Venice Conferences on Institutional Arbitration (12 and 19 October 2013)

The Venice Chamber of Arbitration and the Venice Chamber of Commerce, in collaboration with the University of Venice "Cà Foscari" and ARBIT (Italian Forum for Arbitration and ADR), will host two one-day conferences on institutional arbitration: "**Arbitrato interno e internazionale: aspetti procedurali dall'avvio all'esecuzione del lodo in Italia e nel mondo**" [Internal and International Arbitration: Procedural Aspects from the Commencement to the Execution of the Award in Italy and in the World].

The conferences, which will take place in Venice on **Saturday 12 October** and **Saturday 19 October**, will focus on institutional arbitration (both in international commercial and investment disputes), under the point of view of the procedural aspects ("L'arbitrato istituzionale. Aspetti procedurali", 12 October) and of the challenging and enforcement of the arbitral award ("L'arbitrato istituzionale. Il lodo: annullamento, nullità, esecuzione", 19 October). Speakers include leading academics and practitioners and members of arbitration institutions (see the full programme here).

Participation is free, upon registration on the site of the Venice Chamber of Arbitration.

International Arbitration and the U.S. Federal Courts: The "Pro-

Arbitration Campaign" and the UNCITRAL Rules

In the United States at least, judicial decisions deferring competence to arbitrators seem to be on the rise—if not in number, at least in profile. International Arbitration is no exception. Last week, the United States Court of Appeals for the Ninth Circuit held that both the 1976 and 2010 versions of the UNCITRAL Arbitration Rules authorize the arbitral panel to determine its own jurisdiction and arbitrability. In Oracle America, Inc. v. Myriad Group, A.G. (9th Circ. Docket No. 11-17186, July 26, 2013), the Court of Appeals concluded that "incorporation of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules into an arbitration provision in a commercial contract constitutes clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator."

The complete facts of the case including the parties' arbitration clause is set out in the text of the judicial decision. In brief, Oracle and Myriad signed a Source License agreement which provided that "[a]ny dispute arising out of or relating to this License shall be finally settled by arbitration [before the AAA and under the UNCITRAL rules]," with certain specified exclusions. When a dispute developed between the parties, Oracle filed suit in the U.S. District Court for the Northern District of California and sought an injunction preventing Myriad, a Swiss company, from proceeding with arbitration. Myriad responded with a motion to compel arbitration. The District Court granted the injunction and denied the motion to compel arbitration, concluding that the incorporation of the UNCITRAL arbitration rules did not constitute clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator. The district court reasoned that the relevant provision of the 2010 UNCITRAL rules states only that the arbitrator has authority, but not exclusive authority, to decide its own jurisdiction.

The Ninth Circuit rejected that holding. First, the appellate panel resolved a threshold dispute as to whether the 1976 or 2010 versions of the UNCITRAL Rules applied, and ultimately held that there was no substantive difference between the two versions in this regard. With this said, the real issue was whether the incorporation of the UNCITRAL Rules "constitutes clear and

unmistakable evidence that the parties intended to arbitrate arbitrability." The Ninth Circuit followed the DC Circuit and the Second Circuit and answered in the affirmative. Indeed, "[v]rtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *** The AAA rules contain a jurisdictional provision similar to Article 21(1) of the 1976 UNCITRAL rules and almost identical to Article 23(1) of the 2010 UNCITRAL rules."

This decision (and those it relies on) may form the international component of a nationwide trend for federal courts to fall in line with the U.S. Supreme Court's "pro-arbitration campaign." Naturally, though, we must juxtapose this decision with BG Group v. Republic of Argentina, which the Supreme Court will hear and decide in its upcoming term (indeed, the D.C. Circuit case favorably cited by the Ninth Circuit in Oracle was the decision under review in BG Group!). BG Group involves an investment treaty arbitration conducted in the UNCITRAL rules between a British company and Argentina. The tribunal had held that it had jurisdiction to decide the dispute, notwithstanding BG Group's failure to proceed first in Argentina's own courts which the treaty required as a prerequisite to arbitration. While the tribunal would surely have power to decide on arbitrability challenges after the agreement to arbitrate became effective (at least in the Ninth, Second and D.C. Circuits), what about decisions on threshold contract defenses before the agreement to arbitrate is even triggered? The district court confirmed the award, holding that the arbitrators had power to decide such questions, but the DC Circuit reversed. As the parties and amici begin to file their briefs before the Court, the how far the "pro-arbitration" policies of the FAA and the New York Convention extend is very much in play.

Lex Mercatoria, International

Arbitration and Independent Guarantees

What is the relationship among the new *lex mercatoria*, international commercial arbitration, and independent contract guarantees?. Under the title "*Lex Mercatoria*, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement", a recently published essay by Cristian Gimenez Corte analyses how these elements interact; whether their interaction may have led to the establishment of a new, truly autonomous, transnational legal system; and, if it does, whether and how the transnational legal system is related to, and impacts on, national legal systems. Accordingly, the essay does not seek to provide an in-depth analysis of the nature of each of these legal institutions separately; it rather studies the relations among them, and the outcome of these relations.

Let's start with the relationship between the new *lex mercatoria* and international commercial arbitration. An international contract may be governed solely on the basis of the transnational *lex mercatoria*, without reference to any national law. However, if a dispute arises, one of the parties may bring a claim before a national court, and then national law will necessarily come into play. The parties to an international contract may still, nonetheless, circumvent the jurisdiction of national courts, which are the constitutional organs of the state with the power to adjudicate legal disputes, and refer their dispute to arbitration. This interplay between the substantive *lex mercatoria* and international commercial arbitration as a dispute settlement mechanism has been seen as establishing an 'autonomous' legal system, independent from national legal systems.

Yet, if the arbitral award is not executed voluntarily, the wining party will have to request the assistance of a national court, and of national law, to *enforce* the arbitral award. Thus, at the end of the day, the transnational legal system would not be entirely autonomous; it would depend upon national law, because at the moment of truth, legitimate enforcement remains a monopoly of the governments of nation states.

At this point, independent contract guarantees enter into play. Parties to an international contract may choose the new *lex mercatoria* as the substantive law

of the contract; they may also incorporate an arbitration clause; and, finally, they may agree on an independent contract guarantee as a warrant for the execution of the award. In accordance with the terms and conditions of the independent contract guarantee, the guarantor will pay the winner of the arbitration upon demand, accompanied by the award. Hence, the arbitral award will be enforced without the intervention of any national court.

As seen, the *classical* theory of the *lex mercatoria* as an autonomous system of law finds its own limits at the enforcement stage. The incorporation of independent contract guarantees, however, allows that limit to be exceeded by providing the *lex mercatoria* with its own means of enforcement, thus establishing a truly autonomous and transnational system of law.

In this scenario, the transnational legal system is composed of substantive transnational customary law, which is implemented by private arbitrators, who may even enforce their own decisions without support from national courts. Hence, there is no participation or control by the constitutional organs of national states over the production, adjudication, or even enforcement of transnational law. This situation should necessarily lead to the question of the formal validity and the legitimacy of transnational law—that is, how and on whose behalf this 'law' is invoked and applied.

As said, these arguments are developed in depth in an article published in the *Transnational Legal Theory* journal, which further examines whether and how national law 'validates' transnational law, by analysing the interplay and linkages between them. As a conclusion, the study briefly addresses the issue of the legitimacy of the transnational legal system.

Source: Transnational Legal Theory, Volume 3, Number 4, 2012, pp. 345-370. Click here to access. Also available at SSRN.

Brekoulakis on International Arbitration Scholarship and the Concept of Arbitration Law

Stavros Brekoulakis (Queen Mary University of London) has posted International Arbitration Scholarship and the Concept of Arbitration Law on SSRN.

> *This article is about the concept of arbitration law and its relationship with international arbitration scholarship. It argues that the field of international arbitration scholarship has developed in isolation and never fully engaged with the crucial movements of international legal scholarship that advanced a more progressive and humanitarian concept of international law. The dearth of interdisciplinary scholarship in arbitration has had two undesirable implications. First, it has had a negative impact on how non-arbitration scholars and the public perceive arbitration. Secondly, and more importantly for the purposes of this article, it has crucially impaired the concept and autonomy of arbitration law. By remaining adherent to an old-fashioned version of positivism that accepts state regulation only, arbitration scholarship has failed to develop an account of international arbitration as a non-state community that has the capacity to produce legal rules. Eventually, it has failed to advance persuasive claims of normativity and autonomy of international arbitration. The article revisits the concept of arbitration law and advances the thesis that arbitration community has the normative potency to generate procedural practices and standards that guide the conduct of arbitration and breed expectations of compliance.*

The paper is forthcoming in the *Fordham International Law Journal*.

Transnational Dispute Management 3 (2013) – Corruption and Arbitration

The latest issue of TDM is now available. This special issue on Corruption and Arbitration analyzes new trends and challenges regarding the intersection between allegations of corruption and decisions by arbitral tribunals regarding jurisdiction, admissibility and the merits of commercial and investment disputes. As any transnational practitioners will know, allegations of corruption abroad pervade both arbitral and litigation practices–whether its affirmative claims of corruption before investor-state tribunals, or the enforcement of foreign judgments before national courts. This issue is an important contribution to the field.

The articles included in this issue are:

* *Nailing Corruption: Thoughts for a Gardener – A Comment on World Duty Free Company Ltd v The Republic of Kenya* by S. Nappert, 3 Verulam Buildings

* *Proving Corruption in International Arbitration: A Balanced Standard for the Real World* by C. Partasides, Freshfields

* *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?* by S. Wilske, Gleiss Lutz Rechtsanw?lte T.J. Fox, Gleiss Lutz Rechtsanw?lte

* *Random Reflections on the Bar, Corruption and the Practice of Law* by F.P. Feliciano, SyCip Salazar Hernandez & Gatmaitan (SyCipLaw)

* *Fraud and Corruption in International Arbitration* by C.B. Lamm, White & Case LLP H.T. Pham, White & Case LLP R. Moloo, Freshfields Bruckhaus Deringer LLP

* *Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration* by A. Cohen Smutny, White & Case LLP P. Polášek, White & Case LLP

* *Suspicion of Corruption in Arbitration: A German Perspective* by M.S. Rieder, Shearman & Sterling A. Schoenemann, Shearman & Sterling

* *The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities* by K.S. Gans, DLA Piper LLP D.M. Bigge, US Department of State, Office of the Legal Advisor

* *The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption* by A. Crivellaro, Bonelli Erede Pappalardo

* *Enforcing Anti-Corruption Measures Through International Investment Arbitration* by S. Kulkarni

* *State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration* by A.P. Llamzon, Permanent Court of Arbitration

* *The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?* by T. Sinlapapiromsuk, Faculty of Law, Chulalongkorn University

* *The Judicial Scrutiny of Arbitral Awards in Setting Aside and Enforcement Proceedings Involving Issues of Corruption* by M. Hwang, Michael Hwang S.C. K. Lim, Michael Hwang Chambers

* *West Africa: The Actions of the OHADA Arbitral Tribunal in the Face of Corruption* by C.N. Nana, London Metropolitan University

* *Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?* by S. Dudas, Leaua & Asociatii N. Tsolakidis, Johann Wolfgang Goethe-University

* *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?* by S. Nadeau-Séguin, Baker Botts LLP

* *On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption* by D. Litwin, McGill University, Faculty of Law

* *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator* by C.A.S. Nasarre, McGill University, Faculty of Law

* *Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge With New Answers* by R.H. Kreindler, Shearman & Sterling LLP

BIICL Conference on Unilateral Jurisdiction and Arbitration Clauses

The British Institute of International and Comparative Law will hold a seminar on Unilateral Jurisdiction and Arbitration Clauses, Valid or Not? on Wednesday 8 May 2013 from 17:15 to 19 pm.

> *This seminar examines so-called unilateral or asymmetric dispute resolution clauses, which oblige only one of the parties to bring their case in a specific court, while the other is free to select between different fora. Recently, the French Cour de Cassation has decided that this type of clause is invalid. Since, the validity of one-way jurisdiction clauses has been debated in various countries. The debate includes the question how hybrid arbitration clauses are to be assessed.*
> *Speakers will discuss the French Supreme Court's decision; the views of different Member States on the interpretation of Art. 23 Brussels I Regulation; the future of unilateral jurisdiction clauses; and the interpretation of hybrid arbitration clauses.*

Chair:
Craig Tevendale, Partner, Herbert Smith Freehills

Speakers:
Professor Gilles Cuniberti, University of Luxemburg
Dr Maxi Scherer, Special Counsel, WilmerHale; Senior Lecturer, Queen Mary (London)
Professor Matthias Lehmann, University of Halle-Wittenber

For more information, see here.

The New Issue of the TDM Journal: EU, Investment Treaties, and Investment Treaty Arbitration – Current Developments and Challenges

TDM Journal has just published its newest issue, which addresses the often-tenuous co-existance of EU law, international investment law, and the use of investment treaty arbitration for intra-EU investment disputes. In addition to addressing the latest developments in the field, this issue tries to reflect on the remaining challenges and possible solutions for open questions. It also includes a study requested by the European Parliament's Committee on International Trade which is made available on TDM with kind permission.

NYU Conference on Forum Shopping in International Arbitration

NYU's Center for Transnational Litigation and Commercial Law will host a conference on "Forum Shopping in the International Commercial Arbitration Context" from 28 February to 2 March 2013.

The list of speakers include Prof. George A. Bermann, Ms. Christopher Boog, Prof. Jack Coe, Jr., Prof. Filip De Ly, Mr. Domenico Di Pietro, Mr. John Fellas, Prof.

Franco Ferrari, Mr. Brian King, Mr. Alexander Layton, Mr. Pedro Martinez-Fraga, Prof. Loukas Mistelis, Prof. Peter B. Rutledge, Prof. Maxi Scherer, Prof. Linda Silberman, Mr. Aaron Simowitz and Mr. Robert H. Smit.

The event will start on Thursday, 28 February, at 4 pm, and will take place at 245 Sullivan St., Furman Hall, Pollack Room, 10012 NY. More information is available here.

To RSVP (required), please send an email to: cassy.rodriguez@nyu.edu

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International Commercial Arbitration: A Guide for U.S. Judges

The U.S. Federal Judicial Center has just published a new monograph entitled "International Commercial Arbitration: A Guide for U.S. Judges." The text, which was written by Professor S.I. Strong of the University of Missouri, provides readers with information on the intricacies of international commercial arbitration and the various ways that U.S. courts may become involved in the process. The book is part of the Federal Judicial Center's International Litigation Series and helps further the Federal Judicial Center's statutory mission of providing research and education to the U.S. federal judiciary. The text, which is broken down on a motion-by-motion basis, provides judges as well as practitioners with a useful introduction to international commercial arbitration practice in the United States. The book is available in both hard copy and electronic form, and copies can be downloaded for free from the Federal Judicial Center's website (here).

New Article on Monism and Dualism in International Commercial Arbitration

If you are in need of some holiday reading, Professor Stacie I. Strong has an interesting new piece out entitled "Monism and Dualism in International Commercial Arbitration: Overcoming Barrier to Consistent Application of Principles of Public International Law." Here is the abstract:

"Although monism and dualism are central tenets of public international law, these two principles are seldom, if ever, considered in the context of international commercial arbitration. This oversight is likely due to the longstanding assumption that international commercial arbitration belongs primarily, if not exclusively, to the realm of private international law. However, international commercial arbitration relies heavily on the effective and consistent application of the New York Convention and other international treaties, and must therefore be considered as a type of public international law.

This chapter considers the principles of monism and dualism in international commercial arbitration and identifies a number of ways in which international commercial arbitration can overcome some of the practical and theoretical problems associated with improper or ineffective incorporation of international law into the domestic realm. In so doing, this chapter provides some useful insights not only regarding the operation of the international arbitral regime but also regarding other areas of public international law."

Happy Holidays and Happy New Year to all our readers!