

Spring/ Summer 2006  
Volume 2, Number 1

## In This Issue

- YAP and ILA Events
- Recent Developments in International Arbitration
- The International Arbitration Calendar

## YCAP Steering Committee

### Babak Barin

Woods & Partners, Montreal

### Sonia Bjorkquist

Osler, Hoskin & Harcourt LLP, Toronto

### Tina Cicchetti

Fasken Martineau DuMoulin LLP,  
Vancouver

### Patrick Flaherty

Torys LLP, Toronto

### Angus Gunn

Borden Ladner Gervais LLP, Vancouver

### Ian Laird

Davis & Company LLP, Toronto

### Marie-Claude Rigaud

Université de Montréal, Montreal

### David Roney

Schellenberg Wittmer, Geneva

### Luis Sarabia

Davies Ward Phillips & Vineberg LLP,  
Toronto

### Martin Valasek

Ogilvy Renault LLP, Montreal

### Janet Walker

Osgoode Hall Law School, Toronto

### Todd Weiler

NAFTA<sup>law.org</sup>, Calgary

## Bienvenue ICCA and ILA

YCAP welcomes ICCA and ILA to Canada. Two exceptional events are scheduled to take place in Montreal and Toronto at the end of May/ early June this spring. We encourage all our members to attend. This is a rare opportunity to meet some of the leading practitioners and arbitrators in the world, and to take part in meetings dealing with cutting edge issues in arbitration.

YCAP est honoré d'être un "Partenaire Argent" du programme "Young Arbitration Practitioners (YAP)" lors de la 18<sup>me</sup> édition du Congrès ICCA à Montréal. L'après-midi du 3 juin, et après la conférence ICCA, des jeunes praticiens en arbitrage se réuniront dans le cadre de la première rencontre internationale YAP.

YCAP is also co-sponsoring an afternoon workshop on June 4, 2006 as part of the Young Lawyers Programme of the ILA's Biennial Conference in Toronto. We encourage all our members to attend both events.

## YCAP Law Firm Members:



DAVIES  
WARD  
PHILLIPS &  
VINEBERG LLP



**Woods & Partners**

## Newsletter Sponsor:

**Heenan Blaikie**

## LEX ARBITRI

Spring/ Summer 2006  
Volume 2, Number 1

### Newsletter Committee

#### Adam Goodman

Heenan Blaikie LLP, Toronto

#### Ian Laird

Davis & Company LLP, Toronto

#### Rajeev Sharma

Heenan Blaikie LLP, Toronto

### CONTACT

YCAP

c/o Ian Laird, Davis & Company LLP  
P.O. Box 289,  
1 First Canadian Place  
100 King Street West  
Toronto ON, M5X 1C9  
CANADA

Email: [info@ycap.ca](mailto:info@ycap.ca)

Website: [www.ycap.ca](http://www.ycap.ca)

### CONTRIBUTIONS

News or event contributions are greatly welcomed. Please contact one of the members of the Newsletter Committee, or email us at: [newsletter@ycap.ca](mailto:newsletter@ycap.ca).

### MEMBERSHIP

If you are interested in becoming a member of YCAP, please contact: [membership@ycap.ca](mailto:membership@ycap.ca).

## Recent Developments In International Arbitration

### CANADIAN MOOTERS TAKE VIENNA BY STORM... AGAIN

Once again, Canadian law students have done remarkably well in the Annual Wilhelm C. Vis International Commercial Arbitration Moot held between April 7 to 13, 2006. Over 150 universities from 49 countries competed in the Vis' 13th annual competition in Vienna, Austria.

The University of Ottawa team made it down to the final 8 round, while Osgoode Hall Law School made it as far as the final 16 round. The Martin Domke Award for oral advocacy was awarded to Osgoode and Ottawa finished second in this category. Ottawa also won third place for Best Claimant's Memorandum, while the Université de Laval received an honourable mention for its advocacy. McGill University placed third in the Best Respondents' Memorandum category.

Five Canadian universities participated this year: McGill, Laval, Osgoode Hall, Ottawa and Queen's University. Visit the Vis Moot's website for more information at: <http://www.cisg.law.pace.edu/vis.html>

### LAUNCH OF NETCASE ENABLES ONLINE ARBITRATION

In November 2005, the International Chamber of Commerce (ICC)'s International Court of Arbitration launched NetCase, a secure online environment for ICC Arbitration. NetCase allows arbitrations to be conducted online by enabling parties to communicate and exchange documents through a secure website. The service is available at no additional charge to participants, and can be used as long as all of the parties and arbitrators to an arbitration consent.

The benefits of NetCase include instantaneous communication, twenty-four hour access to information, security and confidentiality, and organized handling, storage and retrieval of documents. NetCase is reputed to be able to reduce costs associated with traditional means of communication, such as couriers and mail. The website also includes discussion forums and details on the arbitration such as the parties, arbitrators, calendar, and financial statements. Passwords ensure the security of participants, and are only provided to the participants involved in a particular arbitration.

For more information visit the ICC International Court of Arbitration website at: [http://www.iccwbo.org/index\\_court.asp](http://www.iccwbo.org/index_court.asp)

### BOOK PUBLISHED IN HONOUR OF PRESIDENT OF ICC INTERNATIONAL COURT OF ARBITRATION

Robert Briner retired as Chairman of the ICC International Court of Arbitration late last year. At a ceremony held in November 2005, Briner was honoured as a key figure in the ICC and commended for his dedication to ICC arbitration and dispute resolution. In addition to his work at the ICC, Briner has had a career as a practicing lawyer and arbitrator and is a past President of the Iran-United States Claims Tribunal in the Hague.

Members of the ICC court and Secretariat presented Briner with a Liber Amicorum, or Book of Friends. The book, entitled Global Reflections on International Law, Commerce, and Dispute Resolution, contains 65 articles related to arbitration and dispute resolution written by international experts, including several of Briner's past colleagues. Global Reflections covers a range of issues including case management, provisional timetables, discovery of documents, jurisdiction, legal privileges, competing orders between courts and arbitral tribunals, investment arbitration, conflicts of interest, costs, online dispute resolution, and international security. Essays include comparative law analysis and perspectives from specific countries and regions.

Global Reflections can be ordered online at: <http://www.iccbooks.com>

## **RUSSIA UPDATES ARBITRATION RULES**

Changes to the rules of the International Commercial Arbitration Court (ICAC) of the Russian Chamber of Commerce and Industry came into force on March 1, 2006. The changes have been designed to assist Russia meet international trade standards, including obligations under the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE).

The new rules aim to:

- Broaden the application of the ICAC by holding arbitrators liable for omissions; extending the duty of confidentiality to experts and ICAC employees; including email and registered delivery as modes of communication; and enabling the Presidium to remove an arbitrator without reason;
- Increase transparency and accountability by requiring arbitrators to meet higher standards including consenting to the ICAC Rules and providing biographical details of education and professional experience;
- Increase flexibility of proceedings by allowing parties to agree not to use interim measures; and providing arbitrators with an option to grant "partial awards".

The rules of the ICAC in their current form can be accessed at: <http://eng.tpprf.ru/img/uploaded/2003061914294091.doc>

## **COMPANIES MUST ARBITRATE OR LOSE RIGHTS**

On December 6, 2005, the U.S. Court of Appeals for the Ninth Circuit ruled that employers must participate in arbitration or lose their right to compel arbitration at a later date. In *Brown v. Dillard's, Inc.*, a company's "Fairness in Action" program required employees to arbitrate employment claims. In 2002, the plaintiff filed a notice of intent to arbitrate regarding an alleged wrongful termination. The company refused to arbitrate, failed to pay the filing fees, and argued that the claim had no merit. In response, the plaintiff filed a claim in court. The company then decided it wanted to arbitrate and moved to compel arbitration in federal district court.

The Court of Appeals upheld the District Court's denial of Dillard's motion. The court held that where there is an arbitration agreement between a

company and its employees, the company must participate in a properly initiated arbitration proceeding or give up its right to compel arbitration. Since Dillard's had breached the agreement by refusing to participate, it could not then seek to enforce it. The company was required to respond to the plaintiff's allegations in arbitration, even if they believed them to be without merit.

The court was concerned about creating a perverse incentive for employers to refuse to participate in arbitration. If the motion was granted, companies would effectively be able to refuse participation in the hope that the employee would give up its claim, and then later compel arbitration if the employee initiated litigation. The court held that this would be counter to the national policy in favour of arbitration.

A copy of the case is available on the website of the U.S. Court of Appeals for the Ninth Circuit at: <http://www.ca9.uscourts.gov/>

### **ARGENTINA LIABLE FOR US \$133 MILLION IN DAMAGES TO U.S. COMPANY**

CMS Gas Transmission Company ("CMS") of the United States was awarded US \$133.2 million in damages in the first of over 40 claims pending against the government of Argentina. The award, made on May 12, 2005, confirms that national governments who violate obligations contained in bilateral investment treaties ("BITs") may have to pay large damage awards to foreign investors, even in times of economic and social crisis.

On July 26, 2001, CMS filed a Request for Arbitration with the International Centre for Settlement of Investment Disputes ("ICSID"). The dispute began in the late 1990s, after Argentina enacted emergency measures in response to a severe currency crisis. CMS argued that Argentina's actions did away with guarantees it received when it invested in a state-owned gas transportation company during the late 1980s.

CMS successfully argued that measures taken between 2000 and 2002 were in violation of the fair and equitable treatment provision in the U.S.-Argentina BIT. However, the Tribunal held that other provisions of the BIT were not violated. For example, the measures did not amount to an expropriation of CMS's investment.

The Tribunal also rejected Argentina's use of the doctrine of necessity to shield it from liability. It held that Argentina did not meet the requirements contained in the U.N. Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles"), since the measures taken were not the only way to prevent the economic crisis and Argentina had contributed to the situation. Further, the emergency clause in the BIT overrode the defence of necessity since it was clear that the BIT was designed to protect investments during difficult economic times.

In any case, the Tribunal held that the defence of necessity is only temporary and would not have protected Argentina once the crisis ended. In addition, Argentina would have had to compensate CMS even if it successfully invoked the defence of necessity. Argentina filed an application for annulment on September 8, 2005.

A copy of the award can be obtained from the ICSID website at: <http://www.worldbank.org/icsid/cases/awards.htm>

## **LOEWEN REQUEST FOR JUDICIAL REVIEW OF NAFTA INVESTOR-STATE AWARD DISMISSED BY U.S. COURT**

On October 31, 2005, the U.S. District Court for the District of Columbia dismissed a petition brought by the Loewen Group Inc. to vacate a NAFTA arbitral award on the ground that it was time-barred.

The dispute began as a US \$10 million contract dispute between Loewen, a Canadian operator of funeral homes in several countries, and a local funeral home operator. A Mississippi jury awarded approximately US \$500 million in damages against Loewen and required a US \$625 million bond in order to appeal the verdict. Loewen decided to settle the litigation for \$175 million, but later sought to recoup its losses from the United States by filing a claim under NAFTA's investment chapter.

After the NAFTA tribunal dismissed the claim in June 2003, Loewen applied for judicial review. On October 31, 2005, Loewen's motion to vacate was dismissed on the basis that it was made after the three month time limit set by the U.S. Federal Arbitration Act. Loewen had requested a supplementary decision from the NAFTA tribunal and, in so doing, lost the opportunity to apply to vacate the award. The court held that the award was final when issued by the tribunal, and rejected Loewen's argument that it could not be vacated until after the supplementary decision was rendered.

The decision of the U.S. District Court for the District of Columbia is available online at:

[http://naftaclaims.com/Disputes/USA/Loewen/Loewen-Circuit\\_Court\\_Decision-31-10-05.pdf](http://naftaclaims.com/Disputes/USA/Loewen/Loewen-Circuit_Court_Decision-31-10-05.pdf)

## **CALIFORNIA COURT UPHOLDS CLASS ACTION ARBITRATION WAIVER**

On December 7, 2005 an appeals court confirmed that California will enforce class action waivers contained in arbitration agreements governed by other states.

The plaintiff in Discover Bank v. The Superior Court of Los Angeles County was a California resident with a credit card issued by Discover Bank. The cardholder agreement was governed by the laws of Delaware and federal law, and contained a clause prohibiting class action arbitration. The plaintiff filed a class action against the bank in the California superior court, which held that the waiver was unenforceable since it contravened California public policy. The Court of Appeal held that the class action waiver was enforceable under the Federal Arbitration Act. However, the issue of choice-of-law was remanded back to the Court of Appeal by the Supreme Court.

The Court of Appeal concluded that Delaware law would apply to the determination of whether the waiver is enforceable since Delaware had a "substantial relationship" to the parties and there was no other reasonable basis for the choice of Delaware law under the contract. Next, the court determined that the class action waiver is enforceable under Delaware law. Since the parties chose Delaware as the governing law, the court enforced the class action waiver. It was unnecessary for the court to

determine whether California public policy prohibited the waiver since California did not have a materially greater interest in the lawsuit than Delaware, even if the waiver was found to contravene public policy.

The validity of class action waivers remains unsettled in several states and the Washington Supreme Court will be next to rule on the issue at the end of February, 2006 in Doug Scott et al. v. Cingular Wireless LLC.

A copy of the Discover Bank case is available on the California Courts website at:

<http://www.courtinfo.ca.gov/opinions/documents/B161305A.PDF>



## International Arbitration Calendar 2006

As of May 2006

Date	Place	Organization	Topic	Web/E-mail Address:
May 30, 2006	New York	Juris Conferences LLC	Juris' International Arbitration Summit at Fordham Law School	<a href="http://www.jurisconferences.com">http://www.jurisconferences.com</a> <a href="mailto:events@jurispub.com">events@jurispub.com</a>
May 30-June 15, 2006	Washington, D.C.	American University, Washington College of Law	2006 International Arbitration Summer Session (five courses)	<a href="http://www.wcl.american.edu/arbitration">www.wcl.american.edu/arbitration</a>
May 31, 2006	Montreal	LCIA	LCIA North American Users' Council Symposium	<a href="http://www.lcia-arbitration.com">http://www.lcia-arbitration.com</a> <a href="mailto:ib@lcia-arbitration.com">ib@lcia-arbitration.com</a>
May 31-June 3, 2006	Montreal	International Council of Commercial Arbitration (ICCA)	2006 (17 <sup>th</sup> ) ICCA Congress	<a href="http://www.iccamontreal2006.org/">www.iccamontreal2006.org/</a> <a href="mailto:info@iccamontreal2006.org">info@iccamontreal2006.org</a>
June 3, 2006	Montreal	Young Arbitration Practitioners (YAP)	1 <sup>st</sup> North American YAP Event: New Expectations, New Challenges	<a href="http://www.iccamontreal2006.org/info@iccamontreal2006.org">www.iccamontreal2006.org/info@iccamontreal2006.org</a> <a href="mailto:marie-claude.rigaud@umontreal.ca">marie-claude.rigaud@umontreal.ca</a>
June 4-8, 2006	Toronto	International Law Association (ILA)	ILA 72 <sup>nd</sup> Biennial Conference: The World is Here	<a href="http://www.ila2006.org">www.ila2006.org</a>



## International Arbitration Calendar 2006

Date	Place	Organization	Topic	Web/E-mail Address:
June 5-16, 2006	Washington, DC	International Law Institute	International Law Institute Seminar: Foreign Investment Agreements and Investor-State Dispute Settlement	<a href="http://www.ili.org/seminars/for-inv.htm">http://www.ili.org/seminars/for-inv.htm</a>
June 14, 2005	Dallas, Texas	Institute for Transnational Arbitration	Roundtable for Young International Arbitrators	<a href="http://www.cailaw.org/ita/">http://www.cailaw.org/ita/</a>
June 15, 2006	Dallas, Texas	Institute for Transnational Arbitration (ITA)	17 <sup>th</sup> Annual ITA Workshop: Investment Treaty Arbitration in the 21 <sup>st</sup> Century	<a href="http://www.cailaw.org/ita/">www.cailaw.org/ita/</a>
June 19-23, 2006	San Salvador, El Salvador	Inter-American Bar Association (IABA)	IABA XLII Conference: Rule of Law and Free Commerce: the IABA Contribution	<a href="http://www.iaba.org/english_%20home%20page.htm">http://www.iaba.org/english_%20home%20page.htm</a>  iaba@iaba.org
September 8, 2006	Tylney Hall, UK	LCIA	LCIA Young International Arbitration Group Symposium	<a href="http://www.lcia-arbitration.com">http://www.lcia-arbitration.com</a>  ib@lcia-arbitration.com
September 8-10, 2006	Tylney Hall, UK	LCIA	LCIA European Users' Council Symposium	<a href="http://www.lcia-arbitration.com">http://www.lcia-arbitration.com</a>  ib@lcia-arbitration.com
September 8-16, 2006	Keble College, Oxford, UK	Chartered Institute of Arbitrators	Diploma Course in International Commercial Arbitration	laustin@arbitrators.org or info@arbitrators.org



Date	Place	Organization	Topic	Web/E-mail Address:
September 11-14, 2006	Paris	International Chamber of Commerce (ICC)	ICC PIDA Seminar: Negotiating, Drafting, Managing, International Contacts & Conflict Resolution: Study of a mock case	<a href="http://www.iccwbo.org/conferences">http://www.iccwbo.org/conferences</a> conf@iccwbo.org
September 15, 2006	Chicago	Juris Conferences LLC	Juris' Leading Arbitrators' Symposium	<a href="http://www.jurisconferences.com">http://www.jurisconferences.com</a> events@jurispub.com
September 16, 2006	Chicago	LCIA	LCIA North American Users' Council Symposium	<a href="http://www.lcia-arbitration.com">http://www.lcia-arbitration.com</a> ib@lcia-arbitration.com
September 17-22, 2006	Chicago	IBA	IBA Annual Conference	confs@int-bar.org
October 9-12, 2006	Paris	International Chamber of Commerce (ICC)	ICC PIDA Seminar: International Commercial Arbitration: Study of a Mock Case under the ICC Rules of Arbitration	<a href="http://www.iccwbo.org/conferences">http://www.iccwbo.org/conferences</a> conf@iccwbo.org
October 9-12, 2006	Washington, D.C.	American University, Washington College of Law	Third Annual Seminar on International Commercial Arbitration - "How to handle a BIT arbitration under the ICSID Rules"	<a href="http://www.wcl.american.edu/arbitration">www.wcl.american.edu/arbitration</a>



## International Arbitration Calendar 2006

Date	Place	Organization	Topic	Web/E-mail Address:
November, 2006 (dates to be confirmed)	Miami	International Chamber of Commerce (ICC)	ICC International Commercial Arbitration in Latin America: The ICC Perspective	<a href="http://www.iccwbo.org/conferences">http://www.iccwbo.org/conferences</a> conf@iccwbo.org
November 6-7, 2006	Paris	International Chamber of Commerce (ICC)	ICC International Advanced Arbitration Practice Workshop (IAAP)	<a href="http://www.iccwbo.org/conferences">http://www.iccwbo.org/conferences</a> conf@iccwbo.org
November 27, 2006	Paris	International Chamber of Commerce (ICC)	Annual Meeting of the ICC Institute	<a href="http://www.iccwbo.org/conferences">http://www.iccwbo.org/conferences</a> conf@iccwbo.org
December 6-7, 2006	Geneva	Global Arbitration Forum	12 <sup>th</sup> Geneva Global Arbitration Forum	<a href="http://www.wernerpubl.com/">http://www.wernerpubl.com/</a>

With the compliments  
of  
the YCAP Steering Committee