



LEX ARBITRI

The E-Newsletter of
Young Canadian Arbitration Practitioners
Jeunes praticiens canadiens de l'arbitrage

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Welcome to YCAP

This is the first edition of LEX ARBITRI, the e-newsletter of the Young Canadian Arbitration Practitioners (YCAP). The Steering Committee members are pleased that we can provide, through this newsletter and our forthcoming website, a regular snapshot into the world of arbitration. We are grateful for the support of our firm sponsors: Torys LLP, Davies Ward Phillips & Vineberg LLP, and Borden Ladner Gervais LLP. A special thanks is given to Rajeev Sharma and Adam Goodman at Heenan Blaikie LLP in Toronto for contributing to the content of this newsletter as well as overseeing its production.

YCAP's Inaugural Symposium was held last October in Montreal at the offices of Davies, Ward, Phillips & Vineberg. Thanks to Davies for the special effort they put into making the event a success. The Honourable Marc Lalonde was our special guest and commentator and numerous subjects were discussed including:

- Designing the right arbitration agreement;
- Constituting the right arbitral tribunal; and
- Defining the right arbitral procedure.

Our next Symposium is a luncheon event to be held on June 28th in Vancouver. Henri Alvarez, of Fasken Martineau DuMoulin LLP in Vancouver, has agreed to be our next special guest. The YCAP Symposium is being held at the same time as the CBA's Annual International Commercial Arbitration Conference in Vancouver. We encourage all members of YCAP to attend the CBA event as it is the premier annual arbitration event in Canada.

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CANADA

YCAP was launched by a group of young Canadian arbitration practitioners in June 2004. The mission of YCAP is:

- to promote interest in and understanding of international arbitration, particularly in Canada, among young lawyers working in private practice and with corporations and government, as well as among other interested young professionals;
- to provide professional development opportunities and a forum for the exchange of ideas for young lawyers and other young professionals with an interest in international arbitration; and
- to provide professional networking opportunities for young lawyers and other young professionals with an interest in international arbitration.

The requirements for membership in YCAP are:

- an interest in international arbitration and support for the mission of YCAP;
- 40 years of age or less, or new to the practice of international arbitration; and
- payment of an annual membership fee.

We encourage new members in YCAP. It is a great opportunity to be involved in an exciting area of law. Annual Individual Memberships are \$85, Student Memberships are \$50 and Firm Memberships are \$500 (with a right to 8 Individual Memberships). Please contact any of the Steering Committee Members if you are interested in being involved.

We look forward to seeing everyone in Vancouver in June.

Recent Developments In International Arbitration

Vis Competition - Young Canadian Arbitration Students Moot their Hearts Out

From March 17-24, 2005, the 12th Annual Willem C. Vis International Commercial Arbitration Moot was held in Vienna, Austria. Seven Canadian law school teams competed against 144 other teams from around the world on an international contractual dispute under the Arbitration Rules of the Chamber of Commerce and Industry of Geneva. Four of the seven Canadian teams advanced to the "round of 32" and three (McGill, Osgoode Hall and Queen's) made it to the "round of 8." In all, the Canadian teams racked up an impressive 14 honours:

- McGill University tied for 2nd place in the Werner Melis Award for Best Respondent Memorandum;
- University of Ottawa won honourable mention in the Werner Melis Award for Best Respondent Memorandum;
- Osgoode Hall and University of Ottawa won honourable mentions in the Pieter Sanders Award for Best Claimant Memorandum;
- Philip J. Furniss of the University of Ottawa won 3rd place in the Martin Domke Award for Best Oral Advocate in the General Rounds;
- Jean-Pierre Blanchette, David Grossman and Alison Lester of McGill University as well as David Rosner and Maria Sirivar of Osgoode Hall won honourable mentions in the Martin Domke Award for Best Oral Advocate in the General Rounds; and
- McGill University, Osgoode Hall Law School, the University of Ottawa and

Queen's University qualified as finalists in the Frédéric Eisemann Award for Team Oral Skills.

The hard work and talent of these young competitors and the buzz that they created while in Vienna has gone a long way in strengthening Canada's profile in the domain of international commercial arbitration.

Visit the Vis Moot's website for more information at:

<http://www.cisg.law.pace.edu/vis.html>

Yukos Arbitration: Largest Claim in Investment Treaty History

The largest known arbitration brought under an investment treaty was unveiled in a claim by Group Menatep against the Government of the Russian Federation on February 9, 2005. The claim, for US\$28.3 billion, alleges expropriation by Russia of the Group's majority shareholding in the Yukos oil firm in breach of the investment provision contained in the European Energy Charter.

In a letter, addressed to Russian President Vladimir Putin, Group Menatep has claimed that recent legal action by Russian authorities against it amounts to an expropriation of its assets. Russia's actions against Yukos, including the jailing of the oil company's head Mikhail Khodorkovsky on charges of theft of state property as well as several of the firm's defence attorneys, has led to a plummeting of its stock.

Group Menatep has retained Professor Emmanuel Gaillard of Shearman and Sterling LLP in Paris as claimant's counsel for the Yukos arbitration. Russia had drafted Cleary Gottlieb Steen & Hamilton LLP Paris partner Robert Grieg as its lead counsel. In April, the Government of Russia selected Stephen Schwebel, former President of the International Court of Justice, as its arbitral appointment. Group Menatep has chosen Daniel Price of Sidley Austin Brown & Wood LLP. The two arbitrators will now agree on the third.

See Group Menatep's press release on the claims against the Russian Federation:

www.groupmenatep.com/update/statements/GM_Press_Release_2_9_2005.pdf

Slovak Republic Agrees to Honour US \$830 million Award

The Slovak Republic has signalled that it will comply with a recent ICSID award ordering it to pay US \$830 million to Ceskoslovenska Obchodni Banka A.S., a private bank in the Czech Republic and one of the strongest in Central Europe.

Counsel to the Slovak Republic had previously hinted that they would be seeking judicial review of the award. However, on February 9, 2004, Slovak Finance Minister Ivan Miklos announced that the Government had agreed to pay two-thirds of the amount owing to the Bank with the remaining amount paid in instalments.

Read the Award at:

www.investmentclaims.com/decisions/Ceskoslovenska-Slovakia-Award-14Dec2004.pdf; Also See: "Slovakia to pay 653 million Euros to Czech bank", Agence France Presse, 9 February 2005.

Jan Paulsson appointed new President of the London Court of International Arbitration

At the LCIA's spring symposium at Tylney Hall on May 7, 2004, the LCIA Court unanimously recommended that Jan Paulsson be appointed to succeed Gerold Herrmann as its President, effective July 1, 2004. At its meeting the same day, the LCIA Board of directors unanimously approved this appointment.

The President serves for a period of up to three years and is eligible for reappointment. The President is assisted by seven Vice Presidents who are drawn from the other 34 eminent and cosmopolitan Members of the Court. The President actively presides over a Court that performs many vital functions under the LCIA Rules, including the selection and appointment of Tribunals, determining challenges to arbitrators, and monitoring and approving the costs of arbitrations. Jan Paulsson is a partner at Freshfields, Bruckhaus, Deringer in Paris.

Ontario Court of Appeal Upholds NAFTA Chapter 11 Arbitral Award

On January 11, 2005, the Ontario Court of Appeal issued a judgment in the case involving the United Mexican States (Mexico) and Marvin Feldman Karpa (Feldman). Justice Robert Armstrong of the Ontario Court of Appeal upheld Justice Dan Chilcott's decision of the Ontario Superior Court of Justice. Justice Armstrong accepted Justice Chilcott's finding that the NAFTA Tribunal's US\$1.6 million ruling against Mexico should be given a high degree of deference and that Mexico had not shown any basis upon which to interfere with the arbitration award.

The NAFTA arbitration concerned Mexico's taxation of the business activities of US citizen Marvin Feldman, who exported cigarettes to the US. Feldman sought US\$50 million in damages, alleging that tax rebates were given to his domestic competitors but not him in violation of three key provisions of NAFTA Chapter 11, namely: Article 1102 (national treatment), Article 1105 (minimum standard of treatment), Article 1110 (expropriation).

On December 16, 2002, the NAFTA Tribunal, issued its final award in the matter. The Tribunal concluded that Mexico discriminated against Feldman vis-à-vis its domestic competitors, violating the national treatment provision of NAFTA's Investor-State provisions and assessed damages at US\$1.6 million. In his discussion of the standard of review to be applied, Justice Armstrong emphasized the clear policy adopted by Canadian legislatures and courts to defer to international commercial arbitration awards, rejecting Mexico's plea that the award violated public policy.

Read the Ontario Court of Appeal's decision at:

www.investmentclaims.com/decisions/Feldman-Review-Appeal-Judgment.pdf

California Bill Could Heighten Review of Arbitral Awards

The California Legislature is considering legislation that could give state courts new power to vacate arbitration awards that are not based on existing law and substantial evidence, reacting to an appeals court ruling that drew new limits on judicial review. California law now provides parties to a public works contract the authority to require arbitrators to follow the law and have non-compliant awards vacated.

Styled *AB 1176*, the Bill would add a new paragraph to the California *Code of Civil Procedure* that would provide the rights held by parties to public works contracts to parties to all contracts. It reads: "The parties to any contract may expressly agree in

writing that in any arbitration to resolve a dispute relating to the contract, the arbitrator's award shall be supported by law and substantial evidence. If the agreement so provides, a court shall, subject to Section 1286.4, vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or that it is based on an error of law."

The Bill is a legislative response to a 2002 ruling in *Crowell v. Downey Community Hospital Foundation* by California's Second Appellate District Court that the California *Arbitration Act* provided the exclusive means for vacating awards and does not allow parties to expand the jurisdiction of courts to review awards. It was scheduled to be heard in committee on March 26, 2005.

Read the text of AB 1176 at:

http://www.leginfo.ca.gov/pub/bill/asm/ab_1151-1200/ab_1176_bill_20050222_introduced.pdf

Discussion Paper Issued On Changes to the ICSID Framework

The ICSID Secretariat has released a discussion paper concerning possible improvements of the framework for ICSID arbitration. The introduction to the discussion paper notes that since the late 1990s, almost all of the new ICSID arbitration cases have been initiated by virtue of the investor-State dispute settlement provisions of bilateral investment treaties, NAFTA and other investment treaties. It further notes that "parties to proceedings seem to have continued to regard the ICSID and Additional Facility Rules as adequately meeting their needs. However, in a number of areas, concerns have been raised and there have been proposals for change."

Preliminary procedures, in particular, interim measures for protection or relief and appeals facilitation are listed as areas that have come under the reform radar. As well, the paper discusses the publication of awards and notes that the ICSID Convention provides that ICSID will not publish an award without the consent of the parties but, as a general practice, "actively seeks, and usually obtains, the consent of the parties for such publication." When one party withholds its consent, the other usually releases it to other publications such as *International Legal Materials* or the *Journal du Droit International*. The discussion paper mentions the possibility of amending ICSID Rule 48(4) to make it mandatory for ICSID to publish excerpts of the awards with or without the consent of the parties in order to make the result of the arbitration available to the public as quickly as possible.

On appeals facilitation, the discussion paper notes the risk of fragmentation between cases subject to an appeals mechanism and others without, but also notes that several countries have committed themselves to such a mechanism. The paper also considers, amongst other areas, proposals to change the rules of evidence, submissions and changes to the *in camera* nature of ICSID proceedings.

Read the ICSID's "Possible Improvements of the Framework for ICSID Arbitration" at: <http://www.worldbank.org/icsid/improve-arb.pdf>

The International Arbitration Calendar

Date	Place	Organization	Topic	Web Address:
May 26, 2005	Paris	ICC	Commission on Arbitration	http://www.iccwbo.org
June 3, 2005	Paris	Chartered Institute of Arbitrators - Young Arbitrators' Group	Experiments in Efficiency in Arbitration	www.arbitrators.org
June 9-10, 2005	Stockholm	SCC	Investment Arbitration and the Energy Charter Treaty	http://www.sccinstitute.com
June 13-16, 2005	Paris	ICC	International Commercial Arbitration (PIDA Seminar, held entirely in Spanish)	http://www.iccwbo.org
June 23-24 / 27-28, 2005	Geneva	WIPO	Workshops for Mediators in Intellectual Property Disputes	http://www.wipo.org
June 26-28, 2005	Vancouver	CBA/ ICC	Fifth Annual International Commercial Arbitration Conference in Canada	http://www.cba.org
June 28, 2005	Vancouver	YCAP	Luncheon Symposium - Special Guest: Henri Alvarez	
June 29, 2005	The Hague	PCA	Book Launch for: Weiler, <i>International Investment Law and Arbitration</i>	http://www.investmentclaims.com

June 30– July 1, 2005	Geneva	WIPO	Advanced Workshop for Mediators in IP Disputes	http://www.wipo.org
June 30- July 2, 2005	The Hague	ASIL	7 th Joint Conference	http://www.asil.org
July 6, 2005	Moscow	LCIA	Symposium	http://www.lcia-arbitration.com
September 2, 2005	Bern	ASA	TBA	http://www.arbitration-ch.org
September 9, 2005	Tylney Hall	LCIA	Young International Arbitration Group Symposium	http://http://www.lcia-arbitration.com/
September 9-11, 2005	Tylney Hall	LCIA	Second Symposium for 2005	http://www.lcia-arbitration.com
September 24, 2005	Prague	LCIA	European Users' Council Symposium	http://www.lcia-arbitration.com
September 25-30, 2005	Prague	IBA	IBA Business Section	http://www.ibanet.org
October 10-13, 2005	Paris	ICC	International Commercial Arbitration (PIDA Seminar)	http://www.iccwbo.org
October 20, 2005	Chicago	AAA	Kissing Cousins ? The FAA and Modern Labor Arbitration	http://www.adr.org
October 20, 2005	Paris	ICC	Arbitration & Managers	http://www.iccwbo.org
November 7-8, 2005	Paris	ICC	International Advanced Arbitration Practice Workshop (IAAP)	http://www.iccwbo.org
November 28, 2005	Paris	ICC	Annual Meeting of the ICC Institute	http://www.iccwbo.org

December 7-8, 2005	Geneva	Global Arbitration Forum	12th Global Arbitration Forum	http://www.wernerpubl.com
May 31, 2006	Montreal	LCIA	North American Users' Council Symposium	http://www.lcia-arbitration.com
June 1-3, 2006	Montreal	ICCA	18 th Biennial International Arbitration Conference	http://www.arbitration-icca.org
June 3, 2006	Montreal	Young Arbitration Practitioners (YAP)	1 st North American YAP Event	
June 5-10, 2006	Toronto	ILA	72 nd Biennial Conference	http://www.ila2006.org