. The decision is currently on appeal before the US Court of Appeals for the Eleventh Circuit.

Finally, the US Supreme Court recently granted a writ of certiorari in *Hall Street Associates, LLC v. Mattel, Inc.*, No. 06-989, 2007 WL 142533 (May 29, 2007), to resolve a division among the courts of appeals on whether parties may agree to expand judicial review of an arbitration award. In the decision under review, the US Court of Appeals for the Ninth Circuit refused to comply with the terms of an arbitration agreement providing for de novo consideration of legal conclusions, holding that the terms of an arbitration agreement controlling the scope of judicial review are unenforceable and severable. By contrast, other courts of appeals have concluded that the Federal Arbitration Act establishes only a default standard of review that parties may contract to alter. See, e.g., *Gateway Technologies Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).

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## ARBITRATION EVENTS

Further information about forthcoming international arbitration conferences, symposia and seminars may be found in the [International Arbitration Planner](#) or on the [IAI site](#).

Date	Details	Venue
3 - 6 Sept 07	<b>5th Summer Academy on International Commercial Arbitration</b> DIS - German Institution of Arbitration <a href="http://www.private-dispute-resolution.net">www.private-dispute-resolution.net</a> / <a href="http://www.central-koeln.de">www.central-koeln.de</a>	Cologne
8 - 16 Sept 07	<b>Diploma Course in International Commercial Arbitration</b> Chartered Institute of Arbitrators <a href="http://www.arbitrators.org">www.arbitrators.org</a>	Oxford
14 Sept 07	<b>9th Investment Treaty Forum Public Conference</b> British Institute of International and Comparative Law <a href="http://www.biicl.org">www.biicl.org</a>	London
14 Sept 07	<b>LCIA YIAG Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	The Grove, United Kingdom
14 - 16 Sept 07	<b>LCIA European Users' Council Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	The Grove, United Kingdom
17 - 20 Sept 07	<b>PIDA/ Negotiating, Drafting, Managing International Construction Contracts and Conflict Resolution</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
21 Sept 07	<b>ASA Conference &amp; General Assembly - Professional Ethics of Counsel in International Arbitration</b> ASA (Swiss Arbitration Association) <a href="http://www.arbitration-ch.org/events">www.arbitration-ch.org/events</a>	Bern
24 - 25 Sept 07	<b>"Les journées de l'Institut": International Commercial Arbitration themes: production of documents, site inspection, confidentiality</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
29 Sept 07	<b>LCIA North American Users' Council Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	Toronto
3 Oct 07	<b>Introduction to Arbitration</b> Chartered Institute of Arbitrators <a href="http://www.arbitrators.org">www.arbitrators.org</a>	London

5 Oct 07	<b>ASA Below 40: “Terms of Reference &amp; Procedural Orders – Enforcement of Awards”</b> ASA below 40 <a href="http://www.arbitration-ch.org/below40">www.arbitration-ch.org/below40</a>	Zurich
8 - 11 Oct 07	<b>PIDA/ International Commercial Arbitration</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
9 - 12 Oct 07	<b>Fourth Annual Seminar on International Commercial Arbitration: How to Handle Oil and Gas Industry Cases</b> Washington College of Law <a href="http://www.wcl.american.edu">www.wcl.american.edu</a>	Washington DC
11 - 12 Oct 07	<b>Second Annual Asian Leading Arbitrators’ Symposium</b> Juris Conferences LLC <a href="http://www.jurisconferences.com">www.jurisconferences.com</a>	Singapore
14 Oct 07	<b>LCIA Asia-Pacific Users’ Council Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	Singapore
14 - 19 Oct 07	<b>IBA Annual Conference 2007</b> IBA <a href="http://www.ibanet.org">www.ibanet.org</a>	Singapore
16 - 17 Oct 07	<b>WIPO Arbitration Workshop</b> WIPO <a href="http://www.wipo.int/amc/en/events">www.wipo.int/amc/en/events</a>	Geneva
22 Oct 07	<b>Arbitration: A Corporate Viewpoint</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
29-30 Oct 07	<b>Dispute Resolution in the International Oil &amp; Gas Business</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
4 - 6 Nov 07	<b>International Commercial Arbitration in Latin America: The ICC Perspective</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Miami
6 - 7 Nov 07	<b>Latin American Leading Arbitrators’ Symposium on the Conduct of International Arbitration</b> Juris Conferences LLC <a href="http://www.jurisconferences.com">www.jurisconferences.com</a>	Miami

8 - 9 Nov 07	<b>Arbitration and Dispute Resolution</b> IBA <a href="http://www.ibanet.org">www.ibanet.org</a>	Caracas
16 Nov 07	<b>Joint Colloquium: ICC/AAA/ICSID</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
16 - 17 Nov 07	<b>OHADA Arbitration/GICAM International Conference</b> OHADA, GICAM <a href="http://www.ohada.com">www.ohada.com</a>	Douala
24 - 25 Nov 07	<b>LCIA Arab Users' Council Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	Dubai
26 Nov 07	<b>LCIA YIAG Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	Dubai
26 Nov 07	<b>ICC Institute of World Business Law - Annual Meeting: "Interest, Auxiliary &amp; Alternative Remedies in International Arbitration"</b> ICC <a href="http://www.iccwbo.org">www.iccwbo.org</a>	Paris
1 - 8 Dec 07	<b>Emerging Trends in International Dispute Resolution</b> Centre for International Legal Studies <a href="http://www.cils.org">www.cils.org</a>	Steamboat Springs, Colorado
6 Dec 07	<b>Introduction to Arbitration</b> Chartered Institute of Arbitrators <a href="http://www.arbitrators.org">www.arbitrators.org</a>	London
7 - 8 Dec 07	<b>LCIA Latin-American and Caribbean Users' Council Symposium</b> <a href="http://www.lcia-arbitration.com">www.lcia-arbitration.com</a>	Bogota
15 - 20 Dec 07	<b>Advocacy in International Arbitration</b> Cairo Regional Centre for International Commercial Arbitration <a href="http://www.crcica.org.eg">www.crcica.org.eg</a>	Cairo
24 Jan 08	<b>ASA below 40 Seminar</b> ASA below 40 <a href="http://www.arbitration-ch.org/below40">www.arbitration-ch.org/below40</a>	Basel
25 Jan 08	<b>ASA Annual Conference - "Performance as a Remedy in International Arbitration"</b> ASA (Swiss Arbitration Association) <a href="http://www.arbitration-ch.org/events">www.arbitration-ch.org/events</a>	Basel

24 - 25 Jan 08

**ICC/FIDIC conference: The Resolution of Disputes  
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