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New York International Chapter News

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Message from the Past Chair

Andre R. Jaglom

As I write this in early June, having just handed over the reins of the International Section to the capable hands of Andrew Otis, I can't help but reflect on what a remarkable year this has been. The Section's scope of activities and issues is breathtakingly broad, and it has been both a privilege and an education to lead the extraordinary team of volunteers that make up the International Section, from the senior officers to our chapter chairs around the world to the committee chairs and members, without all of whom we could not do all that we do.

Perhaps the most visible of our activities are our major meetings. This year we had three, rather than our usual two. First, in September, was our annual Seasonal Meeting in Panama, where we drew nearly 200 lawyers

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Message from the Chair

Andrew D. Otis

As I write this, on the plane back from the very successful seasonal meeting in Lisbon, Portugal, I am reminded again of the key to our Section's success: relationships. We renewed old friendships in Lisbon and made new friends and contacts that I hope will join our Section family.

It is has been an eventful four months since I became Section Chair on June 1, 2012. In that time, we have increased our membership, strengthened and expanded our role as a non-governmental organization in the United Nations Commission on International Trade Law ("UNCITRAL"), and developed a full slate of interesting programs for the upcoming 12 months.

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from 29 countries—14 in Latin America, 14 in other parts of the world, and 10 U.S. states. Reviews of the 30 CLE panels and plenaries were glowing, and the social events, particularly the gala dinner at the Miraflores locks on the Panama Canal, were superb. The Steering Committee, led by Alvaro Aguilar and Juan Pardini in Panama and Alyssa Grikscheit in New York, did a terrific job. Preceding the Panama meeting we held a successful one-day meeting with our Costa Rica Chapter, including lunch with the Costa Rica Bar Association, an evening CLE and a reception. Most of Costa Rica's leading international lawyers participated. Kudos to Hernan Pacheco for organizing that meeting, which will be a model for future pre-meetings at our Seasonal Meetings.

Our Annual Meeting program in January was among the best attended in years, thanks to a fascinating program proposed by Jack Zulack and organized by his partner, Megan Davis, and Jerry Ferguson on "The Madoff Fraud: A Ground-Breaking Case in Cross-Border, International Litigation." At our luncheon we presented our Annual Award for Distinction in International Law and Affairs to Dr. Peter Ackerman, the Founding Chair of the International Center on Nonviolent Conflict, who gave a fascinating presentation on the success of nonviolent revolutions and his Center's work in promoting such movements.

Finally, in late March, the Section organized the Ontario-New York Legal Summit in conjunction with the Ontario Bar Association. Held at the request of NYSBA President Vincent Doyle just prior to the House of Delegates meeting in Buffalo, the Summit presented 18 CLE programs on U.S.-Canada cross-border issues on consecutive days in Toronto and Buffalo. Headlined by Chief Justice Warren K. Winkler of the Court of Appeals for Ontario and Chief Judge Jonathan Lippman of the New York Court of Appeals, the program rivaled a Seasonal Meeting in scope and quality. Quite frankly, when Founding Section Chair Lauren Rachlin, whose inspiration and efforts made the program the great success that it was, told me the breadth of his plans, I thought he had lost his mind. But he and his fellow Program Chairs, Wayne Gray and Neil Quartaro, pulled it off magnificently.

In addition, we held a terrific one-day educational program in Prague together with the Czech Bar Association, with roughly 60 participants attending three panels, a reception and dinner, all wonderfully organized by our Czech Republic Chapter Co-Chairs Andrea Carska-Sheppard and Jiri Hornik. And to cap our especially busy March and April, we put on our annual one-day Fundamentals of International Law Practice as Tuesday's "boot camp" program at the ABA Section of International Law's Annual Meeting in New York in April, organized by Matt Kalinowski and Enrique Liberman, and sponsored a reception and two panels at the meeting.

Not only was our meeting schedule full, informative and educational, it was financially successful as well, with the Panama Seasonal Meeting and the New York-Ontario Legal Summit both raising funds to replenish our Section fund balance that had been depleted in recent years.

In addition to the meetings, our Chapters and Committees were very active with a variety of seminars, meetings and other activities, and we have made some progress toward coordinating the Chapters and the Committees more than in the past. Our Committee on International Contract and Commercial Law was especially active, led by Albert Bloomsbury. In addition to developing a contract checklist project as a resource for cross-border practitioners, this Committee and Albert led our UNCITRAL activities, which included active participation in last year's Plenary Session in Vienna and Working Group meeting last year in Vienna and this year in New York. We became active advocates for UNCITRAL maintaining its system of alternating meetings in New York and Vienna in the face of budget-cutting proposals that would have limited all meetings to Vienna, and our efforts to coordinate New York and federal officials as well as our own advocacy were credited by both UN and UNCITRAL officials as critical to the success of that campaign. During the New York sessions we held a highly successful reception for delegates, hosted by Steve Younger and the Patterson Belknap firm and attended by 120 guests from 35 countries, including UN Under-Secretary-General for Legal Affairs Patricia O'Brien, UNCITRAL Chairman Salim Moollan and UNCITRAL Secretary Renaud Sorieul, as well as former Chief Judge of the New York Court of Appeals Judith Kaye. John Hanna and Mike Galligan, as well as the many NYSBA delegates, in addition to Albert, were key participants in our UNCITRAL efforts. Special thanks also go to Otto Waechter, our Austria Chapter Chair, for being our man on the ground in Vienna.

We were also active participants in the U.S. State Department Office of Private International Law's Advisory Committee on the Hague Choice of Court's Convention and proposed implementing legislation and submitted several papers in support of the ratification effort and improved federal legislation. Our delegation consisted of Albert, John, Mike, Thomas Pieper, Jay Safer and me. We have also proposed that NYSBA make ratification one of its federal legislative priorities.

One of our newest Committees, the Committee on International Microfinance and Financial Inclusion, led by

Azish Filabi and Julee Milham, had a successful kick-off event that gathered a large group for a seminar presentation and also submitted comments to UNCITRAL urging its adoption of microfinance as a Working Group topic.

The Section also submitted comments on pending legislation that would have retroactively impaired a foreign sovereign's ability to assert a merger doctrine defense in judgment collection proceedings and would have changed the rules of the game in pending litigation involving the Republic of Argentina. That proposal was ultimately withdrawn in the face of the Section's opposition and that of others, but has recently reappeared in a more general form not limited to foreign sovereigns but equally objectionable on rule of law and other policy grounds, so the Section has again prepared an opposing memorandum. Mark Rosenberg has led these efforts.

The Section has also maintained the high quality of its three publications, the *International Law Practicum*, the *New York International Chapter News* and the *New York International Law Review*, thanks to the efforts of our publications team, including David Detjen, Thomas Backen, Dunniela Kaufman, Lester Nelson and Chryssa Valletta.

This is by no means an exhaustive list of the Section's activities over the past year. It is enough of a sampling to make clear that the Section's accomplishments are the work of a large team and not of the Section's Chair, or even its senior officers. But I cannot end without expressing my great appreciation for the extraordinary help and support of my immediate predecessors, Carl-Olof Bouveng and Michael Galligan, who were unstinting in providing their time, efforts and sound advice. Without their assistance, we would not have had the successful year we have had. The same is true of Andrew Otis, our new Chair; Glenn Fox, our Chair-elect; Larry Shoenthal, our long-time Treasurer; as well as Thomas Pieper and Neil Quartaro who round out the senior officer team from the past year.

Perhaps most important, we accomplished the difficult transition after the retirement of Linda Castilla, the NYSBA's extraordinary staff liaison to the Section since its founding. While Linda is in many ways irreplaceable, and was critical to our success over the last quarter century, her successor, Tiffany Bardwell, has made the transition far smoother than we had any right to expect. I am grateful for her diligence and dedication, which made a change I very much feared become smooth sailing for me and for the Section.

It has been a pleasure and a privilege to serve as the Section's Chair for the past year and to help advance all of its wide range of activities. Many thanks to everyone who participated in making it as good a year as it was. I am looking forward to seeing where Andrew takes us next.

Andre R. Jaglom

A Message from the Chair

(Continued from page 1)

As of October 1, our membership stood at approximately 2,200. This is very good and almost near a record; however, it is well short of my goal of raising Section membership to 2,500 during my term. Under the leadership of our Vice Chairs for Membership, Joyce Hansen, Allen Kaye, Eberhard Rohm and Dan Rosenstein, we have developed and are implementing a strategic plan to achieve our membership goal but they cannot do it alone. They need your help. I ask each of you to try to recruit one new member this year. Simply tell them why you joined the Section and what you enjoy most about Section membership. You can also tell them about our excellent publications, active listserves and fantastic meetings, but the most convincing reason to join is your own enthusiasm for the Section. And remember to renew your own membership before it expires at the end of the calendar year.

Under the leadership of Albert Bloomsbury, Nina Laskarin, Michael Galligan and John Hanna, the Section has become an active and valued participant in the UNCITRAL process and in the United Nations more broadly. In June-July, NYSBA representatives attended the 45th UNCITRAL Plenary Session in New York. Based on a paper developed by the International Microfinance and Financial Inclusion Committee co-chaired by Julee Milham and Azish Filabi and submitted to UNCITRAL, the NYSBA delegates participated in UNCITRAL discussions of a microfinance conference, among other topics. In addition to becoming more involved with UNCITRAL directly, the Section increased its profile at the United Nations by submitting a statement for the September 24, 2012 high-level meeting on the Rule of Law which Albert Bloomsbury and Nina Laskarin attended. The Section's statement was praised by the United Nations Legal Department and will appear on the Rule of Law meeting website, along with statements from other non-governmental organizations. I am very excited about our role in the Rule of Law meeting and would like to see the Section become more active in this important area.

Our Section continues to develop and produce top notch events throughout the year. The Lisbon seasonal meeting was a great hit thanks to meeting co-Chairs Neil Quartaro and Pedro Pais de Almeida. This was also staff liaison Tiffany Bardwell's first meeting and it went off without a hitch. The meeting went so well that at the final dinner, a first time meeting attendee asked me whether Section meetings always occur so flawlessly. In addition, the Section held its first meeting in Africa in the form of a pre-meeting in Casablanca, Morocco on October 9, the Monday before the Lisbon meeting occurred. The meeting could not have been so successful without all of those Section members who chipped in to organize and speak on panels and who attended. We are hoping that many of the first time attendees will become members and regularly attend Section events.

There are also a number of exciting meetings scheduled in the future. In January, we will have a program organized by First Vice-Chair Thomas Pieper that will be part of the overall NYSBA meeting in New York. In March, Italy Chapter Chair Marco Amorese will host a Europe regional Chapter Chairs meeting in Milan. And we will repeat our very successful Global Law Week from May 14-17, 2013 to be followed by our annual retreat on May 18. I hope that you will join us for these events. In addition to these Section events, many Committees and Chapters are also developing or co-sponsoring events. We have attempted to gather all of these events, along with events from other international law organizations and major holidays, on one calendar on the Section website. It's under the "events" tab on the left. If you are developing a Committee or Chapter event, I urge you to check the calendar as part of the planning process and let us know when your event will occur so that we can make sure that the calendar is as comprehensive as possible,

In conclusion, our Section is growing both in members and in activities. It is my privilege to lead the Section during this time but the credit for the Section's successes goes to all of its members. I hope that you will join me as we move forward to make our Section even better. I look forward to seeing each of you soon.

Andrew D. Otis

Anti-Corruption and Bribery Compliance: U.S., UK, EU, Prague: How Does It All Fit Together? The UK Perspective

By Jonathan P. Armstrong

Introduction

The UK's new wide ranging anti-bribery legislation, the Bribery Act 2010 came into force on 1st July 2011. It has been called "the toughest enforcement standard in the world" and has received widespread comment not only in specialist compliance media but also in the mainstream press. Indeed, at least one UK newspaper moved a senior journalist from his existing duties solely to focus on anti-corruption as a sign of the interest in the new legislation.

When announcing the start date last March the Lord Chancellor and Secretary of State for Justice Kenneth Clark also issued the Ministry of Justice (MoJ) final guidance on how a company should comply with the new legislation. At the same time, joint prosecutorial guidance was issued indicating who should feel the full weight of the legislation. The documents are lengthy. The MoJ's *guidance* stretches to 45 pages, with the *prosecutors' guidance* a further 12 pages.

What Does the Act Cover?

The new UK Act is markedly different from the U.S. Foreign and Corrupt Practices Act (FCPA), which was formerly regarded by many as the high-water mark. The new legislation replaces UK legislation stretching back to 1889 and the UK Government has said

> The Bribery Act reforms the criminal law to provide a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad.

It has a number of stringent new features, including:

- Increased penalties of up to 10 years in jail and unlimited fines for individuals, companies and partnerships (contrasted with five years' maximum jail term under the equivalent provisions of the FCPA);
- The banning of bribes to both public and private officials;
- A new strict liability offense of failure to prevent bribery;
- A ban on facilitation payments;
- The criminalization of both the giving and acceptance of bribes.

The new UK legislation applies to UK corporate entities—even if they are foreign-owned—individuals who ordinarily reside in the UK, and non-UK nationals and entities if an act or omission forming part of the offence takes place within the UK.

Perhaps the most significant way in which the Act alters the international anti-corruption landscape is with the new offense of failure to prevent bribery. This is a strict liability offence, although companies and individuals may be able to fall back on an "adequate procedures" defence.

Bribery Offences

The Act creates four offences:

1. A general offence covering offering, promising or giving a bribe (in section 1 of the Act).
2. A general offence covering requesting, agreeing to receive or accepting a bribe (section 2).
3. A distinct offence of bribing a foreign public official to obtain or retain business (section 6).
4. A new strict liability offence for commercial organisations where they fail to prevent bribery by those acting on their behalf (section 7).

The New Offence of Failure to Prevent Bribery

It is the new offence of failure to prevent bribery which has received by far the most attention. A company commits an offence if a person associated with it bribes another person for its benefit. Under the Act a person is "associated" with the company if he or she performs services for or on its behalf, regardless of the capacity in which he or she does so. This could cover agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers. All of them could make the company guilty of the new offence.

This is a strict liability offence. This means that there is no need to prove negligence or the involvement and guilt of the "directing mind and will" of the company. This makes the offence easier to prove and will likely lead to more corporate prosecutions and convictions.

Adequate Procedures Defence

A company could have a defence to the section 7 failure to prevent bribery offence if it can prove it had "ad-

equate procedures" in place to prevent bribery.[1] "Adequate procedures" are not defined in the Act but both the MoJ guidance and the Prosecution Guidance give some indications of what adequate procedures might look like.

Criminal Penalties

The potential consequences of being convicted of a bribery offence include criminal penalties for both individuals and companies. As we have already said, individuals can be jailed for up to ten years. Fines for companies are likely to be substantial. No guidance has yet been given on the level of fines, but recently a UK Crown Court judge in a case against a company that had been found guilty of bribery said that fines for corruption should be in the tens of millions of pounds or more.

The first case to come to court under the Act gives an indication of likely penalty and also illustrates a key difference between the Bribery Act 2010 and the FCPA in that the case involved domestic bribery. In November 2011 a court clerk at Redbridge Magistrates' Court in the South of England was convicted of offences under the Bribery Act 2010 and sentenced to prison for those offences for three years. Munir Patel pleaded guilty to taking a bribe of £500 to avoid putting details of a traffic summons on a court database. He also pleaded guilty to offences under pre-existing legislation which were committed before the Bribery Act 2010 came into force. He was additionally sentenced to six years for those offences. Both sentences will run concurrently. The judge, Judge Alistair McCreath, told the court that Patel's offences were a "very substantial breach of trust" and would be punished accordingly. As an aside the Patel case came to court after the *Sun* (a News International newspaper) filmed Patel agreeing to be bribed by another motorist for not entering details of that motorist's speeding charges. Whilst some uninformed comment in the UK has suggested that this shows that offences under the new bribery legislation will be disproportionate, informed commentators, and the judge, saw the need for the sentence to take into account Patel's offending. Patel had said in a text message after being approached by a motorist, "I only do this for Asian bruvs. I do this all day long," and the court heard that at least 53 cases involving Patel had come to light.

"Senior officers of a company" (which is broadly defined, and includes directors) can also be convicted of an offence where they are deemed to have given their consent or connivance to giving or receiving a bribe. Importantly, it is possible that omitting to do something might be regarded as consent or connivance and lead to prosecutions, fines and/or imprisonment. A director convicted of a bribery offence is also likely to be disqualified from being a director for up to 15 years.

What Does the MoJ Guidance Say?

Whilst technically the guidance speaks only to the new offence of failure to prevent bribery, the guidance goes through most of the main provisions of the Act, expanding on its principles, and also contains examples at the end of the document following the same format as the draft guidance that the MoJ put out to the consultation exercise which closed in November 2010. Some of its language is legalistic, and in places the guidance does not appear as clear as it could have been. The six principles of compliance that were in the draft guidance are retained, but have been altered slightly. Those six principles and the short explanatory notes given by the MoJ are as follows:

1. **Proportionate procedures.** "A commercial organization's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities. They are also clear, practical, accessible, effectively implemented and enforced."

2. **Top-level commitment.** "The Top-Level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by a person associated with it. They foster a culture within the organization in which bribery is never acceptable."

3. **Risk assessment.** "The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf of persons associated with it. The assessment is periodic, informed and documented."

4. **Due diligence.** "The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks."

5. **Communication (including training).** "The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces."

6. **Monitoring and review.** "The commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."

From my experience in advising multi-national businesses there have been three key areas of interest. All three are covered in the MoJ Guidance.

Hospitality

It is clear, in contrast to equivalent legislation in other countries, that hospitality is clearly within the scope of the Act. The MoJ's draft guidance had made it clear that hospitality is fully within the ambit of the new law, saying *"Hospitality and promotional expenditure can be employed improperly and illegally as a bribe."* It seems to be the view of the UK government and the prosecutors that hospitality is often just the first act in a bribery play. For example, one of the prosecutors said during the guidance process that hospitality is "used…to groom employees…into a position of obligation and thereby prepare the way for major bribery." Against this background, it was natural that hospitality was one of the main areas of concern in submissions to the MoJ consultation.

Earlier guidance from the MoJ did not shed sufficient light on the level of hospitality that would be permitted and how that value would be determined. Mr. Clarke commented on this specifically in his March announcement, stating:

> The guidance makes clear that no one is going to try to stop businesses getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix. Reasonable hospitality to meet, network and improve relationships with customers is a normal part of business.

The MoJ's guidance also says that the sector of business could be taken into account. What is viewed as normal entertaining in some industries would likely appear lavish in others. The MoJ's guidance says:

> The standards or norms applying in a particular sector may also be relevant.... However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.

The guidance also explains that travel and hospitality connected with the service offered is unlikely to be prosecuted—for example, a trip to see a hospital to show the efficiency of its management and standards of care is likely to be acceptable to a potential buyer of those services.

Facilitation Payments

Facilitation (or facilitating) payments—small payments to government officials to expedite an official act—are in some circumstances permitted under the FCPA but are not allowed under the UK Act. The MoJ guidance has a slightly changed tone on facilitation payments from the earlier draft. Whilst emphasizing that they are not permitted, in contrast to the FCPA, the guidance states that the eradication of facilitation payments is a long-term objective. This echoes the comments of Vivian Robinson, QC, the then-General Counsel of the Serious Fraud Office (SFO) when he spoke on a panel I organized in London on 18 March 2011. Mr. Robinson said then that no one would expect facilitation payments to stop overnight. The MoJ's guidance also appears to build on Mr. Robinson's comments at the London meeting that duress would be a factor taken into account when considering prosecutions for making facilitation payments. The MoJ guidance says:

> It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

The SFO's activity following the introduction of the Act seems also to suggest a particular focus on facilitation payments. In October the SFO charged three former executives of Innospec Limited with respect to alleged corrupt payments to public officials in Iraq to expedite tests on a competitor's product and then to produce unfavourable results from that test. We do not know the exact nature of the alleged offences but it seems likely that the payment of facilitation payments is alleged. The alleged offences took place between 2002 and 2008 and as a result are charged under the legislation which existed prior to the Bribery Act 2010, but nonetheless show the SFO's interest in this area.

Associated Persons

Another area of special difficulty for multinational corporations has been the fact that a corporation can be liable under Section 7 of the Act if a person associated with it bribes another person intending to obtain or retain business or a business advantage for the organization. The investigatory firm Control Risks has called associated persons *"the single most important risk companies need to manage"* and has said that all of the major corruption cases in recent years have involved bribes paid by third parties such as commercial agents.

The MoJ guidance makes it clear that an associated person can be an individual, or an incorporated or unincorporated body. The capacity in which a person performs services for and on behalf of the organization does not matter, so employees, agents and subsidiaries will be included. It could also include an obligation on franchisors to ensure that their franchisees comply. The MoJ guidance emphasises this:

> this broad scope means that contractors could be "associated" persons to the extent that they are performing services for or on behalf of a commercial organiza-

> tion. Also, where a supplier can properly be said to be performing services for a commercial organization, rather than simply acting as the seller of goods, it may also be an "associated" person.

The MoJ guidance does, however, seem to give more comfort than was previously thought, saying that where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors an organization is unlikely to be prosecuted for failure to exercise control over those further down the chain than its own contractual reach. This means that a prime contractor will be liable for the acts of his subcontractors but not his subcontractors' subcontractors. The contractor would still need to explain its anti-bribery policy to those it contracts with and also ask them to pass compliance obligations down the chain. Whether any prosecutor would follow the MoJ guidance is, however, a matter for debate.

What Are the Prosecutors Thinking?

It is important to note that unlike the Department of Justice in the United States, the MoJ does not have the ability to prosecute offenses under the Bribery Act 2010. The majority of the prosecutions will be brought by the SFO, which has been heavily involved to this point in explaining to businesses how their new powers are likely to be exercised. At the London event, Mr. Robinson confirmed that the SFO would look to examine each case on its facts. The prosecutors' guidelines reinforce this, saying that

> The Act is not intended to penalize ethically run companies that encounter an isolated incident of bribery.

Prosecutors will employ a two-step test:

1. Is there sufficient evidence to provide a realistic prospect of conviction?
2. If so, is prosecution in the public interest?

For the SFO, the two main factors that are likely to influence whether or not a prosecution is in the public interest are whether the company has adequate procedures in place and whether it self-reported the issue to the SFO.

The following factors also indicate that a prosecution under the Act will be more likely:

1. A conviction would bring a significant sentence.
2. Offences are premeditated.
3. Offences are committed in order to lead to more-serious offending.
4. Those involved are in positions of authority or trust and take advantage of that position.

Facilitation Payments

The prosecutors' guidelines also outline how their discretion should be issued when considering prosecutions for making facilitation payments. Factors likely to lead to prosecution include:

1. Large or repeated payments.
2. Facilitation payments that are planned for or accepted as part of a standard way of conducting business.
3. Payments that indicate an element of active corruption of the official in the way the offense was committed.
4. Whether a commercial organization has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these procedures have not been correctly followed.

It is this final factor which is likely to cause the most concern to companies that have made the effort to implement clear policies that have failed. However, the guidelines clarify that a single, small payment is likely to result in only a nominal penalty. In addition, the SFO will also take into account self-reporting, the clarity of any policy in place and whether the payer was in a vulnerable position when a payment was sought.

Hospitality

The prosecutorial guidance also reinforces the MoJ guidance on hospitality. The guidelines state that the cost of the hospitality is only one factor, but little additional guidance is provided.

Issues Around Data Privacy and the Act

One of the most challenging areas for multinational businesses with the coming into force of the Bribery Act 2010 has been the heightening of the conflicts already felt between data privacy laws in the UK (known as data protection laws) and the requirements imposed by bribery legislation. The fact that effectively the burden of proof is reversed and the company will have to prove that it took adequate procedures to avail itself of the defence under the Bribery Act 2010, rather than the prosecution prove that it did not, is likely to increase the focus on internal procedures. The EU's proposed new Data Protection Regulation will add to those difficulties, especially in its introduction of a new EU-wide "right to be forgotten" which is seen by some as a criminal's charter in its current proposed form. The most troubling conflicts between existing data protection law and adequate procedures are likely to be felt in three main areas.

Due Diligence

The principle in the guidance requires that

> The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services, for or on behalf of the organisation, in order to mitigate identified bribery risks.

Traditionally, due diligence projects in the supply chain have been challenging. Whilst the organisation at the head of the supply chain may be clear and transparent with its suppliers about the level of due diligence it will require and mandate in its contracts that suppliers agree to join in the process, and to take the necessary consents from their employees, it is often the case that those further down the supply chain do not. It is common these days for many supply chains to end up, for obvious reasons, in lower cost jurisdictions. Often it is assumed (sometimes wrongly) that these countries have little or no data privacy law. As part of their policy revisions for the new legislation companies must do much more analysis on their supply chain, not only to find out where it ends but also to ensure that bribery and corruption are not involved to satisfy their legal obligations. In addition, they will have to ensure that they have the right to monitor individuals' behaviours and actions lawfully. The MoJ guidance makes it clear that enquiries into individuals are part of the fulfilment of the Principle 4 requirements:

> "Due diligence" for the purposes of Principle 4 should be conducted using a risk-based approach… In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged "associated" persons may also be required, proportionate to the identified risks…due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following tip of references, etc… A commercial organisation's employees are presumed to be persons "associated" with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question...

Communication (Including Training)

Principle 5 was called "Clear, practical and accessible policies and procedures" in the draft guidance. It requires that

> The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

The issue with this principle is a familiar one. The Ministry of Justice feels that a necessary part of Principle 5 is:

> the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called "speak up" procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

Most multinationals will be familiar with the issues caused by Sarbanes-Oxley reporting lines and the conflict in Europe between a company's need to have effective whistleblowing schemes set against the hostility to those schemes from data protection regulators, employees and Works Councils in some parts of Europe. Those issues are likely to recur again here as whilst the helpline will be taking reports on UK based legislation, it is still likely that for most global corporations they will want to operate one whistleblowing scheme based in the U.S.

Monitoring and Review

Those same conflicts between data protection law and the need to report and deal with corruption are often felt when incidents are to be investigated. Most corporations that have faced a significant corruption investigation will be familiar with the need to balance the thoroughness of the investigation with the need to respect the suspect and the informant's data protection rights. Increasingly we are seeing suspects and their advisors seek to exercise these rights to slow down or halt an investigation. In at least one case where I have been involved injunction proceedings were threatened. Corporations will need to exercise even more care than usual when conducting investigations under the new legislation as personal criminal liability, as well as corporate liability, are likely to be in the

minds of prosecutors. If the informal comments made by prosecutors during the consultation process are to be believed, the threshold for investigation will be set lower than under the FCPA. This, coupled with the emphasis on hospitality and promotional expenditure and the fact that relatively small facilitation payments are in scope, could lead to more investigations of relatively junior employees. If the class of employees who are likely to be investigated under the Bribery Act 2010 is greater, then similarly the data protection issues are likely to be more keenly felt.

What Steps Should Businesses Consider Taking Now?

It is apparent that businesses should consider undertaking a thorough program of compliance with the new legislation, given the possibility of sanctions that include up to 10 years in prison. Most organizations have concentrated on 5 key steps as part of their initial implementation plan:

1. The review of any existing ethics code, FCPA code or the like, to check its compliance with the UK legislation.
2. Communicating to employees what is expected of them. This should extend beyond people employed by a UK company or a UK subsidiary. It would also include those negotiating contracts in the UK and UK nationals employed by the organization wherever they work.
3. Companies should consider embedding compliance programs in subsidiaries, whether wholly owned or not. For most organizations, this would likely involve a structured program of board meetings of subsidiary entities, with the Bribery Act 2010 as an agenda item. If they have not already done so they may also want to send a briefing note to all of the directors of the relevant subsidiaries beforehand, explaining their responsibilities and instructing them to develop an action plan to deal with the new law.
4. A specific training session for affected employees. This might coincide with training the organization has already completed; for example, under Canadian law or under the FCPA, showing again any online materials that are not inconsistent with the new UK legislation. Over time, corporations can build on this initial training, incorporating the MoJ's guidance.
5. A review of "associated persons." The Act imposes obligations on a company to do due diligence on those with whom it does business. This would include consultants, agents, suppliers and others- for example, a franchisor may want to check compliance at its franchisees.

It is important to remember that the new UK legislation also comes at a time of changing cultural attitudes. Greater job mobility, decreased loyalty to employees and demographic changes make whistleblowing more likely. Initial reports on Dodd-Frank whistleblowing claims show UK employees as keen participants. The SFO's own whistleblowing line, which does not incentivise whistleblowers, recorded 2,000 website hits and 500 calls in the first month alone.

Anyone who reads the newspapers or watches the news on TV cannot be in any doubt that Europe is currently in a state of uncertainty. What is not in doubt, however, is the UK's commitment to stamping out corruption. The Bribery Act 2010 is a clear call to action for businesses large and small doing business from or with UK entities. They ignore it at their peril.

Endnote

1. Section 7 of the Bribery Act 2010. The offence covers UK corporate entities and "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom."

Resources

1. Bribery Act 2010 full text—http:/www.legislation.gov.uk/ukpga/2010/23/contents.
2. The MoJ guidance—http://www.justice.gov.uk/guidance/docs/briberty-act-2010-guidance.pdf.
3. The Prosecution Guidance—http:/www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf.
4. Details of the proposed new EU data regime—www.bit.ly/neweudata.

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The Revised Swiss Rules of International Arbitration

On June 1, 2012 the revised version of the Swiss Rules of International Arbitration will come into force. The 2004 Swiss Rules of International Arbitration adapted the UNCITRAL Rules to modern practice of administered arbitrations and their revised version will continue to offer a leaner, yet very effective, administration while ensuring the necessary flexibility and autonomy for the arbitral tribunal to conduct the proceedings according to the circumstances of each case.

The main amendments or new provisions are described below:

- The body which administers the arbitrations under the Swiss Rules is now named the "Arbitration Court" (instead of the "Arbitration Committee" under the 2004 Swiss Rules). It is assisted by a "Secretariat," which has offices in the seven Swiss cities of the Chambers that have adopted the Swiss Rules.
- The revised Swiss Rules contain some new provisions granting certain additional powers to the institution as compared to the 2004 version of the Rules. In particular:
  - According to the new article 1.4, by submitting their dispute to arbitration under the Swiss Rules, the parties confer on the Arbitration Court, to the fullest extent possible permitted under the law applicable to the arbitration, all of the powers required for the purpose of supervising the arbitral proceedings otherwise vested in the competent judicial authority, including the power to extend the term of office of the arbitral tribunal and to decide on a challenge to an arbitrator on grounds not provided for in the Swiss Rules.
  - According to article 5.3, in the event of any failure in the constitution of the arbitral tribunal, the Arbitration Court shall have all powers to address such failure and may, in particular, revoke any appointment made, appoint or reappoint any of the arbitrators and designate one of them as the presiding arbitrator.
  - Under the revised Swiss Rules, the Arbitration Court shall now approve the determination on costs and may adjust it. The revised article 40.4 specifies that such approval or adjustment is binding upon the arbitral tribunal.
- To further expedite the proceedings, the procedures for removals and replacement of arbitrators have been amended. In particular, according to article 11.1 of the revised Swiss Rules, a party intending to challenge an arbitrator must now file a notice of challenge with the Secretariat within 15 days after the circumstances giving rise to the challenge became known to that party.

  Also, where an arbitrator has to be replaced, a replacement arbitrator shall be designated pursuant to the procedure applicable for the appointment of arbitrators within the specific time-limit set by the Arbitration Court.

  According to the essential new article 15.7, all participants in the arbitral proceedings shall act in good faith and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays.

  Under the new article 15.8, the arbitral tribunal may, with the agreement of each of the parties, take steps to facilitate the settlement of the dispute. This is a new development geared at increasing the efficiency of the proceedings.

  To further increase cost and time efficiency of the arbitral process, the revised Swiss Rules provide that, as a rule, the parties shall file all documents and other evidence on which they rely with their statement of claim or statement of defense, respectively (articles 18.3 and 19.2). Although arbitrators remain free to decide otherwise based on the circumstances of each case, the revision imposes a higher standard on the completeness of the parties' first submissions.
- Consolidation as well as joinder of third parties to the proceedings are now possible. In particular, the institution may decide to consolidate a new case with a pending proceeding after consulting with the parties and any confirmed arbitrator to all proceedings, if need be even by revoking the appointment and confirmation of arbitrators (article 4.1).
- The provision addressing interim measures of protection has introduced substantial changes.
  - Article 26.1 now specifies that, upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative, the arbitral tribunal may also modify, suspend or terminate any interim measures granted.
  - Under the new article 26.3, the arbitral tribunal may, in exceptional circumstances, rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made, at the latest, together with the preliminary order and that the other

parties are immediately granted an opportunity to be heard.

– Although the right to request interim relief from the arbitral tribunal is an additional option, article 26.5 clearly stipulates that, by submitting their dispute to arbitration, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority and that such request shall not be deemed to be incompatible with the agreement to arbitrate.

- The provision on emergency relief is entirely new to the Swiss Rules (article 43). The main purpose for introducing emergency arbitrator proceedings was to allow urgent interim measures before the constitution of the arbitral tribunal. In the event of particular urgency, the emergency arbitrator can also issue a preliminary order, as an arbitral tribunal (see above on article 26.3).

  As soon as possible after the receipt of the application for emergency relief, the payment of a registration fee of CHF 4,500 and the deposit of an advance of CHF 20,000 for the costs of the emergency relief proceedings, the Arbitration Court shall appoint and transmit the file to a sole emergency arbitrator, unless (i) there is manifestly no agreement to arbitrate referring to the Swiss Rules, or (ii) it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the application for emergency relief to it.

  The emergency arbitrator must render a decision within 15 days from the date on which he or she has received the file. His or her decision shall have the same effect as a decision on interim relief pursuant to article 26. Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal.

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Spotlight on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Introduction

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[1] is a crucial international agreement because it allows parties to participate in international arbitrations without fear that an arbitral award rendered in one country will not be enforced in another. Accordingly, one of the three long-term missions of the New York State Bar Association International Section, as adopted by the Executive Committee of the International Section on September 15, 2009, has been to serve as the guardian of the New York Convention and the international arbitration process. In this second edition of the "reporter" on recent statutory and case law developments in application of the New York Convention, compiled from submissions we received by soliciting each of the Chapter Chairs for contributors from their country, we were able to include submissions from 3 countries. We plan to publish a new edition of the reporter annually, and hope that we will have more contributors next year. Please contact either of the undersigned directly if you would like to contribute to the next edition. We look forward to hearing from you.

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AUSTRALIA

Statutory Developments

In 2011 Australian courts continued to take a pro-enforcement approach to the recognition and enforcement of foreign arbitral awards consistent with the New York Convention. Also during 2011 most Australian states and territories enacted legislation adopting the Model Commercial Arbitration Bill (*the Model Bill*) which applies to domestic arbitration and which implements the grounds for recognition and enforcement of arbitral awards in the UNCITRAL Model Law on International Commercial Arbitration (*the Model Law*). As a result, the laws governing international and domestic arbitration in Australia will be more closely aligned and this should assist in the development of a more nationally consistent approach to arbitration. The key decisions in 2011 relating to the implementation of the New York Convention in Australia are discussed below.

Case Law Developments

A. *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415

(a) Uganda Telecom Limited (*UTL*) applied to the Federal Court seeking to have a foreign arbitral award made in Uganda recognised and enforced against Hi-Tech Telecom Pty Ltd (*Hi-Tech*) under the International Arbitration Act 1974 (Cth) (*the IAA*). Hi-Tech objected on the basis that:

(b) the arbitration clause was uncertain, and therefore void, because it did not specify various matters that were necessary in order to conduct the arbitration;

(c) the arbitrator made factual and legal errors in making the award;

(d) the award was contrary to Australian public policy; and

(e) the court has a general discretion to refuse enforcement, which it should exercise in this instance.

In recognising and enforcing the award, the Federal Court held that:

(a) the arbitration clause was not void because the Ugandan Arbitration and Conciliation Act 2000 includes provisions for "filling in the blanks," which were "meticulously followed in the present case";

(b) an error of fact or law in the arbitrator's reasoning is not a ground for refusing enforcement of a foreign award under Australian law;

(c) the public policy exception "should be narrowly interpreted" and generally is not to be exercised on the basis of "[e]rroneous legal reasoning or misapplication of law" by the arbitrator; and

(d) Australian courts have no general discretion to refuse enforcement of a foreign award, and indeed, the purpose of the New York Convention requires a "pro-enforcement bias."

B. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VCA 248

Altain Khuder LLC (*Altain Khuder*) applied to the Victorian Supreme Court seeking to have a foreign arbitral award made in Mongolia recognised and enforced against IMC Aviation Solutions Pty Ltd (*IMC*) under the IAA. IMC argued that it was not a party to the arbitration agreement and, therefore, recognition and enforcement of the award

should be refused. In recognising and enforcing the award, the Victorian Supreme Court held that:

i. in light of the pro-enforcement policy of the IAA, the onus of proving any of the defences against enforcement is borne by the party resisting enforcement; and

ii. IMC did not discharge this onus.

However, on appeal, the Victorian Court of Appeal held that the onus only shifts to the party resisting enforcement once the party seeking enforcement has established the following three matters on a prima facie basis:

(a) an award has been made by a foreign arbitral tribunal which grants relief to an award creditor against an award debtor;

iii. this award is made pursuant to an arbitration agreement; and

iv. the award creditor and award debtor are both parties to this arbitration agreement.

The Court of Appeal held that Altain Khuder could not prima facie show that IMC was a party to the arbitration agreement, and therefore refused to recognise and enforce the arbitral award.

C. *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905

ESCO Corporation (ESCO) applied to the Federal Court seeking to have a foreign arbitral award made in the United States (in relation to a license agreement) recognised and enforced against Bradken Resources Pty Ltd (Bradken) under the IAA. However, at the same time Bradken appealed the award to the United States District Court. Consequently, Bradken sought the adjournment of the Federal Court proceedings until there has been a final determination of proceedings in the United States.

Section 8 of the IAA implements Article VI of the New York Convention and provides that where an application to set aside or suspend an arbitral award has been made in the country in which the award was made, the court may, "it considers it proper to do so," adjourn the proceedings and may also order the other party to give suitable security. The Federal Court considered that in this case it would be fair to both parties to allow an adjournment given that ESCO's interests could be protected by an order for substantial security (equivalent to the balance of monies payable under the award, excluding interest).

Article VI of the New York Convention attempts to streamline the arbitral process by preventing concurrent proceedings taking place in multiple jurisdictions. Justice Foster upheld this approach by adjourning the proceedings until proceedings in the United States are concluded.

D. *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 1305; [2011] NSWSC 1331

In two related proceedings the NSW Supreme Court first lifted a stay to allow proceedings to enforce an arbitral award to be brought against a company in administration and then recognised and enforced the arbitral award. In granting leave to bring proceedings against the company in administration, the court noted that under the Commercial Arbitration Act 2010 (NSW) (the *NSW Act*) a court can only refuse to enforce arbitral awards in defined circumstances. While a stay is not a refusal, it is an impediment to enforcement. In the subsequent enforcement proceedings the court held that public policy objections to enforcement under the NSW Act are properly limited to notions of "morality and justice." The court noted that the public policy exception has been typically read narrowly by Australian courts. Although this decision relates to a domestic arbitration award, the NSW Act is based on the Model Bill which implements the grounds for recognition and enforcement of arbitral awards in the Model Law, which in turn reflect the New York Convention.

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SINGAPORE

Statutory Developments

There have been no significant legislative developments in relation to the enforcement of foreign arbitral awards over 2011.

Some changes are being proposed to the International Arbitration Act ("IAA"). These, however, relate to the definitions of "arbitral tribunal" and "arbitration agreement," as well as the scope of an arbitral tribunal's powers and not the enforcement of foreign arbitral awards in Singapore. The proposed changes were the subject of a public consultation in October 2011.

Case Law Developments

A. Public Policy Considerations in Setting Aside an Arbitral Award

In a significant decision, the Singapore Court of Appeal in *AJU v AJT* [2011] SGCA 41 overturned the High Court's decision to set aside an arbitral award ("the Award") on the basis that it enforced an illegal agreement and was therefore in conflict with the public policy of Singapore. The High Court decision was the first reported judgment in Singapore where an arbitration award had

been successfully set aside on the grounds that it was in conflict with public policy.

The Respondent had initiated arbitration proceedings in Singapore against the Appellant for alleged wrongful termination of an agreement. After arbitration had been initiated, the Appellant made a complaint to the Thai Police of fraud against the Respondent's sole director and shareholder and two of its subsidiary companies on the basis of an alleged forged document faxed to the Appellant. The complaint led to criminal charges being laid for joint fraud, forgery and use of a forged document. The latter charges were non-compoundable offences under Thai law and agreements to compromise any such offences were against Thai public policy.

Whilst the police investigations were continuing, the parties negotiated a settlement of their disputes and entered into an agreement that provided, amongst other things, for each party to terminate and withdraw all actions. After the agreement was signed, the Appellant withdrew its complaint to the police and cessation orders were issued in respect of the criminal charges. However, the Respondent refused to terminate the arbitration proceedings, contending that the charges could still be reactivated by new or additional information. The Appellant formally applied to the arbitral tribunal ("the Tribunal") to terminate the arbitration on the grounds that the parties had reached full and final settlement of their claims. The Respondent challenged the validity of the agreement on the grounds that it amounted to an illegal agreement to stifle the prosecution of a non-compoundable offence in Thailand. The Tribunal ruled that the agreement was not illegal and directed that the arbitration be terminated. The Respondent appealed to the High Court, where the critical issue was whether the court could, in exercising its supervisory jurisdiction, reopen the Tribunal's findings of fact and/or law and decide for itself whether the agreement was illegal. The court held that it could do so in "*an appropriate case*" (but without explaining what would qualify as an "*appropriate case*").

However, the Court of Appeal held that the High Court had erred in reopening the arbitral tribunal's finding of fact that the agreement in issue was not illegal and in so holding, the Court of Appeal reaffirmed the narrow scope of the public policy ground for challenging arbitral awards under Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which is based on Article V(2)(b) of the New York Convention. The Court of Appeal held that findings of fact made in an arbitral award issued pursuant to the IAA were binding on the parties and could not be reopened except where there was fraud, breach of natural justice or some other recognized vitiating factor. The Court of Appeal held that this approach was in line with the legislative policy of the IAA of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards, and declined to follow a more interventionist approach advocated in a number of English court decisions.

B. Court of Appeal Upholds High Court Decision to Set Aside Arbitral Award Where Tribunal Exceeded Powers

In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, the Singapore Court of Appeal upheld the High Court's decision to set aside a majority award made by an ICC arbitral tribunal ("the Tribunal"). Our report on Singapore developments in the Summer 2011 NYSBA *New York International Chapter News* covered the case before the High Court, which was based on the Tribunal's decision to issue a Final Award upholding a Dispute Adjudication Board ("DAB") decision issued pursuant to the *Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer* (1st Ed, 1999) (the "FIDIC Conditions of Contract") published by the Fédération Internationale des Ingénieurs-Conseils ("FIDIC"). The FIDIC Conditions of Contract set out terms for adjudication and arbitration in the event of a dispute between parties who incorporate its provisions into a construction contract.

The Tribunal issued a Final Award, providing that the Appellant was entitled to immediate payment as sought. Whilst the Appellant applied to the court to enforce the Final Award, the respondent applied to set the award aside pursuant to Article 34(2)(a)(iii) of the Model Law, which is substantially similar to Article V(1)(c) of the New York Convention. The Respondent argued that the tribunal had acted in excess of its powers by converting the DAB decision into a Final Award. The High Court agreed that the Tribunal had exceeded its powers and set the Award aside.

The Court of Appeal agreed with the High Court. The Court held that it was not open to the Tribunal to issue a Final Award without reviewing the merits of the case. What the Tribunal ought to have done was to make an interim award in favour of the Appellant for the amount assessed by the DAB (or such other appropriate amount) and then proceed to hear the parties' substantive dispute afresh before making a final award.

The status of such a decision and the manner of its enforcement have been open questions both in Singapore and internationally for some time and academic opinion on the subject has been divided. The decision of the Court of Appeal in this case has settled the position in Singapore, although some international commentators have questioned the decision.

C. Available Courses of Action to Challenge or Enforce an Arbitration Award

A party seeking to challenge an arbitration award has two courses of action open to him. He can either apply to the supervising court to set aside the award, or he can apply to the enforcement court to set aside any leave granted to the opposing party to enforce the award. The argument

put forward by plaintiffs in *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2010] SGHC 304 ("*Glory Wealth Shipping*") was that these were alternative options and not cumulative ones and the fact that the defendants had already commenced proceedings in the English courts to challenge the arbitration award on the grounds of irregularity precluded them from making an application to set aside the order granting leave to the plaintiffs to enforce the award.

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UKRAINE

Statutory Developments

In 2011 Ukrainian legislation experienced significant changes with respect to the enforcement of international arbitral awards.

A. Enforcement and Setting Aside of International Arbitral Awards

In February 2011 the Ukrainian Parliament introduced several important amendments to the Code of Civil Procedure of Ukraine. The amendments established a new regime for enforcement and setting aside of international arbitral awards.

In accordance with Law No. 2979-VI, dated 3 February 2011, international arbitral awards are to be enforced in accordance with the provisions for granting permission to enforce foreign court judgments. The Law actually "legitimized" the previous interpretation of legislation by Ukrainian courts.[2]

Despite the positive effect of Law No. 2979-VI, its imprecise wording may have created a backdoor for third parties to set aside international arbitral awards issued in Ukraine as the seat of the arbitration. Now, third parties whose rights and obligations were influenced by such arbitration awards may challenge the awards to Ukrainian courts, albeit no case law has emerged yet in this regard.

B. Interim Measures in Support of Applications for Recognition and Enforcement of International Arbitral Awards

In September 2011 the Ukrainian Parliament adopted amendments to the Code of Civil Procedure of Ukraine allowing application of interim measures by Ukrainian courts against the respondent while the application on recognition and enforcement of an international arbitral award is pending with the court. Applications for interim measures are served on an *ex parte* basis. Despite being a breakthrough for the arbitration practitioners, an application for interim measures from Ukrainian courts in support of international arbitration proceedings is still not permitted.

C. Court Fees with Respect to Applications on Recognition and Enforcement of International Arbitral Awards

In August 2011 the Law of Ukraine No 3674-VI "On Court Fees" was adopted. Previously, no court fees for submission of an application on recognition and enforcement of international arbitral awards were required save for costs of informational-technical support of court proceedings. The law actually substituted the payment for costs of informational-technical support of court proceedings with an appropriate court fee, the amount of which had been increased 1.5 times though it is at a low level, reaching a little more than USD 10.

Case Law Developments

A. Notification of Respondent, Non-arbitrable Issues And Excessive Legal Costs

***(Raiffaisen Property Management GmbH -v- LLC "Double W,"* Case No. 1519/6-1/11)**

Raffaisen applied to Odessa Malynovskii District Court for recognition and enforcement of an award of the International Arbitration Center at the Federal Chamber of Economy of Austria. The dispute concerned a credit agreement and agreement on sale of shares.

Double W resisted the recognition and enforcement on two main grounds: (1) improper service of process (*Double W* was not duly informed about the arbitration proceeding), and (2) non-arbitrability of the issues submitted by *Raffaisen* to the Tribunal.

The Court found that the mistake in *Double W*'s address used for the purposes of service of process was an insufficient ground for refusal to recognize or enforce the award in view of the fact that *Double W* did serve its defense submissions in the arbitration proceedings.

The Court, however, refused to recognize the award as it dealt with non-arbitrable issues. It was held that under Ukrainian law disputes arising from corporate relations are non-arbitrable and that the Tribunal had no jurisdiction to issue a declaratory award on the title to shares and facts of legal significance, which were under the exclusive jurisdiction of Ukrainian courts.

However, the Court granted recognition and enforcement of the award in part concerning arbitration costs and other expenses, but the Court refused to recognize and enforce the portion of the award that awarded costs for *Raffaisen*'s legal representation since the amount of legal costs was excessive and would contravene principles of reasonableness, fairness and good faith set down in Art. 3 of the Civil Code of Ukraine. It was concluded that obliging *Double W* to cover *Raffaisen*'s legal costs would entail "punitive" economic consequences for *Double W*.

B. Recognition of the Settlement Agreement Confirmed by an Arbitral Tribunal

(*BEARCO S.A. -v- Zaporizhzhya Titanium & Magnesium Combine*, Case No. 6-170/11)

In the arbitration proceeding *BEARCO* and the state-owned Zaporizhzhya Titanium & Magnesium Smelter (*ZTMS*) settled their dispute by way of a settlement agreement which was consequently affirmed in an award issued by the Tribunal of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce (ICAC). As the settlement agreement was not complied with, *BEARCO* applied to Zavodskyi Court of Zaporizhzhya for recognition and enforcement of the award.

ZTMS objected on the grounds that the Tribunal recognised Swiss law as applicable to the merits of the dispute, but applied Ukrainian law only.

The Court recognised the award of the ICAC, holding that the Tribunal did not have to decide the dispute on merits but only used *lex arbitri* to affirm the settlement agreement in its award.

C. Defence Based on Improper Notification of Commencement of Arbitration Proceedings Rejected by Highest Specialized Court of Ukraine on Civil and Criminal Matters

(*VA Intertrading Aktiengesellschaft -v- HEKRO PET Ltd*)

In defending against recognition and enforcement of the award issued by the Tribunal of International Arbitration Center at the Federal Chamber of Economy of Austria, *HEKRO PET* alleged that it had not been notified of the commencement of arbitral proceedings, nomination of arbitrators and issuance of arbitral award. The Highest Specialized Court on Civil and Criminal Matters rejected these defences on the basis that notices were sent to the latest known address of *HEKRO PET* and that the latter had failed to notify the Tribunal and the claimant of the change of address.

D. Courts Do Not Review Whether the Arbitral Tribunal Had Properly Selected the Applicable Law

(*OJSC Efirnoe -v- Delta Wilmar CIS*, Case No.2-k-1/2011p)

Efirnoe applied to the Yuzhnyy court of Odessa region for the recognition and enforcement of the arbitral award of International Commercial Arbitration Court at the Russian Federation Chamber of Commerce.

Delta Wilmar contested the application for recognition and enforcement, arguing that the Tribunal failed to properly identify the law applicable to the merits of the dispute. It was alleged that this amounted to breach of the arbitration agreement (procedure) and that the award was contrary to public policy of Ukraine.

The court found that the award complied with both Ukrainian law and the New York Convention, dismissing the defences of *Delta Wilmar*.

E. Courts Do Not Review Interpretation of Evidence by the Arbitral Tribunal

(*STS TRANS OY (Finland) -v- CJSC "Kyiv Manufacturing Company "Rapid,"* Case No.6-207/11)

STS sought to set aside the arbitral award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce after its claims were held to have failed.

STS submitted that the Tribunal wrongly interpreted the evidence and such wrong interpretation was in conflict with the public policy of Ukraine. The Court dismissed the application of *STS*, confirming that any misinterpretation of evidence may not lead to the violation of Ukrainian public policy.

F. Recognition of the Award After the Applicant Had Changed Its Commercial Name

(*JSC Zaklady Gumove Bitom S.A (Konbelts Bitom) -v- "Tradimg Commercial Enterprise "Krymtorg"*)

The Tribunal of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce (ICAC) rendered an award requiring *Krymtorg* to pay *Zaklady Gumove* the value of certain delivered and unpaid goods. In the aftermath *Zaklady Gumove* changed its name to *Konbelts Bitom* and applied for recognition and enforcement of the arbitral award.

The trial court and court of appeal refused to grant recognition and enforcement of the arbitral award. Reversing the judgements of the trial court and court of appeal, the Highest Specialized Court of Ukraine on Civil and Criminal Matters held that since *Konbelts Bitom* was a legal successor of *Zaklady Gumove* there were no grounds to refuse recognition and enforcement of the award.

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Endnotes

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (New York 1958).
2. Before the introduction of those changes, Article 81 of the Law of Ukraine "On Private International Law" No. 2709-IV, dated 23 June 2005, was interpreted to mean that "foreign court judgments" included foreign arbitral awards. *See* NYSBA New York International Chapter News, Summer 2011, Vol. 16, No. 1, at p. 34.

New ICC Arbitration Rules for Today's Business Now in Force

As of 1 January 2012 the revised rules of arbitration of the International Chamber of Commerce (ICC) (hereinafter "the 2012 Rules" or the "Rules") entered into force. The last revision of the ICC arbitration rules had come into force in 1998. The new Rules were elaborated on by a working body of more than 175 professionals and users from 41 countries, including lawyers, arbitrators and business and government users.

The 2012 Rules are intended to respond to criticisms made against arbitration generally regarding cost, time effectiveness and transparency, while introducing new features to respond to "*today's business needs*." However, the revisions still retain the classic features of the original rules such as the terms of reference, the role of National Committees in the appointment of arbitrators, and the scrutiny of the awards.

Introducing the Arbitration and Challenges to Jurisdiction

It is possible to file a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (hereinafter "Court") in Paris, Hong Kong, and soon also in New York. Previously, if a party failed to file an Answer or raised a plea concerning the existence, validity or scope of the arbitration agreement, the issue would be submitted to the Court to decide whether it was *prima facie* satisfied that an arbitration agreement may exist, in which case the arbitration could proceed. Under the new Rules, questions of jurisdiction will automatically be transferred to the arbitral tribunal unless the Court's Secretary General refers the matter to the Court for its decision. The reason behind this streamlining measure is that statistically, by far the majority of claims disputing the existence of an arbitration agreement were denied at the *prima facie* stage, so that dealing with such claims at that stage was perceived as a waste of time.

Towards an Efficient Case Management

The ICC had previously issued a booklet in 2007 entitled *Techniques for Controlling Time and Costs in Arbitration* in order to improve the management of cases. The 2012 Rules also contain provisions aimed at improving case management and time and cost efficiency. These provisions can be separated into two groups: the first concerns the parties at the time they initiate the arbitration and the second concerns the arbitrators when conducting the arbitration.

To start with, the initial pleadings of the parties must now be more precise. Articles 4(3)(c), 5(1)(c) and 5(5)(a) state that parties have to describe the nature and circumstances of the dispute giving rise to the claims and the basis upon which they are made. Further, parties to arbitration shall, in accordance with 4(3)(d), 5(5)(b) and 23(1)(c) communicate their requested relief and the amounts of their claims. When this is not possible, each party must provide the other party with an estimate of the monetary value of its claims. On the matter of evidence, parties may submit any relevant material that "*may contribute to the efficient resolution of the dispute*" (Articles 4(3) and 5(1)).

Further, under the 2012 Rules the arbitral tribunal shall make every effort to conduct the arbitration in an expeditious and cost-effective manner (Articles 22(1) and (2)) and adopt any procedural steps to achieve this goal (as long as not contrary to the agreement of the parties). In doing so, the arbitrators may refer to Appendix IV of the Rules, which includes a list of proposed case management techniques to improve efficiency.

Provisions on Multiple Contracts and Parties

The 1998 rules did not contain any provisions providing for the joinder of additional parties or for claims arising out of multiple contracts. The 2012 Rules now include a detailed set of provisions dealing with complex arbitrations involving multiple parties and contracts. These provisions largely reflect existing practices as well as positions espoused in academic literature.

First, the 2012 Rules provide for the possibility of consolidating arbitrations. Article 10 allows the Court to consolidate arbitrations pending under the Rules into a single arbitration under some circumstances. A notable feature is that the consolidation may be granted even if the terms of reference have been already signed or approved.

Second, Article 7 of the Rules introduces the possibility of joinder. An existing party may join an additional party to the arbitration if the joinder request is made prior to the confirmation or appointment of any arbitrator. Joinder may be of particular interest where a party acted as guarantor under the relevant contract and wants to join the guaranteed party. Where the time for joinder has expired, it is only possible to join an additional party with the consent of all the parties; otherwise, the parties may have the option of consolidation.

Third, while the 1998 rules did not contain an answer to the question of whether cross-claims were permitted in ICC arbitration, the 2012 Rules specifically include in Article 8 the possibility for any party to assert claims against any other party. This means that multiple claimants or respondents may assert claims against one another within the same arbitral proceedings.

Fourth, Article 9 of the 2012 Rules provides that claims arising out of or in connection with several contracts may

be made in one single arbitration, provided that the contracts all contain compatible ICC arbitration clauses.

Lastly, in all the new cases where an arbitration is multi-party, the nomination of the arbitrator(s) is addressed in Article 12 and the advance to cover costs of the arbitration in Article 36.

Impartiality and Availability of the Arbitrator

Since 2009 the Secretariat of the Court requires arbitrators to fill out and sign a form called "*statement of acceptance, availability and independence*" in which they indicate, *inter alia*, in how many cases they are already involved with and any other competing professional demands on their time. This document is designed to increase time and costs effectiveness by having the arbitrator confirm that he or she expects to be able to make available the time and effort necessary for prompt and efficient conduct of the case. The 2012 Rules adopt this practice in Article 11(2), while Article 11(1) confirms the obligation for arbitrators to be and remain impartial and independent.

The Introduction of the Emergency Arbitrator

The appointment of an emergency arbitrator is one of the most notable amendments of the 2012 Rules and joins the practice of a few other arbitral institutions. Governed by Article 29 of the 2012 Rules, the emergency arbitrator aims at modernizing the pre-arbitral referee procedure of the 1998 rules—which was rarely used—provides time effectiveness to ICC arbitration and provides parties that do not want to turn to state courts with an alternative for interim relief prior to the constitution of the arbitral tribunal. The emergency arbitrator process is set forth in Appendix V to the Rules and is intended to take no more than three weeks from the moment the application is received by the Secretariat until an order is rendered.

The orders of the emergency arbitrator are binding upon the parties—even if the enforcement of such decisions is dependent on the courts of the seat of arbitration. In any case, the parties are free to seek interim measures before national courts (Article 29(7)). But Article 29(3) makes it clear that the orders of the emergency arbitrator are not binding on the arbitral tribunal, which is empowered to modify, annul or terminate the order made by the emergency arbitrator.

The provisions on the emergency arbitrator do not apply if the arbitration agreement was concluded before the new Rules entered into force. They also do not apply to parties who have not signed the arbitration agreement relied upon for the application, or successors to such signatories (Article 29(5) and (6)). Parties can opt-out of the emergency arbitrator procedure either expressly or impliedly by agreeing to another pre-arbitral procedure that provides for the granting of interim relief (Article 29(6)). This aims to reassure States in particular, in the case of investment disputes, which are often opposed to emergency arbitration mechanisms.

New Features Designed for Investment Disputes

The new Rules contain a number of changes in recognition of the growing importance of investor-state arbitrations and arbitrations involving state parties, some of which are administered by the ICC.

For instance, Article 1(1) of the 1998 rules used to refer to the "*settlement by arbitration of business disputes*." It could have been argued that the scope of the 1998 rules did not encompass "*investment disputes*." Article 1(2) of the 2012 Rules now indicates that the role of the Court is to administer "*the resolution of disputes by arbitral tribunals*."

Previously, some States have been reluctant to insert a reference to the ICC Arbitration Rules in their bilateral investment treaties (BITs) because under the 1998 rules the method of appointing arbitrators could have led to situations in which the State might question the independence of the arbitrator. The appointment of arbitrators (for single arbitrators and chairpersons) was made upon proposals from National Committees, which some States may view as merchants' associations opposed to States' interests. Under the 2012 Rules, the Court may directly appoint as arbitrator "*any person whom it regards as suitable where: a) one or more of the parties is a state or claims to be a state entity*" (Article 13(4)(a)). Furthermore, Article 21(2) provides that arbitrators have to take into account the provisions of the contract, "*if any*," between the parties and "*any relevant trade usages*," thus clarifying that these two legal sources are not always applicable in investment disputes.

Conclusion

The 2012 Rules have been welcomed by the arbitration community. This revision serves to bolster the ICC's reputation as a leading institution for the resolution of disputes and may incidentally do the same for the reputation of cities where the ICC has a Secretariat such as Paris (and soon New York) as a venue for international arbitration.

The 2012 Rules consist of updates, codification of existing practices, and new features. It remains to be seen in practice whether these new features and refinements will meet their expected goals: in particular, gaining time, saving costs, and better coping with complex arbitrations. As the needs of businesses and users of arbitration change, it is good to see that arbitration institutions such as the ICC are listening and responding.

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Perspectives on Three Recent Annulment Decisions from Spain: Is Where You Stand Determined by Where You Sit?

By Clifford J. Hendel

ABSTRACT

The effect of certain recent Spanish court decisions annulling arbitral awards in high-profile cases will be a subject of intense debate in Spanish legal circles. How the cases are viewed and understood by the Spanish arbitral community could have a significant effect on the development of arbitration in the country, jump-started by a 2003 UNCITRAL-based arbitration law and a series of amendments promulgated in mid-2011. Two very contrasting views are emerging: Some will see the cases as favouring the development of arbitration in Spain by setting down useful guidance as to arbitrator and counsel conduct; others will view them as constituting unwarranted judicial meddling and thus as damaging to the development of arbitration in the country. This article frames the issues and sets out the two diverging views on the topic.

In the summer of 2009, and again (twice) in the summer of 2011, different sections (panels) of Madrid's regional high court, the Audiencia Provincial, rendered important decisions annulling arbitral awards. The 2009 decision, involving an underlying dispute of modest proportions and without particular economic or media interest in itself, generated a good deal of discussion and literature—some positive, some negative—in Spanish legal circles. The 2011 annulments, on the other hand, both involve underlying disputes of substantial economic and media interest and have already received mention in the general and business press; they will surely spawn significant discussion and literature in legal and professional circles.

If past is precedent, the critiques will again be dichotomous, revealing an apparent fault-line in the Spanish arbitral community: A certain spectrum of the community will likely heap praise on the decisions as providing useful and appropriate lessons to arbitrators which will tend to stimulate greater confidence in the still somewhat unsteady institution of Spanish arbitration. An equally broad spectrum will likely heap scorn on the decisions as constituting unnecessary and counterproductive meddling by the courts, draining predictability from the system, encouraging litigation and generally undercutting confidence in arbitration in Spain.

Rather than taking sides on the issues, this article will try to limit itself to recounting in summary fashion the facts underlying each case, the reasoning applied in the decisions and (especially) the actual or expected perspectives of the two camps concerning the decisions.

Underlying and unifying the discussion will be the strong impression that the split in views is no more and no less than a reflection of the co-existence of two schools of thought in the Spanish arbitral community. On the one hand, a somewhat traditional school in which judicial upsetting of the arbitral applecart is viewed with particular hostility. And on the other, a more liberal school in which occasional judicial re-alignment of the arbitral applecart via annulment is actually welcomed and even embraced, if and so long as the annulments can be viewed as cautionary tales with the intent and/or effect of raising the bar of arbitrator and counsel conduct in order to foster greater user confidence in the institution.

Case 1.—Jurisdiction of the Arbitrator in Light of an Imperfectly Drafted Arbitration Clause: The Limits of "*Competence/Competence*"?

The 2009 case involved, in essence, nothing more than the interpretation of a narrowly drafted arbitration clause. Expressly referring only to disputes "*with respect to the interpretation*" of the agreement in question, the clause did not include broader (perhaps somewhat boilerplate) mention of substantive matters such as *"execution," "performance"* or *"breach"* of the agreement, or customary and similarly broad catch-all language along the lines of *"arising out of, relating to, or in connection with the agreement…"* or similar formulations.

After an arbitration was filed seeking a declaration of breach and the assessment of damages, the respondent raised a jurisdictional objection on the basis of the terms of the arbitration clause. The arbitral tribunal rejected the objection, and issued an interim award confirming its competence to hear the matter. The Audiencia Provincial, in a short and crisply drafted ruling, annulled the award on the grounds that questions of breach and assessment of damages consequent upon a breach were not questions of *"interpretation"* within the scope of the arbitration clause and thus not within the jurisdiction of the arbitral tribunal.

The Court reached its decision relying on a tenet of contractual construction enshrined in Spain's Civil Code pursuant to which clear contractual terms leaving no doubt as to the parties' intent will generally be given literal effect. The Court reasoned that the express submission to arbitration only of matters involving *"interpretation"* left little or no doubt for purposes of this canon of construction as to the parties' intent *not* to submit to arbitration any

and all disputes arising from the contract, but rather, only those involving its "*interpretation.*" Moreover, the court reasoned, it was or could be logical and sensible in the circumstances of the case for the parties to have agreed to submit to arbitration only "*interpretative*" matters, and not the broader range of possible disputes involving matters of performance, breach and the like. In other words, a literal reading of the clause would not necessarily give rise to a manifestly absurd result which could not have been intended; accordingly, the tribunal should have applied the clause consistently with its literal meaning, and found that the dispute as to breach was not within its competence.

In short order, a polarization of the views of the Spanish arbitral community on the merits and consequences of this decision became manifest.

To some, the decision was right and proper, a gentle reminder to counsel to be careful in drafting arbitration clauses and to arbitrators in construing them so as to avoid granting themselves jurisdiction beyond the literal scope of the matters submitted clearly and unambiguously to arbitration. From this perspective, the decision should stimulate rather than hinder the growing but still somewhat immature Spanish arbitration culture, and can be considered "pro-arbitration." This camp takes heart in the following observation of the Court:

> Precisely because arbitration is predicated on the free will and autonomy of the parties, its furtherance and solidity comes not as much from the all-out defence of the institution (such doubtless will always be welcome) as, principally, from scrupulous respect of the agreement of the contracting parties.

To others, the decision was an over-punctilious application of the Civil Code's rules of interpretation and a departure from a general readiness in Spanish judicial practice to explore, or even presume to know, the parties' "real" or subjective intent irrespective of seemingly clear contractual language reflecting the objective intent (real or not, far-fetched or not) manifested by that language. As such, the decision has been criticized as restrictive of the arbitrator's inherent power and responsibility to determine his or her own jurisdiction (the principle of *competence/competence*), as an invitation to further judicial challenges on this issue and as a step backwards for the development of arbitration in Spain.

Case 2.—Majority Decisions and the Importance of Collegiality of the Tribunal: Where Are the Limits?

In June 2011, Madrid's Audiencia Provincial annulled an arbitral award in a case which—due to its economic importance and the media visibility of one of the parties—received a certain amount of attention in the Spanish business press. No doubt it will soon receive similar attention in the legal press.

The case involved the question of whether, in the very last steps of an *ad hoc* arbitration before a majority award was issued, the third arbitrator had been excluded from the decision-making process and if so, whether such exclusion constituted a violation of public policy protected by the Spanish Constitution.

Summarizing, the facts of record showed that the panel had maintained a long series of deliberations aimed at reaching a unanimous decision. A final deliberation meeting among the panel came close to a unanimous decision, but terminated acrimoniously with a sharply divided panel, and with two divergent draft awards on the table, and the possibility of the Chair's drafting a third.

Very shortly thereafter, the Chair and one of the co-arbitrators met and agreed the text of a majority award. The other co-arbitrator, whose absence from Madrid for a few days was known to his colleagues, was not informed of or invited to this meeting. After the meeting, the Chair sent the third arbitrator the text of the majority award by email, inviting him to adhere to it or dissent from it, as he preferred, but informing him that it was to be notified immediately to the parties and thus (implicitly) that he could not contribute in any respect to its content. Minutes later, the secretary of the tribunal circulated the same text by the same means to counsel, describing it as the definitive award. Shortly thereafter the award signed by the majority was issued to the parties, with a note stating that the award was issued by majority and that the third arbitrator had not "yet" expressed his conformity with it.

In a terse and emphatic decision, the Audiencia Provincial annulled the award. Inasmuch as the final meeting attended by the entire panel had ended without result—i.e., with widely divergent postures and without the majority having formed, crafted and presented to the third arbitrator the agreement that they ultimately reached for his review—and inasmuch as the text that was ultimately adopted by the majority was "appreciably different" from the text reviewed at such meeting, the Court held that the non-inclusion of the third member at the meeting at which the majority award was generated and signed effectively denied him the opportunity to consider and comment on the majority text before it was issued and thus for all practical purposes excluded him from the decision-making process. On this basis, the Court annulled the award due to infringement of the "principle of collegiality" of the arbitral panel and thus of public policy.

Divergent views of the merits of this decision have begun to be voiced in the local arbitral community.

Certain observers will find the decision a laudable exercise of judicial oversight to rein in precipitous arbitrator conduct which might, or might not, be perceived to run roughshod over the form or substance of what is, after all, a contractual means of dispute resolution. And thus, again, a decision annulling an arbitral award is viewed (from

this perspective) as being pro, and not anti, arbitration in general.

Another school of thought will be less indulgent towards the ruling, and will criticize it as both excessively formalistic and insufficiently legally based.

Formally, members of this second camp might agree that there may have been an element of precipitation in the issuance of the majority award. They might concede that it could have been better practice to have invited the third arbitrator to the meeting at which the majority was formed and agreed on the result and definitive text of the award, or at least to have allowed him time to review and meaningfully participate in the final text. But they will argue that the real consequence of not observing these niceties is far from clear. Indeed, it seems likely from the facts as set out in the decision that the "die was cast" as to the final award, in which case they will ask: Was there really any effective exclusion, and even if there was, did it make any practical difference?

Similarly, this school of thought will be critical of the limitedly developed Constitutional basis set out in the ruling, which concludes (without particular argument or discussion) that the exclusion constituted a kind of *per se* violation of a vague and undeveloped principle of collegiality which is tantamount to a violation of the constitutionally-established principles of public policy. Where, they may ask, is this principle of collegiality established? How and where is it enshrined in the Constitution or in the umbrella concept of public policy? And, where the losing party had fully and fairly presented its case and the panel had deliberated extensively before things broke down and, inevitably, a majority was formed, what precise Constitutional right of that party was really violated, given that traditionally the concept of public policy or procedural due process in this area focuses on a party's having or having been denied the right to present its case fully and fairly?

For these reasons, and from this angle, the decision will surely be criticized for opening a Pandora's box of potential and amorphous public policy (due process) challenges, tending to further clog the courts with what in general tend to be baseless and desperate actions to avoid or postpone enforcement of adverse awards and thus causing harm to the institution of arbitration in Spain.

Again, the ruling can be viewed from two very different optics and can thus give rise to two very different readings and reactions.

Case 3.—Independence and Impartiality: Caesar's Wife?

Later in the same month of June, 2011, in a lengthy and somewhat rambling ruling, another panel of Madrid's Audiencia Provincial annulled a particularly high-visibility award, arising from a high-value dispute involving a leading Spanish financial institution, with a tribunal chaired by a particularly well-known Spanish legal academic, author, lawyer and arbitrator.

The Court held that a cumulus of circumstances involving relationships between the Chair and both the financial institution and its counsel was, in the aggregate, sufficient to have created such doubt as to his impartiality and independence as to have warranted his recusal, notwithstanding that viewed individually, the relationships in question would have been largely or wholly innocuous. The relationships at issue included the following:

- the fact that a principal partner (at the time of the proceedings, Managing Partner) of the large law firm representing the financial institution had worked with the Chair as a law clerk or junior lawyer for two or three years some thirty years ago, and the two remained friendly to this day;
- the fact that the Chair acknowledged having friends in the law firm in question, and that his son-in-law worked there as a result of such relationships;
- the fact that the Chair had served as a non-remunerated member of an academic advisory board to a master's program offered by a center affiliated with the law firm and bearing its name, such service involving attending one or two meetings per year with the full board, including the Managing Partner referred to above;
- the fact that he had dedicated an academic work to the name partner of the law firm;
- the fact that over the years he had issued legal opinions for the financial institution or its affiliates, on the request of their counsel; and
- the fact that the Chair had conversed on two occasions prior to the arbitration with senior legal executives of the financial institution.

Certain other academic and academic/social relations were considered irrelevant by the Court and are not mentioned here.

The Court ruled that the circumstances listed above, taken together, evidenced a relation of sufficient depth and proximity with the law firm and with the financial institution as to cast reasonable doubt on the Chair's impartiality and independence. The Court expressed the view that arbitrations in equity (as in the case under discussion) require even greater confidence and assurance of impartiality and independence than arbitrations at law, due to the freer hand that the arbitrator has in deciding at equity than when deciding at law). The Court noted that the Chair's failure to make voluntarily disclosure of certain of the relationships provided additional basis for the recusal. The Court further noted that, while the IBA Guidelines on Conflicts of Interest in International Arbitration are not applicable even as a matter of orientation, the relations

involving the son-in-law and the legal opinions were such as to constitute waivable, "orange list" items under the IBA Guidelines, so that if they were applicable the Chair's non-disclosure would be questionable. (The Court did not make reference to the Spanish equivalent of the IBA Guidelines, the Recommendations on the Independence and Impartiality of Arbitrators issued by the Spanish Arbitration Club, which express, like the IBA Guidelines, the general fallback or "golden rule" in the area, i.e., the maxim "when in doubt, disclose").

By now, the pattern is clear: the ruling—having created great waves in the sector due to the visibility of the dispute, the disputants, the arbitrators and counsel—has already been the subject of heated and polarized reaction.

Proponents applaud the message that a series of relatively innocuous relationships, even and perhaps especially among leaders of the tightly-knit Spanish legal community, can be sufficient to require recusal, especially if not disclosed promptly and voluntarily. Viewing Case 1 as constituting a deserved and commendable slap on the wrists of both counsel whose drafting is imprecise and arbitrators who have difficulty in resisting the temptation to expand the scope of their competence beyond the parties' manifested intent, and Case 2 as constituting a deserved and commendable reminder that arbitral forms are no less important than arbitral substance and formal dereliction is precisely what the courts are charged with monitoring, Case 3 (for the proponents) is an appropriate and high-visibility cautionary tale, an orange traffic light warning the clubbish Spanish arbitral community to be ever-mindful of the importance not only of being impartial and independent, but also of appearing to be impartial and independent. Thus, the ruling is seen by many as pro-arbitration, inasmuch as they believe it will increase user comfort with the impartiality and independence of arbitrators, strengthening confidence and trust in the institution and furthering its growth.

Again, there is another side of the coin. Opponents of the decision will be particularly vociferous due to the interest, individuals and institutions involved and the ramifications of the case: after all, not every case involves imperfect arbitration clauses (Case 1) or colourable arbitral misconduct (Case 2), but every case involves arbitrators selected precisely because they are known to counsel and/or the parties and thus every case involves the issue of potentially disclosable relationships.

Among the questions that the opponents will raise are: Where exactly was the tipping point in the case, i.e., when did a series of innocuous relations (viewed individually) become meaningful when viewed together? And if the tipping point is not clear, will the ruling simply result in confusion and litigation rather than providing guidance to avoid the same? Is there really any merit in the Court's statement that the impartiality and independence concerns in cases decided in equity are greater than those decided at law? And if this is the case, what is the relevance of the decision in the typical international proceeding, decided at law? Will this prove to be yet another source of confusion and litigation rather than guidance? Why does the Court refer to the IBA Guidelines but indicate so emphatically that they are not applicable even as guidelines? Is it because the dispute was domestic? Why does the Court fail to mention the Recommendations of the Spanish Arbitration Club? Does this too generate confusion and uncertainty when using them as they were intended, as guidelines as to best practices, might do the opposite? And finally, where does the "slippery slope" of disclosure take us in a rather small and concentrated business environment and a smaller and more concentrated legal market, in which a relatively limited number of academics and law firms tend to be involved in most of the significant transactions and the disputes that arise from them? How can the maintenance of "normal," friendly relations between and among arbitrators and counsel be so suspect in a small community that the failure to disclose them can be considered recusable?

It will be interesting to see how the views of the Spanish legal and arbitral community on the two 2011 cases will actually develop, and whether the dichotomy of views suggested in this piece is really confirmed. The author's expectation is that anyone who likes the result and lesson of Case 1 will also like those of Cases 2 and 3, and inversely, anyone who does not like Case 1 will not like Cases 2 or 3. And that each camp will lift its voices and its pens in support of its position.

Both camps will find arguments, both legal and of a policy nature, to support their views. Both will argue, not without some force, that their views are pro-arbitration. The trio of decisions would seem a classic case of the hoary maxim that "where you stand is where you sit"; their real impact on arbitration in Spain will likely only be known some years down the road.

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Mediation Law in Spain: An Overview of the Spanish Mediation Act

Law 5/2012, of July 6, on Mediation in Civil and Commercial Matters (the "Mediation Act"), was published in the Official Gazette of the Spanish State on July 7, 2012 and entered into force on July 27, 2012.[1]

The Mediation Act incorporates the European Union Directive 2008/52/EC into Spanish law and establishes a general regulation for mediation.[2]

The Mediation Act is divided into the following sections: (i) general provisions, (ii) underlying principles of mediation, (iii) provisions applicable to mediators, (iv) mediation rules of procedure and (v) enforceability of agreements resulting from mediation. A summary of each of the sections follows.

1. General Provisions

a. The filing of the request for mediation suspends but does not interrupt the prescription or limitation periods in which a party may bring an action. Nonetheless, failure to execute the Minutes of the constitutive session (the constitutive session is explained in Section 4(a) below) within 15 days from the date on which the request for mediation was received by the mediator and/or the mediation institution would cause the prescription and limitation periods to resume.

b. Mediation Institutions promote mediation and administer mediation proceedings but are not permitted to act as mediators themselves. These institutions must guarantee transparency in the appointment of mediators and must separate mediation and arbitration, should they be involved in administering arbitration proceedings as well.

2. Underlying Principles of Mediation

a. Whenever an agreement in writing to submit a dispute to mediation is in place, mediation must be attempted before the parties may institute any other extrajudicial proceedings, such as arbitration, or bring an action in court. This is the case even when the dispute concerns the validity or existence of the contract that contains the agreement to submit the controversy to mediation. The jurisdiction of the chosen dispute resolution authority may be challenged when an agreement to refer the matter to mediation is not honored.

b. Equality among the parties, impartiality and neutrality of the mediators.

c. Confidentiality. Any person involved in the mediation (including the mediator) must keep confidential any information he acquired as a result of the mediation process, and is exempted from giving evidence about any such information in judicial or arbitration proceedings, unless the parties agree otherwise in writing or the evidence is requested by a reasoned decision of a judge of the criminal jurisdiction.

d. The parties involved in the mediation process must act in good faith, with loyalty and showing mutual respect.

3. Provisions Applicable to Mediators

a. The mediator must be a natural person satisfying the following requirements: (a) he must be in full possession of his civil rights, (b) must not incur in any conflict of interest and (c) must have completed specific training that has been provided by "duly accredited" institutions. Additionally, a mediator must have a civil liability insurance policy.

b. Quality and self-regulation of mediation. Adequate training of the mediators shall be promoted, as well as the drafting of, and adherence to, voluntary codes of conduct.

c. The mediator shall disclose any circumstance that may affect his impartiality or generate a conflict of interest and, in particular, the circumstances mentioned in the Mediation Act: (i) the existence of personal, contractual, commercial and/or business relationships with any party; (ii) direct or indirect interest; (iii) previous actions by the mediator or a member of his company or organization in favor of one or more of the parties, in any circumstance, excluding the mediation process at stake.

d. Liability of mediation institutions and mediators. Should the mediator fail to faithfully comply with his responsibilities, he may be held liable for any damages caused by his acting. The damaged party shall have a direct action against the mediator and, when applicable, against the mediation institution, regardless of the availability of any actions for reimbursement of the mediation institution against the mediator. Potential liability of the mediation institution derives from the appointment of the mediator and/or the breach of any obligations pertaining to the mediation institution.

4. Mediation Rules of Procedure

a. Constitutive session. Once the mediation request has been filed and the informative session[3] has taken place, the mediation procedure will commence with a constitutive session in which, among other issues, the subject matter of the dispute submitted to mediation, the program of activities (i.e., the procedural calendar) and the deadline for completion of the procedure shall be agreed upon by the parties and recorded in the corresponding Minutes. If no agreement is reached on any of those matters, the Minutes of the constitutive session shall state that the mediation was not successful.

b. Duration and termination of the procedure. The Mediation Act stresses that the procedure shall be as brief as possible and the different stages be condensed into the fewest possible number of sessions. The procedure may end without an agreement due to any of the following reasons: (i) one or all the parties exercise their right to terminate it, (ii) the time limit allocated to the mediation procedure elapses; or (iii) the mediator determines that the parties' positions are irreconcilable. The Final Minutes executed at the end of the procedure shall include any agreements reached.

c. Conduction of proceedings through electronic means. Recourse to electronic means for any session and stage of the proceedings is encouraged. This is particularly the case in any dispute submitted to mediation consisting of a monetary claim not exceeding 600 Euro, unless recourse to such means is not possible for any of the parties.

5. Enforceability of Agreements Resulting from Mediation

a. The parties may include the terms of the agreement resulting from mediation in a public deed, thereby constituting an enforceable title. The Spanish Notary Public will verify whether the requirements established by the Mediation Act are satisfied and the content of the agreement is not contrary to the laws.

b. Without prejudice to the provisions of EU regulations and international conventions, agreements enforceable in another State will only be enforceable in Spain when their enforceability stems from the intervention of a competent authority performing functions equivalent to those accomplished by the Spanish authorities. A foreign agreement resulting from mediation that has not been declared enforceable by a foreign authority will only be enforceable in Spain upon its formalization in a public deed before a Spanish Notary Public at the instance of all the parties or at the instance of one of them with the express consent of the others.

c. The agreement resulting from mediation may be challenged before the courts with an action seeking annulment of said agreement based only on causes for the annulment of contracts.

d. When the agreement is reached as a result of a mediation process that took place after the commencement of judicial proceedings, the parties may request judicial approval ("homologación") of said agreement.

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Endnotes

1. The Mediation Act has been in force as a Royal Decree-Law since March 7 (Royal Decree-Law 5/2012, of March 5, on mediation in civil and commercial matters, which was approved by the Council of Ministers on March 2, 2012). This Royal Decree -aw was subsequently passed as an "ordinary law" by Spanish Parliament on July 6 and now the official reference to the Mediation Act is "Law 5/2012." Royal Decree-Laws are approved by the Council of Ministers in cases of necessity and urgency of adoption of norms in certain, limited subject matters. Royal Decree-Laws do have the same binding force than Ordinary Laws. Yet, Royal Decree-Laws can be introduced into the Parliament to undergo the parliamentary legislative process (as it happened in this case). In practice, this means that the Parliament may introduce amendments and/or include provisions dealing with other matters that the Royal Decree-Law could not rule on considering the limited scope allowed to Royal Decree-Laws by the Spanish Constitution.
2. Law 5/2012 includes further provisions dealing with varied procedural topics such as amendments to the Civil Procedural Code and articles governing access to Spanish Bar. This article does not discuss those provisions.
3. After receiving the request for mediation, the ad hoc mediator and/or the mediation institution calls the parties for an initial session where information is given as to any issues that may affect the impartiality of the mediator (should there be any), main features of the mediation process and proceedings, its costs and consequences and the deadline for the signature of the constitutive session Minutes.

Sedona Conference Issues International Data Protection Principles

By Steven C. Bennett

Recently, Working Group 6 of the Sedona Conference (a group of lawyers, judges, academics and service providers aimed at improving the law) issued a draft document addressing the potential conflict between U.S. discovery rules and international data protection law. The draft, entitled "International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation and Discovery of Protected Data in U.S. Litigation," text available at www.thesedonaconference.org [the "Sedona International Principles"], is the product of nearly six years of work. Sedona Working Group 6 previously issued a "Framework for Analysis of Cross-Border Discovery Conflicts" (2008) and an "International Overview of Discovery, Data Privacy & Disclosure Requirements" (2009), as well as a host of related papers published in the *Sedona Conference Journal*. In October 2009, moreover, Working Group 6 provided a detailed response to the Article 29 Data Protection Working Party's "Working Document 1/2009 on pre-trial discovery for cross border civil litigation."

The new International Principles identify six essential principles for reconciliation of the potential conflict between privacy and disclosure in the context of U.S. litigation: 1. "Due respect" for data protection; 2. "Good faith and reasonableness" in evaluating actions; 3. Limits on the scope of preservation and disclosure to what is "relevant and necessary;" 4. Optional use of a stipulation or court order to protect data; 5. The obligation to adopt "appropriate data protection safeguards;" and 6. Retention of data "only as long as necessary to satisfy legal or business needs." In addition, the Principles offer a model Protective Order and a "Transfer Protocol" (identifying important issues to consider in implementing data transfers in the context of disclosure for litigation).

The International Principles are subtitled "European Union Edition." Working Group 6 plans to issue additional versions of the Principles to address data protection concerns in other regions of the world. The Principles, moreover, are labeled "draft," with the expectation that interested parties and groups will provide comments on the Principles for inclusion in revised versions. Comments may be submitted via the Sedona Conference website, or by email at info@thesedonaconference.org. Working Group 6 was scheduled to meet in June 2012, in Toronto, to discuss comments on the Principles, and plans for the Working Group's further activities.

Steven C. Bennett is a partner at Jones Day in New York, and Chair of the firm's Ediscovery Committee. He is a founding member of the Sedona Conference Working Group 6. The views expressed are solely those of the Author, and should not be attributed to the Author's firm or its clients, or to the Sedona Conference.

New York State Bar Association International Section

Cocktail Reception in Honour of the 56th Session of the UNCITRAL Working Group II (Arbitration and Conciliation)

Tuesday, 7 February 2012
Patterson Belknap Webb & Tyler LLP
6:00pm—6:30pm

Remarks by Ms. Patricia O'Brien Under-Secretary-General of the United Nations for Legal Affairs The Legal Counsel

Mr. Bloomsbury,
Colleagues and Friends,
Ladies and Gentlemen,

Good evening.

I would like to begin by thanking the organizers of this wonderful reception—the New York State Bar Association, and the Co-Chair of its Committee on International Contract and Commercial Law, Mr. Albert Bloomsbury—for their very kind invitation. We are also grateful to the firm of Patterson Belknap Webb & Tyler for graciously hosting this evening's event. Let me extend a warm welcome to delegates from around the world, to New York and to the 56th session of UNCITRAL's Working Group II, which currently deals with the legal issues of Arbitration and Conciliation.

Since UNCITRAL decided to resume its standard-making work in those areas of law and since Working Group II took on these subjects in 2000, twenty-five working group sessions have been held, and twelve of those meetings have been here in New York.

UNCITRAL has been holding its Working Group and Commission sessions in New York—on a rotating basis first with Geneva and then with Vienna—for well over forty years, and so New York is in effect a second home to UNCITRAL.

As many of you know, budgetary constraints have been felt throughout the United Nations this past year, and there was the distinct possibility that meetings of UNCITRAL in New York would be discontinued as a cost-saving measure.

However, for all those—representatives of member States and nongovernmental observers alike—for whom New York is not only a convenient and efficient venue for meetings but an agreeable one as well, I am happy to report that the Fifth Committee and the General Assembly have agreed to maintain the alternating pattern of UNCITRAL meetings in New York and Vienna.

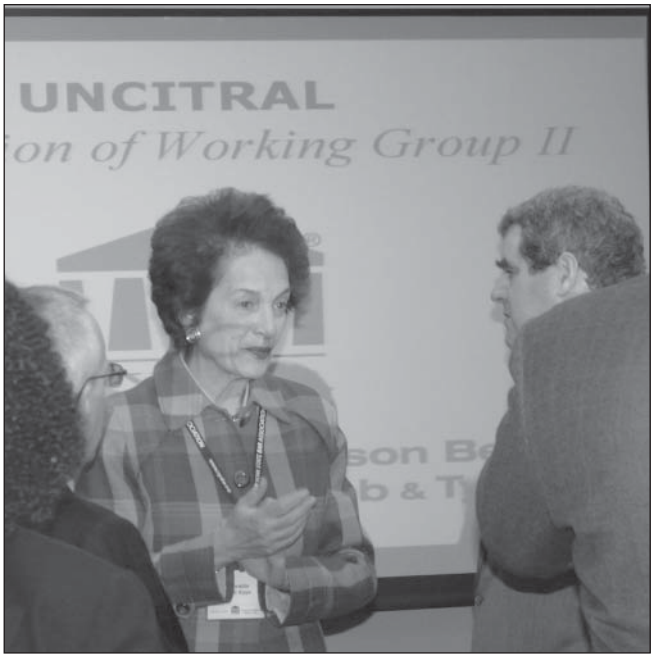
Many of you will appreciate the significance of holding meetings here. For delegates from North, Central and South America and the Caribbean, New York offers quick and easy access. For the many smaller states and developing countries attending UNCITRAL, a large number of whom maintain a diplomatic presence in New York but not in Vienna, this venue offers them a wider opportunity to take part in the decision-making of this important body. Indeed, much of the authority of UNCITRAL's texts rests on a process of deliberation which is as global and inclusive as possible.

As the core legal body of the United Nations system in the field of international trade law, it is of course a very positive thing that UNCITRAL maintains its strong connection with New York—not only because UN Headquarters are here but just as importantly because of its status as a foremost commercial and legal centre of the world.

New York is home to a very

dynamic international commercial arbitration community, with many leading practitioners. Integration of the work of UNCITRAL with other initiatives of the United Nations is becoming increasingly important—matters such as rule of law, development programmes and post-conflict reconstruction come to mind. Here again, the importance of the link to the United Nations Secretariat can be seen.

Last but not least, I would mention that the UNCITRAL Secretariat—the International Trade Law Division—is part of my Office, the Office of Legal Affairs.



I would like to close by acknowledging the cooperation and active participation of the New York State Bar and its members in many areas of the work of UNCITRAL. I hope that we can look forward to this co-operation and participation continuing, and indeed increasing, in the years to come. It is a working partnership we value very highly.

Please accept my best wishes for a successful outcome of your meetings this week.

Thank you.

Summary of Remarks

Hon. Judith S. Kaye, former Chief Judge of the New York State Court of Appeals, currently of counsel at Skadden, Arps, Slate, Meagher & Flom LLP

Many thanks for the privilege of joining this distinguished gathering and particularly for the pleasure of meeting Patricia O'Brien, Salim Moolan and Renaud Sorieul. My compliments as well to our great host, the State Bar's International Section and its leader Drew Jaglom, and to Steve Younger (past president) and Seymour James (future president) of the New York State Bar Association).

As many of you know, for more than 25 years it was my good fortune to serve as a judge of New York State's high court, called not the Supreme Court but the Court of Appeals, 15 of those years as Chief Judge of the State of New York. In that quarter-century, I watched many changes in our world, most especially enormous advances in technology and globalization, and their impact on the law and the courts. I saw the increasing recognition of alternative dispute resolution as a highly effective means of resolving the disputes people inevitably have among them, and welcomed arbitration and mediation as an aid to expediting litigation in our courts.

But from that glorious vantage point on the high court I also saw the growth of alternative dispute resolution outside the courts, particularly in international matters, as our world globalized. And more and more, as Chief Judge I came to appreciate the role of judicial support—and I mean this in at least two respects. The first is the vital importance for our courts to clearly articulate the law of the State of New York so that it is, and is perceived to be, stable and predictable. While this is true generally, the fact that New York law is so often specified in agreements reaching around the world further underscores the principle. And the second is the vital importance for our courts to recognize, and enforce, awards secured through the increasingly utilized alternative tribunals. In my years on the high court of New York reviewing arbitral awards I learned the true meaning of "deference," so essential to the reliability and finality of alternative dispute resolution awards.

Now I am in what I call my "after-life," meaning my Chief Judge after-life, happily associated with the firm of Skadden Arps and all of you. I am so proud to report back to my judicial colleagues that they have earned the enormous respect of the international community by decisions that keep the law of the State of New York stable and predictable. And I am so proud to report back to all of you that judicial deference, respect for your efforts, is regarded, equally, as a very serious matter by our courts, as it should be. It is my pleasure now to be working alongside you to assure that, both as a venue for arbitrations and as a court system for review and enforcement, New York will remain a forum of choice.

I too look forward to continuing our work together to promote just and effective dispute resolution essential to our global community.

Note of Thanks

Salim Moollan, Chairman, United Nations Commission on International Trade Law

Distinguished Members of the New York State Bar Association, Distinguished Delegates to the UNCITRAL Working Group:

It is a kind attention of the New York State Bar Association to ask me to say a few words tonight, as it is clear to me that the members of the Working Group do not get to hear enough of my voice during the course of our deliberations.

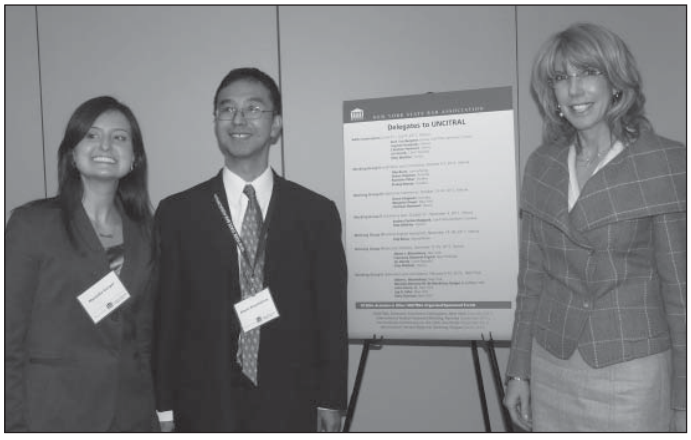
Pleasantries apart, our thanks are due to the NYSBA for hosting this event to celebrate the long-standing link between UNCITRAL and its Working Group II, and the City of New York.

As many of you will be aware, UNCITRAL was informed during its Commission sessions in July last year of concrete proposals by the Secretary-General to reduce the budget of UNCITRAL and of its Secretariat for the biennium 2012-2013.

Budget cuts were proposed to the hiring of consultants, the travelling of experts, travelling of the Secretariat staff, furniture and equipment. However, the most troublesome aspect was a proposal to cut out—purely and simply—the entire travel budget of the Secretariat staff to service UNCITRAL meetings in New York,

At its July 2011 meetings, UNCITRAL fully endorsed the need to make cuts. Indeed, it expressed unanimous support for the current efforts to achieve savings across the United Nations in general.

But this last proposal would have had the effect of discontinuing the long-established practice of holding sessions of the Commission and of its Working Groups alternately in New York and Vienna. It would have severely impaired UNCITRAL's global reach and turned it—to all intents and purposes—into a purely Vienna-based organization with no presence in New York.



The Commission considered this proposal with great care. It recalled that the alternating pattern of meetings between New York and a headquarter city in Europe (Geneva from 1969 to 1977 and Vienna since 1978) has been a feature of UNCITRAL throughout its existence. There are numerous reasons for this *modus operandi.* In particular:

- it achieves a proportionate distribution of travel costs among delegations,
- it maximizes the influence and presence of UNCITRAL globally, and
- it reflects the needs of developing countries, many of which do not have any representation in Vienna.

These reasons are as valid today as they have been over the past forty years. The Commission accordingly unanimously agreed that the current alternating pattern should not be unravelled, and if discontinued, would entail detrimental consequences for UNCITRAL's ability to continue its work. The Commission thus expressed its unanimous support for the continuation of the current pattern of alternating meetings, and identified alternative ways of making the necessary savings.

From my personal perspective, the next step was an unexpected crash course in the internal workings of the UN, which I do not wish onto any of you.... But what soon became apparent was that UNCITRAL would have to demonstrate that its Member States were willing to put their money (at the level of the General Assembly) where their mouth was (at the level of the Commission).

It bodes infinitely well for the future of UNCITRAL that—when push came to shove, on Christmas Eve 2011—this is precisely what the UN Member States did. And thus we are here, meeting in New York for yet another year.

This would not have been possible without the support of a great many States who spent a considerable amount of time and resources to ensure that the Commission's wishes could be implemented, nor without the support of organizations such as the NYSBA who played a pivotal role in mobilizing their Governments in that respect. It accordingly behooves me—as the current Chairman of the Commission—to thank the New York State Bar Association—to thank you all—for your help in maintaining the long-standing link between UNCITRAL and this City, and thus UNCITRAL's global presence.

Section News

The Role of the Lawyer in Microfinance Event

One of the Section's new committees, Committee on International Microfinance and Financial Inclusion, had its kick-off event May 22 at the offices of Mayer Brown in midtown. As part of our program entitled "The Role of the Lawyer in Microfinance," Jim Carlson of Mayer Brown, Chuck Day of Opportunity International, and Jennifer Maurer of Results.org inspired great discussion on the influence and proliferation of practice areas related to financial inclusion as well as the breadth of ways lawyers can get involved. The Committee is planning a series of one-hour teleconferences beginning this fall on microfinance and a variety of substantive areas, such as real property, insurance, banking, rule of law, technology, and more. If you have a topic you'd like us to explore or for which you'd like to lead the conversation, please contact us through www.nysba.org/mafic. We enthusiastically encourage everyone to join us.

Azish Filabi and Julee Milham

Section Diversity Challenge

The International Section was recently honored as a "Section Diversity Challenge Leader" at the New York State Bar Association May Section Leaders Conference. Joyce Hansen received the award on behalf of the International Section

Front Row: Anthony Fletcher, Business Law Section; Joyce Hansen, International Section; Sherry Levin Wallach, co-chair, Membership Committee.

Back Row, left to right: First on left: Steve Alden, Real Property Law Section; Second from left: Peter Cedeno, Family Law Section; Third from left: Guy Mitchell, Criminal Justice Section; Charles Weigell, Intellectual Property Law Section; Vincent Doyle III, past NYSBA President; Seymour W. James, Jr. current NYSBA President; Glenn Lau-Kee, co-chair, Membership Committee.

New International Section Members

David T. Ackerman
Christine Alber
Tina E. Albright
Danielle Elizabeth Holmes Allen
Andrea Zanini Almeida
Emily Altman
Niranjali Manel Amerasinghe
Linda Ammar
Hillary Warren Amster
Tawakalitu Amusa
Sheila E. Anantharaj
Liane Marie Aronchick
Anna Christina Arstein-kerslake
Djamalitdin Ahmadalievich Askarov
Ruby Maria Asturias Castillo
Lindsey Ann Austin
Alexander Averbuch
Clifford A. Bail
Mark I. Bailen
Irwin Curtis Baker
Shruti Bali
Katherine Marie Ball
Moya Ball
Da Bao
Li Bao
Erika Barros Sierra
Peter John Baston
Adele Marilyn Batonga
Richard M. Baumann
Marc Beaumont
Elma Beganovic
Yariv C. Ben-Ari
Mehdi M. Bennani
Roy Berg
Daniel Jacob Best
Xiaohan Bi
Henry Parkman Biggs
Gerard Bilotto
Chuan Bin
Anna Birtwistle
Charles Blanaru
Heather Elizabeth Blanco
Lisa Martina Bonfield
Robin Julia Boucard
Aaron Zakon Bourke
Victoria Loraine Bourke
Amarilda Brahimi
Antonietta Brancaccio-Balzano
Drilona Brecani
Adam Michael Brenner
Jamie Michelle Briggs
Jessica Rozier Brown
Florian Bruno
Lauren Elizabeth Brylinski
D. Shawn Burkley
Samantha Bushey
Bowen Cai
Chenwei Cai
Jinyang Cai
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India Campbell
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Hua Cao
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Dorcia Carrillo
Marilda Cassago
Antonino Catanese
Martha Lily Cebrian Vega
Johny Chaklader
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Danlin Chang
Hui Chang
Sung Chang
Guneet Chaudhary
Carla Monteiro Chaves
Cheng Chen
Chi Chen
Fei Chen
Hongye Chen
Huangqi Chen
Jiatai Chen
Jingkun Chen
Linlin Chen
Lixia Chen
Qiuming Chen
Ying Chen
Yuanjie Chen
Zhi Chen
Cheng Cheng
Vincent Chirico
Sonali Priyamvada Chitre
Hae Eun Choi
Sung-Hwan Choi
Yoon Suk Choo
Chang-ning Chou
Wook Chung
Oreste Cipolla
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Cynthia Gail Claytor
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Victor Ian Cohen
Claudia M. Colom Abreu
Amy Beth Comer
Nicole Danielle Comstock
Liting Cong
Cody Dickinson Constable
Isabelle Cote
Weihua Cui
Luiz Otavio Monte Vieira Cunha
Christopher Scott D'Angelo
Carey R. D'Avino
Rebecca Dakpe-Bocognonvi
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Shanshan Su
Bingbing Sui
Breen Marie Sullivan
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Lan Sun
Muran Sun
Xiaoli Sun
Yu Sun
Zhenhua Sun
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Qiongyue Wang
Ruoxu Wang
Shaoshan Wang
Tongdong Wang
Wenye Wang
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Xinye Wang
Yao Wang
Ying Wang
Yongzhe Wang
Yue Wang
Peng Wei
Xuanyu Wei
Xuedan Wei
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Wei Xia
Nan Xiang
Wang Yan Xiang
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Ayman Elfatih Yousif
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Hongyu Yu
Sanya Yu
Shengsheng Yu
Weiye Yu
Yiqian Yu
Shitai Yuan
Xiaonan Yuan
Ying Yue
Aaron Yuen
Daisuke Yuki
Courina Yulisa
Giulio Zanolla
Chao Zhang
Cunyuan Zhang
Haomiao Zhang
Jiajia Zhang
Jing Zhang
Kaicheng Zhang
Kailei Zhang
Kaixiang Zhang
Li Zhang
Liang Zhang
Liang Zhang
Lining Zhang
Meng Zhang
Minmin Zhang
Ruquan Zhang
Shengyi Zhang
Weiguo Zhang
Wenguang Zhang
Wenjuan Zhang
Xian Zhang
Xuran Zhang
Yan Zhang
Yin Zhang
Zhenduo Zhang
Bo Zhao
Feng Zhao
Lei Zhao
Qing Zhao
Shu Zhao
Xiao Zhao
Xiaohong Zhao
Yuxian Zhao
Ziyi Zhao
Tianyuan Zheng
Bin Zhou
Kaichen Zhou
Quan Zhou
Shilin Zhou
Xin Zhou
Yu Zhou
Xu Zhu
Yixuan Zhu
Zhaoke Zhu
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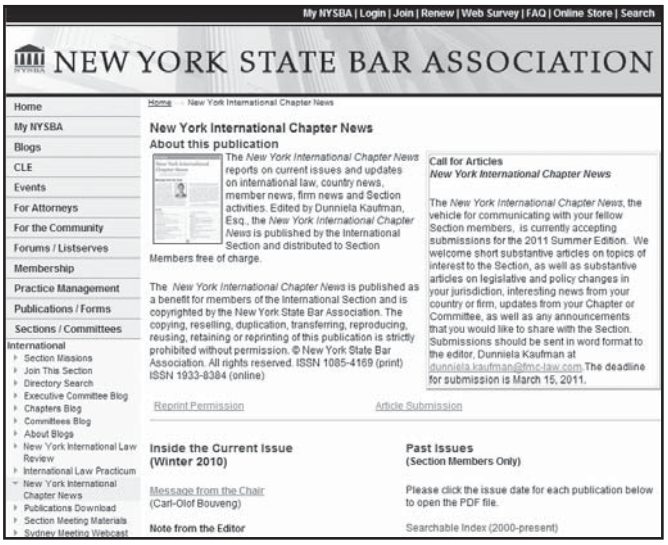

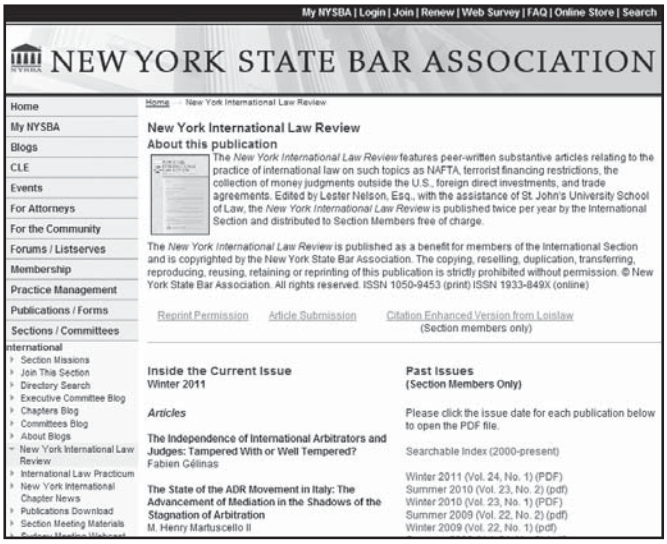

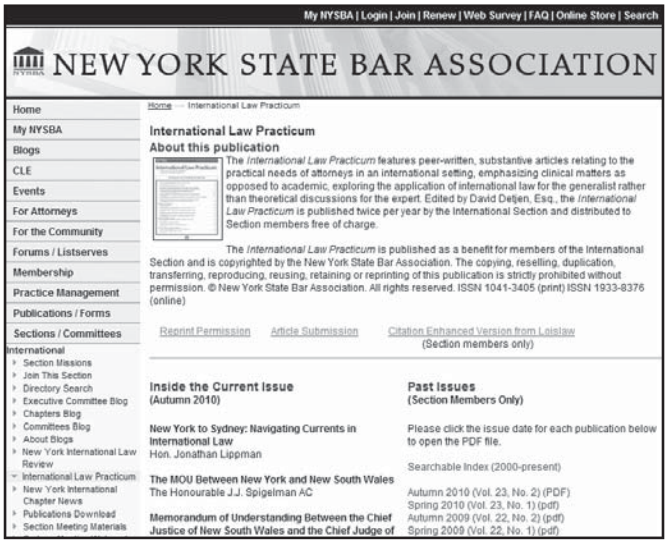

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